IMPLEMENTATION OF THE FEDERAL DEATH PENALTY PROCEDURE IN GEORGIA: A PROPOSAL TO REDUCE IRREPARABLE MISCARRIAGES OF JUSTICE

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INTRODUCTION

On the night of September 19, 2011, Troy Davis, a man who had been convicted and sentenced to death for the murder of a police officer, took his last breath.[2] Up until his execution, Davis maintained his innocence saying, "I will not stop fighting… Georgia is prepared to snuff out the life of an innocent man."[3] For the 20 years that Davis sat on death row, doubt was cast over whether the jury entered the right verdict. Although the world may never truly know whether Davis was actually innocent, there are hundreds of individuals that have been proven innocent after being sentenced to death.[4] Since 1973, 185 innocent people were freed from death row after the U.S. courts found that they did not commit the crimes for which they were convicted.[5] Seven of those 185 individuals were wrongly convicted in Georgia.[6] Despite the number of innocent people being sentenced to death, there has been little in the way of reform in Georgia's death penalty system

[2] Kim Severson, *Davis is Executed in Georgia*, THE NEW YORK TIMES (Sept. 21, 2011), https://www.nytimes.com/2011/09/22/us/final-pleas-and-vigils-in-troy-davis-execution.html.

[3] *Id.*

[4] Two other individuals, Brian Terrell and Carlton Michael Gary, were executed in Georgia, but may have also been innocent. Brian Terrell was convicted and sentenced to death in 1995. However, no physical evidence linked Terrell to the murder and the prosecution's key witness spent a year in jail facing the threat of death himself before finally testifying against Terrell in exchange for a 5-year sentence. Despite this information pointing to Terrell's innocence, he was executed in 2015. Carlton Michael Gary was convicted and sentenced to death in 1986 for the murder of three elderly women. Notwithstanding the fact that post-conviction DNA testing excluded Gary from the crime scene and exculpatory evidence contradicting Gary's guilt was not presented to Gary's defense counsel, his clemency petition was denied, and he was executed in 2018. *See* Death Penalty Information Center, *Executed But Possibly Innocent,* DEATH PENALTY INFORMATION CENTER (Nov. 1, 2020), https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent.

[5] Death Penalty Information Center, *Innocence by the Numbers*, DEATH PENALTY INFORMATION CENTER (2020), https://deathpenaltyinfo.org/policy-issues/innocence/innocence-by-the-numbers.

[6] Death Penalty Information Center, *Innocence and the Crisis in the American Death Penalty*, DEATH PENALTY INFORMATION CENTER (2004), https://files.deathpenaltyinfo.org/documents/pdf/Innocence-and-Crisis-Rpt.f1560295687.pdf.

since the landmark Supreme Court cases of *Furman v. Georgia*[7] and *Gregg v. Georgia.*[8]

In 1972, the Supreme Court decided in *Furman* the death penalty was unconstitutional as it was being applied, pointing to the racial disparity in the application of the death penalty, the arbitrariness, and the unfettered judge and jury discretion at trial as the causes for violations of the Eighth Amendment's prohibition on "cruel and unusual punishment."[9] Four years later, the Court ruled in *Gregg* that the new procedural safeguards Georgia implemented in response to *Furman* dealt with the arbitrary and discriminatory problems plaguing the death penalty system and was thus constitutional.[10] However, to this day systemic issues continue to deeply penetrate the death penalty system. Racial inequality and unfettered prosecutorial discretion are at the forefront and the sporadic application of the death penalty has led to a continued arbitrary and capricious system.

The purpose of this Comment is to propose that Georgia adopt a procedure similar to the federal procedure when seeking to implement the death penalty in order to not only decrease the number of wrongful convictions that occur, but to minimize prosecutorial discretion in the charging process, eliminate racial disparity and promote consistency state-wide to avoid an inconsistent application of the death from county to county. Part I of this Comment will focus on Georgia's current death penalty system discussing the landmark cases of *Furman* and *Gregg* which contributed to the changes in the current system. Despite the reforms made post-*Furman*, Georgia's death penalty system is still fraught with issues. Part I will analyze these issues, specifically discussing the racial disparity in the application of the death penalty and the unfettered prosecutorial discretion which can lead to inconsistencies and racial disparity in their charging decisions. In addition, Part I will discuss the constitutionality of sentencing innocent people to death and why it is necessary to reform the death penalty system. Repeal is an unlikely solution in Georgia since the public opinion on the death penalty remains strong. Thus, Part I will examine not only the longstanding history of the death penalty in Georgia but why a reform in the death penalty system is a more viable option than a repeal.

Part II of this Comment will focus on the particular reform that is being proposed – adopting a death penalty procedure similar to the federal procedure. This section will consist of a brief history of the federal death

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[7] 408 U.S. 238 (1972).
[8] 428 U.S. 153 (1976).
[9] *Furman*, 408 U.S. at 238.
[10] *Gregg*, 428 U.S. at 153.

penalty system and the policies and procedures that were enacted after the re-establishment of the federal death penalty post-*Furman.* The internal policies implemented by the Department of Justice requires U.S. attorneys to submit all death-eligible cases to the Attorney General's Office for a three-step review. This review process consists of an initial recommendation by the Capital Case Unit, a detailed review of the case by the Capital Review Committee followed by a recommendation, and a final determination by the Attorney General as to whether the death penalty is appropriate in the particular case at issue.[11] The federal government has implemented these internal policies to create a consistent framework nation-wide, to ensure the death penalty is being applied neutrally and proportionately to all defendants, and that impermissible factors such as race, ethnicity, gender, and religion are not considered during the review process.[12]

Finally, Part III will argue that the adoption of a similar death penalty procedure to the federal governments will help create oversight over capital punishment cases and minimize prosecutorial discretion, reduce racial disparity by adopting a race-blind policy, and provide procedural consistency across the state. This Comment will conclude by positing that the minimization of prosecutorial discretion, the consistency in the death penalty state-wide, and the elimination of racial disparity in capital punishment will help to redress the continued arbitrary and capriciousness plaguing Georgia's death penalty system.

I. GEORGIA'S POST-FURMAN DEATH PENALTY SYSTEM

A. Overview of Georgia's Death Penalty system post-Furman

In 1972, the Supreme Court put a halt to the death penalty in the case of *Furman v. Georgia* by deciding the death penalty in Georgia, as it was being applied, was unconstitutional.[13] *Furman* was the first death penalty case in which the Supreme Court decided the issue of constitutionality.[14] In this per curiam decision, two Justices, Justice Brennan and Justice Marshall, believed the death penalty was unconstitutional per se as it constituted cruel and

[11] *See* U.S. Dep't of Just., Just. Manual § 9-10.000 (2018).
[12] This Comment recognizes that other impermissible factors such as gender and religion may also lead to inconsistencies in the charging of capital murder, but this Comment seeks to specifically discuss racial disparity as it has been a crucial issue that has continued to trouble the American death penalty system.
[13] *Furman*, 408 U.S. at 238 (per curiam).
[14] *Id.*

unusual punishment in violation of the Eight and Fourteenth Amendments.[15] However, Justices Stewart, Douglas, and White did not reach the question of whether the death penalty was unconstitutional per se.[16] All three Justices found that the current death penalty system was unconstitutional in its application as it was imposed in a "wanton and freakish manner" and it was cruel and unusual to apply the death penalty selectively to minorities.[17]

After the Supreme Court's decision in *Furman v. Georgia,* the Georgia legislature took to reform the death penalty system by creating procedural safeguards in order to correct the Constitutional violations. Georgia reformed its death penalty system in several ways. First, the Georgia Code provides for twelve aggravating circumstances that make a defendant eligible for the death penalty.[18] If one of these circumstances is present, the prosecutor may try the defendant for capital punishment. Second, a criminal trial where the death penalty is an option is met with a bifurcated system which includes a guilt phase and a penalty phase of the trial.[19] Third, in the penalty phase of the trial, the defendant is allowed to introduce any mitigating circumstances.[20] The jury can weigh the defendant's mitigating circumstances against the aggravating circumstances to determine whether capital punishment is appropriate.[21] Finally, Georgia's Supreme Court is required to perform a

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[15] Justice Brennan in his concurring opinion stated, "When examined by the principles applicable under the cruel and unusual punishments clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore 'cruel and unusual' and the States may no longer inflict it as a punishment for crimes." *Id.* at 305 (Brennan J., concurring).

[16] Justices Stewart, Douglas, and White found that the issue before them in this case was not whether capital punishment was constitutional in the abstract, but whether the current system in its application was constitutional. *Id.* at 308. Justice Stewart stated, "These death sentences are cruel and unusual in the same way being struck by lightning is cruel and unusual…the Petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed… The 8th and 14th Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.* at 309-310 (Stewart J., concurring).

[17] *Id.*

[18] GA. ANN. CODE § 17-10-30 (2020). Georgia's statute requires the Georgia Supreme Court to determine 1) whether sentence of death was imposed under influence of passion, prejudice, or any other arbitrary factor; 2) whether in cases other than treason or aircraft hijacking, evidence supports the jury or judge's finding of statutory aggravating circumstances; and 3) whether the sentence of death is excessive or disproportionate to penalty imposed in similar cases, considering both the crime and defendant. The third factor is defined as proportionality review.

