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The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion

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THE REIMPOSITION OF CAPITAL PUNISHMENT IN NEW JERSEY: THE ROLE OF PROSECUTORIAL DISCRETION

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I. INTRODUCTION

This is the story of the first three years of application of the New Jersey capital punishment statute. It is a story which formally begins on August 6, 1982, the effective date of the reenactment of capital punishment in New Jersey.[1] This part of the story ends with the death penalty decisions of the New Jersey Supreme Court decided as of August 16, 1988.[2] This Article describes the operation of the statute during its initial period of application.

Shortly after capital punishment was reenacted in New Jersey, the New Jersey Office of the Public Defender began a comprehensive study of all homicide cases in New Jersey in which the homicide occurred after the effective date of the reimposition of capital punishment. The purpose of this Study was to examine the implementation of the new statute, with particular attention to the possibility of discriminatory impact. From the beginning, the research design for this study incorporated a systems approach to capital case processing at the trial level. Entry into the system occurred when there was a formal charge for a homicide offense. The final decision-making point for this analysis was the imposition of the death sentence at the penalty phase of capital trial. This system is presented graphically in Figures 1 and 2 in the Methodology Appendix (Appendix A). Our focus was on discrimination in the capital case processing system as a whole.[3]

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1. N.J. STAT. ANN. §§ 2C:11-1 to -6 (West 1982 & Supp. 1988). The capital punishment statute in New Jersey is an amendment to the homicide statute. The statute is included here as Appendix D. References to the statute in this Article will be to particular section numbers. The previous capital punishment statute was declared unconstitutional in State v. Funicello, 60 N.J. 60, 286 A.2d 55 (1972), after remand from the United States Supreme Court. The death penalty fell because the procedures concerning *non vult* pleas, which resulted in defendants pleading guilty to avoid the imposition of the death penalty, were declared unconstitutional.

2. Four death penalty cases were decided in August, 1988 by the New Jersey Supreme Court. State v. Bey (I), 112 N.J. 45, 548 A.2d 846 (1988); State v. Bey (II), 112 N.J. 123, 548 A.2d 887 (1988); State v. Koedatich, 112 N.J. 225, 548 A.2d 939 (1988); State v. Zola, 112 N.J. 384, 548 A.2d 1022 (1988). Citations to these cases in the text are to the slip opinions, which were the only available form of the decisions during the editing of this Article. All four death sentences were reversed. The cases are discussed in Part IV of this Article. In September and October of 1988, the New Jersey Supreme Court handed down three additional decisions vacating death sentences. *See* State v. Rose, 112 N.J. 454, 548 A.2d 1058 (1988); State v. Gerald, No. A-6, slip op. (N.J. Oct. 25, 1988); State v. Moore, No. A-31, slip op. (N.J. Oct. 26, 1988).

3. This project has produced a series of reports. L. Bienen, N. Weiner & D. Denno, The Reimposition of Capital Punishment in New Jersey: Homicide Cases, 1982-1986 Preliminary Report, 1987, (unpublished) [hereinafter *Preliminary Report*] was issued in January

This Study consists of data on 703 cases which reached final disposition at the trial stage during the first years of the application of the statute.[4] This Article focuses upon the discretion of prosecutors in selecting cases for capital prosecution from among those eligible for capital prosecution.[5]

From the outset, the Supreme Court of New Jersey has been concerned that unlimited and unstructured prosecutorial discretion in the selection of capital cases could call into question the application of the New Jersey capital punishment scheme. The Supreme Court of New Jersey in *State v. Ramseur*[6] rejected the approach taken in Louisiana, where county-wide uniformity was all that was required for prosecutorial discretion to withstand constitutional challenge.[7]

In response to the court's concern, this Study incorporated in

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of 1987 and submitted to the trial court in State v. Lazorisak, Hunterdon County Indictment No. 86- 04-0039, 1987. L. Bienen, N. Weiner, D. Denno, P. Allison & D. Mills, The Reimposition of Capital Punishment in New Jersey: Interim Report [hereinafter *Interim Report*], Parts I and II (1988) (unpublished) was submitted to the Supreme Court of New Jersey in January of 1988. The *Interim Report* and *Preliminary Report* are both on file at the Rutgers-Newark Law School Library. The *Interim Report* contains the full set of frequencies for study variables on the 703 cases as well as appendices describing over one hundred variables used in the regression analysis of the two key points of prosecutorial decision-making. The *Preliminary Report* and its Supplement present comparable background information on the data set of 568 cases which formed the statistical basis of that report. The majority opinion in *Koedatich* cites to figures from the *Preliminary Report*, while noting that the *Interim Report* has been submitted to the Court for its consideration. Slip op. at 31-32 (N.J. Aug. 3, 1988). The dissenting opinion of Justice Handler in *Koedatich* cites to the *Interim Report*. Slip op. at 52-53 (N.J. Aug. 3, 1988) (Handler, J., dissenting).

4. This Study has collected data on approximately 100 additional cases since the *Interim Report* was submitted to the Supreme Court of New Jersey in January of 1988. The analogous data on those cases will be presented to the Special Master. Given that homicide cases typically take almost two years to final trial disposition, with capital cases taking even longer, the data base of 703 cases includes homicides which occurred primarily in the first three years of the statute. *See* Table B-3 in Appendix B.

5. For a detailed discussion of the constitutional problems created by the unfettered discretion of prosecutors in the selection of capital cases, see opinion of Justice Blackmun, McCleskey v. Kemp, 107 S. Ct. 1756, 1794-1805 (1987) (Blackmun, J., dissenting). This Article does not attempt to summarize or comment upon the academic literature or case law which generally addresses this issue. This Article simply reports out what was found when the 703 cases which reached final disposition at the trial court stage during the initial period of the statute's application were analyzed.

6. 106 N.J. 123, 524 A.2d 188 (1987).

7. "We may anticipate considering whether to address concerns about possible misuse of prosecutorial discretion presented to the courts of this state, including in the review all cases in which a prosecutor had the discretion to seek the death penalty." *Id.* at 329, 524 A.2d at 293 (citations omitted).

its research design the identification of death-possible cases. These death-possible cases were identified by defense counsel as having a factual basis for serving a notice of factors on one of the eight statutory aggravating factors.[8] The exact definition of this group of cases is described in the Methodology Appendix (Appendix A) and discussed in detail in the Research Findings section of this Article (Part VI). The Annotation of Death-Possible Cases (Part VIII) identifies and describes the death-possible cases in the data base of 703 cases.

This Article begins with a history of capital punishment in New Jersey (Part II), starting with the earliest colonial times and continuing up to the most recent amendments to the capital punishment statute. Capital punishment has been a sentencing option in New Jersey for all but a brief period of our history, although very few executions have actually been carried out in this century. At various times capital punishment has been a possible penalty for horse stealing, stealing a slave, kidnapping and threatening foreign royalty. As a matter of practicality, however, capital punishment has been applied infrequently and selectively, even in periods when there was no constitutionally recognized right to representation for those accused, and few available avenues for appeal. It is a punishment with a history which strongly suggests discrimination based upon race, class and economic status. The character of capital punishment has remained surprisingly unchanged over the centuries. It is a punishment whose application is attended by exaggerated public attention and outcry, and a punishment whose implementation does not seem to bring out the most noble aspects of the human spirit.

The next section (Part III) outlines the legislative history of capital punishment in New Jersey since reenactment in 1982. It is followed by a section which briefly summarizes the reported case law interpreting the 1982 capital punishment statute (Part IV). The Supreme Court of New Jersey began to address specialized issues raised by the first capital cases in 1983. It was not until 1987, however, that the court, in *Ramseur*, upheld the constitu-

8. The death penalty may only be imposed if the penalty phase jury or court has found that at least one statutory aggravating factor exists, and that the aggravating factor(s) outweigh(s) the mitigating factors found to exist. N.J. STAT. ANN. § 2C:11-3c(3) (West 1982). The statutory aggravating and mitigating factors are discussed individually in Part VII of this Article.

tionality of the statute on its face.[9] Trial and appellate courts have issued opinions on a variety of topics since reenactment, and those cases are noted.[10]

The Literature Review section of this Article (Part V) places the present Study in the context of previous empirical studies and discusses other empirical work on capital punishment, both before and after the United States Supreme Court opinion in *Furman v. Georgia*.[11] The Literature Review section reviews previous empirical studies up to and including the study of capital case processing in Georgia conducted by Professor David C. Baldus and his colleagues. This section concentrates upon research which analyzed original data on capital case processing. Space limitations did not allow for the inclusion of a discussion of the extensive legal and academic literature surrounding the United States Supreme Court decisions in this area.

The Research Findings section (Part VI) reports out the frequencies and probabilities of case advancement by capital case processing stage. This analysis begins by identifying five discrete stages of capital case processing. Beginning with all cases, the first progression is to death-possible. Cases in which there is a factual basis for serving a notice of factors indicating the presence of one or more statutory aggravating factors are defined as death-possible. The next stage is death-eligible, which is defined by the prosecutor's decision to serve a notice of factors, the procedural formality which declares a case capital. All of the cases in which there is a factual basis for serving a notice of factors are not designated capital.

The progression from death-possible to death-eligible is described statistically in the stage statistics and the probability tables reported for identified groups of cases. This section includes the regression analysis of the prosecutor's decision to designate a case capital and the regression analysis of the plea/trial decision. After a case is designated capital by the prosecutor serving a notice of factors, the next stage is progression to capital trial. The case progression tables and probability tables report out the findings for this progression.[12]

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9. *Ramseur*, 106 N.J. at 154, 524 A.2d at 202.

10. This section includes cases up to and including the cases decided on August 16, 1988 by the Supreme Court of New Jersey.

11. 408 U.S. 238 (1972).

12. Since this Article concerns prosecutorial decision-making at the earliest case

The next progression is from capital trial to penalty phase, and the final stage is penalty phase to death verdict. For these last stages the statistics and probabilities of advancement are reported for cases grouped by county of jurisdiction and race of defendant and victim.

The section titled Statutory Aggravating and Mitigating Factors (Part VII) reports descriptive statistics on the individual statutory aggravating and mitigating factors. To the best of our knowledge, this is the first time data on individual statutory aggravating factors have been separately reported and included in a regression analysis, although other researchers have identified groups of cases by characteristics such as the presence of the "heinous" factor and the felony factor, particularly rape. The data reported here, however, on the progression of individual statutory aggravating and mitigating factors is, to the best of our knowledge, unique. The data presented in the tables on the progression of each individual statutory aggravating factor across identified case processing stages is the beginning of a disaggregated analysis of the individual statutory aggravating factors. Even the preliminary results reported here strongly suggest that each individual statutory aggravating factor functions as a mini-capital punishment statute. Additional and more sophisticated disaggregate analysis of the individual factors is highly warranted.

In theory, proof of an aggravating factor is not an issue until the penalty phase of trial, after the jury returns a conviction for death-eligible murder.[13] In fact, the serving of a notice of factors immediately gives the case an entirely different status from that of the ordinary homicide case. The case will be calendared differently. A series of special pretrial motions and procedures will ensue, possibly including a motion requesting an evidentiary hearing on the factual basis for the filing of an aggravating factor.[14]

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processing stage, there is no logistic regression analysis of the stages past death-eligible. The authors of this Article are in the process of preparing another article on the subset of 252 felony murder cases within this data base of 703 cases. That article will include additional regression analysis. *See* L. Bienen, N. Weiner, P. Allison & D. Mills, The Reimposition of Capital Punishment in New Jersey: Felony Murder Cases, 1982-1985 (forthcoming, 1989).

13. The absence or presence of aggravating factors is determined only at the penalty phase trial. *See* N.J. STAT. ANN. § 2C:11-3c (West 1982 & Supp. 1988).

14. The procedures for such a hearing were set out in State v. McCrary, 97 N.J. 132, 142-43, 478 A.2d 339, 344-45 (1984). The threshold evidentiary requirement is minimal. Any evidence alleged in support of the aggravating factor will prevent the trial court from dismissing the factor. The prosecutor does not have to prove the existence of the aggravat-

Once the notice of an aggravating factor is filed, the case will then be scheduled to proceed to capital trial, with the selection of death-qualified jurors.[15]

The Annotation of Death-Possible Cases (Part VIII) includes individual summaries of over two hundred cases which were identified by the respondents in the interview as death-possible, but not designated death-eligible by the individual county prosecutor. The range and number of these cases from a data base which does not purport to be complete is yet additional evidence and illustration of the widespread discrepancies in charging practices through the state. The Annotation of Death-Possible Cases puts flesh on the statistical analysis. The Research Findings (Part VI) analyze aggregate data and report the results of multivariate logistic regressions. The summaries of individual death-possible cases in the Annotation document the disparities found by the statistical analysis and illustrate them with concrete examples. These are not hypothetical cases. These are cases in this Study which went to final disposition at the trial court stage. The circumstances and procedural history of these cases are additional evidence of the fact that there are twenty-one autonomous county prosecutors and that each of the twenty-one is interpreting the capital punishment statute differently.

The range of prosecutorial decision-making is broad. These cases vividly illustrate that pretrial procedures are extremely flexible and vary greatly from county to county. When prosecutors wish to by-pass the capital case processing system, they can easily do so without risking public censure. Plea bargaining to avoid the death penalty is not a practice which has fallen into disuse.

Plea bargaining can and does occur in a capital case at several very early stages. Negotiations concern the form of the charging instrument, the framing of the charge, and whether the charge will be murder. Plea bargaining may concern the filing of a notice of factors itself. The plea/trial regression analysis reported in Table 32 attempts a systematic examination of that decision. In 1972, the New Jersey Supreme Court held the former death penalty statute unconstitutional because defendants were pleading guilty to avoid the imposition of the death penalty.[16] The practice

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ing factor at the *McCrary* hearing; he simply must assert that there is such evidence. *Id.* at 143, 478 A.2d at 345.

15. N.J. Ct. R. 1:8-3.

16. State v. Funicello, 60 N.J. 60, 65-67, 286 A.2d 55, 58-59 (1972).

of pleading guilty to avoid the death penalty is alive and well under present capital punishment jurisprudence.[17] There does not seem to be any reason to assume that the constitutional infirmities associated with the previous law have been remedied.

Finally, the appendices include a detailed description of the methodology and data collection and verification procedures of this Study (Appendix A), reported frequencies on the principal study variables for which data was collected (Appendix B), a list of the death sentences imposed in New Jersey since the reimposition of capital punishment (Appendix C), the death penalty statute itself (Appendix D), and the July 29th Order of the Supreme Court of New Jersey appointing David C. Baldus as special master to make recommended findings as to proportionality in the administration of capital punishment (Appendix E).

This Study's analysis of prosecutorial decision-making concentrates upon the progression from death-possible to death-eligible, which reflects the prosecutor's decision to seek the death penalty, and upon the decision to offer and accept a plea bargain. The *Interim Report* presented to the New Jersey Supreme Court included regression analyses of these two key decision-making points in the capital case processing system. These two early discretionary decision-making points are controlled almost exclusively by the individual county prosecutors. The plea/trial decision is often a mirror image or surrogate for the decision to declare a case capital, and therefore that decision was subjected to investigation. If a plea agreement is reached, a case will not be declared capital. Once a case has been declared capital, a plea agreement is unlikely.

In *State v. Koedatich*, the Supreme Court of New Jersey expressed its concern about the unfettered nature of prosecutorial discretion in the capital case selection process.[18] The prosecutor

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17. *See, e.g.*, Case number 545, Camden County, in Part E of the Annotation (Part VIII), and case numbers 422, 447 and 454, in Part D of the Annotation (Part VIII).

18. "[We] recognize the need for greater guidance for prosecutors as they attempt to perform their constitutional duty of enforcing this statute . . . . Accordingly, we strongly recommend that the Attorney General, and the various county prosecutors, in consultation with the Public Defender, adopt guidelines for use throughout the state by prosecutors in determining the selection of capital cases." *Koedatich*, slip op. at 37-38 (N.J. Aug. 3, 1988). Although the majority found that the Public Defender homicide study had not proved that prosecutorial discretion had been exercised in an arbitrary and capricious fashion, the majority said: "Nevertheless, we believe there is a need to promote uniformity in the administration of the death penalty, which will be an additional safeguard against arbitrariness and an assistance to this Court in its developing proportionality review." *Id.*

has the greatest discretionary power in the earliest case processing stages. The prosecutor must first decide whether or not to charge a particular defendant with any crime at all.[19] The prosecutor has the option not to charge the defendant, or to charge him with a non-homicide offense, a lesser offense, or a homicide offense which does not carry the possibility of the death penalty. The next point at which the prosecutor acts unilaterally with respect to death eligibility is in the framing of the homicide charge, that is, the decision as to which homicide offense to charge, or the specific wording of the charge if it is to be murder.

A separate but related decision, which has determinative consequences for death eligibility, is the decision whether to proceed by indictment or accusation. In capital cases, a crucial difference exists between an indictment, which must be returned by a majority vote of the grand jury, and an accusation, which is drawn up by the prosecutor and filed without ratification by the grand jury. A case which is going to be capital must proceed on an indictment, not on accusation.[20] Therefore, the decision to proceed by accusation means that the prosecutor has already made a decision precluding death eligibility. The practice in the twenty-one county jurisdictions in New Jersey varies greatly. Some counties routinely reduce a murder charge to manslaughter in the context of a plea to an accusation. This process may include dismissing an indictment for murder.[21] Other county prosecutors infrequently use accusations, even though they may be plea bargaining murder charges to manslaughter convictions.[22]

Co-defendant cases offer a wide variety of charging options. Both or all co-defendants could be charged with the highest grade of homicide, purposeful or knowing murder, or with felony murder, or with aggravated manslaughter, or manslaughter. In New Jersey, the highest grade of homicide is purposeful or knowing

19. The prosecutor can decide that the offense was a justified homicide or that prosecution is unwarranted for other reasons. This happens infrequently, but the prosecutor does have the discretion not to charge a defendant with any crime at all, or to charge a misdemeanor. *See, e.g.*, case numbers 252, 275, 283, 316 and 379 in part D of the Annotation (Part VIII).

20. N.J. Ct. R. 3:7-2.

21. *See, e.g.*, case numbers 422, 447 and 454 in part D of the Annotation (Part VIII), and case number 242, in part E of the Annotation (Part VIII).

22. *See, e.g.*, Mercer County, case number 529, in part E of the Annotation (Part VIII), and case number 49, Essex County, in part E of the Annotation (Part VIII).

murder.[23] In fact, if the crime is to be declared death-eligible, the indictment must charge purposeful or knowing murder by the defendant's own conduct.[24] The case will not, however, be designated capital without the additional presence of one of the eight statutory aggravating factors.[25] The existence of particular statutory aggravating factors is alleged in a separate and discrete post-indictment procedure, called the serving of a notice of factors, which usually takes the form of a letter to the defendant and the court.

On July 29, 1988, the Supreme Court of New Jersey handed down an important and far reaching order which affects all pending capital cases and all sentences of death imposed as of that date.[26] The Order appoints Professor David C. Baldus[27] as a Special Master for the purpose of developing a system for proportionality review. The issuing of this order marks the beginning of an entirely new phase of death penalty jurisprudence in New Jersey. In *State v. Ramseur*, the Supreme Court of New Jersey expressed its intent to develop a review system which would ensure similar results in similar cases and prevent discrimination on an impermissible basis, including, but not limited to, race and sex.[28] The supreme court also announced that proportionality review in capital cases would be subject to a heightened standard, and that the appropriate universe of cases for comparative analysis was state-

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23. *See* N.J. STAT. ANN. § 2C:11-3a-c (West 1982 & Supp. 1988). Basically, this is killing with the highest form of culpability. *See* N.J. STAT. ANN. §§ 2C:2-2b(1) and (2) (West 1982). A felony murder indictment by itself will not support the serving of a notice of factors even though the presence of an eligible concomitant felony is one of the eight enumerated statutory aggravating factors.

24. *See* N.J. STAT. ANN. § 2C:11-3 (West 1982 & Supp. 1988).

25. The jury must find both the statutory aggravating circumstances and that the circumstances outweigh any mitigating circumstances in order for the defendant to receive the death penalty. N.J. STAT. ANN. § 2C:11-3c (West 1982 & Supp. 1988).

26. The text of this order is included here as Appendix E.

27. Professor David C. Baldus of the State University of Iowa School of Law is a most distinguished scholar who has served as a proportionality review consultant to other state supreme courts. With his colleagues Professors George Woodworth and Charles A. Pulaski, Jr. he prepared the data base and statistical analysis which was introduced as evidence in McCleskey v. Kemp, 107 S. Ct. 1756 (1987). The results of this research have been published in a series of articles in professional journals and are about to be issued as a book: D. BALDUS, G. WOODWORTH & C. PULASKI, EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (Northeastern University Press, forthcoming 1989). Citations are to the 1987 manuscript copy which was distributed to professionals for comments. The research conducted by Professor Baldus and his colleagues is discussed in detail and cited at length in the Literature Review section of this Article (Part V).

28. *Ramseur*, 106 N.J. at 324-31, 524 A.2d at 291-94.

wide.[29] The July 29th Order of the Supreme Court of New Jersey authorizes the Special Master, in conjunction with the Administrative Office of the Courts, to develop a public data base for purposes of conducting proportionality review.[30] The July 29th Order states that this public data base may incorporate some of the data collected by the Office of the Public Defender. Findings from the Interim Report of that Study are reported in this Article.

The terms of the July 29th Order instruct the Special Master to develop a public data file that may additionally include other available data and a record of the dispositions of all relevant homicide cases. This process is now in its formative stage. The Special Master has the authority to conduct hearings, procure the services of expert technical advice, call witnesses, and request public records and other relevant information.[31] The Special Master will file a Report consisting of recommended findings of fact and recommended conclusions of law. This Report will be

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29. *Id.*

30. Statistical evidence from a large data base of Georgia homicide cases was presented to the United States Supreme Court in McCleskey v. Kemp, 107 S. Ct. 1756 (1987). The majority opinion in *McCleskey*, written by Justice Powell, rejected the argument that aggregate data demonstrating system-wide discrimination on the basis of race is sufficient to overturn an individual death sentence, absent proof of individualized discrimination. This result has been widely criticized. *See, e.g.*, Burt, *Disorder in the Court: The Death Penalty and the Constitition*, 85 MICH. L. REV. 1741 (1987) and Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988). Legislation has been introduced in the United States Congress in the form of a civil rights bill which would allow the introduction of such aggregate data to be used to challenge individual death sentences. *See* H.R. 4442, 100th Cong., 2d Sess. (1988) (The Racial Justice Act of 1988).

On August 9, 1988, at the American Bar Association Annual Meeting in Toronto, Canada, the House of Delegates of the American Bar Association adopted the following resolution, No. 109:

> BE IT RESOLVED, that the American Bar Association opposes discrimination in capital sentencing on the basis of the race of either the victim or defendant.
>
> BE IT FURTHER RESOLVED, that the American Bar Association supports the enactment of federal and state legislation which strives to eliminate any racial discrimination in capital sentencing which may exist.
>
> BE IT FURTHER RESOLVED, that this resolution does not create a position for the American Bar Association on whether or not capital punishment is an appropriate criminal sanction.

31. The authors of this Study have repeatedly and continuously asked for an evidentiary hearing on the findings and methodology of the Study. Motions have been submitted to a number of trial courts, and a remand for an evidentiary hearing was one of the requests made to the Supreme Court of New Jersey in *Koedatich*.

submitted to the interested parties, who shall have the opportunity to respond and state exceptions to it in such form as they desire.[32] The exact procedural details of the evidentiary hearings which will be held, the extent and form of the public data base to be created, and the study design are all questions that remain to be addressed by the Special Master and the Administrative Office of the Courts. The issuance of the July 29th Order, as well as its scope and comprehensiveness, indicate that the Supreme Court of New Jersey does not intend to conduct proportionality review in a manner which is either superficial or perfunctory.

From the outset of this Study the authors have asked county prosecutors to come forward with their criteria for selecting cases for capital prosecution. The evidentiary hearings which will be conducted pursuant to the July 29th Order of the Supreme Court of New Jersey will give the twenty-one individual county prosecutors the opportunity to demonstrate that the reenacted capital punishment statute has been applied uniformly across counties and without the taint of discrimination based upon impermissible factors such as race, gender and economic status. The data reported here suggest that the statute has not been applied in a manner which is free from impermissible discrimination.

II. THE HISTORY OF CAPITAL PUNISHMENT IN NEW JERSEY PRIOR TO 1982[33]

There is indeed a long tradition of capital punishment in New Jersey which can be traced to, and even beyond, the days of the earliest colonial settlements. The historical record provides a wealth of information on such subjects as: what crimes were considered serious enough to be punished with death; how and by whom the penalty was to be carried out; who had the authority to

32. The Report of the Special Master will not bind the Supreme Court of New Jersey on any issue, nor shall the recommended findings and conclusions of law include any determination concerning the excessiveness or disproportionality of any individual death sentence. *See* Appendix E.

33. The authors wish to thank David Blaustein, Librarian, Department of the Public Advocate; Anne Sinclair, Public Advocate Library; Robert Bland, Librarian, New Jersey State Library; and Rosemary Little, Librarian, Princeton University Library, for their continued asistance in obtaining the sometimes elusive documents and materials for this section. The authors are especially indebted to Erwin L. Feiertag, author of Capital Punishment in New Jersey 1664-1950 (Columbia University M.A. Thesis, 1951, Political Science) [hereinafter Feiertag] for his detailed summary of the history of capital punishment in the colony and State of New Jersey.

impose it or rescind it; what was assumed about capital punishment and what was apparently subject to contemporary debate; and when and how legislative changes concerning capital punishment occurred.

Prior to 1702, the territory which is now New Jersey was divided into East Jersey and West Jersey, each with its own separate set of criminal laws and traditions.[34] The criminal code of East Jersey, the first criminal legislation in the state, was enacted in 1668 and designated eleven crimes as punishable by death, including: bearing false witness, buggery, sodomy, forcible stealing, incorrigible stealing, being a witch, and being an undutiful child.[35] In 1681-82, the East Jersey legislature added arson to the list of capital crimes.[36] West Jersey, by contrast, did not enact a long list of capital offenses.[37] In both colonies corporal punishments such as lashing at the stake, the use of stockades, branding, whipping and mutilation were authorized punishments. Imprisonment was not a generally accepted form of punishment.[38]

In 1681-82, a group of Quakers purchased West Jersey for 3400 pounds, and their influence on the criminal laws was quickly apparent.[39] In 1693, the West Jersey legislature established the Court of Oyer and Terminer with capital jurisdiction. Formerly,

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34. "In comparing the laws of East and West Jersey, we cannot help but be impressed by the wide differences between them especially insofar as the capital laws are concerned." *Id.* at 10.

35. The eleven capital crimes were (1) willful murder; (2) kidnapping; (3) being a witch; (4) rape; (5) bestiality; (6) willingly and maliciously bearing false witness with purpose to take away a man's life; (7) homosexuality; (8) for children above sixteen years of age to smite or curse their natural father or mother; (9) a third offense for robbery; (10) a third offense for burglary; and (11) a fourth offense for thievery. *Id.* at 7-8. This statute is reprinted in 2 STATE OF NEW JERSEY, REPORT OF THE PRISON INQUIRY COMMISSION 343-47 (1918) [hereinafter 1918 REPORT].

36. Feiertag, *supra* note 33, at 8. In 1698 the East Jersey legislature additionally made a form of piracy in the service of a foreign prince a capital offense. *Id.* at 9.

37. The heterogeneous population of East Jersey was apparently dominated by Puritan immigrants from New Haven who came to settle in Essex, Middlesex, Monmouth and Bergen Counties. The East Jersey Code followed the strict, puritanical Connecticut code of 1650. Sections of the Connecticut Code of 1650 are reprinted in 1918 REPORT, *supra* note 35, at 341-43. By contrast, the population of West Jersey was primarily middle class Englishmen, mainly Quakers. Feiertag, *supra* note 33, at 4.

38. New Jersey was unusual in its early introduction of restitution, both to society and to the victim's relatives. *See* Harry E. Barnes, *A History of the Penal, Reformatory and Correctional Institutions of the State of New Jersey*, in 1918 REPORT, *supra* note 35, at 30.

39. Feiertag, *supra* note 33, at 11. The original Quaker Criminal Code of West Jersey, 1681, is reprinted in 1918 REPORT, *supra* note 35, at 347-51.

the legislature alone had the authority to try capital cases.[40] Significant differences remained between the two colonies and influenced the development of their laws. For example, slavery was developed to a higher degree in West Jersey, especially in the southern part of the colony where large Quaker estates similar to southern plantations used slave labor.[41]

It was not until 1702 that East and West Jersey were united under a common colonial government with a single legislative body, the General Assembly.[42] The first criminal code of the state was not passed until 1796. Between 1717 and 1782, however, seven additional crimes were declared capital by the newly centralized state legislature.[43]

At the close of British colonial rule in New Jersey there were 17 crimes which carried the possibility of the death penalty.[44] The manner of execution was hanging and burning, with the latter punishment being applied especially to slaves. Although New Jersey did not have a separate slave code, a number of legal distinctions existed regarding slaves and the imposition of the death penalty.[45] In 1713-1714, an act provided that any "Negro, Indian or other Slave" who committed murder, rape, conspiracy or other designated crime would "suffer the Pains of Death" upon conviction of three justices of the peace in conjunction with five of the principal freeholders, without grand jury if "seven . . . agreeing,

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40. Feiertag, *supra* note 33, at 12.

41. *Id.* at 14.

42. *Id.* at 15-16.

43. These included: (1) "destroying of ships . . ."; (2) "destroying of bastard children . . ."; (3) counterfeiting of "bills of Credit"; (4) counterfeiting of currency; (5) embezzlement by a bank officer; (6) stealing a horse; and (7) treason. *Id.* at 19-24. The offense of stealing a horse was made capital in 1747 "because it was found this offense was on the increase," and the law was passed to deter others. However, in 1769, this same act was repealed, because horse thievery was continuing and the severity of the punishment, rather than deterring the crime itself, seemed instead to discourage persons from vigilantly pursuing the thieves. *Id.* at 21-22 (citing S. ALLENSON, ACTS OF THE GENERAL ASSEMBLY OF NEW JERSEY, 1702-1776, at 352-53 (1776)).

44. *Id.* at 24.

45. *Id.* at 26. In 1772, the slave population of New Jersey was relatively small, numbering 3,313 out of a total population of 71,023 for eight counties reporting. By 1790, when the first state census was taken, the total population consisted of 184,139 persons, of whom approximately 170,000 were white, 11,400 were slaves, and 2,800 were designated as "all other free persons." Seven counties had populations between 15,000 and 20,000; four had over 10,000 and one over 5,000. Only Cape May had a population of less than 5,000. *Id.* at 32 (quoting U.S. BUREAU OF CENSUS, A CENTURY OF POPULATION GROWTH, 1790-1900 (1909)).

shall give Judgment."[46] This statute also institutionalized summary procedures for the execution of slaves.

Only white free males over 21 had the vote and the authority to hold public office. The creation of special courts for slaves coincided with a period when other special punishments were established for slaves, including recorded instances of burning alive, and cutting off a man's right hand and burning it before him, followed by hanging and a burning of the body.[47] Other slaves were brought to attend the executions of slaves for deterrent effect, and all executions were generally public and well attended. Burning alive was usually reserved as a punishment for slaves who committed murder or assault; but even for "petty thefts and misdemeanors, 'they were hung on short shrift.' "[48] In 1768, the procedure of trying slaves in separate, summary proceedings was abolished, but slaves could still be put to death for crimes which were not capital for free white men. Slaves could be executed for manslaughter, stealing a sum above the value of five pounds and any other felony or burglary.[49]

The first constitution of New Jersey[50] provided that the common and statutory law of England, which had heretofore been the law in the colony,[51] would remain in force. At the time of American independence, the common law of England provided for the death penalty for all felonies and for a host of other crimes, including a variety of forms of property crimes.[52]

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46. *Id.* at 26 (quoting W. BRADFORD & A. BRADFORD, THE ACTS OF THE GENERAL ASSEMBLY, 1703-1730 (1732)).

47. *Id.* at 27-28. The tradition of burning the body of the executed for certain classes of offenders or for heinous crimes goes back to pre-Elizabethan England. Burning continued until 1790 to be the punishment inflicted on women for treason, but the practice was abolished, apparently by George III. The goal of such methods of capital punishment as burning, gibetting, drawing and quartering was to punish some capital crimes more severely than others. 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND at 477 (1883) [hereinafter J. STEPHEN].

48. Feiertag, *supra* note 33, at 28 (quoting A. MALLICK, THE STORY OF AN OLD FARM (n.d.)). This book recounts tales of justice in the Monmouth County Court of Sessions in 1694.

49. *Id.* at 29.

50. N.J. CONST. of 1776, art. XXII, *reprinted in* Laws of the State of New Jersey (Trenton, N.J. 1821) [hereinafter 1821 REV. LAWS].

51. The earliest colonial statutes of New Jersey were principally concerned with establishing the metes and bounds of the county lines, Hunterdon being the first county formed. *See, e.g.*, L. 1713-14, 1821 REV. LAWS 5.

52. This was not always the situation in Britain. In ancient England homicide was a crime amendable with money; in other words, it was a tort. 2 F. POLLOCK & F.W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 451 (2d ed. 1898

In New Jersey, the first comprehensive statute governing crimi-

& reiss. 1968) [hereinafter POLLOCK & MAITLAND]. Criminal jurisdiction, however, became a source of revenue to the King. The idea of an offense against the State, central to our concept of crime, originates from the historical fact that "pleas" belonged to the crown. *Id.* at 456-57. Pleas and forfeitures were among the rights owned by the King which only the King could grant. Certain pleas belonged specially to the crown, and the profits and fees from them belonged to the King. A breach of the King's peace included violence to persons, and the King was the supreme judge or arbiter in all criminal cases. *Id.*

From the time of Henry II pleas to homicide, mayhem, robbery and rape belonged to the crown, but the penalties differed radically from place to place. *Id.* at 457. Outlawry was the capital punishment of the age. It was the punishment reserved for those who were guilty of the worst crimes. *Id.* at 450-51.

The term murder derives not from any concept of intent or premeditation, but from the name of the fine, *murdrum*, exacted from the village or surrounding community. At the time of the Danish conqueror Canute, murder was a killing with no apparent suspect or motive, *see* 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 194-9, 195 (1769) (facsimile ed. 1979) [hereinafter BLACKSTONE'S COMMENTARIES] ("The name of murder was anciently applied only to the secret killing of another . . . for which the whole hundred [or community] was liable to a heavy [fine or] amercement.") The assumption was that if the community could not produce the murderer, the community committed it or "connived at the murder." The "murdrum" was therefore the fine paid by the community.

As to punishment, it was felt that hanging was too good a death for one who killed his Lord. Rather, it was felt that the killer "should perish in torments to which hell-fire will seem a relief." POLLOCK & MAITLAND, *supra*, at 500. The law could and did on occasion demand several deaths, drawing, hanging, disembowelling, burning, beheading, and quartering. The famous traitors of Edward I's day were sentenced to four or five different forms of the death penalty. David of Wales, for example, was "drawn for treason, hanged for homicide, disembowelled for sacrilige, beheaded, and quartered for compassing his king's death." *Id.* at 501 n.1. Towards the end of the 13th century, however, there were only seven crimes in England for which the punishment was death, and in general executions were by hanging. The crimes were: treason, homicide, rape, robbery, arson, burglary and grand larceny. *Id.* at 511.

All of this would imply that the death penalty would have been meted out routinely and with frequency, were it not for the Benefit of Clergy. *See* 1 J. STEPHEN, *supra* note 47, at 459-73 (citing Blackstone, Braxton, Hale and others).

> The result of [the Benefit of Clergy] was to bring about for a great length of time a state of things which must have reduced the administration of justice to a sort of farce. Till 1487 anyone who knew how to read might commit murder as often as he pleased, with no other result than that of being delivered to the ordinary to make his purgation, with the chance of being delivered to him "alisque purgatione." That this should have been the law for several centuries seems hardly credible, but there is no doubt that it was. Even after 1487 a man who could read could commit murder once with no other punishment than that of having M branded on the brawn of his left thumb, and if he was a clerk in orders he could till 1547 commit any number of murders apparently without being branded more than once.

Id. at 463-64.

It was not until the reign of Henry VII that the Benefit of Clergy was limited at all, *id.* at 464, and only in 1547 was it taken away in all cases of murder, *id.* at 465. Still, the punishments at early criminal law were severe, particularly so for those not so fortunate as to qualify for the Benefit of Clergy, and the severity of punishments had increased greatly under the Tudors.

nal procedure was enacted in 1795[53] and the first comprehensive crimes act was passed in 1796.[54] The 1796 statute prohibited murder and set out its punishment as death,[55] with the special proviso that the body of the executed person could be turned over for dissection.[56] Under the 1796 law, there was no distinction between first and second degree murder, or between principals and aiders and abettors. All murderers were sentenced to death.

A later section of the 1796 statute defined a separate category

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> [T]here can be no doubt that the legislation of the eighteenth century in criminal matters was severe to the highest degree, and destitute of any sort of principle or system. In practise the punishment of death was inflicted in only a small proportion of the cases in which sentence was passed. The persons capitally convicted were usually pardoned conditionally on their being transported either to the American colonies for life or afterwards to the Australian colonies for life or a long term of years.

Id. at 471.

The history of capital punishment in England seems to indicate that although death was the statutory penalty for many crimes, in fact there were many procedural avenues of bypass.

53. Act of Mar. 6, 1795, 1821 REV. LAWS 184. The 1795 criminal procedure statute set out that a defendant could plead not guilty or stand mute at his criminal trial. *Id.* at 184. The *peine forte et dure*, which involved starvation and crushing the accused person's naked body with heavy stones or iron in order to force the person to plead, was abolished under the statute as well, *id.* at 185. The state wanted the accused to enter a plea because a person who stood silent could not be executed. *See also* Act of Nov. 22, 1794, 1821 REV. LAWS 142.

54. Act of Mar. 18, 1796, 1821 REV. LAWS 244.

55. The crime of murder was not defined in the statute but a penalty was stipulated: "That every person, who shall commit murder, or shall aid, abet, counsel, hire, command, cause or procure any person or persons to commit murder, shall, on being thereof convicted or attainted, suffer death . . . ." Act of Mar. 18, 1796, 1821 REV. LAWS 245. This statute was a typical "penalty" statute. Its function was to specify penalties for crimes, not to define crimes. Earlier statutes referred to capital punishment indirectly; *e.g.*, they declared that "indictments for treason, murder, manslaughter, sodomy, rape, polygamy, arson, burglary, robbery, forgery, perjury, and subornation of perjury, and *crimes punishable with death*, . . . shall be tried in the supreme court or the court of oyer and terminer." Act of Nov. 22, 1794, 1821 REV. LAWS 143 (emphasis added).

56. Act of Mar. 18, 1796, 1821 REV. LAWS 245. ("[T]he court may, at their discretion, add to the judgment, that the body of such offender shall be delivered to a surgeon for dissection . . . .") The tradition for turning the body of the executed person over for dissection was derived directly from the British tradition.

> In the reign of George II an act was passed which was intended to make the punishment for murder more severe than the punishment for other capital crimes. This was 25 Geo.2, c.37, which provided that a person convicted of murder should be executed on the next day but one after his sentence (unless he was tried on a Friday, in which case he was to be hanged on the Monday). He was to be fed only bread and water in the interval, and his body, after death, was either to be dissected or to be hung in chains.

1 J. STEPHEN, *supra* note 47, at 477.

of crimes and declared them also to be murder, and hence punishable by death.[57] This was the first comprehensive statutory definition of felony murder in the state, and it included a killing during the commission of *any* unlawful act against the peace of the state of which the probable consequence *may* be bloodshed. This section also provided that the death of anyone during the commission of a crime would be defined as murder. This definition of felony murder was readopted in 1898 and remained the effective statutory definition of felony murder until 1979.[58]

This same section provided that it would be murder to kill "any judge, justice of the peace, sheriff, coroner, constable, or other commonly known officer of justice, either civil or criminal, . . . [of the State or the United States] in the execution of his office or . . . a private person, endeavoring to suppress an affray, or to apprehend a criminal . . . ."[59] This incorporated two crimes into the category of murder: the killing of a public official and the killing of any private person assisting in the apprehension of a criminal. The statutory structure, which remained unchanged until 1979, was that certain acts were declared to be murder, and murder was punishable with death. There was no specific language concerning intent in the section setting out death as the punishment for murder. The section merely stated: "[E]very person who shall commit murder" shall "suffer death."[60]

The 1796 statute provided that if a person previously convicted and sentenced to hard labor "shall be convicted of a second offense of a like nature [i.e., manslaughter, sodomy, rape, arson, burglary, robbery, or forgery] he shall suffer death."[61] The 1796 law also specifically abolished the Benefit of Clergy, itself not a

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57. Act of Mar. 18, 1796, 1821 REV. LAWS 262. Included in this category were persons who killed in the course of

> committing or attempting to commit sodomy, rape, arson, robbery or burglary, or any unlawful act against the peace of this state, of which the probable consequence may be bloodshed, . . . or if the death of any one shall ensue from the committing or attempting to commit any such crime or act as aforesaid . . . .

Id.

58. *Cf.* N.J. STAT. ANN. 2C:11-3(a)(3) (West 1982).

59. Act of Mar. 18, 1796, 1821 REV. LAWS 262.

60. *Id.* 1821 REV. LAWS 245. Paragraph 66 also did not specify an intent requirement for felony murder or the killing of a law enforcement officer. The only reference to intent is in the *proviso* concerning killing during an escape, which includes the language "knowing the intention with which such private person interposes . . . ." *Id.* 1821 REV. LAWS 262.

61. *Id.* 1821 REV. LAWS 263.

meaningless technicality.[62] The 1796 statute specified hanging as the method of execution,[63] and the local sheriff was responsible for carrying out the sentence.[64] The crimes of Treason and Petit Treason were also punishable by death.[65] Manslaughter carried a fine of $1,000 and a maximum term of three years at hard labor.[66]

The Criminal Code of 1796 was a revision of the East Jersey Code of 1668.[67] Death was the penalty for twelve crimes[68] and every person who committed murder, or aided, abetted, counseled, caused or procured any person to commit murder was also guilty of murder. There was no differentiation between first and second degree murder.[69] Death was to be inflicted solely by hanging for all, white or black.[70] The Court of Oyer and Terminer was given jurisdiction to try all capital cases, and the legislature had the power to grant pardons. It was not until the revision of 1820-1821 that the governor was given the power to suspend the execution of a death sentence and to grant a reprieve from a death sentence.[71]

The revision of 1829 changed the definition of murder to exclude killings by misadventure or in defense of self, family or household, and the killing of a person committing a felony.[72] In 1833, Governor Seeley asked the legislature to abolish public executions, stating: "I have long been convinced that public executions for the crime of murder have very little influence in deterring others from committing the same offense. Indeed, I am

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62. *Id.* 1821 REV. LAWS 263. The Benefit of Clergy provided for significantly reduced punishments for clergymen found guilty of criminal acts in England until its abolition in 1827. The Benefit originated in the fourteenth century in England, apparently as a means of freeing clergymen from the jurisdiction of the secular courts. Over time, however, it came to be applied not only to clergy, but to anyone who could read and to all Peers. The Benefit served to insulate the most politically powerful members of English society from the imposition of the most severe criminal punishment. *See* 1 J. STEPHEN, *supra* note 47, at 464.

63. Act of Mar. 18, 1796, 1821 REV. LAWS 264.

64. *Id.* 1821 REV. LAWS 245.

65. *Id.* 1821 REV. LAWS 244-45.

66. *Id.* 1821 REV. LAWS 245.

67. Feiertag, *supra* note 33, at 33.

68. In 1796, the twelve capital crimes were: murder, treason, petit treason, a second offense of manslaughter, sodomy, rape, arson, burglary, robbery, or forgery, permitting a capital defendant to escape, and aiding in the rescue of a capital prisoner. *Id.* at 34-36.

69. *Id.* at 34-35.

70. *Id.* at 36.

71. *Id.* at 39.

72. *Id.* at 39-40.

inclined to think it has a contrary effect."[73] In 1835 the legislature responded by passing a law that prohibited public executions and provided that executions be carried out either in the prison where the convict is confined or in some special enclosure near the prison.[74] Public executions had been a well established tradition as a form of public entertainment in England, on the continent of Europe, and in America.[75] The punishments of branding, cutting off a limb, and whipping were also presumably carried out in public.

In 1839 the crime of murder was substantially redefined, and two degrees of homicide were introduced.[76] First degree was defined as "premeditated" murder and was punished by death. Second degree was defined as all murders other than first degree. Second degree murder was punished by imprisonment at hard labor for a term not less than five years, nor more than 20 years. This legislation significantly reduced the class of death-eligible murders.

The death penalty is referred to in several statutes between the Crimes Act of 1796 and the next major revision of criminal law, the Crimes Act of 1846, but no other change in the definition of murder or the class of death eligibles was enacted.[77] The 1844 New Jersey Constitution contains only one reference to capital punishment, a provision exempting capital crimes from the provi-

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73. *Id.* at 40.

74. *Id.* It was not until 1907 that all executions were to be carried out in a single "death house" at Trenton State Prison. In the 1950's, executions customarily took place on Tuesdays at 10 p.m. Pamphlet, "Thirty-seven Questions on Capital Punishment" at 1 (Indianapolis, 1963). The Capital Sentencing Unit remains segregated and centralized at Trenton State Prison. The Execution Chamber where the death penalty is to be carried out by injection is in Trenton State Prison. In 1986 the Department of Corrections adopted a set of regulations regarding the Capital Sentencing Unit, *see* 18 N.J. Reg. 2034.

75. "Executions in America began as public events, sometimes attracting thousands of spectators and often accompanied by a carnival atmosphere." W. BOWERS, LEGAL HOMICIDE, 43 (1984). For numerous accounts of such executions, see N.K. TEETERS & J.H. HEDBLOM, HANG BY THE NECK, Springfield (1967).

76. Act of Mar. 7, 1839, 1839 N.J. Laws 147, 147-48. Feiertag refers to this amendment as a law passed in 1838. The session law clearly states it was passed in 1839. Feiertag, *supra* note 33, at 41.

77. An act of 1797 did not allow the "importation" of any person sentenced to death. Act of Jan. 28, 1797 1821 REV. LAWS 266. A law of 1798 provided for the conditions of imprisonment. Act of Feb. 15, 1798, 1821 REV. LAWS 325. A person convicted of murder or other felonies could not be a witness. Act of June 7, 1799 1821 REV. LAWS 462. An 1820 supplement to the Crimes Act of 1796 provided for slaves convicted of manslaughter and other crimes who were sentenced to imprisonment to be sent out of state. Act of Nov. 3, 1820, 1821 REV. LAWS 793.

sion creating a constitutional right to bail.[78] The constitution did not grant the governor the power to pardon death sentences by himself. Instead, he was made a member of the Court of Error and Appeals, and this court had the power to grant pardons in all cases except impeachment.[79]

The 1847 revision of the murder statute was part of a wholescale revision of the criminal and civil laws. The revision of 1846 consolidated the former offenses classified as murder and changed the defining language.[80] The revised murder statute began with language almost identical to that used in the 1796 statute. Section three defined as murder: (1) killing during the commission of sodomy, rape, arson, robbery, burglary or "any unlawful act against the peace of this state of which the probable consequence may be bloodshed . . . ";[81] or (2) the killing of a judge or police officer; or (3) killing "a private person" assisting in the apprehension of a criminal.[82]

The next section divided murder into first degree, for which death was the penalty, and second degree. First degree murder was defined as murder "perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing" and felony murder, when arson, rape, sodomy, robbery or burglary were the underlying felonies.[83] All other murders were second degree. Third degree murder was eliminated. The penalty for all second degree murder was a maximum term of 20 years with a minimum term of five years. Life imprisonment in solitary confinement was removed as a penalty for murder. For the first time, the murder statute specified an intent requirement for first degree murder. This new definition of first degree murder expanded the class of death-eligible murders from the 1839 definition, which excluded felony murders. The punishment for second degree murder, or all residual killings, was reduced. Second degree murder was punishable by what had been the penalty for the former third degree murder, a term of 20 years with no minimum.

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78. N.J. CONST. art. I, § 10 (1844), *reprinted in* N.J. REV. STAT. XXII (1847).

79. N.J. CONST. art. V, § 10, *id.* at XXVIII-XXIX. Feiertag, *supra* note 33, at 42-43. The governor did not receive power to commute death sentences on his own authority until the New Jersey Constitution of 1947 was ratified.

80. N.J. REV. STAT. tit. 8, §§ 3-6 (1847).

81. *Id.* § 3.

82. *Id.* § 3.

83. *Id.* § 4.

The 1846 statute provided that the jury was to decide whether the defendant was guilty of first degree murder or second degree murder.[84] If the defendant's conviction was based upon a confession, this same section ordered the court to examine witnesses to determine the degree of crime, and consequently whether or not death should be imposed. Death was the penalty for those convicted of murder in the first degree as principals, "aiders and abettors, counselors and procurers."[85] The proviso stating that the body of the executed person may be given over for dissection was retained.[86]

The 1846 statute retained the death penalty for treason and petit treason.[87] Suffering escapes or rescuing capital prisoners remained capital offenses.[88] Hanging continued to be the method of execution, with the cost and duty to execute falling upon the county.[89] This may be the first mention of the cost of the death penalty in the New Jersey legislative enactments. The same 1846 revision of the laws established a state prison and set out the duties of its administrators and the conditions of solitary confinement, providing for the first time that the costs of conviction of every prisoner sentenced to labor and imprisonment shall be paid by the state.[90]

The next major revision of the Criminal Code of New Jersey was enacted in 1898. The death penalty was continued for treason, petit treason, murder, felony murder and the killing of designated officials of the state and federal government.[91] The 1898 statute divided murder into first and second degree and increased the penalty for second degree murder from a maximum of 20

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84. The language is unequivocal: "[T]he jury . . . shall . . . designate, by their verdict, whether it be murder of first or second degree . . . ." *Id.* Feiertag argues that the jury did not have the authority to decide between life and death until 1874, but by deciding the degree of crime, they decided penalty. Certainly, the jury received greater authority over sentencing when they were given the authority to recommend life instead of death without a finding of second degree murder in 1874. *Cf.* Feiertag, *supra* note 33, at 48.

85. *See* N.J. REV. STAT. tit. 8, ch. 1, § 5 (1847).

86. *Id.*

87. *See id.* § 1 for the definition of Treason, and § 8 for the stipulation of the penalty for Petit Treason. Misprison of Treason was not a capital offense. *Id.* § 2.

88. *Id.* §§ 54 and 56. Death was no longer the penalty for a second conviction for a felony. *See id.* § 94.

89. *Id.* § 97.

90. N.J. REV. STAT. tit. 8, ch. 10, § 3 (1847).

91. Act of June 14, 1898, ch. 235, § 106-13, 1898 N.J. Laws 794, 824-26 (defined murder and sets out the penalty of death).

years to a maximum term of 30 years. Aiders, abettors, counselors, and procurers of first degree murder continued to be subject to the death penalty. The 1898 law did not alter the jury's authority to determine the degree of a homicide and thereby determine the limits of the punishment.

The 1898 statute added a new proviso creating for the first time the *non vult* plea to murder.[92] The 1846 law did not provide for a *non vult* plea.[93] The *non vult* plea established in 1898 continued in effect until 1972 when the New Jersey Supreme Court ruled that the *non vult* plea violated a defendant's sixth amendment rights under the principles established in *United States v. Jackson*.[94] The form of the plea in 1898 contained all of the salient features of the law which remained in effect until 1972. The purpose of the plea was the avoidance of the death penalty. The prosecutor could refuse to accept the plea, without explanation, even if the defendant admitted guilt.

In 1902, a new capital crime was introduced: assault with intent to kill the President or Vice President of the United States, the chief executive of any other state, or the heir to the throne of any foreign state.[95] In 1900, a bill was introduced which proposed

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92. This proviso read: "[P]rovided, nothing herein contained shall prevent the accused from pleading *non vult* or *nolo contendere* to such indictment; the sentence to be imposed, if such plea be accepted, shall be the same as that imposed upon a conviction of murder in the second degree." (emphasis added). 1898 N.J. Laws 825. The same section continued to prohibit a guilty plea to murder.

93. *See* N.J. REV. STAT. tit. 8, ch. 1, § 3-4 (1847). On the subject of pleas the 1846 law only stated: "[I]f such person [the accused murderer] shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly." *Id.* § 4. This implies that under the 1846 law the court would not always sentence to death if the accused confessed to the charged crime.

94. 390 U.S. 570 (1968). In State v. Funicello, 60 N.J. 60, 286 A.2d 55 (1972), the New Jersey Supreme Court declared the then operative capital punishment statute unconstitutional on the grounds that the *non vult* plea coerced guilty pleas and consequently violated the defendant's sixth amendment rights under *Jackson* and subsequent cases. This conclusion was reached reluctantly by the court. The New Jersey Supreme Court initially held that the *non vult* plea was not unconstitutional under *Jackson*. The United States Supreme Court disagreed and remanded. 403 U.S. 948 (1971). The New Jersey Supreme Court thereupon declared: "All pending and future indictments for murder shall be prosecuted on the basis that upon a jury's verdict of murder in the first degree, the penalty shall be life imprisonment." *Jackson*, 60 N.J. at 68, 286 A.2d at 59.

95. The new crime was a category of treason and was defined as assault with intent to kill upon the President or Vice President of the United States or upon the ruler, governor or chief executive of any state, or upon the heir to the throne of any foreign state. Act of Apr. 3, 1902, ch. 133, 1902 N.J. Laws 405. The law appears to have been aimed at "anarchists." The records of execution, which have been kept at Trenton State Prison since

electrocution as the method of execution instead of hanging. Electrocution was adopted as the means of execution in 1906.[96] All executions were to take place at a special execution building within Trenton State Prison. This marked the beginning of centralized record keeping for executions. One reason for centralization was the expense of building an execution chamber. Facilities for electrical execution could not, it was felt, be reasonably borne by the counties. Execution was to take place not less than four weeks nor more than eight weeks after trial court judgment.[97]

Feiertag refers to bills introduced in 1900 which would give the jury the discretion to decide between life and death. An editorial in the *Newark Evening News* expressed the opinion that the adoption of such a bill was tantamount to abolishing capital punishment because juries were too readily influenced by pleas for compassion and would always vote against the death penalty.[98] Since the jury decided whether the murder was first degree (and hence punishable by death) or second degree (and punishable only by a term of imprisonment), juries already had some authority to decide between life and death. In 1916, however, the legislature authorized the jury to choose between the death sentence or imprisonment at hard labor for life after a conviction for first degree murder,[99] a change which was perceived as significant. This provision was not included in the reformulation of the murder statute of 1917 which reinstated the 1898 definition of murder. The statute did, however, provide for life imprisonment as an al-

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1907, indicate that no one was ever executed or sentenced to death under this statute. Nor has anyone ever been executed in New Jersey since 1907 for a crime other than murder. N.J. COMM'N TO STUDY CAPITAL PUNISHMENT, REPORT at 18 (1964) [hereinafter 1964 REPORT]. Feiertag describes this law as part of the revision of 1898. Feiertag, *supra* note 33, at 49. It was an amendment to the 1898 code which was enacted in 1902.

96. Act of Apr. 4, ch. 79, 1906 N.J. Laws 112. The changeover to electrocution was widely supported: "[The] revolting spectacle of a man slowly strangling to death at the end of a rope should be relegated to the Dark Ages as fast as possible . . . it is certain that the spectacle of death by electricity is far less barbarous to sight than death by hanging." Editorial, N.J.L.J., *quoted in* Feiertag, *supra* note 33, at 53. In 1907, an amendment to the statute authorizing execution authorized representatives of the daily newspapers and news services to be present at executions. Act of Apr. 25, 1907, ch. 104, 1907 N.J. Laws 260.

97. Feiertag, *supra* note 33, at 54.

98. *Id.* at 52.

99. Act of Mar. 29, 1916, ch. 270, 1916 N.J. Laws 576. This legislation put into effect the change which had been debated and rejected in 1900. Feiertag, *supra* note 33, at 56. The definition of murder was not changed; the statute simply allowed the jury to recommend life imprisonment at hard labor, "in which case this and no greater punishment shall be imposed." *Id.*

ternative penalty to be imposed upon a plea of *non vult*.[100]

In 1919, the 1898 formulation for imposing the death penalty was amended to introduce the language "unless the jury shall by their verdict . . . recommend imprisonment at hard labor for life, in which case this and no greater punishment shall be imposed . . . ."[101] In other words, the legislature regranted to the jury the discretion to impose a life term instead of the death penalty for first degree murder. Aiders and abettors, counselors and procurers were still subject to the death penalty, and the penalty for second degree murder remained 30 years, unchanged from 1898.

In 1922, the legislature provided that if a person condemned to death has been or shall be found insane, execution shall be stayed or postponed and the prisoner confined in the State Hospital at Trenton, "until such time as such condemned person shall be conscious of having committed such crime and shall be aware that he or she is amenable to punishment and is appreciative of his situation as one awaiting the execution of the death penalty . . . ."[102] The same statute provided, upon the order of the trial judge, for the release of one acquitted by reason of insanity if he was restored to reason.[103]

The next important development was the addition of kidnapping to the roster of capital crimes with the passage of the "Lindbergh" kidnapping law in 1933.[104] After the highly publi-

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100. Under the 1898 statute, upon a plea of *non vult* the penalty was to be the same as for second degree. *See* Act of Mar. 29, 1917, ch. 238, 1917 N.J. Laws 801. According to an article published in the Newark Evening News in January, 1918, this made a plea to avoid the death penalty more likely. *See* Feiertag, *supra* note 33, at 62. In this period, the death penalty was rarely imposed. In the years 1917-18 a total of 10 death sentences were imposed. That figure dropped to 2 in 1919. Bedau, *Death Sentences in New Jersey, 1907-1960*, 19 RUTGERS L. REV. 1, 10 (1964). The impact of World War I upon the male population may have had greater influence upon the number of sentences imposed than the change in the penalty structure for *non vult* pleas to murder.

