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THE FLORIDA SUPREME COURT AND DEATH PENALTY APPEALS*

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I. INTRODUCTION

In the 1972 case of *Furman v. Georgia*,[1] the United States Supreme Court narrowly voted to invalidate all death penalty statutes then in existence. While each Justice wrote a separate opinion, the death penalty statutes were criticized repeatedly for allowing unguided discretion. This, it was believed, led to the imposition of death sentences in an arbitrary and capricious manner. Within four years of *Furman*, thirty-five states had enacted new death penalty statutes. These new statutes were of two general types: those legislating a mandatory death sentence for everyone convicted of a certain crime and those specifying new rules to guide juries and judges in deciding who should receive a death sentence. Five of the new statutes were reviewed by the United States Supreme Court in 1976. The Court held that mandatory capital punishment statutes were unconstitutional,[2] but it upheld those containing guided discretion provisions.[3] The history and content of these decisions have received detailed analysis elsewhere.[4]

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1 408 U.S. 238 (1972).

2 Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

3 Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

4 *See* M. MELTSNER, CRUEL AND UNUSUAL (1973); D. PANNICK, JUDICIAL REVIEW OF

Florida was the first state to enact a post-*Furman* death penalty statute. Immediately after the *Furman* decision, a special session of the Florida legislature was called for the sole purpose of enacting new capital punishment legislation. The new law, unlike Florida's earlier statute, specified aggravating and mitigating circumstances to give to the jury and judge in deciding whether to impose death. This decision was to be made in a sentencing hearing held after determination of guilt. A second feature of this legislation which distinguished it from the earlier Florida death penalty statute was its provision for an automatic, direct appeal to the Florida Supreme Court for every person condemned to death. While the pre-*Furman* statute permitted an appeal to the Florida Supreme Court, the court could not reduce the sentence as excessive as long as it was within statutory guidelines.[5] In part because of the mandatory appeal provision, the 1972 Florida law was upheld by the United States Supreme Court in its 1976 decisions.[6]

According to a former Chief Justice of the Florida Supreme Court, death penalty cases currently consume thirty-five to forty percent of the court's total working time.[7] By the beginning of 1982, the court had rendered decisions in 146 direct appeals, and the death sentence was affirmed in about half of the cases. The purpose of this study is to identify both legal and extra-legal correlates of the Florida Supreme Court's decisions. More specifically, we are interested in (A) the degree to which the state supreme court has achieved the goals of consistency and fairness in capital sentencing, and (B) whether the extra-legal factors of defendant's race and/or victim's sex correlate with the court's decisions.

II. BACKGROUND

Under Florida's post-*Furman* death penalty statute, the ultimate responsibility for imposing the death sentence rests with the trial judge. Although a jury vote is taken on the question of imposing a death sentence, this vote is advisory and can be overridden by the judge.[8] Any cases that result in a death sentence are then automatically reviewed by

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THE DEATH PENALTY (1982); Bowers & Pierce, *Arbitrariness and Discrimination under post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980); Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979); Lanza-Kaduce, *Formality, Neutrality, and Goal-Rationality: The Legacy of Weber in Analyzing Legal Thought*, 73 J. CRIM. L. & CRIMINOLOGY 533 (1982).

[5] Ehrhardt & Levinson, *Florida's Legislative Response to* Furman: *An Exercise in Futility?*, 64 J. CRIM. L. & CRIMINOLOGY 10 (1973).

[6] Proffitt v. Florida, 428 U.S. 242 (1976).

[7] Gainesville Sun, Aug. 24, 1981, at B1, col. 5.

[8] "Alabama, Indiana, and Florida are the only states with laws that allow a judge to overrule a jury's recommendation of life in prison and sentence a convicted murderer to die. Alabama judges have done it twice. Indiana judges have done it twice. Florida judges have done it 70 times." Miami News, Nov. 19, 1982, at 1A, col. 3.

the state supreme court. While precise details of this appellate review process are not specified in the statute, the Florida Supreme Court outlined its function in *State v. Dixon*:

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex.[9]

In its review of the Florida statute in *Proffitt v. Florida*[10] the United States Supreme Court, with Justices Brennan and Marshall dissenting, concluded that the state supreme court review would ensure evenhanded and consistent application of the death penalty: "Finally, the Florida statute has a provision designed to ensure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases."[11] The court also stated that all death penalty cases in Florida are "conscientiously reviewed by a court which, because of its statewide jurisdiction, can ensure consistency, fairness, and rationality in the evenhanded operation of the state law."[12] The data presented below, therefore, are useful in evaluating the degree to which the state supreme court has been successful in adhering to these standards.