[19] Gregg v. Georgia, 428 U.S. 153, 163 (1976).

[20] *Id.* at 164-65.

[21] *Id.* at 165.

comparative proportionality review of all death penalty cases.[22] This review consists of determining whether the death sentence was "disproportionately imposed compared to sentences in similar cases."[23]

After Georgia implemented its newly reformed death penalty system, the Supreme Court decided whether it was constitutional in the case of *Gregg v. Georgia*. In reviewing Georgia's reforms in *Gregg*, the Court found that the death penalty system was constitutional, as the revised statutes dealt with the problems of unfettered jury and judge discretion, and the arbitrary application of a death sentence.[24] The Court found that the bifurcated system and the mandatory appellate review eliminated any arbitrariness and guided the jury in making a determination of whether a death sentence is appropriate.[25]

However, despite the Court's ruling in *Gregg,* there are several problems with Georgia's comparative proportionality review procedures. In *Pulley v. Harris,* the Supreme Court declared that proportionality review is not mandatory.[26] The Court did not specify what the Eight Amendment does require in regards to appellate procedures, but it did emphasize that "some sort of prompt and automatic review" is necessary.[27] Thus, according to the Supreme Court, Georgia's statute requiring automatic review in addition to comparative proportionality review is constitutionally sound.[28] Nevertheless, Georgia's statute delineating the requirement of proportionality review provides for general guidelines and does not specify the standard in which the Georgia Supreme Court is to implement such a review.[29] As a result, the Georgia Supreme Court has had to fix their own standards.[30]

For most of the death penalty appeals, the Georgia Supreme Court has created broad categories when comparing similar cases.[31] As a result, most cases that the Court reviews will fit into their overly simplified categories. For instance, if a case involves a domestic murder then it is compared to other cases involving domestic murder. The problem with this overly broad characterization is that it can lead to the Court comparing two cases completely antithetical in circumstances and facts. An example of this is the

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[22] *Id.* at 198.
[23] *Id.* at 205.
[24] *Id.* at 206-207.
[25] *Gregg*, 428 U.S. at 206-207.
[26] *See* Pulley v. Harris, 104 S. Ct. 871 (1984).
[27] *Id.* at 879.
[28] *Gregg*, 428 U.S. at 206-207.
[29] Ellen Liebman, *Appellate Review of Death Sentences: A Critique of Proportionality Review*, 18 U.C. DAVIS L. REV. 1433, 1438 (1985).
[30] *Id.*
[31] *Id.*

Court's comparison between *Dix v. State*[32] and *Tyler v. State*.[33] In *Dix,* the defendant was convicted for murdering his former wife.[34] The facts of the case reveal that the defendant tortured his wife by cutting and carving an 'S' shape into her midsection, as well as strangling her before he stabbed her thirteen times.[35] In addition, the defendant was also convicted on three counts of kidnapping the victim's mother, sister and niece in order to try and cover up the murder.[36] *Tyler v. State,* in contrast, involves the conviction of a defendant for the murder of her husband.[37] She killed him by putting rat poison in his food three separate times.[38] The defendant claimed she killed her husband because she was trying to protect her son from her husband's physically abusive nature.[39] The Georgia Supreme Court compared *Tyler* to *Dix* since they both fit into the category of domestic murder cases and the Court determined that because the death penalty has been imposed in a known number of domestic murder cases, like it was in *Dix,* then the death penalty was proportionately imposed in *Tyler*.[40] This overgeneralized comparison leads to an inadequate proportionality review, because the death penalty cases: 1) are not being compared to non-death penalty cases to see if the death penalty should not have been sought in the case at hand; and 2) are not given a meaningful comparison to similar cases in the substance of their facts and circumstances.[41]

B. Issues Plaguing Georgia's Death Penalty System

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[32] 238 Ga. 209 (1977).
[33] 247 Ga. 119 (1981).
[34] *Dix*, 238 Ga. at 209 (1977).
[35] *Id.* at 211.
[36] *Id.* at 209-10.
[37] *Tyler*, 247 Ga. at 119 (1981).
[38] *Id.* at 120-21.
[39] *Id.* at 121.
[40] *Id.* at 126.
[41] *See* Solem v. Helm, 463 U.S. 277, 291 (1983) ("It may be helpful to compare sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalties, or to less serious penalties, that is some indication that the punishment at issue may be excessive."); *See also* Kristen Nugent, *Proportionality and Prosecutorial Discretion: Challenges to the Constitutionality of Georgia's Death Penalty Laws and Procedures Amidst the Deficiencies of the State's Mandatory Appellate Review Structure,* 64 U. Miami L. Rev. 175, 206 (2009) (arguing that the Supreme Court of Georgia's failure to properly undertake the comparative analysis described by the Helm court, and the resultant acquiescence in the inconsistent application of the death penalty against criminal defendants within the state, is one of the many indications that the state's capital sentencing procedures are unconstitutional.).

Notwithstanding the reforms that were made to capital sentencing and the Supreme Court's ruling in *Gregg*, substantial issues still remain in Georgia's death penalty system.[42] Racial bias continues to infiltrate prosecutors' decisions to seek the death penalty.[43] In addition, unbridled prosecutorial discretion has led to an unequal application of the death penalty among various judicial circuits and the selective prosecution of certain cases, substantially affecting minorities in the process. Out of the 185 individuals wrongly convicted in the United States, seven were wrongly convicted in Georgia.[44] Collectively, these innocent individuals have spent a total of 58 years in prison for crimes they did not commit.[45] Racial inequality and prosecutors' unfettered discretion in the charging of capital cases have largely contributed the continued problems plaguing those that have been wrongly convicted.[46]

1. Racial Disparity in the Application of the Death Penalty

Racial disparity in the application of capital sentencing continues to be a longstanding characteristic that has plagued Georgia's death penalty

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[42] *Id.*

[43] See sources cited *infra* note 44.

[44] Those seven individuals were James Creamer, Earl Charles, Jerry Banks, Robert Wallace, Gary Nelson, Howard Stack and Lawrence Lee. All seven were either acquitted or their charges were dismissed. This number might actually be larger, as those that have been removed from death row after being cleared of their capital offense but had pled guilty to a lesser charge to guarantee their immediate release are not included in the list of those that had been exonerated. For instance, Johnny Lee Gates, an African American man who had been sentenced to death had his sentenced reduced to a lesser charge after it was determined the physical evidence found at the crime scene did not match Gates DNA. Gates maintained his innocence, but accepted charges of manslaughter and armed robbery in exchange for a reduced sentence that would guarantee his immediate release. *See* Death Penalty Information Center, *Partial Innocence – Sentence Reduced*, DEATH PENALTY INFORMATION CENTER (Nov. 1, 2020), https://deathpenaltyinfo.org/policy-issues/innocence/partial-innocence. In addition, this number does not include those that were sentenced to death but should not have been eligible for the death penalty to begin with. In 2005, the Georgia Board of Pardons and Paroles posthumously pardoned Lena Baker, an African American woman who was sentenced to death and executed for killing her white employer, Ernest Knight. She was tried, convicted, and sentenced to death all in one day by an all-white jury. The Board found that the denial of her clemency petition was an egregious error as evidence pointed to the fact that she might have killed Knight in self-defense and she should have been charged with a lesser offense of voluntary manslaughter rather than capital punishment. *See* Death Penalty Information Center, *Posthumous Pardons*, DEATH PENALTY INFORMATION CENTER (Aug. 16, 2005), https://deathpenaltyinfo.org/news/georgia-board-to-pardon-woman-60-years-after-her-execution.

[45] *Id.*

[46] See *supra* text accompanying notes 39–42.

system.[47] The topic of racial discrimination in capital sentencing is not a new one. Several studies as well as Supreme Court opinions throughout the years serves as evidence of this discrimination. In 1967, the President's Commission on Law Enforcement and Administration of Justice found that the death penalty followed a pattern of discrimination stating, "[t]he death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups."[48] Recognizing a need for reform, *Furman* put a halt to capital punishment for the disproportionate application of the death penalty against a selected few.[49] However, despite the Supreme Court's decision in *Furman*, several studies conducted after 1974 have indicated that racial discrimination continues to penetrate the death penalty system.[50]

One of the most prominent studies on discrimination in capital charging and sentencing was conducted by Professor David Baldus in 1983.[51] The study analyzed 2,484 cases in Georgia between 1973 and 1979 and found a discriminatory application in the charging and sentencing of the death penalty based on the race of the victim and the race of the defendant.[52] The Baldus study estimated defendants were 4.3 times more likely to receive the death penalty when the victim was white as opposed to a victim who was black.[53] In addition, jurisdictions were 1.1 times more likely to sentence black defendants to death than other nonblack defendants.[54]

The studies on racial discrimination in capital sentencing did not stop at the Baldus study. In 1980, Bowers and Pierce found that in homicide cases in Florida, Georgia, and Texas in the late 1970's, defendants were more likely to receive a death sentence when the murder involved a white victim.[55] In addition, in 1984, Professor Gross and Mauro analyzed all reported homicides that occurred in eight states, including Georgia, between 1976 and

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[47] See sources cited *infra* note 48.
[48] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).
[49] Furman v. Georgia, 408 U.S. 238 (1972).
[50] *See* David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience (Symposium on Current Death Penalty Issues)*, 74 J. CRIM. L. & CRIMINOLOGY 661, 728 (1983) [hereinafter Baldus].; *see also* William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 629 (1980); *and* Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 42 (1984).
[51] Baldus, *supra* note 50.
[52] Baldus, *supra* note 50, at 709-710.
[53] *Id.* at 709.
[54] *Id.* at 710.
[55] Bowers & Pierce, *supra* note 50, at 594.

