EXPERT REPORT
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I have been retained by the ACLU Foundation to serve as an expert in their litigation brought in connection with their representation of Mr. Cornell McNeal, who has been charged with capital murder under K.S.A. § 21-5401 in Sedgwick County, Kansas. My expert services include research to assess patterns of charging to determine the existence of racial disparities in the prosecution of capital-eligible cases under the same statutes in the period 1994 through August 2, 2020. My research and conclusions are based on a review of case documents, statutes and prosecution procedures, reports and monographs on capital punishment in Kansas and Sedgwick County, and statistical analyses of cases prosecuted under the same statute. I assess evidence on racial disparities in charging and sentencing of capital-eligible cases in this period, and compare patterns to cases charged and convicted capitally with all death eligible cases, including cases charged under K.S.A.§§ 21-5401 (capital murder), 21-5402 (first degree murder) and 21-5403 (second degree murder). This report presents details of the research completed for this case, including questions addressed, data accessed, methods, and conclusions.[1]

I. OVERVIEW

A. Qualifications

I am the Isidor and Seville Sulzbacher Professor of Law at Columbia Law School and Professor of Epidemiology at the Mailman School of Public Health at Columbia University. I also am a Senior Research Scholar at Yale Law School. A summary of my credentials and curriculum vitae are presented in Appendix F.

B. Questions Addressed

1. What are the demographic characteristics of persons charged by the Sedgwick County District Attorney ("DA") with capital murder under K.S.A. § 21-5401? What are the characteristics of the cases who received death notices?
2. What are the demographic characteristics of defendants who were considered eligible for capital punishment by the Sedgwick County District Attorney but who were not charged under K.S.A. § 21-5401?
3. Of the cases where a death notice was issued, how many were sentenced to death? What is the gender, race and victim characteristics of those who were or were not sentenced to death?

[1] I supervised a team of researchers (the "Columbia team") to assist in data collection, coding and analysis. The team included two retired criminology professors, a third year law student, a Computational Data Science researcher with a M.S. in Statistics, and advanced undergraduate majors and Ph.D. students in the Department of Psychology at Yale University.

4. Are there differences between those sentenced to death and those identified under ¶1-2 above based on their race, gender, and age, and the race, gender, and age of the victim?
5. What is the race-gender interaction of the cases identified in ¶1-2 above?

C. Files Reviewed

1. A roster of all cases charged with Capital Murder (§ 21-5401) in Kansas on or after July 1, 1994 through 2020 was obtained from the statewide indigent defense services agency (BIDS) (see Appendix A). A second list was obtained in response to a discovery request from the Sedgwick County District Attorney's Office (see Appendix B, discovery request dated November 29, 2019 and responses dated February 21, 2020, March 30, 2021, and December 14, 2021).
2. From the BIDS list, capital charges were confirmed in 23 cases in Sedgwick County.[2] Cases charged with Capital Murder fulfilled one or more of seven categories of murder (see Appendix C). A list of those cases is in Appendix D.
3. Counsel for Mr. McNeal submitted a public records request for all potentially capital-eligible cases to the Sedgwick County District Attorney's office. In response, the Sedgwick County District Attorney's office provided a list of 168 homicide cases falling within seven categories of potentially capital-eligible offenses (see Appendix B). Updates with five additions and four deletions to this list were provided on two occasions after the initial discovery response, resulting in a revised total of 169 cases. *Id*.
4. We excluded all manslaughter cases at the outset. For the remaining cases, we reviewed relevant records. The records included at least three components: (1) probable cause affidavits shared under seal through a stipulated court order; (2) public court records, including docket reports, complaints, presentence reports, entries of judgment, notice of intent to seek the death penalty at a separate sentencing proceeding, withdrawal of notice to seek the death penalty, notice of aggravating circumstances, notice of mitigating circumstances, and jury instructions, where applicable; and (3) Kansas Standard Offense Reports (KSORs) requested and received from the investigating police agencies. Where available, appellate decisions were also reviewed. In some instances, we also reviewed media reports.
5. In addition, the Sedgwick County DA's office generated and provided a list of adult defendant prosecutions it considered as "possible" cases for capital murder charges and death notices. It updated this list twice. After

[2] This list included one case, Gregory Moore, where venue had been changed from Harvey County to Sedgwick County. Mr. Moore thus was not prosecuted by the Sedgwick County DA office and is not included in my analysis in this report. The Harvey County prosecutors filed a death notice in his case, and he was tried and convicted by a Sedgwick County jury.

removal of the juveniles, who were not eligible for the death penalty, the DA's office "possible" list had 44 individuals. Of these, 23 cases were charged with capital murder, 17 cases were charged with first degree premeditated murder, three were charged with first degree felony murder, and one case was charged with second degree intentional murder. A roster of these cases is shown in Appendix D.

6. From these lists, the Columbia team coded the records for a large number of factors, including the race, age, and gender of the defendant and victim(s), whether the case was resolved by trial or plea, whether death was sought, and what sentence was imposed.

D. Additional Materials Reviewed

1. Additional materials reviewed included statutes, statistical data on the administration of the death penalty in Kansas during from 1990-2019, and media accounts of Sedgwick County capital cases.
2. I read the November 2004 report titled "Report of the Kansas Judicial Council Death Penalty Advisory Committee Report on Certain Issues Related to the Death Penalty" and the June 4, 2021 report titled "Equal Justice Under Law," Report of the Racial Justice Task Force of the Wichita Bar Association to the Board of Governors.
3. Statutes - K.S.A. § 24-5401: Capital Murder Statute; K.S.A. § 21-5402: First Degree Murder Statutes; K.S.A. § 21- 5403: Second Degree Murder Statute; K.S.A. § 21-6624: Aggravating Circumstances.
4. Handouts from a presentation by District Attorney Marc Bennett on when to seek the death penalty.

E. Summary of Conclusions

Statistical analyses comparing death-noticed and death-sentenced persons to several sets of similarly-situated cases suggest two forms of racial discrimination in charging.

1. Cases where one or more victims were White were significantly more likely to be charged with capital murder and to be death-noticed than compared to cases of intentional killing with victims who were Black or from other racial or ethnic groups.
2. Cases with one or more female victims were also significantly more likely to result in a capital murder charge or death notice compared to cases with male victims.
3. Cases where the victim was a White female are significantly more likely to be charged with capital murder and to be death noticed, compared to all other cases.

4. Black or Hispanic defendants who kill White victims are significantly more likely to be capitally charged and death noticed compared to other death-eligible cases. The presence of an increased propensity to seek death for cross-racial cases is consistent with results of several charging and sentencing studies in the post-*Gregg*[3] era.

II. STUDY DESIGN

A. Study Population

From the several sets of files described above, we developed four lists of cases for comparison and analysis. These cases originated from 1994, when Kansas reinstated the death penalty, through August, 2020. The specific cases on each list are shown in Appendix D. The tables in Appendix D show the demographics of each of these subsamples.

1. Death Sentenced Cases (N=6)[4]
2. Death Charged and Death Noticed Cases[5] (N=18)
3. DA compilation of Potential Death-Eligible Cases as defined (N=44)[6]
4. Cases evaluated to be death-eligible according to a systematic independent review using a decision tree analysis (N=58) (see Appendix E).[7]

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[3] *Gregg v. Georgia*, 428 U.S. 153 (1976).

[4] This list includes all death-sentenced cases, including those whose death sentences were later set aside.

[5] This includes all cases where the defendant was charged with capital murder and the state filed notice of its intent to seek death, regardless of whether that notice was later withdrawn or the case was resolved by plea for a lesser offense. This list includes eight cases where the state filed notice of its intent to seek death after January 14, 2013, under the tenure of the present Sedgwick County District Attorney.

[6] These are cases defined by the DA as death "possible," cases that the DA identified as possibly eligible for the death penalty, regardless of how they were charged or convicted. The DA's lists of "death possible" cases included individuals charged with (a) second degree murder, (b) first degree murder, (c) charged with capital murder but not death noticed, (d) charged with capital murder and noticed for the death penalty, and (e) those sentenced to death. Five persons on the original list were identified as minors who were below the age of 18 and ineligible for the death penalty (Sakone Donesay, Joshua Duque, Carlos De La Cadena-Edwards, Everett Gentry, and Santos Carrera-Morales).

