crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." [178]

Proof of prosecution bias is another matter. The Court ruled in *McCleskey v. Kemp* [179] that a strong statistical showing of racial disparity in capital sentencing cases is insufficient to establish an Eighth Amendment violation. Statistics alone do not establish racial discrimination in any particular case, the Court concluded, but "at most show only a likelihood that a particular factor entered into some decisions." [180] Just as important to the outcome, however, was the Court's application of the two overarching principles of prior capital punishment cases: that a state's system must narrow a sentencer's discretion to impose the death penalty (*e.g.*, by carefully defining "aggravating" circumstances), but must *not* constrain a sentencer's discretion to consider mitigating factors relating to the character of the defendant. Although the dissenters saw the need to narrow discretion in order to reduce the chance that racial discrimination underlies jury decisions to impose the death penalty,[181] the majority emphasized the need to preserve jury discretion not to impose capital punishment. Reliance on statistics to establish a *prima facie* case of discrimination, the Court feared, could undermine the requirement that capital sentencing jurors "focus their collective judgment on the unique characteristics of a particular criminal defendant"—a focus that can result in "final and unreviewable" leniency.[182]

Limitations on Habeas Corpus Review of Capital Sentences.—The Court's rulings limiting federal *habeas corpus* review of state convictions, reinforced by the Antiterrorism and Effective Death Penalty Act of 1996,[183] may be expected to reduce significantly the amount of federal court litigation over state imposition of capital punishment. In the *habeas* context, the Court rejected the "death is different" approach by applying to capital cases the same

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[178] Turner v. Murray, 476 U.S. 28, 36–37 (1986).

[179] 481 U.S. 279 (1987) (5-to-4 decision).

[180] 481 U.S. at 308.

[181] 481 U.S. at 339–40 (Brennan), 345 (Blackmun), 366 (Stevens).

[182] 481 U.S. at 311. Concern for protecting "the fundamental role of discretion in our criminal justice system" also underlay the Court's rejection of an equal protection challenge in *McCleskey*. *See* discussion of "Capital Punishment" under the Fourteenth Amendment, *infra*. *See also* United States v. Bass, 536 U.S. 862 (2002) (per curiam), requiring a threshold evidentiary showing before a defendant claiming selective prosecution on the basis of race is entitled to a discovery order that the government provide information on its decisions to seek the death penalty.

[183] Pub. L. 104–132, 110 Stat. 1214.