1980 and found that in all eight jurisdictions there involved an unequal application of the death penalty when the victim was white as opposed to another race.[56] Further, a study done by Raymond Paternoster, among several other studies, have shown that defendants are more likely to be charged with capital punishment when the victims are white as opposed to when the victims are non-white, indicating racial disparity in the charging phase of capital crimes not just in sentencing.[57]

Although these studies were conducted in the 1970's and 1980's, evidence indicates that this pattern of racial discrimination in the application of the death penalty has continued in capital sentencing.[58] Justice Blackmun dissented in the 1994 *Callins v. Collins*[59] opinion stating that despite it being 20 years after the *Furman v. Georgia* decision, "the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake."[60]

The Baldus study was used as a basis for a defendant's appeal of his death sentence in 1987.[61] In *McCleskey v. Kemp*, the defendant, McCleskey, pointed to racial discrimination in the application of the death penalty in Georgia as the reason why his death sentence was unconstitutional under the Eighth and Fourteenth Amendments.[62] McCleskey indicated that Baldus's study showed jurisdictions were more likely to sentence a black defendant to death over a white defendant and were more likely to sentence a defendant to death when the victim is white as opposed to black.[63] Thus, McCleskey concluded that Georgia's death penalty system discriminated against him as a black man.[64] Despite McCleskey's showing of racial discrimination in the application of Georgia's death penalty, as evidenced through the Baldus study, the Supreme Court found that empirical studies were not sufficient to show that the individual defendant was discriminated against on the basis of race.[65] In order to making a showing that a death sentence was imposed on the basis of racial discrimination, the individual must show that the defendant

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[56] Gross & Mauro, *supra* note 50, at 49.
[57] Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination,* 18 LAW & SOCIETY REV. 437 (1984); *see also* Bowers & Pierce, *supra* note 40, at 599.
[58] *See* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, app. B at 1742-45 (1998).
[59] 510 U.S. 1141, 1144-45 (1994) (Blackmun, J., dissenting).
[60] *Id.*
[61] Baldus, *supra* note 50.
[62] 481 U.S. 279 (1987).
[63] *Id.* at 286.
[64] *Id.* at 292.
[65] *Id.* at 297.

was subjected to actual discrimination specifically in his or her case.[66] Thus, notwithstanding the several studies indicating that racial discrimination continues in capital sentencing, the studies cannot serve as a basis for racial discrimination claims in death sentences after the *McCleskey* opinion.[67]

Not all Justices on the Supreme Court agreed with the *McCleskey* opinion. Justices Brennan, Blackmun and Stevens dissented stating that an individual showing of racial discrimination in a defendant's case is not needed in order to show racial discrimination.[68] If a defendant can show a pattern of racial discrimination in the application of the death penalty as to make it arbitrary and capricious then this would be sufficient to show violations of the Eighth and Fourteenth Amendments.[69] The majority's opinion in *McCleskey* has made it extremely hard to show racial discrimination in capital sentencing and has deeply contributed to the continued problem of racial disparity in the application of the death penalty.

2. Unfettered Prosecutorial Discretion

The Supreme Court in *Furman* struck down the death penalty for being arbitrary since it was being applied in a sporadic and infrequent manner indicating it was not being used for its created purposed – to punish those that have committed the most heinous of crimes.[70] Georgia's decision makers were unable to articulate why the death penalty was sought against some defendants while others, who had committed the same or similar crimes, were not subject to capital punishment.[71] In addition, the Supreme Court believed that unfettered judge and jury discretion in capital sentencing also contributed to a standard less, capricious system.[72] Although the reforms made after *Furman* sought to reduce judge and jury discretion during the guilt and sentencing phases of capital trials, the system continues to allow unbridled prosecutorial discretion in the charging phase.[73] Allowing prosecutors' broad

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[66] *Id.* at 292.
[67] *Id.*
[68] *McCleskey*, 481 U.S. at 322-323 (Brennan J., dissenting).
[69] *Id.*
[70] *See* Kansas v. Marsh, 548 U.S. 163, 206 (2006) ("The death penalty must be reserved for the 'worst of the worst.'"); *see also* Roper v. Simmons, 543 U.S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and those with extreme culpability makes them 'the most deserving of execution.'" (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002))).
[71] Furman v. Georgia, 408 U.S. 238 (1972).
[72] *Id.*
[73] *See* Gregg v. Georgia, 428 U.S. 153, 199 (1976) (rejecting the defendant's argument that prosecutors had "unfettered authority" under Georgia's death penalty statute holding that "[n]othing in any of our cases suggests that the decision to afford an individual defendant

discretion in whether to implement the death penalty has led to a continued arbitrary system.

Georgia's Administrative Office of the Courts organized the state's 159 counties into 49 superior court judicial circuits.[74] One District Attorney resides over each judicial circuit thus, there are 49 District Attorneys in Georgia.[75] All 49 District Attorneys have, in their sole discretion, the ability to choose whether to seek the death penalty against a defendant.[76] There has been little guidance by the United States Supreme Court or the Georgia Supreme Court in limiting or setting standards for the discretion of prosecutors in deciding whether to seek the death penalty.[77] The only mechanisms restricting a prosecutor's discretion are § 17-10-30 of the Georgia Code and the Supreme Court cases that have sought to limit the prosecutor's ability to seek the death penalty against only those defendants that are death-eligible. A death-eligible defendant means the individual is at least eighteen years old,[78] has been charged with homicide[79], and at least one of the twelve aggravating factors under § 17-10-30 is present.[80] However, even if the defendant is death-eligible, the prosecutor can either choose to

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mercy violates the Constitution."). Thus, unfettered prosecutorial discretion does not render a state's death penalty unconstitutional despite the fact that the Court also stated, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 189.

[74] Reform Georgia, *Georgia Judicial System Structure,* REFORM GEORGIA: BUILDING A BETTER JUSTICE SYSTEM (Nov. 2, 2020), https://www.reformgeorgia.org/georgia-judicial-system-structure/.

[75] *Id.*

[76] *See* John A. Lundquist, *Prosecutorial Discretion – A Re-Evaluation of the Prosecutor's Unbridled Discreetion [sic] and Its Potential for Abuse,* 21 DEPAUL L. REV. 485, 501 (1972) (discussing prosecutorial discretion stating "[w]ithout any controls or limitations, the exercise of such power rests solely with the men possessing it.").

[77] *See* United States v. Armstrong, 517 U.S. 456 (1996) (holding discovery in a selective prosecution claim could be allowed if Petitioner has shown that the Government declined to prosecute similarly situated person of other races); *see also* United States v. Batchelder, 442 U.S. 114, 125 (1979) (holding while it is broad, prosecutorial discretion is nonetheless subject to constitutional constraints).

[78] *See* Roper v. Simmons, 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments forbid imposition of death penalty on offenders who were under the age of eighteen when their crimes were committed).

[79] *See* Enmund v. Florida, 458 U.S. 782 (1982) (holding capital punishment improper when defendant is charged with felony murder and didn't kill, attempt to kill, or intend to kill); *see also* Coker v. Georgia, 433 U.S. 584 (1977) (holding capital punishment may not be imposed on a defendant whose only charge is rape).

[80] GA. ANN. CODE § 17-10-30 (2020). *See* Godfrey v. Georgia, 446 U.S. 420, 428-429 (1980) (plurality opinion) (holding that states must give a narrow and precise definition of the aggravating factors that can result in capital sentences).

seek the death penalty or forego capital sentencing for an alternative punishment.[81]

Allowing District Attorneys discretion in enforcing the death penalty and in particular, which defendants to enforce the death penalty against, has led to a fickle use of the death penalty among judicial circuits.[82] A study done by criminologist, Raymond Paternoster, indicates that a District Attorney's decision to seek the death penalty can vary between geographic locations. Paternoster studied 1,686 non-negligent homicides in South Carolina between 1977 and 1981.[83] The results indicated that a District Attorney was substantially more likely to charge a defendant with the death penalty in rural areas than urban areas.[84] This discretionary authority in the enforcement of the death penalty by geographic location is further illustrated in a case study of Missouri's judicial circuits. Jennifer Joyce, District Attorney residing over the St. Louis circuit, has not prosecuted a capital case since she was elected in 2001.[85] However, Robert McCulloch, the District Attorney that presides over the suburban jurisdictions in Missouri has charged 10 defendants with the death penalty since 2000, even though the suburban counties have only ¼

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[81] This was the case in May 2020, when Paul Howard, Fulton County District Attorney and one of the most aggressive prosecutors in the implementation of the death penalty, declared that he would no longer seek the death penalty. *See* Bill Rankin, *Fulton DA, two challengers commit to not seeking the death penalty*, ATLANTA JOURNAL CONSTITUTION (May 29, 2020), https://www.ajc.com/news/local/fulton-two-challengers-commit-not-seeking-the-death-penalty/7sfZRVL5ngc3eRf9Xo2MgJ/. Howard said this while up for re-election in the June 9th, 2020 primary. *Id.* However, 8 days after the primary, Howard charged a former Atlanta Police Department officer with murder and stated he intended to seek the death penalty. *Id. See also* Christian Boone, Alexis Stevens, & Bill Rankin, *Fulton DA charges former APD cop with murder in Wendy's shooting*, ATLANTA JOURNAL CONSTITUTION (June 18, 2020), https://www.ajc.com/news/crime--law/fulton-charges-former-apd-cop-with-murder-wendy-shooting/Gi2sNmHpB0s2JB3QCk6UDO/. *Id.* Howard's sudden change in policy is likely due to the fact that, as an elected official, Howard is concerned about being re-elected. *Id.* A prosecutor's unbridled discretion in the implementation of the death penalty allows district attorneys like Howard to seek the death penalty one moment and to put a halt to it at a later date purely because of political influences and public opinions. *Id. See generally* Stewart F. Hancock, Jr. et al., *Race, Unbridled Discretion, and the State Constitutional Validity of New York's Death Penalty Statute – Two Questions*, 59 ALB. L. REV. 1545, 1563 (1996).