[7] These cases were identified by a senior capital defense attorney who was not previously a participant in any aspect of the McNeal case. This person independently reviewed files of Sedgwick County cases of persons charged with (a) capital murder who were not death noticed and (b) first degree and second degree murder cases. The Independent Attorney used a formally structured decision tree to determine whether: (1) capital murder could have been charged; and (2) whether "death was possible." *See* Appendix E. The defense attorney did not independently review the cases that were actually death noticed; those cases were by definition treated as death eligible. Like the DA's "possible" list, the defense attorney's list included cases charged with: second degree murder, first degree murder, and capital murder.

B. Variables and Measures

All cases were coded by students who were trained and supervised by Columbia researchers and a spreadsheet was created containing relevant information for each case from the source files. Data were cross-checked against the source documents, and again checked for consistency, accuracy and completeness by the supervisors. Data were ingested directly from the spreadsheets into a statistical data base Stata 17,[8] for computational analysis.

In addition to demographic variables on victims and defendants shown in Tables 1 - 4, variables representing the details of each case were coded, including:

1. Number of victims and defendants
2. Kansas Penal Code charges
3. Co-defendants
4. Number and demographic characteristics of victims and defendants
5. Statutory aggravators alleged and found, where applicable
6. Weapon used
7. Defense counsel and prosecutors
8. Appellate review and decisions

Variables were eliminated from the analyses that were either redundant with this list, or where missing information was too extensive and would bias the analyses.

C. Methods of Analysis

Two analytic methods were used in the analyses. First, we conducted a series of bivariate cross-tabulations to isolate variables in response to specific questions that would identify the potential influences of race or ethnicity, gender, and age of defendants and victims. We also included information on the weapon used in the killing a potential consideration in the charging of the crime and the alleging of specific statutory aggravators.

1. *Bivariate analyses.*

The test for statistical significance in a bivariate analysis of a contingency table of categorical (discrete) variables is the Fisher's Exact T Test. It is ideally suited for tests when the sample sizes are small. It tests the statistical significance of an association between two variables. The p-value of significance is based on the deviation of the values in each combination of the variables compared to what one would expect from knowing frequencies of the composite variables.[9] In this example, we want to know if teenagers vary in how often they study for an important test.

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[8] https://www.stata.com/new-in-stata/

[9] *See* Graham J.G. Upton, *Fisher's Exact Test*, 155 J. ROYAL STATISTICAL SOCIETY (SERIES A) 395 (1992).

	Men	Women	*Row Total*
Studying	***a***	***b***	*a + b*
Non-studying	***c***	***d***	*c + d*
Column Total	*a + c*	*b + d*	*a + b + c + d (=n)*

We would test to see if these values in each cell were significantly different from what we would expect only knowing the row or column totals. The basic formula is:

$$p = \frac{\binom{a+b}{a}\binom{c+d}{c}}{\binom{n}{a+c}} = \frac{\binom{a+b}{b}\binom{c+d}{d}}{\binom{n}{b+d}}$$

The formula tells us the conditional probability that studying and gender are independent or if studying is conditional on gender. The statistical package[10] used for this analysis calculates the probability of observing the distribution. The p-values derived from these analyses assume a two-tailed distribution, which is agnostic about the actual distributions of this variable in a large population.

2. Multivariate Regression

A series of multivariate regressions were estimated to identify which factors would predict which cases will be charged as capital cases and have a death notice filed. The primary interest was on racial disparities in death-noticing and sentencing capital cases compared to cases that were capital-eligible but not death noticed or death sentenced. This requires a regression method that is tailored for categorical (including binary) outcomes. Accordingly, logistic regression methods were used to identify the case factors that predict the outcomes of interest.[11] The basic logistic regression model takes the form of:

$$\text{logit}(Y) = \textit{natural}\log(\textit{odds}) = \ln\left(\frac{\pi}{1-\pi}\right) = \alpha + \beta X_i$$

The results of the logistic regression show the odds ratio indicating the likelihood of a unit change in the dependent variable (group membership) given a change in the predictor (independent variable).[12]

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[10] *See* Stata 17, supra n. 7.

[11] David W Hosmer Jr, Stanley Lemeshow, & Rodney X. Sturdivant, Applied Logistic Regression (2nd. ed.) 1- 7 (Wiley & Sons, Inc., 2nd ed. 2013).

[12] Max A. Halvorson, Connor J. McCabe, Dale S. Kim, Xiaolin Cao, and Kevin M. King. "Making sense of some odd ratios: A tutorial and improvements to present practices in reporting and visualizing quantities of interest for binary and count outcome models." *Psychology of Addictive Behaviors* https://doi.org/10.1037/adb0000669 (2021).

However, the small number of cases in the various groups suggested that a linear or logistic regression would be underpowered to draw reliable conclusions.[13] Accordingly, we use a Firth regression, a form of logistic regression designed to reduce the risk of biased estimates in regression estimates under conditions of small samples.[14] Standard testing methods that rely on typical theories will also not preserve the Type I error rate, and they risk an inflated Type II (false positive) error rate. Joint analyses by pooling or "collapsing" multiple factors based on information are preferred in association tests with finely divided groups.[15] The Firth method provides a bias-reduction for small sample size to avoid these constraints. The Firth regression, as with logistic regression generally, generates unbiased statistical significance tests for the probability that a change in a predictor variable will produce a change in the dependent variable or outcome. The statistical package that used for data analysis in this Report, Stata, includes a component for the Firth regression.[16]

[13] The power of a statistical test is probability it correctly rejects a false null hypothesis. In lay terms, if an effect (a difference between groups) has a certain size, how likely are we to discover it given the sample size? Will it have sufficient sensitivity to detect those effects it purports to test? A more technical definition is that it is the probability of avoiding a Type II error, or rejecting the null hypothesis of no group differences when it may actually be true. For this charging and sentencing study, power is the ability to detect bias when it exists given differences in the charging and sentencing rates of small groups. Power depends not only on the difference in charging rates but on their magnitudes as well. Small variations in these parameters can produce large variations in power. *See* JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES (Routledge, 2013).

[14] David Firth, *Bias Reduction of Maximum Likelihood Estimates*, 80 BIOMETRIKA 27–38 (1993), doi: 10.1093/biomet/80.1.27

[15] Xuefeng Wang, *Firth Logistic Regression for Rare Variant Association Tests*. 5 FRONTIERS IN GENETICS 187 (2014), doi: 10.3389/fgene.2014.00187

[16] Joseph Coveney, *FIRTHLOGIT: Stata Module to Calculate Bias Reduction in Logistic Regression*, (2021), available at https://econpapers.repec.org/software/bocbocode/S456948.htm.

III. RESULTS

A. Bivariate Tests

We conducted a series of bivariate tests of each of the independent variables with the 'test' groups of capital-charged and death-noticed defendants.

Prosecutors filed death notices in 18 cases in Sedgwick County during the relevant time period. Table 1 compares these 18 cases to the 26 cases the Sedgwick County prosecutors identified as death eligible, but not death noticed.[17] Table 1 identifies four significant comparisons. Cases with female victims were more likely to be death-noticed as compared to cases with male victims.[18] The number of aggravators alleged also are a significant predictor, but the discussion below suggests reasons to doubt the reliability of those measures and the probative value of the conclusions about the aggravators. To examine the intersection of victim race and victim gender, a variable was created to compare White female victim cases with all other race-gender groups. The White female victim cases were significantly more likely than other victim race-gender combinations to be death-noticed.

[17] There was a single Asian defendant in the death eligible population, and that case was the only case with Asian victims. Because of the small numbers, they were captured in the analysis for "Defendant POC" and "Victim POC" but not shown independently.

[18] In cases with multiple victims, the case was treated as "female" if there was at least one female victim.