The above standards suggest that, to achieve consistency in the imposition of the death penalty, the state supreme court must recognize and correct any systematic biases that might be introduced at earlier stages in the criminal justice process. Evidence gathered from the years before[13] and after *Furman*[14] has shown that both race of defendant and race of victim are associated with the probability of receiving the death sentence. In Florida, black defendants, especially those with white victims, are more likely to be indicted for first degree murder, and once indicted are more likely to be sentenced to death.[15] Thus, if the state supreme court is effectively removing racial biases in the administration

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9 283 So. 2d 1, 10 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974).

10 428 U.S. 242 (1976).

11 *Id.* at 258.

12 *Id.* at 259-60.

13 W. BOWERS, EXECUTIONS IN AMERICA, (1974); Garfinkle, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOC. FORCES 369 (1949); Wolfgang & Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS 119 (1973).

14 Bowers & Pierce, *supra* note 4; Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379 (1982); Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

15 Bowers & Pierce, *supra* note 4; Radelet, *supra* note 14; L. Foley, The Effects of Race on the Imposition of the Death Penalty (Sept. 1979) (unpublished manuscript).

of capital punishment, we would expect the court to be less likely to affirm the death sentences for those groups of defendants who, given similar legal circumstances, are significantly more likely to be sentenced to death in the trial courts.

On the other hand, it is possible that appellate courts do not remove and may even widen disparities in the imposition of capital punishment. Few studies have focused specifically on correlates of decisions made after the death sentence has been imposed by the trial court,[16] and only one has been conducted since *Furman*.[17] These studies show that decisions made after the trial do not correct the earlier arbitrariness; in fact, racial disparities are exacerbated. In one study, Wolfgang, Kelly, and Nolde examined the records of 412 persons sentenced to death for first degree murder in Pennsylvania between 1914 and 1958. The authors found that 82.77% of these men eventually were executed and that 17.23% of the sentences were commuted.[18] White offenders were significantly more likely than black offenders to have their death sentences commuted, even after controlling for whether or not the homicide was classified as a felony murder. In fact, of the 308 cases for which complete information was available, nearly three times more white felony murderers than black felony murderers had their sentences commuted.[19] A second study examined records of the 660 convicted capital offenders sent to death row in North Carolina between 1909 and 1954.[20] Of the 650 cases reported, 42.94% of the 170 whites were eventually executed, compared to 57.92% of the 480 blacks.[21]

Between the 1972 *Furman* decision and October 1983, eight Americans have been executed, four in what have been termed consensual executions.[22] Other condemned persons continue to pursue their appeals. Thus, too few cases have reached final disposition to permit replication of the above studies. Enough cases have passed through the mandatory direct appeals, however, to allow analysis of decisions made at this stage. The Florida Supreme Court has decided more direct appeals in death penalty cases than any other state court. The large number of decisions provides an excellent opportunity to examine post-sentencing outcomes.

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16 W. Bowers, *supra* note 13; C. MANGUM, THE LEGAL STATUS OF THE NEGRO 369 (1940).

17 Bowers & Pierce, *supra* note 4.

18 Wolfgang, Kelly, & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 301 (1962).

19 *Id.* at 307, Table IV.

20 Johnson, *Selective Factors in Capital Punishment*, 36 SOC. FORCES 165 (1957).

21 *Id.* at 169, computed from Table 7.

22 The eight post-*Furman* executions were: Gary Gilmore, Utah, Jan. 17, 1977; John Spenkelink, Fla., May 25, 1979; Jesse Bishop, Nev., Oct. 22, 1979; Steven Judy, Ind., Mar. 19, 1981; Frank Coppola, Va., Aug. 10, 1982; Charles Brooks, Tex., Dec. 7, 1982; John Evans, Ala., Apr. 22, 1983; Jimmie Lee Gray, Miss., Sept. 2, 1983.