101. Act of Apr. 12, 1919, ch. 134, 1919 N.J. Laws 303. The 1964 Study Commission describes the New Jersey death penalty statute as "mandatory" until 1916 and describes the 1919 statute as a "technical" amendment. 1964 REPORT, *supra* note 95, at 19.

102. Act of June 14, 1922, ch. 101, 1922 N.J. Laws 186.

103. *Id.* at 189.

104. New Jersey passed two kidnapping laws after the Lindbergh crime. The first statute provided for the imposition of a maximum penalty of 30 years for kidnapping. Act of June 26, 1933, ch. 322, 1933 N.J. Laws 846. The Lindbergh baby was kidnapped on March 1, 1932. The second kidnapping statute, enacted in 1933, provided the death penalty for kidnapping for ransom. Act of Sept. 5, 1933, ch. 374, 1933 N.J. Laws 1057, 1058. The capital offense of kidnapping specifically allowed the jury to recommend a term of life imprisonment. Note that the capital offense of kidnapping did not require the death of the victim, nor was kidnapping a felony predicate to felony murder at the time.

cized trial of Bruno Hauptmann, one of the most sensational trials of that era or any other time, a majority of states, including New Jersey, and also the United States Congress, redefined kidnapping as a capital offense. Bruno Hauptmann himself was sentenced to death and executed for felony murder.[105] Kidnapping had never before been a capital crime in New Jersey.[106] No one was ever tried or executed for kidnapping under the 1933 formulation of the offense.[107]

In 1934, the legislature removed two crimes from the category of capital offenses: permitting the escape of a person sentenced to death and rescuing a person sentenced to death.[108] The total number of death sentences imposed during the period 1900-1940 remained relatively low. In six of these years, there were less than two death sentences imposed, and the high for the period was 16 death sentences, imposed in 1930.[109] In 1915, a 16 year-old black male was executed, the youngest person ever executed in New Jersey, prompting the introduction of legislation prohibiting the execution of juveniles. It was not until 1954, however, that it became clear under the former law that persons under 16 could not be executed.[110]

The 1937 revision of the criminal code was the last major revision prior to the introduction of the 1979 Code of Criminal Justice. Four crimes were designated capital: murder, kidnapping, treason, and assault upon the President and Vice President, etc.[111] Murder was defined as first degree and second degree, with the jury deciding upon the degree. Murder continued to include killing during the attempt to commit arson, burglary, rape, rob-

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105. *See* State v. Hauptmann, 115 N.J.L. 412, 180 A. 809 (N.J. 1935). The state's theory was that this was a murder committed during the cause of a burglary. Burglary was defined as entry with the intent to commit a felony. The underlying felony in this instance was larceny of the child's clothing. *Id.* at 424, 180 A. at 818.

106. The Code of 1796 provided a penalty of a fine of $1,000 or imprisonment for a maximum of 5 years or both. The 1871 Code provided a penalty of a maximum of 20 years, or $5,000, or both. In 1907 the maximum penalty was increased to life. Feiertag, *supra* note 33, at 65-66.

107. 1964 REPORT, *supra* note 95, at 18.

108. Act of June 11, 1934, ch. 227, 1934 N.J. Laws 528, 529. The penalty was changed to a maximum of 30 years for both offenses.

109. Bedau, *supra* note 100, at 10. Bedau analyzes these figures by race, native origin, age of offender, type of offense, and other variables. The Bedau article is discussed in detail in the Literature Review section of this Article (Part V).

110. *Id.* at 24. See discussion of *State v. Bey I, infra* notes 276-81 and accompanying text.

111. N.J. REV. STAT. § 2:138-1 to -9 (1937).

bery, sodomy, or any unlawful act of which the probable consequences may be bloodshed, and the killing of a law enforcement officer.[112] First degree murder was murder "perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate arson, burglary, rape, robbery, or sodomy."[113] This was the same as the 1898 definition. *Non vult* pleas, if accepted, could result in either a sentence to hard labor for life or a sentence of 30 years, the sentence for second degree murder.[114] The presumptive penalty for "aiders, abettors, counselors, and procurers" was also death.[115] Juries continued to be able to recommend imprisonment at hard labor for life for first degree murder, and that recommendation could not be countermanded.[116]

In spite of the broad scope of the death penalty during the period 1930 to 1960, relatively few death sentences were imposed.[117] The high for the period was the year 1930, when 16 death sentences were imposed.[118] In only four years after 1930 were more than five death sentences imposed in a single year.[119] During this period, however, the homicide rate was increasing, along with the population of the state.[120] The 1922 law concerning those found to be insane at the time of the offense or while awaiting execution was retained in the 1937 revision. The power to commute a death sentence remained with the Court of Pardons, of which the governor was a member. It was not until the New Jersey Constitution of 1947 was adopted that the governor could unilaterally pardon a person sentenced to death for murder.

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112. *Id.* § 2:138-1.

113. *Id.* § 2:138-2.

114. *Id.* § 2:138-3.

115. *Id.* § 2:138-4.

116. *Id.*

117. Bedau, *supra* note 100, at 10.

118. For the entire United States, legally imposed executions reached an historic high in 1935 and declined subsequently until 1967. W. BOWERS, LEGAL HOMICIDE, *supra* note 75, at 25.

119. (1935, 1948, 1954, and 1957) *Id.* Thirteen years during the period had one or two executions or none.

120. *See* Pamphlet, Chart III, "37 Questions On Capital Punishment," Homicides, Executions, and Population in New Jersey (1963). The homicide rate is the number of homicides per 100,000 people in the population, a statistic which is compiled and published by the New Jersey Department of Health, Health Data Services. In New Jersey the homicide rate for 1986 was 6.0. For the United States as a whole the homicide rate was 11.7 in 1935, the year when executions were at their height.

In 1942, a statute was passed prohibiting the family of the person executed or the family of the victim from being present at an execution.[121] In 1951, as part of a general effort toward statutory and code reform, the section defining murder was renumbered and relabeled. Except for minor changes in the language and the removal of the reference to "at hard labor" the definition of first degree murder as a capital offense was unchanged.[122] Kidnapping, however, was removed from the category of capital offenses.[123] Treason[124] and assault of a high executive officer[125] remained capital offenses.

In 1965, the definition of first degree murder was amended to include the offenses of killing for the purpose of "resisting, avoiding or preventing" a lawful arrest, killing for the purpose of "effecting or assisting an escape or rescue from legal custody," and "murder of a police or other law enforcement officer acting in the execution of his duty" or of a person assisting a law enforcement officer during the course of duty.[126] This was a significant enlargement of the category of first degree murder, for which the penalty was death. In 1971, the legislature repealed the 1965 definition and reenacted the 1898 definition of first degree murder.[127]

Given the number of statutory enactments, it is perhaps surprising that the 1898 definition of first degree or death-eligible murder changed little from 1898 until 1979. The exceptions were the periods 1839-1846 and 1965-1971, when alternative penalties and formulations were briefly in effect. During this period, there were several crimes other than murder designated as capital, but these laws were inconsequential in practice. Since 1907, when centralized record-keeping for executions was initiated, all persons sentenced to death and executed were sentenced to death for murder; and the great majority of these executed were sentenced to death for murder during the course of a burglary or robbery.[128]

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121. Act of May 2, 1942, ch. 61, 1942 N.J. Laws 299, 300. The former provisions allowing attendance by witnesses, members of the press, and clergymen remained in effect.

122. *See* N.J. REV. STAT. tit. 2A (1951) which replaced N.J. REV. STAT. tit. 2 (1937). The homicide statute was renumbered § 2A:113-1 to -9. The one difference between § 2:138-4 (1937) and § 2A:113-4 (1951) is that references to "at hard labor" are removed in the punishment sections.

123. *See id.* § 2A:118-1 and 2.

124. *Id.* § 2A:148-1.

125. *Id.* § 2A:148-6.

126. Act of Dec. 23, 1965, ch. 212, 1965 N.J. Laws 887, 888.

127. Act of Jan. 15, 1971, ch. 2, § 7, 1971 N.J. Laws 14, 16.

128. Bedau, *supra* note 100, at 23. *See also* 1964 REPORT, *supra* note 95, at 18.

Though there were very few executions in New Jersey after 1960,[129] the New Jersey Supreme Court did not declare capital punishment unconstitutional until 1972.[130] The United States Supreme Court had declared all existing death penalty statutes unconstitutional that same year in *Furman v. Georgia*.[131] In 1976, a number of states began the long process of reenacting capital punishment statutes, appealing successful attacks on the new statutes to the United States Supreme Court, and then reenacting or amending them to comport with the pronouncements of the Court. New Jersey was relatively late in joining that process.

In 1979 the Code of Criminal Justice went into effect.[132] This was the first comprehensive reform of New Jersey statutory criminal law since 1898. It was the first major legislative reform of the law regarding homicide since 1796. The Code of Criminal Justice was modeled upon the American Law Institute's *Model Penal Code*, with important adaptations to accommodate existing New Jersey Law. In the area of homicide, however, the 1979 Code followed the *Model Penal Code* definition of the offense closely. The *Model Penal Code*, drafted in the 1950's and ratified in 1960, did not recommend the abolition of capital punishment.[133] Although revised comments were published in 1980 and 1985, the *Model Penal Code* itself has not been amended or modified since its ratification by the American Law Institute in 1960. The American Law Institute's formulation of the *Model Penal Code* does not take into account any of the decisional law and jurisprudence which developed after 1960, including the substantial body of law both before and after *Furman*. The *Model Penal Code* was the source, however, for a majority of post-*Furman* death penalty statutes. The *Model Penal Code* capital punishment statute enumerated statutory aggravating and mitigating circumstances and made provision for a separate jury sentencing proceeding.[134]

In spite of its inclusion in the *Model Penal Code*, and contrary

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129. *See infra* note 153, in Part III of this Article. The last person executed in New Jersey was Ralph Hudson, a white male executed on January 22, 1963. Source: New Jersey Department of Corrections.

130. State v. Funicello, 60 N.J. 60, 286 A.2d 55 (1972).

131. 408 U.S. 238 (1972).

132. It was passed in 1978, effective Sept. 1, 1979, as title 2C.

133. *See* MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962) [hereinafter MPC].

134. *See id.* The Institute "takes no position" on the question of whether the death penalty should be retained or abolished. *Id.* at 119. The Institute does recommend that the death penalty only be applied to murder.

to the wishes of the legislature, however, the Code of Criminal Justice as passed in 1978 did not contain a provision reinstating capital punishment for murder.[135] Governor Brendan Byrne had stated publicly that he would veto any code which contained a capital punishment provision.[136] Murder was defined as a crime of the first degree in the Code as enacted in 1978, with a penalty of 30 years with a 15 year mandatory minimum, in the absence of an extended term, which provided for a life term with a minimum of 30 years.[137]

The definition of murder under the 1979 code significantly changed the prior law. The language used for the definition of criminal acts and intent was entirely new. The Code of Criminal Justice redefined the general principles of liability for crimes. In addition, it changed the structure of sentencing and decision-making at sentencing.[138] For the first time, crimes were generally grouped according to degrees, and the common law definitions of intent were replaced by *Model Penal Code* definitions of criminal responsibility.[139] Murder under the 1979 Code was defined as causing death, or serious bodily injury resulting in death, with a "purposeful" or "knowing" intent requirement.[140] Felony murder was defined with robbery, sexual assault, arson, burglary, kidnapping or criminal escape as underlying felonies.[141] The definition of felony murder included the *Model Penal Code's* four-part affirmative defense to felony murder, and this was also entirely new.[142]

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135. *See* N.J. STAT. ANN. § 2C:11-3 (1980); Code of Criminal Justice, ch. 95, 1978 N.J. Laws 482.

136. *N.J. Public Hearing on S. 112 (Death Penalty) Before the Senate Comm. on the Judiciary*, 200th Leg., 1st Sess. 2 (1982) (introductory remarks of Senator John F. Russo, Chairman).

137. N.J. STAT. ANN. § 2C:43-7 (West 1980). There were only minor differences in wording between the 1978 and 1979 versions of the definition of murder in the Code of Criminal Justice. *Compare* Code of Criminal Justice, ch. 95, 1978 N.J. Laws 482 *with* N.J. STAT. ANN. tit. 2C (West 1980).

138. N.J. STAT. ANN. § 2C:43-1 to -6 (West 1980). These sections were based on MPC provisions. *See* MPC Art. 2 § 2.02(a)-(d). *See also* N.J. STAT. ANN. §§ 2C:43, 44 and 46 (West 1982), which introduced entirely new principles to be applied at sentencing.

139. *See* N.J. STAT. ANN. § 2C:2-2 (West 1982). The definitions of force, duress, mistake, and intoxication were also new and derived from the MPC. The 1980 Parole Act introduced additional changes affecting sentencing and release.

140. *See* N.J. STAT. ANN. § 2C:11-3a(1)-(3). Minor changes in wording to the homicide statute were introduced in Act of Aug. 29, 1979, ch. 178, 1979 N.J. Laws 664. *Cf.* Code of Criminal Justice, ch. 95, 1978 N.J. Laws 482.

141. N.J. STAT. ANN. § 2C:11-3a(1)-(3) (West 1982).

142. *Id.* § 2C:11-3a(3)a-d.

Other forms of homicide included aggravated manslaughter, manslaughter and death by auto.[143] This definition of murder encompassed fewer circumstances than the 1898 law, even though that broad statutory definition had been considerably narrowed by case law. In 1981, the legislature made a small technical amendment to the sentencing provision for murder.[144] In 1982, an amendment to the homicide statute reenacted capital punishment for some murders, and the penalty for non-capital murder was increased to a mandatory minimum of 30 years, or to a term of years between 30 years and life, with a 30-year mandatory minimum.[145]

The history of capital punishment in New Jersey is a history of confusion and contradiction. In both Britain and America prior to the twentieth century many crimes were declared capital, but there is scant evidence that penalties were applied uniformly, regularly, or justly. Since 1668, New Jersey legislative bodies have considered and enacted a number of bills concerning the method and manner of the application of capital punishment. In this century, the only century for which there are reliable records, the number of persons sentenced to death and the number of persons actually executed has always been very small. Historically, the death penalty has been more important as a symbol than as a punishment which was actually applied to a significant number of people eligible for its imposition. For every Bruno Hauptmann or Ralph Hudson, there were many others who committed similar offenses and were not sentenced to death or executed. The jurisprudence surrounding the death penalty has always specialized in the extreme and the sensational—truly the very visible whirlpool beside the large stream of ordinary criminal case processing. Certain procedural safeguards and avenues of appeal only apply to capital cases. Death cases are indeed very different. A close examination of the present death penalty indicates that capital punishment may be a symbol which has outlived even its symbolic value. The statistical findings and case processing analysis presented

143. *Id.* § 2C:11-4; 2C:11-5.

144. The legislature removed "notwithstanding the provision of 2C:44-1f." *See* Act of Sept. 24, 1981, ch. 290, § 12, 1981 N.J. Laws 1095, 1106-07. The intent requirement for manslaughter was changed from "other than purposely or knowingly" to "recklessly caus[ing] death under circumstances manifesting extreme indifference to human life." *Id.* § 13, at 1107-08.

145. The legislation which introduced the death penalty also increased the penalty for non-capital murder. *See* Act of Aug. 6, 1982, ch. 111, 1986 N.J. Laws 555.

here describe what the reimposition of capital punishment in New Jersey has meant in practice.

III. The Legislative History of the Death Penalty in New Jersey, 1982-1986

The New Jersey statute reenacting capital punishment was signed into law by Governor Thomas Kean on August 6, 1982.[146] It is an amendment to the section of the homicide statute defining murder[147] and applies to all homicides committed after the date of signing. The reinstatement of capital punishment in New Jersey was late relative to other states, whose legislatures attempted to reinstate the death penalty almost immediately after the United States Supreme Court declared all then existing state death penalty statutes unconstitutional as applied in *Furman v. Georgia*.[148] Between 1972, when the former New Jersey capital punishment statute was declared unconstitutional by the Supreme Court of New Jersey in *State v. Funicello*,[149] and 1982, the New Jersey legislature voted twice, in 1977[150] and in 1979,[151] to reinstate capital punishment.[152] Both bills were vetoed by Governor Brendan Byrne and never became law. The present statute reenacts the death penalty after a decade of its legal absence and after two decades of a moratorium on executions.[153]

There were two legislative amendments to the capital punishment statute between 1982 and 1986: Chapter 178 of the Laws of 1985, effective June 10, 1985,[154] and Chapter 478 of the Laws of 1985, effective January 17, 1986.[155] Chapter 178 made a series of substantive and procedural amendments to the capital punishment statute. The legislature indicated that these amendments

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146. Act of Aug. 6, 1982, ch. 111, 1982 N.J. Laws 555.

147. N.J. Stat. Ann. § 2C:11-3 (West 1982 and Supp. 1988).

148. 408 U.S. 238 (1972).

149. 60 N.J. 60, 286 A.2d 55 (1972).

150. S. 1477, 197th Leg., 2d Sess. (1977).

151. A. 1550, 198th Leg., 2d Sess. (1979).

152. *See* State v. Ramseur, 106 N.J. 123, 172, 524 A.2d 188, 212 (1987).

153. The last execution in New Jersey was in 1963. Ralph Hudson, a 43 year-old white male whose crime was committed in Atlantic County, was executed on January 22, 1963. N.J. Dept. of Corrections.

154. Act of June 10, 1985, ch. 178, 1985 N.J. Laws 536 (codified at N.J. Stat. Ann. § 2C:11-3 (West Supp. 1988)).

155. Act of Jan. 17, 1986, ch. 478, 1985 N.J. Laws 1935 (amending N.J. Stat. Ann. § 2C:11-3).

were to be applied prospectively only.[156] This amendment allowed the judge in his discretion to increase the number of peremptory challenges in a capital case for both the defense and prosecution.[157] It substituted the word "shall" for the word "may" in the section of the homicide statute defining the penalty for murder when the death penalty was not imposed. This change mandated that a defendant convicted of murder when the death penalty was not imposed must be sentenced to a mandatory minimum of 30 years without parole and to a maximum term of between 30 years and life.[158] The former language had created an ambiguity suggesting that a person convicted of murder could receive the ordinary sentence for a first degree crime, a maximum term of 20 years with a 10 year mandatory minimum. Chapter 178 also provided that an alternate juror could replace a juror who could not proceed to the penalty-phase trial due to illness or other inability.[159]

Chapter 178 clarified several issues concerning the burden of proof at penalty-phase trials. It made explicit the necessity for the State to prove the existence of any aggravating factor beyond a reasonable doubt.[160] The defense has only the burden of production, or the burden of coming forward, with reliable evidence relevant to any mitigating factors.[161] There is no threshold standard of proof for mitigating factors.[162] The jury must decide whether or not mitigating factors have been proved based upon the evidence provided. The rules of evidence are strictly applicable to evidence offered by the prosecution to prove aggravating factors, but evidence of mitigating factors offered by the defense need only be relevant and reliable.[163] However, the prosecution is also not bound by the rules of evidence when offering rebuttal evidence of mitigating factors.[164] Chapter 178 additionally provides that the jury must find beyond a reasonable doubt that all aggravating factors outweighed all of the mitigating factors before

156. ASSEMBLY JUDICIARY COMMITTEE STATEMENT, SENATE No. 950, 201st Leg., 1st Sess. (1984).

157. Act of June 10, 1985, ch. 178, § 1, § 2A:78-7, 1985 N.J. Laws 536, 537.

158. Act of June 10, 1985, ch. 178, § 2, 1985 N.J. Laws 536, 538 (§ 2C:11-3(b)).

159. *Id.* at 538 (§ 2C:11-3(c)(1)).

160. *Id.* at 539 (§ 2C:11-3(c)(2)(a)).

161. *Id.*

162. *Id.*

163. *Id.* (§ 2C:11-3(c)(2)(b)).

164. *Id.*

a death penalty can be imposed.[165]

Chapter 178 made two substantive changes to the statutory aggravating factors. The first change provided that a prior murder conviction could be used as the factual basis for the prior murder aggravating factor if the sentence for the prior murder was a final sentence at the trial level.[166] In other words, a murder conviction still on appeal in state or federal courts can be used as the factual basis for the prior murder statutory aggravating factor. This change legislatively overruled in part the New Jersey Supreme Court opinions in *State v. Bey*,[167] and *State v. Bey*,[168] and in *State v. Biegenwald*,[169] and *State v. Biegenwald*.[170] Chapter 178 limits the evidence admissible to prove this factor to the identity and age of the victim, the manner of death and the relationship, if any, of the victim to the defendant.[171] An earlier version of this amendment would have made evidence concerning all of the circumstances of the prior homicide admissible.[172]

Chapter 178 also made a minor change in the terminology of the "heinous" factor,[173] that the murder was outrageously or wantonly vile. The amendment substituted the word "assault" for the word "battery." The factor is now defined as follows: "The murder was outrageously or wantonly vile . . . in that it involved . . . an aggravated assault to the victim."[174] Chapter 178 further provides that evidence of aggravating or mitigating factors introduced at guilt phase need not be reintroduced at penalty phase.[175] The amendment also requires the court to inform the jury of the penalty that will be applied if the jury does not return the death penalty, and that a failure to reach a unanimous verdict at penalty phase will result in the imposition of a sentence to life imprisonment.[176]

The second substantive change to the statutory aggravating factors added murder to the list of crimes eligible for the felony

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165. *Id.* at 540 (§ 2C:11-3(c)(3)(a)).
166. *Id.* (§ 2C:11-3(c)(4)).
167. 96 N.J. 625, 477 A.2d 315 (1984).
168. 97 N.J. 666, 483 A.2d 184 (1984).
169. 96 N.J. 630, 477 A.2d 318 (1984).
170. 97 N.J. 666, 483 A.2d 184 (1984).
171. Act of June 10, 1985, ch. 178, § 2, 1985 N.J. Laws 536, 540 (§ 2C:11-3(c)(2)(f)).
172. S. 950, 201st Leg., 1st Sess. (1984).
173. Act of June 10, 1985, ch. 178, § 2, 1985 N.J. Laws 536, 540 (§ 2C:11-3(c)(4)(c)).
174. *Id.*
175. *Id.* at 539 (§ 2C:11-3(c)(2)(c)).
176. *Id.* at 542 (§ 2C:11-3(f)).

aggravating factor.[177] After the effective date of the amendment, a murder committed during the course of another murder could provide a factual basis for the felony aggravating factor. Finally, Chapter 178 removed language stating that a proportionality review by the Supreme Court of New Jersey is required. The law now states that a proportionality review is required only upon request of the defendant.[178]

The second legislative amendment to the capital punishment statute, chapter 478 of the Laws of 1985, effective January 17, 1986,[179] clarified that it was the legislature's intention that juveniles tried and convicted of murder should not be subject to the death penalty.[180] This amendment applied to all pending cases, not simply to prospective cases.[181] At the time the amendment went into effect, there was one defendant sentenced to death for a crime committed when he was a juvenile.[182] This defendant also had received the death sentence for a homicide committed when he was an adult. There was at least one additional case pending where a notice of factors had been served for a homicide committed when the defendant was a juvenile.[183] That case was downgraded to a non-capital prosecution after the amendment was passed.

Chapter 478 also required the Supreme Court of New Jersey to hear the appeal of all death sentences,[184] but did not require the Supreme Court of New Jersey to conduct a proportionality review of all death sentences.[185] In those cases where the defendant fails

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177. *Id.* at 541 (§ 2C:11-3(c)(4)(g)).

178. *Id.* (§ 2C:11-3(e)).

179. Act of Jan. 17, 1986, ch. 478, 1985 N.J. LAWS 1935 (amending N.J. STAT. ANN. § 2C:11-3).

180. *See Id.* § 2C:11-3g at 1940.

181. Ch. 478, Senate Judiciary Committee Statement, Senate No. 2652, 1985 N.J. Sess. Law Serv. at 556.

182. Marko Bey received two death sentences. One was for an offense committed when he was a juvenile. Both death sentences were overturned by the Supreme Court of New Jersey on August 3, 1988. See State v. Bey I, No. A-2, slip op. (N.J. Aug. 2, 1988), and State v. Bey II, No. A-5, slip op. (N.J. Aug. 2, 1988). The opinion in *Bey I* clarified that the death penalty would not be applied to persons under 18 in this state.

183. *See* State v. Smith, 202 N.J. Super. 578, 495 A.2d 507 (Law Div. 1985). The indictment in the *Smith* case was pending on the effective date of the amendment, so the capital indictment was set aside.

184. *See* Act of Jan. 17, 1986, ch. 478, 1985 N.J. LAWS 1940 (§ 2C:11-3e).

185. The proportionality review requirement appears in Ch. 478, 1985 N.J. Sess. Law Serv. 556, but does not appear in N.J. STAT. ANN. § 2C:11-3(e) (West Supp. 1988), which retains the language "upon request of the defendant." *See supra* text accompanying note

or refuses to appeal, the Office of the Public Defender, or other counsel appointed by the Supreme Court, is required to appeal all death sentences, even over the objection of the defendant.[186]

IV. Case Law Interpreting the 1982 Capital Punishment Statute

This section summarizes the reported cases in New Jersey which have directly addressed or interpreted the capital punishment statute.

A. *Decisions of the New Jersey Supreme Court*

The first New Jersey Supreme Court case interpreting the 1982 capital punishment statute was *State v. Williams and Koedatich*.[187] Both defendants had made motions to close pretrial proceedings which were separately denied. The supreme court heard the matter on interlocutory appeal and set out the standard for trial judges to use in determining whether to close pretrial proceedings, including jury selection, to the public and press. In these cases the defendants sought to exclude the public from probable cause hearings and bail applications. The court held that in the context of a capital case, the general rule under the state constitution was that all pretrial proceedings should be open to the public and the press. The only exception arises where the trial court is satisfied that if the proceedings were conducted in open court, adverse pretrial publicity would prevent the defendant from having a fair trial before an impartial jury. The court required the defense to show that past and anticipated adverse pretrial publicity is sufficient to create bias in the minds of jurors or prospective jurors. The court recommended several alternatives to closure, including more extensive questioning on *voir dire*.

The New Jersey Supreme Court addressed a range of issues concerning the capital punishment statute in four decisions

178. Section 2C:11-3(e) provides that every death sentence must be appealed, but a proportionality review is undertaken only at the request of the defendant. However, as the Supreme Court of New Jersey commented: "While proportionality review is no longer mandatory, and shall be undertaken only '[u]pon the request of the defendant,' L. 1985, c. 478, we assume that almost all defendants who are sentenced to death will request such review." State v. Ramseur, 106 N.J. 123, 327, 524 A.2d 188, 292 (1987).

186. *See* Act of Jan. 17, 1986, ch. 478, 1985 N.J. Laws 1940 (§ 2C:11-3e).

187. 93 N.J. 39, 459 A.2d 641 (1983) (decided April 26, 1983).

handed down on June 26, 1984. All four decisions involved constitutional issues and were decided on interlocutory appeal. The court in *State v. Davis*[188] held that in penalty phase proceedings the defendant may offer in mitigation general evidence from empirical studies, including the presentation and analysis of statistical data, which are relevant to rehabilitation. In *Davis*, the defense sought to introduce evidence that there was a low statistical probability that the defendant, a white male in his twenties at the time of trial, would be likely to commit another crime should he be released at age 57 after serving the New Jersey mandatory minimum term of a life sentence, which is 30 years of incarceration.

The court in *Davis* held that the proposed testimony was admissible under the language of the catch-all mitigating factor[189]: "any other factor which is relevant to the defendant's character or record or to the circumstances of the offense."[190] The court reasoned that the proposed statistics, based upon empirical evidence from a national data base, can assist the jury at penalty phase, subject to appropriate standards concerning the scientific reliability of the data and the qualifications of the expert witness. In *Davis* these criteria were met. The court noted that its ruling was consistent with the then pending amendment to the capital punishment statute which clarified that generalized relevance was the only criterion for admitting mitigating evidence at penalty

188. 96 N.J. 611, 477 A.2d 308 (1984). *See also* 47 A.L.R. 4th 1055 (discussing admissibility of expert testimony as to appropriate punishment for convicted defendant).

189. *Id.* at 624, 477 A.2d at 314. The case arose after the defendant pled guilty to death-eligible murder and then offered in mitigation the expert testimony of Professor Marvin E. Wolfgang, an eminent sociologist and the Director of the Sellin Center for Studies in Criminology and Criminal Law at the University of Pennsylvania. Dr. Wolfgang's offered testimony was that aggregate empirical data demonstrate that persons with this defendant's statistical profile in all probability would never commit another serious crime, if released after 30 years of incarceration. Dr. Wolfgang's report did not include an individual or personal evaluation of this defendant. Rather his testimony was based upon selected demographic features of the defendant, his age, race, and gender and the nature of his offense. The State moved to exclude the expert testimony on the ground that it was not relevant to the individual characteristics of this defendant. The trial court ruled that the proffered evidence would be excluded at penalty phase; the appellate division reversed. The supreme court granted certification on interlocutory appeal, staying the penalty phase trial and discharging the jury. *Davis* was the basis for the trial court's decision in State v. Lazovisak, Hunterdon County Indictment No. 86-04-0039 (1987), that the proposed statistical evidence from the 1987 *Preliminary Report* of this Study was admissible.

190. N.J. STAT. ANN. § 2C:11-3c(5)(h) (West 1982).

phase.[191] In a footnote the court stated that the use of variables such as race, gender, or other suspect characteristics may have unacceptably invidious implications, bearing upon the ultimate admissibility of the expert's testimony.[192] The trial court has the discretion to exclude the evidence on such grounds if its probative value is outweighed by its unfounded or speculative character and by the risk of confusion. The court was concerned that the statistics demonstrated a difference between black defendants and white defendants, and therefore the evidence might be used to make constitutionally impermissible arguments, *e.g.*, white defendants are less likely to recidivate than black defendants, therefore juries should consider the race of the defendant in deciding whether or not to impose the death penalty.

Since the *Davis* decision, a variety of mitigating evidence has been introduced by the defense and admitted at penalty phase: testimony from clergy, statistical evidence on patterns of crime and deterrence, the likelihood of recidivism for a particular defendant, evidence concerning the history of the death penalty in the United States and testimony by an eyewitness to an execution in another state.

In both *State v. Biegenwald*,[193] and *State v. Bey*,[194] decided on June 26, 1984, the supreme court held that a defendant's prior conviction for murder could not be used as the factual basis for aggravating factor (a)[195] (that the defendant has been convicted, at any time, of another murder), if the prior murder conviction is pending on direct appeal.[196] This holding of the *Bey* and *Biegenwald* opinions was subsequently overruled by a legislative amendment to the capital punishment statute.[197] A second part of

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191. *Davis* goes farther than the United States Supreme Court did in Lockett v. Ohio, 438 U.S. 586 (1978). The *Lockett* court referred to *any* aspect of the defendant's character or record or any of the circumstances of the offense. . . . The *Lockett* language was the basis of the catch-all, any other statutory mitigating factor, but *Davis* expands the definition of relevance to include facts which have no direct relationship to the individual defendant or circumstances of the offense.

192. *Davis*, 96 N.J. at 623 n.2, 477 A.2d at 314 n.2.

193. 96 N.J. 630, 477 A.2d 318 (1984), *clarified in* State v. Biegenwald, 97 N.J. 666, 483 A.2d 184 (1984).

194. 96 N.J. 625, 477 A.2d 315 (1984), *clarified in* State v. Bey, 97 N.J. 666, 483 A.2d 185 (1984).

195. N.J. STAT. ANN. § 2C:11-3c(4)(a) (West 1982) (prior murder factor).

196. *Biegenwald*, 96 N.J. at 632-33, 477 A.2d at 319; *Bey*, 96 N.J. at 628, 477 A.2d at 317.

197. The legislature added the following language to the definition of the prior murder

the *Bey* opinion, which cited *Williams and Koedatich* and was not overruled by subsequent statutory amendment, held that within the special context of a capital case, the standard to be used for a change in venue was an analogous standard to that established for the closure of pretrial proceedings: whether a change of venue was necessary to overcome the realistic likelihood of prejudice from pretrial publicity.[198]

State v. McCrary[199] created procedures for establishing a new and special pretrial hearing on the sufficiency of evidence necessary to support the serving of an aggravating factor. Although a presumption of validity exists when the prosecutor serves notice of the existence of an aggravating factor, the *McCrary* decision permits judicial review, prior to trial, of the factual basis for the aggravating factors. Since there is no requirement of a probable cause determination on the existence of aggravating factors, the serving of a notice functions as a pleading, one with momentous effects, noted the court, since the prosecutor's notice triggers both death qualification of a jury and a special sentencing phase.[200]

The purpose of the newly created hearing is to interpose some judicial oversight into the process.[201] The standard established is analogous to the standard for dismissal of an indictment. The presumption favors the validity of the factors, and the defense must demonstrate that evidence is clearly lacking to support the charge of a specific aggravating factor. Defense motions to strike an aggravating factor should be brought only when the evidence is so thin, so lacking and so weak as to leave no question in the

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aggravating factor, indicating that its clear intent was that a conviction was to be considered final after the imposition of the trial court judgment: "for the purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal." N.J. STAT. ANN. § 2C:11-3c(4)(a) (West Supp. 1988). The issue of whether a conviction subsequent to the first penalty phase trial can be introduced at a penalty phase retrial was decided by the New Jersey Supreme Court in State v. Biegenwald, 110 N.J. 521, 542 A.2d 442 (1988). The court held that a conviction for murder imposed subsequent to a penalty phase death verdict which was reversed could be introduced at the penalty phase retrial. *Id.* at 540-41, 542 A.2d at 451-52.

198. *Bey*, 96 N.J. at 630, 477 A.2d at 317-18. The supreme court also remanded for a reconsideration of the venue question.

199. 97 N.J. 132, 478 A.2d 339 (1984) (decided June 26, 1984).

200. *Id.* at 140-41, 478 A.2d at 343-44.

201. Since the grand jury does not consider or review the factual basis for statutory aggravating factors, the *McCrary* hearing is the only opportunity the defense has to challenge the serving of a notice of factors prior to penalty phase. In practice, few hearings have resulted in the dismissal of factors.

minds of a reasonable factfinder as to the existence of that aggravating factor. The hearing is at the discretion of the court, and was envisioned by the supreme court to be a summary review of the evidence upon which the prosecutor relied in charging the aggravating factor. Hearsay evidence is admissible, and the trial court may order testimony.

Some judges take the position that there is no reason to hold a *McCrary* hearing on one factor if the notice of factors includes more than one factor,[202] but the dismissal of one of two or three factors prior to guilt phase will significantly affect the defense preparation. If, for example, the court dismisses the outrageously or wantonly vile factor[203] and the felony factor[204] is the only factor remaining, that decision would have a great deal of consequence for the defense.[205] The striking of an aggravating factor is to be without prejudice, and the State is free to serve again the dismissed aggravating factor should additional supporting evidence subsequently come to light prior to trial.[206]

State v. Engel[207] interpreted the constitutional provision and implementing court rule exempting capital cases from the presumption of bail. The question was whether bail could be denied to a capital defendant on the basis of hearsay evidence. The circumstances involved the prosecutor's submission of a co-defendant's confession at a bail hearing when the co-defendant was unavailable for cross examination because he asserted the fifth amendment.[208] The ruling was that hearsay evidence, in the form

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202. *See, e.g.*, State v. Spotwood, 202 N.J. Super. 532, 495 A.2d 483 (Law Div. 1984).

203. N.J. STAT. ANN. § 2C:11-3c(4)(c) (West 1982 and Supp. 1988).

204. N.J. STAT. ANN. § 2C:11-3c(4)(g) (West 1982 and Supp. 1988).

205. As the statistics on individual statutory aggravating factors indicate, the defendant is much more likely to receive the death penalty if the heinous factor is served and found at penalty phase. *Cf.* Tables 42 and 45, *infra*. If a case goes to capital trial with the felony factor as the only statutory aggravating factor, the defense can challenge the serving of that factor under State v. Smith, 202 N.J. Super. 578, 495 A.2d 507 (Law Div. 1985). If the heinous factor remains in the case, the defense must challenge on the basis of State v. Ramseur, 106 N.J. 123, 329, 524 A.2d 188, 293 (1987) and subsequent cases.

206. State v. McCrary, 97 N.J. 132, 144-45, 478 A.2d 339, 345-46 (1984).

207. 99 N.J. 453, 493 A.2d 1217 (1985) (decided June 13, 1985).

208. The trial court held that the challenged hearsay evidence demonstrated both a sufficient likelihood of conviction and reasonable grounds to believe the death penalty might be imposed, meeting the required standard, and ruled that none of the three defendants was entitled to bail. *Id.* at 458, 493 A.2d at 1219-20. The appellate division granted an interlocutory appeal, set bail, and remanded to the trial court. *Id.* at 459, 493 A.2d at 1220. The supreme court granted the prosecutor's motion for a stay of the appellate division opinion. *Id.*

of a co-defendant's confession, may be considered in determining whether to deny bail to a capital defendant.[209] The State is required to show that the co-defendant's confession is the most probative evidence available, that it is trustworthy, and that the confession will be available in some form at trial. The court set out what factors and facts the trial court should consider in its decision to admit the co-defendant's confession in this circumstance.

State v. Gilmore[210] is a non-capital case which is expected to have significant impact upon capital trials.[211] The court found that an assistant prosecutor's exercise of peremptory challenges to exclude all black prospective jurors was improperly based on presumed group bias and consequently deprived the defendant of his right to a fair trial before a jury drawn from a representative cross section of the community.[212] If it were demonstrated that a prosecutor similarly exercised peremptory challenges to exclude other cognizable groups and consequently deprived the defendant of a fair trial before a jury drawn from a representative cross section, that would also be constitutionally impermissible. The prosecutor may, however, exclude jurors on situation-specific grounds. The defendant has the burden of establishing a *prima facie* case of purposeful discrimination, which gives rise to a rebuttable presumption of unconstitutional action.

On March 5, 1987, more than two years after oral argument, the New Jersey Supreme Court handed down *State v. Ramseur*[213] and *State v. Biegenwald*,[214] the first decisions addressing direct, constitutional challenges to the 1982 capital punishment statute. *Ramseur* and *Biegenwald* held the 1982 capital punishment stat-

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209. *Id.* at 473, 493 A.2d at 1228.

210. 103 N.J. 508, 511 A.2d 1150 (1986) (decided July 16, 1986).

211. State v. Breakiron, 108 N.J. 591, 532 A.2d 199 (1987) is another opinion which will have an impact on capital cases, although the case was no longer a capital case when it reached the New Jersey Supreme Court. Citing *Ramseur*, *Breakiron* held that a defendant was entitled to have the jury charged regarding diminished capacity not only on the issue of insanity but also at guilt phase trial on the issue of *mens rea*, to disprove the mental element of the crime itself. *Breakiron*, 108 N.J. at 609, 532 A.2d at 208. Diminished capacity is not an affirmative defense, but allows the introduction of evidence relevant to the question of whether the State has proven beyond a reasonable doubt the requisite mental culpability. *Id.* at 620, 532 A.2d at 214.

212. The opinion goes farther than the United States Supreme Court opinion in Batson v. Kentucky, 476 U.S. 79 (1986), which addressed similar issues. The basis for the holding is the New Jersey Constitution. This holding was given limited retroactive effect. *Gilmore*, 103 N.J. at 544, 511 A.2d at 1169.

213. 106 N.J. 123, 524 A.2d 188 (1987).

214. 106 N.J. 13, 524 A.2d 130 (1987).

ute was constitutional on its face under principles of federal and state constitutional law.[215] The court, however, reversed both death verdicts.[216] In *Ramseur*, the court imposed a life sentence. In *Biegenwald*, the court remanded for a penalty phase retrial. *Ramseur* additionally addressed a series of constitutional challenges, including jury selection and the composition of jury pools, the construction of individual aggravating factors, diminished capacity instructions, instructions on mitigating factors and the weighing process at penalty phase.

In upholding the statute on its face, the majority in *Ramseur* held that the 1982 capital punishment statute did not violate community standards or conflict with contemporary moral standards,[217] that retribution could constitute a valid penological objective,[218] and therefore the statute is not a *per se* violation of the federal or state constitutional ban against cruel and unusual punishment.[219] The majority additionally found that the statute did not violate federal or state constitutional prohibitions against cruel and unusual punishment by failing to narrow sufficiently the jury's discretion at sentencing phase.[220]

The majority opinion discussed the arbitrariness standard under *Eddings v. Oklahoma*,[221] *Furman v. Georgia*,[222] and other cases as applied to the issue of the jury's discretion at sentencing, and concluded that the 1982 New Jersey capital punishment statute sufficiently guides jury discretion.[223] The court then turned to a detailed analysis of aggravating factor (c), that the murder was

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215. *Id.* at 18, 524 A.2d at 132; *Ramseur*, 106 N.J. at 154-55, 524 A.2d at 202-03.

216. *Biegenwald*, 106 N.J. at 25-26, 524 A.2d at 136; *Ramseur*, 106 N.J. at 154, 524 A.2d at 202.

217. *Ramseur*, 106 N.J. at 174, 524 A.2d at 212-13.

218. *Id.* at 179, 524 A.2d at 215.

219. *Id.* at 166-78, 524 A.2d at 208-14.

220. *Id.* at 182-97, 524 A.2d at 216-24.

221. 455 U.S. 104 (1982).

222. 408 U.S. 238 (1972).

223. *Ramseur*, 106 N.J. at 182-97, 524 A.2d at 216-24. Together the two opinions total 468 printed pages. The opinion of the court in *Ramseur*, written by Chief Justice Wilentz, comprises 179 pages, followed by a relatively short opinion by Justice O'Hern concurring in the result. Justice O'Hern addressed the issue of death-qualified juries at guilt phase, expressing the view that death-qualified juries at guilt phase are inconsistent "with New Jersey's traditional sense of fairness and justice." *Id.* at 333, 524 A.2d at 295. Justice Handler's dissent comprises 132 pages and is in fundamental disagreement with the majority's finding that the statute is constitutional. A number of issues critical to capital litigation are discussed at length in all three opinions. This Article can only touch upon a few of the important constitutional issues raised in *Ramseur*.

outrageously or wantonly vile.[224] The court noted that of the 37 states which provide the death penalty for murder, 24 of them have similar provisions,[225] most of which are based upon Model Penal Code section 210.6(c)(3)(h)[226] and share common problems of definition and application as well as a common origin.[227] The court then interpreted the New Jersey provision to limit or avoid allegations of unconstitutional vagueness. The majority adopted a construction requiring a jury instruction stating that there must be a finding either that there was torture, an aggravated battery or depravity to support the return of the (c) factor.[228] The court concluded that the *Ramseur* jury was instructed incorrectly at penalty phase, but that the jury might legitimately have found the heinous factor on the facts of the case had it been properly instructed.[229]

In his dissent, Justice Handler reviewed state and federal cases which considered the constitutionality of provisions analogous to the (c) factor and concluded that "the majority's effort is just one more attempt to salvage an incurably vague standard by rewriting it."[230] The dissent chronicles the attempts of other courts to limit analogous provisions and concludes that the heinous factor is intractable, vague and "itself inscrutable and overbroad."[231]

The majority also addressed a series of difficult issues concerning the trial court's instructions on mitigating factors,[232] the ne-

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224. *Id.* at 197-212, 524 A.2d at 224-32.

225. *Id.* at 198 n.25, 524 A.2d at 225 n.25.

226. MODEL PENAL CODE § 210.6(c)(3)(h) (Proposed Official Draft 1962).

227. *Ramseur*, 106 N.J. at 198 n.25, 524 A.2d at 225 n.25.

228. *Id.* at 204-05, 524 A.2d at 228.

229. *Id.* at 211, 286-91, 524 A.2d at 231, 270-72. Since a life sentence was imposed in the case, however, there will be no reconsideration of the factor with revised instructions at a penalty phase retrial.

230. *Ramseur*, 106 N.J. at 395, 524 A.2d at 327 (Handler, J., dissenting). Justice Handler argues that the 1982 capital statute violates the New Jersey State Constitution on a number of grounds.

Questions concerning alternative and overlapping bases for constitutional principles are the subject of a long, distinguished and continuing debate among the Justices of the New Jersey Supreme Court and others. Unfortunately, this jurisprudence cannot be summarized or substantively addressed in this Article. *See, e.g.*, Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 37 RUTGERS L. REV. 707 (1983); Brennan, *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313 (1986).

231. *Ramseur*, 106 N.J. at 404, 524 A.2d at 332 (Handler, J., dissenting). The summary of the experience of other states can be found at 106 N.J. at 395-404, 524 A.2d at 327-32.

232. *Ramseur*, 106 N.J. at 292-99, 524 A.2d at 273-77.

cessity for a unanimous verdict,[233] and prosecutorial error in statements during trial and sentencing phase.[234] The majority additionally addressed the instructions given on diminished capacity[235] and the present status of a pre-*Furman non vult* plea to murder, when that conviction is being offered as a factual basis for the prior murder factor.[236] Finally the court turned to errors in the court's charges and supplemental instructions to the jury and other trial errors, such as prosecutorial misconduct.[237]

Of relevance to this Article are the comments in *Ramseur* on the subject of prosecutorial discretion and proportionality review.[238] This section of *Ramseur* was the basis for the July 29th order of the supreme court appointing Professor David C. Baldus as Special Master.[239] Proportionality addresses, *inter alia*, whether the death penalty is unacceptable in a particular case because it is disproportionate to the punishment imposed on others

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233. *Id.* at 304-15, 524 A.2d at 280-86.

234. *Id.* at 264-67, 524 A.2d at 259-60.

235. *Id.* at 267-70, 524 A.2d at 260-62. The defense had requested a diminished capacity instruction so that if the jury found the defendant did not commit the murder purposely or knowingly, then diminished capacity would serve to "mitigate" the offense to manslaughter. State v. Breakiron, 108 N.J. 591, 532 A.2d 199 (1987) provides further interpretation of this section of the *Ramseur* opinion.

236. *Ramseur*, 106 N.J. at 271-79, 524 A.2d at 262-66. The majority held that a *non vult* plea could, and in this case did, offer a sufficient factual basis for the prior murder factor. The court allowed, however, that there might be circumstances where the court would look behind this plea: where the plea was entered to avoid the imposition of the death penalty under prior law and the circumstances suggested either that the defendant was not guilty of the offense or that his version of the offense suggested the possibility that the prior murder conviction might have involved circumstances which amounted only to manslaughter. This section of *Ramseur* has been amplified and expanded upon in State v. Koedatich, No. A-1 (N.J. Aug. 3, 1988).

237. *Ramseur*, 106 N.J. at 315-24, 524 A.2d at 286-91. The court found prejudicial error in several comments by the Essex County prosecutor and additional errors in the court's charges and supplemental instructions to the jury, including errors in the court's instructions on aggravating and mitigating factors. The court also said that the trial court did not err in refusing to instruct that the defendant's age was a mitigating factor, when the defendant's age was introduced for the purpose of telling the jury that the defendant would be over 70 at the time of the expiration of a 30-year mandatory minimum term. Such evidence would, however, properly come in under the "any other" catch-all mitigating factor as evidence of the defendant's potential for rehabilitation. *Id.* at 295, 524 A.2d at 275.

238. *Id.* at 324-31, 524 A.2d at 291-94. Although proportionality review is no longer required by the 1982 capital punishment statute, N.J. STAT. ANN. § 2C:11-3e (West Supp. 1988), the court notes that "almost all defendants who are sentenced to death will request the review." *Id.* Since the statute and case law now provide for representation of the capital defendant even over his objection, *all* defendants sentenced to death will have their death sentences reviewed.

239. See Appendix E.

convicted of the same or similar crimes.[240] Proceeding on the principle that death is indeed a different penalty from the ordinary criminal sentence of imprisonment, the court recognized that a higher standard of reliability and more rigorous and systematic appellate scrutiny are required to ensure that the death penalty is not influenced by impermissible considerations. Putting the matter bluntly, the court stated: "Discrimination on the basis of race, sex or other suspect characteristic cannot be tolerated."[241] The court declared that the appropriate pool of similar cases was a statewide data base: "[T]hose parties who expect to participate in the appellate review process in future capital cases should begin gathering the data necessary for proportionality review of a death penalty in comparison to similar crimes and defendants."[242] In addition to criminal justice experts, the court said that it expected to solicit the advice of experts outside of the law.

The determination that the pool of comparable or similar cases would be statewide was a departure from the practice in many states where death sentences are only compared with other cases within a single county or parish or death sentences are compared only with other death sentences.[243] In deciding that the appropriate pool was all cases in the state where the death penalty could have been sought or imposed, the court noted that this squarely raised issues concerning disparity between counties and the possible misuse of prosecutorial discretion.[244] The court speculated as to how similar crimes might be categorized,[245] and anticipated re-

240. *Ramseur*, 106 N.J. at 326-28, 524 A.2d at 291-93.

241. *Id.* at 327, 524 A.2d at 292.

242. *Id.* at 328, 524 A.2d at 293. As of August, 1988, no state agency except the Office of the Public Defender had attempted a systematic collection of data on the application of the statute. The preparation of a statewide, comprehensive database will now be undertaken by Professor Baldus and the Administrative Office of the Courts. See Appendix E.

243. *Ramseur*, 106 N.J. at 328-29, 524 A.2d at 293. When proportionality review only includes other death sentences, the analysis then is reduced to comparing the imposed sentence with a very small number of other death sentences. The review is truncated and necessarily perfunctory because the appellate court never compares the death sentence with similar or "worse" cases where the death sentence could have been but was not sought, or with cases where the penalty was sought but the case never reached penalty phase, or cases where death was rejected by the penalty phase jury.

244. *Id.* (citing *McCrary*, 97 N.J. 132, 478 A.2d 339 (1984)).

245. The court suggested that it might consider categories such as "torture," "sexual mutilation," "multiple victim," "domestic," "depravity of mind" and "execution style." *Ramseur*, 106 N.J. at 329-30, 524 A.2d at 293. Indeed as the data analyzed here demonstrates, homicides can be classified in a multiplicity of ways, and the court may choose

ceiving suggestions from criminologists, sociologists and statisticians on what criteria would be appropriate to classify cases. Again, the court singled out race, sex and socioeconomic status of the defendant as appropriate variables for examination, as well as the relationship of the defendant and victim and procedural considerations. The court reiterated its intention to "ensure that discriminatory factors are not shifting the balance between life and death."[246] Those identified impermissible bases for selecting death-eligible cases include, but are not limited to, race and sex. In its earlier discussion of constitutionality the court declared it would receive any evidence on the issue of racial discrimination[247] including a review of prosecutorial discretion at the charging stage.[248] The majority addresses this issue again and at greater length in *State v. Koedatich*.[249] In *Ramseur*, the court considered allegations of impermissible discrimination "premature" since they were not formally presented with a statistical study in that case. Justice Handler's dissent, however, concluded that the class of death-possible cases is so broad as to justify a decision declaring the 1982 capital statute unconstitutional under the state constitution,[250] and also that prosecutorial discretion is virtually unfettered in the decision of who will be charged with death eligible murder.[251] Citing the 1987 Preliminary Report of the results of this Study, the dissent concluded that arbitrariness in such a system is inevitable; and prosecutorial decisions to prosecute for cap-

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alternative and different categories in its analysis of proportionality. Presumably the Report of the Special Master will provide a comprehensive and complete factual basis for categorizing death-possible homicides. See Appendix E.

246. *Ramseur*, 106 N.J. at 330, 524 A.2d at 294.

247. "Suffice it to say this Court will receive any evidence on the issue and that we will, in addition, attempt to monitor the racial aspects of the application of the Act." *Id.* at 182, 524 A.2d at 216.

248. *Id.* at 187 n.20, 524 A.2d at 219 n.20.

249. No. A-1, slip op. (N.J. Aug. 3, 1988). The majority opinion in *Koedatich* reaffirms this intention, specifically citing to the data reported in this Study. *See id.* at 25.

250. *Ramseur*, 106 N.J. at 345, 524 A.2d at 301 (Handler, J., dissenting). Justice Handler would hold the capital murder-death penalty statute violates "the state constitutional provision relating to cruel and unusual punishment and due process as enhanced by the New Jersey doctrine of fundamental fairness." *Id.*

251. *Id.* at 405, 524 A.2d at 332-33. ("Any prosecutor is in a position to classify almost any murder as a capital offense. His decision, though conscientious, must necessarily be highly subjective and speculative.") The argument concerning unconstitutionality because of the "real risk of arbitrary enforcement" by prosecutors can be found *id.* at 404-08, 524 A.2d at 332-34.

ital murder are "basically standardless."[252]

In *State v. Biegenwald*[253] the supreme court also reversed the verdict of death. The ground for reversal was an error in the jury instruction concerning the weighing of aggravating and mitigating factors. The court additionally held that the decision whether to allow attorney-conducted *voir dire* was properly within the discretion of the trial court, even in capital cases.[254] The court further held that the denial of the defendant's motion for a change in venue was not prejudicial error,[255] nor were the prosecutor's remarks prejudicial,[256] nor was it prejudicial to deny the defendant's motion to waive the jury at penalty phase.[257] The holding that the instruction was erronous on the weighing of aggravating and mitigating factors requires resentencing in perhaps as many as 15 death sentences.[258] Finally, the *Biegenwald* majority began the process of delineating the procedures for resentencing trials[259]

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252. *Id.* at 406, 524 A.2d at 333. Quoting the *Preliminary Report supra* note 3, to the effect that discrepancies in the application of the death penalty statute across counties are enormous, Justice Handler commented: "Hence it becomes clear that prosecutorial decisions to prosecute for capital murder are basically standardless, and there is no procedure that will adequately provide a screen to intercept those defendants who should not be tried for capital murder." *Id.*

253. 106 N.J. 13, 524 A.2d 130 (1987) (decided March 5, 1987).

254. *Id.* at 28-29, 524 A.2d at 138. The general rule had been announced in State v. Manley, 54 N.J. 259, 255 A.2d 193, 205-06 (1969). When the 1982 capital punishment statute was enacted, a number of courts granted defendants' requests for attorney-conducted *voir dire*. In the data base of 703 cases, attorney-conducted *voir dire*, in conjunction with judge-granted *voir dire*, was used in at least 40 cases, including the other *Biegenwald* capital murder prosecution in which Biegenwald received a life sentence instead of the death penalty.

255. *Id.* at 35, 524 A.2d at 141.

256. *Id.* at 40, 524 A.2d at 144.

257. *Id.* at 48, 524 A.2d at 148. The defendant had sought to waive the jury at penalty phase, and the prosecutor objected. The statute allows for the penalty phase jury to be waived with the consent of the prosecutor. "On motion of the defendant and with the consent of the prosecuting attorney the court may conduct a [penalty phase] proceeding without a jury." N.J. STAT. ANN. § 2C:11-3c(1) (West 1982 & Supp. 1988). It is this provision which allows the defendant to "plead guilty" to capital murder and, with the consent of the prosecutor, waive the penalty phase jury. The court has not yet addressed the issues raised by a plea of guilty which might have been entered into to avoid the death penalty. *Cf.* State v. Funicello, 60 N.J. 60 (1972) (holding unconstitutional a statute which allowed entry of *non vult* plea to avoid death penalty).

258. There were 15 cases which resulted in a death sentence which took place before the statutory amendment clarifying the standard was enacted. Some of those cases may have used the correct version of the instruction. As of August of 1988, none of these defendants has been resentenced in a new penalty phase trial.

259. *Biegenwald*, 106 N.J. at 70-72, 524 A.2d at 160-61. The resentencing trials are to take place before a newly empanelled, death-qualified jury. *Id.* In at least one state, a trial

and held that resentencing of a capital defendant does not violate principles of double jeopardy.[260]

State v. Biegenwald II,[261] decided June 20, 1988, was the third opinion involving the capital conviction of Richard Biegenwald. The issue in this case was whether a murder conviction that occurred after the original imposition of the death penalty could be introduced at a penalty phase retrial as evidence for the prior murder factor.[262] The prior murder factor had already been served and found at the first penalty phase trial.[263] The factual basis for the factor had been a 1959 conviction for murder.[264] Prior to the penalty phase retrial, the State sought to introduce as additional evidence on the prior murder factor a murder conviction which was handed down subsequent to the first penalty phase verdict.[265] On interlocutory appeal and prior to the penalty phase retrial, the Supreme Court of New Jersey held that the admission of a murder conviction that was imposed subsequent to the imposition of the death penalty at the first penalty phase proceeding would not violate principles of due process, double jeopardy or *ex post facto*.[266]

The court commented generally upon procedures for the admissibility of new evidence at penalty phase retrials and announced

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court has reconvened the original penalty phase jury for a penalty phase retrial, even though the retrial took place several years after the original verdict. *See* Whalen v. State, 434 A.2d 1346 (Del. Super. Ct. 1981), *cert. denied*, 455 U.S. 910 (1982). In New Jersey, the state will present its evidence through witnesses, where available, and the defendant will have the option of using live witnesses or transcripts of testimony at the original trial. Evidence relevant only to issues concerning guilt will not be admitted. Issues concerning the submission of new, additional or different evidence at the penalty phase retrial are addressed in considerable detail in State v. Biegenwald, 110 N.J. 521, 542 A.2d 442 (1988).