Table 1. Comparison of Death-Noticed Defendants with the State DA List of Possibly Death-Eligible Cases

Variables	Death Notice (N=18)	State DA List/No Notice (N=26)
Defendant Black	7 (39%)	14 (54%)
Defendant Hispanic	3 (17%)	3 (12%)
Defendant White	7 (39%)	8 (31%)
Defendant POC†	11 (61%)	18 (69%)
Defendant Female	1 (6%)	1 (4%)
Defendant Male	17 (94%)	25 (96%0
Defendant Over 21	8 (44%)	12 (46%)
Defendant Under 21	10 (56%)	14 (54%)
Victim Black	2 (11%)	9 (35%)
Victim Hispanic	2 (11%)	7 (27%)
Victim White	**13 (72%)**	**10 (38%)* p=.036**
Victim POC	**5 (28%)**	**16 (62%)* p=.036**
Victim Female	**18 (100%)**	**11 (42%)*** p=.000**
Victim Male	**0 (0%)**	**15 (58%)*** p=.000**
Victim Under 14	2 (11%)	0 (0%)
Victim Over 14	16 (89%)	26 (100%)
Victim White Female	**13 (72%)**	**5 (19%) p=.001**
Multiple Aggravators	**15 (83%)**	**10 (38%)p=.005**
Mean Aggravators	3	1.42
Multiple Decedents	13	20
Mean Decedents	2	1.88

† "POC" or "Person of Color" includes any defendant who is not White; this includes all Black (7), Hispanic (3), and Asian (1) defendants.

Table 2 compares characteristics of death-noticed cases with cases identified as death-eligible through the Independent Review. Seven comparisons were statistically significant. Black victim cases were less likely to be death-noticed, while White victim cases were more likely to be death-noticed. Cases with victims who were either Black or Hispanic were significantly less likely to be death noticed. Similar to Table 1, cases with Female victims and White Female victims were significantly more likely to be death-noticed, as were cases with a higher number of statutory aggravators.

Table 2. Comparison of Death-Noticed Cases with Cases Determined Death Eligible in the Independent Review

Independent Variables	Death Notice (N=18)	Independent Review (N=40)
Def Black	7 (38.89%)	23 (57.50%)
Def Hispanic	3 (16.67)	6 (15.00)
Def White	7 (38.89)	10 (25.00)
Def POC	11 (61.11)	30 (75.00)
Def Female	1 (5.56)	2 (5.00)
Def Male	17 (94.44)	38 (95.00)
Def < 22 years old	8 (44.11)	20 (50.00)
Def > 21 years old	10 (55.56)	20 (50.00)
Victim Black	**2 (11.11)**	**18 (45.00)* p=.016**
Victim Hispanic	2 (11.11)	9 (22.50)
Victim White	**13 (72.22)**	**13 (32.50)* p=.009**
Victim POC	**5 (27.78)**	**27 (67.50)* p=.009**
Victim Female	**18 (100.00)**	**18 (45.00)* p=.000**
Victim Male	0 (0.00)	22 (55.00)
Victim < 15 years old	2 (11.11)	0 (0.00)
Victim > 14 years old	16 (88.89)	40 (100.00)
Victim White Female	**13 (72.22)**	**6 (15.00)* p=.000**
Aggs > 1 (v4025a)	**15 (83.33)**	**14 (35.00)* p=.001**
Mean # Aggs (v4025)	**3.06**	**1.40* p=.000**
Decedents > 1 (v1019a)	13 (68.42)	31 (77.50)
Mean # decedents	2.11	1.85

Table 3 compares cases charged with Capital Murder with those on the State DA List of possibly death-eligible cases who were not capitally charged. As in the tables above, Female victim cases and White Female victim cases were significantly more likely to be charged as capital cases. Again, cases with more aggravators also were more likely to be charged with capital murder.

Table 3. Comparison of Cases Charged with Capital Murder and the State DA List of Potentially Death-Eligible Cases Not Capitally Charged

Independent Variables	Charged Capital Murder (N=23)	State DA List (N=21)
Def Black	10 (43.48%)	11 (52.38%)
Def Hispanic	3 (13.04)	3 (14.29)
Def White	9 (39.13)	6 (28.57)
Def POC	14 (60.87)	15 (71.43)
Def Female	1 (4.35)	1 (4.76)
Def Male	22 (95.65)	20 (95.24)
Def < 22 years old	12 (52.17)	8 (38.10)
Def > 21 years old	11 (47.83)	13 (61.90)
Victim Black	4 (17.39)	7 (33.33)
Victim Hispanic	3 (13.04)	6 (28.57)
Victim White	15 (65.22)	8 (38.10)
Victim POC	8 (34.78)	13 (61.90)
Victim Female	**22 (95.65)**	**7 (33.33)* p=.000**
Victim Male	**1(4.35)**	**14 (66.67)*p=.000**
Victim < 15 years old	2 (8.70)	0 (0.00)
Victim > 14 years old	21 (91.30)	21 (100.00)
Victim White Female	**14 (60.87)**	**4 (19.05)* p=.007**
Aggs > 1 (v4025a)	**19 (82.61)**	**6 (28.57) * p=.001**
Mean # Aggs (v4025)	**2.87**	**1.24* p=.000**
Decedents > 1 (v1019a)	17 (73.91)	16 (76.19)
Mean # decedents	2.13	1.81

Note: The State DA List included all of the cases that were capitally charged. For this analysis, those cases were included in the capitally charged group and thus omitted from the State DA List.

Table 4 shows a familiar pattern of case factors that distinguish cases charged as Capital Murder from those on the Independent Review list of possible death-eligible cases. Cases with Black victims were less likely to be charged with Capital Murder than victims of other racial or ethnic groups. The same is true in cases where the victim is a Person of Color. In contrast, cases with White victims and Female victims also are significantly more likely to be charged as capital murders compared to potentially death-eligible cases identified in the Independent Review. Together, these results suggest a preference to charge cases with White victims more often as capital cases. Cases with female victims, and White female victims in particular, were significantly more likely to be charged capitally. The number of aggravators alleged is also a significant predictor.

Table 4. Comparison of Cases Charged as Capital Murder with Cases Identified as Death-Eligible but Not charged as Capital Murder from the Independent Review

Independent Variables	Charged Capital Murder (N=23)	Independent Review (N=35)[a]
Def Black	10 (43.48%)	20 (57.14%)
Def Hispanic	3 (13.04)	6 (17.14)
Def White	9 (39.13)	8 (22.86)
Def POC	14 (60.87)	27 (77.14)
Def Female	1 (4.35)	2 (5.71)
Def Male	22 (95.65)	33 (94.29)
Def < 22 years old	12 (52.17)	16 (45.71)
Def > 21 years old	11 (47.83)	19 (54.29)
Victim Black	**4 (17.39)**	**16 (45.71)* p=.047**
Victim Hispanic	3 (13.04)	8 (22.86)
Victim White	**15 (65.22)**	**11 (31.43)* p=.016**
Victim POC	**8 (34.78)**	**24 (68.57)* p=.016**
Victim Female	**22 (95.65)**	**14 (40.00)* p=.000**
Victim Male	**1 (4.35)**	**21 (60.00)* p=.000**
Victim < 15 years old	2 (8.70)	0 (0.00)
Victim > 14 years old	21 (91.30)	35 (100.00)
Victim White Female	**14 (60.87)**	**5 (14.29)* p=.000**
Aggs > 1 (v4025a)	**19 (82.61)**	**10 (28.57) * p=.000**
Mean # Aggs (v4025)	**2.87**	**1.29* p=.000**
Decedents > 1 (v1019a)	17 (73.91)	27 (77.14)
Mean # decedents	2.13	1.80

Table 5 compares death sentenced individuals to those defined as death eligible by the DA. Only six defendants have ever been sentenced to death in Sedgwick County. The ability to draw statistical conclusions about sentencing practices from this group is necessarily limited by the small number of cases. Nonetheless, similar patterns from the charging analyses apply in the death sentenced cases.

Statistically significant differences were found in comparisons between those individuals ever sentenced to death and those considered death eligible, as defined by the District Attorney. Compared to the DA death eligible list, White victim, female victim, and White female victim cases were all significantly more likely to result in death, and victim of color cases were less likely to result in death.