[82] *See* Sherod Thaxton, *Disciplining Death: Assessing and Ameliorating Arbitrariness and Capital Charging,* 49 ARIZ. ST. L.J. 138, 204-05 (2017) (stating, "[p]rosecutors' charging decisions remain highly arbitrary both within and across jurisdictions. Effective death penalty reform, if possible, must begin with the gatekeepers of the system.").

[83] Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 762-63 (1983).

[84] *Id.* at 780-83.

[85] Death Penalty Information Center, *Prosecutorial Discretion Results in Arbitrary Application of the Death Penalty*, DEATH PENALTY INFORMATION CENTER (July 15, 2008), https://deathpenaltyinfo.org/news/Prosecutorial-Discretion-Results-in-Arbitrary-Application-of-the-Death-Penalty.

as many murders as St. Louis.[86] Committing a murder in one judicial circuit over another could really mean the difference between life and death.[87] The death penalty was struck down in *Furman* for its capricious nature, yet Georgia's current death penalty system is still fraught with caprice as illustrated through an inconsistent application of capital punishment within the state.[88] In addition to the inconsistent application of the death penalty among judicial circuits, a lack of oversight and unbridled prosecutorial discretion can lead to prosecutorial misconduct and abuse of discretion in the charging of defendants.[89] Prosecutorial misconduct continues to be one of the leading factors of wrongful convictions.[90] All seven cases in Georgia that were overturned based on wrongful convictions were riddled with prosecutorial misconduct.[91] One of these individuals, James Creamer, was convicted in 1973 of "a murder allegedly committed with six other individuals".[92] Creamer was the only one who received a death sentence while the six others received life sentences.[93] Instances where a prosecutor selectively prosecutes some individuals over others, like in Creamer's case, has led to selective prosecution claims. Selective prosecution is where the government prosecutes a defendant based upon the defendant's race, religion, ethnicity, or in another discriminatory manner in violation of the United States' Constitution's Equal Protection Clause.[94] Nevertheless, Supreme Court precedent involving selective prosecution claims has made it extremely difficult to prove such claims. A defendant is tasked with putting forth

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[86] *Id.*

[87] *See* Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES, July 16, 1995, at 22 ("Prosecutorial discretion insures that the lives of identical murderers committing identical crimes can be valued completely different on opposite sides of the county line.").

[88] *See* Glossip v. Gross, 576 U.S. 863, 918-20 (2015) (Breyer, J., dissenting) (noting that geography, like race and gender, impermissibly affect the application of the death penalty).

[89] *See* Ashley Rupp, *Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?*, 71 FORDHAM L. REV. 2735, 2773 (2003) ("Prosecutorial autonomy has led to prosecutorial abuse of discretion including cases supported by inadequate evidence, pandering in politics, and using impermissible factors when making charging decisions….").

[90] *See* A.B.A, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE GEORGIA DEATH PENALTY ASSESSMENT REPORT 109 & n.1 (2006) ("Between 1970 and 2004, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions or reducing sentences in at least 2,012 criminal cases, including both death penalty and non-death penalty cases.").

[91] *Id.*

[92] *Description of Innocence Cases,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence/description-of-innocence-cases (Creamer "was resentenced to life in prison in September 1973".).

[93] *Id.* James Creamer was later exonerated in 1975 after it was determined prosecution withheld and destroyed evidence.

[94] United States v. Armstrong, 517 U.S. 456, 463 (1996).

evidence of a prosecutor's purposeful discrimination and a defendant is only granted an evidentiary hearing if they can put forth a colorable claim that "the Government has failed to prosecute others who are similarly situated to the defendant."[95] However, defendants may not be able gather such evidence because they do not have access to the prosecutor's notes or documents.[96] In addition, prosecutors are usually not forthright in their discriminatory practices and a defendant may be able to proffer circumstantial evidence at best.[97] Thus, without blatant discriminatory evidence, a defendant will likely not be able to prove such a claim.

Despite prosecutorial misconduct being a leading cause of wrongful convictions, prosecutors are rarely punished criminally or civilly for their misconduct. Moreover, no appellate body is required to review "whether a prosecutor's decision to seek the death penalty was influenced by racial animus or other characteristics unrelated to the defendant's guilt."[98] The broad, unbridled discretion of prosecutors without any regulation on such discretion has allowed prosecutors to overstep the bounds of their authority and abuse their discretion in death penalty cases.

C. Constitutionality of the Post-Furman Death Penalty System

The substantial issues in the death penalty system have led to the continued debate over whether the system is truly constitutional if it has resulted in innocent people being sentenced to death. Although the Supreme Court has not explicitly decided this issue, Justice O'Connor, in her concurring opinion in *Herrera v. Collins,*[99] stated, "[t]he execution of a legally and factually innocent person would be a constitutionally intolerable event."[100] Studies have shown that people are in fact being sentenced to death

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[95] *Id.* at 469.
[96] *Id.* at 463.
[97] *Id.*
[98] *See* Phuc Le, *Prosecutorial Discretion and the Death Penalty's Constitutionality*, CORNELL J. OF L. AND PUB. POL'Y (June 7, 2015), http://jlpp.org/blogzine/prosecutorial-discretion-and-the-death-penaltys-constitutionality/. Mandatory appellate review of a death penalty case is required under Georgia law, but Georgia Supreme Court not required to look into the reasons why a prosecutor has decided to try a death penalty case. *Id.*
[99] *Herrera*, 506 U.S. 390, 419 (1993) (O'Connor J., concurring). This Comment recognizes that *Herrera v. Collins* dealt with innocence as a claim on appeal and that the Court ultimately ruled that no such action was available to defendants. However, this quote is used to emphasize the importance the Court places in ensuring wrongful convictions do not occur and that wrongful convictions, if they continue, have the possibility to affect the constitutionality of the death penalty system.
[100] *Id.* (Justice O'Connor stated, "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution." *Id.* at 419. However, O'Connor

who are later found to be factually innocent.[101] For these reasons, Georgia is left with two options in order to reduce the number of wrongful convictions and ensure it is being applied in a consistent manner: 1) repeal the death penalty altogether or 2) make serious reforms in the application of the death penalty.

Repealing the death penalty is not a new concept in the fight for reform. Several states have suggested this solution over the years.[102] Some states have been successful in this endeavor while others, including Georgia, have not.[103] In 2019, several Georgia representatives introduced House Bill 702 proposing the repeal of the death penalty, pointing to the economic inefficiency, the unequal application, and the wrongful convictions that occur as reasons for the proposal.[104] House Bill 702 was first introduced in March of 2019, but the bill did not make any headway and was unable to clear the House Committee.[105] The lack of traction for House Bill 702 is likely due to Georgia's longstanding history in the implementation of the death penalty.

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ultimately found that defendant in this particular case was in fact guilty); In 2001, Justice O'Connor expressed her doubts on the death penalty again when she stated, "after 20 years on (the) high court, I have to acknowledge that serious questions are being raised about whether the death penalty is being fairly administered in this country." *See Death Penalty*, REPORT ACLU OF OREGON (2021), https://www.aclu-or.org/en/issues/death-penalty.

[101] See *supra* note 42.

[102] *See Virginia Legislature Votes to Abolish the Death Penalty,* DEATH PENALTY INFO. CTR. (Feb. 5, 2021), https://deathpenaltyinfo.org/news/virginia-legislature-votes-to-abolish-the-death-penalty. Recently, as of February 4, 2021, a bill to repeal the death penalty in Virginia gains final legislative approval and Virginia's Governor, Ralph Northam, has already pledged to sign the bill. *Id.* This will make Virginia the 23rd state to abolish the death penalty and the 1st state in the south to do so. *Id.* The passing of Virginia's bill to abolish the death penalty is particularly momentous as no former Confederate state has abolished the death penalty in its 400-year history. *Id.* In addition, Virginia "has executed more people than any other state and," after executions resumed post-*Furman,* is second only to Texas. *Id.* Other state legislators have filed bills to abolish the death penalty in Arizona, Nebraska, Missouri, North Carolina, California, Colorado, Florida, Kansas, and Louisiana. *See also Recent Legislative Activity,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity.