260. *Biegenwald*, 106 N.J. at 67, 524 A.2d at 158. The opinion states, however, that evidence of either torture or aggravated battery may not be resubmitted to the jury in this case because to do so would run counter to principles of double jeopardy. As of October 19, 1988, a total of eleven out of thirty-three death sentences have been reversed. In addition to the opinions discussed here, the New Jersey Supreme Court set aside the death sentence of Benjamin Lodato and imposed a life sentence without issuing an opinion. And on April 15, 1987, Warren County Superior Court Judge John Kingfield set aside on his own motion the death penalty he had imposed on Raymond Kise, on the grounds the jury had been improperly instructed. Raymond Kise was subsequently sentenced to life in a penalty phase retrial conducted without a jury. *See* Appendix C.

261. 110 N.J. 521, 542 A.2d 442 (1988).

262. *Id.* at 524-25, 524 A.2d at 443-44.

263. *Id.* at 525, 524 A.2d at 444.

264. *Id.*

265. *Id.* at 527, 524 A.2d at 444.

266. *Id.* at 532, 524 A.2d at 447.

several rules. If a defendant is sentenced to life at penalty phase, he or she cannot be sentenced to death at resentencing.[267] That is, a non-death verdict at penalty phase will function as an acquittal of the capital aspect of the murder charge. The court also decided that if a penalty phase jury specifically rejects, that is, does not return after submission, a specific aggravating factor, or if an appellate court finds the State failed to establish the existence of a specific aggravating factor, the specific aggravating factor, or that part of the aggravating factor not found or established, cannot be resubmitted at the penalty phase retrial.[268] The reference to part of an aggravating factor presumably refers to factors such as the heinous factor and the felony factor, where evidence concerning the factor may be submitted in discrete, component parts. A third rule stated by the court is if the penalty phase jury which returned a death penalty found a specific aggravating factor at the first penalty phase proceeding, both old and new evidence concerning that aggravating factor may be admitted at the resentencing proceeding.[269] Fourth, if the penalty phase jury which returned the death penalty returned the prior murder factor, or if the prior murder factor was not submitted to the penalty phase jury which returned the death penalty, evidence of a defendant's subsequent murder conviction may be admitted at resentencing.[270] Fifth, with regard to aggravating factors other than the prior murder factor, only in extremely rare occasions will the State be allowed to submit evidence of a new aggravating factor and only upon proof that such evidence was unavailable to the State at the time of the original trial.[271] And, finally, at penalty phase resentencing, the court stated that the defendant may submit new evidence both on previously found mitigating factors and of any new mitigating factor. The State may offer rebuttal evidence, but the State is precluded from introducing a new aggravating factor under the guise of producing rebuttal evidence to mitigating factors.[272]

Justice Handler dissented on narrow grounds, endorsing the majority's conclusion that the State should be generally pre-

267. *Id.* at 542, 524 A.2d at 452.
268. *Id.*
269. *Id.*
270. *Id.*, 542 A.2d at 453.
271. *Id.* at 543, 524 A.2d at 453.
272. *Id.*

cluded from introducing new aggravating factors at resentencing, disagreeing only with the majority's unwillingness to follow the logic of this decision and preclude the use of any new aggravating factors.[273] Justice Handler construed the original, unamended language of the prior murder factor to preclude the admissibility at retrial of a conviction for murder obtained a year after the first penalty phase trial and not made final until four years after the first penalty phase.[274]

On July 29, 1988, the Supreme Court of New Jersey handed down the Order appointing Professor David C. Baldus as a Special Master for the purpose of developing a system for proportionality review as required by statute.[275] That Order is discussed in the Introduction to this Article.

On August 2, 1988, the Supreme Court of New Jersey reversed the two death sentences which had been imposed upon Marco Bey. In *State v. Bey I*,[276] the court reversed the convictions on fifth amendment grounds under *Miranda v. Arizona*,[277] and *State v. Hartley*.[278] The court additionally held that the jury's potential exposure to prejudicial mid-trial publicity violated the defendant's right to a fair and impartial jury. The trial court's refusal to poll the jury on the issue of possibly prejudicial publicity required a new trial.[279] The supreme court also held that the 1986 amendment to the death penalty statute which excluded juveniles tried as adults from capital punishment applied retroactively to the defendant and was a basis for vacating this death sentence, since the death sentence was imposed for a homicide committed when the defendant was a juvenile.[280] The court did not address the question of whether the execution of persons who were juveniles at the time of their offense would constitute cruel and unusual punishment under federal and state constitutional principles.[281] The court found that the New Jersey legislature's clear intent was that capital punishment not be applied to persons who were juveniles at the time of their offense. A concurring opinion by

273. *Biegenwald*, 110 N.J. at 544, 542 A.2d at 453.
274. *Id.* at 547, 524 A.2d at 455.
275. N.J. STAT. ANN. § 2C:11-3e (West 1982 and Supp. 1988).
276. No. A-2, slip op. (N.J. Aug. 2, 1988).
277. 384 U.S. 436 (1966).
278. 103 N.J. 252, 511 A.2d 80 (1988).
279. *Bey I*, slip op. at 43.
280. *Id.* at 66.
281. *Id.* at 64.

Justice Handler addressed the enhanced standard of appellate review of the record and proceedings in capital cases and the nature of reversible error in the context of capital appeals.

In *State v. Bey II*,[282] the New Jersey Supreme Court upheld the defendant's conviction and reversed the defendant's death sentence on the ground that the death sentence had been imposed in violation of the recent United States Supreme Court ruling in *Mills v. Maryland*.[283] The jury had been instructed it must unanimously find that mitigating factors existed. Under *Mills*, so long as one juror perceives any mitigating factor is not outweighed beyond a reasonable doubt by the aggravating factors, the defendant may not be sentenced to death.[284] *Bey II* sets out the standards for the appropriate charge at penalty phase in light of *Mills* and offered guidance on instructions concerning non-unanimous verdicts.

The court additionally held that a juror must be excused for cause if his views on the death penalty would substantially impair the performance of his duties as a juror, although the issue was harmless error in this case because the defense did not exhaust its allotment of peremptory challenges.[285] Other issues addressed included *Miranda* issues, the admissibility of evidence on the non-deterrence of capital punishment, the omission of a manslaughter charge, limitations on the admissibility of photographic evidence regarding the heinous factor in light of *Ramseur*, and appropriate instructions when a single set of factors or circumstances are offered in proof of more than one aggravating factor.

Justice Clifford joined Justice Handler in dissenting on the issue of harmless error both as applied to the peremptory challenge and as to the majority's upholding of the conviction in light of a factual record which, in the opinion of the dissenters, supported a finding that the defendant invoked his right to remain silent. Justice Handler additionally dissented on the grounds set out in his dissenting opinion in *Ramseur*, which included jury selection issues. He reasserted his view that the New Jersey capital punishment statute insufficiently narrows the class of death-eligible murders. Justice Handler also disagreed with the majority's analysis of the issues raised by the overlapping or double counting of

282. No. A-5, slip op. (N.J. Aug. 2, 1988).
283. *Id.* at 2 (citing Mills v. Maryland, 108 S. Ct. 1860 (1988)).
284. *Mills*, 108 S. Ct. at 1870.
285. *Bey II*, slip op. at 37.

separate aggravating factors.

The supreme court decided *State v. Koedatich*,[286] on August 3, 1988. The defendant's death sentence was reversed, and the conviction for capital murder was affirmed. The case was remanded for a new penalty phase trial. The defendant at penalty phase had stated that he wished no evidence of mitigating factors to be submitted on his behalf, and if the death sentence were returned he wished to be executed within 60 days. At the defendant's request, defense counsel made no opening statement, presented no evidence of mitigating factors to the jury and made no closing statement to the jury.[287] The trial judge instructed the jury as to the "catch-all" mitigating factor, and during deliberations instructed the jury that they must find the mitigating factor unanimously.[288] These errors were sufficient to overturn the death sentence.[289] The court took the occasion to address other matters of general concern in capital cases. Issues concerning prejudicial pretrial publicity,[290] procedures on *voir dire*,[291] and prosecutorial misconduct[292] were discussed at length.

The majority opinion cited the 1987 Preliminary Report of this Study[293] and concluded that the capital case processing system was not unconstitutional on its face because of the unguided nature of prosecutorial discretion. Noting that the court in *Ramseur* had been concerned with the possible misuse of prosecutorial discretion, the majority found no reason as yet to conclude that the administration of the death penalty has resulted in an unconstitutionally arbitrary system.[294] Citing the statistics in the 1987 Preliminary Report,[295] the court observed that the critical ques-

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286. No. A-1, slip op. (N.J. Aug. 3, 1988).

287. *Id.* at 23.

288. *Id.* at 130-31.

289. *Id.* at 2.

290. *Id.* at 49-70.

291. *Id.* at 44-76.

292. *Id.* at 121-30.

293. *Id.* at 26-38. The majority cited to statistics from the *Preliminary Report*, *supra* note 3 which reported on 568 cases. The *Interim Report*, *supra* note 3 with the data on 703 cases had been presented to the court as an appendix to the defendant's brief in *Koedatich*.

294. *Id.* at 31.

295. *Id.* at 34. The *Preliminary Report*, *supra* note 3, and the *Interim Report*, *supra* note 3, use the same terminology and statistical framework. The *Interim Report* includes an analysis of 703 cases, an increase from the 568 cases in the *Preliminary Report*. The *Interim Report* incorporates new sections including the Literature Review, the History of Capital Punishment and the Annotation of Death-Possible Cases. These sections are in-

tion in assessing prosecutorial discretion is what standards are applied to move a death-possible case to death-eligible status.[296] Noting that it could not rely upon statistical discrepancies developed solely by defense counsel and that the 1987 Preliminary Report was never part of the record in *Koedatich*,[297] and that the report had not been subjected to challenge and cross examination in the context of an evidentiary hearing,[298] the majority concluded it would be appropriate to analyze the Study's findings in their more comprehensive form.[299]

Although prosecutorial decision-making is normally beyond its purview, the court noted, fundamental fairness required the court to review the basis for the State serving a notice of factors in a capital case.[300] The majority opinion perceived "a need to promote uniformity in the administration of the death penalty, which will be an additional safeguard against arbitrariness," and went on to "strongly recommend that the Attorney General, the various county prosecutors, in consultation with the Public Defender, adopt guidelines for use throughout the state by prosecutors in determining the selection of capital cases."[301] The majority rejected the specific claim of arbitrariness in the instant case and stated that it has considered and will continue to consider the statistical results of this Study.[302]

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cluded in this Article in somewhat different form.

296. *Id.*

297. *Id.* at 36. Presumably the court is referring to the fact that the *Preliminary Report*, *supra* note 3, was not submitted to the trial court in *Koedatich* and is not part of the trial court record. The *Interim Report*, *supra* note 3, was submitted to the supreme court in *Koedatich* by the defense. The prosecutor did not object to its submission on appeal.

298. *Id.* The Office of the Public Defender has made repeated motions throughout the state for an evidentiary hearing on the data presented in both the *Preliminary Report*, *supra* note 3, and the *Interim Report*, *supra* note 3. With the exception of the trial court in State v. Lazorisak, Hunterdon Co. Indictment No. 86-04-0039 (1987), those requests for an evidentiary hearing have been consistently denied by the trial court. The Attorney General and the county prosecutors have opposed these motions for an evidentiary hearing on the data presented here while simultaneously objecting to the fact that the reported research results have not been subject to cross examination.

299. *Koedatich*, slip op. at 37. The appointment of a Special Master with the authority to conduct hearings, call upon experts, and make findings of fact and conclusions of law provides the opportunity for the Attorney General and the individual county prosecutors to come forward with evidence as to how they select cases for capital prosecution. This will allow the Special Master to make findings of fact as to how each individual county prosecutor selects cases for capital prosecution. *See* Appendix E.

300. *Koedatich*, slip op. at 25.

301. *Id.* at 38.

302. *Id.* at 37.

Justice Clifford in his dissent agreed with Justice Handler that egregious prosecutorial misconduct in this case was sufficient to reverse the convictions as well as the death sentence.[303] Justice Handler's dissenting opinion addressed a number of issues in detail, including prejudicial pretrial publicity, prosecutorial misconduct, the appropriateness of an enhanced standard of review in capital appeals, the role of curative instructions and the constitutional issues raised by the research findings of this Study.

Citing the 1988 Interim Report,[304] Justice Handler noted that, at a minimum, its results should "give the court pause; realistically it calls for further study and for the imposition of a mandatory system to guide prosecutor's judgments as to whether to charge on capital murder."[305] On the question of county by county disparity, Justice Handler observed: "The county by county discrepancies, contrary to the majority's view, are indicative that defendants in different areas of the state are likely being treated differently."[306] Justice Handler concluded that the county by county discrepancies reported in the Study indicate "arbitrary imposition of the death penalty"[307] and that to hold to the contrary violates *Ramseur*. Justice Handler would require the development of statewide standards for selecting cases for capital case processing.[308] Noting that the majority "dismisses the importance of the discrepancies suggested by the Public Defender's study," Justice Handler concluded, "I believe the Study's preliminary evidence is sufficiently strong to warrant a showing by the State that no bias in charging exists."[309]

State v. Zola,[310] was decided on August 16, 1988. The supreme court affirmed the convictions and reversed the death sentence, remanding for a new penalty phase proceeding. The basis for the reversal of the death sentence was an error in the trial court's instruction concerning the weighing of aggravating and mitigating

303. *Id.* at 1 (Clifford, J., dissenting).

304. *Id.* at 52, 46-56 (Handler, J. dissenting).

305. *Id.* at 53.

306. *Id.* at 55.

307. *Id.* at 54.

308. *Id.* at 55. "The indications suggested by the data are that such arbitrary results may be occurring and accordingly I strongly disagree with the majority's reluctance to face the implications of this data and to adequately guide the discretion given to county prosecutors." *Id.* at 56.

309. *Id.* at 53.

310. No. A-30, slip op. (N.J. Aug. 16, 1988).

factors, as in *Bey II*.[311] The court addressed issues concerning *voir dire*, the adequacy and placement of the trial court's charge on diminished capacity in light of *State v. Breakiron*,[312] the necessity of a charge on intoxication, issues concerning the admissibility of expert testimony regarding sexual assault, the adequacy of the charge on the heinous factor in light of *Ramseur*, prosecutorial misconduct and the defendant's right to allocution. In the exercise of its supervisory jurisdiction over criminal trials, the court found that a capital defendant had a narrowly defined right to make a brief, unsworn statement in mitigation to the jury at the close of the presentation of evidence at penalty phase.[313] The majority cited to this Article as forthcoming in the *Rutgers Law Review* and stated once again it has and will continue to consider the research findings of this Study in its proportionality review.[314] Justices Pollock and Handler concurred in part and dissented in part. Justice Handler agreed with the majority's reversal of the death sentence and disagreed with the court's treatment of the issues raised by the expert testimony on aggravated assault. Justice Handler would have reversed the conviction for aggravated assault.[315] Justice Pollock joined the dissenting opinion on this issue.[316] Justice Handler also disagreed with the majority's interpretation of issues raised by the evidence of diminished capacity. Justice Handler concluded by saying: "Finally, I continue to believe that constitutional standards and principles of fundamental fairness impugn our capital murder death penalty statute as enacted, as interpreted, and as applied."[317]

B. *Reported Decisions of the Superior Court of New Jersey*

The Superior Court of New Jersey consists of the trial court division, known as the Law Division, and the intermediate appellate court, the Appellate Division. Trial court jurisdiction is coterminous with the county jurisdiction, although technically every Superior Court judgment is law within the state as a whole.[318]

311. *Id.* at 2.
312. 108 N.J. 591, 532 A.2d 199 (1987).
313. *Zola*, slip op. at 56-64.
314. *Id.* at 68-69.
315. *Id.* at 2 (Handler, J., dissenting).
316. *Id.* at 22 (Handler, J., dissenting).
317. *Id.*
318. N.J. Ct. R. 3:1-2.

The Appellate Division of the Superior Court sits as either a two or three-judge court and its opinions have statewide application. There is an appeal as of right to the Appellate Division from a final judgment of the trial court,[319] and the Appellate Division can overrule the law division. An Appellate Division opinion and judgment is subject to review by the Supreme Court of New Jersey. There is not an automatic appeal as of right to the New Jersey Supreme Court for all criminal cases. There is, however, an appeal as of right to the Supreme Court of New Jersey in all cases where the death penalty has been imposed.[320] As a consequence, there are very few Appellate Division opinions interpreting the capital punishment statute. Several law division opinions, however, have addressed specific issues arising in the particular context of various capital proceedings.

The first Law Division case interpreting the recently re-enacted capital punishment statute was *State v. Bass*.[321] *Bass I* addressed an eighth and fourteenth amendment challenge to the (c) aggravating factor, that the murder was outrageously or wantonly vile. The facts of the case involved the death of a child, and the only aggravating factor served in the case was the (c) factor, that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery upon the victim. The defendants initiated a pretrial facial constitutional attack upon that aggravating factor. Relying upon United States Supreme Court decisions, the law division held that the statutory factor was not unconstitutional on its face and it did not violate due process, nor was it in violation of the eighth amendment to the United States Constitution, as interpreted by the United States Supreme Court in *Gregg v. Georgia*[322] and subsequent cases. Part of the opinion dealt with the burden of proof at penalty phase and with the jury's obligation to weigh mitigating factors against aggravating factors. That part of the opinion has been rendered moot by the subsequent statutory amendment requiring a unanimous jury to find beyond a reasonable doubt both that the aggravating factor exists and that all of the aggravating factors outweigh all of the mitigating factors.[323]

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319. N.J. CT. R. 2:2-3.
320. N.J. CT. R. 2:2-1.
321. 189 N.J. Super. 445, 460 A.2d 214 (Law Div. 1983).
322. 428 U.S. 153 (1976).
323. N.J. STAT. ANN. § 3C:11-3c(3) (West 1982 & Supp. 1988).

A second Law Division opinion in the same case was handed down on March 22, 1983. *Bass II*[324] concerned the procedures for death qualification of jurors. The defense argued that death qualification should take place only after a death-eligible verdict had been reached at guilt phase. The challenge was based upon the sixth amendment to the United States Constitution and upon *Witherspoon v. Illinois*[325] and its progeny. The Law Division rejected the defendant's request to postpone death qualification until penalty phase and refused the defendant's request for a special evidentiary hearing on the effect of death qualification of jurors. The court reserved decision on whether attorney-conducted *voir dire* would be allowed.

The third Law Division opinion in this case was handed down on May 23, 1983. *Bass III*[326] involved a subpoena to county prosecutors and to other state officials seeking records pertaining to other fatal child abuse cases which had not been the subject of a capital prosecution. This was basically the same argument as was advanced in *State v. Smith*,[327] except that it was made in the context of child victim cases. The defense sought the information to introduce as mitigating evidence at penalty phase. The information was to be offered on the issue of proportionality. The court held that issues of proportionality should not be addressed pretrial and quashed the subpoenas.

In *State v. Timmons*,[328] the defense sought an order precluding the State from alleging aggravating factors. The defense argued that if the State did not allege aggravating factors at arraignment and did not seek the specially provided-for extension of time for discovery in capital cases, the State was precluded from subsequently asking for the death penalty by serving a notice of factors. Noting that the function of a notice of factors was the same as an indictment, to notify the defendant of charges against which he must defend, the court held that the prosecutor was precluded from seeking the death penalty and the jury was precluded from considering the presence of aggravating factors.

The Appellate Division of the Superior Court addressed the issue of a defendant's right to attorney-conducted questioning of

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324. 189 N.J. Super. 461, 460 A.2d 223 (Law Div. 1983).
325. 391 U.S. 510 (1968).
326. 191 N.J. Super. 347, 466 A.2d 347 (Law Div. 1983).
327. 202 N.J. 568, 495 A.2d 507 (Law Div. 1985).
328. 192 N.J. Super. 141, 469 A.2d 46 (Law Div. 1983).

potential jurors in *State v. Howard.*[329] Three defendants filed motions for leave to appeal from trial court orders restricting attorney-conducted questioning, or *voir dire*, at capital trial. The court held that sequestration of jurors during questioning was clearly permitted. The court noted that the rule in New Jersey has always been that the judge shall interrogate prospective jurors, and the parties or their attorneys may supplement the judge's interrogation at the court's discretion.[330] The specially drafted rules for capital cases provide that in capital trials jurors shall be individually examined. The Appellate Division upheld the former rule as interpreted in *State v. Manley*,[331] and found no constitutional right to attorney-conducted *voir dire*. The more recent pronouncement of the New Jersey Supreme Court in *State v. Gilmore*,[332] although not directly addressed to *voir dire* in capital cases, found that issues of jury selection may reach constitutional proportion.[333]

In *State v. Price*,[334] decided January 11, 1984, the defendant moved to strike aggravating factors on various constitutional and non-constitutional grounds. The trial court held that evidence of aggravating factors did not have to be presented to the grand jury and the (b) aggravating factor, that the defendant knowingly or purposely created grave risk of death to another, was not unconstitutional on its face or as applied in this case. The opinion summarized other states' law interpreting analogous provisions. The court treated the prosecutor's failure to serve a notice of factors at arraignment as if a request to enlarge time had been filed and granted *nunc pro tunc* and found that there was no prejudice created by the delay in this case. The court did say, however, that it would be unsupportable for a prosecutor to wait until penalty phase to serve the notice of aggravating factors. The general rule was that a notice of factors must give an itemization of the aggravating factors and the discovery relating to the factors at arraignment, unless the time is enlarged. Should the prosecutor need an extension of time, it is the prosecutor's responsibility to file such a motion.

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329. 192 N.J. Super. 571, 471 A.2d 796 (App. Div. 1983).
330. N.J. Ct. R. 1:8-3.
331. 54 N.J. 259, 255 A.2d 193 (1969).
332. 103 N.J. 508, 511 A.2d 1150 (1986).
333. *Id.* at 543-44, 511 A.2d at 1169.
334. 195 N.J. Super. 285, 478 A.2d 1249 (Law Div. 1984).

State v. Monturi,[335] decided in Essex County on March 8, 1984, involved a pretrial challenge to the projected admissibility of evidence at penalty phase. The combined issue of procedure and substance occurred in the following context. The indictment charged the defendant with a series of offenses, including two counts of conspiracy to commit murder, three counts of murder, and fifteen additional counts for events which occurred three days after the murders. The evidence regarding the post-murder offenses was admissible at the guilt phase trial for the murders. The court held, however, that the same evidence regarding post-murder events would not be admissible at penalty phase to prove the existence of the (c) factor, that the murder was outrageously or wantonly vile, or the (f) factor, that the murder was for the purpose of escaping detection. The court held that the appropriate procedure in such a circumstance was not severance, but to try the defendant at guilt phase on all counts before a death qualified jury, deferring any decision as to the necessity of empanelling a second death qualified jury for penalty phase. The court reiterated the holding in *Bass I*, that the factual basis for the outrageous factor can be found only by proof of conduct prior to the homicide. The court then made a similar finding as to what facts would be admissible to prove the aggravating factor (f), that the murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense by the defendant or another. The court held that the offer of proof for this factor must be the concealment of another offense which was itself prior to the murder, and the post-murder offenses in this case would be irrelevant to the proof of this factor at penalty phase. It further held that in this circumstance good cause could exist to empanel a second death-qualified jury should a verdict of guilty of death-eligible murder be returned by a death-qualified jury which had already been exposed to evidence inadmissible at penalty phase.

State v. Wright,[336] decided in Camden County on April 19, 1984, involved a plea to capital murder. A mother killed her four children. The state had agreed to withdraw the notice of aggravating factors in exchange for the defendant's guilty plea to capital murder with a sentence recommendation of four concurrent

335. 195 N.J. Super. 317, 478 A.2d 1266 (Law Div. 1984).

336. 196 N.J. Super. 516, 483 A.2d 436 (Law Div. 1984).

life sentences with four concurrent 30 year terms of parole ineligibility. The court held the prosecutor did not have the discretion to withdraw the notice of factors; however, it was constitutionally permissible for the defendant to plead guilty to avoid the death penalty. The court stated that allowing the prosecutor to withdraw the notice of factors might give an interpretation to the statute which would render the death penalty unconstitutional. It then proceeded to conduct a guilt phase trial and a penalty phase hearing without a jury. The court found the defendant guilty of death-eligible murder and found the (c) statutory aggravating factor and six statutory mitigating factors. The mitigating factors were found to have outweighed the aggravating factor. The court then rejected the death penalty and imposed the four concurrent life terms. It outlined a procedure for conditional pleas in capital cases in which the defendant agrees to waive a jury trial with the understanding that the court will not return the death penalty. The opinion states that if the court rejects the agreement and sentences the defendant to death, the defendant has the opportunity to withdraw the guilty plea and proceed to capital trial. This procedure has been followed in a few other cases.[337]

In *State v. Ramseur*,[338] decided in Essex County on August 2, 1984, the trial court examined the representative nature of the jury pool in Essex County. The defendants brought a pretrial motion seeking the reversal of convictions and/or the dismissal of the indictment on the grounds that they were indicted and would be tried by grand and petit juries drawn from improperly constituted pools, or venires. The pretrial motion was bifurcated from the guilt phase trial, and thirteen other Essex County defendants joined the motion. The defendants alleged three separate defects in the Essex County jury selection system: (1) that the juror source list and juror qualified list were unconstitutionally unrepresentative because they included too few blacks, women, persons from low income groups, young people, students and Newark residents, in proportion to the distribution of those groups within the population of Essex County; (2) that blacks and women were ex-

337. There were four cases of pleas to capital murder in the data base. All were cases in which jury trial was waived; all resulted in a life sentence. In a case which is not included in this data base, the death sentence was imposed by an Essex County judge sitting without a jury. *State v. DiFrisco*, Essex County. Death sentence was imposed 1/25/88. *See* Appendix C.

338. 197 N.J. Super. 565, 485 A.2d 708 (Law Div. 1984).

cluded from the position of grand jury foreperson; and (3) that various violations of the New Jersey jury selection statutes had occurred, including the manner of discretionary selection of grand jurors by the assignment judge, the improper exclusion of students and teachers, the improper exclusion of 18 year olds and miscellaneous other improper disqualifications. The defendants' challenge was premised upon the sixth and fourteenth amendments to the United States Constitution and upon article 1, paragraphs 5 and 9 of the New Jersey Constitution. The constitutional issues raised were disposed of on state constitutional grounds in the New Jersey Supreme Court opinion in *Ramseur*. Similar challenges to jury selection statutes and procedures were subsequently brought in other counties and are currently pending final decision and state appellate review.[339] A New Jersey Supreme Court Task Force recently submitted recommendations for administrative and statutory reforms of jury selection to the legislature, and several bills on the issue of jury selection are presently pending before the legislature.

In *State v. Spotwood*,[340] decided in Union County on December 20, 1984, the defense moved for a pretrial evidentiary hearing to dismiss one of two noticed aggravating factors pursuant to *McCrary*. The court denied the motion for a pretrial evidentiary hearing because the defense only sought to dismiss one of two noticed aggravating factors. The court said that *McCrary* motions should be considered before guilt phase only when the granting of the motion would eliminate the possibility of the death penalty, or when the hearing would serve some other substantial purpose. For example, a *McCrary* hearing would be justified if the defendant's pretrial preparations to rebut the challenged aggravating factor entailed an extraordinary expenditure of time or money.

State v. Long,[341] decided in Atlantic County on January 7, 1985, was a challenge to the constitutionality of the array of both grand and petit juries in Atlantic County. The court ordered an evidentiary hearing and stayed trial in this case and in other cases where similar motions had been filed. The State filed an interlocutory appeal and the appellate division upheld the trial court order except insofar as it barred dismissal of the joined

339. State v. Rose, No. 24,400 (N.J.), and State v. Long, No. 24,871 (N.J.), both pending before the Supreme Court of New Jersey.

340. 202 N.J. Super. 532, 495 A.2d 483 (Law Div. 1984).

341. 204 N.J. Super. 469, 499 A.2d 264 (Law Div. 1985).

cases. The defense alleged a systematic exclusion of a cognizable class and also a violation of the state jury selection statutes. The defense alleged that the computerized juror selection process resulted in a non-random selection. The court found that the defense did demonstrate that the jury selection process was not random, and hence a constitutional violation was shown. The court ordered the county to correct the improprieties in the system and its ruling was given prospective effect only. Additional challenges to the jury selection process are pending.[342]

In *State v. Smith*,[343] decided in Essex County on April 25, 1985, the court addressed constitutional issues concerning the application of the death penalty to juveniles and the defendant's claim that the county prosecutor had arbitrarily designated this case as capital when fifteen other felony murder cases with similar circumstances had not been selected for prosecution as capital cases. The defendant was 17 years old on the date of the offense, and at the time of the court's decision the legislature had not yet made clear that it did not intend the death sentence to be applied to persons whose homicides were committed when they were juveniles. The subsequent legislation exempting juveniles from capital punishment applied to all pending cases and rendered moot the defendant's argument concerning the prosecutor's selective application of the statute.[344] The issue has been raised in other pending cases.

In *Smith*, the defense had served a subpoena on the county prosecutor asking for all guidelines and memoranda relating to the Essex County Prosecutor's methods of selection in capital cases. The court stated that one possible indicator of unconstitutional arbitrariness in the selection process was the frequency with which the capital punishment statute was actually applied in comparison to the number of cases in which it might have been applied. The court was satisfied that the defense had demonstrated that this defendant had been singled out for capital prosecution. The court further found the demonstrated disparity in the prosecution of capital cases to be sufficiently disturbing to order the Essex County Prosecutor to come forward with the guidelines and criteria used in the selection of cases for capital prosecu-

342. Jury selection challenges are pending in Gloucester County and Atlantic County.

343. 202 N.J. Super. 578, 495 A.2d 507 (Law Div. 1985).

344. *See* N.J. STAT. ANN. § 2C:11-3g (West Supp. 1988).

tion.[345] The case was eventually disposed of as a plea to manslaughter.

In *State v. Marshall*,[346] decided March 20, 1985, the appellate division considered whether the media was entitled to disclosure of a co-defendant's claimed incriminating statement and a forensic laboratory report. The trial court had ordered partial closure of the bail hearing where the evidence was admitted. The appellate division upheld the order of partial closure under *State v. Williams*,[347] and found no realistic likelihood of prejudice from the disclosure which did occur.

State v. Moore,[348] decided in Essex County on June 13, 1985, involved a variety of procedural and substantive challenges to the State's notice of aggravating factors. Three defendants were charged with capital murder for their joint participation in beating to death a victim of robbery and burglary. Each of the three defendants was indicted with the death-eligible, purposeful or knowing murder by the defendant's own conduct. Each of the three defendants was served with a notice of factors alleging three aggravating factors: the (c) factor, that the murder was outrageously or wantonly vile; the (f) factor, that the murder was committed for the purpose of escaping detection; and the (g) factor, the felony factor. All three defendants were also indicted for felony murder, for both burglary and robbery, for a weapons charge and for conspiracy. The three defendants' trials were severed. At the first trial, one defendant was found guilty of purposeful or knowing murder, but the jury could not reach a unanimous decision on whether the defendant committed the murder by his own conduct. That was held to be an acquittal of the capital murder count. The two co-defendants were pending trial at that point, and a series of pretrial motions were brought on their behalf.

Regarding the (f) factor, that the murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense, the court rejected the defendant's argument that it should be interpreted to apply only to the killing of a law enforcement officer. The court, however,

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345. The twenty-one county prosecutors will have the opportunity to come forward with the criteria they have used for selecting capital cases in the context of the evidentiary hearings which will be conducted by the Special Master. *See* Appendix E.

346. 199 N.J. Super. 502, 489 A.2d 1235 (App. Div. 1985).

347. 93 N.J. 39, 459 A.2d 641 (Law Div. 1983).

348. 207 N.J. Super. 561, 504 A.2d 804 (Law Div. 1985).

construed the term "another offense" to include only the underlying crimes committed prior to or during the commission of the homicidal act itself. The court also held that if this factor is served, there must be at least some evidence from which the jury could infer that at least one reason for the killing was to prevent the victim from informing the police and testifying against the defendants. In this case the court found that the prosecutor presented evidence sufficient for this factor to survive dismissal under *McCrary*. The two co-defendants pending trial had also been served with the felony aggravating factor: one notice specified robbery as the underlying felony and one notice specified burglary as the underlying felony. The court held that the facts presented indicated a single aggravating factor, with the jury instructed to consider and weigh both the robbery and burglary as part of the same aggravating factor.

With regard to the (c) aggravating factor, that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim, the court agreed to strike the language referring to torture and depravity of mind, pursuant to *McCrary*. The defense also moved to strike all aggravating factors on the grounds that the state could not prove that either of the remaining defendants purposely or knowingly committed the homicidal act by his own conduct. Both were unpaid accomplices, the defense argued. The court held that this was ultimately a question of fact for the jury and denied the motion. Finally, the State argued that the first jury's inability to reach a unanimous verdict solely on the issue of the "by his own conduct" element constituted a mistrial on the count alleging purposeful or knowing murder by the defendant's own conduct, and, therefore, the state was entitled to retry the first defendant for capital murder. The court held that "by his own conduct" was not an element of the offense of murder. It was merely a triggering device for the special penalty phase sentencing proceedings associated with the death penalty. Therefore, the conviction on the murder count remained a valid verdict though the jury was unable to find that the defendant committed the murder by his own conduct. The court further held that it would violate principles of double jeopardy to retry the first defendant for capital murder.

In *State v. Breakiron*,[349] decided May 22, 1986, the appellate division held in a non-capital case that the defendant had to establish sufficient evidence of diminished capacity by a preponderance of the evidence for the issue of diminished capacity to be submitted to the jury at trial. In other words, diminished capacity would be considered an affirmative defense to be raised by the defendant. Since the case was not a capital case, the issue did not concern the burden of proof required to submit evidence of mental mitigating factors to the jury at penalty phase. The decision, however, has important ramifications for capital cases.[350]

In *State v. Cohen*,[351] decided May 28, 1986, the defendant challenged the death qualification of jurors under both the federal and state constitutions. The defendant was charged with death-eligible murder and a notice of factors was served. After the death qualification of jurors, the case went to trial as a capital case and the defendant was found guilty of death-eligible murder. At penalty phase the death penalty was not returned. The defendant argued the procedures for death qualification and the fact of death qualification denied him his right to a fair and impartial trial because death qualified juries are conviction prone. During the pendency of the appeal, the United States Supreme Court decided *Lockhart v. McCree*,[352] which held that death qualification was acceptable as a matter of federal constitutional law. The appellate division followed the *Lockhart* decision.

In *State v. Russo*,[353] decided in Gloucester County on April 25, 1986, the defendant sought to dismiss his death-eligible indictment on the ground that the grand jury was unlawfully and unconstitutionally selected. The court held that the omission from jury lists of licensed drivers residing within certain zip codes, although made in good faith, was a violation of the state statute. The grand jury and petit jury panels were therefore improperly convened, and the jury selection system had to be corrected. The court further held that the procedures to merge jury lists needed correction, and the assignment judge's method of selecting the

349. 210 N.J. Super. 442, 210 A.2d 80 (App. Div. 1986) *rev'd in part*, 108 N.J. 591, 532 A.2d 199 (1987).

350. The supreme court has now issued an opinion addressing how the jury must be instructed on the issue of diminished capacity. *See State v. Zola*, No. A-30, slip op. (N.J. Aug. 16, 1988).

351. 211 N.J. Super. 544, 512 A.2d 500 (App. Div. 1986).

352. 476 U.S. 162 (1986).

353. 213 N.J. Super. 219, 516 A.2d 1161 (Law Div. 1986).

grand jury foreperson and deputy foreperson also violated the statutory mandate. As a result, the trial was stayed and the motion to dismiss the indictment was granted. The case subsequently went to capital trial on an amended indictment. The defendant was not sentenced to death.

State v. Hightower,[354] decided November 3, 1986, concerned a defendant's request not to have any mitigating evidence submitted on his behalf at penalty phase. The appellate division held that defense counsel could present mitigating evidence at penalty phase, in contravention of the defendant's express wish not to contest the imposition of the death sentence. The trial court judge had issued an order precluding the defense from introducing mitigating evidence over the objection of the client.

Finally, on March 26, 1987, the Superior Court in Union County handed down an opinion concerning pretrial publicity, the number of peremptory challenges and *voir dire* issues in *State v. Halsey*.[355] The *Halsey* case subsequently went to capital trial but did not proceed to penalty phase.

State v. Wilkins,[356] decided May 29, 1987, concerned a motion to sever the case of a co-defendant who was charged with non-capital murder from the case of a defendant who was jointly indicted for capital murder. This issue had been raised previously in *State v. Savage*,[357] and in that case, the trial court ordered the severance of the non-capital defendant. Distinguishing *Savage* on the ground that the co-defendant in *Savage* was not charged as a co-defendant on the murder, the trial court in *Wilkins* held that joinder of capital and non-capital co-defendants was proper when the co-defendants were charged jointly with purposeful or knowing murder and weapons counts.

V. Literature Review: Prior Empirical Studies

During the past sixty years there has been an extensive amount of empirical research conducted on the death penalty. Studies have varied widely in their use of data, time, methodological technique, location, case processing stage, and focus. The combined results of these studies, however, have revealed some consistent

354. 214 N.J. Super. 43, 518 A.2d 482 (App. Div. 1986).
355. 218 N.J. Super. 149, 526 A.2d 1165 (Law Div. 1987).
356. 219 N.J. Super. 671, 530 A.2d 1324 (Law Div. 1987).
357. 198 N.J. Super. 507, 487 A.2d 790 (Law Div. 1984).

trends and patterns.

A predominant pattern shows that both "legal" and "extra-legal" factors can influence sentencing decisions concerning the death penalty. Legal factors reflect legally relevant influences or "official-normative descriptions of the criminal justice system,"[358] such as the offender's prior criminal record, statutory aggravating or mitigating characteristics, and official charges.[359] Extra-legal factors "refer to perceived characteristics of the offender that are legally irrelevant to the imposition of sentence,"[360] such as race, gender, and socio-economic status. In general, much of the death penalty research suggests that arbitrary and discriminatory decision-making exists in the criminal justice system because extra-legal factors significantly predict the likelihood of a death sentence after "controlling for," or taking into account, the impact of legal factors.

The primary purpose of this section is to review past and present death penalty research in order to draw contrasts and comparisons with the ongoing New Jersey study presented in this Article. The review concentrates upon empirical research examining the possibly arbitrary and discriminatory application of the death penalty. This section also pinpoints occasional methodological or substantive weaknesses which are primarily characteristic of the older studies. Section A summarizes research conducted prior to *Furman v. Georgia*.[361] Section B discusses research continued or initiated after *Furman*. Section C discusses the research of David C. Baldus and his colleagues. Section D concludes with a general assessment of current death penalty research and its impact on judicial decision-making.

A. *Pre*-Furman *Death Penalty Studies*

The general focus of pre-*Furman* death penalty research differs from post-*Furman* research in essentially two ways. Pre-*Furman* research includes proportionately more studies of non-southern jurisdictions[362] and the majority of studies of the death penalty as

358. Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 LAW & SOC'Y REV. 357, 358 (1974).

359. *Id.*

360. *Id.* at 380 n.1.

361. 408 U.S. 238 (1972).

362. D. BALDUS, G. WOODWORTH & C. PULASKI, EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS at 8-29 (forthcoming, 1989, Northeastern Press; page

applied to rape offenses,[363] since the Supreme Court held in *Coker v. Georgia*[364] that the death penalty was an unconstitutional punishment for rape. The eighteen states which allowed the imposition of the death penalty for rape were all southern or border states.[365] Pre-*Furman* research was also concerned with bias in the application of the death penalty, particularly in terms of race.

1. The Impact of Race in Pre-*Furman* Studies: 1900-1959

One of the earliest published studies on the death penalty, conducted by Brearley, included an examination of race differences in homicides and murder conviction rates derived from reports of the Attorney General of South Carolina.[366] Analyses of the reports showed that between 1920-1926, blacks charged with murder or homicide in the circuit courts were twice as likely to be convicted as their white counterparts. In turn, between 1915-1927, it was found that, on the average, capital punishment was administered to "one white for every 101 white homicides and one Negro for every 38 Negro homicides."[367] Comparably sized racial discrepancies were noted in Brearley's examination of North Carolina homicide data[368] and in Sellin's study of Arkansas murder cases and executions during the eight years 1912-1916 and 1921-1924.[369] Mangum showed that blacks had consistently higher ratios of executions to sentences in data for nine southern states in years ranging from 1908 to 1938.[370]

Early explanations for these discrepancies pinpointed the discriminatory bent of the criminal justice system. According to Brearley, the racial difference "is due, doubtless, to such factors

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numbers refer to 1987 manuscript).

363. *See, e.g.*, Wolfgang & Riedel, *Rape, Race and the Death Penalty in Georgia*, 45 AM. J. ORTHOPSYCHIATRY 658 (1975) [hereinafter Wolfgang & Riedel, *Rape*].

364. 433 U.S. 584 (1977).

365. The eighteen states were: Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. See W. WHITE, LIFE IN THE BALANCE: PROCEDURAL SAFEGUARDS IN CAPITAL CASES (1984) and Partington, *The Incidence of the Death Penalty for Rape in Virginia*, 22 WASH. & LEE L. REV. 43, 52-53 (1965) for a discussion of the legal background of the death penalty for rape.

366. Brearley, *The Negro and Homicide*, 9 SOC. FORCES 247 (1930).

367. *Id.* at 252.

368. *Id.*

369. T. SELLIN, THE PENALTY OF DEATH at 56-63 (1980).

370. C. MANGUM, THE LEGAL STATUS OF THE NEGRO at 368-70 (1940).

as race prejudice by white jurors and court officials and the Negro's low socioeconomic status, which prevents him from securing 'good' criminal lawyers for his defense."[371] However, these early studies did not control for potentially influential legal factors or other kinds of extra-legal effects. As Bowers and Pierce point out, "The magnitude of racial differences [in these early studies] especially at later stages of the process does . . . cast doubt on the possibility that legally relevant factors are responsible for these differences."[372]

In a study published in 1957, E.H. Johnson made use of additional variables. He reported that the 660 convicted capital offenders who entered death row in North Carolina from 1909 to 1954 were disproportionately comprised of blacks (74%), and had significantly lower educational and occupational levels compared to the other male convicts.[373] Blacks in E.H. Johnson's study were also significantly more likely to be executed than whites, according to Hagan's reanalysis of E.H. Johnson's data.[374] Other research revealed another key variable—race of the victim. In general, conviction and death sentencing rates were relatively higher in those cases where the victim was white.[375] The highest rates of capital sentencing occurred in those cases where the victim was white and the defendant was black.[376]

In 1941, G.B. Johnson examined 330 murder defendants and their victims in five counties in North Carolina between 1930 and 1940: 32% of the black defendants and 13% of white defendants linked to white victims received a death sentence, while 4% of the black defendants and none of the white defendants linked to black victims received a death sentence.[377] With regard to differences in execution rates, an examination in the same study of 123 death sentences for murder in North Carolina during 1933-1939

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371. Brearley, *supra* note 366, at 252.

372. Bowers & Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 580 (1980).

373. E.H. Johnson, *Selective Factors in Capital Punishment*, 36 SOC. FORCES 165, 168-69 (1957).

374. Hagan, *supra* note 358, at 370. *See also* Kleck, *Racial Discrimination in Capital Sentencing: A Critical Evaluation of the Evidence With Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783, 788 (1981).

375. *See infra* note 377 and accompanying text.

376. *See infra* note 381 and accompanying text.

377. G.B. Johnson, *The Negro and Crime*, 217 ANNALS 93, 99 (1941) (these percentages were derived from BALDUS, WOODWORTH & PULASKI, *supra* note 362, at 8-23, who transformed Johnson's 1941 data in Table 1 into percentages).

showed that 80.5% of the black-defendant/white-victim pairs resulted in executions, as compared to 64.4% of the black-defendant/black-victim cases.[378] In 1949, Garfinkel's expanded study of North Carolina data focused on 821 homicide offenders in ten different counties during the period 1930-1940.[379] The study was particularly sophisticated because defendant-victim racial differences were compared across three stages of disposition: indictment, charge, and conviction.[380] The defendant-victim racial pattern observed in G.B. Johnson's study persisted at all three stages. For example, among those offenders convicted of first and second degree murder, black defendants with white victims were sentenced to death in 43% of the cases as compared to 19% of the cases for white defendants with white victims. Only 7% of the black defendants with black victims were sentenced to death and none of the white defendants who killed black victims received death sentences.[381]

Garfinkel did not include data on executions, although subsequent studies have confirmed G.B. Johnson's findings of a higher proportion of executions among blacks. In 1962, Wolfgang, Kelly, and Nolde analyzed differences in social characteristics between persons whose sentences were commuted (usually to life imprisonment) and persons who were actually executed, within a sample of 439 detainees on death row in Pennsylvania between 1914 and 1958.[382] The strongest finding was that a significantly higher proportion of blacks was executed as compared to whites. This race differential remained even after the study controlled for a series of legal and extra-legal influences such as the presence of felony murder, defendant's occupation, marital status, and age.[383] This study also supported Brearley's earlier suggestion[384] that differences in the type of defense counsel influenced sentencing outcome.[385]

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378. *Id.* at 100.

379. Garfinkel, *Research Note on Inter- and Intra-racial Homicides*, 27 SOC. FORCES 369, 369-71 (1949).

380. *Id.* at 371.

381. *Id.* at 374-75. The small number of white-defendant/black-victim cases limits the reliability of this conclusion.

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

383. *Id.* at 308-09.

384. Brearley, *supra* note 366, at 252.

385. Wolfgang, Kelly & Nolde, *supra* note 382, at 311.

> [I]t appears that the three significant findings are intricately related: type of

Few nationwide studies have been conducted on early death penalty cases or on sentencing in general.[386] Kalven and Zeisel's study of the American jury was particularly thorough in its examination of 3576 criminal jury trials conducted by a total of 555 judges in every state except Rhode Island.[387] The trials occurred primarily in the years 1954-55 and 1958.[388] The basic purpose of the study was to assess patterns of disagreement between judges and juries in the particular cases, based upon trial judges' responses to questionnaires.[389] The focus of Kalven and Zeisel's research was not the prediction of sentencing or the imposition of the death penalty, but those factors which may have influenced the disparity between the jury's or the judge's decision-making. Nonetheless, their results relayed "the implicit message of equal justice in death sentencing which informed the decision of the United States Supreme Court in *Furman v. Georgia* and inspired many of the procedural reforms of the post-*Furman* period designed to promote rationality and consistency in death sentencing."[390] Altogether, Kalven and Zeisel reported "111 cases in which either judge or jury found the defendant guilty of a capital crime and hence *could* have given the death penalty."[391] In only 13% of these cases, however, did both the judge and the jury agree on the death penalty as a sentence.[392]

2. The Impact of Race in Rape Cases

The race effect is particularly striking in studies of capital punishment as applied to rape offenses. In a highly critical examina-

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> murder, race of offender, and type of counsel. The one factor that links each of the others together is race; for while more offenders convicted of felony murder and offenders with court-appointed counsel are executed than offenders convicted of non-felony murder and offenders with private counsel, respectively, these differences are produced by the fact that significantly more Negroes than whites are executed.

Id.

386. *See* Kleck, *supra* note 374, at 787, for a listing of the earlier studies by geographic area.

387. H. KALVEN & H. ZEISEL, THE AMERICAN JURY at 36-38 (1966).

388. *Id.* at 33 n.1.

389. *Id.* at 45-54.

390. BALDUS, WOODWORTH & PULASKI, *supra* note 362, at 8-8.

391. KALVEN & ZEISEL, *supra* note 387, at 435-36.

392. *Id.* at 436. For an in-depth discussion concerning why the death penalty should be imposed by a jury, and not a judge (unless the jury is knowingly waived), see Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980).

tion of the methods and conclusions of early sentencing and death penalty research published in 1981, even Kleck concedes that:

> Regarding the use of capital punishment for rape, the evidence strongly suggests overt discrimination against black defendants . . . [and] that the death penalty for rape was largely used for punishing blacks who had raped whites . . . . [I]t is doubtful if additional controls could eliminate the huge differentials in use of the death penalty.[393]

In 1965, Partington noted that all of the 56 individuals executed for rape or attempted rape in Virginia between 1908-1964 were black, as were all of the 66 individuals executed for rape in five states and the District of Columbia between 1930-1962.[394] Overall, within the 18 states that imposed the death penalty for rape, blacks constituted 90% of the 444 rape defendants who were executed between 1930-1962.[395]

E.H. Johnson's study of 660 offenders who were already on death row in North Carolina between 1909-1954 reported that 89% of the 124 rapists in the sample were black. Within this sample, 56% of the black offenders were executed compared to 43% of the white offenders.[396] Wolfgang and Riedel's studies have been the most comprehensive and methodologically controlled documentation of the strength of the race effect in capital rape cases. Their research results were "presented as evidence in six states to support petitioners' claims of racial discrimination in the administration of the death penalty."[397] The results also comprised part of the brief in *Maxwell v. Bishop*,[398] as well as evidence presented to a subcommittee of the U.S. House of Representatives which concerned the possible suspension or abolition of the death penalty.[399]

The first Wolfgang and Riedel rape study in 1973 collected data on over 3,000 rape convictions occurring between 1945 and

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393. Kleck, *supra* note 374, at 788.

394. Partington, *supra* note 365, at 43, 52-53.

395. *Id.* at 53.

396. E.H. Johnson, *supra* note 373 (percentages derived from Table 7 at 169).

397. Wolfgang & Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS 119, 126 (1973) [hereinafter Wolfgang & Riedel, *Judicial Discretion*].

398. 398 U.S. 262 (1970).

399. Wolfgang & Riedel, *Judicial Discretion*, *supra* note 397, at 126. For further discussion of *Maxwell*, see M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT at 149-67, 199-213 (1973).

1965 in 230 counties in 11 southern and border states. The counties were selected "to represent the urban-rural and black-white demographic distributions of each state."[400] Unlike earlier research, nearly 30 nonracial variables were used as controls in comparing the likelihood of receiving a death sentence for different racial combinations of defendants and victims. The controls comprised five groups of variables concerning characteristics of the (1) offender (*e.g.*, prior criminal record, previous imprisonment, employment status), (2) victim (*e.g.*, prior criminal record, marital status), (3) nature of relations between the offender and victim (*e.g.*, offender was known to the victim, prior sexual relations), (4) circumstances of the offense (*e.g.*, contemporaneous offense, display or carrying of a weapon, amount of injury to a victim, one or multiple offenders), and (5) circumstances of the trial (*e.g.*, plea, defense of insanity, appointed or retained counsel).[401] The data were analyzed for seven states which contributed to a sample of 1265 cases in which the race of the defendant and the sentence were known.[402]

Without controls, the race differences in the Wolfgang and Riedel study were striking. A black-defendant/white-victim combination showed a .36 likelihood of receiving a death sentence in comparison to a .02 likelihood for other racial combinations. These probabilities mean that black-defendant/white-victim pairs were sentenced to death about 18 times more frequently compared to the other racial combinations.[403] Hagan's reanalysis of the Wolfgang and Riedel data presents an alternative way of interpreting the results: "knowing the inter-and/or intra-racial make-up of rape cases allows a 22.6 percent increase in the accuracy of predicting a life or death outcome for the defendants."[404] More striking, however, was Wolfgang and Riedel's finding that none of the potentially explanatory or compensatory nonracial control factors diminished the strength of this race effect.[405]

Wolfgang and Riedel's second rape study, published in 1975, satisfies Hagan's comment that this race effect would be more "convincing" if key variables, such as prior record and contempo-

400. Wolfgang & Riedel, *Judicial Discretion*, *supra* note 397, at 127.
401. *Id.* at 127-28.
402. *Id.* at 129.
403. *Id.* at 130.
404. Hagan, *supra* note 358, at 371.
405. Wolfgang & Riedel, *Judicial Discretion*, *supra* note 397, at 132.

raneous offenses, were controlled simultaneously rather than presented individually in a tabular analysis.[406] The second rape study examined the 361 rape convictions occurring between 1945 and 1965 from the 25 counties of Georgia, the same sample used in the first Wolfgang and Riedel rape study. Georgia was of particular interest because of its relatively high frequency of executions for rape and because 58 of the 61 defendants executed in Georgia between 1930 and 1964 were black.[407] Using the presence or absence of a death sentence as a dependent variable, a stepwise discriminant function analysis incorporating nearly 30 legal (*e.g.*, defendant's criminal record) and extra-legal (*e.g.*, defendant's and victim's race) variables was applied. Of the three variables which were found to be statistically significant, the factor of black-defendant/white-victim showed an overwhelmingly significant and dominating effect.[408]

In an effort to study the impact of a mandatory death penalty and to test Wolfgang and Riedel's results from their first study,[409] Bedau examined 128 first degree murder indictments involving male defendants and female victims between 1946 and 1970 in two Massachusetts counties.[410] Of the 17 (13%) cases identified as felony-murder rape, four involved a black defendant and a white victim. Bedau concludes that because there were no felony-murder rape convictions (which would have resulted in a mandatory death penalty) for these four cases, "our data clearly shows [sic] that the most outrageous racist hypothesis one could contemplate—that the mandatory death penalty has been reserved by prosecutors and juries for black male offenders who sexually assault and kill white female victims—is false."[411] Bedau's study, however, has serious methodological and sampling flaws which counter this statement.[412] Furthermore, Bedau's own evidence

406. Hagan, *supra* note 358, at 381 n.11.

407. Wolfgang & Riedel, *Rape*, *supra* note 363, at 663.

408. *Id.* at 666.

409. *See supra* note 397.

410. Bedau, *Felony-Murder Rape and the Mandatory Death Penalty: A Study in Discretionary Justice*, 10 SUFFOLK U.L. REV. 493, 503 (1976) [hereinafter Bedau, *Felony-Murder Rape*].

411. *Id.* at 516-17.

412. First, *none* of the 17 felony-murder rapes resulted in a death sentence. Thus, as Bedau notes, prosecutors did not use the felony-murder rape mandatory death penalty to indict, or to attempt to convict, any of these rape offenders, *id.* at 516-17, regardless of their race or the race of their victims. This pattern of prosecutorial decision-making may have reflected an overall disillusionment with mandatory death sentences, or perhaps, the

demonstrates that these four black-defendant/white-victim cases received the more severe sentencing treatment relative to the other three racial combinations. Overall, Bedau's conclusion that a "racist hypothesis" is "false"[413] is neither proven nor warranted.

3. The Impact of Race in Pre-*Furman* cases: 1960-1970

Sentencing research which included relatively later pre-*Furman* cases and non-southern jurisdictions also demonstrates sizable defendant-victim race effects in those studies which have sufficient demographic information. In studies with generally limited demographic data, however, differential sentencing patterns are more difficult to detect. For example, Bedau's study of 92 death sentences imposed under statute in Oregon from 1903 to 1964 was limited in sample size and the number of variables analyzed.[414]

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attitudes of citizens of the individual communities during the study years.

Second, only two of the 128 first-degree murder indictments resulted in a death sentence; however, no information is provided concerning the race of the two murder defendants or their victims or the nature of the offenses. The two death sentence cases remain statistically and substantively enigmatic.

Third, as Bedau acknowledges repeatedly throughout the article, the felony-murder rape designation for these 17 rape cases was based on a process of guesswork derived from brief case descriptions, rather than any known or official felony-murder rape prosecution. Indeed Bedau's rationales for the felony-murder specifications are both inaccurate and statistically unjustified: "The few dubious cases [of the felony-murder rape specification] among the seventeen . . . constitute a very small percentage . . . and thus if there is error by overinclusion among the cases treated as FMR [felony-murder rape], it is probably error in the right direction." *Id.* at 507. Once again, Bedau appears to rely on hope, rather than accuracy, in assuming the reliability of his decision-making. Statistically the sample of 17 is too small for reliable analysis of such a complex design. *See, e.g.*, L. KISH, SURVEY SAMPLING at 49-52 (1965) and S. SIEGEL, NONPARAMETRIC STATISTICS FOR THE BEHAVIORAL SCIENCES at 8-17 (1956). Specification error in even a few cases could significantly impact on results.

Fourth, all four black-defendant/white-victim cases resulted in a sentence of life imprisonment. In addition, Bedau concedes that "in three of these four, the sentence was not received by plea bargaining but by jury verdict. Thus, both the risk of a discretionary death sentence and the severest alternative sentencing outcome was much greater for this racial combination of offender/victim than for any or all of the other three racial combinations." Bedau, *Felony-Murder Rape*, *supra* note 410, at 516 (footnote omitted). In contrast, only 23 (18%) of the entire sample of 128 first-degree murder indictment cases resulted in a sentence of life imprisonment (these 23 cases include the four black-defendant/white-victim cases). *Id.* at 503, based upon calculations from Table I.

Fifth, there appeared to be marked prosecutorial and county differences in plea bargaining and in types of felony-murder rape dispositions, *id.* at 513, 518, which could have been influential in case outcomes. Unfortunately, no other county, racial, or prosecutorial charge breakdowns are provided to examine the data further.