Table 5. Comparison of Death Eligible Cases as Defined by the State without Death Sentences and Death Sentenced Cases

Variables	Death Eligible by State (N=38)	Death Sentence (N=6)
Defendant Black	19	2
Defendant Hispanic	6	0
Defendant White	11	4
Defendant POC	27	2
Defendant Female	2	0
Defendant Male	36	6
Defendant Over 21	16	4
Defendant Under 21	22	2
Victim Black	11	0
Victim Hispanic	9	0
Victim White	**17**	**6***
Victim POC	**21**	**0***
Victim Female	23	6
Victim Male	15	0
Victim Under 14	2	0
Victim Over 14	36	6
Victim White Female	**12**	**6****
Multiple Aggravators	**19**	**6***
Mean Aggravators	29	4
Multiple Decedents	**2**	**3.33***
Mean Decedents	2	2.67

Table 6 compares death eligible cases, as determined by the Independent Review, that did not result in death sentences with those that did result in a death sentence. For the Independent Review, these same factors as with the State's definition of death eligibility—White victim, victim of color, White female victim, multiple aggravators and multiple decedents—were statistically significant when comparing death eligible defendants not death sentenced to those individuals death sentenced.

Table 6. Comparison of Cases Identified as Death-Eligible from the Independent Review But Not Death Sentenced with Those Death Sentenced

Variables	Death Eligible by Independent Review (N=52)	Death Sentence (N=6)
Defendant Black	28	2
Defendant Hispanic	9	0
Defendant White	13	4
Defendant POC	39	2
Defendant Female	3	0
Defendant Male	49	6
Defendant Over 21	24	4
Defendant Under 21	28	2
Victim Black	20	0
Victim Hispanic	11	0
Victim White	20	6**
Victim POC	32	0**
Victim Female	30	6
Victim Male	22	0
Victim Under 14	2	0
Victim Over 14	50	6
Victim White Female	13	6***
Multiple Aggravators	23	6*
Mean Aggravators	40	4
Multiple Decedents	2	3.33*
Mean Decedents	2	2.67

Table 7 reports the numbers of individuals at each stage of the process, beginning with the universe of death eligible individuals as defined by the State. This demonstrates where demographic groups fall out or concentrate in the process from eligibility to death imposition. For example, male defendants are in the vast majority at every stage of the process and all capital trials and death sentences are of male defendants. In contrast, Black victims are a significant portion of death eligible cases but a much smaller portion of death noticed cases and are entirely absent from death sentenced cases.

Table 7. Progression of Death Eligible Cases as Defined by the State Through Charging, Death Noticing, Capital Trial and Death Sentencing

Variables	Death Eligible by State		Charged Capital Murder		Death Noticed		Proceeded to Trial		Death Sentenced	
Defendant Black	21	48%	10	43%	7	39%	5	56%	2	33%
Defendant Hispanic	6	14%	3	13%	3	17%	0	0%	0	0%
Defendant White	15	34%	9	39%	7	39%	4	44%	4	67%
Defendant POC	29	66%	14	61%	11	61%	5	56%	2	33%
Defendant Female	2	5%	1	4%	1	6%	0	0%	0	0%
Defendant Male	42	95%	22	96%	17	94%	9	100%	6	100%
Defendant Over 21	20	45%	12	52%	8	44%	6	67%	4	67%
Defendant Under 21	24	55%	11	48%	10	56%	3	33%	2	33%
Victim Black	11	25%	4	17%	2	11%	1	11%	0	0%
Victim Hispanic	9	20%	3	13%	2	11%	0	0%	0	0%
Victim White	23	52%	15	65%	13	72%	8	89%	6	100%
Victim POC	21	48%	8	35%	5	28%	1	11%	0	0%
Victim Female	29	66%	20	87%	18	100%	9	100%	6	100%
Victim Male	15	34%	1	4%	0	0%	0	0%	0	0%
Victim Under 14	2	5%	2	9%	2	11%	2	22%	0	0%
Victim Over 14	42	95%	21	91%	16	89%	7	78%	6	100%
Victim White Female	18	41%	14	61%	13	72%	8	89%	6	100%

This progression across cases can also be shown graphically. Figures 1 to 3 illustrate the different stages beginning with the State's estimation of death eligible cases for cases with at least one White victim compared to all others (Fig. 1); cases with at least one Female victim compared to all others (Fig. 2); and cases with at least one White Female victim compared to all others.