[103] Twenty-two states have been successful in repealing the death penalty: Washington, North Dakota, Minnesota, Michigan, Iowa, Illinois, New York, West Virginia, Maryland, Delaware, Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Hawaii, Alaska, Rhode Island, New Jersey, Delaware, and New Mexico. *State by State,* DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

[104] Telephone Interview with Scott Holcomb, Ga. State Rep., (Oct. 11, 2019) (notes on file with the Atlanta's John Marshall Law Journal).

[105] *2019-2020 Criminal Procedure; Imposition of the Death Penalty in This State; Repeal*, Ga. Gen. Assemb., https://www.legis.ga.gov/legislation/56364 (May 4, 2021) [hereinafter H.B. 702 Status Sheet].

Georgia's first known execution occurred in 1735, only two years after Georgia was founded by James Oglethorpe.[106] The defendant, Alice Riley, "was hung for the murder of her master."[107] Since Georgia's first execution, the state has put an additional 1,152 persons to death.[108] Between 1930 and 1964 Georgia executed 367 people which was more than any other state at the time.[109] In addition, Georgia has been involved in more than four of the landmark Supreme Court death penalty cases. Further, notwithstanding the fact that public views on the death penalty have decreased nationally, the public opinion in Georgia still supports the imposition of the death penalty.[110] Moreover, Capital punishment is favored by more than three quarters of Republicans.[111] Georgia's unsuccessful venture in repealing the death penalty leaves only one other option in the quest for rectifying a capricious and arbitrary system— Georgia should make death penalty reforms in order to reduce the racial disparity and the unfettered prosecutorial discretion in the applicable of the death penalty.[112]

II. THE FEDERAL DEATH PENALTY SYSTEM

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[106] Office of Planning and Analysis, *The Death Penalty: A History of the Death Penalty in Georgia*, DEPT. OF CORRS. (Jan. 2015), http://www.dcor.state.ga.us/sites/all/files/pdf/Research/Standing/Death_penalty_in_Georgia.pdf.

[107] *Id.*

[108] Death Penalty Information Center, *Georgia History of the Death Penalty,* DEATH PENALTY INFORMATION CENTER (Nov. 2, 2020), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/georgia.

[109] *Id.*

[110] Nationally, the percentage of Americans who consider the death penalty to be morally acceptable has fallen to a record low. See Gallup, *Death Penalty,* GALLUP (Nov. 2, 2020), https://news.gallup.com/poll/1606/death-penalty.aspx; However, in Georgia, 76% of residents support the death penalty. See I Side With, *Do You Support the Death Penalty?* I SIDE WITH (Nov. 2, 2020), https://www.isidewith.com/poll/49841143/9333310.

[111] J. Baxter Oliphant, *Public Support for the Death Penalty Ticks Up in 2018,* PEW RESEARCH CENTER (June 11, 2018), https://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/.

[112] *See generally* Gregg v. Georgia, 428 U.S. 153 (1976). *See also* Tara Elgie, *The Death Penalty in Virginia: Attempts at Legislative Reform,* RICHMOND J. OF L. & PUBLIC INTEREST 35, 38-43 (2001). Although Virginia is an example of a state that has abolished the death penalty despite its longstanding history of executing people, it has proposed several bills over the years that were not passed. This likely indicates Virginia has experienced a long road in its fight to abolishing the death penalty. I hope that Georgia can eventually move in the same direction as Virginia one day, but HB 702 is an indication that Georgia is not ready for such change. Until Georgia is ready to abolish capital punishment, important reforms need to occur to ensure that the death penalty is not continuing in an arbitrary and capricious manner.

A. Overview of the Federal Death Penalty System

The death penalty reform that is being proposed in this Comment is a variant of the federal government's death penalty procedures. The federal death penalty procedures have minimized prosecutorial discretion and have established policies to combat racial animus in the implementation of the death penalty.[113] In order to analyze which specific federal procedures Georgia should adopt, it is important to first address the history of the federal death penalty and the policies that make up the current federal death penalty system.[114]

In 1972, the federal death penalty system was also invalidated by the Supreme Court's decision in *Furman v. Georgia*.[115] However, it was not until 1988 that the federal death penalty system was reinstated. In 1988, President Reagan signed into law the Anti-Drug Abuse Act which gave the government the authority to seek capital punishment against defendants charged with "certain drug-related offenses."[116] With the reinstatement of the death penalty, the Department of Justice reformed its internal policies to require the approval of the Attorney General in death penalty cases. All U.S. attorneys were required to submit" every case in which they believed the death penalty should be sought "to a committee of senior attorneys" for review. [117] The Attorney General, after reviewing each case, would make a final determination on whether the death penalty was appropriate.[118] At this time, the Department of Justice's policy allowed the U.S. attorneys discretion in choosing not to seek the death penalty in certain cases.[119]

The Department of Justice enacted a new set of policies which required U.S. attorney's to submit any cases in which a defendant was eligible for the death penalty, even if the attorney did not wish to pursue the death penalty.[120] The U.S. attorney must first submit death-eligible cases to the Capital Case Unit of the Criminal Division of the Department of Justice.[121] The attorneys must submit all documents significant to the case, including, "a detailed prosecution memorandum, copies of indictments," other relevant court

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[113] U.S. Dep't of Just., *The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review,* U.S. DEP'T OF JUST. (June 6, 2001), https://www.justice.gov/archive/dag/pubdoc/deathpenaltystudy.htm#feddeathpenaltylaw [*hereinafter Federal Death Penalty System*].
[114] *Id.*
[115] *See generally* Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).
[116] *Federal Death Penalty System*, *supra* note 113.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*

decisions, and "any written materials submitted by defense counsel in opposition to the death penalty."[122] After reviewing all information, the Capital Case Unit makes an initial recommendation as to whether the death penalty should be sought.[123]

In addition to minimizing prosecutorial discretion in the decision of whether to charge a defendant with capital murder, the Department of Justice also established the Capital Review Committee ("Committee") as part of the approval process to ensure there is an independent and individualized determination for each case.[124] After an initial recommendation is made by the Capital Case Unit, the case is transferred to the Committee.[125] The Committee consists of senior attorneys from the Deputy Attorney General's office, "the office of the Assistant Attorney General for the Criminal Division," and prosecutors from various U.S. Attorney's offices.[126] The members of the Committee review the cases and make an independent "recommendation to the Attorney General."[127] The review consists of looking at all the relevant facts of the case, the defendant's criminal history, the victim's criminal history, and the federal interest in the prosecution of the case or the prosecutor's rationale as to why the death penalty should not be sought.[128] The federal prosecutor must provide the Committee with their recommendation as to whether the death penalty should or should not be sought in a particular case and they must provide their reasons for such recommendation.[129] The *Justice Manual* emphasizes that the federal prosecutors must give great consideration when making their recommendation.[130]

In reviewing all relevant information, the Committee takes several things into consideration.[131] First, any mitigating factors reasonably raised by the evidence should be considered in the light most favorable to the defendant.[132] In addition, it is to consider whether all the aggravating factors found to exist "sufficiently outweigh the applicable mitigating factors . . .. or, in the absence of any mitigating factors, whether the aggravating factors themselves are

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[122] *Id.*
[123] *Id.*
[124] U.S. Dep't of Just., Just. Manual § 9-10.130 (2020), https://www.justice.gov/jm/jm-9-10000-capital-crimes [hereinafter Justice Manual].
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.* at § 9-10.080 (2018).
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.* at § 9-10.140 (2011).

sufficient to justify capital punishment."[133] If there's an ambiguity as to the presence or strength as to any aggravating or mitigating factor, the Committee should resolve that ambiguity in favor of the defendant.[134] The federal policies emphasize that the analysis for weighing "aggravating and mitigating factors should be qualitative" rather than quantitative and the evidence of aggravating factors "must be substantial, admissible and reliable" and found to be supported beyond a reasonable doubt.[135] As a result, the Committee may give weak aggravating factors little to no weight.[136] The Committee should also consider, when looking at the determinations made in other similar cases, whether the case at hand warrants the death penalty to ensure consistency in the death penalty's application.[137] Further, the Committee should also consider "the strength and nature of the evidence", "the relative roles in the offense of defendants in jointly undertaken criminal activity", and "whether the defendant has accepted responsibility for his conduct as demonstrated by s/he's willingness to plead guilty and accept a life or near-life sentence without the possibility of release."[138] In addition, defense counsel is afforded an opportunity to present its arguments against capital punishment, either by submitting an oral presentation, a written statement, or both.[139]

The federal death penalty procedure has also established policies to eliminate racial disparity in the imposition of capital punishment. One such mechanism to alleviate racial bias is the implementation of a race-blind policy.[140] This policy requires that the Capital Case Unit, the Committee, and the Attorney General make their determination without regard to race, gender, ethnicity, or religion.[141] This race-blind policy is carried out by requiring the U.S attorney's offices to eliminate the defendant and victim's race, ethnicity, and religion from all documents that are to be submitted for review.[142] In addition, the Department of Justice's secretarial staff is required to review all documents prior to the Capital Case Unit's review to ensure that any information alluding to the defendant or victim's race, ethnicity, or religion is not present.[143] As a result, the Capital Case Unit and the Committee's recommendation, as well as the Attorney General's final determination, are made without the knowledge of the defendant or victim's