413. Bedau, *Felony-Murder Rape*, *supra* note 410, at 517.

414. Bedau, *Capital Punishment in Oregon, 1903-64*, 45 OR. L. REV. 1 (1965) [hereinaf-

Altogether, Bedau showed that a total of 58 individuals (63%) were ultimately executed in Oregon over the 61 year period and the sentences of 23 (25%) were commuted.[415] Commutations, death sentences, and executions declined over time.[416] The sample size was too small and the number of counties was too large to definitely confirm differences in sentencing among counties, although there were differential trends. In turn, all but one of the death sentences were given to males, and disproportionate numbers were given to nonwhites (including native American Indians), when compared to the total distribution of Oregon's nonwhite population.[417]

In Bedau's analysis of the 232 death sentence convictions in New Jersey during the 53 year span from 1907 to 1960,[418] the larger sample size allowed for more definitive conclusions. Altogether, 157 persons (68%) were executed, 5% more than the figure (63%) reported in Oregon. Thirty four of those sentenced to death (14%) had their sentences commuted, 10% fewer than the figure (25%) reported in Oregon.[419] Thus, comparing the percentage of executions relative to commutations, New Jersey appeared to be somewhat more punitive than Oregon. An alternative interpretation, however, is that the group of people sentenced to death in New Jersey may have been more restrictively selected.

Sentencing distributions by county showed some interesting variations which Bedau attributed to differences in types of murders and murderers, rather than to any possible policy differences among county prosecutors.

> In Camden, Cumberland, Mercer and Monmouth counties, the distribution in final disposition is fairly close to that for the state as a whole; in Essex, Gloucester, Middlesex and especially Union, the ratio of executed to commuted was below the state average, whereas in Bergen, Burlington, Hudson and Salem, the opposite is true.[420]

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ter Bedau, *Oregon*]. These limitations may have accounted for the nonsignificant effects found when Hagan and Kleck reanalyzed the data. *See* Hagan, *supra* note 358, at 360, and Kleck, *supra* note 374.

415. Bedau, *supra* note 414, at 5-6.

416. *Id.* at 9.

417. *Id.* at 11.

418. Bedau, *Death Sentences in New Jersey, 1907-1960*, 19 RUTGERS L. REV. 1, 6 (1964) [hereinafter Bedau, *New Jersey*].

419. *Id.* at 7.

420. *Id.* at 8.

The death sentence population in New Jersey also varied considerably over the years, and, as in Oregon, there was a marked decline in death sentences and executions in the later years.[421] As would be expected, the great majority of death sentences was given to males[422] and a disproportionate number of those executed had engaged in a felony murder.[423] Particularly striking in New Jersey was the race effect. "[W]hereas eight times as many non-whites have been executed as commuted, only four times as many whites have been executed as commuted. These data suggest that in New Jersey, non-whites have had barely half the chance for commutation of a death sentence as have whites."[424] This race difference does not appear to be explained by differences in felony murder status.[425] A disproportionate number of those who were executed in New Jersey were also from lower socioeconomic occupational groups.[426] Bedau acknowledges, however, that "the death sentence population in New Jersey is slightly more representative of the general population than is true elsewhere."[427]

In his research on 159 defendants convicted of murder in New Jersey from 1937-1961, Wolf found that a disproportionate number of black defendants (48%) were sentenced to death relative to white defendants (30%), although this race discrepancy was greatest for cases involving a related felony: 60% and 41% for blacks and whites, respectively.[428] In Wolf's study, race of victim

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421. *Id.* at 9-11.

422. *Id.* at 12. *See also* Hagan, *supra* note 358, at 377.

423. Bedau, *New Jersey*, *supra* note 418, at 13-15.

424. *Id.* at 19. *See also id.* at 59-60.

425. *Id.* at 20-21.

426. *Id.* at 26-27.

427. *Id.* at 27. Hagan's reanalysis of Bedau's data did not find a significant difference in terms of socioeconomic status and the likelihood of execution, although Hagan fails to report specifically how he made this analysis with the many different kinds of occupational levels that Bedau provided in this study. Hagan had to have categorized the occupational levels in order to have performed a simple chi square analysis, but his method cannot be validated by other researchers without more information. *See* Hagan, *supra* note 358, at 374, 381 n.12, reanalyzing the data on occupational groups in Bedau, *New Jersey*, *supra* note 418, at 26-27. In general, Bedau's New Jersey study is restricted to tabular analyses, with no examination of the combination of defendant and victim race effects.

428. Wolf, *Abstract of Analysis of Jury Sentencing in Capital Cases: New Jersey 1937-1961*, 19 RUTGERS L. REV. 56, 59-61 (1964). A defendant's age generally did not have a significant effect on sentence, although weapon type did. Blacks were sentenced disproportionately more than whites for beatings, but somewhat less than whites for gun murders. These results, however, were not statistically significant. *Id.* at 62-63.

data were available for only 78 cases, about half of the sample. The strong defendant-victim race differentials generally followed the pattern revealed in other research: black defendants received death sentences in 72% of the cases where the victim was white relative to 50% of the cases where the victim was black.[429] As Bowers explains, although Wolf "made no effort to examine the effect of interpretive factors on [these] offender-victim differences in the likelihood of a death sentence, it is clear from the magnitude of the disparity that none of the control variables available to him could account for it."[430]

The nature and the extent of statistical controls for legal and extra-legal factors can have a significant impact on the ability to accurately predict sentencing outcomes, as the two different multivariate analyses of 238 penalty jury trials conducted in California between 1958 and 1966 suggest. The first analysis of these cases, which was conducted by the *Stanford Law Review*,[431] was highly sophisticated even by current standards of methodology and was also the "most thoroughly controlled pre-*Furman* study outside the South."[432] The Stanford study examined 178 variables in each case concerning characteristics of the defendant, the victim, the crime, the trial, and the judges and attorneys.[433] The Stanford study asked: "What accounts for the incidence of the death penalty which was given in somewhat less than half of the cases in which the jury had the power to give it?"[434]

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429. *Id.* at 64 n.17.

430. W. BOWERS, LEGAL HOMICIDE at 212 (1984).

431. Special Issue, *A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STAN. L. REV. 1297 (1969) [hereinafter Stanford Study (1969)].

432. BALDUS, WOODWORTH & PULASKI, *supra* note 362, at 8-26. This sophisticated study provided an elaborate appendix which incorporated a copy of the questionnaire used for the analyses and an explanation of the study's methodology. Similar to this Article's study, the primary data sources included interviews with the defense attorneys involved in the cases. The quality and reliability of this data source are described by the authors:

> We discovered that the attorneys could remember their cases in considerable detail without having to refer to their files. In fact, they were able to recall data not explicitly called for in the second draft of the questionnaire; this prompted us to include several more questions in the final draft. Further, we found that there was little or no information loss due to our precoding of the possible responses to the questions. Most important, the responses they gave agreed in each case with those we had previously obtained at the Department of Corrections and the California supreme court [sic]. The attorneys responded with apparent lack of bias and with excellent recall.

Stanford Study (1969), *supra* note 431, at 1464 (footnote omitted).

433. Stanford Study (1969), *supra* note 431, at 1317.

434. Kalven, *Preface* to Stanford Study (1969), *supra* note 431, at 1299.

Results from the first analysis of the Stanford study showed that jury decision-making was not a totally random or arbitrary process. For example, race of the victim had no significant impact on jury sentencing, and there was no evidence of racial bias among jurors. "Whites, blacks, and Mexican-Americans received essentially equal treatment by the juries when all other associated aspects of the cases are partialled out."[435] Especially notable, however, was the finding of a highly significant socio-economic impact on sentencing, after controlling for the numerous legal and extra-legal factors. A defendant's blue collar occupation was a strong aggravating factor in sentencing but a white collar occupation was a strong mitigating factor.[436] The finding that the defendant's occupational status was statistically one of the greatest influences on the penalty jury's decision-making reinforces evidence questioning the system's rationality.[437]

The second analysis of the Stanford study's data was conducted in order to suggest methods for examining the comparative excessiveness of individual death sentences.[438] Four death cases were selected from the sample for comparison with the remaining cases.[439] After testing three different types of statistical approaches (main determinants, salient features, and overall culpability) for measuring sentence excessiveness in the four cases, the authors concluded that the culpability index was the "best able of the three [measures] to assess the relative importance of various case characteristics,"[440] although all three measures should be used for validation. Importantly, this second analysis of the Stanford study's data confirmed the Stanford study's first analysis by also showing significant socioeconomic effects. Once again, there was no finding of race of victim or defendant effects.[441]

Overall, then, one of the major conclusions of both analyses of the Stanford study's data is that there exists strong evidence of socio-economic or occupational bias, but no evidence of racial bias, using California data at a particular point in time. As Kalven notes, however, the Stanford study's authors are "under-

435. Stanford Study (1969), *supra* note 431, at 1366-67.

436. *Id.* at 1367, 1379.

437. *Id.* at 1430-31.

438. Baldus, Pulaski, Woodworth & Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1, 21-22 (1980).

439. *Id.* at 22-23.

440. *Id.* at 53.

441. *Id.* at 24-28. *See also* BALDUS, WOODWORTH & PULASKI, *supra* note 362, at 8-26.

impressed with their extraordinary finding that race plays no role in explaining the incidence of the death penalty. Surely there is embedded in that point a profound secret about the nature of race prejudice and the nature of law."[442] That "secret" may be the link between class and race itself. As Kleck comments: "Because blacks in the United States are disproportionately members of the lower class, class discrimination would affect them more heavily than whites, independent of any overt racial discrimination."[443] If, as an example, minority defendants are sentenced more harshly because they cannot afford to hire effective attorneys, economic discrimination could lead to racial disparities in sentencing as a secondary effect.

Other studies had narrower perspectives. An examination of the first 204 homicides reported to the Philadelphia police in 1970 was considerably limited by small sample sizes because only "three of the 171 adults convicted of homicide charges were sentenced to death and none will be executed."[444] Altogether, 75% of the victims and more than 80% of the offenders were black and fewer than one-fifth of the cases involved black offenders and white victims; however, all three death penalties involved black offenders who were linked to white victims.[445]

Bowers attempted "to provide a broader historical and regional perspective on racial discrimination in capital punishment"[446] by examining executions which occurred throughout the United States from 1864 through 1967.[447] In general, blacks were much less likely than whites to appeal their convictions, regardless of the nature of their offenses; this phenomenon was more pronounced in the South.[448] The lack of controls in this study once again inhibits broader conclusions from the findings.

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442. Kalven, *Preface* to Stanford Study (1969), *supra* note 431, at 1301.

443. Kleck, *supra* note 374, at 784.

444. Zimring, Eigen & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227, 227 (1976).

445. *Id.* at 229, 233. Notably, these three cases did not include the sample's rape or multiple victim offenders who conceivably would be most eligible for the death penalty. *Id.* at 245. In light of this discrepancy, the authors drew a major point: "[I]t is difficult to justify the enormous difference in punishment outcome by the difference in culpability." *Id.* at 247. The small sample size in this study limits more definitive conclusions, however.

446. BOWERS, *supra* note 430, at 71.

447. *Id.* at 73-87.

448. *Id.* at 98-99.

4. Pre-*Furman* Research: Comments and Conclusions

Kleck's critical review of the literature adds perspective to the place and purpose of pre-*Furman* research, as well as the intricacies of selective data interpretation. The article includes a review and critique of the major pre-*Furman* research on race and criminal sentencing, an analysis of execution rates by race from 1930 to 1967, and an examination of death sentencing rates from 1967 to 1978. Our comments on Kleck show there are multiple sides to every issue.

First, Kleck highlights the Stanford study's finding of no existing relationship between race and death penalty sentencing, but fails to mention the study's finding that socio-economic status had a highly significant impact.[449] Second, Kleck downplays the current significance of the strong discriminatory effects found in past rape research because rape is no longer a capital offense, and because the death penalty for rape was restricted to the South and several border states.[450] This type of analysis, however, skirts two related issues. The first issue is that the disproportionate imposition of the death penalty for rape among minority groups offers clear evidence of the existence of racial discrimination in capital sentencing. Even critics of sentencing research, such as Kleck, who have rebutted suggestions of persistent racial discrimination, acknowledge the punitive application of the death penalty for blacks accused of raping whites.[451] Given this, it is difficult to assert that a criminal justice system could be so overwhelmingly and overtly discriminatory in the application of the death penalty to one type of offense in the South but be entirely fair or neutral towards minorities in all other types of offenses in the South or elsewhere in the United States. It could be argued that racial discrimination has been amply proven in capital rape cases and is just one relatively visible facet of a systemwide and pervasive bias which penalizes minorities linked to white victims. Racial discrimination in capital rape sentencing may be merely the tip of a larger body of more subtle discriminatory practices which have so far eluded statistical identification.

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449. Kleck, *supra* note 374, at 786.

450. *Id.* Arkin offers a similar argument. *See* Arkin, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-*Furman *Murder Cases in Dade County, Florida, 1973-1976*, 33 STAN. L. REV. 75, 82 (1980).

451. Kleck, *supra* note 374, at 788.

A second issue concerns felony murder. Rape still constitutes a contemporaneous offense in a number of jurisdictions, including New Jersey, with the felony aggravating factor.[452] Although judges and juries can no longer disproportionately impose the death penalty for rape if there is no murder, they may disproportionately impose the death penalty for murder when rape is an aggravating factor. The racial bias demonstrated so powerfully in rape cases may carry over to felony-murder rape cases. This point is overlooked when prior research on the death penalty for rape is dismissed as irrelevant.[453]

In Kleck's analysis of execution rates by race from 1930 to 1967, execution risk by race was "measured as the number of executions (for murder) of persons of a given race in a given year, divided by the number of homicide victims of that race who died in the previous year."[454] The number of homicide victims was

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452. N.J. STAT. ANN. § 2C:11-3c(4)(g) (West 1982 & Supp. 1988).

453. One of the relatively clearer examples of Kleck's criticisms focuses on Table VIII of Bedau's 1964 study, which presents a cross tabulation of race (non-white) by final disposition (executed, commuted, other). Kleck, *supra* note 374, at 786. Kleck is correct in noting that "the observed relationship [in Table VIII] was in the opposite direction to that indicating discrimination against nonwhites" because "66.2% of nonwhites sentenced to die were executed, compared to 68.4% of whites." *Id.* at 786. In both substantive and statistical terms, this comment is misleading because the race difference is both substantively minor and statistically nonsignificant. Moreover, a comparison among all three final disposition categories shows that non-whites appear to be treated more harshly than whites, apart from executions.

According to our calculations, which are included in the *Interim Report*, Bedau's 1964 data show no significant difference between whites and non-whites relative to the percentage of those executed. Relative to the two alternative dispositions, however, non-whites appear to be treated more harshly, particularly in terms of their significantly fewer commutations.

Kleck's 1981 reanalysis of Table IX in Bedau's 1964 New Jersey study can also be interpreted differently depending on the ways that the final disposition categories are collapsed or deleted. Our reanalysis of Bedau's 1964 Table IX data showed, however, that *both* Kleck 1981 and Bedau 1964 had statistically supportable conclusions depending upon the ways the data were examined. Unfortunately, it is unclear how either Kleck 1981 or Bedau 1964 analyzed the data because neither gave enough information for an exact replication. Although Kleck 1981 reported a chi square statistic, he did not specify how he compared categories and despite our many different methods of analysis, we did not exactly replicate his result. In turn, although Bedau 1964 designated which columns he compared in his analysis, he did not report the nonsignificant chi square statistic which he mentions and he also did not specify how he collapsed rows.

According to our calculations, all models with a significant interaction between felony status and race were in the direction of a felony status predicting the disposition rather than a nonfelony status. In other words, a race effect was found among felony cases but no race effect was found among nonfelony cases.

454. *Id.* at 793.

used to approximate the number of persons who were convicted for homicide, regardless of whether it was a capital murder or a noncapital murder. Data were not available to compute execution rates for rape.[455] In general, Kleck (1981) concludes that "over the entire period, blacks were subject to a lower execution risk than whites,"[456] however, the execution risk of nonwhites was greater than the risk for whites in the South, while the opposite result appeared in the rest of the country.[457]

Kleck also examined death sentencing rates from 1967 to 1978 in two ways: (1) the number of death sentences for murder compared with the number of homicides in the previous year; and (2) the same measure as the first but using persons arrested for murder or non-negligent manslaughter as the base of the death sentencing rate. Kleck concludes that "[t]he resulting rates, whether based on homicide deaths or homicide arrests, indicate that nonwhites were subject to a lower risk of being sentenced to death than whites. . . ."[458]

There are major difficulties with both of these conclusions. Kleck's methodologies share most of the same weaknesses as the studies he criticizes. In his review of past death penalty research, Kleck asserts that "[p]robably the most serious shortcoming of death-penalty discrimination studies is that they nearly all fail to control for prior criminal record."[459] Yet, Kleck concedes that with regard to his own research "[t]he simple computation of execution and death-sentencing rates obviously does not in any way control for differences in prior criminal record (or other legally relevant variables, for that matter)."[460] His argument that deleting such controls would enhance rather than diminish race differences is mere conjecture. As Baldus, Woodworth, and Pulaski point out, Kleck also failed to control for victim's race and the defendant's culpability.[461] In light of these deficiencies, it is difficult to grant any greater credibility to Kleck's work than to the similar types of broad surveys which he criticizes.[462]

Methodological limitations aside, pre-*Furman* research suggests

455. *Id.* at 793 n.7.
456. *Id.* at 794.
457. *Id.*
458. *Id.* at 797.
459. *Id.* at 786.
460. *Id.* at 797.
461. *See* BALDUS, WOODWORTH & PULASKI, *supra* note 362, at 8-28.
462. *See, e.g.*, W. BOWERS, EXECUTIONS IN AMERICA (1974) and BOWERS, *supra* note 430.

that there was strong evidence of racial discrimination against minorities in the application of the death penalty for rape in the South and border states. And evidence for the disproportionate sentencing of minorities and individuals from lower socioeconomic groups was solid and generally consistent, particularly in those homicide cases where the victims were white.

B. *Post*-Furman *Death Penalty Studies*

Various death penalty studies have been initiated or continued after *Furman*.[463] Predominantly, these studies attempt to determine whether the new post-*Furman* capital statutes affirmed in *Gregg v. Georgia*[464] have eliminated the arbitrary and discriminatory sentencing which spurred the Court to declare in *Furman* that such capital statutes were unconstitutional. The post-*Furman* studies are generally more methodologically sophisticated and comprehensive than pre-*Furman* research, although they tend to concentrate on Southern states. Post-*Furman* studies have also focused relatively more strongly on factors in addition to race (*e.g.*, county, case processing stage) in determining sentencing arbitrariness. Because these studies have tended to build upon one another both substantively and methodologically, the following review is organized sequentially according to when the research and data collection occurred in the fifteen year period since *Furman*.[465]

1. Post-*Furman* Research: 1976-1979

In the first study of race differences in post-*Furman* cases, Riedel compared race distributions in a post-*Furman* sample of 407 offenders in 28 states who were under sentence of death as of January 2, 1976 with a pre-*Furman* sample of 493 offenders in 28 states who were under sentence of death as of December 31,

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463. For example, among the most unusual is Watt Espy's study and documentation of 14,000 of 15,487 people who have been legally executed in the United States from 1608 to the present. Smothers, *Historian's Death Penalty Obsession*, N.Y. Times, Oct. 21, 1987, at A16, col. 1. *See also* Espy, *Capital Punishment and Deterrence: What the Statistics Cannot Show*, 26 CRIME & DELINQ. 537 (1980).

464. 428 U.S. 153 (1976).

465. For a discussion of this history, see BALDUS, WOODWARD & PULASKI, *supra* note 362, ch. 5, 10-13. For a description of the post-*Furman* backlash, *i.e.*, the public's and the legislature's initial impression that the death penalty was being abolished, see also F.E. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 38-49 (1986).

1971.[466] The Legal Defense Fund provided data for the post-*Furman* sample and National Prisoner Statistics provided data for the pre-*Furman* sample.[467] In order to compare the characteristics of offenders sentenced under different types of statutes, an additional sample of 142 offenders was examined from Legal Defense Fund files. These offenders had been sentenced to death in three guided discretion states and three mandatory penalty states between June, 1972 and August, 1975.[468]

Riedel found that a significantly higher proportion of nonwhites (62%) had been sentenced to death under post-*Furman* statutes relative to the proportion (53%) of nonwhites sentenced to death under pre-*Furman* statutes. The racial difference in sentencing in both the pre-*Furman* statutes and the post-*Furman* periods was higher in the South than any other region in the United States. Relative to other regions in the country, which showed a larger proportion of nonwhites sentenced to death in the post-*Furman* period, the South showed a small nonsignificant decrease between the pre- and post-*Furman* periods. The western region accounted for most of the disproportionate increase in death sentences for nonwhites in the post-*Furman* period.[469] A series of chi square analyses showed no significant differences between mandatory and guided discretion statutes on 18 selected characteristics (including race) of the offender, the victim, circumstances of the offense, and the trial.[470] These results support Chief Justice Burger's observation that mandatory and guided discretion statutes are "substantially equivalent."[471] Riedel's results suggest that post-*Furman* statutes are not successful in reducing discriminatory sentencing because the proportion of nonwhite offenders increased relative to the pre-*Furman* period and there were no significant differences found between the mandatory and guided discretion statutes.[472]

Riedel's study used tabular and not multivariate statistics. It

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466. Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-*Furman *and Post-*Furman, 49 TEMP. L.Q. 261, 270-72 (1976), discussed in BALDUS, WOODWORTH & PULASKI, *supra* note 362, at 8-19.

467. *Id.* at 270.

468. *Id.* at 273.

469. *Id.* at 276-79.

470. *Id.* at 282.

471. *Id.* at 269 (quoting *Furman*, 408 U.S. at 400 n.30).

472. *Id.* at 282. For additional discussion of mandatory vs. discretionary death sentences, see D. PANNICK, JUDICIAL REVIEW OF THE DEATH PENALTY at 95-138 (1982).

focused on the defendant's race and not the interaction between the defendant's and the victim's race, and it did not include measures of offense seriousness or other legal and extra-legal variables. The study's emphasis on measuring changes over discrete time periods relative to significant developments in statutory and case law, however, is a crucial and frequently overlooked aspect of death penalty research. Sellin is among the few who have recognized the importance of time factors, as is shown in his analysis of (predominantly) pre-*Furman* prosecution and conviction rates drawn from historical records in selected states over a number of time periods.[473] Dix focused on another element of time—the end of the case processing stage—in an examination of the appellate review of capital homicide cases in Georgia, Florida, and Texas.[474]

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473. *See supra* note 369.

474. Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979).

Based on pertinent Supreme Court opinions and "legislative expectations", Dix considered the extent to which appellate courts engaged in three functions: (1) the invalidation of death penalties as impermissible; (2) the setting of guidelines or guidance for proper and consistent sentencing; and (3) the resolution of procedural problems that could lead to arbitrary or inappropriate application of the death penalty. *Id.* at 109-10.

In Georgia, appellate review was mandated and its provisions were the most specific and detailed. Thus, Dix used the Georgia Supreme Court as a benchmark for comparison with other states. The Georgia Supreme Court disposed of 81 homicide appeals as follows: Death penalty convictions and sentencing were confirmed for 61 cases (75%); convictions were reversed in four cases (5%); the death penalty was reversed on procedural grounds in 14 cases (17%); and the death penalty was reduced on the merits in two cases (3%). *Id.* at 110-11. In his subjective case review, Dix concludes that despite the Georgia Supreme Court's "extensive discussions of substantive capital sentencing issues," the broad and ill defined framework the court followed in its reviews is not "useful" for examining individual sentences. *Id.* at 123.

According to Dix, the Florida Supreme Court was more apt to reduce death penalties than the Georgia Court, although this tendency required "extraordinary" justification. *Id.* at 141. Of the 66 Florida homicide death appeals examined, death penalty convictions and sentencing were confirmed for 33 cases (50%); convictions were reversed in 8 cases (12%); the death penalty was reversed on procedural grounds in 10 cases (15%); and the death penalty was set aside on the merits in 15 cases (23%). Of these last 15 cases, 13 were determined to be death sentences by judges despite a jury recommendation of life imprisonment. *Id.* at 125. Aside from the Florida Supreme Court's greater willingness to reduce sentences, Dix concluded that the court had not succeeded in structuring the sentencing process for the lower courts, had treated procedural matters inconsistently, and overall had "not provided effective appellate review." *Id.* at 141.

The Texas Court of Criminal Appeals was difficult for Dix to evaluate because its procedure was defined with such uncertainty. *Id.* at 142. (A discussion of the vagaries of the Texas court's procedure can be found in C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE at 66-72 (1981). *See also* Dix, *id.* at 111-34 for a comparison with procedures from other states.) Of the 69 homicide appeals in Texas which were examined, death penalty convictions and sentencing were confirmed for 46 cases (67%); convictions were reversed in 14 cases (20%); the death penalty was reversed on procedural

Studies of the characteristics of death row inmates present different research limitations. Lewis, Mannle, Allen, and Vetter conducted extensive interviews over a five month period with 83 of the 96 inmates on Florida's death row during the Spring of 1977. The authors compiled 145 variables on questionnaires, as well as information from prison files, and presented a profile of Florida's condemned.[475] For the present study, however, the data on the offenders' and victims' race are more pertinent. The 83 inmates were linked to 106 victims. The 46 white inmates were linked to 52 white victims and only one black victim; the one black victim was part of a multiple murder involving at least one of the other white victims. In contrast, the 37 nonwhite inmates were linked to 46 white victims and 7 nonwhite victims. The defendant and victim racial difference was statistically significant.[476] An offender received a death sentence in only eight cases where the victim was nonwhite although the percentage of nonwhite murder victims in Florida for the period was in the 50% range. "[I]t would be expected that the ratio of white to non-white victims of Death Row inmates would be much closer to 1:1 instead of the 9:1 ratio found in the study."[477] Whether or not these differences were attributable in part to a disproportionate number of multiple murders[478] by nonwhites, other unmeasured aggravating characteristics, a small sample size, or a univariate perspective, could not be determined within the methodological confines of the study. Other research has compensated in part for these types of limitations.

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grounds in 8 cases (12%) and the death penalty was held to be invalid on the merits in one case (1%). *Id.* at 145. Dix asserts that regardless of the unclearly defined appellate review procedure in Texas, the court's decisions were "lax and unsophisticated," inconsistent, and they provided "little guidance for trial courts." *Id.* at 158. Considering together the evaluations of appellate review procedures in Georgia, Florida, and Texas, Dix draws several major conclusions:

> Appellate review cannot be regarded as a useless part of death penalty litigation, but it has not lived up to the expectations some held for it. . . . If objective standards are impossible to achieve, uniformity within a system of individualized discretion may be an illusory goal. . . . The failure of appellate review of death penalties, therefore, may reflect less upon the appellate process than upon the nature of the objective.

Id. at 160-61.

475. Lewis, Mannle, Allen & Vetter, *A Post*-Furman *Profile of Florida's Condemned—A Question of Discrimination in Terms of Race of the Victim and a Comment on* Spinkellink v. Wainwright, 9 STETSON L. REV. 1, 16 (1979).

476. *Id.* at 30-31.

477. *Id.* at 31.

478. *Id.* at 35.

2. Post-*Furman* Research: 1980

Bowers and Pierce analyzed sentencing disparities in homicide cases during the first five years following *Furman* for four states: Florida (n=4010), Georgia (n=3793), Texas (n=6700), and Ohio (n=2193).[479] Analyses were based on those criminal homicides which occurred between the effective date of reenactment and the end of 1977, plus any other death sentences given under the post-*Furman* statutes for a homicide prior to 1978. An examination of judicial processing in Florida incorporated only those offenses that occurred before 1978. Not all states were included in all analyses. The five primary topics of the study and respective states included in the analyses were: race (all four states); region (Florida and Georgia); judicial processing (Florida); appellate review (Florida and Georgia); and the form of the statute (Florida and Georgia).[480] Bowers and Pierce used three types of data: (1) criminal homicide data as provided by Supplementary Homicide Reports (SHR's);[481] (2) death sentence and appellate review data; and (3) judicial processing data. These data-gathering sources were accompanied by two types of missing data problems: missing SHR information resulting from nonreporting and missing information on offender characteristics from the pre-1976 period. In order to complete this information, Bowers and Pierce incorporated demographic information from the Vital Statistics programs of each state for the years 1973-77.[482]

The second type of data, death sentences and appellate reviews, was compiled from state court records, trial attorneys, and other officials. The third type of data on judicial-processing was gathered on all first degree murder indictments from 1973 through 1976 in 21 Florida counties, and then for the years 1976-

479. Bowers & Pierce, *supra* note 372, at 592-94.

480. *Id.* at 593.

481. Supplementary Homicide Reports (SHR's) have a history before they reach the FBI. They are completed first on a volunteer basis by local police departments, who then submit the SHR information to a state crime reporting agency, which then transmits its state level crime statistics to the FBI's Uniform Crime Reporting section. Before 1976, SHR's included information on the offense (*e.g.*, circumstances, weapon type, offender, and victim relationship) and on the victim (*e.g.*, age, sex, and race); in 1976, the reports were expanded to include information on arrested and/or suspected offenders (*e.g.*, age, sex, race, and crime motive). This expansion has provided data on most victims and offenders who would be involved in capital offenses, although comparable demographic data on offenders before 1976 are, of course, more limited. *Id.* at 590-91.

482. *Id.* at 591, 633-34.

77 for 20 other Florida counties, some of which were included in the first sample of 21 counties.[483]

Race differences for defendant-victim comparisons without controls were striking. In all four states, black offenders and offenders with white victims were "substantially" more likely to receive a death sentence.[484] The strength of the race-of-defendant effect diminished considerably, however, when homicides were tabulated separately according to felony murder or nonfelony murder status. The race-of-victim effect in felony murders, however, remained as a major influence in sentencing.[485]

Regional variations in death sentencing in Florida and Georgia appeared to be even more outstanding and became even stronger with felony and nonfelony murder controls. For example, the imposition of a death sentence in central Georgia was six times more likely than it was in northern Georgia, and between seven and eight times more likely than in Fulton County, which includes Atlanta.[486] Controlling for type of killing showed that these differences were not the product of regional variations in the kinds of homicides committed. The regional differences became greater when variables for type of offense were incorporated. For example, relative to Fulton County, a death sentence in central Georgia was three times more likely for nonfelony homicides and nearly ten times more likely for felony homicides.[487] Taking the analysis one step further, Bowers and Pierce examined the combined effects of region and race-of-victim on the likelihood of a death sentence for felony-type murders in Florida, finding that both factors made independent contributions.

> Together [region and race of victim], these two extralegal sources of variation in the likelihood of a death sentence produce extreme disparities. Consider, for instance, the difference in the probability that a death sentence will be given the felony killer of a white in the panhandle and the probability that a felony killer of a black in the northern region will be sentenced to death: For killings under similar circumstances the death sentence is roughly thirty times more likely for the killer of a white

483. The detailed description of this convoluted data collection process can be found in *id.*, at 591-92. Florida has a total of 67 counties. *See* Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918, 920 (1981).

484. Bowers & Pierce, *supra* note 372, at 595.

485. *Id.* at 598-600.

486. *Id.* at 602-03.

487. *Id.* at 603-05.

> in the panhandle than for the killing of a black in the northern region.[488]

Such differences could only by the most remote of probabilities occur by chance. Bowers and Pierce note further that these differences are probably understated because of the need to aggregate (and thus homogenize) the different counties into regions for comparative purposes.[489]

Arbitrariness also consistently characterizes the different case processing stages. Bowers and Pierce examined three stages (charge, conviction, and penalty trial or sentencing) for 707 Florida cases processed between 1973-77. At each stage black defendants linked to white victims had the greatest chance of moving to the next stage, although white victim cases generally had high chances of advancing.[490] This race-of-victim effect remained for both felony and nonfelony cases.[491] Looking at probabilities across case processing stages, Bowers and Pierce suggest that prosecutors may tend to overcharge or reclassify black-defendant/white-victim cases, including changing an initial nonfelony police report into a felony related homicide for the court records.[492]

> In effect, the dice are loaded against black offenders and the killers of whites . . . . It is an influence revealed not only in the movement from one stage to the next, but also in the decisions about circumstances, accompanying charges, and sentencing findings within the respective stages of the process. And it is an influence that persists despite separate sentencing hearings, explicity articulated sentencing guidelines, and automatic appellate review of all death sentences.[493]

There are methodological problems, of course, with the Bowers and Pierce 1980 study: (1) aside from the distinction between felony and nonfelony murders, there were no other controls for aggravating circumstances and a wide range of other potentially influential variables (e.g., prior record); (2) any possible error due to estimating the missing offender and arrest information is unknown; (3) the Supplementary Homicide Reports provide information as of the time of the offense only and do not reflect addi-

488. *Id.* at 607.
489. *Id.*
490. *Id.* at 608-09.
491. *Id.* at 610.
492. *Id.* at 612-13.
493. *Id.* at 616.

tional information or corrections which may be discovered at later processing stages;[494] and (4) tabular analyses of different variables, despite cross-variable tabulations, are not as precise for estimating simultaneous effects as are multivariate analyses. Overall, however, these powerful results outweigh the drawbacks of the study in assessing the significance of a race-of-victim effect. The effect remained strong throughout types of data bases, at different points in the criminal justice system, and with different cross variables. This strength and stability in the findings throw doubt on suggestions that these effects could be attributable to chance or to an omitted variable that would be so highly correlated with race of victim.[495]

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494. *See, e.g.*, Arkin, *supra* note 450, at 76, 86 n.85.

495. *Id.* Indeed Arkin's 1980 findings also support a race-of-victim effect based upon very detailed data, although curiously Arkin appears unconvinced (apart from any distrust engendered by his study's methodological limitations). Arkin analyzed 350 murder cases presented to the grand jury between 1973-76 in Dade County Florida. *Id.* at 86. Information on each case was gathered from several sources: files in the State Attorney's Office; interviews with prosecutors, judges, and defense attorneys; as well as grand jury memoranda compiled from police reports, medical examiner reports, and witness testimony. *Id.* at 86 n.85. A total of 81 cases (23 percent) resulted in first-degree murder convictions and 10 cases (3 percent) resulted in death sentences that were not later reduced to life imprisonment. *Id.* at 86.

Arkin's 1980 study is hindered by a small sample size, although clear trends appear. Altogether, nine of the ten death cases involved white victims, and half of the death cases involved black offenders with white victims, even though this racial combination comprised only 21 percent of all cases presented to the grand jury. *Id.* at 87. Arkin asserts that when felonies and nonfelonies are separated, such disparities among offender-victim racial groups are "greatly reduced," *id.* at 88, but so are the sample sizes, and this consequence affects significance levels. Moreover, disparities even among small sample sizes are reduced but in no way eliminated.

Among felony murders, for example, 80% of the white-victim cases resulted in death sentences relative to 30% of the black-victim cases. *Id.* at 89. As Arkin further concedes, "[c]ases with black offenders and white victims . . . resulted in death sentences most often . . . ," *id.* at 90, a nonsignificant (and sample-size limited) result that is linked to a statistically significant difference in first degree murder convictions for felony murder cases. *Id.* at 90 n.94. Differences in first degree murder convictions among felony murder cases are in turn "related to the race of the victim rather than to the race of the offender. Of the 113 felony murders with white victims, 51 (45%) resulted in first-degree murder convictions, compared to 6 (21%) of the 29 cases with black victims . . . . [T]his is statistically significant." *Id.* at 90 n.94.

Arkin also found evidence of arbitrariness in death sentencing in an unusual and commendable effort to distinguish the ten murder cases that resulted in a death sentence from the 340 that did not. A total of 44 felony murder cases that resulted in first degree murder convictions (with a death option) were compared in detail with the ten death cases, because all ten death sentences were imposed for felony murder. *Id.* at 91-92. Overall, Arkin found that 24 of these 44 comparison cases showed a "clear distinction" from the ten death cases, 14 showed a "debatable distinction" from the death cases, and six showed "no

3. Post-*Furman* Research: 1981-1982

Zeisel's 1981 study relied upon the file of Florida Supplementary Homicide Reports used by Bowers and Pierce, in addition to some unpublished data, to examine 114 men on Florida's death row in September of 1977.[496] The purpose of the study was to compare defendant and victim race distributions among the 114 condemned men with race distributions found in 189 Florida homicide arrests compiled from January, 1976 to September, 1977. Altogether, 85 or 75% of the men on death row were convicted of murders committed during the course of a felony. Of these homicides, 94% of the convicts were convicted of killing victims who were white only, 2% were convicted of killing victims who were white and black in multiple-victim cases, and 4% were convicted of killing victims who were black only.[497] Results showed a difference ratio of 31:1 based upon the race of the victim. The ratio of death row offenders to felony murder arrestees was 31% for defendants with white victims relative to 1% for defendants with black victims. Among those arrested for crimes against white victims, 47% of the black defendants received a death sentence relative to 24%, or half the number, of white defendants.[498] Aside from the methodological limitations that the Zeisel study shares with others that have been reviewed, these race differences are large and are consistent with the differences reported in other research.

Radelet examined race and defendant-victim relationship data

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distinction" whatsoever from the death cases. *Id.* at 95, Table 6. "In these [six] cases, the life sentences were the result not of the application of the statutory criteria or of evidentiary problems, but rather of uncontrolled sentencing discretion." *Id.* at 98.

According to Arkin, whether or not such differences reveal unconstitutional "arbitrariness" is a "matter of interpretation." *Id.* at 101. That comment applies to Arkin's mode of analysis as well. For example, Arkin's case-by-case evaluation did not afford inter-rater reliability because his methods of categorization were not cross-checked or confirmed independently by others. Any bias Arkin may have had could have been reflected in his results. In his statistical analysis of possible racial discrimination, Arkin down played race-of-victim effects and, indeed, ultimately asserted that there was "no conclusive evidence of racial discrimination" when the felony murder factor was considered. *Id.* at 100. Despite these criticisms and Arkin's attempts to downplay his results, however, his findings do indicate a race-of-victim effect. Moreover, his analysis of why some cases were distinguishable while others were not was detailed and internally consistent.

496. Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 458 n.18, 459 n.20 (1981).

497. *Id.* at 458.

498. *Id.* at 458-60.

on 637 homicide indictments that occurred in 1976 and 1977 in the 20 Florida counties originally sampled by Zeisel.[499] Among all homicide indictments, the defendant-victim race distributions followed the expected pattern: white-victim cases had a higher probability of the defendant receiving a death sentence than black-victim cases. Despite the finding that more black-victim cases were "primary homicides," *i.e.*, homicides involving family, friends, or acquaintances, the race-of-victim effect remained when examining only "nonprimary homicides," *i.e.*, homicides typically involving strangers that usually take place in the course of another felony. Because only 1% of the primary homicides resulted in a death sentence, Radelet focused his analyses on the 326 cases that involved only nonprimary homicide.[500]

By applying a loglinear logit analysis, Radelet examined the main and interaction effects between defendant's race, victim's race, and in separate models, three different variables: (1) first degree murder indictment (all indictments sample); (2) imposition of the death penalty (all indictments sample); and (3) imposition of the death penalty (first degree murder indictments sample only). Among nonprimary homicides, defendants with white victims had a higher probability of being indicted for first degree murder and of receiving the death penalty than defendants with black victims, although there was not sufficient evidence to suggest an interaction between the defendant's and victim's race. Among those defendants indicted for first degree murder, however, neither the defendant's nor the victim's race, nor the interaction between the two, related significantly to the probability of receiving a death sentence.[501]

Foley and Powell studied Florida data that comprised all of the 829 first degree murder defendants processed in 21 Florida counties between 1972, the date of reenactment, through 1978.[502] Data were gathered from court records by law students who used a

499. Radelet, *supra* note 483, at 918-20. *Id.* at 920 n.1.

500. *Id.* at 919-22.

501. *Id.* at 923-26. Radelet appropriately warns that this statistical nonsignificance "must be interpreted with caution" because of the small size of the sample and the resulting wide range of the confidence interval. *Id.* at 925. "Evidence from other studies, taken together with the range of this confidence interval, suggests that an association between race of the victim and a sentence of death, given an indictment for first degree murder, could be found if the sample size was increased." *Id.*

502. Foley & Powell, *The Discretion of Prosecutors, Judges, and Juries in Capital Cases*, 7 CRIM. JUST. REV. 16, 17 (1982).

standardized form. Unlike previous research on the Florida data, Foley and Powell examined a variety of independent variables including demographic information on the defendant and the victim, defendant's prior convictions, crime as charged, additional crimes charged, number of victims and accomplices, county, circumstances of the crime, relationship between the defendant and victim, weapons used, type of disposition (trial or plea), and type of attorney. These data were analyzed in three different regression equations that predicted three binary case processing stages: (1) the prosecutor's decision to dismiss the case or to take it to trial; (2) the jury's recommendation of a life sentence or a death penalty; and (3) the judge's final decision to impose a life sentence or the death penalty, since in Florida the judge can overrule the jury verdict.[503]

Altogether, four extra-legal variables (attorney type, presence of an accomplice, county, and defendant's gender) and one legal variable (circumstances of the offense) significantly predicted whether a trial was held. Female defendants and defendants with private attorneys, accomplices, and less aggravating circumstances were less likely to have a trial.[504] Moreover, prosecutors in some counties were relatively more likely to dismiss cases, although "[t]he data do not provide information as to the reason for this discrepancy."[505]

Three variables predicted the jury's recommendation of the death penalty over a life sentence (male offender, additional offenses, and a not guilty plea). Five variables predicted the judge's recommendation of a death sentence (male offender, additional offenses, not guilty plea, white victim, and number of victims).[506] Whereas the judge and jury were both influenced by the defendant's gender, additional offenses, and not guilty plea, only the judge was affected by the victim's race "despite the recommendations of the juries which are less biased."[507] The authors admit that the reasons for this judge-jury discrepancy cannot be determined from their data. What is clear, however, is that "[n]one of the participants in the legal process is completely free of bias."[508]

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503. *Id.* at 17-18.
504. *Id.* at 20, 21.
505. *Id.* at 21.
506. *Id.* at 18, 19, 21.
507. *Id.* at 21.
508. *Id.*

4. Post-*Furman* Research: 1982-1983

Bowers's study of Florida data is somewhat confusing because five different samples were used for five different analyses, and the last analysis used data from Georgia only. The analyses of the Florida data were based on the 20 counties examined by other researchers,[509] and the selection of a particular group of counties depended on whether the sample comprised those persons charged with criminal homicides, or those indicted for first degree murder.[510] Each of the five analyses was a separate study in itself, and each focused on a different perspective of the criminal justice system. Bowers's purpose was to analyze decision-making at four stages of the criminal justice system for potentially capital cases. The four stages were: the prosecutor's decision to impose charges and proceed with trial; the impact and distribution of defense services; the implemention of the death sentence upon convicted offenders; and state appellate courts' proportionality reviews of death sentences.[511]

The study's regression equations predicted the outcome of four primary dependent variables, which varied depending on the sample and scope of the analysis. The dependent variables were: (1) the decision to indict for first degree murder; (2) a conviction for first degree murder; (3) the decision to make a case capital and proceed to trial; and (4) the imposition of the death sentence. Various legal and extra-legal independent variables were examined, including felony-related killing, multiple offenders and victims, female victim, victim age, gun as weapon, defendant accessory, juvenile defendant, a quarrel-precipitated killing, race (black and white), region (North, Central, Southern, panhandle), and type of attorney (court-appointed and public defender). In describing the extra-legal data that were analyzed, Bowers states that the variables selected had missing information in no more than 15% of the cases.[512]

Each of the five samples in the study was used to investigate a different kind of hypothesis and dependent variable. Sample One was used to research the estimated effects of legal and extra-legal

509. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1072 n.9 (1983).

510. *Id.* at 1079 n.22.

511. *Id.* at 1070-71.

512. *Id.* at 1072 n.10.

factors on the decision to indict for first degree murder among persons charged at arrest with criminal homicide in Florida from 1976-1977. Data were available on 17 regression variables for 508 cases, or two-thirds of the total sample of 771 cases.[513] Altogether, results showed that the influences of race of the victim and location of the crime were striking:

> Critically, the variables designating racial combinations show substantial and significant effects. That a black has killed a white is virtually as strong a predictor of a first degree indictment as any of the legally relevant factors except felony circumstance, *i.e.*, the commission of a separate felony in the course of the homicide. . . .
>
> The location of crime within the state also is an important factor. The analysis shows a significantly higher level of first degree murder indictments in the central region of Florida (the southern region is the reference category), when other legally relevant factors have been controlled. . . .
>
> Finally, defendants with court-appointed attorneys were far more likely to receive a first degree murder indictment compared to those with privately retained attorneys.[514]

Sample Two was designed to compare the statistical evidence gathered for Sample One with the interview data based upon the experiences of those who handle capital cases. The primary issue was identifying which factors influenced a decision to process a case to trial on a first degree murder charge. Data on these factors were gathered from a standard questionnaire that included two questions about filing a capital charge and taking such a charge to trial. Results from the questionnaire produced 188 codable responses from 16 judges, 16 prosecutors, and 38 defense attorneys.[515]

Questionnaire responses highlighted the importance of extra-legal effects. "Respondents mentioned more extralegal considerations—including the personal orientation of the prosecutor, situational pressures and constraints in handling a case, and social influences and pressures from the community—than factors falling within the general category labelled 'legal factors or considerations.' "[516] Contrary to the criticisms of death penalty research,

513. *Id.* at 1073-74.
514. *Id.* at 1074-75.
515. *Id.* at 1075-77.
516. *Id.* at 1077.

which charge that the statistical data do not reflect or measure actual legal practice, subjective questionnaire responses from a variety of participants in the criminal justice system bolster the findings on the significance of extra-legal effects in decision-making. According to the decision-makers themselves, the extra-legal factors are considerably more important than the legal factors.

Sample Three comprised a group of 613 individuals indicted for first degree murder in Florida from 1973 to 1977, or 59% of the 1045 cases in the combined sample of criminal homicide cases.[517] The primary purpose of the Sample Three study was to examine legal and extra-legal effects on the decision to convict for first degree murder.

Results from the Sample Three predictions showed three major differences from the Sample One predictions. First, in Sample Three analyses, the defendant's youth was a significant mitigating factor in predicting conviction in comparison to its apparent aggravating effect on the decision to indict in Sample One. Second, the defendant's role as an accessory rather than as a "triggerman" significantly reduced the likelihood of a first degree murder conviction. Third, relative to the effect at the indictment stage, the effect of attorney type on conviction was not as strong.[518] Consistent with Sample One findings, however, victim's race and region remained as significant and strong predictors of conviction after controlling for legally relevant factors.

> Black defendant-white victim has as strong an effect as any other variable in the analysis. . . . Racial bias is stronger in the conviction process than it is in the indictment.
>
> Region has a statistically significant impact on the conviction stage of the process as well, and again it is the central region of Florida where first degree murder convictions are most likely compared with otherwise comparable cases in the rest of the state.[519]

Sample Four consisted of 191 cases without any missing data. These cases constituted 63% of the 305 first degree murder convictions in the 1973-1977 combined sample.[520] The purpose of this study was to predict the effect of legal and extra-legal variables

517. *Id.* at 1078, 1079 n.22.
518. *Id.* at 1080-81.
519. *Id.* at 1080.
520. *Id.* at 1083.

upon the likelihood of receiving a death sentence. In these analyses, the effects of race and region were even more striking than they were in earlier stages of the process, suggesting a cumulative impact independent of legally relevant aggravating or mitigating influences. Both black-defendant/white-victim and white-defendant/white-victim cases had a significantly higher probability of a death sentence than the black-defendant/black-victim cases or the few white-defendant/black-victim cases. Regional effects were stronger than they were at the earlier stages: courts in the northern region showed a significantly higher likelihood of imposing the death sentence than all other regions in the state. In turn, type-of-attorney was among the strongest factors for predicting a death sentence. As an illustration, the effect of having a court-appointed attorney was comparable to having committed a felony-related murder.[521]

As with other studies, Bowers's research is not without methodological difficulties. There is no mention or description of how missing data were treated or estimated. All variables in the analyses were also entered in binary form, thereby limiting ranges of seriousness.[522] Further, it is difficult to compare findings across the different samples, which were tested at different times, with a different dependent variable and in different counties.

What may be viewed initially as a limitation, however, can be an additional test of reliability. For example, race and county effects were consistent and strong in all analyses and at each of the different case processing stages. These effects remained "intractable under different kinds of statutes in different states; and replicated in different kinds of studies using different kinds of data."[523] A methodological purist could argue that the most relia-

521. *Id.* at 1086. Sample Five comprised a Georgia data base of 297 murder cases tried between 1970 and 1977. Data on these cases were gathered in order to examine the first 36 post-*Furman* death sentences for murder reviewed for proportionality by the Georgia Supreme Court. The data were collected by the Georgia Supreme Court, which used a six-page questionnaire completed by trial judges for post-*Furman* death sentences, and completed by a clerk of the court for all life sentence cases as well as pre-*Furman* death sentence cases. *Id.* at 1091. The data showed that the cases the Georgia Supreme Court chose for comparative review were not consistently more similar than the other cases in the pool, but appeared to be selected because their original death sentence was upheld by the Georgia Supreme Court. *Id.* at 1092. "Thus, from the substantial pool of almost 300 cases available for proportionality review by 1977, the Georgia Supreme Court repeatedly relied upon a small and highly selective subsample." *Id.* at 1094.

522. *Id.* at 1072.

523. *Id.* at 1098.

ble means of measuring legal and extra-legal effects would be to follow the same sample of cases throughout the criminal justice system. A methodological pragmatist, on the other hand, might argue that such documentation is difficult and, indeed, may not be necessary. Evidence of the consistency of certain effects is proof enough of their impact, despite whatever inaccuracies might result from comparisons of different samples across time.

Paternoster examined prosecutorial discretion and the race-of-victim effect more specifically in three articles based upon an analysis of South Carolina data. In the first article, Jacoby and Paternoster studied all death-eligible cases of homicide in South Carolina from June 8, 1977, the effective date of reenactment, through November 30, 1979.[524] Supplemental Homicide Reports indicated that a total of 205 identified murder cases had at least one aggravating factor that met the statutory conditions necessary for a death sentence. Within this group of 205 potentially death-eligible cases, prosecutors were 3.2 times more likely to seek the death penalty when the victim was white, irrespective of the defendant's race.[525] Prosecutors were four times more likely to seek the death penalty when blacks were accused of killing whites as compared to killing other blacks.[526]

Paternoster's second study, published in 1983, examined the initial charging decisions made by prosecutors in 1805 non-negligent homicides recorded in South Carolina from June 8, 1977, the effective date of reenactment, until December 31, 1981.[527] From the total sample of 1,686 homicides where offenders were known, 321 or 19% were capital murders, and these provided the principal sample for analyses.[528]

Paternoster's study used three data sources. First, Supplemental Homicide Reports provided information about the known characteristics of the victim and suspect, if known, and the circumstances of the offense (*e.g.*, type of weapon used, felony circumstances, etc.). In addition, the original police incident report and subsequent investigation reports of the homicide were gath-

524. Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379, 382 (1982).

525. *Id.* at 384.

526. *Id.* at 384-85. The cases termed death-eligible by Jacoby and Paternoster would be analogous to the cases designated death-possible in the New Jersey data of this Study.

527. Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 764 (1983).

528. *Id.* at 765.

ered for approximately 95% of the cases reported in the Supplemental Homicide Reports. The police and investigation reports contained more detailed information on the crime and the offenders. Third, data were collected for a subset of cases that resulted in an arrest and indictment. For these homicides, records kept by the State Office of the Attorney General were used. By matching the Supplemental Homicide Reports and police incident reports with a criminal indictment and disposition record, homicides were classified according to type of indictment, trial outcome, and disposition.[529]

Various dependent variables were examined, depending on the type of analysis, including the number of homicidal acts, number of requests for the death penalty, and number of capital cases. The most frequently examined variable, however, was the prosecutor's binary (yes/no) decision to seek the death penalty. In addition, several important independent variables were used, including all 16 judicial circuits in South Carolina: an urban/rural categorization of judicial circuits based upon Standard Metropolitan Statistical Areas;[530] offender/victim racial categories (black/white); numbers of victims and offenders; relationship between the victim and the offender; victim's age and gender; and type of weapon used.[531]

Two homicide seriousness scales were constructed. The first scale consisted of four aggravating factors: whether the homicide involved: (1) strangers; (2) multiple victims; (3) multiple offenders; or (4) female victims. A score of 1 was assigned for each aggravating factor present, thereby producing an aggravation scale for each homicide that could range in value from 0 (no non-statutory aggravating factor present) to 4 (all four non-statutory aggravating factors present). A second, identical scale was created that included a fifth aggravating factor. This fifth factor had a score of 1 if any of the following characteristics were present: the offender had a history of violent offenses; the offense involved post-mortem abuse or multiple afflictions (*e.g.*, stabbing and shooting); the murder was particularly brutal; there was a concurrent sex offense not involving rape; the victim was shot more than once; or the offender tried to hide the body. This second scale could range

529. *Id.* at 763-64.

530. *Id.* at 778-80.

531. *Id.* at 770-71.

from 0 to 5, where the value 5 indicated that all five of those aggravating factors were present.[532]

Paternoster conducted a variety of analyses to determine the significance of race on the prosecutor's decision to seek the death penalty. An examination of probabilities in terms of the four defendant-victim race categories for capital murders showed that black-defendant/white-victim cases had over 4.5 times the risk of the death penalty being sought than black-defendant/black-victim cases.[533] Paternoster admitted that this difference could still be attributed to other non-statutory aggravating factors that were found to have significant associations with the prosecutor's decision.[534] Consequently, many of these factors were used as controls in the application of the two seriousness scales to the analysis. Even when the seriousness scales were used as controls, however, Paternoster found a race-of-victim effect that corresponded to the offense's seriousness: at each aggravation level of the scale, the probability of the death penalty being requested was higher for white-victim relative to black-victim cases. Patterns were identical for both aggravation scales.[535]

Paternoster recognized that singular analyses of the impact of different variables may vary from the results that would occur in a simultaneous analysis.[536] In order to accommodate a dichotomous dependent variable (a yes/no decision to seek the death penalty), a logit analysis was applied.[537] Logit analyses showed that of the three (previously found-to-be-significant) explanatory variables that were analyzed, race of the victim had a "much greater" impact on the death penalty decision than either the number of victims or the victim-offender relationship.[538]

Furthermore, the analyses of the sixteen judicial circuits showed considerable variation in the likelihood of a death penalty being requested. Whereas the prosecutor requested the death penalty in over 50% of the capital murder cases in six circuits, for example, the death penalty was sought in less than 30% of the

532. *Id.* at 772.
533. *Id.* at 768.
534. *Id.* at 769-72.
535. *Id.* at 772-75.
536. *Id.* at 774.
537. *Id.* Goodman's ECTA (Everyman's Contingency Table Analysis) program, which Paternoster used, calculates "log-linear fits for hierarchical models for contingency tables, and estimates the parameters of the model." *Id.* at 774 n.60.
538. *Id.* at 778.

potentially capital murder cases in five other circuits. When circuits were classified according to urban/rural composition, results showed that a death sentence was significantly more likely to be sought in rural than in urban areas, even though rural capital murders did not have significantly more aggravating characteristics than urban capital murders.[539] Indeed, as Paternoster emphasized, "The greatest difference between rural and urban capital murders is that rural murders are more likely to involve white victims than urban murder."[540] Similar to the findings reported by Bowers and Pierce, "the effects of race of victim and geographical area operate independently of one another to produce glaring disparities in the likelihood of a death request."[541] In general, therefore, race of victim and geographical variations in the state had strong and consistent relationships with the prosecutor's decision to seek the death penalty, after controlling for a number of important aggravating factors.

Paternoster's study is methodologically sophisticated and thorough, although it is not without drawbacks.[542] As Paternoster

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539. *Id.* at 779-81.

540. *Id.* at 781.

541. *Id.* at 783. *See also* Bowers & Pierce, *supra* note 372, at 605.

542. Paternoster, *supra* note 527, at 774. Two other criticisms relate to methodology. First, Paternoster claimed that a multiple regression analysis could not be used to examine the simultaneous effects of different independent variables because the dependent variable was dichotomous. *Id.* A logit analysis was therefore used. Although a logit analysis is an appropriate technique for binary dependent variables, there is considerable evidence that the statistical results based upon a logit analysis will be comparable if not nearly identical to the results obtained using a typical multiple regression analysis. Multiple regression techniques are robust. That is, they can accommodate or account for differences in variable distributions as well as levels of measurement. Unless the dependent variable is extremely skewed or problematic, multiple regression techniques can be used without fears of inaccuracy. This point is particularly pertinent with regard to Paternoster's analyses because application of the logit model limited the number of independent variables to only three so that cell sizes would not become unreliably small. A re-analysis of Paternoster's data with a multiple regression technique would allow for a simultaneous measure of the effects of all the independent variables that were examined individually, thereby providing some indication of which variables weighed most heavily compared to others.