Fig 1. Capital Stages By White Victim

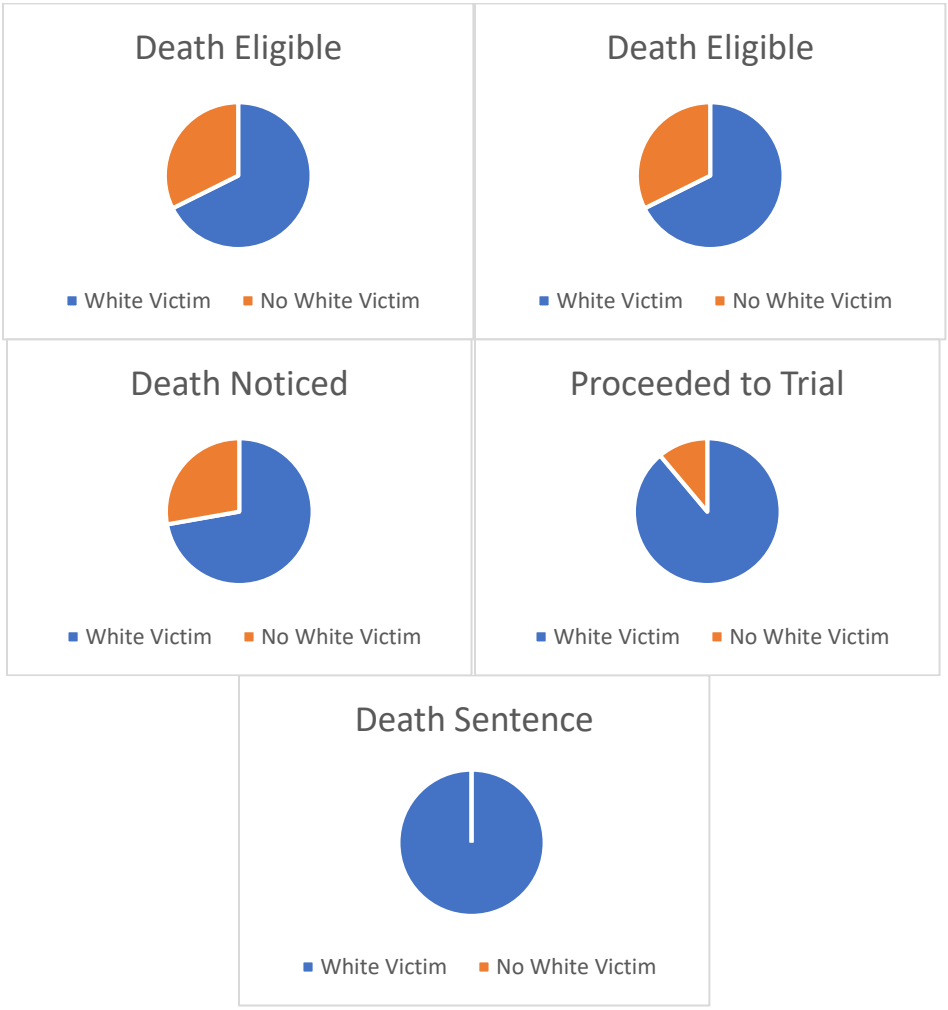


Fig 2. Capital Stages By Female Victim

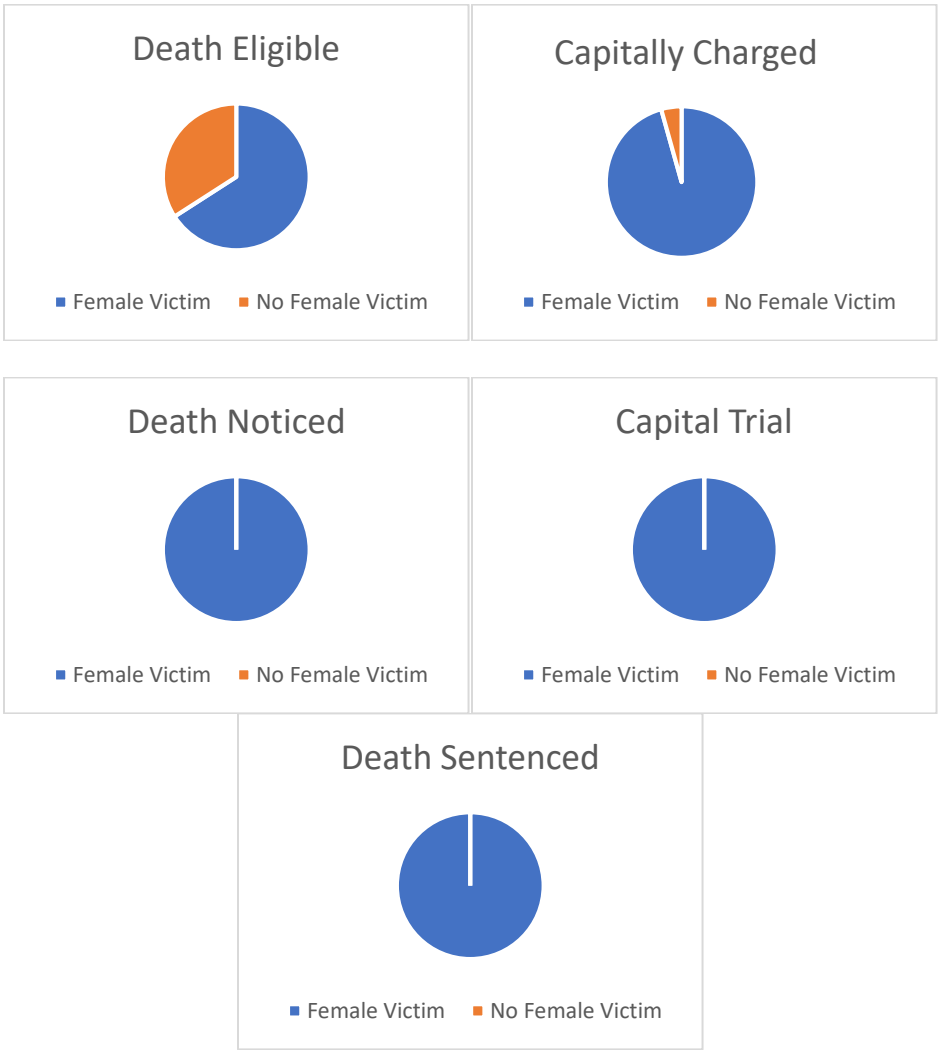
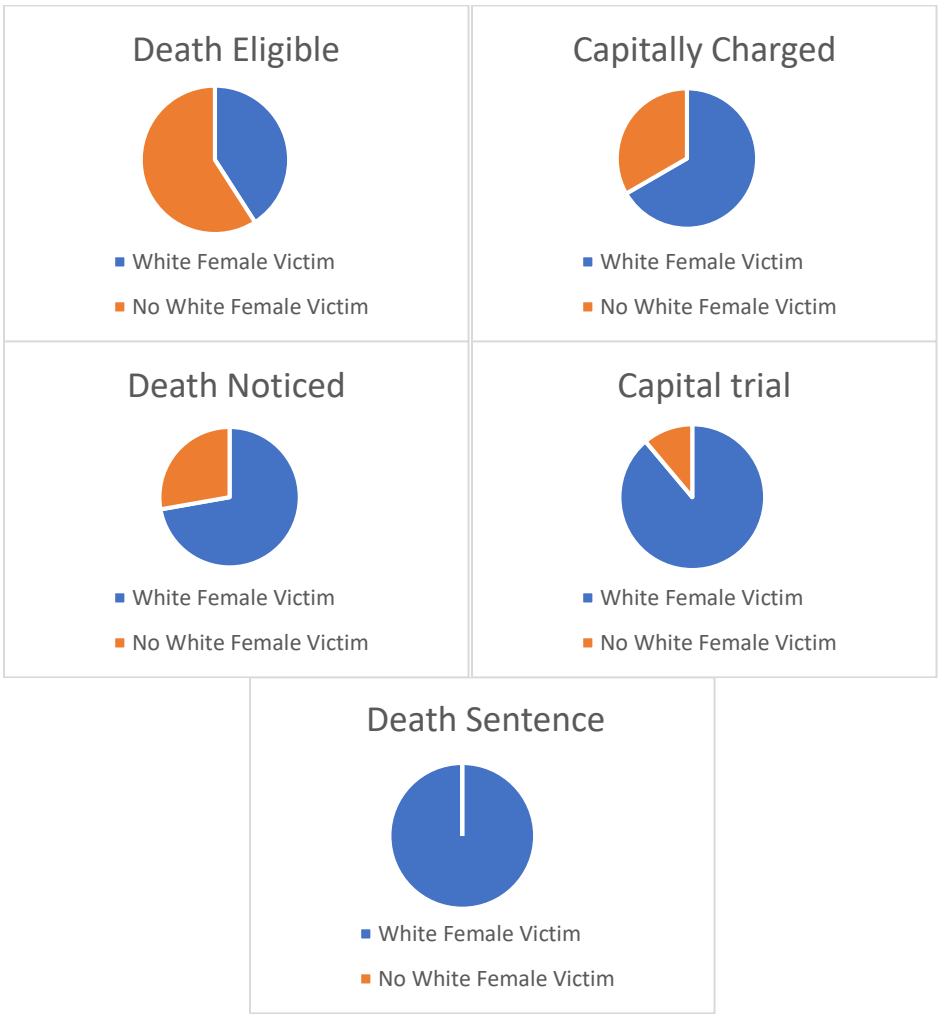


Fig 3. Capital Stages for White Female Victims Compared to All Others



Summary Of Bivariate Charging and Death Sentencing Results

The tables and figures shown above collectively and consistently identify a set of case characteristics that are associated with the decision to either charge a case as a capital murder or to pursue a death sentence, distinguishing those cases from other similarly situated murders where death is not sought. The patterns show the systematic contributions of White victim status to the decision to charge or seek a death sentence. A second consistent contributor to death-seeking is the subgroup of White victim cases where the victim is female. Additionally, some of these tables identify a pattern of not charging Black victim cases capitally, suggesting again a preference for White victim cases. Even in the presence of other potential contributors to the decision to seek death, the robustness of the White victim feature of death-seeking stands out. This racial gap in death-seeking aligns with

the results of empirical studies over the past three decades on charging and sentencing in capital-eligible cases.[19]

B. Firth Logistic Regressions

Using the results in Tables 1–4, I estimated a series of Firth logistic regressions to identify the interaction of these factors in predicting which cases are more likely to lead to a decision to charge, seek or impose a death sentence. From the tables above, I isolated factors associated with victim race, victim gender, and case features including the number of decedents and the statutory aggravators.[20]

Table 8 below shows the results of the regressions. These models were designed to test the combined effects of the various case factors identified in Tables 1–4. The regression parameters are shown as odds ratios, for ease of interpretation. An odds ratio greater than 1.0 suggests that the factor is positively influencing the outcome compared to the reference group. An odds ratio below 1.0 suggests the factor is negatively influencing the outcome.[21]

Four regressions were estimated, matching several of the bivariate comparisons and isolating the significant effects from those tables in the decision to charge or seek death. The first compares cases where defendants received death notices compared to those whom the State DA identified as "death eligible." The second compares Death-Noticed cases with those identified as death eligible based on the Independent Review discussed earlier. The third compares cases where capital murder was charged with the State DA list of "possible" death penalty cases. The

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[19] *See, e.g.*, Catherine M. Grosso, et al., *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, *in* America's Experiment with Capital Punishment: Reflections on The Past, Present, And Future of the Ultimate Penal Sanction 525-576 (J.D. Bessler et al. eds., 3rd ed., 2014); David C. Baldus, George Woodworth, Michael Laurence, Jeffrey Fagan, Catherine M. Grosso & Richard Newell, Furman *at 40: Constitutional Challenges from California's Failure to (Again) Narrow Death Eligibility*, 16 J. EMP. LEG. STUD. 693 (2019); Barbara O'Brien, Catherine M. Grosso, George Woodworth & Abijah Taylor, *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*, 94 NCL REV. 1997 (2015); Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. CR-CLL REV. 585, 625 (2020) (showing that those convicted of killing white victims were more likely to be sentenced to death and to be put to death). (2020) (showing that those convicted of killing white victims were more likely to be sentenced to death and to be put to death.)