III. METHOD

Data were gathered on all reported Florida Supreme Court decisions in death penalty cases during the period from January 1, 1973 to December 31, 1981. Only direct appeals were examined. Decisions made by the Florida Supreme Court in appeals for stays of execution were not considered, as this part of the appellate process is not explicitly charged with ensuring consistency and proportionality.[23]

Cases where defendants received multiple death sentences for multiple victims were treated as one case if the sentences were imposed after one trial, appealed in one brief, and decided as one case by the state supreme court. Three men had two separate cases decided. Each was indicted and tried separately for two murders. Separate appeal briefs were filed, separate oral arguments were held, and the court delivered two separate decisions for each man. We treated these as six independent cases.

Five men went through the process of direct appeal two times. In each case, a favorable decision for the defendant by the Florida Supreme Court was followed by reimposition of the death sentence by the trial court and a second direct review by the supreme court. These also were treated as ten separate decisions.

Using these procedures, we identified a total of 146 decisions made on direct appeal for 138 defendants. Because of our interest in identifying demographic correlates of the decisions, the single case with a female defendant was deleted. This reduced the final population to 145 cases.

The variables used in the analysis were coded as follows. First, the defendant's and victim's races, victim's sex, and the trial jury's sentence recommendation were constructed as a series of (0,1) dichotomous vari-

[23] Also not included were the cases remanded for resentencing under the United States Supreme Court's ruling in Gardner v. Florida, 430 U.S. 349 (1977). In this decision the Court held that a trial judge's use of material relevant to sentencing without notifying the defendant was a violation of due process. All information used by a trial judge to determine sentences, the Court ruled, must be presented to the defendant and his counsel. After *Gardner*, the Florida Supreme Court wrote to all trial judges who had sentenced people to death and asked if they had based their decisions on any information not known to the defendant. Several condemned men independently appealed their cases, alleging *Gardner* violations. Seven cases that had previously been affirmed by the Florida Supreme Court were eventually sent back to the trial courts for resentencing because of *Gardner* violations. In all of these cases, the men were resentenced to death and the state supreme court reaffirmed the sentences. Because the Florida Supreme Court rehearings did not review the cases fully, and their decisions concerned one limited issue, *see, e.g.*, Funchess v. State, 399 So. 2d 356 (Fla. 1981), we excluded these post-*Gardner* decisions from the analysis.

Two cases presented a rather different situation. In these, the Florida Supreme Court remanded the cases for *Gardner* violations at the same time that it conducted its direct review of the convictions and sentences. It was strongly implied that the only flaw was that of a *Gardner* violation and that, absent that mistake, the cases would have been affirmed. These two cases were thus coded as receiving affirmations.

ables where 1 represented black, male, and death or waived jury recommendation.[24] Second, the number of murdered victims was coded as an interval variable. In three cases the defendant had been found guilty of the rape of a child, rather than murder, and thus the number of murdered victims was coded as zero.[25] Third, a series of dummy variables was constructed to represent the type of trial and appellate attorney. These variables allowed us to assess the predictive power of each independent variable after controlling for the effects of the type of attorney. One pair represented private attorneys, and a second pair represented court-appointed attorneys. A third pair, representing trial and appellate public defenders, was the omitted category for the regression analysis, thereby becoming the standard against which we compared the other two attorney types. Finally, we examined several two-way interaction terms. One of these interactions represented the product of defendant's race and victim's sex and is included in the final model. The outcome variable was then coded (0 = affirmed and 1 = sent back to trial court for new trial or sentence, or sentence reduced to life by the supreme court).[26]

The statistical technique used for analysis was multiple regression, which allows researchers to model changes in a dependent variable using a series of predictor variables.[27] With a large sample size, such as the one used in this study, the estimates are approximately normally distributed.[28] The F statistic, which tests the null hypothesis that a par-

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[24] In five cases, the defendants waived the right to a jury during their sentencing hearings.

[25] After these three individual cases had been reviewed, the Florida Supreme Court ruled that the death sentence for the rape of a child was cruel and unusual punishment. Buford v. State, 403 So. 2d 943 (Fla. 1981), *cert. denied*, 454 U.S. 1163 (1982). The Florida law had allowed a death sentence to be imposed upon defendants 18 or older who were found guilty of raping a child 11 or younger.