The second criticism pertains to Paternoster's use of aggregate scales. Although Paternoster is to be commended for his creativity (his article was among the first to use scaling techniques in death penalty research), aggregate measures can be problematic because they may mask or artificially equalize potentially different effects. A prosecutor may be more strongly affected by a particularly brutal murder than, for example, a murder between strangers, all else being equal. With Paternoster's scaling technique, however, "brutal murder" and "stranger murder" would each have a score of one. If variable distributions are adequate it would be preferable to examine each factor independently to determine its individual, unmasked effect. Using this approach, it may be found that some

himself noted, two important controls were not included in the analyses: criminal history of the defendant and the legal strength of the case. Whether or not either of these two variables would be related to black defendants with white victims or the rural location is unknown, although studies such as those conducted by Baldus and his colleagues have shown that such an explanation is unlikely. Moreover, the impact of such strong and consistent race and region effects on the decision to seek the death sentence would be diminished only by a finding that other variables were extremely significant.[543]

5. Post-*Furman* Research: 1984-1985

Paternoster's third study, published in 1984,[544] focused on the same sample of capital murders examined in the 1983 study. Capital murders were analyzed in three groups: (1) all homicides with accompanying felonies (n = 300); (2) the subgroup of homicides with a single felony (n = 213); and (3) the subgroup of homicides with multiple felonies (n = 87).[545] Separate probit models were estimated for each of the three groups, with the prosecutor's decision to seek the death penalty as the dependent variable predicted by ten independent variables: number of statutory felonies; number of non-statutory felonies; number of non-felony aggravating factors; number of victims; number of offenders; sex of victim; age of victim; weapon used; victim-offender relationship; and race of victim.[546]

An examination of all felony murders showed that the victim's race had a highly significant effect on the prosecutor's decision to seek the death penalty, a finding that cannot be explained by the circumstances surrounding the homicides involving white and black victims, given the controlling variables.[547] When the type of felony was controlled, however, it appeared that these defendant-victim race differences pertained predominantly to single felony homicides, because the effect was not significant for multiple fel-

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of the variables in Paternoster's scale have no predictable effect on the prosecutor's decision, whereas others may have strong and highly significant effects.

543. *Id.* at 784.

544. Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 (1984).

545. *Id.* at 464.

546. *Id.* at 465.

547. *Id.* at 464-66.

ony homicides.[548] Paternoster suggested that prosecutors may react to community pressures accompanying multiple felony cases. Race of the victim may thus be "dwarfed to the point of nonsalience by other aspects of a killing."[549] Other data provided by Paternoster supported this view by demonstrating that the race-of-victim effect diminished as the homicides became more aggravated.[550]

E.L. Murphy examined the 438 murder indictments that took place in Cook County, Illinois from June 21, 1977, the date of reenactment of the death penalty in Illinois, through 1980.[551] Of the total of 230 defendants who were found guilty of murder with one or more aggravating factors present, only 18 (8%) received a death sentence.[552] Irrespective of the defendant's race, the risk of receiving the death penalty was four times greater in cases with a white victim than in those with a black victim. Among the total of 52 capital murder convictions, prosecutors recommended a death sentence for both black and Hispanic defendants with white victims more than twice as frequently as in cases with other racial combinations. In penalty trial decisions, however, black defendants with white victims were only slightly more likely to receive a death sentence than white defendants with white victims. Hispanic defendants with white victims, on the other hand, were the most likely to have the death penalty imposed upon them.[553] Murphy's study suffered from small sample sizes, particularly of Hispanic individuals. It was not able to control for aggravating or mitigating factors, and it applied only tabular analyses. The large race differences reported are nonetheless consistent with those studies that incorporate such controls and add to the cumulative evidence of race effects.

In 1984, Gross and Mauro investigated post-*Furman* death penalty statutes in eight states: Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia. Their study examined the expanded Supplementary Homicide Reports for all homicides reported to the FBI from January 1, 1976

548. *Id.* at 467-68.

549. *Id.* at 472.

550. *Id.* at 473-75. As noted earlier, data on the defendant's record and strength of the case were not included in the analyses.

551. Murphy, *Application of the Death Penalty in Cook County*, 73 ILL. B.J. 90, 91 (1984).

552. *Id.* at 91.

553. *Id.* at 93.

through December 31, 1980, or during whatever portion of that time the particular state had the death penalty in effect.[554] These eight states produced 379 death sentences, more than one-third of the national total at the time. Gross and Mauro concentrated their analyses on the three states that had the largest number of death sentences—Georgia, Florida, and Illinois. Their examination of disparities in the imposition of death sentences focused on eight variables: race of the defendant and the victim (black, white, without a distinction for Hispanic individuals); felony circumstance (felony, non-felony homicide); relationship of victim to defendant (stranger, non-stranger); number of victims; sex of victim; use of a gun; and location of the homicide (urban, rural).[555]

Tabular analyses of individual variables for Georgia, Florida, and Illinois showed a higher likelihood of the death penalty for defendants linked to white victims, with the relationship being strongest for black defendants. Three other variables also were strongly associated with the likelihood of a death sentence: the commission of a separate felony along with the homicide, killing of a stranger, and killing more than one victim. These factors diminished, but did not explain, the race-of-victim effects found.[556] Furthermore, when these three non-racial factors were summed into an "aggravation scale," the race-of-victim disparities "remained consistent and large" after controlling for level of aggravation as measured by the scale.[557] Sex of the victim, use of a gun, and location of the homicide had only weak effects on the likelihood of a death sentence and thus were not incorporated in the aggravation scale.[558]

The effects of all eight variables, and selected interaction variables, were examined simultaneously in multiple regression analyses that were performed separately on the data from each state.[559] The race of the victim had a strong and statistically significant effect on the odds of a defendant receiving the death sentence in six of the eight states: Georgia, Florida, Illinois, Oklahoma, Mississippi, and North Carolina.[560] The likelihood of a death sen-

554. Gross & Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 49 (1984).

555. *Id.* at 49-65.

556. *Id.* at 66.

557. *Id.* at 75. The scale is explained at 70.

558. *Id.* at 66.

559. *Id.* at 78. *See id.* n.127.

560. *Id.* at 78, 96-97.

tence was higher in white-victim cases in the two states with the smallest number of death sentences, Virginia and Arkansas, but the effects were not significant at the p-val. $<.05$ level.[561] Logistic regression analyses enabled Gross and Mauro to calculate the odds of receiving a death sentence in each state. For example, the odds of receiving a death sentence were about four times greater in Illinois, North Carolina, and Oklahoma, about five times greater in Florida and Mississippi, and about seven times greater in Georgia for defendants linked to white victims (relative to black victims).[562]

Gross and Mauro acknowledged the limitations of their research, particularly with regard to omitted variables. Data on strength of the evidence and criminal record information were not available.[563] Moreover, their data did not include the disposition of those homicide cases that did not result in a death sentence.[564] Verification of their findings from other research that has included these omitted variables is the most convincing evidence that these variables would not change these results.

Radelet and Pierce examined data on 1017 defendants indicted for criminal homicide in selected Florida counties between 1973 and 1977.[565] The purpose was to compare the police department's classification of a case, as recorded on the Supplemental Homicide Reports, with the prosecutor's classification of a case, as recorded on the court records. Primarily, they sought to identify possible extra-legal influences on those cases where the prosecutor's assessment of a case differed from the initial assessment provided by the police department. The study data were derived from two overlapping data sets. Supplemental Homicide Reports for an initial selection of 1382 cases were matched with case data collected by law students and lawyers who searched the criminal dockets for the sample years and completed a standardized information sheet for each case. Altogether, 1017 or nearly three-

561. *Id.* at 98.

562. *Id.* at 78, 79, 83 and 96. *See also* Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U.L.Q. 573, 575 (1985). For a review of the first eleven cases that resulted in executions after 1976, see Streib, *Executions Under the Post-*Furman *Capital Punishment Statutes: The Halting Progression from "Let's Do It" to "Hey, There Ain't No Point in Pulling So Tight"*, 15 RUTGERS L.J. 443 (1984).

563. Gross & Mauro, *supra* note 554, at 99.

564. *Id.* at 99 n.191.

565. Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 595-97 (1985).

quarters of the cases were successfully matched, and these cases served as the sample for analyses.[566]

Loglinear models were applied to determine whether there were statistically significant differences between race of the defendant or race of the victim in felony upgrading or downgrading by prosecutors. Results showed that relative to the initial police classification, prosecutorial assessments of a case were most likely to be upgraded, and least likely to be downgraded, in cases where the defendant was black and the victim was white. These results were followed in decreasing order of significance by the following defendant/victim racial combinations: white-defendant/white-victim; black-defendant/black-victim; and white-defendant/black-victim. Results of logistic regression models showed that the correlation between race and prosecutorial classification remained when eight potentially influential variables were introduced as controls on the prosecutor's decision to seek the death penalty: victim's and defendant's gender; victim/offender relationship; victim's and defendant's age; numbers of victims and offenders; and weapon use.[567]

Furthermore, while controlling for these influences, results of logistic regressions demonstrated that upgrading was also a significant predictor of the imposition of the death penalty. Overall, upgrading increased the probability of a death sentence being imposed by 22%.[568] Additional analyses demonstrated, however, that these defendants were either not offered a plea bargain, or refused the bargain they were offered. Those defendants who were offered a plea and accepted it were not at risk of receiving a death sentence. The evidence of this study suggests that prosecutors may: (1) upgrade some cases in order to secure a plea bargain; and (2) "retaliate" in some cases where a plea bargain has been refused.[569]

> These results underscore the point that prosecutors have broad discretionary power which affects how homicides are investigated and presented, whether defendants are allowed to plead guilty to noncapital offenses, whether death sentences are sought, and numerous other decisions concerning the processing of a case. Sentencing studies that take the prosecutor's case de-

566. *Id.* at 588, 595-97.
567. *Id.* at 601-06.
568. *Id.* at 614.
569. *Id.* at 611.

> scriptions and the formal charges as objective and unbiased reflections of the seriousness of a crime are based therefore on a questionable foundation that can lead to the underestimation of race effects on sentencing whenever race has affected earlier processing decisions.[570]

6. Post-*Furman* Research: 1986-1987

Nakell and Hardy's recent study examined 489 homicide cases that occurred in North Carolina from June 1, 1977, to May 31, 1978, during the first year of the state's capital punishment law.[571] The study involved a rich data base and introduced different methods for measuring certain difficult variables such as quality of the evidence. The study emphasized the treatment of cases from their entry into the criminal justice system to their eventual final disposition. Each case was followed from the time that the case was certified as a homicide in the medical examiner's office "through the pretrial, trial, postconviction, and clemency procedures to ascertain for each stage and for the system as a whole whether the discretion of the decision-makers was sufficiently controlled so that the decisions reached at each stage were made in accordance with the statutory standards."[572]

Information about each case was gathered from several different sources: the files of the state medical examiner, court records, police reports, and interviews with most of the prosecuting and defense attorneys. Such data gathering diversity provided two kinds of data: (1) "legal" or statutorily relevant factors, such as quality of the evidence, and presence of mitigating and aggravating circumstances; and (2) "extra-legal" factors, such as race and sex of the defendant and location of the homicide. According to Nakell and Hardy, the only relevant piece of information they did not acquire was the quality or effectiveness of counsel (apart from a variable for retained or appointed status) because of the difficulties involved in devising an adequate measure.[573]

Devising an adequate measure of "quality of the evidence" was particularly difficult. By comparing evidence information from three different sources—police reports and interviews with de-

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570. *Id.* at 616 (citation omitted).

571. B. NAKELL & K.A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY 93 (1987).

572. *Id.* at 93.

573. *Id.* at 93, 98-99.

fending and prosecuting attorneys—the extent and accuracy of the evidentiary materials could be determined for each decision-making point. An evidence measure was formulated in two stages: (1) a qualitative stage, and (2) a quantitative stage. At the qualitative stage, the authors derived three "guilt or innocence" issues from the study cases: (1) identification of the defendant as a perpetrator; (2) defendant's degree of culpability; and (3) defendant's self-defense status.[574] Two additional issues were identified at the penalty stage for those cases that resulted in a first degree murder conviction: (1) statutory aggravating circumstances and (2) statutory mitigating circumstances.[575] Although the statutory aggravating and mitigating factors were analyzed as two separate measures, two additional circumstances were examined as single variables: (1) the defendant's prior record (because it could be either a statutory aggravating or mitigating factor) and (2) multiple victims (because "it does not correspond precisely to a statutory aggravating factor but corresponds closely to two of them").[576]

At the quantitative stage, a numerical score was developed to represent the quality of information for each of these three guilt or innocence issues.

> On the basis of a review of the literature on litigation of a criminal case and on the basis of experience, the *study* estimates the relative probative value of the different kinds of evidence in homicide generally. Each item of evidence is assigned a maximum value based on that estimate. From that maximum value, percentage reductions are made on the basis of factors that tend to limit, qualify, or discredit the evidence. The size of the percentage reduction depends on both the category of evidence and the character of the compromising factor. For subsequent impeaching factors for each item, additional reductions are taken from the remaining total, not the amount of the original maximum. (emphasis added).[577]

The word "study" is emphasized in the explanation because the authors never specified *who* estimated the relative probative value of the different kinds of evidence. Presumably, the authors conducted the weighing themselves, but it is never mentioned how the initial weighted values were derived nor whether any at-

574. *Id.* at 104.
575. *Id.* at 105.
576. *Id.*
577. *Id.*

tempts were made to account for inter-rater reliability. Such concerns are important because the authors' weighing scheme appears to be entirely arbitrary.[578]

This scoring system for strength of the evidence is disconcerting for four related reasons. First, the system is totally arbitrary, and consequently, has no proven basis in statistical reality. Second, the system's validity and reliability cannot be tested without additional information. Third, the aggregation and weighing inhibit opportunities to determine which factors are of greater importance than others in predicting different outcome variables, such as the likelihood of receiving the death penalty. Fourth, relative to the weighted scales proposed by Paternoster, for example, the weighing methods used by Nakell and Hardy depend on subjective assignment.

The Nakell and Hardy scoring system lacks statistical reality because there are methods available for devising weights that reflect a level of actual predictive validity rather than subjective estimation. Multiple regression techniques can be used whereby each variable reflects a value according to its weight as a standardized beta coefficient.[579]

Altogether, Nakell and Hardy's data set comprised seven evidence variables (defendants' and victims' race and sex variables) and nine variables representing the 30 judicial districts where the cases were processed. A series of logistic regression models were

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578. The authors also seem to have arbitrarily assigned different values to each of seven categories of information that "might be relevant to an issue." *Id.* The categories used were: (1) the testimony of an eyewitness to an incident; (2) the testimony of a witness to relevant circumstances; (3) the testimony of an accomplice; (4) the statement of a defendant; (5) physical or scientific evidence; (6) character testimony; and (7) electronic wiretap or eavesdrop evidence. *Id.*

The authors explained that they relied on "experience" to assign scores to cumulative items of evidence in the same category of an issue which, they claimed, tended to "have diminishing value" at higher levels. In turn, "related items of physical evidence [were] aggregated and given a single score," such as fingerprint evidence at the scene of the crime, which was assigned a value of 60 points. *Id.* This elaborate scoring process ultimately produced a range of possible (positive or negative) scores for each of the three issues: (1) identification of the defendant ranged from 350 to -90; (2) degree of culpability ranged from 309 to -250; and (3) self-defense ranged from 300 to -218. *Id.* at 106-07.

In addition, four other score ranges were developed for those evidentiary issues relating to the penalty phase of the case: (1) aggravating circumstances ranged from zero to 25; (2) mitigating circumstances ranged from zero to 25; (3) the defendant's prior record ranged from zero to 30; and (4) number of victims was either a score of zero, which represented one victim, or one, which represented more than one victim. *Id.* at 107.

579. *See supra* note 542.

applied using the six different stages in the criminal justice system as outcome variables.[580] The six outcome variables started with the odds of a dismissal at any stage given an arrest and ended with the odds of being given a death sentence.[581] A total of nine individuals received death sentences: three white males, two white females, and four "nonwhite" males who were in fact three Native Americans and one black. One of the defendants (it is not specified which one) was sentenced to death twice for two separate homicides, and one of the white males committed suicide on death row, leaving a total of eight cases for analysis. This small number of death sentences is representative of the number of sentences in later years in North Carolina.[582]

Legal variables defined in this study as evidentiary, and extralegal variables, showed different effects at the six different system stages. Stage One, the decision to dismiss, was significantly predicted only by the evidence variables that indicated, not surprisingly, that those cases with the stronger evidence were least apt to be dismissed.[583] Stage Two, the decision to indict for first degree murder, was also significantly predicted by the evidence variables and, just as strongly, by the judicial district. Certain districts showed extremes of relatively higher or lower indictment rates, a variation that could not be explained on the basis of differences in the strength of the evidence or seriousness of the homicides.[584] Stage Three, the decision leading to a trial for first degree murder, was predicted by the quality of the evidence and two variables that represented case seriousness: the aggravating circumstances score and the involvement of multiple victims.[585] The judicial district factor was also highly significant, although relatively less so compared to its strength at the indictment stage.[586] For example, all other factors being equal,

> the odds for a defendant in District 5 of standing trial on first degree murder were 158 times those of a similarly situated defendant in comparison District Group B; of a defendant in District 14, 18 times greater; and of a defendant in District 27, 9

580. NAKELL & HARDY, *supra* note 571, at 109-11.
581. *Id.* at 113-14.
582. *Id.* at 93-94.
583. *Id.* at 121-22.
584. *Id.* at 123-30.
585. *Id.* at 130-31.
586. *Id.* at 131.

> times greater. This demonstrates a statistically significant differential in the exercise of prosecutorial discretion in different judicial districts, controlling for quality of evidence in the cases.[587]

Also significant was the race of the defendant in interaction with the degree of culpability and aggravating circumstances. For example, at a high culpability level, a nonwhite defendant had a 2.3 times greater chance of going to trial for first degree murder if the aggravating circumstances scores for both nonwhite and white defendants were high; a nonwhite defendant had a 10 times greater chance if the aggravating circumstances scores for nonwhite and white defendants were low. These odds held when all other factors were controlled.[588] Stage Four, the decision to submit the case to the jury on first degree murder, was significantly predicted by the evidence variables measured by defendant's prior record and the interaction of the prior record with degree of culpability. Race of the defendant, however, in interaction with defendant's prior record and aggravating circumstances, also had a significant effect.[589]

Stage Five, the decisions of the jury, was limited to models testing only the basic evidence and the race and sex of the defendant, because of the small number (18) of defendants convicted of first degree murder and sentenced to death (8). Results showed that for both the guilt and penalty decisions, the degree of culpability score and the defendant's prior criminal record were the only statistically significant evidence variables. In turn, victim's race alone had a significant effect at the verdict stage: defendants with white victims were six times more likely to be found guilty of first degree murder than defendants in cases with nonwhite victims. Although small sample sizes limited further conclusions and testing of additional variables (such as judicial circuits), these findings were consistent with other studies.[590]

Stage Six, the decisions after the trial, could not be tested reliably because of small sample sizes. The authors noted, however, that the Supreme Court of North Carolina reversed the convictions in two of the nine cases that received a death sentence and reversed the death penalty only in six of the remaining cases. In

587. *Id.* at 136.
588. *Id.* at 137-39.
589. *Id.* at 139-44.
590. *Id.* at 144-48.

only one case was the defendant executed. That case involved the first white female to be executed, who was only the third female executed in North Carolina since 1910.[591] Overall, the Nakell and Hardy study did show arbitrariness in the capital punishment system in North Carolina. The findings of their study are consistent with the findings reported in other research.

C. *The Baldus Studies*

The death penalty studies conducted by Baldus and his colleagues warrant separate analysis because they represent the state-of-the-art in methodology and scope. This review will focus on two studies in particular, although discussion of other studies will be incorporated.

In one of their first studies, Baldus, Pulaski, and Woodworth examined the Georgia Supreme Court's selection of similar cases for its proportionality review of 68 of the first 69 post-*Furman* death sentences for murder affirmed between 1973 and 1979 in Georgia.[592] The Georgia Supreme Court is required to conduct a proportionality review to compare the sentences of those cases under review with the sentences of select cases with similar characteristics. This pool of similar cases is to include capital cases in which sentences were imposed after January 1, 1970 or earlier, if it is determined to be appropriate.[593]

The 68 death sentence cases were compared with a total of 724 cases: 130 pre-*Furman* and 594 post-*Furman*.[594] A separate file was created for each case for including data on over 200 potentially aggravating and mitigating factors. These factors were used to develop the seven measures of comparative excessiveness for the study. Three of these seven measures were based on methods applied by state supreme courts and were created to assess an individual death sentence. The three measures were: (1) the salient factors method; (2) the main determinants method; and (3) the index method. The salient factors method included those aspects of a case which appeared most likely to have influenced the

591. *Id.* at 149-50.

592. Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 679-83 n.87 (1983).

593. *Id.* at 673-74.

594. *Id.* at 680 nn.80-81.

jury's decision.[595] The method was applied to the 68 cases "in a manner designed to replicate the actual comparative sentence reviews of each case by the Georgia Supreme Court."[596] The death sentence frequency was then calculated for each group of similar cases.[597]

The main determinants method defined similarity, using multiple regression analysis, through those factual characteristics which most significantly predicted sentencing decisions. Contrary to the salient factors method, the main determinants method used a statistical, rather than a subjective, procedure for selecting factors. It incorporated more "factually diverse" types of similar cases because several of its factors were defined relatively more broadly. The method pinpointed six case characteristics that significantly predicted a death sentence: (1) number of decedents; (2) presence of a serious contemporaneous offense; (3) presence of one or more major aggravating factors; (4) defendant's record of, or felony conviction for, violent personal crimes; (5) presence of one or more mitigating factors; and (6) presence of one or more aggravating factors. Death sentencing frequencies were conducted on subgroups of cases that matched on a range of one to six case characteristics.[598]

The index method classified cases as similar according to the probability that the defendant would receive a death sentence based on multiple regression analysis. Weights for those factual characteristics that best explained the capital sentence decision were computed into a score for each case, which represented the relative likelihood that the defendant would receive the death sentence. Aggregate death sentencing frequencies were then calculated.[599]

Four additional measures were created from legislative criteria and regression-based scales to assess system-wide excessiveness from a variety of viewpoints. These four measures were: (1) legislative criteria measures based on all cases that had the same statutory aggravating circumstance; (2) all cases that had an equal number of statutory aggravating circumstances; (3) regression-based scales using pre- and post-*Furman* cases; and (4) post-

595. *Id.* at 681-83.
596. *Id.* at 683.
597. *Id.* at 684.
598. *Id.* at 684-86.
599. *Id.* at 689-92.

Furman cases only.[600]

As the authors noted, there is no court opinion which establishes a quantified or quantifiable measure of comparative excessiveness.[601] Two previous Georgia Supreme Court decisions, however, have indicated that the Georgia court may "classify a death sentence as excessive if the death-sentencing frequency in 'similar' cases is somewhat less than .35,"[602] a standard which the authors adopted. In turn, if the death sentencing rate was .80 or greater a case was classified as "presumptively evenhanded." No formal classification was given for frequencies between the two figures of .35 and .80.[603]

In terms of comparative excessiveness, the major results showed

> that from 12 to 17, or 17% to 25%, of the death sentences that the court affirmed were probably excessive in that death sentencing rates among other defendants of comparable culpability were below .35. We also found that 20% to 30% of the death sentences in affirmed cases were probably evenhanded in that .80 or more of the defendants that our measures classified as similarly situated received death sentences. In the remaining death sentences cases, which account for nearly one-half of the total, the death sentencing rate among similar cases fell between .35 and .80.[604]

Overall, then, the Georgia Supreme Court was biased toward overselecting as "similar" those cases in which a jury imposed a death sentence.[605] Moreover, homicide cases were processed differently according to the race of the victim; black-victim cases showed a death sentencing rate of .06 relative to a rate of .24 for white-victim cases.[606]

This study has some methodological limitations. Different samples were used in the different methods for measuring comparative excessiveness, and small sample sizes posed a problem in some attempts to analyze multiple effects. As the authors acknowledged, despite the advantages of regression-based measures,

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600. *Id.* at 680-81, 693-94.

601. *Id.* at 695.

602. *Id.* at 696.

603. *Id.* at 698.

604. BALDUS, WOODWORTH & PULASKI, *supra* note 362, at 7-9, summarizing the results in Baldus, Pulaski & Woodworth, *supra* note 592.

605. Baldus, Pulaski & Woodworth, *supra* note 592, at 718.

606. *Id.* at 709.

difficulties arise in the use of a single set of regression results.[607] "The principal problem with the regression-based approaches is the circularity inherent in using factors identified as the most predictive of the observed results as the basis for testing the system's consistency."[608] Consequently, the system can appear to be atypically consistent.[609]

On the other hand, the authors' use of methodological techniques and their modes of data analysis are highly sophisticated and far superior to the techniques employed by most of their research peers. This advanced status is illustrated by their most recent study of Georgia which compared the processing of 294 pre-*Furman* convicted murder defendants, who were arrested after September 30, 1969, with 594 post-*Furman* convicted murder defendants, who were prosecuted between March 28, 1973 and June 20, 1978. Sentences for the pre- and post-*Furman* groups resulted either in life or death after a jury trial, or resulted in death sentences upon pleading to murder.[610] The study focused on the final two stages of Georgia's charging and sentencing process, which involved both the prosecutor's decision to seek the death sentence and the jury's decision to impose a life or a death sentence after the penalty trial.[611]

The pre-*Furman* group of life sentence cases was weighted to enhance sample size.[612] The post-*Furman* group, however, was a universe of cases: the group included all offenders with the mentioned criteria who "appealed their convictions to the Georgia Supreme Court or whose names appeared in the files of the Georgia Department of Offender Rehabilitation in January, 1979, and whose files were available in the Georgia Department of Probation and Paroles in 1981."[613] Information on over 150 aggravating and mitigating factors was collected on each case from the official records of several sources: the Supreme Court of Georgia, the Georgia Department of Offender Rehabilitation, the Georgia Department of Pardons and Paroles, and Georgia's Bureau of Vital Statistics. The data were collected and coded in two stages by law

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607. *Id.* at 695. *See also* D. BALDUS & J.W.L. COLE, STATISTICAL PROOF OF DISCRIMINATION 273-86 (1980).

608. Baldus, Pulaski & Woodworth, *supra* note 592, at 695.

609. *Id.*

610. BALDUS, WOODWORTH & PULASKI, *supra* note 362, at 4-3.

611. *Id.* at 4-1.

612. *Id.* at 4-3.

613. *Id.* at 4-3, 4-4.

students who initially used a large questionnaire that was subsequently transformed (through a computer program) into a final format which was used in the second stage of data collection.[614]

Again, the authors used multiple measures of aggregate independent variables to assess the reliability of their results. In total, they developed two *a priori* measures and two empirical measures of culpability. The *a priori* measures of culpability were comprised of: (1) a legislative criteria measure which consisted of the number of statutorily designated aggravating circumstances; and (2) a qualitative *a priori* measure which weighed the statutory and nonstatutory aggravating factors against the mitigating factors present in each case.[615] The weight given to each factor "reflects a normative judgment about its respective bearing on the appropriate sentence."[616] Cases were ranked according to the number and strength of the aggravating and mitigating factors present.[617]

The empirical measures of culpability were comprised of: (1) a qualitative three-dimensional classification system, and (2) a statistically-based culpability index. The qualitative system was a three-dimensional classification method developed by Barnett in 1985 and was applied to classify the relative culpability of all the post-*Furman* cases examined in the study.[618] The system attempts to identify, through "intuition and common sense," those factors that distinguish life sentence cases from death sentence cases. In this regard, the system mimics one approach used by some state supreme courts in proportionality reviews.[619]

Based upon the presence or absence of 35 specific variables, Barnett's system classified cases as similar or dissimilar according to three dimensions:

> 1. Certainty the defendant is a deliberate killer - (0) Clearly no; (1) (Neither 0 nor 2); (2) Clearly yes.
> 2. Close relationship between defendant and victim: (0) Yes;

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614. *Id.* at 4-2, 4-6. Appendix J, section I A contains a further description of the data collection effort. The final questionnaire format is included in Appendix B.

615. *Id.* at 4-8.

616. *Id.* at 4-4, 4-11.

617. *Id.* at 4-8.

618. Barnett, *Some Distribution Patterns for the Georgia Death Sentences*, 18 U.C. DAVIS L. REV. 1327 (1985). *See also* Baldus, Woodworth & Pulaski, *Monitoring and Evaluating Contemporary Death Sentence Systems: Lessons from Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985).

619. BALDUS, WOODWORTH & PULASKI, *supra* note 362, at 4-10.

(1) No.

3. Vileness or heinousness of the killing - (0) (Elements of self defense); (1) (Neither 0 nor 2); (2) (Vile killing).[620]

From this classification, eighteen groups of potentially "similar" cases were created by Baldus and his colleagues as baselines for determining evidence of excessive or discriminatory sentencing.[621]

The statistically-based culpability index was developed through logistic regression analysis in order to pinpoint those factors which most strongly predicted the likelihood of a death sentence. Relative culpability was calculated by summing all of the "weights" of the regression coefficients in each case and then constructing a general culpability index by ranking cases according to their individual scores. Six groups of cases with "similar" culpability scores were then identified. This method differed from Barnett's insofar as it classified cases according to one, not three, dimensions, and also because it selected factors according to statistical rather than subjective or intuitive procedures.[622]

Logistic regression models were next developed to assess each of four decision points in the system: (1) pre-*Furman* death sentencing decisions for murder defendants convicted at trial; (2) post-*Furman* death sentencing decisions for murder defendants convicted at trial; (3) post-*Furman* decisions by prosecutors to seek a death sentence for murder defendants convicted at trial; and (4) post-*Furman* jury decisions to impose a death sentence in a penalty trial.[623] For each of these decision points, two indices were created in order to measure, respectively, "excessiveness" and "discrimination."[624]

"Excessiveness" was determined by the "excessiveness index," which was based only on legitimate or legally relevant variables.[625] The index ranked and divided cases into six separate culpability levels. "Discrimination" was determined by the impact of illegitimate and suspect variables that were dropped from the basic model and represented by the new partial regression coefficients for the legitimate variables only. In turn, specific measures for each of the two indices were developed. Altogether, there were

620. *Id.*
621. *Id.* at 4-11.
622. *Id.* at 4-12, 4-13.
623. *Id.* at 4-13, 4-14.
624. *Id.* at 4-14.
625. *Id.*

four measures of excessiveness: (1) the difference between the median culpability scores of defendants receiving life and death sentences; (2) the proportion of death sentence defendants with culpability scores lower than the 95th percentile of the scores for life sentence defendants; (3) the magnitude of the death sentencing rates among those defendants who were similarly situated; and (4) the proportion of all death sentences that were imposed in very high or very low categories of death sentencing rates.[626]

Three different measures of discrimination were described: (1) the disparity in the actual imposition of death sentencing rates among different racial groups with similar culpability scores; (2) the differences between regression predictions of death sentencing rates among cases comprising particular racial groups; (3) the partial regression coefficient, which represents the magnitude of the average differences among the types of cases pinpointed in the first and second measures of discrimination.[627] Nearly one-quarter of the variables used in regression analyses were constitutionally illegal or suspect,[628] and race was among the most important.

In light of the numerous measures and hypotheses that were developed in this study, only those results that are most pertinent for this review are reported. The major results are as follows:

1. Similar to other research reports, Baldus, Woodworth, and Pulaski acknowledged that in both the pre- and post-*Furman* time periods, the total number of death sentences actually imposed was considerably lower than the class of cases that could have resulted in a death sentence under Georgia's statutory criteria.[629]

2. This low death sentencing rate may explain why Georgia's post-*Furman* statutory aggravating circumstances did not reliably distinguish between those murder cases in which death sentences were frequently imposed from those which most frequently resulted in a life sentence.[630]

3. Sentences imposed in the post-*Furman* era were more consistent than the sentences imposed in the pre-*Furman* era.[631] Most

626. *Id.* at 4-15—4-17.
627. *Id.* at 4-18, 4-19.
628. *Id.* at 6-20.
629. *Id.* at 5-14.
630. *Id.* at 5-15, 5-38.
631. *Id.* at 5-14.

significant was the reduction in the proportion of excessive death sentences.[632]

4. Prosecutors and juries did not favor the death penalty for only the most serious cases. Imposed death sentences appeared to be presumptively excessive in 15% to 30% of the cases and "nearly one-half of all of Georgia's post-*Furman* death sentences show some evidence of excessiveness."[633]

5. The improvements recognized in Georgia's post-*Furman* sentencing procedure appeared to be attributable in large part to the 1973 reforms of Georgia's death sentencing system. "To a substantial degree, those reforms served to restrict the kinds of murder cases in which the death sentence was a permissible sanction and to guide the exercise of sentencing discretion by juries."[634]

6. The prosecutor's role in the post-*Furman* sentencing system was more significant than the role that was predicted by the Court in *Gregg v. Georgia*.[635] Contrary to the Court's presumption, defendants guilty of capital crimes did not routinely undergo penalty trials, because prosecutors generally elected to waive the death sentence in all but a small proportion of the capital cases.[636]

7. Although unadjusted data showed state-wide variations in death sentencing rates, controls for case culpability reduced these differences significantly. An examination of the distributions of excessive and evenhanded death sentences over the state's five regions showed, however, that excessive sentences were overrepresented in the North Central region, urban areas, and circuits with above average death sentencing rates. Much of this variation could not be explained by legitimate case factors, suggesting that illegitimate factors, such as race, played a dominant role.[637]

8. "The most striking post-*Furman* change has been the statewide decline in the race-of-defendant effect,"[638] a finding which the authors attributed to changing attitudes toward race over the course of their study rather than to the 1973 statutory reforms.[639]

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632. *Id.* at 5-37.

633. *Id.* at 5-15. The .35 and .80 standards of excessiveness and evenhandedness, respectively, were the same as those discussed in Baldus, Pulaski & Woodworth, *supra* note 592.

634. BALDUS, WOODWORTH & PULASKI, *supra* note 362, at 5-37.

635. 428 U.S. 153 (1976).

636. BALDUS, WOODWORTH & PULASKI, *supra* note 362, at 5-38.

637. *Id.* at 5-39, 5-40.

638. *Id.* at 6-36.

639. *Id.* at 6-36, 6-37.

In contrast, however,

> the victim's race is nearly as influential in the post-*Furman* period as it was pre-*Furman*; particularly in cases that fall within the mid-range of cases in terms of defendant culpability. Among these cases, the presence of a white victim increases the risk of a death sentence by a factor of 2 or more and by as much as 20 percentage points. Moreover, we estimate that up to one-third of the death sentences imposed in the white victim [cases] may have been the product of race-of-victim discrimination . . . .
>
> As for suspect and questionable case characteristics, our post-*Furman* data reflect a decline in the influence of the defendant's sex, but an increase in the impact of the victim's sex and socio-economic status. On the other hand, certain other ethically questionable case characteristics assumed importance, including the defendant's socio-economic status, the defendant's out of state residence, the victim's socio-economic status, the presence of a race motive, and bloody circumstances of a murder.[640]

Discrimination based upon the race of the victim was found in both urban and rural areas, as well as in the five major regions of the state. The largest impact was seen, however, in the decisions of urban juries and rural prosecutors, and in the Southeast region. The race-of-victim effect was also an underlying source of comparative excessiveness in the post-*Furman* system.[641]

9. Relative to jury decision-making, prosecutorial decision-making appeared to be more influenced by the victim's race and age, the number of victims, defendant's socio-economic status and gender, and the defendant/victim relationship.[642]

10. Pre-*Furman* data showed no statistically significant regional or circuit variations in the race-of-defendant or race-of-victim effects on decision-making. Post-*Furman* data also did not reveal overall regional differences, although one circuit (Ocmulgee) had a considerably higher than average death sentencing rate for black defendants and the Eastern circuit showed a considerably lower black defendant death sentencing rate.[643] Only one circuit (Stone Mountain) demonstrated an above average death sentencing rate for white-victim cases. Analyses of separate post-*Furman* prosecutorial decisions indicated that the

640. *Id.* at 6-20, 6-21.
641. *Id.* at 6-39.
642. *Id.* at 6-26.
643. *Id.* at 6-35, 6-36.

Northern region's penalty trial rate in white-victim cases was "substantially" below the statewide average and was comparable to the black-victim rate in that area. Jury decisions did not differ significantly from the statewide norms.[644]

11. Concerning the procedure of state appellate court review, the authors concluded: "the Georgia Supreme Court regularly affirms death sentences as evenhanded and not excessive, because, when it selects other 'similar' cases for comparative purposes, the Court customarily over-selects other cases that resulted in death sentences and under-selects life sentenced cases."[645]

> On the other hand, for procedural reasons the Georgia court has reversed nearly one-third of the death sentences that it has reviewed. These reversals have reduced the magnitude of the race-of-victim effect observed in the system. This was particularly true when we re-computed the statistical impact of racial factors, classifying all cases reversed on appeal as life sentence cases. This adjustment reduced the estimated overall race of victim dispute in a logistic multiple regression anaylsis by 35%.[646]

In general, this study confirms the findings of arbitrariness and discrimination found in prior death penalty research.

D. *Empirical Research on the Death Penalty: Conclusions*

The nature of research concerning the death penalty has changed and evolved over the last two decades. Much of the debate in the 1970's and early 1980's concerned whether or not the death penalty actually served as a deterrent for future crime. There appears to be some consensus among a majority of the leading authorities in the field that the evidence and rebuttals originally suggesting that the death penalty was an effective deterrent[647] are not reliable; nor have they been supported in other studies,[648] despite the "moral" arguments given in support of the

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644. *Id.* at 6-36.

645. *Id.* at 7-12.

646. *Id.* at 7-25.

647. *See, e.g.*, Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209 (1975); Ehrlich, *On Positive Methodology, Ethics, and Polemics in Deterrence Research*, 22 BRIT. J. CRIMINOLOGY 124 (1982).

648. *See, e.g.*, Archer, Gartner & Beittel, *Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis*, 74 J. CRIM. L. & CRIMINOLOGY 991 (1983); Baldus & Cole, *A Comparison of the Work of Thorstein Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); Beyleveld, *Ehrlich's Analysis of Deterrence*, 22 BRIT. J. CRIMINOLOGY 101 (1982); Forst, *Capital Punishment*

death penalty.[649] The most recent study of the Georgia system by Baldus and his colleagues represents an extremely thorough and sophisticated perspective on the death sentencing process that both supports and builds upon previous research conducted elsewhere by the authors.[650] Moreover, the authors have addressed,[651] and in many cases denounced, in detail the methodological criticisms of their study that were raised in *McCleskey v. Zant*[652] and *McCleskey v. Kemp*.[653] Although the authors admit that their study is not without methodological limitations, their rebuttals make clear that whatever limitations exist, they do not significantly affect the study's results nor alter the author's original conclusions. Indeed, the Baldus study simply replicates with a more sophisticated methodology the results found in the numerous prior studies summarized here. Race is not a neutral variable. It may be as significant as the presence of an additional statutory aggravating factor.

The United States Supreme Court's majority opinion in *McCleskey v. Kemp*[654] found policy, not methodological, difficulties with the arguments and data presented by Baldus and his colleagues showing statistical evidence of racial discrimination in death sentencing. There were no surprises in the data; the results were consistent with the prior empirical work in a number of

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and Deterrence: Conflicting Evidence?, 74 J. CRIM. L. & CRIMINOLOGY 927 (1983).

649. *See, e.g.*, Berns, *Defending the Death Penalty*, 26 CRIME & DELINQ. 503 (1980); van den Haag, *In Defense of the Death Penalty: A Legal-Practical Moral Analysis*, 14 CRIM. L. BULL. 51 (1978). For commentary and discussion of the courts' treatment of empirical studies, *see, e.g.*, Bedau, *Felony-Murder Rape*, *supra* note 410; Bersoff, *Social Science Data and the Supreme Court:* Lockhart *as a Case in Point*, 42 AM. PSYCHOLOGIST 52 (1987); Dorin, *Two Different Worlds: Criminologists, Justices and Racial Discrimination in the Imposition of Capital Punishment in Rape Cases*, 72 J. CRIM. L. & CRIMINOLOGY 1667 (1981); Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 COLUM. L. REV. 737 (1980); Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980); Myers, *Race and Punishment: Directions for Economic Research*, 74 AM. ECON. A. PAPERS & PROC. 288 (1984); White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 13 DUQ. L. REV. 279 (1974).

650. *See* Baldus, Pulaski & Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133 (1986); Baldus, Woodworth & Pulaski, *supra* note 618; *see also* discussion in Myers, *Statistical Tests of Discrimination in Punishment*, 1 J. QUANTITATIVE CRIMINOLOGY 191 (1985).

651. BALDUS, WOODWORTH & PULASKI, *supra* note 362, chs. 12-13.

652. 580 F. Supp. 338 (N.D. Ga. 1984).

653. 753 F.2d 877 (11th Cir. 1985).

654. 107 S. Ct. 1756 (1987).

states which has been described in this section. The only surprise was that the United States Supreme Court declared this evidence of racial discrimination to be tolerable.

VI. Research Findings

A. *Case Characteristics*

Selected frequency tables for the present data base of cases are included in Appendix B.[655] Over half (53.5%) of the homicides occurred in three of New Jersey's twenty-one counties. The largest number of cases occurred in Essex County and constituted 29.6% of the total. Twenty-four percent of the homicides took place in Hudson and Camden counties.[656] The great majority (90.6%) of the defendants were males. Over one-half (56.6%) were black, one-quarter (24.8%) were white, and slightly less than one-fifth (18.6%) were Hispanic. Nearly half (44.8%) were young adults, ages 18 to 25; and nearly one-fifth (17.5%) were ages 26 to 30. Juveniles below age 18 and adults over age 45 accounted for relatively small proportions of the sample (6.8% and 6.3%, respectively).

The great majority (96.2%) of the defendants were prosecuted for a homicide involving one decedent victim;[657] 2.7% of the cases involved two victims; and the remaining 1.1% involved more than two victims. Most of the homicides involved no victim other than the decedent.[658] Nearly three-quarters (74.8%) of the victims

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655. A full set of frequencies on every study variable, a more detailed description of the research design and data gathering, the data collection instrument, and a technical note on the programming procedures are contained in the *Interim Report, supra* note 3. Frequencies cited in this section which are not included here in Appendix B can be found in the *Interim Report*.

656. Five other counties each accounted for between 4.0% and 7.0% of the cases (Atlantic, Mercer, Monmouth, Passaic and Union). Fewer than 4.0% of the cases occurred in each of the thirteen remaining counties (Bergen, Burlington, Cape May, Cumberland, Gloucester, Hunterdon, Middlesex, Morris, Ocean, Salem, Somerset, Sussex and Warren).

657. The characteristics for victims refer to the first homicide victim for whom data were recorded on the interview. Data on decedent victims were not recorded according to any rank ordering of victims.

658. Eighty-one cases involved a non-decedent victim, and 65% of these involved only one victim. A non-decedent victim was defined as a victim who was the subject of formal charges against this defendant. For example, if two defendants were charged with homicide of a single decedent victim and only one of the two was charged with robbery of a non-decedent victim, only the defendant against whom formal charges were brought for the non-decedent victim would be coded as having a non-decedent victim. The case summary would detail the circumstances involving a non-decedent victim for each co-defendant.

were males. One-half (49.6%) were black, one-third (33.6%) were white, and 16.2% were Hispanic. One-half (50.5%) of the victims were ages 18 to 35, with the majority falling between ages 18 and 25. Only small proportions of the victims were very young or elderly—8.3% were age 17 or younger, and 4.1% were age 71 or older. More defendants belonged to minority groups than did their victims. The largest racial difference appeared between blacks and whites. There were 8.8% more white victims than white defendants. In contrast to defendants, a higher proportion of the victims were females (25.2% female victims versus 9.4% female defendants). The defendants were considerably younger than the victims: 80.8% were age 35 or younger, compared to 58.4% of the victims.

Almost nine out of ten cases (87.6%) under study were charged under an indictment rather than an accusation.[659] For the analysis by case processing stage, we distinguished between five types of homicide charges: capital murder (notice of factors served); murder (no notice of factors served); felony murder; aggravated manslaughter; manslaughter; and offenses other than homicide.[660] The majority of cases (83.2%) were initially charged as capital murder and murder.

The prosecutors served a notice of factors in cases involving 131 defendants (18.6% of the 703), for 94 of whom (13.4%) the case went to trial as a capital case before a judge or death-qualified jury, that is, the factor was neither dismissed by the judge nor withdrawn by the prosecutor prior to trial. Of these 94 cases, 69 (73.4%) resulted in a capital conviction for death-eligible murder

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659. As discussed *supra* at text accompanying notes 21-23, the distinction between a prosecution under an indictment or an accusation is not a mere formality. Selecting an accusation as the procedural form means the prosecutor has foregone the opportunity to declare the case capital. In this Study we distinguished form of the charge at two stages: the initial charge and the charge at disposition. If there was an initial indictment, subsequently dismissed when the defendant pled guilty to an accusation, the case would be coded for an indictment at the charging stage and an accusation at the disposition stage. The cases which are recorded as accusations at the charging stage (12.4%) are those cases where an indictment was never returned by a grand jury. The group of non-indictment cases also includes a small number of cases involving juveniles which proceeded on a juvenile complaint without indictment or accusation.

660. Attempts or conspiracies to commit a homicide offense were coded as the substantive offense. The individual case summary prepared for each case specifically details the homicide charge. There are no cases in the data base for which there is no decedent victim. A defendant may be charged with attempted homicide on a second victim. Very few defendants in co-defendant cases were charged only with conspiracy to commit homicide.

followed by a penalty phase trial before a judge or a death-qualified jury. Of these 69 cases, 25 (36.2%) resulted in the death sentence being imposed by a death-qualified jury after a penalty phase trial.[661] Slightly less than half (46.2%) of all cases went to trial, including those cases which went to capital trial. Of the 307 cases which were pled, about two-thirds (67.8%) were pleas to manslaughter.[662]

Two-thirds (65.9%) of the defendants committed the homicides alone.[663] The data on the defendant's prior conviction and arrest record is as follows: Over one-half (54.5%) of the defendants had prior juvenile or adult conviction records,[664] and 54.3% of these defendants had prior convictions for a felony or a form of homicide.[665] Nearly one-third (30.9%) of the defendants had no prior juvenile or adult arrest records.[666]

Of the 703 homicide cases, 564 (80.2%) had at least one contemporaneous offense charged; and nearly half (46.0%) had one

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661. Overall, then, of the 703 homicide cases, 18.6% were recommended for the death penalty by the prosecutors serving a formal notice of at least one statutory aggravating factor (131 cases were designated death-eligible), 13.4% (94 cases) resulted in a capital trial before a judge or a death-qualified jury, 9.8% (69 cases) were convicted of capital murder and went to penalty phase before a judge or a death-qualified jury, and 3.6% of all homicide cases (25 cases) resulted in the death sentence being imposed. This case flow is represented in Figure 1 in the Methodology Appendix.

662. Only eight cases were disposed of by the dismissal of all charges.

663. One-fifth (19.7%) were either the primary assailants or committed the homicide together with others. More than 14% of the defendants were reported not to have committed the homicidal act, but were technical accomplices or provided assistance only. Overall, 206 (36.2%) of the homicides involved at least one other co-defendant. One-half (50.5%) of these cases had one co-defendant only. About one-fifth (21.4%) involved three or more co-defendants.

664. The source of data on the defendant's prior record was the presentence report prepared by the county probation department as interpreted by the defense attorney or, in the absence of a presentence report, the defense attorney's recollection.

665. A conviction for a prior felony or form of homicide included convictions for murder, manslaughter, robbery, kidnapping, sexual assault, burglary, arson, and convictions for attempts or conspiracy to commit these offenses. Convictions included adult and juvenile convictions. Convictions from other jurisdictions were coded as their closest equivalent under the New Jersey statutory scheme, *e.g.*, a prior conviction for rape would be coded as sexual assault.

666. Of those defendants whose age at first conviction was known, nearly two-thirds (65.0%) sustained that initial conviction between ages 15 and 25. A majority of defendants had been incarcerated at least once prior to the homicide (55.8%). Most defendants who had been incarcerated previously had been incarcerated few times: once (14.9%), twice (9.7%), or three (6.8%) times. Relatively few defendants had been incarcerated more than three times previously. Less than one-third (29.5%) had five or more arrests; and 18.8% had eight or more prior arrests. Altogether, 76.1% of the defendants were not on probation or parole at the time of these offenses.

or two contemporaneous offenses charged.[667] Victim-defendant relationships were nearly evenly divided among three primary groups—intimates or relatives (29.9%), friends or acquaintances (38.9%), and strangers (30.6%). The largest proportion (36.7%) of the homicides took place where the victim lived.[668] For nearly one-quarter (24.0%) of the defendants, the primary motive was immediate rage; and for more than one-fifth (22.2%), obtaining money or valuables.[669]

Three primary methods were used to kill the victims: shooting, stabbing, and beating. Over one-quarter (29.3%) of the homicides resulted from pistol shootings; relatively few of the other shootings involved a rifle or shotgun. Nearly one-third (31.8%) of the homicides resulted from stabbings which involved the use of a knife or other sharp instrument. One-fifth (17.9%) of the homicides resulted from a beating with a blunt instrument or, less frequently, a beating with the hands and feet. No other method of killing (*e.g.*, strangulation or drowning) accounted for more than 2.7% of the cases.

Of those victims who sustained gunshot or stab wounds, 46.6% sustained only one wound, 16.3% sustained two wounds, and 20.6% sustained three to five wounds. Altogether, 13.5% of the gunshot or stab wound victims received more than five wounds. Only 6.0% of the cases involved incidents of sexual assault or mutilation, which in most cases occurred before death or injury.

Overall, three-fifths (58.5%) of the victims were reported to have engaged in one or more of ten possible behaviors which may have provoked, precipitated, or otherwise contributed to the homicide. Most frequently, the defendant was reported to have been threatened or abused (36.7% of the cases), physically assaulted (35.0%), and/or made to fear for his/her life (27.3%). In one-fifth of the cases the victim was reported to be armed with a weapon (21.2%) or there was a history of bad relations between

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667. Two hundred and thirty (32.7%) of these contemporaneous offense cases involved at least one felony offense, while just over one-fifth (22.4%) involved more than one felony. Of all of the serious contemporaneous offenses charged, the majority (59.6%) were for robbery and one-fifth (20.5%) were for burglary.

668. Twenty-three percent occurred in the victim's own residence; and 13.7% occurred in the residence of the victim and defendant or co-defendant. One-quarter (24.9%) of the homicides took place in the street or on the sidewalk. Homicides occurred at the remaining locations relatively infrequently.

669. Revenge was the primary motive for 13.9% of the defendants. The frequencies were relatively low for the remaining types of motives.

the defendant and victim (19.1%). In 9.8% of the homicides, the victim had been convicted previously for assaultive conduct.

Over two-thirds (67.9%) of the defendants had never been married; 12.7% were married and living with their spouses; and 17.5% were separated or divorced. Two-fifths of the defendants (41.7%) were living with parents or other close family at the time of the homicide, followed, in decreasing order of occurrence, by those who were living with paramours (13.9%), alone (11.5%), or with spouses (10.8%). Altogether, 43.8% were employed full time or part time; 38.3% were unemployed; and 5.8% had never worked or were incapable of working. The defendants held predominantly low level occupations: 56.0% were blue-collar or unskilled workers; 10.1% had unstable or "extra-legal" occupations; 5.4% were chronically unemployed; and only 4.7% had professional, managerial, or white collar occupations.

The majority of the defendants had limited education. Nearly 57% had completed some high school, while 29.1% had had no more than a ninth grade education. Only 6.5% of the defendants had attended college or completed training beyond high school. Nearly one-tenth (8.6%) of the defendants attended special classes in school. More than one-tenth (11.1%) had been institutionalized in childhood through either foster care (4.0%), residential treatment for emotional or educational disorders (1.6%), institutionalization for mental retardation or psychiatric disabilities (1.4%), or some other type of institutionalization (4.1%). Of those defendants who were institutionalized and whose age at childhood institutionalization was known, 42.6% were institutionalized before age ten and 57.4% were institutionalized after this age. Nearly equal numbers were institutionalized for less than one year (51.2%) and for more than one year (48.8%), among defendants for whom this information was available. Almost 16% of the defendants were reported to have experienced some form of physical or emotional neglect or abuse as children.

Some of the defendants had experienced confinement for a variety of disorders ranging from psychiatric commitment (10.0%) to drug and alcohol treatment (4.1%).[670] A sizable proportion of

670. Of those who had been confined for psychiatric, alcohol or drug problems, nine-tenths had been confined for one year or less (89.3%). More than 15% had had out-patient psychiatric care either for a mental disorder (7.8%) or for drug and alcohol abuse (7.4%). Three-fifths (61.4%) of those defendants who were enrolled in out-patient care remained in such care for one year or less. In turn, 7.9% showed some form of special

the defendants indicated drug impairment at some time. Over one-third were impaired prior to the homicide through the use of alcohol (13.8%), heroin (7.0%), marijuana (3.6%), or some other drug. Nearly one-half of the defendants were impaired at the time of their offenses due to the influence of alcohol (31.7%), marijuana (3.0%), cocaine (2.6%), or some other drug.

In over one-third (35.1%) of the cases, a mental or psychiatric examination was recommended for the defendant.[671] The data on the defendants' behavior immediately after the homicide were as follows: in 42.6% of the cases the defendant either took no evasive action or took action to identify himself/herself to the police. In three-fifths (60.2%) of the cases the defense theory was denial that the defendant was involved in the homicide or a contemporaneous offense or intended to kill the victim. In an additional one-fifth (21.3%) of the cases the defense counsel claimed that the defendant acted in self-defense. There were relatively few cases (4.1%) in which insanity was offered as a defense.

The majority (61.7%) of the defendants were represented by public defender staff attorneys. Nearly equivalent proportions were represented by public defender pool attorneys[672] or private attorneys (19.8% and 18.5%, respectively).

Overall, 404 (57.5%) of the homicide cases had at least one statutory aggravating factor present and therefore were death-possible.[673] Only 131 cases (18.6%), however, were death-eligible,

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handicap—including neurological disorders (3.8%), orthopedic problems (2.0%), and hearing or visual impairment (1.4%).

671. More than 82% of the examinations involved a psychiatrist for the defense, and 14.2% involved a psychologist for the defense. Of those defendants who underwent diagnosis, one-third (35.8%) were not diagnosed as ill; the remainder were diagnosed, in decreasing order of occurrence, as suffering from personality disorders (12.5%), alcohol addiction (8.3%), paranoid schizophrenia (7.9%), and mild retardation (5.4%).

672. In New Jersey, the Office of the Public Defender is a centralized, statewide office under the Department of the Public Advocate. The Office of the Public Defender includes 21 regional trial offices, a centralized Appellate Section, and specialized sections, such as the Special Projects Unit, which conducted this study. Public Defender pool attorney assignments are made by the public defender trial or appellate regional office to members of the private bar, who are then paid by the State at a specified, predetermined rate for their legal work. In New Jersey there is no cap or ceiling on the amount of money the State will pay per case to a public defender pool attorney.

Cases will always be assigned to public defender pool attorneys in co-defendant cases, and counties will routinely assign cases to public defender pool attorneys in high volume counties, or where a conflict of interest with the office arises for some other reason.

673. A case is designated death-possible on the basis of the defense attorney's indication that a factual basis existed for one or more of the eight statutory aggravating factors. See discussion in Appendix A.

in that a prosecutor formally served a notice of aggravating factors to the defense. One-third (32.4%) of all the cases were reported to have an aggravating factor present but the prosecutor elected not to serve a notice of factors designating the case as capital. Of the 131 cases which were designated death-eligible by the county prosecutor, roughly comparable proportions had either one or two aggravating factors (35.0% and 41.7%, respectively). In turn, 18.5% had three aggravating factors; and 4.9% had four aggravating factors alleged present. The next section of this Article reports the detailed data on each separate statutory aggravating factor, including a breakdown of which factors were found by the penalty phase jury in cases where the penalty phase jury sentenced the defendant to life imprisonment or death.

Three mitigating factors other than the catch-all mitigating factor were reported to be factually present in approximately one-half or more of all cases: the defendant's lack of a significant history of prior criminal activity (65.0%), the age of the defendant at the time of the murder (51.2%), and the defendant's capacity to appreciate the wrongfulness of his conduct (47.1%). All other mitigating factors were present in less than one-third of the cases. Detailed data on the statutory mitigating factors, including which specific statutory mitigating factors were found by penalty phase juries, are included in the next section.

B. *Analysis by Capital Case Processing Stage*

Five capital case processing stages are analyzed in this study. Beginning with all homicides in the data base (N=703), the first stage is death-possible, cases identified as having a factual basis for serving a notice of factors (N=404). The second stage is death-eligible, cases where the prosecutor actually serves a notice of factors, designating the case capital (N=131). The third stage is capital trial, cases which progress to capital trial before a judge or a death-qualified jury (N=94). The fourth stage is penalty phase, cases which result in a conviction for death-eligible murder and consequently progress to a penalty phase decision before a judge or a death-qualified jury (N=69). The fifth or final stage is the imposition of the death penalty (N=25).[674]

674. In this data base all death sentences were imposed by a death-qualified jury sitting at penalty phase, although there is nothing in the statute to prohibit a judge from imposing the death penalty at a penalty phase trial conducted without a jury. In New Jersey

Table 1 presents for these homicide defendants the sequence of the rising probabilities of receiving the death sentence as defendants progressed from one case-processing stage to the next. Probabilities increased continuously from .04 (four chances in one hundred relative to the total group of homicide cases), to .06 (six chances in one hundred at the death-possible stage), to .19 (nearly one chance in five at the death-eligible stage), to .27 (more than one chance in four at capital trial), and, finally, to .36 (more than one chance in three at the penalty phase). The above sequence of case progression probabilities is retrospective because it is based upon the knowledge that twenty-five defendants had received the death penalty. This section examines case advancement prospectively in order to begin to understand why certain defendants moved further into the system.