[20] Data on aggravators that were found at trial was sparse and unreliable, and that factor was omitted from the regressions.

[21] Odds ratios of 1.0 suggest no difference based on that factor. An odds ratio above 1.0 is interpreted as a multiple of the factor. For example, when the victim is a White female, the odds ratio above 1.0 suggests that defendant in that case is more likely to face a death charge or notice or sentence. If, for example, the defendant is Black, the odds ratio of .675 in Table 8 suggests that that person is 32.5% less likely to face the death penalty compared to defendants of other races. If the victim is a White female, the defendant is 9 times more likely to face a death charge than a person who murders a Black or Hispanic or Other Race Female or male.

fourth compared cases charged with capital murder with death-eligible cases identified in the Independent Review.

Table 8. Firth Logistic Regressions on Factors Predicting Death Penalty Charge or Notice (OR,SE, p)

	Death-Noticed Cases v. State DA List		Death-Noticed Cases v. Independent Review		Capital Murder Charged Cases v. State DA List		Capital Murder Charged Cases v. Independent Review List[a]	
	OR	SE	OR	SE	OR	SE	OR	SE
Defendant Black or Hispanic	3.020	(3.00)	1.91	(1.69)	1.680	(1.43)	1.05	(.81)
Victim White Female	8.75**	(7.66)	9.39***	(7.62)	3.60*	(2.83)	4.30*	(3.13)
>1 Aggravators	4.68*	(3.89)	4.04*	(3.07)	6.76***	(4.95)	5.78***	(3.83)
Multiple Decedents	1.22	(.991)	1.33	(1.06)	1.32	(1.03)	1.32	(.96)
Constant	.042**	(.06)	.042**	(.06)	.125*	(.15)	.118**	(.123)
N of Observations	44		58		44		58	
Log likelihood	-19.12		-22.59		-20.16		-25.48	
Chi-square	10.25		14.51		11.24		15.15	
p(Chi-square)	0.040		0.006		0.024		0.004	

a. Excludes five cases that were prosecuted as death cases

Significance: * = p <. .10, ** = p < .05, *** = p <.01

Across the four models in Table 8, the regressions show strong preference for seeking death in cases where the victim was a White female, and where multiple aggravators were alleged. The regression estimates for each variable take into account the influences of the other variables in the regression model. In other words, mutual influences of the various predictors are accounted for. The effects of victim-gender dyads are adjusted for - or controlled for - the effects of the other variables in the model. Accordingly, the results show that in White female victim cases, death is sought or charged at least three times more often than in other victim-gender dyads, and as high as nine times more likely in the death-noticed model compared to the Independent Review list, controlling for the other variables in the model.

An additional set of Firth regressions was estimated to assess racial discrimination in the subset of cross-racial killings in the pool of cases charged with capital murder. This is an important feature of death penalty caselaw and research for over three decades, and that remains controversial today as a matter of Fourteenth Amendment Equal Protection and Eighth Amendment Cruel and Unusual Punishment caselaw.[22] Using the set of cases analyzed in Table 4, 18 cross racial

[22] *See, e.g.*, Marvin E. Wolfgang & Marc Riedel, RACE, JUDICIAL DISCRETION, AND THE DEATH PENALTY, ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 407.1 (1973): 119-133. *McCleskey v. Kemp*, 481 U.S. 279 (1987); Grosso et al., supra n. 18. David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An*

killings were identified, including14 cases of Black or Hispanic defendants killing White victims and an additional four cases of Whites killing non-White victims. The model of four White defendants charged with killing non-White victims did not converge due to insufficient statistical power, and accordingly are not shown.

Table 9 shows the results of the Firth logistic regression on charging or death noticing in cross-racial killings in cases with Black or Hispanic defendants charged with killing White victims. Compared to within-race killings by Black or Hispanic defendants in the State DA List or in the Independent Review, cross-racial killings were five times more likely to be charged or noticed as a capital case compared to the same killings among those identified as possibly death-eligible in the independent review. The result was statistically significant ($p < .05$).

Table 9. Firth Logistic Regressions on Cross-Race Killings and Death Penalty Charge (OR,SE, p)

	Capital Murder Charged Cases v. Independent Review List[a]		Capital Murder Charged Cases v. Independent Review List	
	OR	SE	OR	SE
Cross-Racial Killing[b]	5.00**	(3.74)	5.08**	(4.00)
Constant	.231***	(.12)	.171***	(.10)
N of Observations	37		36	
Log likelihood	-14.13		-16.79	
Chi-square	7.19		4.25	
p(Chi-square)	0.028		0.039	

a. Independent Review excludes cases charged as capital murder

Empirical Study of the Georgia Experience. 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Barbara O'Brien *et al*., *The Role of Race in Charging and Sentencing*, *supra* n. 18; Glenn L., Pierce, Michael L. Radelet & Susan Sharp, *Race and Death Sentencing for Oklahoma Homicides Committed Between 1990 and 2012*, 107 J. CRIM. L. & CRIMINOLOGY 733 (2017); Philips and Marceau, *Whom the State Kills*, *supra* n. 18; David C. Baldus, George Woodworth & Charles A Pulaski Jr., *The Influence of Racial and Suspect Factors in the Postconviction Phases of Georgia's Capital-Sentencing System*, in Equal Justice and the Death Penalty: A Legal and Empirical Analysis 140–97 (1990); Frank R. Baumgartner, Amanda J. Grigg & Alisa Mastro, *#BlackLivesDon'tMatter: Race-of-Victim Effects in US Executions, 1976–2013*, 3 POLITICS, GROUPS & IDENTITIES 209 (2015), doi: 10.1080/21565503.2015.1024262; FRANK BAUMGARTNER, MARTY DAVIDSON, KANEESHA JOHNSON, ARVIND KRISHNAMURTHY & COLIN WILSON, DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY 139 (2018).

b. Includes 14 killings of White Victims by Black or Hispanic defendants. Models with 4 Killings by White Defendants of Black or Hispanic victims did not converge.

Significance: * = p <. .10, ** = p < .05, *** = p <.01

Accordingly, within the broader set of cases in Sedgwick County, the analysis of this small subset of cross-racial killings adds to the evidence of racial discrimination in the application of the state's death penalty statutes.

C. Interpreting Statutory Aggravators

The *Gregg* Court was adamant that statutory aggravators are the case factors that would assist courts to distinguish crimes that might receive a death sentence from "ordinary" murders.[23] However, empirical studies on charging and sentencing rarely take aggravators into consideration in assessing racial disparities. Although the research for this case collected and coded information on statutory aggravators, these data were inconsistently available. This information was often missing from the court and prosecution records that were the sources relied on to describe the specific nature of the killing and its eligibility for capital punishment. There are strong doubts about their probative value in an empirical project to compare cases, and their validity as a measure of the severity of a murder. For the following reasons, data on statutory aggravators were not discussed in the interpretation of the analyses of racial bias in charging and sentencing.