[26] We attempted to identify the aggravating and mitigating circumstances found in each case by the trial judge, and approved or disapproved by the Florida Supreme Court during its review. Such data are needed to ascertain if similar decisions are made by the Florida Supreme Court in cases with roughly similar circumstances. The court has recognized the great importance of these factors in its decisions, writing in State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974): "The most important safeguard presented in the Fla. Stat. § 921.141, F.S.A., is the propounding of the aggravating and mitigating circumstances which must be determinative of the sentence imposed." Given the court's own assessment of the crucial importance of these circumstances, it is noteworthy that the court's written opinions often omit any mention of aggravating and mitigating circumstances, or are ambivalent about the circumstances under discussion. Such omissions are more common in the court's earlier decisions than in the more recent ones. Careful reading of all post-*Furman* decisions revealed insufficient data with which to analyze aggravating and mitigating circumstances.

[27] For general discussion of regression, see A. AGRESTI & B. AGRESTI, STATISTICAL METHODS FOR THE SOCIAL SCIENCES 321-405 (1979); J. NETER & W. WASSERMAN, APPLIED LINEAR STATISTICAL MODELS (1974).

[28] The ordinary least squares (linear) regression model reported in this Article was compared to a similar model using logistic multiple regression. Only minor differences in signifi-

ticular beta equals zero, was used to assess the unique contribution of each variable to the equation's overall predictive capacity.

IV. RESULTS

Of the 145 death sentence cases examined, 75 (51.7%) were affirmed by the Florida Supreme Court. Of the seventy cases resulting in a favorable decision for the defendant, 42.86% of the men were resentenced to life imprisonment, 25.71% were returned to the trial court for new sentencing, and 31.43% were returned for new trials. We labelled these non-affirmed decisions as "favorable," although some of the men returned to the trial courts were or eventually will be resentenced to death.

In the first stage of the analysis, we found that several variables and interaction terms did not contribute substantially to the prediction of the decision, and they therefore were deleted. These included whether the defendant was employed at the time of the crime, whether the defendant was offered a plea bargain at the original trial, his original plea, the length of time between the trial and the supreme court decision, and the victim's and defendant's ages. Since only eleven of the 145 defendants had black victims (7.59%), it also was necessary to delete this variable. The lack of cases in this population with black victims reflects the fact that, given similar circumstances, defendants in Florida with black victims are much less likely than defendants with white victims to be sentenced to death.[29]

Table 1 presents the means and standard deviations of the variables. The means of the dichotomous variables can also be interpreted as the proportion of the sample coded as 1. Thus, 72% waived the jury recommendation or the jury recommended death, 59% had male victims, 41% of the cases had black defendants, 19% had a private trial attorney, and 48% received a favorable supreme court ruling. The intercorrelations between these variables are presented in Table 2.

Table 3 reveals that after controlling for the effects of the type of trial and appellate attorney, there are five statistically significant independent predictors of the supreme court decisions. Each of two strongest predictors, jury recommendation and the number of victims, has some legal relevance. Defendants receiving a jury recommendation

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cance levels for each variable were found, none of which affect the conclusions. Over the ranges of independent variables, the logistic model produces a fit which is close to linear. For simplicity, we report only the results of the linear model because it has been used widely in the literature and thus is easier to interpret. For comparison of the linear and logistic regression models, and a discussion of the similarity of statistical estimates they provide, see Swafford, *Three Parametric Techniques for Contingency Table Analysis: A Nontechnical Commentary*, 45 AM. SOC. REV. 664 (1980).

29 Radelet, *supra* note 14.

TABLE 1

MEANS AND STANDARD DEVIATIONS (N=145)

Variables	Mean	Standard Deviation
Jury Recommendation	.72	.45
N of Victims	1.26	.79
Defendant's Race X Victim's Sex	.25	.43
Victim's Sex	.59	.49
Defendant's Race	.41	.49
Trial Court-Appointed Attorney	.39	.49
Trial Private Attorney	.19	.39
Appeal Court-Appointed Attorney	.30	.46
Appeal Private Attorney	.12	.32
Supreme Court Decision	.48	.50

TABLE 2

ZERO ORDER CORRELATIONS[a]

	A	B	C	D	E	F	G	H	I	J
A. Jury Recommendation										
B. N of Victims	−.141	—								
C. Defendant's Race X Victim's Sex	.042	.194	—							
D. Victim's Sex	−.021	.151	.476	—						
E. Defendant's Race	.021	.116	.694	.029	—					
F. Trial Court-Appointed Attorney	−.005	.132	.200	.225	.093	—				
G. Trial Private Attorney	−.132	−.024	.012	.072	−.072	−.379	—			
H. Appeal Court-Appointed Attorney	.081	−.162	.142	.058	.064	.308	.070	—		
I. Appeal Private Attorney	−.152	.096	−.061	−.091	.004	−.201	.431	−.241	—	
J. Supreme Court Decision	−.252	−.181	.020	−.071	−.042	.027	.070	−.067	.120	—

[a] With 145 cases, the absolute value of the correlation coefficient must exceed .163 for significance at the .05 level.