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[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at § 9-10.140.
[139] *Id.* at § 9-10.130.
[140] *See* sources cited *infra* note 123.
[141] *Id.* at § 9-10.030.
[142] *Federal Death Penalty System*, *supra* note 113.
[143] Justice Manual, *supra* note 124.

race or any other identifying features.[144] In addition to the race-blind policy, during the Committee's review process, defense counsel may present any arguments that it has in regards to individual or systemic racial bias in the administration of the death penalty.[145] If a racial bias argument is presented, the Committee is to review all allegations that are made to determine whether racial bias exists.[146]

The Committee's recommendation does not have to be unanimous.[147] Certain members of the Committee may agree on the outcome but arrive at it for different reasons. Thus, the Committee is tasked with compiling a memorandum that consists of the Committee's recommendation; specifically, including the differences in rationale amongst the members or any differences in what the outcome should be, if any.[148] Once the Committee has reviewed all evidence, the Committee's recommendation along with all relevant documents is forwarded to the Attorney General.[149] The Attorney General, after reviewing the information, usually schedules a meeting with the Committee in which they discuss the case and the varying viewpoints.[150] After this meeting, the Attorney General may require the Committee to gather more information or perform further legal analysis.[151] If no further information is required, the Attorney General will make its final determination.

Usually, the U.S. attorney's recommendation as to whether the defendant should be charged with capital punishment or not is given great weight when both the Committee and the Attorney General are reviewing the case.[152] This is especially true when the attorney's recommendation is to not seek the death penalty.[153] The attorney's recommendation that the death penalty should not be sought in a case is almost always accepted.[154] However, the Attorney

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[144] *Id.*
[145] This might "unblind" the race-blind policy; however, whether defense counsel wants to divulge the race of the defendant is within the defendant's discretion. *See* Rory K. Little, *The Federal Death Penalty: History and Some Thoughts about the Department of Justice's Role,* 26 FORDHAM URBAN L.J. 347, 412 (1999) (stating that unless the defense informs the Committee, as they sometimes do for strategic reasons, or some fact necessary to the prosecution suggests ethnicity, the Attorney General and her review committee remain ignorant of race or ethnicity).
[146] *Id.*
[147] *Id.* at 427.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.* at 422.
[153] *Id.*
[154] *Id.*

General may nevertheless determine that the death penalty is appropriate despite the U.S. attorney's recommendation to not seek the death penalty.[155]

If the Attorney General ultimately believes the death penalty is appropriate in a given case, after reviewing both the Capital Case Unit's and Committee's recommendations, the Attorney General is to issue a notice of intent to seek the death penalty to the U.S. Attorney's office handling the case.[156] If the U.S. attorney wants to enter into a plea agreement with the defendant, they may not do so without the prior review and authorization by the Attorney General.[157] The Attorney General is to review the prosecutor's memorandum, which specifies why they believe a plea agreement is an appropriate disposition of the charges and it may also include any statements by defense counsel, to determine whether a plea agreement is appropriate.[158]

Additionally, if the U.S. Attorney's office believes that there are material changes in the facts or circumstances of a case that did not exist the time of the initial determination, it may put in a request to withdraw the Notice of Intent to Seek the Death Penalty.[159] The Committee is than tasked with evaluating the withdrawal request under the same principles it used to make its initial determination and is to limit its "evaluation to determine if the changed facts and circumstances, had they been known at the time of its initial determination, would have resulted in a decision not to seek the death penalty."[160] If the Committee would have elected not to seek the death penalty, than that recommendation is forwarded to the Attorney General who makes the final determination whether to grant or deny such withdrawal request. [161]

B. Critiques of the federal government's death penalty procedures

One of the reasons why the federal death penalty procedures were implemented was to ensure impermissible factors, such as the defendant's race, ethnicity, gender and religion, were not given any weight in the decision-making process. The Department of Justice conducted a report in 2001 studying whether racial disparity exists in the federal death penalty and ultimately found that there was no racial disparity after the implementation

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[155] *Id.* at 422-423.
[156] Justice Manual, *supra* note 124.
[157] *Id.*
[158] *Id.*
[159] *Id.* at § 9-10.160.
[160] *Id.*
[161] *Id.*

of the federal government's death penalty protocols.[162] However, the report was widely criticized for having incomplete data and coming to conclusory statements in regards to racial bias.[163] However, despite the criticisms made to the Department of Justice's report, there is evidence that if there is racial disparity in the federal application of the death penalty, it has more to do with the heinousness of the crime rather than the race of the victim or defendant. A study prepared for the National Institute of Justice reviewed all federal death-eligible cases from 1995 to 2000.[164] It indicated that white defendants were more likely to be charged with the death penalty than black or Hispanic defendants.[165] In contrast, a defendant was more likely to be charged with the death penalty when the race of the victim was white as opposed to non-white.[166] However, the study also emphasized that although the raw data was indicative of racial disparity in the charging decisions when the victim was white, these disparities disappear when the aggravating and mitigating factors are reviewed in each case.[167] Thus, the study concluded that the decision to

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[162] *Federal Death Penalty System*, *supra* note 113.

[163] American Civil Liberties Union, *Analysis of June 6 Justice Department Report of the Federal Death Penalty,* AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/report/analysis-june-6-justice-department-report-federal-death-penalty (last visited Mar. 2, 2021). *See also* Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse,* 53 DEPAUL L. REV. 1615 (2004).

[164] Richard A. Berk, Laura J. Hickman & Stephen P. Klein, *Race and the Decision to Seek the Death Penalty in Federal Cases,* OFFICE OF JUSTICE PROGRAMS (2006), https://www.ojp.gov/pdffiles1/nij/grants/214730.pdf. ("Three independent teams investigated whether these racial differences could be explained by differences in heinousness of the crimes." Each team was given the same copy of the study's database but were told to independently construct their own methods to analyze the data. When all the teams came together to review their findings, each team essentially reached the same conclusion despite their differences in analytic methods. The determination that the racial disparities disappear when the data is used to adjust for the heinousness of the crime remained true whether the study analyzes the race of the victim alone, race of the defendant alone, and the interaction between the victim and defendant's race).

[165] *Id.*

[166] *Id.*

[167] *Id. See also* Raymond Paternoster, *Prosecutorial Discrimination in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination,* 17 LAW & SOCIETY REV. 437, 440 (1983) (when comparing the state prosecutorial charging decisions, Paternoster found the race of the victim has a strong impact on both the charging of murder and imposition of the death penalty. However, he noted that this doesn't necessarily indicate racial discrimination and that the discrepancy "may reflect: 1) differences in victim or offender characteristics other than race and/or 2) qualitative differences in characteristics of black victim and white victim homicides." In addition, Paternoster suggests a plausible explanation for when the victim's race influences a prosecutor's death penalty request when more than one aggravating felony accompanies homicide – the possibility that murders accompanied by multiple felonies are regarded by prosecution and the community as more heinous and prosecutors are more likely to see the death penalty in such situations). *Id.* at 472.

seek the death penalty was largely due to the heinousness of the crime rather than the race of the victim or defendant.[168] As a result, the federal government's race-blind policies should continue to be upheld as reducing racial disparity in the death penalty.

III. IMPLEMENTATION OF THE FEDERAL DEATH PENALTY PROCEDURE IN GEORGIA

In order to make necessary reforms to Georgia's death penalty system, Georgia should adopt similar procedures to the federal government's death penalty review process with slight variations to provide for additional procedural safeguards. The exact policies and procedures Georgia should adopt from the federal government and the policies they should improve upon will be discussed in greater detail below.

A. The Implementation of a Capital Case Unit and Capital Review Committee

Georgia's Attorney General's office has in place the Criminal Justice Division which represents the State in all capital felony appeals that deal with the death penalty, in both state and federal court, in addition to providing legal representation to various law enforcement agencies throughout the state.[169] Although the Criminal Justice Division deals with death penalty cases on appeal, the Division is not involved in the initial trials for capital punishment. For this reason, a separate Capital Case Unit within the Criminal Justice Division should be created to deal with the death penalty review process being proposed in this Comment. The Unit should be comparable to the U.S. Department of Justice's Capital Case Unit and should include the following duties: 1) assisting the Capital Review Committee in its review process to determine the appropriateness of seeking the death penalty in a given case and 2) performing a preliminary assessment of all the death-eligible cases submitted by Georgia's district attorney's offices. The creation of a separate Unit will ensure that the review process is being carried out expeditiously. In addition, a separate Unit will allow the Criminal Justice Division to continue conducting their regular duties without being overworked by an influx of death-eligible cases and will require the separate Capital Case Unit to manage these cases.

In addition to the creation of a Capital Case Unit, a Capital Review Committee should be established to review each capital case after the Capital

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[168] *Id.*

[169] Off. of the Att'y Gen., *Organization of the Office* (Mar. 2, 2021), https://law.georgia.gov/about-us/organization-office.