First, the number of aggravating factors charged, if any, is entirely a function of prosecutorial discretion, because there is nothing in Kansas law requiring prosecutors to charge aggravating circumstances. Whether a prosecutor seeks death is likely to have a direct impact on whether the prosecutor will notice aggravating factors. While aggravating factors are a requirement for a capital sentence and must be noticed, there is no requirement in Kansas law to allege aggravating factors in first degree murder cases. State law changed in July 2014 to increase the presumptive sentence for first-degree intentional murder to life in prison with the possibility of parole after 50 years.[24] From that point on, there was no functional purpose for prosecutors to allege statutory aggravators in first-degree premeditated murder cases. The data analyzed in this study confirm that statutory aggravators are rarely mentioned in any of the first-degree murder case files. Incentives for prosecutors to assess and charge aggravators are attenuated

[23] Chelsea Creo Sharon, "The" most deserving" of death: The narrowing requirement and the proliferation of aggravating factors in capital sentencing statutes." 46 *Harv. CR-CLL Rev.* 223 (2011). Sam Kamin and Justin Marceau. "Vicarious Aggravators." 65 *Fla. L. Rev.* 769 (2013). David C., Baldus et al. "Furman at 45: Constitutional challenges from California's failure to (again) narrow death eligibility." 16 *Journal of Empirical Legal Studies* 693 (2019). James S. Liebman, James S. "The overproduction of death." 100 *Colum. L. Rev.* 2030 (2000)

[24] *See* Kansas Legislator Briefing Book (2017) at 1-2, available at http://www.kslegresearch.org/KLRD-web/Publications/BriefingBook/2017Briefs/G-7-Sentencing.pdf.

for many otherwise death-eligible cases. In those cases, an observer would be unaware of their presence.

For this analysis, then, no conclusion can be made about the role of statutory aggravators in charging or death-noticing a case, when comparing cases charged or not charged with capital murder, or death-noticed. This is true for the subset of cases that were thought to be "potentially death-eligible," either through the Independent Review or the cases nominated in the State DA's list.

In terms of research design and statistical analysis, this inconsistent reporting means that data on aggravators are considered missing or censored information, and no assumptions can be made about these cases. A researcher might assume that missing data are random, in which case they might be ignorable. One ignores this kind of selection bias at the risk of reliability of any conclusions; ignoring selection bias on cases or information would lead to flawed conclusions.[25] In simpler terms, the claim of race-neutral prosecutorial decisions to charge suspects with death-eligibility without complete or robust information on the necessary aggravators is blind to the possibility that these results may not be replicable under other sampling and measurement conditions.[26]

An additional problem is the highly subjective nature of aggravating circumstances. The Independent Review, which was based on the record in the case files, identified 40 cases which could have been death noticed but were not. The attorney identified 54 factually applicable aggravating circumstances across those 40 cases. In no case did she identify more than 2 applicable aggravating factors; the average number of applicable aggravating factors per case is 1.3. The aggravator “knowingly or purposely killed or created a great risk of death to more than one person” was by far considered the most applicable. Table 10 shows the aggravators most frequently identified in the Independent Review.

[25] Todd D. Little, Terrence D. Jorgensen, Kyle M. Lang, and E. Whitney G. Moore. "On the joys of missing data." 39 *Journal of pediatric psychology* 151 (2014). Douglas G., Altman, and J. Martin Bland. "Missing data." *Bmj* 334, no. 7590 (2007): 424-424. Dean Knox, William Lowe and Jonathan Mummolo, "Administrative records mask racially biased policing." 114 *American Political Science Review* 619 (2020).

[26] Roland Neil and Christopher Winship, "Methodological challenges and opportunities in testing for discrimination in policing," 2 *Ann. Rev. Crim'gy* 73 (2019).

Table 10. Aggravating Factor	# Cases charged	% Cases applicable
(a) The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.	2	5%
(b) The defendant knowingly or purposely killed or created a great risk of death to more than one person.	32	80%
(c) The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.	6	15%
(d) The defendant authorized or employed another person to commit the crime.	2	5%
(e) The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.	4	10%
(f) The defendant committed the crime in an especially heinous, atrocious or cruel manner.	5	13%
(g) The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.	1	3%
(h) The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.	2	5%

This was a more conservative estimate than the State DA list, whose evidentiary basis was unknown and undocumented. Table 11 shows that the Sedgwick County District Attorney's office specified aggravating factors in all of the 18 cases in which a death notice was filed. Across those 18 cases, 56 aggravators were charged—an average of 3.1 aggravating factors per case, a total number nearly three times the number charged in the list of cases that were considered death-eligible by the DA. If these considerations are based on the record, there is no reason for this difference to be present.

Similar to the Independent Review, State prosecutors considered the "risk of death to more than one person" aggravating factor to be factually present in about 75% of cases.

Table 11. Aggravating Factors Identified by the State DA	# Cases charged	% Cases charged
(a) The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.	**0**	**0%**
(b) The defendant knowingly or purposely killed or created a great risk of death to more than one person.	**13**	**72%**
(c) The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.	**10**	**56%**
(d) The defendant authorized or employed another person to commit the crime.	**4**	**22%**
(e) The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.	**11**	**61%**
(f) The defendant committed the crime in an especially heinous, atrocious or cruel manner.	**14**	**78%**
(g) The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.	**0**	**0%**
(h) The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.	**4**	**22%**

Similar to the Independent Review, State prosecutors considered the "risk of death to more than one person" aggravating factor to be factually present in about 75% of cases. But there were important differences in which aggravators the prosecutors charged. They charged the "heinous, atrocious, or cruel" (HAC) aggravating circumstance in more than 75 percent of the cases which were identified as potentially death-eligible, while the Independent Review found it applicable in only 13 percent of cases. Similar patterns exist for the aggravating factors alleging that the defendant committed the crime to avoid a lawful arrest or prosecution (61 percent v. 10 percent) and that the defendant committed the crime for the purpose of receiving money or any other thing of monetary value (56 percent v. 15 percent). Because the data is derived from two sources with different perspectives about the overall applicability of aggravating circumstances, the impact of aggravating factors on the likelihood that a case will be death-noticed will be overstated in the results. The gap in these two estimates of the presence of statutory aggravators typify reliability threats in social science: the ability of different observers to see a pattern of facts and reach the same conclusions about what those facts are saying.[27]

These comparative differences in these perceptions of aggravation from two very different perspectives—perceptions about both which aggravators are present and

[27] Keith S. Taber, "The use of Cronbach's alpha when developing and reporting research instruments in science education." 48 *Research In Science Education* 1273 (2018): 1273-1296. Meiyuzi Gao, Philip Kortum, and Frederick Oswald. "Psychometric evaluation of the use (usefulness, satisfaction, and ease of use) questionnaire for reliability and validity." In 62 *Proceedings of The Human Factors and Ergonomics Society Annual Meeting*, 1414-1418 (2018).

their applicability in seeking a death sentence—suggest caution in interpreting the impact of aggravating factors on the likelihood that a case will be death-noticed. If present at all in the records, the role of aggravators is likely to be overstated in the data analyzed in this report. It is less of a burden to charge an aggravator, but prosecutors have the burden of proving that aggravator beyond a reasonable doubt at sentencing. That evidence is missing far more often than it appears in the data, suggesting that there is some inflation in the lodging of aggravators to attain a death sentence.

Finally, perhaps the most important reason to doubt the probative value of the heavy use of statutory aggravators is empirical: the models that were estimated for this report show that whether aggravators were present or absent, the White victim preference, and the White female victim preference, were still significant predictors of a death charge and a death notice. In other words, the racial and gender components of death charging superseded the contributions of aggravators—if they could be at all observed and measured—in the decision to seek death.

IV. SUMMARY AND CONCLUSION

In statistical social science, when different analytic methods are applied to the same datasets and empirical questions, and when those methods reach the same conclusions, one can have confidence that relationships among the predictor variables and the outcomes are robust and reliable. That is the case in these analyses. Using tests specifically designed for small datasets, the analyses identified a consistent pattern of preferences by prosecutors to charge capital murder and seek the death penalty in cases where the victim is White, and especially when the victim is a White female. These results are present across comparisons of multiple subsets of cases that reflect a set of selection decisions by prosecutors.

The regression models are particularly important because the results of each variable are adjusted to account for the mutual influences among the predictors on the outcomes. However, the results of the bivariate models complement the multivariate models and show an overall pattern of effects that reinforce the statistical depiction of disparate treatment. Prosecutors are more likely to charge and seek death when the victim is White, and less likely to seek or charge death when the victim is Black. These patterns point to biases that can affect the decision making processes of prosecutors in deciding which cases are death-worthy.