TABLE 3
MODELS FOR DECISIONS[a]

Variables	b (standard error)	F	Probability
Jury Recommendation	−.30 (.09)	11.54	.00
N of Victims	−.17 (.05)	10.86	.00
Defendant's Race X Victim's Sex	.40 (.17)	5.99	.02
Victim's sex	−.22 (.11)	4.28	.04
Defendant's race	−.25 (.13)	3.77	.05
Trial Court-Appointed Attorney	.14 (.10)	2.11	.15
Trial Private Attorney	.06 (.13)	.23	.63
Appeal Court-Appointed Attorney	−.15 (.10)	2.29	.13
Appeal Private Attorney	.13 (.14)	.77	.38
Constant	1.01		

[a] See text for coding. $R^2 = .177$.

of life imprisonment rather than death are the most likely to receive a favorable supreme court decision. The Florida Supreme Court has written repeatedly that a jury's recommendation must be given great consideration.[30] In addition, the fewer the number of victims, the greater the defendant's chances for a favorable decision.

Three extra-legal variables also have significant unique effects in predicting the supreme court's decisions. These variables are defendant's race, victim's sex, and the interaction between defendant's race and victim's sex. The significance of the interaction term indicates that it must be considered concurrently with the two independent variables; that is, the impact of defendant's race varies with victim's sex, and the impact of victim's sex varies with defendant's race. Recall that the variables were coded as 1 for black defendants, male victims, and a favorable decision. To compare differences across the four categories of defendant's

[30] Brown v. State, 367 So. 2d 616 (Fla. 1979); Cooper v. State, 366 So. 2d 113 (Fla. 1976); Tedder v. State, 322 So. 2d 908 (Fla. 1975).

race and victim's sex, the value of the variable was multiplied by the unstandardized regression coefficient b in Table 3. For white defendants with male victims, the score was zero times the b for defendant's race in Table 3 plus 1 times the b for victim's sex, or −.22. For whites with female victims, both b's were multiplied by zero for a score of zero. For blacks with male victims, we added the b for race (−.25), the b for victim's sex (−.22), and the interaction term times the product of the two variables (.40 times 1) for a total of −.07. A black with a female victim has a score of −.25 for defendant's race plus zero for victim's sex, or −.25. Comparing these we see that given a male victim, white defendants have a .15 higher probability of affirmation than black defendants (−.22 minus −.07). Given a female victim, the probability of affirmation is .25 less for whites than blacks. Similarly, given a white defendant, cases with male victims are .22 more likely to be affirmed than cases with female victims; given a black defendant, cases with male victims are .18 less likely to be affirmed than cases with female victims. The magnitude of these differences indicates the substantive importance of these findings.

One possible explanation for the above patterns is that the variables might be spuriously related to the supreme court's decisions because of differences in the type of defense attorney. For example, if black defendants were more (or less) likely than whites to be represented by a public defender, the relationship between defendant's race and the supreme court decision could be explained by differences in attorney type. To dismiss these possibilities and thus narrow the range of possible interpretations, the measures of attorney type were retained as control variables in the final model. They provide scant evidence that the type of trial or appellate attorney significantly affects the supreme court's decisions. While those defendants with a court-appointed trial attorney are slightly more likely and those with a court-appointed appellate attorney are slightly less likely to receive a favorable decision than those with analogous public defenders, these differences could occur by chance ($p < .15$ and .13, respectively). Thus, the type of trial or appellate attorney appears to make only a small difference in the state supreme court decisions, and this difference is controlled for in assessing the effects of other variables in the model.

V. Discussion

Since nearly half of the death sentences reviewed on direct appeal are reversed, it is clear that the Florida Supreme Court believes that the trial courts frequently make serious errors in their imposition of death sentences. Further, this rate of reversal indicates that the state supreme

court is reviewing the death penalty cases carefully rather than simply rubber-stamping the trial judge's determination.