Case Unit makes its initial recommendation. In the federal scheme, the review committee consists of senior U.S. prosecutors and attorneys within the Attorney General's office. However, this Comment suggests that members of Georgia's Capital Review Committee should not only consist of senior prosecutors, but also defense attorneys within the state. This variant of the federal policy ensures that the Capital Review Committee offers different viewpoints on capital punishment and is not one-sided. It is also important to acquire members that have diverse backgrounds and are from different parts of the state to ensure that all Georgia citizens are being adequately represented.

The most important objectives in reforming Georgia's death penalty procedure are to minimize prosecutorial discretion, promote consistency statewide, and eliminate racial disparity in the application of the death penalty while hopefully reducing the number of wrongful convictions. The adoption of certain federal death penalty procedures would help ameliorate many of the problems plaguing Georgia's death penalty system. The specific procedures Georgia should adopt and the reasons why these procedures are necessary for reform are discussed below.

B. Requiring District Attorneys to Submit Death-Eligible Cases for Review

First, Georgia should adopt a policy similar to the federal governments by requiring district attorneys to submit all death-eligible cases to the Capital Case Unit regardless of whether they wish to seek the death penalty or not, absent extenuating circumstances. The extenuating circumstances requirement will allow a district attorney to submit a memorandum to the Georgia Attorney General's Office to inform the Office that they have legitimate concerns seeking the death penalty as it will expend too many resources or time. If a district attorney claims there are legitimate extenuating circumstances, then the Georgia Attorney General should approve such claim and allow the district attorney to forego capital punishment, despite the case being death-eligible. However, absent extenuating circumstances, district attorneys must submit all death-eligible cases for review.

Requiring the prosecutors to submit all death-eligible cases helps minimize unfettered prosecutorial discretion and racial disparity in the charging phase since it commands the submission of all cases where the death penalty may be imposed rather than allowing the prosecutor the opportunity to pick and choose which cases to submit for review. It creates a checks and balances on prosecutorial discretion by providing oversight in the application of the death penalty. Prosecutors play an important role in the death penalty

system – they act as gatekeepers in the administration of justice.[170] However, their charging decisions on whether to seek the death penalty have enormous impacts on individuals as their decision can result in a final penalty that cannot be overturned.[171] The ABA's Death Penalty Moratorium Implementation Project conducted an assessment of Georgia's death penalty system and found that "the character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecution exercises his or her discretion."[172] Despite this, courts have been cautious in minimizing prosecutorial discretion because of the impact it may have in the criminal justice system.[173] Irrespective of the court's reluctance, allowing prosecutors to go unchecked without any review has deeply contributed to the continued inconsistencies and racial disparities in the application of the death penalty.

Georgia should also implement the federal government's policy requiring prosecutors to seek prior review and approval before entering into a plea agreement with a defendant where the plea would remove the death penalty as an option. This Comment recognizes that prosecutors have traditionally had the freedom to enter into plea agreements with defendants and pleas can be important to prosecutors in situations where they believe that a capital case may pose a risk of acquittal when plausible mitigating factors may be at play or the district attorney's office does not have resources or time to try a capital case.[174] However, several studies have suggested that plea agreements are offered more to white defendants than they are to black defendants.[175] As a

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[170] *See* Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process,* 26 FORDHAM URBAN LAW JOURNAL 767, 771 (1999).

[171] Ford v. Wainwright, 477 U.S. 399, 411 (1986) ("[E]xecution is the most irremediable and unfathomable of penalties… death is different.").

[172] *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Georgia Death Penalty Assessment Report*, AMERICAN BAR ASSOCIATION (Jan. 2006), https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/georgia_report.pdf.

[173] *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (holding that courts are deferential to prosecutorial discretion and require "clear evidence" to rebut the presumption that prosecutors have acted legally.).

[174] *See* Rory K. Little, *The Federal Death Penalty History and Some Thoughts about the Department of Justice's Role,* 26 FORDHAM URBAN L.J. 347, 423 (1999) (it is important to note that this Article talks about plea bargaining before the Attorney General required U.S. attorneys to get approval by the Attorney General. In 2001, the Attorney General adopted this requirement). *See* U.S. Dep't of Just., Just., Manual § 9-10.120 (2018), https://www.justice.gov/jm/jm-9-10000-capital-crimes.

[175] *See Racial and Geographic Disparities in the Federal Death Penalty System: Hearing Before the Subcommittee on the Constitution, Federalism, and Property Rights*, 107th Cong. 107-396 (2001), https://www.govinfo.gov/content/pkg/CHRG-107shrg78760/html/CHRG-107shrg78760.htm (Mar. 2, 2021) (Deputy Attorney General Thompson confirmed at the

result, if Georgia were to allow prosecutors the discretion in entering into plea agreements with death-eligible defendants, the implementation of a race-blind policy would be ineffective. This is true because if more white defendants receive plea deals then the majority of cases submitted by the district attorney for the review process will be cases involving black defendants. Thus, more black defendants at the on-set of the review process would be in the pool of cases that the Georgia Attorney General's office is to review which would lead to the implementation of the death penalty against more black defendants than white defendants further contributing to the racial disparity issue.

In order to reduce racial disparity in the plea-bargaining process, a district attorney is required to submit a memorandum to the Georgia Attorney General's Office explaining why a plea agreement is an appropriate disposition of the charges. The district attorney's memorandum can also include any statements made by defense counsel as to the plea agreement.

C. Documents and Information to be Submitted to Georgia Attorney General's Office

Georgia should largely mirror their document requirements after what the federal government requires during their review process by instructing the district attorneys to submit all relevant information to the Capital Case Unit. This includes police reports, all relevant evidence and facts, any court documents and indictments, the criminal history and background of both the defendant and victims, an impact statement by the victim's family, a memorandum by the prosecutor stating their recommendation and the specific reasons for their recommendation, and all documents the defense counsel submits in opposition to the death penalty. If a district attorney believes that the death penalty is not appropriate because it would expend too many resources or time and there are significant economic issues in seeking the death penalty, the district attorney should include in its memorandum any of these extenuating circumstances and the Georgia Attorney General, in

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senate hearing that a disparity exists in the treatment of plea agreements, and a new protocol would be initiated to afford greater consistency in the application of the death penalty per the prior approval of the Attorney General in order to enter into plea agreements that would take the death penalty off the table); *See* Kevin McNally, *Race and the Federal Death Penalty: A Nonexistent Problem Gets Worse,* 53 DEPAUL L. REV. 1615 (2004) (stating that Whites were allowed to negotiate away death with considerably more frequency.); *and see also Federal Death Penalty System*, *supra* note 113 (For example, 47% of all White defendants for whom the Attorney General authorized capital prosecution subsequently entered into a plea bargain in exchange for a non-death sentence, as compared to only 27% of Hispanic defendants).

making its final determination should ultimately decide not to seek the death penalty if it finds the district attorney's claims to be legitimate.

In addition to requiring district attorneys to gather and submit this information, the Capital Case Unit should compile all the available information into a database that allows the Capital Case Unit and Capital Review Committee to easily retrieve the documents during the review process. In addition, the Capital Case Unit and Capital Review Committee should input their recommendations and the final determination by the Georgia Attorney General. The Office should compile all death-eligible cases in the database that way it can keep track of the cases in which capital punishment was deemed appropriate and the cases in which it was not. Compilation of all death-eligible cases and the determination that was made as to the implementation of the death penalty will make it easier for the Capital Review Committee to carry out a proportionality review during the review process of each case. Further, the collection of data, not only as to those cases where the death penalty was sought but to all the death-eligible cases that were reviewed, can ensure the Georgia Attorney General's office will efficiently and effectively analyze cases in the future eliminating racial disparity and the inconsistent application of the death penalty in the process.

This Comment recognizes that state governments are generally more inundated with death-eligible cases than the federal government. Thus, it may be a lot easier for the federal government to implement policies requiring district attorneys to submit all death-eligible cases then it would be for state governments to do so. Some may argue that requiring district attorneys to submit all death-eligible cases for review whether or not they wish to seek the death penalty may expend too many resources and may require a considerable amount of time. This Comment has taken into consideration possibly eliminating such a policy and requiring Georgia district attorneys to submit only those cases they believe should proceed with the death penalty; however, this Comment instead posits that the implementation of certain additional procedural safeguards will help to alleviate the amount of time and resources spent on reviewing death-eligible cases.

For instance, allowing the district attorney to submit a memorandum explaining the presence of extenuating circumstances and the reasons why the death penalty is not warranted in a particular case will likely remove a substantial amount of death-eligible cases from the review process. Generally, most district attorneys wish not to seek the death-penalty when it would require a significant amount of resources or time. If the district attorney provides extenuating circumstances, the Capital Review Committee should give great deference to the district attorney's extenuating circumstances. With the implementation of this policy, the amount of death-

eligible cases will likely be reduced and the Capital Review Committee's remaining cases would be more easily manageable.

Additionally, although a district attorney must get prior approval before entering into a plea agreement with a death-eligible defendant, if the district attorney submits a memorandum explaining why a plea agreement would be a proper disposition of the case, the Capital Review Committee would have the ability to remove the case from the normal review process. Thus, the implementation of this additional policy could reduce the Capital Review Committee's case load making it more easily manageable.