The disparate treatment identified in these analyses reflect decision processes often cited in studies on charging and sentencing.[28] The essential role of

[28] *See, e.g.*, Nick Petersen, Examining the Sources of Racial Bias in Potentially Capital Cases: A Case Study of Police and Prosecutorial Discretion, 7 RACE & JUSTICE 7 (2017); Jefferson

prosecutorial discretion in deciding when to seek death and for which victims and offenders was highlighted in the June 2021 report of The Racial Justice Task Force of the Board of Governors of the Wichita Bar Association.[29] The report notes that "[T]he decision whether or not to charge a crime, what crime to charge, and what plea negotiations to engage in, are inherently judgment calls of the prosecutor. If those decisions are affected by bias of the prosecutors against racial and ethnic minority people, including any implicit bias, that would be a way that the system would not result in 'equal justice' for those people."[30]

The Racial Justice Task Force report goes on to note that there is data to "explore this problem."[31] This report does just that, to identify the extent of racial disparities in the selection of cases for capital punishment.

Post-Script

The data analyzed in this report begins at the charging stage of capital-eligible proceedings. Recent events in Wichita draw attention to earlier stages of the process: police investigation and arrests. As I have previously written about, the patterns of racial disparity may exist at this earlier stage, which, if present, produce a racially skewed supply of capital-eligible defendants.[32] My earlier research examined data from the FBI Supplementary Homicide Reports for every homicide reported between 1976 and 2009, and found that homicides with White victims are significantly more likely to be "cleared" by the arrest of a suspect than are homicides with minority victims. *Id*. at 266. Thus, the racially skewed process does not begin with discretionary decisions by prosecutors to seek death, but is implicated at the earliest stages of the administration of justice and the creation of a supply of potential capital cases for possible prosecution.

E. Holcomb, Marian R. Williams & Stephen Demuth, White Female Victims and Death Penalty Disparity Research, 21 JUSTICE QUARTERLY 877 (2004); Catherine Lee, Hispanics and the Death Penalty: Discriminatory Charging Practices in San Joaquin County, California, 35 J. CRIMINAL JUSTICE 17 (2007); Jeffery T. Ulmer, John H. Kramer & Gary Zajac, The Race of Defendants and Victims in Pennsylvania Death Penalty Decisions: 2000–2010, 37 JUSTICE QUARTERLY 955 (2020); Sherod Thaxton, Disentangling Disparity: Exploring Racially Disparate Effect and Treatment in Capital Charging, 45AM. J. CRIM. L. 95 (2018); Scott Phillips & Justin Marceau, Whom the State Kills, 55 HARV. CR-CLL REV. 585 (2020); Jeffrey Fagan & Amanda Geller, Police, Race, and the Production of Capital Homicides 23 BERKELEY J. CRIM. L. 261 (2018)

[29] Equal Justice Under Law**:** Report of The Racial Justice Task Force to The Board of Governors of The Wichita Bar Association (2018). Available at: https://cdn.ymaws.com/www.wichitabar.org/resource/resmgr/files/wba_racial_justice_report_06.pdf

[30] *Id.* at 9.

[31] *Id.*

[32] *See*, Jeffrey Fagan & Amanda Geller, Police, Race, and the Production of Capital Homicides, supra n. 28.

Recent disclosures about officers employed by the Wichita Police Department and Wichita Sheriff's Department underscore this concern for the Sedgwick County cases. On March 21, 2022, an investigation by the *Wichita Eagle* revealed several overtly racist private messages exchanged between several officers in both departments.[33] The messages depicted memes, photoshopped images, and text containing racial slurs that praised the "hunting" and killing of Black people by police officers. *Id.* Though the text messages were discovered in April 2021, neither the police department nor the sheriff's office revealed the existence of a particularly offensive racist meme to the Sedgwick County District Attorney's office.[34] Other city officials were similarly dismayed by the lack of disclosure and the nature of the messages, with one county commissioner stating "I am very disappointed that this type of blatant racism is tolerated in part of our government."[35]

These revelations suggest that antagonism among police toward Black and Latinx residents may be widespread and diminish the intensity and integrity of investigations of homicides in their communities.[36] These tensions and antagonism explain substantially why a diminished quality of investigations of Black or Latinx victim homicides may suppress prosecution of those cases. Studies and reports of distrust between minority citizens and police have complicated police investigations of homicides in Los Angeles,[37] New York[38] and

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[33] Available at https://www.kansas.com/news/local/article259423154.html.

[34] *See* Michael Stavola, *Racist meme sent by Wichita officer could affect cases, but DA wasn't told for months*, The Wichita Eagle (March 21, 2022) ("Federal law requires attorneys to disclose any exculpatory or impeachable evidence to anyone accused or convicted of a crime. That includes evidence that an officer involved in the case is biased toward a group of people."). Available at https://www.kansas.com/news/local/article259620404.html.

[35] Chance Swaim & Matthew Kelly, *'Slap in the face': Officials react to racist messages between Wichita-area officers*, The Wichita Eagle (March 21, 2022). Available at https://www.kansas.com/news/politics-government/article259633769.html.

[36] Jeffrey Fagan and Daniel Richman, Understanding Recent Spikes and Longer Trends in American Murders, 117 COLUMBIA LAW REVIEW 1235, 1278-9 (2017) (citing a 2016 survey of African American residents in South Los Angeles showing "deep distrust and anger toward the police among African American residents, leading to a "'profoundly serious disconnect'" between the LAPD and the city's Black citizens"). *See, e.g.*, Cindy Chang, The LAPD's Biggest Conundrum: How to Suppress Crime Without Alienating South L.A.'s Black Residents, L.A. Times (Feb. 4, 2017), http://www.latimes.com/local/california/la-me-lapd-crime-trust-20170203-story.html.). See, also, Kate Mather & Cindy Chang, LAPD Watchdog Takes a Long Look into Allegations of Racial Profiling, L.A. Times (Nov. 15, 2016), http://fw.to/WjQB4oY.

[37] Chang, id. Mather & Chang, id.

[38] Benjamin Mueller & Al Baker, Rift Between Officers and Residents as Killings Persist in South Bronx, N.Y. Times (Dec. 31, 2016), http://nyti.ms/2jVye66 (on file with the Columbia Law Review) [hereinafter Mueller & Baker, Rift Between Officers and Residents]. Among the NYPD's seventy-seven precincts, nine of the fourteen lowest-staffed detective squads are in the Bronx.

Chicago.[39] In general, hostile policing in minority neighborhoods expose local residents to repeated stops, disrespect from police, and the types of petty indignities.[40] These police actions confirm the attitudes of police officers that characterize the views among police toward minority residents, views that reduce incentives for aggressive investigation of murders of people of color. The poor evidentiary record, for those cases that do result in an arrest, may translate into a weak evidentiary record and a pattern of decisions to prioritize White victim cases while reducing the salience of Black victim cases. We now have valid reasons to suspect that these pressures exist in Sedgwick County to produce the statistical findings presented in this report.

DECLARATION

I have not been compensated for this work.

Jeffrey Fagan, Ph.D.
New York, NY

April 8, 2022

[39] Monica Davey & Giovanni Russonello, In Deeply Divided Chicago, Most Agree: City Is Off Course, N.Y. Times (May 6, 2016), http://nyti.ms/2kV84of . See, also, Monica Davey, In Chicago, Bodies Pile Up at an Intersection of 'Depression and Rage,' N.Y. Times (Dec. 9, 2016), http://nyti.ms/2k4UY3U (detailing uncooperative witnesses after a major shooting).

[40] See Jill Leovy, Ghettoside: A True Story of Murder in America 48–49 (2015)(discussing clearance rates in L.A. County and South L.A.). See, generally, Josh Bowers, Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity," 66 Stan. L. Rev. 987, 1008 (2014). I. Bennet Capers, Policing, Race, and Place, 44 Harv. C.R.-C.L. L. Rev. 43, 68–69 (2009) (stating similar claims in terms of "public shaming").