The strongest predictor of a favorable Florida Supreme Court decision is a jury recommendation of life imprisonment rather than death. In a case in which the trial judge had disregarded the jury's recommendation of life, the court held: "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."[31] Thus, the trial judge must present strong evidence in the sentencing memorandum to the state supreme court to justify his or her decision to override the jury recommendation. Thirteen of the forty-one cases (31.71%) in which the jury had recommended life did not result in a favorable supreme court decision. Thus, a jury recommendation of life is by no means a guarantee that the Florida Supreme Court will render a decision favorable to the defendant. In twenty-five of the twenty-eight cases (89.29%) with a jury recommendation of life and a favorable decision, the supreme court's decision was to reduce the penalty to life. In fact, of the thirty cases in which the supreme court resentenced the defendant to life, twenty-five (83.33%) received jury recommendations of life imprisonment after their original trials.

The supreme court is less likely to find errors at the trial or sentencing stages as the number of victims increases. This result was obtained partly because three of the death sentences reduced to life by the supreme court were for defendants convicted of the rape of a child (coded as zero homicide victims) rather than murder. The incriminating evidence might also be stronger as the number of victims increases. Furthermore, because one role of the supreme court review is to reverse sentences of those whose crimes make the death penalty relatively excessive, it is not surprising that the number of victims is inversely associated with the probability of a favorable decision.

The final three predictors of the supreme court decisions are defendant's race, victim's sex, and the interaction between victim's sex and defendant's race. A zero order cross-classification shows that white defendants are slightly more likely to receive a favorable decision than black defendants, and those with female victims are slightly more likely to receive a favorable decision than those with male victims. Overall, forty-three out of eighty-six (50.00%) cases with white defendants and thirty-two out of fifty-nine (54.24%) cases with black defendants resulted in affirmation. The impact of defendant's race, however, is significantly modified by victim's sex, and vice versa. We found that 39.13% of the

[31] Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

twenty-three convicted blacks with female victims received a favorable supreme court decision, whereas 50% of the thirty-six blacks convicted of killing a man received positive outcomes. This pattern reverses with white defendants. Of the thirty-six white defendant/female victim appeals, 61.11% resulted in a favorable ruling, while only 42% of the fifty white defendant/male victim appeals had similar results.

The twenty-three cases of black defendant and female victim constituted the category least likely to receive a favorable decision. Twenty of these cases had white victims; twelve of these twenty were affirmed. The disproportionate use of capital punishment and harsh sentences to punish black male defendants with white female victims has been particularly well documented for rape.[32] The above results indicate that a possibility remains that capital punishment is applied disproportionately to this category of offenses.

VI. CONCLUSION

It is somewhat surprising to learn that in nearly half of the Florida death penalty cases reviewed since 1972, the state supreme court has found flaws or errors of such severity that it could not affirm the penalty. This result is particularly common where a zealous trial judge has overridden a jury's recommendation of life imprisonment, but less so as the number of victims increases. Further, the state supreme court has found that trial judges are more likely to err in cases with white defendant/female victim or black defendant/male victim. This finding underscores the necessity for state supreme court review: if the probability of error or discrepant sentencing were low, such review would be less important. Given the stress that a death sentence causes for those personally involved in the case and the expense entailed by the cumbersome process, the high rate of erroneous death sentences is particularly noteworthy.[33]

The principal findings that remain unexplained are the effects of defendant's race and victim's sex on outcomes. There are three possible interpretations. First, these variables could be related to legally relevant variables which were not measured in the study. For example, the cases of white defendant/female victim (the least likely to be affirmed) might be less heinous, involve less criminal intent, or have other characteristics which the trial court did not take sufficiently into account. While our interpretation of the state supreme court decisions does not lend support

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[32] LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. 842 (1980); Wolfgang & Riedel, *supra*, note 13.