This section summarizes both defendant and victim racial and ethnic characteristics for all homicide cases and for four individual counties, the three highest volume counties and Monmouth County.[675] The section then summarizes the plea versus trial decision by county, and by racial group within the county, for all homicide cases and, in more detail, for death-possible cases. Tables analyzing the plea/trial decision by race are similarly included for the three high volume counties and Monmouth County.[676] The decision by the prosecutor to offer a plea bargain, coupled with the defendant's acceptance, effectively terminates the defendant's possibility of receiving the death sentence and is consequently critical to the capital sentencing process.

C. *Case Progression by County and Race*

The percentage distribution by the race of the defendant and

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there is no provision allowing the judge to overturn a jury verdict recommending a non-death verdict of life.

675. Capital case processing tables for the three individual counties with the largest number of cases in the data base include: Essex County with 208 cases; Hudson County with 98 cases; and Camden County with 70 cases. Statistics from Monmouth County are included for purposes of comparison. The *Interim Report*, *supra* note 3, includes, in addition, capital case processing tables for Passaic County (N=47); Union County (N=38); Mercer County (N=35); Atlantic County (N=31); and the residual category, all other counties (N=145).

676. In the *Interim Report*, *supra* note 3, tables analyzing the plea/trial decision by race of defendant/race of victim are additionally presented for Passaic County (N=47); Union County (N=38); Mercer County (N=35); Atlantic County (N=31); and the residual category, all other counties (N=145).

the race of the victim at each processing stage is presented in Table 2.

Approximately the same percentage of black defendants appears at each of the subsequent five processing stages. White defendants, on the other hand, exhibit an increase in their percentage representation across case processing stages, beginning as one-quarter (24.8%) of all homicide defendants but then comprising, at the final stage, almost one-half (44.0%) of the defendants sentenced to death—nearly a twofold jump. Hispanic defendants present a striking pattern. They account for nearly one-fifth (18.6%) of the initial group of 703 homicide defendants. However, as these defendants advanced to successive case processing stages, their percentage representation decreased dramatically. Indeed, this decrease was total by the final processing stage: no Hispanic defendant received the death sentence in the group of cases analyzed here.

The percentage distribution by victim's race at each case processing stage, which is presented in the lower panel of Table 2, exhibits, in the main, the same general pattern as that observed above for the defendants. The percentage of black victims diminished across case processing stages. This diverges somewhat from the stable pattern observed for the proportion of black defendants. The percentage of white victims increased substantially from the first stage to the last stage, and no homicide involving a Hispanic victim resulted in a death sentence.

The percentage of black, white, and Hispanic defendants at each case processing stage described above is influenced by the probability that each defendant racial category has of advancing from one stage to the next. Table 3 displays the probability that a case will advance from one processing stage to the next for all homicide cases in the study.[677]

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677. The numerator of each fraction in each row comprises the number of homicide cases which advanced to the processing stage designated by the corresponding row label; the denominator of each fraction comprises the number of cases at the immediately prior processing stage which were candidates for progressing to the designated processing stage.

For example, consider the black defendants (left panel, first column). The first row in this column indicates that, overall, there were 398 black defendants among the 703 defendants. Of the 398 black defendants, 232 were involved in death-possible cases (second row, first column). The figure 232 appears as the leading number in the fraction presented in parentheses in the second row of the first column. The probability that a black homicide defendant will be involved in a death-possible case is calculated by dividing the number of defendants who advanced to the death-possible stage (232) by the number of all black defendant homicides (398), producing a probability of .58. This probability appears

Comparing probabilities across columns at a specific processing stage indicates the relative risk that cases involving black, white, and Hispanic defendants or black, white, or Hispanic victims had of advancing to the next capital case processing stage. Consider the comparative probabilities of black, white, and Hispanic defendants progressing from all homicides to the death-possible stage. Their respective probabilities are listed in the second row. The three categories of defendants were almost equally likely to be involved in homicides which were death-possible regardless of their race: members of each racial group had nearly three chances in five of being involved in a death-possible case (black, .58; white, .57; and Hispanic, .56).

Although the three racially identified groups of defendants exhibited similar probabilities of being involved in death-possible homicides, this parity disappeared as the cases advanced from the death-possible stage to the death-eligible stage. White defendant cases advanced at the highest rate (.43) relative to blacks (.32) and Hispanics (.18): white defendants, therefore, were nearly two and one-half times more likely to progress to the death-eligible stage than were Hispanic defendants (2.40 = .43/.18).[678]

in the second row, first column above the fractional computation which produced it.

678. The majority of cases, regardless of the defendant's race, progressed from death-

TABLE 1

PROBABILITY OF RECEIVING DEATH SENTENCE BY CASE PROCESSING STAGE

Case Processing Stage	Probability of Receiving Death Sentence
All Homicides	.04 (25/703)
Death-Possible	.06 (25/404)
Death-Eligible (Notice Served)	.19 (25/131)
Capital Trial	.27 (25/94)
Penalty Phase	.36 (25/69)

TABLE 2

RACE OF DEFENDANT AND RACE OF VICTIM BY CAPITAL CASE PROCESSING STAGE

	All Homicides		Death-Possible		Death-Eligible (Notice Served)		Capital Trial		Penalty Phase		Death Sentence	
	%	N	%	N	%	N	%	N	%	N	%	N
Defendant's Race												
Black	56.6	398	57.4	232	57.3	75	56.4	53	53.6	37	56.0	14
White	24.8	174	24.5	99	32.8	43	34.0	32	37.7	26	44.0	11
Hispanic	18.6	131	18.1	73	9.9	13	9.6	9	8.7	6	0.0	0
Total	100.0	703	100.0	404	100.0	131	100.0	94	100.0	69	100.0	25

Victim's Race*												
Black	49.9	349	44.8	179	38.5	50	38.7	36	32.4	22	41.7	10
White	33.8	236	40.5	162	53.1	69	53.8	50	58.8	40	58.3	14
Hispanic	16.3	114	14.7	59	8.4	11	7.5	7	8.8	6	0.0	0
Total**	100.0	699	100.0	400	100.0	130	100.0	93	100.0	68	100.0	24

*Victim's race was defined as the race of the first decedent on the interview questionnaire (v. 292).

**The total for victims is four less than for defendants because four victims were "other" race.

TABLE 3

PROBABILITY OF PROGRESSING TO NEXT CAPITAL CASE PROCESSING STAGE*
BY RACE OF DEFENDANT AND RACE OF VICTIM

	Defendant's Race				Victim's Race**			
Processing Stage	Black	White	Hispanic	Total	Black	White	Hispanic	Total***
All Homicides	1.00 (398)	1.00 (174)	1.00 (131)	1.00 (703)	1.00 (349)	1.00 (236)	1.00 (114)	1.00 (699)
Death-Possible	.58 (232/398)	.57 (99/174)	.56 (73/131)	.57 (404/703)	.51 (179/349)	.69 (162/236)	.52 (59/114)	.57 (400/699)
Death-Eligible (Notice Served)	.32 (75/232)	.43 (43/99)	.18 (13/73)	.32 (131/404)	.28 (50/179)	.43 (69/162)	.19 (11/59)	.33 (130/400)

Capital Trial	.71 (53/75)	.74 (32/43)	.69 (9/13)	.72 (94/131)	.70 (36/50)	.72 (50/69)	.64 (7/11)	.72 (93/130)
Penalty Phase	.70 (37/53)	.81 (26/32)	.67 (6/9)	.73 (69/94)	.61 (22/36)	.80 (40/50)	.86 (6/7)	.73 (68/93)
Death Sentence	.38 (14/37)	.42 (11/26)	0.00 (0/6)	.36 (25/69)	.45 (10/22)	.35 (14/40)	0.00 (0/6)	.35 (24/68)

*The death flow probabilities are calculated by dividing the number of cases at the designated processing stage by the number of cases at the immediately prior processing stage.

**Victim's race was defined as the race of the first decedent on the interview questionnaire (v. 292).

***The total for victims is four less than for defendants because four victims were "other" race.

TABLE 4

PERCENTAGE DIFFERENCE AND PERCENTAGE RATIO OF DEFENDANTS PROGRESSING BY RACE AND CAPITAL CASE PROCESSING STAGE

	(1) Percentage Progressing			(2) Percentage Difference			(3) Percentage Ratio		
Processing Stage	Black %	White %	Hispanic %	Black vs. White %	Black vs. Hispanic %	White vs. Hispanic %	Black vs. White	Black vs. Hispanic	White vs. Hispanic
Death-Possible	58.0	57.0	56.0	+ 1.0	+ 2.0	+ 1.0	1.02	1.04	1.02
Death-Eligible (Notice Served)	32.0	43.0	18.0	-11.0	+14.0	+25.0	.74	1.78	2.39

TABLE 5

PERCENTAGE DIFFERENCE AND PERCENTAGE RATIO OF DEFENDANTS PROGRESSING BY COUNTY AND CAPITAL CASE PROCESSING STAGE

	Percentage Progressing		Monmouth vs. Essex	
Processing Stage	Monmouth %	Essex %	Percentage Difference %	Percentage Ratio
Death-Possible	65.0	55.0	+10.0	1.18
Death-Eligible (Notice Served)	70.0	23.0	+47.0	3.04

TABLE 6

PROBABILITY OF PROGRESSING TO NEXT CAPITAL CASE PROCESSING STAGE*
BY RACE OF DEFENDANT AND RACE OF VICTIM COMBINED

	Defendant's Race/Victim's Race**									
Processing Stage	Black/ Black	White/ White	Hispanic/ Hispanic	Black/ White	Hispanic/ White	Black/ Hispanic	White/ Black	Hispanic/ Black	White/ Hispanic	Total***
All Homicides	1.00 (319)	1.00 (141)	1.00 (82)	1.00 (61)	1.00 (34)	1.00 (17)	1.00 (16)	1.00 (14)	1.00 (15)	1.00 (699)
Death-Possible	.52 (166/319)	.62 (87/141)	.50 (41/82)	.85 (52/61)	.68 (23/34)	.76 (13/17)	.31 (5/16)	.57 (8/14)	.33 (5/15)	.57 (400/699)
Death-Eligible (Notice Served)	.28 (46/166)	.43 (37/87)	.10 (4/41)	.50 (26/52)	.26 (6/23)	.06 (3/13)	.20 (1/5)	.38 (3/8)	.80 (4/5)	.33 (130/400)

Capital Trial	.74 (34/46)	.76 (28/37)	.75 (3/4)	.69 (18/26)	.67 (4/6)	.33 (1/3)	0.00 (0/1)	.67 (2/3)	.75 (3/4)	.72 (93/130)
Penalty Phase	.65 (22/34)	.82 (23/28)	1.00 (3/3)	.78 (14/18)	.75 (3/4)	1.00 (1/1)	---	0.00 (0/2)	.67 (2/3)	.73 (68/93)
Death Sentence	.45 (10/22)	.43 (10/23)	0.00 (0/3)	.29 (4/14)	0.00 (0/3)	0.00 (0/1)	---	---	0.00 (0/2)	.35 (24/68)

*The death flow probabilities are computed by dividing the number of cases at the designated processing stage by the number of cases at the immediately prior processing stage.

**Victim's race was defined as the race of the first decedent on the interview questionnaire (v. 292).

***Four cases were omitted because four victims were "other" race.

TABLE 7

PROBABILITY OF PROGRESSING TO NEXT CAPITAL CASE PROCESSING STAGE BY COUNTY*

Processing Stage	County									
	Essex	Hudson	Camden	Passaic	Union	Mercer	Atlantic	Monmouth	Other	Total
All Homicides	1.00 (208)	1.00 (98)	1.00 (70)	1.00 (47)	1.00 (38)	1.00 (35)	1.00 (31)	1.00 (31)	1.00 (145)	1.00 (703)
Death-Possible	.55 (115/208)	.39 (38/98)	.66 (46/70)	.53 (25/47)	.71 (27/38)	.63 (22/35)	.55 (17/31)	.65 (20/31)	.65 (94/145)	.57 (404/703)
Death-Eligible (Notice Served)	.23 (27/115)	.24 (9/38)	.28 (13/46)	.32 (8/25)	.41 (11/27)	.27 (6/22)	.59 (10/17)	.70 (14/20)	.35 (33/94)	.32 (131/404)
Capital Trial	.70 (19/27)	.67 (6/9)	.54 (7/13)	.75 (6/8)	.55 (6/11)	1.00 (6/6)	.60 (6/10)	.93 (13/14)	.76 (25/33)	.72 (94/131)
Penalty Phase	.53 (10/19)	.67 (4/6)	.86 (6/7)	1.00 (6/6)	.83 (5/6)	.33 (2/6)	1.00 (6/6)	.77 (10/13)	.80 (20/25)	.73 (69/94)
Death Sentence	.40 (4/10)	0.00 (0/4)	.67 (4/6)	.17 (1/6)	0.00 (0/5)	1.00 (2/2)	.50 (3/6)	.30 (3/10)	.40 (8/20)	.36 (25/69)

*The death flow probabilities are computed by dividing the number of cases at the designated processing stage by the number of cases at the immediately prior processing stage.

These comparative probabilities can be alternatively expressed as percentages, by simply multiplying each probability by 100. (See Table 4.) The probability that black defendant cases will be death-possible is .58 which is 58%. Differences in probabilities can similarly be expressed as percentage differences. For example, in Table 4 the percentage difference between black defendant and white defendant cases which are death-possible is small, one percent. (See column 2 of Table 4). This is another way of expressing the fact that black defendants and white defendants have nearly identical chances, or almost the same probability, of being involved in a death-possible homicide. A different way of expressing this percentage comparison between black defendant cases and white defendant cases is as a ratio. (See column 3 of Table 4.) If two percentages are equal, their ratio will be one to one, which is expressed as 1.00. If the first percentage is greater than the second, the ratio will be greater than one. Conversely, if the first percentage is less than the second, the ratio will be less than one. In Table 4 the ratio of the percentage of black defendants to the percentage of white defendants in death-possible cases is 1.02, only slightly more than 1.00, reiterating the negligible percentage difference between black and white defendants. For death-eligible cases, that is, cases where a notice of factors was served, the percentage differences between black, white, and Hispanic defendants are greater than the corresponding percentage differences at the death-possible stage. There are 11.0% fewer black defendants than white defendants whose cases are designated death-eligible. (See column 2 of Table 4). Furthermore, there is a percentage difference of 25% between white defendants and Hispanic defendants at the death-eligible stage. These percentage differences can alternatively be expressed for comparative purposes as the ratios in column 3 of Table 4. Since the percentage of black defendant cases designated death-eligible is less than the percentage of white defendant cases designated death-eligible, the ratio is less than one (.74). Comparing percentage differences and percentage

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eligible status to the capital trial stage, although white defendants continued their advancement at a marginally higher level (.74, in comparison to .71 and .69 for the black and Hispanic defendants, respectively). Once again, regardless of race, defendants continued to advance from capital trial to penalty phase at high rates, but with white defendants still at the fore (.81). At the final processing stage, the imposition of the death sentence, white defendant cases (.42) slightly outpaced blacks (.38) and, strikingly, Hispanics (.00), none of whom received the death penalty.

ratios at a given case processing stage can highlight case processing disparities at that particular stage. Comparing percentage differences and percentage ratios across case processing stages helps to identify those stages at which case processing disparities appear and are most pronounced. The percentage difference and percentage ratio operations just illustrated could be similarly used in the forthcoming analyses which rely primarily on probabilities.

Table 5 calculates analogous percentage differences and percentage ratios for two comparison counties, Monmouth and Essex. In Monmouth County 65% of the cases were death-possible; and in Essex County the figure was 55%, resulting in a 10% difference. At the death-eligible stage, these percentage differences are much larger. Monmouth County declares 70% of its death-possible cases death-eligible, whereas Essex County declares 23% of its death-possible cases death-eligible. This results in a percentage difference of 47%, or alternatively, a ratio of slightly more than three to one. This percentage ratio means that a defendant in a death-possible case in Monmouth County is three times more likely to have his case declared capital than a defendant in a comparable case in Essex County.

Considering the race of the victim, which appears in the columns in the right panel of Table 3, cases involving white victims were more often death-possible than were either black- or Hispanic-victim cases: nearly seven in ten (.69) white victim cases were death-possible, relative to one in two for both black-victim (.51) and Hispanic-victim (.52) cases. In turn, of the death-possible cases, white-victim cases were more than two and one-quarter times more likely than Hispanic-victim cases and one and one-half times more likely than black-victim cases to be designated death-eligible (white vs. Hispanic, .43/.19 = 2.3; white vs. black, .43/.28 = 1.5).[679]

679. The probabilities of advancing to capital trial and to the penalty phase were uniformly high across victim races, although white-victim cases were more likely than black-victim cases to advance from capital trial to penalty phase (.80 vs. .61). Hispanic victims are omitted from this comparison because there were too few such cases to permit a reliable analysis. Black-victim homicides progressed more often than white-victim homicides to a death sentence (.45 and .35, respectively). Consistent with the defendant race pattern, no homicide involving an Hispanic victim advanced from the penalty phase to a death sentence. Except for the case progressions from death-eligible to capital trial and from penalty phase to the death sentence, white-victim probabilities were consistently higher than black-victim probabilities. Although the Hispanic-victim probability was higher than that

What of the intersection of the defendant's race and the victim's race? Do case progression probabilities differ across race combinations? Table 6 displays these probabilities by the nine defendant race/victim race combinations. The following discussion focuses only on the racial combinations listed in the first four columns: black/black, white/white, Hispanic/Hispanic, and black/white.[680]

Black/white cases had the highest probability of being death possible (.85), followed, in decreasing order, by white/white (.62), black/black (.52), and Hispanic/Hispanic (.50). White victim cases, regardless of whether the defendant was black or white, exhibited the highest probabilities of advancing to the death-eligible stage (black defendant, .50; white defendant, .43). These advancement probabilities were more than one and one-half times higher than those for black/black homicides (.28) and more than four times higher than for Hispanic/Hispanic homicides (.10).[681]

Case progression probabilities by county are displayed in Table 7. County differences in probabilities appear at several case processing stages. For example, there are some marked county differences in the probabilities that cases were death-possible.[682] Union County fell at the high end of the probability range (.71), which is nearly twice that exhibited by Hudson County, which fell at the low end of the range (.39). Camden County displayed the next highest probability that a homicide case would be death-possible (.66), followed by Monmouth County (.65).

At the next two processing stages, death-eligible and capital trial, Monmouth County exhibited the highest case advancement

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for white victims at the penalty phase, the number of cases was small, making this an unreliable comparison.

680. The few homicides involving the other racial combinations do not permit their reliable analysis, especially at the more advanced case processing stages.

681. Among racial combinations with sufficient numbers of cases to permit meaningful comparisons, the white/white progression generally displayed the highest advancement probabilities or was among the highest probabilities at each of the remaining three stages: capital trial (.76) (although this probability was marginally higher than that for the black/black cases); penalty phase (.82) (the few Hispanic/Hispanic cases made their probability of 1.00 of suspect reliability); and at death sentence (.43) (in comparison with .45 for black/black cases).

682. Part II of the *Interim Report*, *supra* note 3, includes an annotation of the procedural history and the factual circumstances of each of the 404 identified death-possible cases. Part II of the *Interim Report* separately identifies case summaries for the 131 cases which were designated death-eligible by the county prosecutor. The cases described in the Annotation of Death-Possible Cases (Part VIII) are taken from those two groups of cases. The Final Report of this study will include the case summaries for all 703 cases.

probabilities (excluding Mercer County which comprised very few cases at the capital trial stage): .70 at the death-eligible stage and .93 at the capital trial stage. The case progression probability for Monmouth County at the death-eligible stage was three times greater than the corresponding probability for Essex County (.23), which had the lowest probability at that stage, and Hudson County (.24). Although the movement of cases to the capital trial stage exhibited high advancement probabilities in most counties, Monmouth continued to show the highest probability (.93).[683]

Tables 8-15 present defendant and victim race characteristics for homicide cases processed within the three highest volume counties and Monmouth County.[684] These tables are ordered in pairs. The first table of each pair presents the case progression probabilities for each processing stage for the indicated county by the race of defendant and the race of victim separately. The second table of each pair presents the case progression probabilities for each processing stage for that county for each combination of race of defendant and race of victim.

Consider, first, the case progressions by the defendant's race. Regardless of the defendant's race, Essex, Camden, and Monmouth Counties all had higher probabilities for death-possible cases than did Hudson County. The total death-possible probabilities based on the defendant's race were .55 in Essex County, .66 in Camden County, and .65 in Monmouth County, in contrast to .39 in Hudson County. Black-defendant cases in Camden County exhibited the highest death-possible rate among the three largest counties, followed closely by Hispanic defendants in Essex County (.67 versus .65). In Monmouth County white defendants had the highest death-possible rate (.69 versus .54 for black defendants). There were too few Hispanic cases to draw inferences. In contrast, Hispanic defendant cases in Hudson County displayed the lowest death-possible probability (.34).

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683. The progression of cases to penalty phase and, in turn, to death sentence involved relatively few cases in all counties and county groups. Of those individual counties with more than ten homicide cases at the capital trial stage—Essex County with 19 and Monmouth County with 13—Monmouth County displayed the greater advancement probability (.77 versus .53). The grouped "other" counties exhibited a higher case-advancement probability than did Monmouth County.

684. The grouped other counties include those counties which had fewer than 30 cases. These are predominantly the smaller and relatively rural counties: Bergen, Burlington, Cape May, Cumberland, Gloucester, Hunterdon, Middlesex, Morris, Salem, Somerset, and Warren.

At the death-eligible stage, white defendant cases in Camden and Essex Counties exhibited higher probabilities (.70 and .50, respectively) relative to Hudson County (.43). In Monmouth County white defendants and black defendants showed comparable probabilities (.73 and .71, respectively). Hispanic defendants in Essex County had the highest death-eligible probability among the three highest volume counties, although the advancement of Hispanic cases in all counties was quite low or failed to occur at all (Essex County, .13; Hudson County, .09; Camden County, .00).[685] For the important death-possible to death-eligible case processing transition, it appears that defendant race differences in case progression probabilities exist across counties, with the higher risk of case advancement sustained by white defendants.

The case progression probabilities based on the victim's race appear for Essex, Hudson, Camden, and Monmouth Counties in the right panels of Tables 8-15. Again, due to limited case numbers, this analysis summarizes case advancement patterns only through the death-eligible stage. In the three highest volume counties, white-victim cases had the highest probabilities or fell among those cases with the highest probability of advancing to the death-eligible stage. Despite the uniformly higher advancement probability of white-victim cases within each county, however, differences exist across counties.

The probability of a white-victim homicide becoming death-eligible was nearly one and one-half times higher in both Hudson and Camden Counties than in Essex County (.46 and .43 versus .27, respectively). The corresponding figure for Monmouth County was much higher (.79). Black-victim homicides in Essex County had a one-in-four chance of progressing to the death-eligible stage compared to between a one-in-five and a one-in-seven chance in Camden and Hudson Counties, respectively (.26, .21 and .15) and an even chance (.50) in Monmouth County.[686]

Further race comparisons in case progression probabilities can be made among Essex, Hudson, Camden, and Monmouth

685. The numbers of cases at each stage after the death-eligible processing stage is low in all counties, making comparisons tenuous. The number of cases involving Hispanic defendants in Monmouth County is too low for meaningful comparison with the three largest counties.

686. Comparisons beyond this processing stage cannot be made due to an insufficient number of homicide cases. As with white defendants, the white-victim case progression risk appears to be the highest in each county, although only marginally so relative to black-victim cases in Essex County.

TABLE 8

ESSEX COUNTY:
PROBABILITY OF PROGRESSING TO NEXT CAPITAL CASE PROCESSING STAGE,*
BY RACE OF DEFENDANT AND RACE OF VICTIM

Processing Stage	Defendant's Race				Victim's Race**			
	Black	White	Hispanic	Total	Black	White	Hispanic	Total
All Homicides	1.00 (157)	1.00 (14)	1.00 (37)	1.00 (208)	1.00 (146)	1.00 (32)	1.00 (30)	1.00 (208)
Death-Possible	.53 (83/157)	.57 (8/14)	.65 (24/37)	.55 (115/208)	.48 (70/146)	.81 (26/32)	.63 (19/30)	.55 (115/208)
Death-Eligible (Notice Served)	.24 (20/83)	.50 (4/8)	.13 (3/24)	.23 (27/115)	.26 (18/70)	.27 (7/26)	.11 (2/19)	.23 (27/115)
Capital Trial	.65 (13/20)	.75 (3/4)	1.00 (3/3)	.70 (19/27)	.72 (13/18)	.71 (5/7)	.50 (1/2)	.70 (19/27)
Penalty Phase	.54 (7/13)	.67 (2/3)	.33 (1/3)	.53 (10/19)	.46 (6/13)	.60 (3/5)	1.00 (1/1)	.53 (10/19)
Death Sentence	.43 (3/7)	.50 (1/2)	0.00 (0/1)	.40 (4/10)	.50 (3/6)	.33 (1/3)	0.00 (0/1)	.40 (4/10)

*The death flow probabilities are computed by dividing the number of cases at the designated processing stage by the number of cases at the immediately prior processing stage.

**Victim's race was defined as the race of the first decedent on the interview questionnaire (v. 292).

TABLE 9

ESSEX COUNTY:
PROBABILITY OF PROGRESSING TO NEXT CAPITAL CASE PROCESSING STAGE,*
BY RACE OF DEFENDANT AND VICTIM COMBINED

Processing Stage	Defendant's Race/Victim's Race**									
	Black/ Black	White/ White	Hispanic/ Hispanic	Black/ White	Hispanic/ White	White/ Black	Black/ Hispanic	Hispanic/ Black	White/ Hispanic	Total
All Homicides	1.00 (134)	1.00 (7)	1.00 (24)	1.00 (18)	1.00 (7)	1.00 (6)	1.00 (5)	1.00 (6)	1.00 (1)	1.00 (208)
Death-Possible	.46 (62/134)	.57 (4/7)	.58 (14/24)	.89 (16/18)	.86 (6/7)	.67 (4/6)	1.00 (5/5)	.67 (4/6)	0.00 (0/1)	.55 (115/208)
Death-Eligible (Notice Served)	.24 (15/62)	.75 (3/4)	.07 (1/14)	.25 (4/16)	0.00 (0/6)	.25 (1/4)	.20 (1/5)	.50 (2/4)	--- ---	.23 (27/115)
Capital Trial	.73 (11/15)	1.00 (3/3)	1.00 (1/1)	.50 (2/4)	--- ---	0.00 (0/1)	0.00 (0/1)	1.00 (2/2)	--- ---	.70 (19/27)
Penalty Phase	.55 (6/11)	.67 (2/3)	1.00 (1/1)	.50 (1/2)	--- ---	--- ---	--- ---	0.00 (0/2)	--- ---	.53 (10/19)
Death Sentence	.50 (3/6)	.50 (1/2)	0.00 (0/1)	0.00 (0/1)	--- ---	--- ---	--- ---	--- ---	--- ---	.40 (4/10)

*The death flow probabilities are computed by dividing the number of cases at the designated processing stage by the number of cases at the immediately prior processing stage.

**Victim's race was defined as the race of the first decedent on the interview questionnaire (v. 292).

TABLE 10

HUDSON COUNTY:
PROBABILITY OF PROGRESSING TO NEXT CAPITAL CASE PROCESSING STAGE,*
BY RACE OF DEFENDANT AND RACE OF VICTIM

Processing Stage	Defendant's Race				Victim's Race**			
	Black	White	Hispanic	Total	Black	White	Hispanic	Total
All Homicides	1.00 (46)	1.00 (20)	1.00 (32)	1.00 (98)	1.00 (37)	1.00 (27)	1.00 (34)	1.00 (98)
Death-Possible	.43 (20/46)	.35 (7/20)	.34 (11/32)	.39 (38/98)	.35 (13/37)	.48 (13/27)	.35 (12/34)	.39 (38/98)
Death-Eligible (Notice Served)	.25 (5/20)	.43 (3/7)	.09 (1/11)	.24 (9/38)	.15 (2/13)	.46 (6/13)	.08 (1/12)	.24 (9/38)
Capital Trial	.60 (3/5)	.67 (2/3)	1.00 (1/1)	.67 (6/9)	.50 (1/2)	.83 (5/6)	0.00 (0/1)	.67 (6/9)
Penalty Phase	.67 (2/3)	.50 (1/2)	1.00 (1/1)	.67 (4/6)	1.00 (1/1)	.60 (3/5)	--- ---	.67 (4/6)
Death Sentence	0.00 (0/2)	0.00 (0/1)	0.00 (0/1)	0.00 (0/4)	0.00 (0/1)	0.00 (0/3)	-- --	0.00 (0/4)

*The death flow probabilities are computed by dividing the number of cases at the designated processing stage by the number of cases at the immediately prior processing stage.

**Victim's race was defined as the race of the first decedent on the interview questionnaire (v. 292).

TABLE 11

HUDSON COUNTY:
PROBABILITY OF PROGRESSING TO NEXT CAPITAL CASE PROCESSING STAGE,*
BY RACE OF DEFENDANT AND VICTIM COMBINED

Processing Stage	Defendant's Race/Victim's Race**									
	Black/ Black	White/ White	Hispanic/ Hispanic	Black/ White	Hispanic/ White	White/ Black	Black/ Hispanic	Hispanic/ Black	White/ Hispanic	Total
All Homicides	1.00 (35)	1.00 (13)	1.00 (24)	1.00 (6)	1.00 (8)	1.00 (2)	1.00 (5)	--- ---	1.00 (5)	1.00 (98)
Death-Possible	.37 (13/35)	.46 (6/13)	.38 (9/24)	.83 (5/6)	.25 (2/8)	0.00 (0/2)	.40 (2/5)	--- ---	.20 (1/5)	.39 (38/98)
Death-Eligible (Notice Served)	.15 (2/13)	.33 (2/6)	0.00 (0/9)	.60 (3/5)	.50 (1/2)	--- ---	0.00 (0/2)	--- ---	1.00 (1/1)	.24 (9/38)
Capital Trial	.50 (1/2)	1.00 (2/2)	--- ---	.67 (2/3)	1.00 (1/1)	--- ---	--- ---	--- ---	0.00 (0/1)	.67 (6/9)
Penalty Phase	1.00 (1/1)	.50 (1/2)	--- ---	.50 (1/2)	1.00 (1/1)	--- ---	--- ---	--- ---	--- ---	.67 (4/6)
Death Sentence	0.00 (0/1)	0.00 (0/1)	--- ---	0.00 (0/1)	0.00 (0/1)	--- ---	--- ---	--- ---	--- ---	0.00 (0/4)

*The death flow probabilities are computed by dividing the number of cases at the designated processing stage by the number of cases at the immediately prior processing stage.

**Victim's race was defined as the race of the first decedent on the interview questionnaire (v. 292).

TABLE 12

CAMDEN COUNTY:
PROBABILITY OF PROGRESSING TO NEXT CAPITAL CASE PROCESSING STAGE,*
BY RACE OF DEFENDANT AND RACE OF VICTIM

Processing Stage	Defendant's Race				Victim's Race**			
	Black	White	Hispanic	Total	Black	White	Hispanic	Total
All Homicides	1.00 (49)	1.00 (16)	1.00 (5)	1.00 (70)	1.00 (45)	1.00 (19)	1.00 (6)	1.00 (70)
Death-Possible	.67 (33/49)	.63 (10/16)	.60 (3/5)	.66 (46/70)	.62 (28/45)	.74 (14/19)	.67 (4/6)	.66 (46/70)
Death-Eligible (Notice Served)	.18 (6/33)	.70 (7/10)	0.00 (0/3)	.28 (13/46)	.21 (6/28)	.43 (6/14)	.25 (1/4)	.28 (13/46)
Capital Trial	.67 (4/6)	.43 (3/7)	--- ---	.54 (7/13)	.67 (4/6)	.33 (2/6)	1.00 (1/1)	.54 (7/13)
Penalty Phase	1.00 (4/4)	.67 (2/3)	--- ---	.86 (6/7)	1.00 (4/4)	1.00 (2/2)	0.00 (0/1)	.86 (6/7)
Death Sentence	.75 (3/4)	.50 (1/2)	--- ---	.67 (4/6)	.75 (3/4)	.50 (1/2)	--- ---	.67 (4/6)

*The death flow probabilities are computed by dividing the number of cases at the designated processing stage by the number of cases at the immediately prior processing stage.

**Victim's race was defined as the race of the first decedent on the interview questionnaire (v. 292).

TABLE 13

CAMDEN COUNTY:
PROBABILITY OF PROGRESSING TO NEXT CAPITAL CASE PROCESSING STAGE,*
BY RACE OF DEFENDANT AND VICTIM COMBINED

	Defendant's Race/Victim's Race**									
Processing Stage	Black/ Black	White/ White	Hispanic/ Hispanic	Black/ White	Hispanic/ White	White/ Black	Black/ Hispanic	Hispanic/ Black	White/ Hispanic	Total
All Homicides	1.00 (41)	1.00 (12)	1.00 (4)	1.00 (7)	---	1.00 (3)	1.00 (1)	1.00 (1)	1.00 (1)	1.00 (70)
Death-Possible	.66 (27/41)	.75 (9/12)	.50 (2/4)	.71 (5/7)	---	0.00 (0/3)	1.00 (1/1)	1.00 (1/1)	1.00 (1/1)	.66 (46/70)
Death-Eligible (Notice Served)	.22 (6/27)	.67 (6/9)	0.00 (0/2)	0.00 (0/5)	---	---	0.00 (0/1)	0.00 (0/1)	1.00 (1/1)	.28 (13/46)
Capital Trial	.67 (4/6)	.33 (2/6)	---	---	---	---	---	---	1.00 (1/1)	.54 (7/13)
Penalty Phase	1.00 (4/4)	1.00 (2/2)	---	---	---	---	---	---	0.00 (0/1)	.86 (6/7)
Death Sentence	.75 (3/4)	.50 (1/2)	---	---	---	---	---	---	---	.67 (4/6)

*The death flow probabilities are computed by dividing the number of cases at the designated processing stage by the number of cases at the immediately prior processing stage.

**Victim's race was defined as the race of the first decedent on the interview questionnaire (v. 292).

TABLE 14

MONMOUTH COUNTY:
PROBABILITY OF PROGRESSING TO NEXT CAPITAL CASE PROCESSING STAGE,*
BY RACE OF DEFENDANT AND RACE OF VICTIM

Processing Stage	Defendant's Race				Victim's Race**			
	Black	White	Hispanic	Total	Black	White	Hispanic	Total
All Homicides	1.00 (13)	1.00 (16)	1.00 (2)	1.00 (31)	1.00 (11)	1.00 (19)	1.00 (1)	1.00 (31)
Death-Possible	.54 (7/13)	.69 (11/16)	1.00 (2/2)	.65 (20/31)	.55 (6/11)	.74 (14/19)	0.00 (0/1)	.65 (20/31)
Death-Eligible (Notice Served)	.71 (5/7)	.73 (8/11)	.50 (1/2)	.70 (14/20)	.50 (3/6)	.79 (11/14)	-- --	.70 (14/20)
Capital Trial	1.00 (5/5)	.88 (7/8)	1.00 (1/1)	.93 (13/14)	1.00 (3/3)	.91 (10/11)	-- --	.93 (13/14)
Penalty Phase	.80 (4/5)	.71 (5/7)	1.00 (1/1)	.77 (10/13)	.67 (2/3)	.80 (8/10)	-- --	.77 (10/13)
Death Sentence	.50 (2/4)	.20 (1/5)	0.00 (0/1)	.30 (3/10)	1.00 (2/2)	.13 (1/8)	-- --	.30 (3/10)

*The death flow probabilities are computed by dividing the number of cases at the designated processing stage by the number of cases at the immediately prior processing stage.

**Victim's race was defined as the race of the first decedent on the interview questionnaire (v. 292).

TABLE 15

MONMOUTH COUNTY:
PROBABILITY OF PROGRESSING TO NEXT CAPITAL CASE PROCESSING STAGE,*
BY RACE OF DEFENDANT AND VICTIM COMBINED

Processing Stage	Defendant's Race/Victim's Race**									
	Black/ Black	White/ White	Hispanic/ Hispanic	Black/ White	Hispanic/ White	White/ Black	Black/ Hispanic	Hispanic/ Black	White/ Hispanic	Total
All Homicides	1.00 (9)	1.00 (14)	--- ---	1.00 (4)	1.00 (1)	1.00 (1)	--- ---	1.00 (1)	1.00 (1)	1.00 (31)
Death-Possible	.56 (5/9)	.79 (11/14)	--- ---	.50 (2/4)	1.00 (1/1)	0.00 (0/1)	--- ---	1.00 (1/1)	0.00 (0/1)	.65 (20/31)
Death-Eligible (Notice Served)	.60 (3/5)	.73 (8/11)	--- ---	1.00 (2/2)	1.00 (1/1)	--- ---	--- ---	0.00 (0/1)	--- ---	.70 (14/20)
Capital Trial	1.00 (3/3)	.88 (7/8)	--- ---	1.00 (2/2)	1.00 (1/1)	--- ---	--- ---	--- ---	--- ---	.93 (13/14)
Penalty Phase	.67 (2/3)	.71 (5/7)	--- ---	1.00 (2/2)	1.00 (1/1)	--- ---	--- ---	--- ---	--- ---	.77 (10/13)
Death Sentence	1.00 (2/2)	.20 (1/5)	--- ---	0.00 (0/2)	0.00 (0/1)	--- ---	--- ---	--- ---	--- ---	.30 (3/10)

*The death flow probabilities are computed by dividing the number of cases at the designated processing stage by the number of cases at the immediately prior processing stage.

**Victim's race was defined as the race of the first decedent on the interview questionnaire (v. 292).

Counties by reference to Tables 8-15, respectively. These tables present case advancement probabilities based upon the nine defendant race/victim race combinations. Because of the small number of cases in the other categories, this discussion will focus only on those combinations listed in the first four columns (black/black, white/white, Hispanic/Hispanic, and black/white). In the three largest counties the probabilities that homicides will be death-possible are almost uniformly highest for the white-victim cases, regardless of whether the defendant is white or black. In particular, the black/white cases tended to have the highest progression probability, which was especially pronounced in Essex County (.89 versus .83 and .71 in Hudson and Camden Counties, respectively). Essex and Camden Counties displayed both higher black/black and Hispanic/Hispanic death possible probabilities than did Hudson County. In Monmouth County white/white cases have a much greater probability of being death-possible cases than black/black cases (.79 versus .56), but the numbers are too small for reliable comparison.

Homicides involving white victims tended to advance with the highest probabilities to death-eligible status, particularly the white/white combinations in Essex (.75) and Camden (.67) Counties, the two counties with the largest numbers of homicides. In contrast to these two counties, though, the case advancement probability of white/white homicides in Hudson County is just one-in-three (.33). Yet, the black/white case progression probability to the death-eligible stage in Hudson County is nearly twice this level, three in five (.60). Monmouth County is consistent in pattern with Essex and Camden Counties: nearly three-fourths (.73) of the white/white death-possible cases become death-eligible.

D. *Analysis of the Plea/Trial Decision by County and Race of Defendant and Victim*

Homicide defendants in New Jersey cannot receive the death sentence unless their cases go to trial before a judge or a death-qualified jury. The decision by the prosecutor to offer a plea, then to engage in plea negotiations, and finally to accept a plea of guilty, marks a key point where cases drop out of the capital case processing system. That a judgment of guilt was entered pursuant to a plea agreement is always recorded on the judgment sheet. The plea/trial decision is not defined as a separate capital case

processing stage. Because of its importance, however, the plea/trial decision is analyzed separately by county and race of defendant and victim.

This section examines the plea-versus-trial case flow for all homicide cases and for death-possible cases. Table 16 presents the distributions of pleas and trials for all homicides broken down by the defendant's race (panel A), the victim's race (panel B), and the combination of the defendant's and the victim's races (panel C). Parallel arrays of pleas and trials are presented for death-possible cases in the corresponding three panels of Table 17. Slightly more than one-half of all cases were adjudicated by plea (53.8%). Regardless of whether they were defendants or victims, cases involving Hispanics received the highest proportions of pleas (approximately 60.0%).

When both the race of the defendant and the race of the victim are considered in tandem, Hispanic/Hispanic, white/black, and white/Hispanic cases cluster together and are disposed of most often by plea (63.4%, 62.5%, and 60.0%, respectively). The fewest pleas included black/white homicides (37.7%). Pleas accounted for between 52.0% and 57.0% of the cases for the other racial combinations.

Looking only at the death-possible cases (Table 17), the overall proportionate pattern in pleas and trials is expectedly reversed, with plea cases now in the minority (45.3% versus 54.7%). Hispanic-defendant cases still involved the greatest chances of resulting in a plea (50.7%), followed by black-defendant and white-defendant cases, in that order (45.7% and 40.4%, respectively). Hispanic- and black-victim cases resulted in the highest percentages of plea cases (49.2% and 48.6%, respectively), followed by white-victim cases (40.7%).[687]

Table 18 presents the percentage distribution of pleas and trials for each county for all homicide defendants. Substantial county differences appear: prosecutors in Hudson and Camden Counties dispose of cases by the greatest proportions of pleas (78.6% and 75.7%, respectively). Mercer and Monmouth Counties fall at the lower end of the plea continuum (28.6% and 29.0%, respectively). With respect to all homicides, Hudson

687. Among those racial combinations involving at least ten cases, Hispanic/Hispanic cases and black/white cases fell at the high and the low end of the continuum of plea cases (53.7% and 36.5%, respectively), which is consistent with the pattern observed for all homicide cases.

County and Mercer County exhibit proportions of pleas that differ by a factor of two and three-quarters (2.75 = 78.6/28.6). These patterns of county disparities in percentages of plea cases remain generally intact when the death-possible cases are examined (Table 19).[688] These patterns in plea/trial proportions indicate large county differences in discretionary decision-making. Consistent county differences in percentages of pleas and trials persist regardless of whether one looks at all homicide cases or just death-possible cases.

Tables 20 and 21 report the data on plea versus trial by defendant's and victim's race, respectively, by county for all homicides. Tables 22 and 23 present the percentage distributions among death-possible cases of pleas and trials by the defendant's race and the victim's race, respectively, for each county and county grouping. Each table is divided into panels corresponding to a county or county group.[689]

Among the three counties with the largest volume of homicide cases, irrespective of the defendant's race, Camden and Hudson Counties had the highest overall proportions of death-possible cases that were pled (73.9% and 63.2%, respectively) in comparison to Essex County (27.0%) (Table 19). Imbedded in the large overall county differences in the proportions of plea cases are distinctive racial patterns. Within both Essex and Hudson Counties, the highest proportions of pleas in death-possible cases were negotiated for black defendants (31.3% and 70.0%, respectively) followed by white (25.0% and 57.1%, respectively), and Hispanic defendants (12.5% and 54.5%, respectively) (Table 22). In Camden County the race pattern was reversed, although not by a large margin: white defendants were granted pleas in higher proportions than were black defendants (80.0% versus 69.7%, respectively). In the present data base there are too few Hispanic defendants in Camden County to draw reliable comparisons.

Patterns in the county distributions of pleas and trials based on the defendant's race shift somewhat when considering the vic-

688. Camden County replaces Hudson County as the leading county (73.9% versus 63.2%, respectively) in the proportion of pleas, although Hudson County still remains among the high percentage counties (as third, behind Atlantic County, 64.7%). Mercer County remains at the lowest extreme (18.2%).

689. Only the three largest counties, Essex, Hudson and Camden Counties, will be individually analyzed. Statistics on Monmouth County are included for purposes of comparison. Disaggregated data for the remaining individual counties and the grouped category of other counties are included in Part I of the *Interim Report*, *supra* note 3.

tim's race. Table 23 displays the county distributions of pleas and trials for death-possible cases based on the victim's race. Consistent with the defendant-race results, homicides involving black victims resulted in the greatest proportions of pleas in both Essex and Hudson Counties (32.9% and 84.6%, respectively). Contrary to the defendant-race pattern, however, cases involving Hispanic victims, not cases involving white victims, resulted in the next highest proportion of pleas (21.1% versus 15.4% in Essex County; 66.7% versus 38.5% in Hudson County).

Plea/trial case dispositions for the three highest volume counties and Monmouth County based on the combination of the race of the defendant and the race of the victim are presented in Tables 24-31. For each county pairs of tables are presented first for all homicides and then for death-possible cases. The discussion focuses on death-possible cases. Among the race combinations with six or more total death-possible cases in Essex, Hudson, and Camden Counties, black/black homicides comprised either the highest category (in the first two counties) or fell among the highest (the last county) categories relative to the proportions of pleas (33.9%, 84.6%, and 63.0%, respectively). The next highest rung in the proportions of pleas shifts by county: For example, in Essex County, black/white cases (18.8%) followed black/black cases, whereas in Hudson County, Hispanic/Hispanic cases (66.7%) followed black/black cases. In Camden County, however, white/white cases comprised the leading category of plea cases (88.9%), followed by black/black cases (63.0%).

There appear to be identifiable patterns in both race and county differences in homicide case processing in New Jersey. Characteristics other than the race of the defendant and the race of the victim, or the county of disposition could possibly influence the flow of cases through the sequential processing points in the capital sentencing system. For example, white-victim cases, which progressed to more advanced stages of capital case processing than did either black- or Hispanic-victim cases, may, in general, have been more aggravated than either of these two types of cases. If this is so, a characteristic of the homicide incident, rather than a characteristic of the victim, was the more influential aspect of case progression. Alternatively, it is possible that homicide cases in Hudson and Union Counties involved mitigating factors which influenced the prosecutor's decision to offer a plea.

TABLE 16

PLEA VERSUS TRIAL BY RACE OF DEFENDANT AND RACE OF VICTIM--
ALL HOMICIDES

A. Plea Versus Trial by Race of Defendant

	White % (N)	Black % (N)	Hispanic % (N)	Total % (N)
Plea	53.5 (93)	51.8 (206)	60.3 (79)	53.8 (378)
Trial	46.5 (81)	48.2 (192)	39.7 (52)	46.2 (325)
Total	100.0 (174)	100.0 (398)	100.0 (131)	100.0 (703)

B. Plea Versus Trial by Race of Victim

		White	Black	Hispanic	Other	Total
		% (N)	% (N)	% (N)	% (N)	% (N)
Plea		48.7 (115)	55.0 (192)	61.4 (70)	25.0 (1)	53.8 (378)
Trial		51.3 (121)	45.0 (157)	38.6 (44)	75.0 (3)	46.2 (325)
Total		100.0 (236)	100.0 (349)	100.0 (114)	100.0 (4)	100.0 (703)

TABLE 16 (cont.)

C. Plea Versus Trial by Race of Defendant and Race of Victim*

	Black/ Black** % (N)	White/ White % (N)	Hispanic/ Hispanic % (N)	Black/ White % (N)	Hispanic/ White % (N)	White/ Black % (N)	Black/ Hispanic % (N)	Hispanic/ Black % (N)	White/ Hispanic % (N)	Total % (N)
Plea	54.6 (174)	52.5 (74)	63.4 (52)	37.7 (23)	52.9 (18)	62.5 (10)	52.9 (9)	57.1 (8)	60.0 (9)	53.9 (377)
Trial	45.4 (145)	47.5 (67)	36.6 (30)	62.3 (38)	47.1 (16)	37.5 (6)	47.1 (8)	42.7 (6)	40.0 (6)	46.1 (322)
Total	100.0 (319)	100.0 (141)	100.0 (82)	100.0 (61)	100.0 (34)	100.0 (16)	100.0 (17)	100.0 (14)	100.0 (15)	100.0 (699)

*Four cases are omitted involving victims of "other" races.

**The defendant's race is listed first, the victim's race second.

TABLE 17

PLEA VERSUS TRIAL BY RACE OF DEFENDANT AND RACE OF VICTIM--
DEATH-POSSIBLE HOMICIDES

A. Plea Versus Trial by Race of Defendant

	White % (N)	Black % (N)	Hispanic % (N)	Total % (N)
Plea	40.4 (40)	45.7 (106)	50.7 (37)	45.3 (183)
Trial	59.6 (59)	54.3 (126)	49.3 (36)	54.7 (221)
Total	100.0 (99)	100.0 (232)	100.0 (73)	100.0 (404)

TABLE 17 (cont.)

B. Plea Versus Trial by Race of Victim

		White	Black	Hispanic	Other	Total
		% (N)	% (N)	% (N)	% (N)	% (N)
Plea		40.7 (66)	48.6 (87)	49.2 (29)	25.0 (1)	45.3 (183)
Trial		59.3 (96)	51.4 (92)	50.8 (30)	75.0 (3)	54.7 (221)
Total		100.0 (162)	100.0 (179)	100.0 (59)	100.0 (4)	100.0 (404)

C. Plea Versus Trial by Race of Defendant and Race of Victim*

	Black/ Black** % (N)	White/ White % (N)	Hispanic/ Hispanic % (N)	Black/ White % (N)	Hispanic/ White % (N)	White/ Black % (N)	Black/ Hispanic % (N)	Hispanic/ Black % (N)	White/ Hispanic % (N)	Total % (N)
Plea	48.8 (81)	42.5 (37)	53.7 (22)	36.5 (19)	43.5 (10)	40.0 (2)	46.2 (6)	50.0 (4)	20.0 (1)	45.5 (182)
Trial	51.2 (85)	57.5 (50)	46.3 (19)	63.5 (33)	56.5 (13)	60.0 (3)	53.9 (7)	50.0 (4)	80.0 (4)	54.5 (218)
Total	100.0 (166)	100.0 (87)	100.0 (41)	100.0 (52)	100.0 (23)	100.0 (5)	100.0 (13)	100.0 (8)	100.0 (5)	100.0 (400)

*Four cases are omitted involving victims of "other" races.

**The defendant's race is listed first, the victim's race second.

TABLE 18

PLEA VERSUS TRIAL BY COUNTY--ALL HOMICIDES

	Essex % (N)	Hudson % (N)	Camden % (N)	Passaic % (N)	Union % (N)	Mercer % (N)	Atlantic % (N)	Monmouth % (N)	Other % (N)	Total % (N)
Plea	35.6 (74)	78.6 (77)	75.7 (53)	59.6 (28)	50.0 (19)	28.6 (10)	54.8 (17)	29.0 (9)	57.2 (83)	52.6 (370)
Trial	64.4 (134)	21.4 (21)	24.3 (17)	40.4 (19)	50.0 (19)	71.4 (25)	45.2 (14)	71.0 (22)	42.8 (62)	47.4 (333)
Total	100.0 (208)	100.0 (98)	100.0 (70)	100.0 (47)	100.0 (38)	100.0 (35)	100.0 (31)	100.0 (31)	100.0 (145)	100.0 (703)

TABLE 19

PLEA VERSUS TRIAL BY COUNTY--DEATH-POSSIBLE CASES

	Essex % (N)	Hudson % (N)	Camden % (N)	Passaic % (N)	Union % (N)	Mercer % (N)	Atlantic % (N)	Monmouth % (N)	Other % (N)	Total % (N)
Plea	27.0 (31)	63.2 (24)	73.9 (34)	44.0 (11)	40.7 (11)	18.2 (4)	64.7 (11)	25.0 (5)	48.9 (46)	43.8 (177)
Trial	73.0 (84)	36.8 (14)	26.1 (12)	56.0 (14)	59.3 (16)	81.8 (18)	35.3 (6)	75.0 (15)	51.1 (48)	56.2 (227)
Total	100.0 (115)	100.0 (38)	100.0 (46)	100.0 (25)	100.0 (27)	100.0 (22)	100.0 (17)	100.0 (20)	100.0 (94)	100.0 (404)

TABLE 20

PLEA VERSUS TRIAL BY DEFENDANT'S RACE BY COUNTY--ALL HOMICIDES

	Essex			Hudson			Camden			Passaic			Union		
	B* % (N)	W* % (N)	H* % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)
Plea	38.2 (60)	35.7 (5)	24.3 (9)	78.3 (36)	75.0 (15)	81.3 (26)	73.5 (36)	75.0 (12)	100.0 (5)	59.1 (13)	57.1 (4)	61.1 (11)	45.5 (10)	50.0 (5)	66.7 (4)
Trial	61.8 (97)	64.3 (9)	75.7 (28)	21.7 (10)	25.0 (5)	18.8 (6)	26.5 (13)	25.0 (4)	0.0 (0)	40.9 (9)	42.9 (3)	38.9 (7)	54.5 (12)	50.0 (5)	33.3 (2)
Total	100.0 (157)	100.0 (14)	100.0 (37)	100.0 (46)	100.0 (20)	100.0 (32)	100.0 (49)	100.0 (16)	100.0 (5)	100.0 (22)	100.0 (7)	100.0 (18)	100.0 (22)	100.0 (10)	100.0 (6)

		Mercer			Atlantic			Monmouth			Other			Total		
		B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)
Plea		28.0 (7)	16.7 (1)	50.0 (2)	56.5 (13)	57.1 (4)	0.0 (0)	46.2 (6)	12.5 (2)	50.0 (1)	51.2 (21)	55.1 (43)	73.1 (19)	50.8 (202)	52.3 (91)	58.8 (77)
Trial		72.0 (18)	83.3 (5)	50.0 (2)	43.5 (10)	42.9 (3)	100.0 (1)	53.8 (7)	87.5 (14)	50.0 (1)	48.8 (20)	44.9 (35)	26.9 (7)	49.2 (196)	47.7 (83)	41.2 (77)
Total		100.0 (25)	100.0 (6)	100.0 (4)	100.0 (23)	100.0 (7)	100.0 (1)	100.0 (13)	100.0 (16)	100.0 (2)	100.0 (41)	100.0 (78)	100.0 (26)	100.0 (398)	100.0 (174)	100.0 (131)

*"B" refers to blacks; "W" refers to whites; and "H" refers to Hispanics.

TABLE 21

PLEA VERSUS TRIAL BY VICTIM'S RACE BY COUNTY--ALL HOMICIDES*

		Essex			Hudson			Camden			Passaic			Union		
		B** % (N)	W** % (N)	H** % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)
Plea		40.4 (59)	15.6 (5)	33.3 (10)	81.1 (30)	66.7 (18)	85.3 (29)	73.3 (33)	78.9 (15)	83.3 (5)	66.7 (16)	25.0 (2)	66.7 (10)	50.0 (9)	38.5 (5)	71.4 (5)
Trial		59.6 (87)	84.4 (27)	66.7 (20)	18.9 (7)	33.3 (9)	14.7 (5)	26.7 (12)	21.1 (4)	16.7 (1)	33.3 (8)	75.0 (6)	33.3 (5)	50.0 (9)	61.5 (8)	28.6 (2)
Total		100.0 (146)	100.0 (32)	100.0 (30)	100.0 (37)	100.0 (27)	100.0 (34)	100.0 (45)	100.0 (19)	100.0 (6)	100.0 (24)	100.0 (8)	100.0 (15)	100.0 (18)	100.0 (13)	100.0 (7)

		Mercer			Atlantic			Monmouth			Other			Total		
		B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)
Plea		29.2 (7)	20.0 (2)	100.0 (1)	57.1 (8)	56.3 (9)	0.0 (0)	36.4 (4)	26.3 (5)	0.0 (0)	73.3 (22)	55.4 (51)	52.6 (10)	53.9 (188)	47.5 (112)	61.4 (70)
Trial		70.8 (17)	80.0 (8)	0.0 (0)	42.9 (6)	43.8 (7)	100.0 (1)	63.6 (7)	73.7 (14)	100.0 (1)	26.7 (8)	44.6 (41)	47.4 (9)	46.1 (161)	52.5 (124)	38.6 (44)
Total		100.0 (24)	100.0 (10)	100.0 (1)	100.0 (14)	100.0 (16)	100.0 (1)	100.0 (11)	100.0 (19)	100.0 (1)	100.0 (30)	100.0 (92)	100.0 (19)	100.0 (349)	100.0 (236)	100.0 (114)

*The table excludes four cases of "other" race.

**"B" refers to blacks; "W" refers to whites; and "H" refers to Hispanics.

TABLE 22

PLEA VERSUS TRIAL BY DEFENDANT'S RACE BY COUNTY--DEATH-POSSIBLE CASES

	Essex			Hudson			Camden			Passaic			Union		
	B* % (N)	W* % (N)	H* % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)
Plea	31.3 (26)	25.0 (2)	12.5 (3)	70.0 (14)	57.1 (4)	54.5 (6)	69.7 (23)	80.0 (8)	100.0 (3)	33.3 (4)	50.0 (2)	55.6 (5)	41.2 (7)	28.6 (2)	66.7 (2)
Trial	68.7 (57)	75.0 (6)	87.5 (21)	30.0 (6)	42.9 (3)	45.5 (5)	30.3 (10)	20.0 (2)	0.0 (0)	66.7 (8)	50.0 (2)	44.4 (4)	58.8 (10)	71.4 (5)	33.3 (1)
Total	100.0 (83)	100.0 (8)	100.0 (24)	100.0 (20)	100.0 (7)	100.0 (11)	100.0 (33)	100.0 (10)	100.0 (3)	100.0 (12)	100.0 (4)	100.0 (9)	100.0 (17)	100.0 (7)	100.0 (3)

	Mercer			Atlantic			Monmouth			Other			Total		
	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)
Plea	17.6 (3)	0.0 (0)	50.0 (1)	75.0 (9)	40.0 (2)	--- ---	42.9 (3)	9.1 (1)	50.0 (1)	45.2 (14)	40.9 (18)	73.7 (14)	44.4 (103)	39.4 (39)	47.9 (35)
Trial	82.4 (14)	100.0 (3)	50.0 (1)	25.0 (3)	60.0 (3)	--- ---	57.1 (4)	90.9 (10)	50.0 (1)	54.8 (17)	59.1 (26)	26.3 (5)	55.6 (129)	60.6 60)	52.1 (38)
Total	100.0 (17)	100.0 (3)	100.0 (2)	100.0 (12)	100.0 (5)	--- ---	100.0 (7)	100.0 (11)	100.0 (2)	100.0 (31)	100.0 (44)	100.0 (19)	100.0 (232)	100.0 (99)	100.0 (73)

*"B" refers to blacks; "W" refers to whites; and "H" refers to Hispanics.