Forgoing the implementation of the federal policy for a policy that allows district attorneys to pick and choose which defendants to seek the death penalty against would hinder the efforts of ameliorating the racial disparity and unfettered prosecutorial discretion in the death penalty system. The implementation of these additional policies would not require an unnecessary amount of resources or time and would ensure that the Capital Review Committee's case load is easily manageable while still ensuring a neutral process devoid of racial bias and inconsistencies in the charging process.

D. Considerations to be Made by the Capital Review Committee and the Adoption of a Race-Blind Policy

When making its recommendation to the Georgia Attorney General's Office, the Capital Review Committee should take several matters into consideration. The Capital Review Committee should consider the nature and strength of the case. In addition, the reviewers should take into consideration the aggravating and mitigating factors. Similar to the federal government's policies in weighing the aggravating and mitigating factors, the reviewers should only look at the aggravating factors that are reliable, admissible, substantial, and present beyond a reasonable doubt. Thus, the Capital Review Committee may view weak aggravating with little to no weight. However, if there's an ambiguity as to the presence of a mitigating factor that ambiguity should resolved in favor of the defendant. The reviewers should determine whether all aggravating factors found to exist sufficiently outweigh all the mitigating factors. If the defendant has not presented any mitigating factors, then the reviewers must determine if the aggravating factors are sufficient on their own to justify capital punishment.

In addition to reviewing all aggravating and mitigating factors, the Capital Review Committee should also conduct a front-end proportionality review. This review will be similar to the Georgia Supreme Court's proportionality review conducted on appeal; however, it will require the Committee to review similar death-eligible cases, in fact and circumstance,

to the case at hand by accessing the database in which all this data is stored. If similar cases have found capital punishment to be warranted or not warranted, then the Committee should take this into consideration when making its determination to ensure that the death penalty is being applied in a consistent manner across the state. Requiring a proportionality review will not only reduce the inconsistency problems, and thus, the arbitrariness of the system, but requiring the review to be conducted in the beginning of the case as well as on appeal will add an additional procedural safeguard to ensure that only those that have committed truly heinous crimes are receiving the death penalty.[176]

The adoption of the federal government's race-blind policy in the review process is also necessary to reduce racial disparity in the application of the death penalty. The race-blind policy should require the district attorney's offices to eliminate all indications of race, ethnicity, gender, and religion from any documents that are to be submitted to the Capital Case Unit for review. The elimination of race, ethnicity, gender, and religion from all documents will ensure that the Capital Case Unit, Capital Review Committee, and the Georgia Attorney General are reviewing the cases based solely on the facts rather than any arbitrary and impermissible factors. Once the documents have been submitted to the Capital Case Unit, secretarial staff should review the documents and ensure that any information indicating the race, ethnicity, gender, and religion of the victim or defendant have been removed. This should also include eliminating the names of any defendant or victim that might give away a person's ethnicity, race, gender, or religion to reduce any implicit bias in the review process.[177]

To adequately reduce racial disparity in the application of the death penalty, the Capital Review Committee should also allow defense counsel to

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[176] *See* Sherod Thaxton, *Disciplining Death: Assessing and Ameliorating Arbitrariness and Capital Charging,* 49 ARIZ. ST. L.J. 138, 204 (2017) ("Front-end comparative proportionality review may hold genuine promise for disciplining capital charging. It removes much of the mystery that has continued to plague the back-end process—namely, inadequate or inappropriate comparisons and lack of transparency.").

[177] Marianne Bertrand, *This Problem has a Name: Discrimination,* CHICAGO BOOTH REV. (May 21, 2016), https://review.chicagobooth.edu/behavioral-science/2016/article/problem-has-name-discrimination (A study was conducted in which 5,000 fictitious resumes were sent out in response to help-wanted ads in Boston and Chicago. Half of the resumes were randomly assigned white-sounding names such as Emily Walsh or Greg Banks. The other half of the resumes were assigned African American-sounding names such as Lakisha Washington or Jamal Jones. The resumes were sent out to more than 1,300 employment ads in sales, administrative support, clerical, and customer sales job categories. The study resulted in the resumes with white-sounding names receiving 50% more callback for interviews than the resumes with African American-sounding names indicating names can lead to implicit, unintentional, and unconscious stereotypes.).

present any arguments of individual or systemic discrimination that might be present in the charging process, including any allegations of discrimination in the district attorney's offices. Allowing the committee to hear evidence that a district attorney's office has been following a pattern of racial discrimination would significantly reduce the consequences of the Supreme Court's *McCleskey v. Kemp* opinion.[178] The *McCleskey* opinion has allowed racial discrimination to continue by making it extremely difficult for defendants to prove racial discrimination.[179] Providing for a committee to hear evidence that there exists a pattern of racial discrimination in a judicial circuit would allow a defendant the ability to argue that a judicial circuit has been following a pattern or practice of racial discrimination by consistently applying the death penalty to minorities or discriminating against minorities during the death penalty process even if the defendant is unable to show racial discrimination in their particular case. Conducting a hearing on individual or systemic discrimination might "unblind" the race-blind policy. However, this is ultimately up to defense counsel to divulge the race, ethnicity, gender or religion of the defendant if they believe that this information is important in reporting any discrimination allegations or they feel that the process is not being equal in its application.

E. Recommendation of Capital Review Committee and Final Determination by Georgia's Attorney General

Once the Capital Review Committee has assessed all of the relevant information in a race-blind manner, has conducted a proportionality review, and has considered any allegations of individual or systemic discrimination, if any, the reviewers must submit their recommendation to Georgia's Attorney General for a final determination. The Capital Review Committee should conduct a vote and the majority vote will become the Committee's recommendation to be put in a memorandum for the Georgia Attorney General. However, the members who differ from the majority may include in the memorandum the rationale for their differing viewpoints. In addition, if the Capital Review Committee reaches a tie and is unable to come to an agreement as to what the recommendation should be than the Georgia Attorney General should look at this fact in favor of the defendant and against capital punishment. Further, if the Capital Review Committee is unanimous in their decision, this fact should also be a significant factor in the Attorney General's determination.

If the Georgia Attorney General elects to forgo the Capital Review Committee's recommendation in favor of a different decision, the Attorney

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[178] *See generally* McCleskey v. Kemp, 481 U.S. 279 (1987).
[179] *Id.*

General should be required to submit to both parties a detailed memorandum stating the reasons why a different determination is warranted despite the Capital Review Committee's recommendation.

It may be argued that the review process may be affected by allowing the Attorney General to bypass the Capital Review Committee's recommendation and issue the final determination in a death-eligible case. This may be so because the Georgia Attorney General, like a district attorney, is an elected official and may base their decisions on outside political influences. However, this Comment recognizes that the Attorney General is an elected official and thus offers a variant of the federal procedure, arguing for the implementation of additional safeguards to ensure that the Attorney General's determination is based solely on the factors required to make an informed decision and is not infiltrated by outside influence.

For instance, requiring the Attorney General to give more weight to the Capital Review Committee's decision and demanding that when the Attorney General makes a determination that is different from the Capital Review Committee's recommendation, that the Attorney General submit a memorandum to both parties detailing the reasons why the Capital Review Committee was wrong in its recommendation and why the final determination is warranted. The implementation of these additional policies seeks to ensure that the review process is as neutral as possible and is devoid of any political or other impermissible influence.

IV. CONCLUSION

The Supreme Court's ruling in *Gregg v. Georgia* has allowed Georgia the ability to continue operating the death penalty system under the guise of constitutionality despite substantial questions in the fairness of its administration. The increasing number of wrongful convictions, the studies indicating racial disparity in the application of the death penalty, and the unbridled discretion of prosecutors without any meaningful standards to guide them, have contributed to a continued caprice and arbitrary system.

The proposal to adopt a variant of the federal government's death penalty procedures in Georgia provides for a meaningful reform to redress the constitutional violations that have occurred over the years in the administration of the death penalty. Implementing a review process that requires a Capital Review Committee and Georgia's Attorney General to analyze the strength and nature of a case will ensure that neutral third parties are reviewing the fact and circumstances surrounding the cases. Additionally, requiring neutral third parties to assess the strength of a case and make a

determination as to whether there is strong enough evidence to proceed will help to reduce possible wrongful convictions in the future. Allowing the Capital Review Committee, rather than a single district attorney, to determine whether the death penalty is appropriate provides a consistent framework and an independent process that is devoid of prosecutor and outside influence.[180]

The independent review process seeks to regulate prosecutorial discretion, promote consistency in the application of the death penalty state-wide, and rectify the racial bias while intending to decrease the number wrongful convictions that occur in Georgia's death penalty system. For these reasons, the adoption of the federal death penalty procedures will hopefully lead to a system that is free from capricious and arbitrary policies.

[180] *See* Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors,* 2 N.Y.U. J. L. & LIBERTY, 512, 513 (2007) (confirmation bias can lead individuals to "seek out and prefer information that tends to confirm whatever hypothesis they are testing", a prosecutor reviewing a file to determine a suspect's guilt would be inclined to look only for evidence that supports a theory of guilt. However, the Georgia Attorney General and Capital Review Committee, are independent from the investigation and would be able to spot weaknesses in the case and would be able to determine whether the death penalty is appropriate).