[33] R. JOHNSON, CONDEMNED TO DIE (1981); Nakell, *The Cost of the Death Penalty*, in THE DEATH PENALTY IN AMERICA 241-46 (H. Bedau 3d ed. 1982).

to this hypothesis, it is theoretically possible that any correlation could be explained by a third unknown factor.[34] Second, the trial courts, at least in the eyes of the Florida Supreme Court, may tend to overreact in sentencing certain groups of defendants. That is, the trial courts might be more likely to impose a death sentence when a white man kills a woman, even though the heinous quality of the offense and weight of the evidence is similar in cases involving different defendant and victim characteristics. The state supreme court's affirmation of a comparatively fewer number of these cases could be seen then as correcting this earlier bias. However, given that trial courts tend to impose harsher sentences on black defendants in death penalty cases,[35] the "bias correction" hypothesis does not explain why cases with black defendants and female victims are the most likely to be affirmed. Third, the state supreme court may be treating black defendants with female victims with disproportionate severity while the trial courts refrain from doing so. This would suggest that a bias is introduced not by the trial courts, but at the state appellate level. Further research is needed to investigate these possibilities. For now, we can conclude only that the supreme court's decisions support the trial court's death sentences differentially, based in part on victim's sex and defendant's race.

While the identification of extra-legal correlates of decisions at one point in the capital sentencing process is noteworthy, its principal importance emerges in the context of comparison with other racially biased decisions made at earlier points. That is, although the death penalty in Florida is given disproportionately to black defendants,[36] the Florida Supreme Court is not correcting the discrepancy in its decisions on direct appeals.[37] In fact, the relationship between defendant's race

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[34] The defendant's prior conviction record would be one possible control variable, although we are aware of no research which suggests that this record might vary with the interaction between defendant's race and victim's sex. All the state supreme court decisions were read to determine whether trial judges found that "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person," FLA. STAT. ANN., § 921.141(3) (b) (West 1973), as an aggravating circumstance, and whether the Florida Supreme Court affirmed the use of that circumstance. We found that no mention of any aggravating circumstances was made in 33 cases (including the 22 cases remanded for new trials). In 70 cases, the trial judge did not find prior convictions as an aggravating circumstance. The Florida Supreme Court struck down a trial judge's finding of this aggravating circumstance in five cases, ignored it in seven, and approved it in thirty. We found no clear relationship between the presence of this aggravating circumstance and defendant's race/victim's sex. Thus, our data present no evidence that the correlation we found between supreme court decisions and these extra-legal factors could be explained by defendant's prior record.

[35] *See* Bowers & Pierce, *supra* note 4; Radelet, *supra* note 14.

[36] Bowers & Pierce, *supra* note 4; Radelet, *supra* note 14; Zeisel, *supra* note 14.

[37] To correct the earlier injustices against black defendants, especially those with white victims, it would be necessary for the Florida Supreme Court to review more than just a small

and outcome indicates the possibility that the supreme court is reinforcing the biases against black defendants which may be observed at earlier stages of the criminal justice process. The greatest impact of racial variables on the death sentence may be at the prosecutorial[38] and sentencing stages, and these initial effects are then augmented at the appellate stage. Thus, studies which examine only one point in the capital sentence decision-making process[39] may miss the cumulative picture and incorrectly conclude that only small racial biases are present.

In sum, it is clear that either the state supreme court or, in its opinion, the trial courts are not applying the death penalty consistently in Florida. Furthermore, inconsistencies tend to parallel defendant's race and victim's sex. The above data provide support for the hypothesis that significant disparities continue to exist in the process through which some convicted murderers are selected for execution. Because of the high probability that the number of executions soon will increase dramatically, future studies will be necessary to expand the search for correlates of post-sentencing relief to include executive clemency and federal court decisions.

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sample of homicide cases. That is, cases that do not result in a death sentence, no matter how factually similar to death penalty cases, do not automatically come to the attention of the Florida Supreme Court on direct appeal. This presents a methodological paradox. The Florida Supreme Court is mandated to strike comparatively excessive sentences and to ensure consistency and fairness in capital sentencing, but in attempting to do so it reviews and compares only the small portion of cases which result in death sentences. Before any systematic study had been done on race and the post-*Furman* imposition of the death penalty in Florida, Justice Stewart stated, in his plurality opinion in *Proffitt*: "[T]his problem is not sufficient to raise a serious risk that the state capital-sentencing system will result in arbitrary and capricious imposition of the death penalty." 428 U.S. at 259 n.16. Nonetheless, if the state supreme court is to correct earlier biases, such as those involving defendant's and victim's race, it must examine the potential death penalty cases in which a death sentence was not imposed.

38 M. Radelet & G. Pierce, Race and Prosecutorial Discretion in Homicide Cases (Sept. 1983) (unpublished manuscript).

39 For an overview, see C. L. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981).