TABLE 23

PLEA VERSUS TRIAL BY VICTIM'S RACE BY COUNTY--DEATH-POSSIBLE CASES*

		Essex			Hudson			Camden			Passaic			Union		
		B** % (N)	W** % (N)	H** % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)
Plea		32.9 (23)	15.4 (4)	21.1 (4)	84.6 (11)	38.5 (5)	66.7 (8)	64.3 (18)	92.9 (13)	75.0 (3)	45.5 (5)	33.3 (2)	50.0 (4)	41.7 (5)	20.0 (2)	80.0 (4)
Trial		67.1 (47)	84.6 (22)	78.9 (15)	15.4 (2)	61.5 (8)	33.3 (4)	35.7 (10)	7.1 (1)	25.0 (1)	54.5 (6)	66.7 (4)	50.0 (4)	58.3 (7)	80.0 (8)	20.0 (1)
Total		100.0 (70)	100.0 (26)	100.0 (19)	100.0 (13)	100.0 (13)	100.0 (12)	100.0 (28)	100.0 (14)	100.0 (4)	100.0 (11)	100.0 (6)	100.0 (8)	100.0 (12)	100.0 (10)	100.0 (5)

		Mercer			Atlantic			Monmouth			Other			Total		
		B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)	B % (N)	W % (N)	H % (N)
Plea		18.8 (3)	0.0 (0)	100.0 (1)	100.0 (4)	53.8 (7)	--- ---	50.0 (3)	14.3 (2)	--- ---	68.4 (13)	45.9 (28)	50.0 (5)	47.5 (85)	38.9 (63)	49.2 (29)
Trial		81.3 (13)	100.0 (5)	0.0 (0)	0.0 (0)	46.2 (6)	--- ---	50.0 (3)	85.7 (12)	--- ---	31.6 (6)	54.1 (33)	50.0 (5)	52.5 (94)	61.1 (99)	50.8 (30)
Total		100.0 (16)	100.0 (5)	100.0 (1)	100.0 (4)	100.0 (13)	--- ---	100.0 (6)	100.0 (14)	--- ---	100.0 (19)	100.0 (61)	100.0 (10)	100.0 (179)	100.0 (162)	100.0 (59)

*The table excludes four cases of "other" race.

**"B" refers to blacks; "W" refers to whites; "H" refers to Hispanics.

TABLE 24

ESSEX COUNTY:
PLEA VERSUS TRIAL BY RACE OF DEFENDANT/RACE OF VICTIM--ALL HOMICIDES

	Black/ Black % (N)	White/ White % (N)	Hispanic/ Hispanic % (N)	Black/ White % (N)	Hispanic/ White % (N)	White/ Black % (N)	Black/ Hispanic % (N)	Hispanic/ Black % (N)	White/ Hispanic % (N)	Total % (N)
Plea	41.0 (55)	28.6 (2)	29.2 (7)	16.7 (3)	0.0 (0)	33.3 (2)	40.0 (2)	33.3 (2)	100.0 (1)	35.6 (74)
Trial	59.0 (79)	71.4 (5)	70.8 (17)	83.3 (15)	100.0 (7)	66.7 (4)	60.0 (3)	66.7 (4)	0.0 (0)	64.4 (134)
	100.0 (134)	100.0 (7)	100.0 (24)	100.0 (18)	100.0 (7)	100.0 (6)	100.0 (5)	100.0 (6)	100.0 (1)	100.0 (208)

TABLE 25

ESSEX COUNTY:
PLEA VERSUS TRIAL BY RACE OF DEFENDANT/RACE OF VICTIM--DEATH-POSSIBLE CASES

	Black/ Black % (N)	White/ White % (N)	Hispanic/ Hispanic % (N)	Black/ White % (N)	Hispanic/ White % (N)	White/ Black % (N)	Black/ Hispanic % (N)	Hispanic/ Black % (N)	White/ Hispanic % (N)	Total % (N)
Plea	33.9	25.0	14.3	18.8	0.0	25.0	40.0	25.0	---	27.0
	(21)	(1)	(2)	(3)	(0)	(1)	(2)	(1)	---	(31)
Trial	66.1	75.0	85.7	81.3	100.0	75.0	60.0	75.0	---	73.0
	(41)	(3)	(12)	(13)	(6)	(3)	(3)	(3)	---	(84)
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	---	100.0
	(62)	(4)	(14)	(16)	(6)	(4)	(5)	(4)	---	(115)

TABLE 26

HUDSON COUNTY:
PLEA VERSUS TRIAL BY RACE OF DEFENDANT/RACE OF VICTIM--ALL HOMICIDES

	Black/ Black % (N)	White/ White % (N)	Hispanic/ Hispanic % (N)	Black/ White % (N)	Hispanic/ White % (N)	White/ Black % (N)	Black/ Hispanic % (N)	Hispanic/ Black % (N)	White/ Hispanic % (N)	Total % (N)
Plea	82.9 (29)	69.2 (9)	83.3 (20)	50.0 (3)	75.0 (6)	50.0 (1)	80.0 (4)	--- ---	100.0 (5)	78.6 (77)
Trial	17.1 (6)	30.8 (4)	16.7 (4)	50.0 (3)	25.0 (2)	50.0 (1)	20.0 (1)	--- ---	0.0 (0)	21.4 (21)
	100.0 (35)	100.0 (13)	100.0 (24)	100.0 (6)	100.0 (8)	100.0 (2)	100.0 (5)	--- ---	100.0 (5)	100.0 (98)

TABLE 27

HUDSON COUNTY:
PLEA VERSUS TRIAL BY RACE OF DEFENDANT/RACE OF VICTIM--DEATH-POSSIBLE CASES

	Black/ Black % (N)	White/ White % (N)	Hispanic/ Hispanic % (N)	Black/ White % (N)	Hispanic/ White % (N)	White/ Black % (N)	Black/ Hispanic % (N)	Hispanic/ Black % (N)	White/ Hispanic % (N)	Total % (N)
Plea	84.6	50.0	66.7	40.0	0.0	---	50.0	---	100.0	63.2
	(11)	(3)	(6)	(2)	(0)	---	(1)	---	(1)	(24)
Trial	15.4	50.0	33.3	60.0	100.0	---	50.0	---	0.0	36.8
	(2)	(3)	(3)	(3)	(2)	---	(1)	---	(0)	(14)
	100.0	100.0	100.0	100.0	100.0	---	100.0	---	100.0	100.0
	(13)	(6)	(9)	(5)	(2)	---	(2)	---	(1)	(38)

TABLE 28

CAMDEN COUNTY:
PLEA VERSUS TRIAL BY RACE OF DEFENDANT/RACE OF VICTIM--ALL HOMICIDES

	Black/ Black % (N)	White/ White % (N)	Hispanic/ Hispanic % (N)	Black/ White % (N)	Hispanic/ White % (N)	White/ Black % (N)	Black/ Hispanic % (N)	Hispanic/ Black % (N)	White/ Hispanic % (N)	Total % (N)
Plea	70.7 (29)	75.0 (9)	100.0 (4)	85.7 (6)	--- ---	100.0 (3)	100.0 (1)	100.0 (1)	0.0 (0)	75.7 (53)
Trial	29.3 (12)	25.0 (3)	0.0 (0)	14.3 (1)	--- ---	0.0 (0)	0.0 (0)	0.0 (0)	100.0 (1)	24.3 (17)
	100.0 (41)	100.0 (12)	100.0 (4)	100.0 (7)	--- ---	100.0 (3)	100.0 (1)	100.0 (1)	100.0 (1)	100.0 (70)

TABLE 29

CAMDEN COUNTY:
PLEA VERSUS TRIAL BY RACE OF DEFENDANT/RACE OF VICTIM--DEATH-POSSIBLE CASES

	Black/ Black % (N)	White/ White % (N)	Hispanic/ Hispanic % (N)	Black/ White % (N)	Hispanic/ White % (N)	White/ Black % (N)	Black/ Hispanic % (N)	Hispanic/ Black % (N)	White/ Hispanic % (N)	Total % (N)
Plea	63.0 (17)	88.9 (8)	100.0 (2)	100.0 (5)	--- ---	--- ---	100.0 (1)	100.0 (1)	0.0 (0)	73.9 (34)
Trial	37.0 (10)	11.1 (1)	0.0 (0)	0.0 (0)	--- ---	--- ---	0.0 (0)	0.0 (0)	100.0 (1)	26.1 (12)
	100.0 (27)	100.0 (9)	100.0 (2)	100.0 (5)	--- ---	--- ---	100.0 (1)	100.0 (1)	100.0 (1)	100.0 (46)

TABLE 30

MONMOUTH COUNTY:
PLEA VERSUS TRIAL BY RACE OF DEFENDANT/RACE OF VICTIM--ALL HOMICIDES

	Black/ Black % (N)	White/ White % (N)	Hispanic/ Hispanic % (N)	Black/ White % (N)	Hispanic/ White % (N)	White/ Black % (N)	Black/ Hispanic % (N)	Hispanic/ Black % (N)	White/ Hispanic % (N)	Total % (N)
Plea	33.3	14.3	---	75.0	0.0	0.0	---	100.0	0.0	29.0
	(3)	(2)	---	(3)	(0)	(0)	---	(1)	(0)	(9)
Trial	66.7	85.7	---	25.0	100.0	100.0	---	0.0	100.0	71.0
	(6)	(12)	---	(1)	(1)	(1)	---	(0)	(1)	(22)
	100.0	100.0	---	100.0	100.0	100.0	---	100.0	100.0	100.0
	(9)	(14)	---	(4)	(1)	(1)	---	(1)	(1)	(31)

TABLE 31

MONMOUTH COUNTY:
PLEA VERSUS TRIAL BY RACE OF DEFENDANT/RACE OF VICTIM--DEATH-POSSIBLE CASES

	Black/ Black % (N)	White/ White % (N)	Hispanic/ Hispanic % (N)	Black/ White % (N)	Hispanic/ White % (N)	White/ Black % (N)	Black/ Hispanic % (N)	Hispanic/ Black % (N)	White/ Hispanic % (N)	Total % (N)
Plea	40.0	9.1	---	50.0	0.0	---	---	100.0	---	25.0
	(2)	(1)	---	(1)	(0)	---	---	(1)	---	(5)
Trial	60.0	90.9	---	50.0	100.0	---	---	0.0	---	75.0
	(3)	(10)	---	(1)	(1)	---	---	(0)	---	(15)
	100.0	100.0	---	100.0	100.0	---	---	100.0	---	100.0
	(5)	(11)	---	(2)	(1)	---	---	(1)	---	(20)

Another possibility is that characteristics of the homicide incident and the victims or defendants may have jointly influenced the progression of cases, explaining the seemingly disparate patterns in case advancement observed here.

E. *Logistic Regression Analysis*

Regression analysis is a statistical technique which provides information on the types and degrees of the effects of one or more independent variables on a dependent variable. An *independent* variable is a characteristic or attribute that has a presumed influence on the *dependent* variable, which is the characteristic or decision-making outcome that a study attempts to explain or predict. For example, in the present study the aim is to identify and measure the effects of selected independent variables, such as the personal characteristics of the homicide defendant and victim (*e.g.*, race, age, and gender), on one of a number of dependent variables, such as whether the prosecutor decided to serve a notice of factors, thereby making the case death-eligible, or offer a plea, thereby removing a case from the capital case processing system.

In a simple regression analysis, one independent variable, such as the defendant's race, is used to explain numerically the outcome of one dependent variable, such as whether or not the prosecutor served a notice of factors. This numerical calculation is called the variable's coefficient. In a multiple regression analysis, two or more independent variables are used to explain one dependent variable. A coefficient is calculated for each independent variable to determine two of its main features: (1) the numerical magnitude, which is the weight of that variable in influencing the dependent variable, and (2) the direction of the variable's effect, which represents whether the variable increases or decreases the chances that the outcome will occur.

Regressions are calculated ("estimated") in such a way as to produce an equation. This equation comprises a set of coefficients, each of which corresponds to an independent variable. The regression equation enables one to predict or explain a dependent variable, or decision-making outcome, based upon its associations with the independent variables selected for study and included in that equation. For example, in the present context, the regression equation permits the prediction of whether a defendant with specific characteristics is more likely to fall into one of two catego-

ries, such as going to trial or receiving a plea.

The multiple regression analysis reported here was designed to assess the relative strength of many independent variables in explaining separately two decision-making outcomes: the plea/trial decision and the decision to serve a notice of factors. The contribution of each independent variable to the decision-making outcome is identified separately, given the contributions of the other independent variables that are similarly related to the outcome. Using this method, the effect of one variable can be discerned while adjusting or "controlling" for the effects of all other significant variables.

Regression analysis allows us to look at the effect of a particular independent variable of interest while holding all other significant influences constant. For example, the influence of a defendant's race on whether a prosecutor served a notice of factors can be assessed while controlling for other potentially influential independent variables, such as the presence of a prior conviction record of the defendant or the presence of a contemporaneous felony. Or, the influence of the victim's race on the serving of a notice of factors is measured after controlling statistically for the presence or absence of a statutory aggravating factor or a contemporaneous felony. In multiple regression analysis, many independent variables can be simultaneously controlled. For example, the effect of the defendant's race can be ascertained when all other significant independent variables are statistically set equal, *i.e.*, the cases differ with respect only to the race of the defendant.

Various regression techniques have been developed to examine the simultaneous influence of multiple variables on a specific outcome event, such as the serving of a notice of factors.[690] Here each dependent variable is measured in the form of a two-value, or dichotomous, scale representing alternative case outcomes. For example, a homicide case can be processed either by receiving a plea or by going to trial. Alternatively, a homicide case which is death-possible can be processed as either death-eligible or not death-eligible by the serving of, or the failure to serve, a notice of factors, respectively.[691] When one wants to examine the influence of

690. Selection of the most appropriate regression technique depends upon several criteria. In the present study, these include the measurement scale used to quantify the dependent and independent variables and the way in which the values of these variables are arrayed, or distributed among the homicide cases.

691. Some of the independent variables to be examined are also two-valued. For in-

several independent variables and the dependent variable is a two-valued outcome, the preferred regression technique is the logistic form.[692] Logistic regression analysis provides a numerical value for the separate effect of each independent variable on the dependent variable. The calculated effect, or coefficient, can be interpreted as the quantitative influence, either positive or negative, that the presence of that case characteristic has on the "odds" that a particular case outcome will occur relative to the absence of that characteristic. For example, a coefficient can be generated which indicates whether and to what extent the presence of a white victim increases the "odds" of a case going to trial in contrast to cases which do not have white victims but, rather, Hispanic victims.

An odds, commonly referred to in gambling and other sporting contexts, is a numerical way of representing the chance that an event or outcome will occur. Odds are a way to characterize the probability of an event, such as the probability that a defendant will go to trial or have a notice of factors served in his case. Odds

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stance, the defendant was either a male or a female; either the case involved a co-defendant or it did not; the defendant either was on probation or parole at the time of the homicide or was not; either there was a sexual assault or there was not.

Other independent variables to be examined are "equal interval" rather than two-valued. These variables can have any integer value over some range of possible values (*i.e.*, 0, 1, 2, 3, etc.). The interval between each pair of adjacent integers is equal, hence, the term "equal interval." For example, the defendant's age, in years, at the time of the homicide assumes an integer value. Similarly, variables like the number of statutory aggravating or mitigating factors, and the number of prior arrests or convictions, and the number of contemporaneous offenses also assume such values.

The distribution of a variable represents the relative frequency with which the cases in a study have the values which define that variable. In the case of a two-value variable such as the defendant's gender, the distribution is simply the percentages of male and female defendants. In the case of an interval variable, the distribution pertains to the percentage of cases which fall at each integer value, for example, the percentage of defendants who are 20 years of age, the percentage who are 21 years of age, and so forth. The array of these percentages is the distribution of these variables with respect to the study cases.

692. A statistical feature of logistic regression which makes it especially useful is that, unlike another technique that might be used in the present context (discriminant function analysis), logistic regression does not require that the independent variables have a specific distribution.

For a more detailed discussion of logistic regression and related statistical procedures, *see, e.g.*, Halperin, Blackwelder & Verter, *Estimation of a Multivariate Logistic Risk Function: A Comparison of the Discriminant Function and Maximum Likelihood Approaches*, 24 J. CHRONIC DISEASES 125-58 (1971); E. HANUSHEK & J. JACKSON, STATISTICAL METHODS FOR SOCIAL SCIENTISTS (1977); G. MADDALA, LIMITED-DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS (1983); and Aldrich & Nelson, *Linear Probability, Logit and Probit Models*, in QUANTITATIVE APPLICATIONS IN THE SOCIAL SCIENCES (1984).

are convertible directly into probabilities.[693] The regression analysis reported here identifies which case characteristics increased the odds that two specific types of case outcomes would occur: (1) a case would go to trial rather than be disposed of by a plea, and (2) a death-possible case would be declared death-eligible, by the prosecutor serving a notice of statutory aggravating factors. Approximately one hundred independent variables were examined separately with respect to each of these two key case processing outcomes.[694]

Our search for influential independent variables consisted of two main analytical stages. The first stage involved a variable screening procedure. Given the large number of independent variables under investigation, using all of these variables at one time as elements of a single logistic regression equation, even with this large data set, would have introduced some estimation imprecision into the analysis.[695] For this reason, a subset of the more than one hundred independent variables were analyzed using a logistic regression procedure known as "backward selection."[696]

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693. The probability corresponding to a stated odds is equal to the odds divided by one plus that odds. The probability corresponding to a 3-to-1 odds is equal to 3 divided by 1 plus 3, which produces a probability of .75 (i.e., 3/ 1 plus 3 = ¾). The probability corresponding to the even odds of 1-to-1 is equal to 1 divided by 1 plus 1, which produces a probability of .50 (i.e., ½ or a "50-50" chance, which is even odds).

A probability is converted into an odds by dividing the stated probability by 1 minus that probability. For instance, a probability of .75 is converted into "3-to-1" odds by dividing .75 by .25, i.e., 1.00 minus .75 = .25.

694. A complete listing of these variables and their frequency distributions is contained in Appendix C* of Part II of the *Interim Report*, *supra* note 3, on file at the Rutgers-Newark Law Library. The data set includes detailed information on the characteristics of the defendant and victim, information on the circumstances of the offense, and data on procedural case processing.

695. The appendices in the *Interim Report*, *supra* note 3, include a description of the data and a more detailed description of this screening procedure. For this logistic regression analysis, over 100 independent variables were selected for examination.

The number of cases under analysis places a constraint upon the number of independent variables which can be included in the logistic regression equation. Examining a large number of variables relative to the number of cases introduces some unreliability into the analysis. With many variables under simultaneous examination, the number of homicide cases might be insufficient to represent the many possible combinations of case characteristics defined by the independent variables. Consequently, some variable combinations will not be represented by enough cases to yield reliable patterns. To guard against the imprecision introduced by too many variables relative to the number of cases, some independent variables were screened; that is, they were examined preliminarily using the logistic regression procedure to select that subset which was significantly related to the outcome measure.

696. This procedure involves searching through a large number of independent variables

This procedure functions to select variables that are statistically significant, creating a more manageable set of variables which can be subjected to further analysis.

The second stage involved the examination of two kinds of independent variables: (1) those independent variables required for inclusion because they were found by prior research to be related to capital case processing and (2) those independent variables which must be evaluated as sets.[697] These two classes of independent variables were excluded from the initial screening stage because we wanted to calculate explicitly their numerical effects. To make these calculations, these variables had to be formally introduced or forced into the estimated logistic regression equation. Independent variables forced into the logistic regression equation at the second stage were evaluated along with those variables found significant at the first stage to determine which variables were significantly associated with the dependent variable. Those independent variables found significant (p-val. $<$ .05) were then included in the final logistic regression equations. Six variable sets were always retained in the second stage and in the final logistic regression analysis for explicit review: the race of the defendant, race of the victim, county of jurisdiction, type of prior conviction record, all statutory mitigating factors, and those statutory aggravating factors for which there were enough cases to sustain a reliable analysis.

1. The Plea/Trial Decision

Table 32 displays the logistic regression results for the plea versus trial decision-making outcome for the 404 death-possible homicide cases. The effects of the independent variables in the

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to determine which variables are statistically most closely associated with the dependent variable of interest, for example, the decision to serve a notice of factors. Variables that were not significantly associated (in the present instance, at "p-val. $<$ .05") with the dependent-outcome variable were deleted sequentially from the initial variable set, with the least significant variables deleted first, until only those independent variables remained which were significantly related to the outcome variable. For documentation of this backward selection procedure, see Harrell, *The Logist Procedure*, in SUGI SUPPLEMENTAL LIBRARY USER'S GUIDE, VERSION 5, 269 (1986).

697. Two types of variables had to be evaluated as sets: interaction variables and variables with missing or unknown values. Examples of the first type include drug or alcohol addiction at the time of the homicide, and their interaction effects, and the race of the defendant, the race of the victim and their interactions. Examples of the second type include: "victim's employment status" and "victim occupation."

table are interpreted in terms of their influence on the odds that the defendant went to trial. A positive value of a coefficient means that the independent variable was positively associated with, or increased, the odds of going to trial. A negative coefficient indicates the opposite effect. Statistically significant and substantively important case processing variables are listed in column 1. The corresponding numerical effects of those independent variables, their coefficients, appear in column 2, controlling for the effects of all other independent variables in the table. Column 3 lists the statistical measure of the association, the chi-square value, between the designated independent variable and the odds of a trial proceeding.[698] Between one and four asterisks appear next to some of the chi-square values in Table 32. The asterisks represent the level of statistical significance of the chi-square values.[699]

Column 4 in Table 32, labeled "odds multiplier," provides an interpretation of the coefficient value of the indicated independent variable, by expressing the odds associated with that coefficient. As an illustration, consider white victim's race. When the coefficient value is converted into the odds multiplier, the value 2.89 is obtained. This number implies that the odds are, on the average, nearly three times greater that a homicide involving a white victim will go to trial than a homicide involving a Hispanic victim, after controlling for the effects of all other independent variables listed in the table.[700]

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698. The higher the chi-square value, the more closely that variable was associated with the presence of a trial, in the sense of improving our ability to explain the presence of a trial outcome. The relative degree of association of the independent variables with the dependent variable can be ranked from high to low on the basis of the chi-square value. Higher values are more closely associated with the dependent variable.

699. A significance level indicates the statistical probability of having calculated an association at the listed chi-square level even if no association actually exists between the independent variable and the dependent variable. For example, after the variable victim's race "White" one asterisk appears which corresponds to a "p-val. $<$ .10" next to the chi-square value of 3.77. The p-val. of $<$ .10 implies that one might expect to observe the indicated level of association between white victim's race and going to trial fewer than 10 times in one hundred even if no such statistical association actually existed.

700. Whenever a variable belongs to a set of related variables, such as the three victim race variables, one variable from the set is omitted from the table to enable a clear comparison of each variable in the table with a single omitted comparison category. This omitted comparison category is the baseline, or zero magnitude category against which the effects of the related variables in the set are contrasted. For each set of related independent variables, the omitted comparison category appears as the last variable in the set and is indicated by "OMITTED."

TABLE 32

PLEA VERSUS TRIAL FOR DEATH-POSSIBLE CASES[a]:
LOGISTIC REGRESSION

(1) Independent Variable		(2) Coefficient	(3) Chi-Square	(4) Odds Multiplier[b]
County of Jurisdiction				
Atlantic [ATLANTIC][c]		-1.40	2.64	---
Essex [ESSEX]		3.01	27.12****	20.29
Hudson [HUDSON]		.07	.01	---
Mercer [MERCER]		3.84	17.13****	46.53
Monmouth [MONMOUTH]		2.59	9.23***	13.33
Passaic [PASSAIC]		1.34	3.33*	3.82
Union [UNION]		1.79	5.79**	5.99
All Other Counties [OTHERCO]		1.18	4.02**	3.25
Camden [CAMDEN]	OMITTED	---	---	---
Defendant's Race				
White [DWHITE]		- .70	1.45	---
Black [DBLACK]		- .20	.15	---
Hispanic [DHISPANI]	OMITTED	---	---	---
Victim's Race				
White [VWHITE]		1.06	3.77*	2.89
Black [VBLACK]		- .59	1.17	---
Hispanic [VHISPAN]	OMITTED	---	---	---
Year of Homicide				
1982 [YROFF82]		1.51	6.74***	4.53
1983 [YROFF83]		1.44	8.04***	4.22
1984 [YROFF84]		1.74	10.25***	5.70
1985 [YROFF85]	OMITTED	---	---	---
1986 [YROFF86]	OMITTED	---	---	---

TABLE 32 (cont.)

(1) Independent Variable	(2) Coefficient	(3) Chi-Square	(4) Odds Multiplier[b]
Statutory Aggravating Factors			
"a": Prior Murder [AGGFACTA]	1.06	.98	---
"b": Grave Risk of Death [AGGFACTB]	1.63	16.85****	5.10
"c": Outrageously or Wantonly Vile [AGGFACTC]	.50	1.88	---
"d": In Expectation of Pecuniary Value [AGGFACTD]	.16	.05	---
"f": Escape Detection [AGGFACTF]	1.19	5.56**	3.29
"g": Felony [AGGFACTG]	.48	1.64	---
Statutory Mitigating Factors			
"a": Extreme Mental Disturbance [MITFACTA]	.20	.28	---
"b": Victim Participated in Conduct [MITFACTB]	- .01	<.00	---
"c": Age of Defendant [MITFACTC]	.56	2.95*	1.75
"d": Capacity to Appreciate Wrongfulness Impaired [MITFACTD]	- .20	.32	---
"e": Duress [MITFACTE]	- .83	3.56*	.44
"f": No Significant History of Prior Criminal Activity [MITFACTF]	-1.14	7.68**	.32
"g": Substantial Assistance to the State [MITFACTG]	-1.76	11.72****	.17
"h": Any Other [MITFACTH]	-1.20	3.95**	.30
Defendant's Type of Prior Conviction Record			
Homicide or Other Felony [PRIORFEL]	- .06	.02	---
Nonfelony [PRINOFEL]	- .37	.38	---
No Prior Conviction [ACONVNO] OMITTED	---	---	---

TABLE 32 (cont.)

(1) Independent Variable	(2) Coefficient	(3) Chi-Square	(4) Odds Multiplier[b]
Defendant's Age at First Conviction			
≤14 [ACONV14]	.35	.17	---
15-17 [ACONV17]	.33	.20	---
18-25 [ACONV25]	- .13	.04	---
≥26 [ACONVOTH]	1.68	3.05*	5.37
Unknown [ACONVUN]	- .97	2.41	---
No Prior Conviction [ACONVNO] OMITTED	---	---	---
Codefendant Present [CODECHRG]	- .90	5.38**	.41
Number of Knife or Firearm Wounds			
1 [NUMWND1]	- .29	.43	---
2-10 [NUMWND2]	- .84	4.35**	.43
≥11 [NUMWND11]	- .18	.10	---
No Wounds [NOGUNKNI] OMITTED	---	---	---
Defendant's Addiction at Time of Homicide			
Drugs [ADDIDRUG]	- .82	3.80*	.44
Alcohol [ADDIALCO]	- .43	.96	---
Not Addict [ADDINONE] OMITTED	---	---	---
Homicide Intentional or Planned [INTENT]	1.06	6.92***	2.89
Defense Theory of Case			
Total Denial or Denial of Involvement [DEFDEN]	1.88	21.17****	6.55
Denial of Intent to Kill [DEFNOINT]	- .68	2.52	---
Self-Defense [DEFSELF] OMITTED	---	---	---
Defense Counsel Representation			
Pooled Attorney [REPPOOL]	.50	1.61	---
Private Attorney [REPPRIV]	1.85	14.67****	6.36
Public Defender [REPPD] OMITTED	---	---	---

TABLE 32 (cont.)

(1) Independent Variable		(2) Coefficient	(3) Chi-Square	(4) Odds Multiplier[b]
Intercept		-2.40	4.54**	---
R^2	.23			
-2 Loglikelihood	331.37			

a. These results are based on the 404 death-possible cases. The dependent variable, "PLEATRIA," is defined in appendix C.I.1 of the Interim Report.

b. The odds multiplier indicates how many times, on the average, a defendant's odds of going to trial, as opposed to being granted a plea, increase or decrease by the presence of the independent variable in column 1, after adjusting for the effects of the other independent variables in the logistic regression equation. For example, if the odds multiplier is 2.00, then the odds are, on the average, twice as great that this defendant will go to trial than a defendant without that characteristic. Alternatively, if the odds multiplier is .50, then the odds, on the average, are half as great that this defendant will go to trial than a defendant without that characteristic.

   The odds multiplier is calculated only for those independent variables which were significant at P-val. < .10. A dash in this column indicates that the variable was nonsignificant or was the omitted category.

   To calculate the odds multiplier, the coefficient value listed in column 2 is "exponentiated" by the natural anti-log function, "e^b": "e" is the exponential base (approximately equal to 2.72) and "b" is the coefficient value listed in column 2. The value "e" raised to the power "b" yields the odds multiplier value.

c. Indicates the label assigned to this variable in the logistic regression estimation procedure. See appendix C.II of the Interim Report for the definition of this and all other independent variables.

*P-val. < .10
**P-val. < .05
***P-val. < .01
****P-val. < .001

Table 32 shows significant race and county effects on the risk of a trial.[701] The effect of race on the odds of going to trial are restricted to the main effect of the race of the victim.[702] The odds of going to trial do not appear to depend on either the defendant's race or the combination of the defendant's race and the victim's race.

Our analysis has confirmed the absence of significant race interaction effects. The direct impact of the victim's race on the decision to go to trial can therefore be interpreted in a straightforward way: the odds that a homicide involving a white victim would go to trial were nearly three times greater than for the Hispanic comparison category and more than five times greater than for the black comparison category.[703]

One can alternatively express the relative risk of going to trial by converting the odds corresponding to each victim race category into a probability. To do so requires that all other independent variables in the logistic regression be taken into account, or adjusted for, with respect to their influence on the dependent variable. For example, one might want to know what the probability of going to trial is for cases involving white victims under some spec-

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701. These results are consistent with earlier regression results reported in our January *Preliminary Report*. Regression tables are included in the *Preliminary Report* at 154 w *et. seq.* The *Preliminary Report* includes regression analyses of the plea/trial decision and the decision to serve a notice of factors for 568 cases.

702. To assess the impact of the combination of the race of the defendant and the victim on the plea versus trial outcome, race interaction variables were introduced into the plea/trial logistic regression equation. The regression equation was then reestimated. If the presence of the race interaction variables in the logistic equation significantly improved the ability of that equation to explain the plea versus trial decision, then the difference between the statistical criterion of the "loglikelihoods" of the two equations would be large, yielding a statistically significant result. One determines whether the two logistic equations are statistically dissimilar in their comparative abilities to explain the outcome variable by (1) calculating minus 2 times the loglikelihood of each logistic equation, (2) subtracting these figures, and (3) determining whether this difference, whose distribution is approximately chi-square, is statistically significant at a prespecified level, such as "p-val. $< .05$," the criterion used throughout this discussion. The "degrees of freedom" corresponding to this significance test is equal to the difference between the degrees of freedom of the two logistic regression equations. In the present case, this procedure for determining statistical significance yields a nonsignificant result (chi-square = 6.83, df =4, p-val. $> .05$), indicating the absence of influential race interaction effects in the plea/trial regression analysis.

703. The effect of the defendant race and victim race on the overall explanatory power of the logistic equation was also evaluated. When the victim race variables and the defendant race variables were removed in turn from the equation, the results were expectedly significant (chi-square = 13.05, df = 2, p-val. $< .01$) and nonsignificant (chi-square = 1.60, df = 2, p-val. $> .05$), respectively.

ified combination of case characteristics represented by the independent variables appearing in the final logistic regression equation.[704] One natural combination involves generating an average case profile and asking what the additional impact of the victim's race is on this average case. Among the death-possible cases, when defined in terms of their average characteristics, the probabilities that a defendant will go to trial when the victim is black, Hispanic, and white are .41, .56, and .79, respectively. These are substantial disparities and they are greater than those observed in the unadjusted probabilities.[705]

There also appear to be substantial differences across counties in the risk that a defendant will go to trial, even after controlling for other influences. With the exceptions of Atlantic and Hudson Counties, all counties exhibit significantly higher odds than Camden County, the comparison category, that a death-possible case will go to trial. The most noteworthy contrast indicates that a case originating in Mercer County sustains nearly fifty times

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704. The procedure for generating an average case profile involves setting all independent variables in the logistic regression equation, except for the subset comprising the victim's race, equal to their sample means. We can then compare individual race effects on the outcome measure while controlling for the effects of the other significant independent variables, because each independent variable is set equal to its average value. Specifically, one executes the following steps: (1) multiply the coefficient of each independent variable times its corresponding sample mean, (2) sum these products, with the exception of the victim race variables, including in the sum the intercept of the logistic regression equation. When this sum is exponentiated, it yields the odds of going to trial for an "average" homicide case involving an Hispanic victim. This initial exponentiated sum always yields the odds associated with the omitted category, whichever one that might be. This figure is then converted into a probability according to the operation outlined earlier. See *supra* note 693. To calculate the probability that an "average" white victim or black victim case will go to trial, the coefficients corresponding to white victim and black victim cases, respectively, are each separately added to the original sum of the products of the variable coefficients and their sample means. As was the case for the Hispanic example, each of these results is then exponentiated and converted into a probability. Importantly, the ranking of the probabilities associated with the three categories of victim races would be preserved no matter which race category is chosen to be the omitted category.

705. Compare these three victim race probabilities, which are statistically adjusted for the average influence of the other significant independent variables, with their unadjusted percentage analogues in panel B of Table 17, which are .51, .51, and .59, respectively, when transformed into probabilities. The unadjusted figures, which do not statistically control for other influential case characteristics, indicate the presence of moderately dissimilar risks in the probabilities of a trial due to the victim's race, but fail to reveal the presence of substantially more pronounced racial differences in the risk of going to trial after controlling for the other variables. The logistic regression analysis controls for the effects of other influential variables and statistically isolates and pinpoints the effect of the victim's race upon the odds of going to trial.

greater odds of going to trial than a comparable case in Camden County.[706] This finding underscores the substantial importance of county in discretionary case processing decision-making. As was done for the race of victim, the probabilities that homicide defendants involved in death-possible cases would go to trial was computed for each county after adjusting for the average influences of the other independent variables in the logistic regression equation reported in Table 32. These probabilities are strikingly different.[707]

Among the six statutory aggravating factors which were factually present a sufficient number of times to permit their inclusion as independent variables, two factors, (b), "the grave risk of death to another" factor and (f), the "purpose of escaping detection" factor, significantly increased the odds of a trial in comparison to all other statutory aggravating factors. The presence of factor (b) increased the odds by an order of more than five; the presence of factor (f) increased the odds by an order of more than three.

Several of the statutory mitigating factors were similarly found to be statistically related to the plea/trial decision. The presence of the statutory mitigating factor (c), the age of the defendant, functioned to increase the odds of a trial relative to all of the other statutory mitigating factors. On the other hand the presence of four other statutory mitigating factors, (e) duress, (f) no significant history of prior criminal activity, (g) rendered substantial assistance to the state, and (h) the "any other" factor, all functioned to decrease the odds of a trial proceeding.[708]

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706. When the county variables are excluded from the logistic regression equation, the resultant loss in the overall explanatory sufficiency of the equation, as measured in terms of the loglikelihood procedure outlined in note 702 *supra*, is significant (chi-square = 73.51, df = 8, p-val. < .001).

707. The average case undergoes the following risk of going to trial in each of the eight individual counties and the one county grouping, in declining rank order: Mercer, .93; Essex, .86; Monmouth, .80; Union, .65; Passaic, .54; all other counties, .50; Hudson, .25; Camden, .24; and Atlantic, .07. These adjusted probabilities of going to trial can be compared to their corresponding unadjusted percentage representations in Table 19. The two sets of figures reveal generally consistent patterns in county rank ordering and large county differences.

708. To determine whether the statutory aggravating factors and the statutory mitigating factors were, as separate groups, influential in explaining the overall plea and trial alternatives, each of the two groups of variables were removed in turn from the logistic regression equation. In each case, the effect on the loglikelihood value was examined. Under both conditions of variable omission, explanatory efficacy, as expressed by the loglikelihood value, was significantly impaired. (Statutory aggravating factors: chi-square = 27.90, df = 6; p-val. < .001; statutory mitigating factors: chi-square = 41.17; df = 8, p-

Among the remaining independent variables, the year in which the homicide took place had a consistent impact on the odds of going to trial. In each of the years 1982, 1983, and 1984, the odds of going to trial were substantially greater than in 1985 and 1986; more than four times as great. The more meaningful comparison is with 1985 because it comprises the greater number of cases.

Among the variables indicating the defendant's prior record, neither the presence of a prior felony or nonfelony conviction was related to the trial outcome. Among the variables representing the age at which the defendant experienced a first conviction, only one of the contrasts with those defendants without any conviction record proved to be significant: defendants older than age 25 at the time of their first conviction were, on the average, more than five times more likely to go to trial.

Among the remaining significant variables, the two most highly associated with a trial outcome were, in decreasing order of association (as measured by their respective chi-square values): a defense theory which indicated total denial or denial of involvement (more than six and one-half times the odds in comparison to a theory of self-defense) and representation by a private attorney (also more than six times the odds of the omitted category, public defender staff attorney). Intent or planning in the homicide incident; the presence of a co-defendant; the number of knife and firearm wounds; and the defendant's drug addiction at the time of the homicide additionally influenced the prospects of a trial in death-possible cases. Expectedly, intent or planning in the homicide incident functioned to increase the odds of a trial proceeding

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val. < .001).

We also wanted to assess whether knowledge of either the type of statutory aggravating factor or the type of statutory mitigating factor yielded more explanatory accuracy in comparison to knowing simply the total number of those factors which were present. To examine this issue, all statutory aggravating factors were dropped from the regression equation and were replaced by a variable representing the total number of aggravating factors. This scaling of the aggravating factors asserts that each factor carries equal explanatory weight because each is given the same value of one. Proceeding as above, we compare the loglikelihoods of the equation including the individual aggravating factors and the equation including the total number of such factors. The contrast in results with respect to statutory aggravating factors just edges into significance (chi-square = 11.31, df = 5, p-val. < .05). The contrast with respect to the statutory mitigating factors is more discernibly significant (chi-square = 26.64, df = 7, p-val. < .001). This suggests that the specific types of statutory aggravating factors and statutory mitigating factors affect case processing outcomes to a greater degree than simply the cumulative presence of those factors in each of these two variable groups.

relative to the absence of these characteristics. It is harder to understand why the higher number of firearm and knife wounds (between two and ten) decreased the risk of going to trial.

2. The Decision to Serve a Notice of Factors

Table 33 presents the logistic regression results with respect to the prosecutor's decision to serve a notice of factors among the death-possible cases. Significant race effects exist. In contrast to the results pertaining to the plea/trial decision, however, the race effects related to the serving of a notice of factors are more complex. Two of the race interaction variables exhibit significant coefficients: those designating white defendants and white victims, and white defendants and black victims. To assess the statistical impact of the race combinations overall on the explanatory sufficiency of the logistic regressions equation, the race interactions variables were omitted from the equation and then the equation was reestimated. Exclusion of the race interactions significantly diminished the ability of the logistic model to account for the serving of a notice of factors (chi-square = 15.62; df = 4; p-val. $< .01$), reinforcing the explanatory importance of these variables. Significant race interactions require that these effects be computed as the sum of the coefficients representing the race of defendant, race of victim and the interaction of these two variables.[709]

Relative to the omitted race interaction, Hispanic/Hispanic, the rank ordering of the race effects are bracketed by the highest risk and the lowest risk racial interactions of white/Hispanic and white/black, respectively. In comparison to a Hispanic/Hispanic case, a white/Hispanic case sustains odds that are more than 160

709. As an example, consider the white/white interaction effect. Begin with the two main effects represented by the coefficients for race of defendant (white) and race of victim (white), reported in Table 33, column 2, which are 5.08 and 2.34, respectively. Sum these main effects, for a total of 7.42. Next look at the coefficient for the white/white interaction variable reported in the same column of the table which equals -6.17. The sum of 7.42 and -6.17 equals 1.25. This value represents the specific race interaction effect of white/white in comparison with the omitted category of Hispanic/Hispanic. Each other interaction effect is calculated in the same way and is in contrast to the omitted category of Hispanic/Hispanic.

The resulting figure of 1.25 is converted to the odds multiplier of 3.49 by the exponential transformation. This figure means that the odds that a notice of factors will be served in a white/white case is 3.49 greater than the odds that a notice of factors will be served in a Hispanic/Hispanic case. Regardless of which victim race and defendant race is selected as the omitted category, the rank ordering of the race interaction effects is the same.

TABLE 33

NOTICE OF FACTORS SERVED FOR DEATH-POSSIBLE CASES[a]: LOGISTIC REGRESSION

(1) Independent Variable		(2) Coefficient	(3) Chi-Square	(4) Odds Multiplier[b]
County of Jurisdiction				
Atlantic [ATLANTIC][c]		1.34	1.53	---
Essex [ESSEX]		.03	<.00	---
Hudson [HUDSON]		.61	.54	---
Mercer [MERCER]		.70	.47	---
Monmouth [MONMOUTH]		.39	.16	---
Passaic [PASSAIC]		.27	.07	---
Union [UNION]		1.82	4.23**	6.17
All Other Counties [OTHERCO]		.95	1.74	---
Camden [CAMDEN]	OMITTED	---	---	---
Defendant's Race				
White [DWHITE]		5.08	4.95**	160.77
Black [DBLACK]		1.85	2.46	---
Hispanic [DHISPANI]	OMITTED	---	---	---
Victim's Race				
White [VWHITE]		2.34	5.22**	10.38
Black [VBLACK]		.74	.29	---
Hispanic [VHISPAN]	OMITTED	---	---	---
Defendant's Race/Victim's Race				
White/White [WDWV]		-6.17	6.43**	d
Black/Black [BDBV]		-1.16	.47	d
Black/White [BDWV]		-1.88	1.78	d
White/Black [WDBV]		-6.09	4.26**	d
Hispanic/Hispanic [HDHV]	OMITTED	---	---	---
White/Hispanic [WDHV]	OMITTED	---	---	---
Hispanic/White [HDWV]	OMITTED	---	---	---
Black/Hispanic [BDHV]	OMITTED	---	---	---
Hispanic/Black [HDBV]	OMITTED	---	---	---

TABLE 33 (cont.)

(1) Independent Variable		(2) Coefficient	(3) Chi-Square	(4) Odds Multiplier[b]
Year of Homicide				
1982 [YROFF82]		3.06	11.75****	21.33
1983 [YROFF83]		2.26	8.26***	9.58
1984 [YROFF84]		1.73	4.83**	5.64
1985 [YROFF85]	OMITTED	---	---	---
1986 [YROFF86]	OMITTED	---	---	---
Statutory Aggravating Factors				
"a": Prior Murder [AGGFACTA]		1.58	1.73	---
"b": Grave Risk of Death [AGGFACTB]		.28	.30	---
"c": Outrageously or Wantonly Vile [AGGFACTC]		.80	2.94*	2.23
"d": In Expectation of Pecuniary Value [AGGFACTD]		.50	.46	---
"f": Escape Detection [AGGFACTF]		1.48	7.12***	4.39
"g": Felony [AGGFACTG]		- .53	1.20	---
Statutory Mitigating Factors				
"a": Extreme Mental Disturbance [MITFACTA]		- .06	.02	---
"b": Victim Participated in Conduct [MITFACTB]		- .43	.57	---
"c": Age of Defendant [MITFACTC]		1.49	9.90***	4.44
"d": Capacity to Appreciate Wrongfulness Impaired [MITFACTD]		1.35	8.22***	3.86
"e": Duress [MITFACTE]		.18	.12	---
"f": No Significant History of Prior Criminal Activity [MITFACTF]		- .51	1.08	---
"g": Substantial Assistance to the State [MITFACTG]		.25	.19	---
"h": Any Other [MITFACTH]		-1.51	5.29**	.22
Number of Contemporaneous Offenses [NMCONTOF]		.37	11.11****	1.45

TABLE 33 (cont.)

(1) Independent Variable	(2) Coefficient	(3) Chi-Square	(4) Odds Multiplier[b]
Defendant's Type of Prior Conviction Record			
Homicide or Other Felony [PRIORFEL]	- .87	2.65	---
Nonfelony [PRINOFEL]	-1.84	5.96**	.16
No Prior Conviction [ACONVNO] OMITTED	---	---	---
Defendant's Age at First Conviction			
≤14 [ACONV14]	- .12	.01	---
15-17 [ACONV17]	1.16	1.62	---
18-25 [ACONV25]	2.26	7.51***	9.58
≥26 [ACONVOTH]	.01	0.00	---
Unknown [ACONVUN]	1.78	5.33**	5.93
No Prior Conviction [ACONVNO] OMITTED	---	---	---
Defendant Primary or Sole Assailant [DEFSOLE]	1.57	9.87***	4.81
Homicide Intentional or Planned [INTENT]	2.32	13.03****	10.18
Defense Theory of Case			
Total Denial or Denial of Involvement [DEFDEN]	.34	.66	---
Self-Defense [DEFSELF]	-1.84	5.73**	.16
Denial of Intent to Kill [DEFNOINT] OMITTED	---	---	---
Defendant Made Bail [MAKEBAIL]	1.92	5.38**	6.82
Time between First Wound and Death			
Not Instantaneous [NOINSDEA]	1.51	6.03**	4.53
Unknown [INSDEAUK]	1.87	6.87***	6.49
Instantaneous [INSTDEATH] OMITTED	---	---	---

TABLE 33 (cont.)

(1) Independent Variable		(2) Coefficient	(3) Chi-Square	(4) Odds Multiplier[b]
Victim/Defendant Relationship				
Domestic [RELDOMES]		1.97	4.99**	7.17
Nonstranger [RELNONST]		2.24	7.96***	9.39
Stranger [RELSTRAN]		2.23	7.34***	9.30
Other Family [RELOTFAM]	OMITTED	---	---	---
Defendant's Age				
≤17 [DJUVENIL]		-1.88	5.50**	.15
26-29 [DMIDADUL]		.46	.61	---
>29 [DEFADULT]		1.08	3.78*	2.94
18-25 [DYOUADUL]	OMITTED	---	---	---
Defendant's Occupation				
White Collar [DWCOLLAR]		2.84	13.64****	17.12
Unstable [DEFUNSTA]		- .65	1.69	---
Blue Collar [DBCOLLAR]	OMITTED	---	---	---
Defendant's Addiction at Time of Offense				
Drugs [ADDIDRUG]		- .44	.71	---
Alcohol [ADDIALCO]		-1.90	6.76***	.15
Drugs and Alcohol [ADDIBOTH]		3.42	8.34***	30.57
None [ADDINONE]	OMITTED	---	---	---
Victim's Employment Status				
Employed [VICTEMPL]		.93	2.81*	2.53
Other [VICTEMOT]		2.82	17.09****	16.78
Unknown [VICTEMUK]		- .75	1.09	---
Unemployed [VICTUNEM]	OMITTED	---	---	---
Victim's Physical Disability [VDISAPHY]		-2.96	16.90****	.05

TABLE 33 (cont.)

(1) Independent Variable		(2) Coefficient	(3) Chi-Square	(4) Odds Multiplier[b]
Intercept		-15.77	40.44****	---
R^2	.26			
-2 Loglikelihood	251.20			

a. These results are based on the 404 death-possible cases. The dependent variable, "DEATHFAC," is defined in appendix C.I.1 of the Interim Report.

b. The odds multiplier indicates how many times, on the average, a defendant's odds of having a notice served, as opposed to not having a notice served, increase or decrease by the presence of the independent variable in column 1, after adjusting for the effects of the other independent variables in the logistic regression equation. For example, if the odds multiplier is 2.00, then the odds are, on the average, twice as great that this defendant will have a notice served than a defendant without that characteristic. Alternatively, if the odds multiplier is .50, then the odds, on the average, are half as great that this defendant will have a notice served than a defendant without that characteristic.

The odds multiplier is calculated only for those independent variables which were significant at P-val. < .10. A dash in this column indicates that the variable was nonsignificant or was the omitted category.

To calculate the odds multiplier, the coefficient value listed in column 2 is "exponentiated" by the natural anti-log function, "e^b ": "e" is the exponential base (approximately equal to 2.72) and "b" is the coefficient value listed in column 2. The value "e" raised to the power "b" yields the odds multiplier value.

c. Indicates the label assigned to this variable in the logistic regression estimation procedure. See appendix C.II of the Interim Report for the definition of this and all other independent variables.

d. The odds multiplier for this interaction term must be calculated separately.

*P-val. < .10
**P-val. < .05
***P-val. < .01
****P-val. < .001

times greater of having a notice of factors served.[710] The odds then drop from this high figure of 160 to more than ten times higher than Hispanic/Hispanic cases for both Hispanic/white and black/white incidents. The Hispanic/Hispanic category is bracketed just above by Hispanic/black cases which have more than twice the odds of Hispanic/Hispanic cases and just below by white/black cases, which exhibit three-fourths the odds of Hispanic/Hispanic homicides.

The influence of the race interactions can be alternatively expressed by converting the coefficients into probabilities, adjusting for the average case profile effects in the sample. We again construct an average homicide case based upon the independent variables in the logistic regression equation reported in Table 33. We can then examine how each of the victim race and defendant race combinations effect this average profile. These probabilities are, in decreasing order of magnitude: white/Hispanic, .88; Hispanic/white, .31; black/white, .31; black/Hispanic, .22; black/black, .15; white/white, .13; Hispanic/black, .08; Hispanic/Hispanic, .04; and white/black, .03.[711]

The above probabilities are instructive when compared to their corresponding unadjusted probabilities listed earlier in Table 6. The case flow probabilities in that table were not adjusted for other significant case characteristics. Those unadjusted figures diverge markedly in several instances from the adjusted probabilities derived from the logistic regression. For example, the adjusted probabilities for white/white, black/white, white/black and Hispanic/black cases are lower than the unadjusted probabilities. The converse is true for the black/Hispanic incidents.

Despite the presence of a higher odds of a notice being served in Union County in comparison to Camden County, this analysis fails to show a consistent or significant overall county effect with

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710. A closer examination of the striking result for white/Hispanic cases indicated that it was based upon a modest number of cases. There were a total of 15 white/Hispanic cases in the data base. Five of these cases were death-possible, and four of the five had a notice of factors served. This is too small a number to establish a meaningful pattern. For the next two categories the corresponding figures were: Hispanic/white, a total of 34 cases in the data base, 23 of which were death-possible; black/white, a total of 61 cases in the data base, of which 52 were death-possible. These numbers are sufficient to yield meaningful results.

711. These probabilities follow the same pattern in decreasing order as their corresponding odds. See Table 3 of the *Interim Report*, *supra* note 3, at page 61.

respect to the serving of a notice of factors.[712] The county variables as a group are not significantly related to the capital case processing decision.

Two of the six statutory aggravating factors examined showed significant effects: (c) the "outrageously or wantonly vile" factor and (f) the "purpose of escaping detection" factor. In each instance, the presence of that factor increased the odds of the serving of a notice in comparison to the other aggravating factors.[713]

We similarly examined the presence of the eight statutory mitigating factors for evidence of a significant association with the serving of a notice of aggravating factors. Three of the statutory mitigating factors were found to be significant in comparison to the other mitigating factors: (c) the age of the defendant; (d) the capacity to appreciate the wrongfulness of conduct; and (h) the "any other" factor. Mitigating factor (h) functioned to decrease the odds of a notice of factors being served, whereas the presence of factors (c) and (d) had the opposite effect.[714]

The year in which the homicide incident took place was related significantly to the risk of having a notice of factors served. In each year from 1982 through 1984, the odds of a death-possible case becoming a death-eligible case were higher than in 1985 and 1986, ranging from a peak of 21 times greater in 1982 to a trough of more than five times higher in 1984. Several aspects of the defendant's prior conviction record (the type of crime and age at prior conviction), the defendant's prior planning and role in the

712. The logistic regression equation with the county variables excluded does not significantly diminish the explanatory capacity of the equation (chi-square = 7.56, df = 8, p-val. > .05).

713. Omission of the set of six statutory aggravating factors decreased discernibly the explanatory capacity of the estimated equation (chi-square = 16.95, df = 6, p-val. < .01).

714. Overall, removal of the statutory mitigating factors from the logistic regression decreased significantly its explanatory power (chi-square = 23.02, df = 8, p-val. < .01).

We also assessed whether knowledge of the type of statutory aggravating and statutory mitigating factors appreciably increased explanatory power beyond that provided by the number such factors which were present. The logistic regression including the types of statutory aggravating factors was compared to the regression containing the total numbers of these factors. The two representations of the aggravating factors did not yield significantly divergent results (chi-square = 9.21, df = 5, p-val. > .05). Knowledge of the specific aggravating factors did not appear to provide more powerful explanatory information about the decision to serve a notice of factors than knowledge of their number.

The same procedure was carried out with respect to the statutory mitigating factors. However, in this comparison, knowledge of the type of mitigating factors provided, overall, more information than did knowledge of the total number of these factors (chi-square = 20.43, df = 7, p-val. < .01).

incident, aspects of the homicide event (the time between the first wound and death; the victim and defendant relationship, the number of contemporaneous offenses), characteristics of the defendant (age, occupation, drug and alcohol addiction) and victim (employment status, physical disabilities), defense theory and bail were also significantly related to the serving of a notice of factors. After the effects of these variables are taken into account, the critical race variable remains a significant influence upon the decision to serve a notice of factors.

VII. The Individual Statutory Aggravating and Mitigating Factors of the New Jersey Capital Punishment Statute

From the outset this Study has focused a great deal of attention on the eight statutory aggravating factors: in what type of case are they served and what is the factual basis for each factor. The tables reporting statistics on individual statutory aggravating factors are included at the end of this section in Tables 34-50. This study examines the number of times each factor was served and found for all cases that went to penalty phase, and for all cases where the defendant was sentenced to death. Comparable data on the individual statutory mitigating factors are reported in Tables 51 and 52.

Although the death penalty statute only refers to aggravating factors which will be proved at penalty phase, in fact the statutory aggravating factors are critical from the beginning in every death-possible or death-eligible case. As soon as a case is reported and a defendant is charged, there is the threshold question of whether a factual basis exists for any of the eight statutory aggravating factors. As a case progresses through capital case processing, the strength of the evidence for a particular statutory aggravating factor is always important. At the bail hearing, which may be at arraignment, or at the first formal court appearance, the prosecution is required to indicate whether bail is to be denied because the death penalty is being sought.[715] The statutory aggravating factors may already be at issue at this early point in the proceedings. Prior to indictment the prosecutor must make a number of threshold decisions concerning the presence or absence of the statutory aggravating factors. If there is any possibility the case will be designated capital, the grand jury must have returned

715. N.J. Ct. R. 3:26-1.

a death-eligible indictment.[716] A death-eligible indictment will allege that the defendant committed the murder purposely or knowingly by his own conduct. In those few cases when death-eligible murder is charged against an accomplice who paid another to commit the murder, there must be a specially drafted section of the indictment to that effect. Moreover, a defendant is precluded from waiving indictment if the crime is death-eligible.[717] If a decision has been made to proceed by indictment rather than by accusation, that decision is relevant to capital case processing. A decision to charge by accusation means the prosecutor has rejected the possibility of the death penalty.

If aggravating factors are alleged, or might be alleged, the case is structured as a capital case from the outset for both the defense and prosecution. Although the death penalty statute addresses only procedures at penalty phase, from arrest to arraignment and thereafter, all the actors in the system behave differently and are treated differently if there is a factual basis alleged for one of the eight statutory aggravating factors or if there is the possibility of a notice of factors being served. At arraignment the prosecutor is required to turn over discovery, including the factual basis for any aggravating factor. Arraignment may be postponed or waived, however, pending the decision to serve aggravating factors. Additional time for discovery, including time for discovery regarding the factual basis for the aggravating factors, is allowed in capital cases at the earliest pretrial stages.[718] The defense attorney and county prosecutor focus upon the proof required for the aggravating factors long before the guilt phase trial, although the evidence supporting proof of an aggravating factor will technically be before the jury only at penalty phase after a verdict of guilty for death-eligible murder. Once a notice of factors is formally served, a series of special pretrial motions concerning the aggravating factors themselves follows.

In the cases where there are no co-defendants, the issue seldom arises as to whether the defendant committed the homicide by his own conduct. The threshold requirement for alleging that the defendant acted by his own conduct is usually easily met at the indictment stage. Problems of proof arise concerning the issue of

716. N.J. Ct. R. 3:7-3.

717. N.J. Ct. R. 3:7-2.

718. N.J. Ct. R. 3:13-31.

intent, but such problems are present in all homicide and non-homicide cases and are routinely addressed by prosecutors. If a homicide was allegedly committed by the defendant alone, the factual presence or absence of one of the eight statutory aggravating factors immediately becomes the critical determination for death eligibility at the pretrial stage, although the formal presentation of the factors to the jury is months or even years away. The statutory aggravating factors are not legally relevant to the State's case until they are put before the jury at the penalty phase when the jury is deciding whether to sentence the defendant to death. In theory, the statutory aggravating factors are not even referred to in the guilt determination process. As a matter of practice, however, prosecutors infrequently introduce new evidence of the statutory aggravating factors at penalty phase. They simply rely upon what was submitted at guilt phase. By the time most cases reach penalty phase, the factual basis for an aggravating factor has already been well established by the states case-in-chief at guilt phase. The wording of the death penalty statute is misleading insofar as it implies that the aggravating factors come into play for the first time at penalty phase.

This section includes a series of tables detailing the survival of each statutory aggravating factor at each case processing stage. These statistics are the beginning of a systematic disaggregated analysis of the capital punishment statute. The tables show which factors are most likely to be dismissed pretrial, which factors are most likely to survive to be submitted to the penalty phase jury, which factors are most likely to be found by the penalty phase jury, and which factors are most likely to be present in those cases where the defendant was actually sentenced to death. Survival at each case processing stage depends upon different decision-making processes and decision-makers and perhaps upon the character of the factors themselves.

At the first stage, the prosecutor makes the decision to serve a particular factor or factors. Prosecutorial decision-making accounts for the fact that particular factors are more likely to be served than others, although the threshold of proof varies among factors. At the pretrial stage, specific aggravating factors may be unilaterally withdrawn by the prosecutor, the notice of factors may be withdrawn in the context of a plea bargain,[719] or specific

719. The trial court opinion in *State v. Wright*, 196 N.J. Super. 516, 483 A.2d 436 (Law

factors may be dismissed by a court prior to trial. Similarly, the decision to withdraw factors already served may be made by the prosecutor alone, the defense and prosecutor together, or upon the suggestion of a court. Typically, the prosecutor will withdraw a notice of aggravating factors in the context of a plea bargain.

Once a case goes to capital trial, the statutory aggravating factors may be dismissed by the judge during the course of trial or after the verdict, although this occurs very infrequently. Dismissal at trial is a formal decision by the judge based upon his interpretation of the law and/or the verdict of the jury. The prosecutor may withdraw the notice of factors during trial, although this would be highly unusual. The defendant may be found not guilty of death-eligible murder, resulting in the automatic dismissal of all aggravating factors, or the defendant may be found not guilty of a crime which was the factual basis for the aggravating factor, e.g., the defendant might be acquitted of the robbery count which was the factual basis for the felony factor. If the defendant is not found guilty of death-eligible murder, at that point the case is no longer a capital case. The statutory aggravating factors must be dismissed because there is no death-eligible verdict of guilty of murder by his own conduct to support the progression to penalty phase.

We report which factors are most likely to be found by the jury at penalty phase, after a verdict of guilty of capital murder, which factors were found in cases where the defendant was actually sentenced to death, and which were found in penalty phase trials where the death sentence was not imposed. This section also reports the frequencies and percentages of the statutory mitigating factors which were submitted to the judge or jury at penalty phase and found by the judge or jury at penalty phase. For those defendants who were sentenced to death, the jury necessarily found that the statutory aggravating factors were not outweighed by any or all mitigating factors. For those cases which did not result in a death verdict, the judge or jury by definition found that the aggravating factors were outweighed by one or more statutory mitigating factors. We report which mitigating factors were found in both groups of cases. This is the only statistical data available on the complex and subtle weighing decision made by

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Div. 1984), suggests that a prosecutor does not have the authority to withdraw a notice of factors. No other opinion has suggested this.

the jury or judge. The penalty phase verdict sheet only indicates whether the jury found the aggravating or mitigating factor and the result of the weighing decision. The data for statutory mitigating factors are reported here for the 69 cases in this data base which reached penalty phase, where statutory mitigating factors were submitted to the judge or jury and found by the judge or jury. The alleged presence of a statutory mitigating factor outside of the context of a penalty phase trial does not have an importance analogous to the presence of statutory aggravating factors. No procedural consequences flow from the alleged presence of statutory mitigating factors.

A. *The Individual Statutory Aggravating Factors*

1. The Prior Murder Factor, 2C:11-3c(4)(a)

The "(a)" factor, the prior murder factor, which can be served when the defendant has been convicted of another murder, is very concrete and specific. It can include a previous conviction for murder, including felony murder, in another jurisdiction. It can arguably include a prior conviction for murder as a juvenile. As a result of the 1985 amendment, this factor includes a conviction for murder which is pending on appeal. It does not include a conviction for aggravated manslaughter, manslaughter, or a conviction for death by auto. There is a provision allowing the defendant to offer affirmative evidence that a prior conviction for murder should not be the factual basis for the serving of this factor if, for example, the guilty plea was entered pursuant to a plea to avoid the death penalty.

The (a) factor was served a total of seven times in this data base. This factor was submitted to the penalty phase jury in six cases and found by the penalty phase jury every time it was submitted. In one case the factor was served, but the case did not reach capital trial. In four of those six cases the defendant was sentenced to death. Once this factor is served there is an exceedingly high probability that the case will go to trial as a capital case, that the case will reach penalty phase, that the penalty phase jury will find the factor and that the jury will return the death penalty.

The reason for this may be that the factor itself is unambiguous and requires little subjective interpretation, especially after the 1985 amendment. The proofs are clear, the judge's instructions

are easy to understand, and the decision as to whether the factor exists is relatively clear-cut. Proof of this factor is straightforward, requiring only a verified judgment sheet indicating a conviction for a prior murder. It is difficult to refute such proof.

An alternative explanation for this factor's persistent survival to subsequent stages may be that substantial unanimity exists as to the validity of the factor. Perhaps the majority of decision-makers in the system, including penalty phase jurors, believe that this factor, if it exists, ought to be the factual basis for the imposition of a death sentence. There were only two cases where the penalty phase jury did not return the death penalty after finding this factor.

2. The Grave Risk to Another Factor, 2C:11-3c(4)(b)

Aggravating factor "(b)," that the defendant created a grave risk of death to another during the commission of the murder, is neither concrete nor specific. There are several aspects of this factor which require interpretation. It must be determined that the defendant had the highest intent requirement—a purposeful or knowing intent—to create a grave risk of death to another. Creation of a grave risk of death to another "in the commission of the murder" must also be found. To some prosecutors, any homicide in which the defendant kills one person and wounds another will qualify for serving a notice of factors on the basis of this factor. An example of this type of homicide is when a defendant shoots and kills a person at a cash register and then shoots and wounds a guard or a bystander. Other prosecutors do not elect to serve a notice on this factor in this type of circumstance. Some prosecutors consider kidnapping of another or threats while armed to be a sufficient factual basis for serving this factor. For another prosecutor this factor may be reserved for those cases where a defendant kills one person and attempts to kill a second person, but the second person does not die. There is presently no judicial guidance on the boundaries of the possible factual basis for this factor. Many ambiguities exist: do particular contemporaneous offenses have to be charged in conjunction with the serving of this factor? If so, what contemporaneous offenses presume the factual basis for this factor? Must there be formal charges involving a non-decedent victim? The cases in the annotations illustrate circumstances where the factor has been served and cases where it

might arguably have applied.[720]

In this data base the (b) factor was served 33 times. It remained intact until the capital trial stage in 27 cases. It was submitted to the jury at penalty phase 16 times. In other words, in the 33 cases in which the (b) factor was served, it was dismissed prior to trial six times and the factor never reached penalty phase in another 11 cases. The (b) factor constituted a relatively small percentage of all of the factors served (12.3%), and a relatively small percentage of all factors which reached capital trial (14.4%). Once the factor was served it survived to capital trial 81.8% of the time and to penalty phase 59.3% of the time.

The (b) factor was submitted to the penalty phase jury in 16 cases and found by the penalty phase jury less than half of the time, or in only seven cases. In only one of the cases where that factor was found was the defendant sentenced to death. In two cases where the factor was submitted to the penalty phase jury, the jury returned the death penalty, but the jury did not find the (b) factor. In sum, when the (b) factor survived to be submitted to the penalty phase factfinder, it was more likely not to be found than to be found. Finding the (b) factor, however, does not seem to be associated with a death verdict: in only one case where the defendant was sentenced to death did the penalty phase jury also find this factor. In two other cases the jury sentenced the defendant to death, although they did not return this factor when it was submitted to them.

This factor seems to function in an entirely different manner than the "prior murder" factor. It is more likely to be served and dismissed prior to trial. It is more likely to be served in cases which never reach capital trial or penalty phase. This factor may be one which the prosecutors are relatively more willing to plea bargain away because it may present problems of proof. It may be one aggravating factor which the prosecutors do not regard as very serious.

When the (b) factor does reach the jury at penalty phase, it is not likely to be found by the factfinder. Of the 16 cases where the (b) factor was submitted to the jury, it was returned in seven cases and not returned in nine cases. This may be because the jury instructions for this factor are not clear or because the proof requirements are ambiguous. Additionally, there may be little so-

720. *See, e.g.*, case nos. 390, 392 and 410 in Part C of the Annotation.

cial or cultural support for the (b) factor. Perhaps jurors do not believe this factor ought to be determinative in deciding who will receive the death penalty. Therefore, even when the factor is returned it is not often associated with a death verdict. Whatever the reasons may be, the (b) factor seems to function differently in the death decision-making process than the "prior murder" factor, or, the "heinous" factor.

3. The Outrageously or Wantonly Vile Factor, 2C:11-3c(4)(c)

If the "prior murder" factor is very concrete, and the "grave risk of death to another" factor admits of a variety of interpretations dependent on particular fact patterns, the "(c)", or "heinous" factor, is the most subjective of all of the eight statutory aggravating factors. The jury must find that the murder was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated assault to the victim. The language which purports to define the factor has been subject to widely divergent interpretation in the cases examined here. Each phrase and descriptive adjective in the statutory language has received differing interpretations. This factor was the subject of extensive comment and interpretation in *State v. Ramseur*.[721] There are no cases in this data base of 703 cases where the offense occurred after March 5, 1987, the date of decision in *Ramseur*. Less than 2% of the cases involve homicides committed in 1986. The cases described here, therefore, were not influenced by the New Jersey Supreme Court's interpretation of the (c) factor in *State v. Ramseur*.

The circumstances in which the (c) factor has been applied vary widely. In one county any case involving children may be considered outrageously or wantonly vile, or horrible.[722] In another county the prosecutor may take the position that any case where strangulation is the method of killing warrants the serving of the (c) factor.[723] In some counties the number of wounds is the factual basis for the serving of this factor.[724] In other counties the

721. 106 N.J. 123, 524 A.2d 188 (1987). *See also* State v. Gerald, No. A-6, slip op. at 27-29 (N.J. Oct. 25, 1988) (discussion of (c) factor).

722. *See, e.g.*, cases discussed in Part B of the Annotation section (Part VIII). *Cf.* Case No. 019, in Part A of the Annotation section (Part VIII).

723. There were informal reports that at least one prosecutor believed that strangulation by itself could be a factual basis for the serving of the heinous factor.

724. *See, e.g.*, Case No. 174 described in Part A of the Annotation section (Part VIII).

basis may be bizarre or unusual circumstances associated with the homicide.[725] In other cases mutilation of the body of the victim was the factual basis for the (c) factor, even though death may have occurred prior to mutilation.[726]

Not only is the (c) factor subject to varying individual interpretation and application by prosecutors, it is also the factor which is most likely to be served and the factor which is most highly related to a death verdict. In this data base the (c) factor was served in 99 cases. The (c) factor was 36.8% of all factors served and it was served in 73.4% of all of those cases which went to capital trial. But in 30 cases where this factor was served, either the case never went to trial as a capital case, or the (c) factor itself was dismissed prior to capital trial, either as part of a plea bargain or for some other reason. The factor did not survive to capital trial 30.3% of the time it was served. For all of those cases which went to capital trial, the (c) factor was served in 69 out of 94 cases. In other words, of the 94 cases which went to capital trial, 69 or 73.4%—nearly three quarters—had the (c) factor served. The factor survived to capital trial 69.7% of the time when it was served.

Of those cases where the (c) factor remained an issue at trial, 46 cases went to penalty phase. Of those cases which went to penalty phase where the (c) factor was submitted to the jury, the jury found the (c) factor in 33 cases, or approximately three quarters of the time. The (c) factor was submitted to the penalty phase jury in two-thirds of all cases which went to penalty phase.

The (c) factor is also highly related to the imposition of the death penalty. For the 44 cases which went to penalty phase and resulted in a non-death verdict, the (c) factor was found 13 times, or 54.2% of the times it was submitted, and not found 11 times (45.8%). In those cases where the defendant was not sentenced to death, the (c) factor was submitted in 54.6% of the cases and found at penalty phase in 29.5% of the cases. In other words, in cases which did not result in the imposition of the death penalty, the (c) factor was submitted and found in slightly over one half of the cases. By contrast, of the 25 defendants in this data base who were sentencd to death, 22 of them, or 88%, had the (c) factor

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But see Case No. 687 described in Part A of the Annotation section (Part VIII).

725. *See, e.g.*, Case No. 675 in Part A of the Annotation.

726. *See, e.g.*, Case No. 676 in Part A of the Annotation. This result would be precluded under *Ramseur*.

submitted to the jury at penalty phase. The jury found the (c) factor in 20 out of 25 cases, or in 80% of the cases where the defendant was actually sentenced to death. There were two cases where the (c) factor was submitted to the penalty phase jury but not found, and the death penalty was imposed nonetheless. In sum, the (c) factor, the factor arguably most subject to varying individual interpretation, is the factor most likely to be served and a factor which is highly related to the imposition of the death penalty.

4. The For Gain Factor, 2C:11-3c(4)(d)

The "(d)," or "for gain" factor is defined as murder as consideration for the receipt of, or in expectation of the receipt of anything of pecuniary value. It may be interpreted to include any murder for gain, such as murder committed during a robbery or burglary. In other jurisdictions, analogous sections have been interpreted to exclude the possibility of serving both the "for gain" factor and the felony factor for a single robbery or burglary. There is no judicial interpretation of this factor at present in this jurisdiction.[727] The language of this factor also encompasses the situation in which a perpetrator is hired to commit murder for another.

The (d) factor was served by prosecutors only six times in the 131 cases which were designated death-eligible in this data base. Of those cases, it survived as an issue in four cases which went to capital trial. It was submitted to the jury at penalty phase in three cases. The penalty phase jury found the factor once in the three cases in which it was submitted. In that case the jury sentenced the defendant to death. In the other two cases where the (d) factor was submitted at penalty phase, it was not found and the defendant was not sentenced to death.

5. The By Payment Factor, 2C:11-3c(4)(e)

The "(e)" factor, that the defendant procured the commission of the offense by payment, is the mirror image of the (d) factor, since it applies to the person who pays another to commit murder. The (e) factor overlaps with one of the two threshold require-

727. *But see* the discussion of overlapping and double counting of statutory aggravating factors in both the majority opinion and the dissenting opinion of Justice Handler in State v. Zola, No. A-30, slip op. (N.J. Aug. 16, 1988).

ments for death-eligibility: that the defendant "as an accomplice procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value."[728] Arguably, in every case where the prosecutor has a sufficient factual basis for indicting for death-eligible murder under the accomplice provision of the death penalty statute, there would presumably be a factual basis for the (e) factor. The definition of (e) factor is clear, although what would constitute sufficient proof prior to trial might be problematic.

In the data base of 703 cases, the (e) factor was served in only two of the 131 cases which were designated death eligible. Both of those cases reached capital trial. Only one of the two cases reached penalty phase. In that case, the jury found the factor and sentenced the defendant to death. Thus, in the one case where the (e) factor was submitted and found at penalty phase, the result was a death verdict.

6. The Escaping Detection Factor, 2C:11-3c(4)(f)

The "(f)" factor, that the murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another, could be interpreted to include a wide-range of circumstances. On its face, the provision applies to situations where the defendant commits murder to escape detection, apprehension, trial, punishment or confinement for any crime other than the death-eligible murder including a second murder. The definition is substantially broadened by the inclusion of the language "committed by the defendant or another." Trial courts have partially addressed issues concerning the sequencing of crimes.[729] This factor has not yet been subject to definitive interpretation by the New Jersey Supreme Court. If a defendant commits a robbery and kills the robbery victim so that the victim cannot identify the robber or another, then presumably the factor could be alleged. Using that analysis, the factor could arguably be alleged in every felony murder. This could be the presumed motive for killing the victim in every robbery-murder. There is nothing in the language of the (f) factor prohibiting its application to any crime which is associated with or contemporaneous to the homicide. The prose-

728. N.J. STAT. ANN. § 2C:11-3c (West 1982).

729. *But see supra* note 335 and accompanying text (discussion of *State v. Monturi*).

cutor, however, would have to prove the highest statutory intent requirement, *i.e.*, "purposely or knowingly," in order to prove the presence of the (f) factor.

As a practical matter, prosecutors may encounter serious proof problems with this factor. For example, it is not clear whether proof of a robbery and a decedent robbery victim are by themselves a sufficient basis for serving this factor. Nor is it clear how a prosecutor can distinguish between a purpose of escaping detection for another crime and a purpose of escaping apprehension, trial, punishment or confinement for the murder itself. A contemporaneous charge for the offense of hindering apprehension[730] would seem to be required whenever this factor is alleged. As with the (b) and (c) factors, individual interpretations and applications of this factor vary widely, as is shown in the annotation of cases.

The (f) factor was served a total of 31 times in the 131 cases in the data base where a notice of factors was served. Of the 31 times it was served, it remained an issue at capital trial in 24 cases (77.4%). The (f) factor was a relatively small percentage (11.5%) of all factors served and of all factors in cases which went to capital trial (12.8%). It was present in only 25.5% of the cases which went to capital trial.

Of the cases which went to penalty phase, the (f) factor was submitted to the penalty phase jury in 18 cases, (26.1%), and found 12 times (66.7%). For those cases where the defendant was not sentenced to death, the factor was submitted to the jury a total of eight times and found five times (62.5%). For those cases where the defendant was sentenced to death, the factor was submitted ten times and found by the jury in seven cases. On the average, then, the (f) factor was found in two-thirds of the cases where it was submitted. It was found by the penalty phase jury in 28% of those cases where the penalty phase jury sentenced to death, and in 11.4% of those cases where the death sentence was not returned. In other words, the jury was likely to find this factor in 70% of the cases where the death sentence was returned, but this factor was found where a non-death verdict was returned in approximately the same proportion (62.5%). In three cases where the (f) factor was submitted, and in which the death sentence was returned, this factor was not found by the penalty

730. See N.J. STAT. ANN. § 2C:29-3 (West 1982). This offense is routinely charged as a contemporaneous offense in homicide cases irrespective of this factor.

phase jury. This factor does not seem to be especially determinative in the decision to impose the death penalty.

7. The Felony Factor, 2C:11-3c(4)(g)

The "(g)," or felony factor, along with the (c) factor, is the factor most likely to be served. This factor is broadly worded and subject to widely varying prosecutorial interpretation. It is likely to survive to penalty phase and is highly related to a death verdict. The felony factor is simply worded: the murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing one of the five predicate felonies, or another murder. The 1985 amendment added murder to the list of predicate felonies for this factor.[731]

The inclusion of language referring to "attempts" and to "flight after committing" makes the arguably eligible circumstances very broad indeed. In every case where one of the predicate felonies is alleged, the case is presumptively death-eligible for the person who committed the homicidal act. The defendant need not have completed the predicate felony. Any murder committed by a single defendant during the course of a robbery or attempted robbery, or any of the other enumerated felonies, would on its face provide a factual basis for this factor. After the 1985 amendment, every case in which there was more than one homicide victim would presumably qualify for the serving of this factor.

The felony factor is somewhat limited, however, by the threshold statutory requirement that a death-eligible murder be committed purposely or knowingly and by the defendant's own conduct or by paying another. Therefore, in co-defendant felony murders, only the person, or persons, who commit the homicidal act by their own conduct meet the threshold eligibility requirement. Only those defendants found by the factfinder to have committed the homicidal act by their own conduct and with the requisite intent can proceed to penalty phase. As is demonstrated in the cases presented in the Annotation of death-possible cases (Part VIII), the application of this factor, especially in situations involving co-defendants, has been the source of much ambiguity and variation.

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731. *See* Act of June 10, 1985, ch. 178, 1985 N.J. Laws 541. In this data base there is no case in which it was alleged that the factual basis for the felony factor was that the homicide was committed while committing another murder.

The felony factor could be served against all co-defendants involved in an alleged felony murder.[732] The prosecutor would simply indict all co-defendants for purposeful or knowing murder by their own conduct, serve a notice of the felony factor against all defendants, and resolve the question of who committed the homicide by his own conduct by submitting the question to the jury at trial. The "by his own conduct" requirement would be part of the State's case-in-chief to be proved at trial. In cases where the victim was beaten or stabbed by more than one co-defendant and there were multiple causes of death, irrespective of whether a felony was involved, the prosecutor could allege the by his own conduct requirement with regard to more than one defendant. The supporting evidence would be presented to the jury which would decide which of the defendants committed the homicide by their own conduct, or which acts caused the homicide. For example, in one capital case, three defendants beat the victim and threw him in a lake, where he drowned.[733] Was the beating, the throwing of the victim into the lake, or were both the conduct causing death? The culpability of the individual defendants in this circumstance is not clear. In a case where all co-defendants refuse to testify, the prosecutor may have few facts to support the allegation of any defendant's acting by his own conduct. Some prosecutors have adopted the strategy of jointly indicting several defendants for purposeful or knowing murder by their own conduct in a single count.[734] More often, however, the prosecutor will make a threshold decision on the "by his own conduct" requirement prior to indictment, or early in the pretrial stage, based upon statements of co-defendants or witnesses.

In co-defendant cases, whether or not a notice of factors is served against a particular defendant may itself be an important lever in ongoing plea negotiations. Co-defendants may be persuaded to testify against one another if the prosecutor will refrain from serving a notice of factors against them. The lengthening of the pre-indictment period for plea bargaining, and the defend-

732. *See, e.g.*, Case No. 252 described in Part D of the Annotation, where four of the five co-defendants were jointly indicted for purposeful or knowing murder by their own conduct in Ocean County. *Cf.* Case No. 142 in Part D of the Annotation, where none of the three co-defendants were indicted for death-eligible murder.

733. *State v. Raymond Kise*, Warren County. Death penalty was imposed March 13, 1987. *See* Appendix C.

734. *See generally* cases described in Parts C and D of the Annotation.

ant's waiver of his right to arraignment,[735] allow for a significant period of plea negotiation on the serving of a notice of factors. When the defense and the prosecution are negotiating over the serving of a notice of factors itself, it is often in the interest of the defendant to postpone arraignment. Once a notice of factors is actually served, the prosecutor will probably be very reluctant to withdraw it. In some cases, the testimony of co-defendants as to who committed the homicidal act may be unreliable. In other cases evidence of who committed the homicidal act may be corroborated by the testimony of less self-interested witnesses.

A comparison between those cases in the Annotation (Part VIII) in which a notice of factors was served on the felony factor,[736] with those cases where it could have been served,[737] illustrates the breadth of prosecutorial discretion regarding the charging of this factor. The factor could arguably be served against the person who committed the homicidal act in every case of felony murder. It could also be served against accomplices who plan robberies or other felonies which result in the eventual commission of a murder, even if the accomplice is only marginally involved. In high volume counties, there are many felony murders, but the percentage of felony murders declared capital is relatively small. As administrative and financial pressures increase, this trend may be accentuated.

The felony factor was served in 89 of the 131 cases (67.9%) where the prosecutor served a notice of factors. In other words, the prosecutor served the felony factor in approximately two-thirds of the cases that were designated death-eligible. The felony factor comprised 33.1% of all factors served. Of the 94 cases that went to trial as capital cases, 53 cases or 56.4% had the felony factor as one of the aggravating factors. The felony factor was dismissed or withdrawn prior to trial in 36 cases. In other words, it was dismissed 40.4% of the time it was served. Of the 69 cases which went to penalty phase, 36 cases, or 52.2% of all cases which went to penalty phase, had the felony factor submitted. The pen-

735. The defendant may waive or indefinitely postpone arraignment. It may be in the interest of the defense to waive an arraignment which would simply lock the prosecutor into serving a notice of factors. See N.J. Ct. R. 3:9-1. *State v. McCrary*, discussed *supra* at note 199, states that a notice of factors will be served at arraignment unless good cause is shown.

736. *See* cases described in Part C of the Annotation.

737. *See, e.g.*, the discussion of arbitrariness in serving the felony factor in State v. Smith, 202 N.J. Super. 578, 593-95 495 A.2d 507, 515-16 (Law Div. 1985).

alty phase jury returned the felony aggravating factor 32 out of the 36 times (88.9%) it was submitted. The threshold showing for a finding of this factor seems to be minimal. When the felony factor is submitted to the penalty phase jury, they typically have just found the defendant guilty of the predicate felony which is the factual basis for the factor. The factual basis for finding the felony factor has already been established at guilt phase. Finding the felony factor at penalty phase is all but assured.

The felony factor is served so frequently that, like the (c) factor, it is likely to survive to penalty phase, but there are also many cases where it is served but not submitted to the penalty phase jury. Like the (c) factor, when it is submitted to the jury it is highly likely that the jury will find the factor. For cases where the defendant was not sentenced to death, the felony factor was submitted 21 times and found 18 times (85.7%). Of the 25 defendants who were sentenced to death, the penalty phase jury found the factor in 14 out of 15 cases where it was submitted (93.3%). In one case the penalty phase jury did not find the felony factor, but still sentenced the defendant to death. For defendants who were sentenced to death, the felony factor was submitted in 60.0% of the cases and found in 56.0% of the cases.

The felony factor is highly likely to be served, it is very likely to be present in cases which go to penalty phase, and it is highly likely to be found by the penalty phase jury, whether or not the death sentence is returned. Stated differently, the felony factor is frequently served and juries have little difficulty finding the factor, but it is a factor which also seems to be rather easily outweighed by mitigating factors when a decision is made not to impose the death sentence. The factual threshold for finding the felony factor seems minimal, but from this data it does not seem to be determinative of a death verdict. A more sophisticated statistical analysis of the role of this factor may be possible when data on additional penalty phase cases enter the data base.[738]

8. The Public Servant Factor, 2C:11-3c(4)(h)

By contrast, the "(h)" aggravating factor, that the defendant

738. The authors are now preparing for publication a separate analysis of the 252 felony murder cases in this data base. *See* L. Bienen, N. Weiner, P. Allison & D. Mills, The Reimposition of Capital Punishment in New Jersey: Felony Murder Cases, 1982-1985, a paper presented at the Annual Meeting of the American Society of Criminology, Chicago, Illinois, November 12, 1988.

murdered a public servant while the public servant was engaged in the performance of his official duties or because of the victim's status, is narrowly drawn. The statutory definition of this aggravating factor includes a cross reference to the definition of public servant found in the section of the code which defines official bribery.[739] That definition of public servant includes "any officer or employee of government, including legislators and judges, and any person participating as a juror, advisor, consultant or otherwise, in performing a governmental function, but the term does not include witnesses."[740] There is little room for statutory interpretation in this definition of public servant. Legal argument would presumably focus on whether the victim was engaged in the performance of a governmental function, or whether the defendant was murdered "because of" his status as a public servant.

The recommended jury instruction on this factor states that the defendant did not have to know the victim was a public servant if the public servant was performing his official duties at the time of the crime. In practice, the factor typically is applied to the murder of a police officer in the course of duty. No case has yet arisen in which a prosecutor has attempted to serve this factor when the victim was an off-duty police officer.

The (g) factor was served only two times in the 131 death-eligible cases in this data base. In both cases, the circumstances involved the murder of a policeman. Both of the cases where the factor was served reached penalty phase. In one case, the penalty phase jury found that the defendant murdered a policeman during the performance of his official duties. In the other case, the penalty phase jury did not return the factor. In the case where the factor was found, the jury sentenced the defendant to death. In the case where the factor was not found, the jury did not sentence to death.

This preliminary analysis suggests that the eight aggravating factors differ greatly in terms of their specificity, the likelihood that they will be served, and in the range of circumstances in which they can arguably be applied. The two most specific aggravating factors, the (a) factor and the (h) factor, are the least likely to be served. The aggravating factors describing murder for gain

739. N.J. STAT. ANN. § 2C:11-3c(4)(h) (West 1982) (citing § 2C:27-1).
740. N.J. STAT. ANN. § 2C:27-1g (West 1982).

(the (d) factor), and for payment (the (e) factor), were similarly infrequently served and infrequently found. The numbers are too small for a statistical analysis of capital case processing with respect to these factors.

The aggravating factors which are most subject to wide ranging interpretation, the (c), or heinous factor, and the (g), or felony factor, were most likely to be served by the prosecutors. Both of these factors were frequently submitted at penalty phase, although they also frequently dropped out prior to penalty phase. The felony factor was very likely to be found by the penalty phase jury if the case reached penalty phase. Both the heinous factor and the felony factor were also associated with the imposition of a death sentence, but both factors were also dismissed or withdrawn prior to capital trial in a significant percentage of cases.

The remaining two factors, the (b) factor, grave risk of death to another, and the (f) factor, for the purpose of escaping detection, fall in the middle range. They were served relatively frequently over a broad range of circumstances. In cases where these factors were presented to the penalty phase jury, they were frequently not found. The (b) factor particularly seemed not to be associated with a death verdict. Perhaps the instructions on these factors are ambiguous, or the statutory language itself is imprecise. Perhaps the penalty phase juries are relatively unlikely to return these factors or consider them dispositive because there is little cultural or social support for making these circumstances the factual basis for imposing a death sentence. These two factors have the potential of being served often and in widely disparate circumstances.

B. *The Statutory Mitigating Factors*

There are eight statutory mitigating factors, and they also range from the very specific to the very general.[741] The most general statutory mitigating factor is the so called catch-all, or "any other mitigating factor." It is defined to include "any other factor which is relevant to the defendant's character or record or to the circumstances of the offense."[742] Data on the presence and absence of the factors for non-capital cases in this data base are

741. *See* N.J. STAT. ANN. § 2C:11-3c(5)(a)-(h) (West 1982).

742. N.J. STAT. ANN. § 2C:11-3c(5)(h) (West 1982).

reported in Table B-26 in Appendix B.[743] For cases which went to penalty phase before a judge or jury, the frequencies and percentages regarding mitigating factors submitted and found are reported in Tables 51 and 52.

Not surprisingly, the statutory mitigating factor most frequently submitted to the jury at penalty phase was the catch-all mitigating factor. It was submitted in 57 of the 69 cases which went to penalty phase, or in 82.6% of those cases, and it was found present at penalty phase 73.7% of the time it was submitted.

The statutory mitigating factor which was the next most likely to be served was mitigating factor (c), based upon the defendants age at the time of the murder. That factor was submitted at penalty phase in 48 of 69 cases, or 69.6%. Either the defendant's youth or the defendant's relatively older age could be submitted as a statutory mitigating factor. For example, the fact that a defendant was only 19 years old could serve as a reason not to impose the death sentence and the fact that a defendant was 50 years old could be submitted to argue that he would not survive 30 years in prison. This factor was found at penalty phase in 24 cases, or 50% of the time it was submitted.

The third most frequently submitted factor was (d), the defendant's capacity to appreciate the wrongfulness of his conduct, which was submitted at penalty phase in 47 of 69 cases (68.1%), and found in 29 cases (61.7%). The fourth factor most frequently submitted was the mental or emotional disturbance mitigating factor (a). It was served in 41 out of 69 cases (59.4%), and found

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743. The variables indicating the presence of statutory mitigating factors were coded differently in the study than the variables for the aggravating factors. If the defense attorney indicated there was *any* factual basis for the statutory mitigating factor, it was entered as factually present, whether or not the case was a death-eligible case. There was no code for the prosecutor's opinion about the presence of the statutory mitigating factor.

Because of their different character and function, the statutory mitigating factors were not analyzed in the same way as the statutory aggravating factors. Proof of a statutory mitigating factor may be presented for the first time at penalty phase. The inclusive definition of several statutory mitigating factors, and especially the catch-all statutory mitigating factor would be present in every case. *See, e.g.*, State v. Koedatich, No. A-7, slip op. (N.J. Aug. 3, 1988), in which the judge submitted the catch-all, any other mitigating factor even though the defendant wished no mitigating evidence submitted on his behalf. Therefore, the statutory mitigating factors are reported on a simple present or absent code for all stages prior to penalty phase. For cases which went to penalty phase, Tables 51 and 52 reported which statutory mitigating factors were submitted to the penalty phase jury and found by the penalty phase jury.

in 23 cases (56.1%).[744]

The other statutory mitigating factor which was submitted frequently was the (f) factor, no significant history of prior criminal activity. It was submitted in 39 of the 69 penalty phase cases (56.5%), and found in 27 cases, or 69.2% of the cases in which it was submitted.

The mitigating factor most likely to be found at penalty phase was the (h) "catch-all" factor (73.2%), followed by the two mitigating factors relating to the defendant's mental condition; i.e., the (a) mitigating factor (56.1%) and the (d) mitigating factor (61.7%). For the defendants who were sentenced to death and those not sentenced to death, the percentage of times the statutory mitigating factors were found is reported in Table 52. Expectedly, for cases where the defendant was not sentenced to death, the mitigating factors were found more often than not. For cases where the defendant was sentenced to death, the proportion of times mitigating factors were found is on average considerably lower, especially on the mental mitigating factors (a) and (d).

Once again, it is noteworthy that the decision to return a death verdict is the only measurable factual indication of the jury's weighing process. In cases where the defendant was sentenced to death, the statutory mitigating factors, although found, by definition did not outweigh the statutory aggravating factors found. In cases where the death penalty was not returned, the aggravating factors by definition were outweighed by any or all mitigating factors. There were 69 penalty phase cases in this database. These disaggregated figures on individual statutory aggravating and mitigating factors are only the beginning of a systematic analysis of the important weighing process whose final outcome is the decision to sentence to death.

C. *Summary*

There are widely varying interpretations of the statutory aggravating factors. In effect, the eight statutory aggravating factors are eight separate and individual death penalty statutes, since the allegation of any one is sufficient to transform an ordinary murder case into a capital prosecution. Yet the eight factors differ

744. This paper does not attempt to address the complicated and difficult constitutional issues raised by the imposition of the death penalty upon the mentally retarded or deficient or deranged.

greatly from one another. Some are susceptible to relatively objective factual verification; others are not. Some encompass a wide range of possible circumstances; others are relatively narrow. Some are subject to individual or idiosyncratic interpretation; others are not.

The statutory mitigating factors also differ widely from one another. They are selected by the defense to be offered to the jury at penalty phase, and they are also subject to varying interpretation. Their interpretation may be influenced by strategic decisions, by available resources of time, energy, or money, or by the defense attorneys' skill. The most difficult decisions often involve the two mental mitigating factors, (a) and (d). Unlike the statutory aggravating factors, the statutory mitigating factors only come into play if and when the case reaches penalty phase after the imposition of a conviction for death-eligible murder. The statutory mitigating factors as such are irrelevant to non-capital sentencing proceedings, although evidence such as the young age of the defendant and the absence of prior convictions might well be considered by the trial court judge in a non-capital sentencing proceeding.

To the best of our knowledge few, if any, researchers have attempted a systematic, disaggregated analysis of a capital punishment statute by looking at each statutory aggravating factor separately. The New Jersey capital punishment statute especially lends itself to this kind of analysis. The jury must separately consider and find or not find each statutory aggravating factor and each statutory mitigating factor. The statistical results presented here suggest that different factors function very differently in the death decision-making process. Each factor has a different character. With additional cases it will be possible to study the interaction effects between statutory aggravating factors. Further study of the separate and distinct impact of each statutory aggravating factor at each capital case processing state is warranted.

TABLE 34

INDIVIDUAL STATUTORY AGGRAVATING FACTORS: NOTICE SERVED, CAPITAL TRIAL, AND CASE NOT A CAPITAL TRIAL

	Factor Served (N=131)*	Factor Served, Capital Trial (N=94)	Case Not a Capital Trial** (N=37)
(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;***	7	6	1
(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;	33	27	6
(c) The murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;	99	69	30
(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;	6	4	2
(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;	2	2	0
(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment, or confinement for another offense committed by the defendant or another;	31	24	7

TABLE 34 (cont.)

	Factor Served (N=131)*	Factor Served, Capital Trial (N=94)	Case Not a Capital Trial** (N=37)
(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping; *** or	89	53	36
(h) The defendant murdered a public servant, as defined in 2C:27(1), while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.	2	2	0
Total Number of Individual Factors Served	269	187	82

*The N in parentheses refers to the number of defendants whose cases reach that stage.

**A factor may not reach capital trial because the factor was dismissed or withdrawn, either unilaterally or after a plea bargain, or as a result of an order from trial or appellate court.

***Incorporates language of 1985 Amendment, L.1985, c.178.

TABLE 35

PERCENTAGE DISTRIBUTION OF INDIVIDUAL STATUTORY AGGRAVATING FACTORS: SERVED AND PRESENT AT CAPITAL TRIAL AND SERVED BUT NOT PRESENT AT CAPITAL TRIAL

	Status of Aggravating Factors		
Statutory Aggravating Factors	Factor Served and Present at Capital Trial % (N)	Factor Served but Not Present at Capital Trial* % (N)	Total** % (N)
(a) Prior Murder	3.2 (6)	1.2 (1)	2.6 (7)
(b) Risk of Death to Another	14.4 (27)	7.3 (6)	12.3 (33)
(c) Outrageous and Vile	36.9 (69)	36.6 (30)	36.8 (99)
(d) For Pecuniary Value	2.1 (4)	2.4 (2)	2.2 (6)
(e) By Payment	1.1 (2)	0.0 (0)	.7 (2)
(f) To Escape Detection	12.8 (24)	8.5 (7)	11.5 (31)
(g) Felony Factor	28.3 (53)	43.9 (36)	33.1 (89)
(h) Victim Public Servant	1.1 (2)	0.0 (0)	.7 (2)
Total	100.0 (187)	100.0 (82)	100.0 (269)

*A factor could be served but not present during a capital trial either because the entire case was no longer a capital case or because that individual factor was dismissed or withdrawn prior to a capital trial.

**The total number of aggravating factors served (N = 269) exceeds the total number of cases in which a notice of factors was served (N = 131) because more than one factor can be served in a case. This table records the survival of factors from the notice being served (N = 131 cases) to capital trial (N = 94 cases).

TABLE 36

INDIVIDUAL STATUTORY AGGRAVATING FACTORS: PERCENTAGE SERVED AND PRESENT AT CAPITAL TRIAL AND PERCENTAGE SERVED BUT NOT PRESENT AT CAPITAL TRIAL

	Statutory Aggravating Factors								
Status of Aggravating Factors	Prior Murder (a) % (N)	Risk of Death to Another (b) % (N)	Outrageous and Vile (c) % (N)	For Pecuniary Value (d) % (N)	By Payment (e) % (N)	To Escape Detection (f) % (N)	Felony Factor (g) % (N)	Victim Public Servant (h) % (N)	Total* % (N)
Factor Served and Present at Capital Trial	85.7 (6)	81.8 (27)	69.7 (69)	66.7 (4)	100.0 (2)	77.4 (24)	59.6 (53)	100.0 (2)	69.5 (187)
Factor Served but Not Present at Capital Trial**	14.3 (1)	18.2 (6)	30.3 (30)	33.3 (2)	0.0 (0)	22.6 (7)	40.4 (36)	0.0 (0)	30.5 (82)
Total	100.0 (7)	100.0 (33)	100.0 (99)	100.0 (6)	100.0 (2)	100.0 (31)	100.0 (89)	100.0 (2)	100.0 (269)

*The total number of aggravating factors served (N = 269) exceeds the total number of cases in which a notice of factors was served (N = 131) because more than one factor can be served in a case. This table records the survival of factors from the notice being served (N = 131 cases) to capital trial (N = 94 cases).

**A factor could be served but not present during a capital trial either because the entire case was no longer a capital case or because that individual factor was dismissed or withdrawn prior to capital trial.

TABLE 37

PERCENTAGE DISTRIBUTION OF INDIVIDUAL STATUTORY AGGRAVATING FACTORS: SUBMITTED AT PENALTY PHASE AND NOT SUBMITTED AT PENALTY PHASE

	Status of Aggravating Factors		
Statutory Aggravating Factors	Factor Submitted at Penalty Phase % (N)	Capital Trial, but Factor Not Submitted at Penalty Phase* % (N)	Total** % (N)
(a) Prior Murder	4.7 (6)	0.0 (0)	3.2 (6)
(b) Risk of Death to Another	12.5 (16)	18.3 (11)	14.4 (27)
(c) Outrageous and Vile	35.9 (46)	38.3 (23)	36.9 (69)
(d) For Pecuniary Value	2.3 (3)	1.7 (1)	2.1 (4)
(e) By Payment	.8 (1)	1.7 (1)	1.1 (2)
(f) To Escape Detection	14.1 (18)	10.0 (6)	12.8 (24)
(g) Felony Factor	28.1 (36)	28.3 (17)	28.3 (53)
(h) Victim Public Servant	1.6 (2)	0.0 (0)	1.1 (2)
Total	100.0 (128)	100.0 (60)	100.0 (187)

*A factor could be present at capital trial but not be submitted at penalty phase either because the entire case did not reach penalty phase or because the factor was dismissed or withdrawn prior to penalty phase.

**The total number of aggravating factors submitted (N = 187) exceeds the total number of cases which went to penalty phase (N = 69) because more than one factor can be submitted in a case. This table records the survival of factors from capital trial (N = 94 cases) to penalty phase (N = 69 cases).

TABLE 38

INDIVIDUAL STATUTORY AGGRAVATING FACTORS: PERCENTAGE SUBMITTED AT PENALTY PHASE AND PERCENTAGE NOT SUBMITTED AT PENALTY PHASE

	Statutory Aggravating Factors								
Status of Aggravating Factors	Prior Murder (a) % (N)	Risk of Death to Another (b) % (N)	Outrageous and Vile (c) % (N)	For Pecuniary Value (d) % (N)	By Payment (e) % (N)	To Escape Detection (f) % (N)	Felony Factor (g) % (N)	Victim Public Servant (h) % (N)	Total* % (N)
Factor Submitted at Penalty Phase	100.0 (6)	59.3 (16)	66.7 (46)	75.0 (3)	50.0 (1)	75.0 (18)	67.9 (36)	100.0 (2)	68.5 (128)
Capital Trial, but Factor Not Submitted at Penalty Phase**	0.0 (0)	40.7 (11)	33.3 (23)	25.0 (1)	50.0 (1)	25.0 (6)	32.1 (17)	0.0 (0)	31.5 (60)
Total	100.0 (6)	100.0 (27)	100.0 (69)	100.0 (4)	100.0 (2)	100.0 (24)	100.0 (53)	100.0 (2)	100.0 (187)

*The total number of aggravating factors exceeds the total number of cases which reached penalty phase because more than one factor can be submitted in a case. This table records the survival of factors from capital trial (N = 94 cases) to penalty phase (N = 69 cases).

**A factor could be present at capital trial but not be submitted at penalty phase either because the entire case did not reach penalty phase or because the factor was dismissed or withdrawn prior to penalty phase.

TABLE 39

INDIVIDUAL STATUTORY AGGRAVATING FACTORS SUBMITTED AT PENALTY PHASE AND FOUND AT PENALTY PHASE (N = 69)*

	Submitted at Penalty Phase	Found at Penalty Phase	Not Found at Penalty Phase
(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;**	6	6	0
(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;	16	7	9
(c) The murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;	46	33	13
(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;	3	1	2
(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;	1	1	0
(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment, or confinement for another offense committed by the defendant or another;	18	12	6

TABLE 39 (cont.)

	Submitted at Penalty Phase	Found at Penalty Phase	Not Found at Penalty Phase
(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping;** or	36	32	4
(h) The defendant murdered a public servant, as defined in 2C:27(1), while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.	2	1	1
Total Number of Individual Factors Served	128	93	35

*The N in parentheses refers to the number of cases which reached penalty phase.

**Incorporates language of 1985 Amendment, L.1985, c.178.

TABLE 40

PERCENTAGE DISTRIBUTION OF INDIVIDUAL STATUTORY AGGRAVATING FACTORS: SUBMITTED AT PENALTY PHASE AND FOUND AT PENALTY PHASE

	Status of Aggravating Factors		
Statutory Aggravating Factors	Factor Found at Penalty Phase % (N)	Factor Not Found at Penalty Phase % (N)	Total Number of Factors Submitted* % (N)
(a) Prior Murder	6.5 (6)	0.0 (0)	4.7 (6)
(b) Risk of Death to Another	7.5 (7)	25.7 (9)	12.5 (16)
(c) Outrageous and Vile	35.5 (33)	37.1 (13)	35.9 (46)
(d) For Pecuniary Value	1.2 (1)	5.7 (2)	2.3 (3)
(e) By Payment	1.2 (1)	0.0 (0)	.8 (1)
(f) To Escape Detection	12.9 (12)	17.1 (6)	14.1 (18)
(g) Felony Factor	34.4 (32)	11.4 (4)	28.1 (36)
(h) Victim Public Servant	1.2 (1)	2.9 (1)	1.6 (2)
Total	100.0 (93)	100.0 (35)	100.0 (128)

*The total number of aggravating factors submitted (N = 128) exceeds the total number of cases which went to penalty phase (N = 69) because more than one factor can be submitted in a case.

TABLE 41

INDIVIDUAL STATUTORY AGGRAVATING FACTORS: PERCENTAGE SUBMITTED AT PENALTY PHASE AND PERCENTAGE FOUND AT PENALTY PHASE

	Statutory Aggravating Factors								
Status of Aggravating Factors	Prior Murder (a) % (N)	Risk of Death to Another (b) % (N)	Outrageous and Vile (c) % (N)	For Pecuniary Value (d) % (N)	By Payment (e) % (N)	To Escape Detection (f) % (N)	Felony Factor (g) % (N)	Victim Public Servant (h) % (N)	Total* % (N)
Factor Found at Penalty Phase	100.0 (6)	43.7 (7)	71.7 (33)	33.3 (1)	100.0 (1)	66.7 (12)	88.9 (32)	50.0 (1)	72.7 (93)
Factor Not Found at Penalty Phase	0.0 (0)	56.3 (9)	28.3 (13)	66.7 (2)	0.0 (0)	33.3 (6)	11.1 (4)	50.0 (1)	27.3 (35)
Total	100.0 (6)	100.0 (16)	100.0 (46)	100.0 (3)	100.0 (1)	100.0 (18)	100.0 (36)	100.0 (2)	100.0 (128)

*The total number of aggravating factors submitted (N = 128) exceeds the total number of cases which went to penalty phase (N = 69) because more than one factor can be submitted in a case.

TABLE 42

INDIVIDUAL STATUTORY AGGRAVATING FACTORS SUBMITTED AT PENALTY PHASE AND FOUND AT PENALTY PHASE, FOR CASES WHERE DEFENDANT WAS NOT SENTENCED TO DEATH (N = 44)*

	Submitted at Penalty Phase	Found at Penalty Phase**	Not Found at Penalty Phase
(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;***	2	2	0
(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;	13	6	7
(c) The murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;	24	13	11
(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value;	2	0	2
(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;	0	0	0
(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;	8	5	3

TABLE 42 (cont.)

	Submitted at Penalty Phase	Found at Penalty Phase**	Not Found at Penalty Phase
(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping;*** or	21	18	3
(h) The defendant murdered a public servant, as defined in 2C:27(1), while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.	1	0	1
Total Number of Individual Factors Served	71	44	27

*The N in parentheses refers to the number of defendants who went to penalty phase and were not sentenced to death.

**The decision maker at penalty phase weighs the aggravating factors against any mitigating factors before returning the death penalty. Therefore, it is possible for individual aggravating factors to be found without the death sentence being returned. At penalty phase the aggravating factor or factors are found but they are found to be outweighed by mitigating factors and, therefore, the death penalty is not returned.

***Incorporates language of 1985 Amendment, L.1985, c.178.

TABLE 43

PERCENTAGE DISTRIBUTION OF INDIVIDUAL STATUTORY AGGRAVATING FACTORS: FOUND AT PENALTY PHASE AND NOT FOUND AT PENALTY PHASE, FOR CASES WHERE DEFENDANT WAS NOT SENTENCED TO DEATH (N = 44)*

	Status of Aggravating Factors		
Statutory Aggravating Factors	Factor Found at Penalty Phase % (N)	Factor Not Found at Penalty Phase % (N)	Total Submitted % (N)
(a) Prior Murder	4.5 (2)	0.0 (0)	2.8 (2)
(b) Risk of Death to Another	13.6 (6)	25.9 (7)	18.3 (13)
(c) Outrageous and Vile	29.5 (13)	40.7 (11)	33.8 (24)
(d) For Pecuniary Value	0.0 (0)	7.4 (2)	2.8 (2)
(e) By Payment	0.0 (0)	0.0 (0)	0.0 (0)
(f) To Escape Detection	11.4 (5)	11.1 (3)	11.3 (8)
(g) Felony Factor	40.9 (18)	11.1 (3)	29.6 (21)
(h) Victim Public Servant	0.0 (0)	3.7 (1)	1.4 (1)
Total	100.0 (44)	100.0 (27)	100.0 (71)

*The N in parentheses refers to number of cases where defendant was not sentenced to death at penalty phase.

TABLE 44

INDIVIDUAL STATUTORY AGGRAVATING FACTORS: PERCENTAGE FOUND AT PENALTY PHASE AND PERCENTAGE NOT FOUND AT PENALTY PHASE, FOR CASES WHERE DEFENDANT WAS NOT SENTENCED TO DEATH (N = 44)*

	Statutory Aggravating Factors								
Status of Aggravating Factors	Prior Murder (a) % (N)	Risk of Death to Another (b) % (N)	Outrageous and Vile (c) % (N)	For Pecuniary Value (d) % (N)	By Payment (e) % (N)	To Escape Detection (f) % (N)	Felony Factor (g) % (N)	Victim Public Servant (h) % (N)	Total* % (N)
Factor Found at Penalty Phase	100.0 (2)	46.2 (6)	54.2 (13)	0.0 (0)	0.0 (0)	62.5 (5)	85.7 (18)	0.0 (0)	62.0 (44)
Factor Not Found at Penalty Phase	0.0 (0)	53.8 (7)	45.8 (11)	100.0 (2)	0.0 (0)	37.5 (3)	14.3 (3)	100.0 (1)	38.0 (27)
Total	100.0 (2)	100.0 (13)	100.0 (24)	100.0 (2)	0.0 (0)	100.0 (8)	100.0 (21)	100.0 (1)	100.0 (71)

*The N in parentheses refers to the number of cases in which the defendant was not sentenced to death at penalty phase.

TABLE 45

INDIVIDUAL STATUTORY AGGRAVATING FACTORS SUBMITTED TO PENALTY PHASE JURY AND FOUND BY PENALTY PHASE JURY, FOR CASES WHERE DEFENDANT WAS SENTENCED TO DEATH (N = 25)

	Submitted at Penalty Phase*	Found at Penalty Phase	Not Found at Penalty Phase**
(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;***	4	4	0
(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;	3	1	2
(c) The murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;	22	20	2
(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value;	1	1	0
(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;	1	1	0
(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment, or confinement for another offense committed by the defendant or another;	10	7	3

TABLE 45 (cont.)

	Submitted at Penalty Phase*	Found at Penalty Phase	Not Found at Penalty Phase**
(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping;*** or	15	14	1
(h) The defendant murdered a public servant, as defined in 2C:27(1), while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.	1	1	0
Total Number of Individual Factors Served	57	49	8

*Every verdict of death was returned by a jury at penalty phase.

**A penalty phase jury may not find every factor submitted although they return a verdict of death.

***Incorporates language of 1985 Amendment, L.1985, c.178.

TABLE 46

INDIVIDUAL STATUTORY AGGRAVATING FACTORS: PERCENTAGE SUBMITTED AT PENALTY PHASE BY DEATH VERDICT

	Statutory Aggravating Factors								
Status of Aggravating Factors	Prior Murder (a) % (N)	Risk of Death to Another (b) % (N)	Outrageous and Vile (c) % (N)	For Pecuniary Value (d) % (N)	By Payment (e) % (N)	To Escape Detection (f) % (N)	Felony Factor (g) % (N)	Victim Public Servant (h) % (N)	Total* % (N)
Factor Submitted, Death Verdict (N = 25)**	66.6 (4)	18.8 (3)	43.1 (22)	33.3 (1)	100.0 (1)	55.5 (10)	40.5 (15)	50.0 (1)	42.5 (57)
Factor Submitted at Penalty Phase, No Death Verdict (N = 44)	33.3 (2)	81.3 (13)	56.9 (29)	67.7 (2)	0.0 (0)	44.4 (8)	59.5 (22)	50.0 (1)	57.5 (77)
Total	100.0 (6)	100.0 (16)	100.0 (51)	100.0 (3)	100.0 (1)	100.0 (18)	100.0 (37)	100.0 (2)	100.0 (134)

*The total number of aggravating factors submitted (N = 134) exceeds the total number of cases which went to penalty phase (N = 69) because more than one factor can be submitted in a case. This table records factors present at penalty phase (N = 69 cases) which were also present in those cases where the defendant received the death penalty (N = 25). Every verdict of death was imposed by a jury at penalty phase.

**Factor present in cases where the death penalty was returned does not mean the penalty phase jury returned that aggravating factor in every case in which they returned the death penalty. See tables 45 and 49 for a description of when the penalty phase jury found the individual statutory aggravating factors by death verdict.

TABLE 47

PERCENTAGE OF INDIVIDUAL STATUTORY AGGRAVATING FACTORS SUBMITTED, BY DEATH VERDICT

Statutory Aggravating Factors	Factor Submitted,* Death Verdict % (N)	Factor Submitted at Penalty Phase, No Death Verdict % (N)	Total** % (N)
(a) Prior Murder	7.0 (4)	2.8 (2)	4.7 (6)
(b) Risk of Death to Another	5.3 (3)	18.3 (13)	12.5 (16)
(c) Outrageous and Vile	38.6 (22)	33.8 (24)	35.9 (46)
(d) For Pecuniary Value	1.8 (1)	2.8 (2)	2.3 (3)
(e) By Payment	1.8 (1)	0.0 (0)	.8 (1)
(f) To Escape Detection	17.5 (10)	11.3 (8)	14.1 (18)
(g) Felony Factor	26.3 (15)	29.6 (21)	28.1 (36)
(h) Victim Public Servant	1.8 (1)	1.4 (1)	1.6 (2)
Total	100.0 (57)	100.0 (71)	100.0 (128)

*Factor submitted does not mean the penalty phase jury found the factor in every case in which they returned the death penalty. Factor submitted in this table means the jury returned the death penalty and this factor was submitted to them. See tables 45 and 49 for a description of when the penalty phase jury found the individual statutory aggravating factors by death verdict.

**The total number of aggravating factors present at penalty phase (N = 128) exceeds the total number of cases which went to penalty phase (N = 69) because more than one factor can be submitted in a case. This table records factors submitted at penalty phase (N = 69 cases) which were also submitted in those cases where the defendant received the death penalty (N = 25).

TABLE 48

PERCENTAGE DISTRIBUTION OF INDIVIDUAL STATUTORY AGGRAVATING FACTORS: FOUND AT PENALTY PHASE AND NOT FOUND AT PENALTY PHASE, FOR CASES WHERE DEFENDANT WAS SENTENCED TO DEATH (N = 25)*

	Status of Aggravating Factors		
Statutory Aggravating Factors	Factor Found at Penalty Phase % (N)	Factor Not Found at Penalty Phase % (N)	Total % (N)
(a) Prior Murder	8.2 (4)	0.0 (0)	7.0 (4)
(b) Risk of Death to Another	2.0 (1)	25.0 (2)	5.3 (3)
(c) Outrageous and Vile	40.8 (20)	25.0 (2)	38.6 (22)
(d) For Pecuniary Value	2.0 (1)	0.0 (0)	1.7 (1)
(e) By Payment	2.0 (1)	0.0 (0)	1.7 (1)
(f) To Escape Detection	14.3 (7)	37.5 (3)	17.5 (10)
(g) Felony Factor	28.6 (14)	12.5 (1)	26.3 (15)
(h) Victim Public Servant	2.0 (1)	0.0 (0)	1.7 (2)
Total	100.0 (49)	100.0 (8)	100.0 (57)

*The N in parentheses refers to number of defendants who were sentenced to death at penalty phase. Every verdict of death was returned by a jury at penalty phase.

TABLE 49

INDIVIDUAL STATUTORY AGGRAVATING FACTORS: PERCENTAGE FOUND AND NOT FOUND AT PENALTY PHASE, FOR CASES WHERE DEFENDANT WAS SENTENCED TO DEATH (N = 25)*

	Statutory Aggravating Factors								
Status of Aggravating Factors	Prior Murder (a) % (N)	Risk of Death to Another (b) % (N)	Outrageous and Vile (c) % (N)	For Pecuniary Value (d) % (N)	By Payment (e) % (N)	To Escape Detection (f) % (N)	Felony Factor (g) % (N)	Victim Public Servant (h) % (N)	Total % (N)
Factor Found at Penalty Phase	100.0 (4)	33.3 (1)	90.9 (20)	100.0 (1)	100.0 (1)	70.0 (7)	93.4 (14)	100.0 (1)	86.0 (49)
Factor Not Found at Penalty Phase	0.0 (0)	66.7 (2)	9.1 (2)	0.0 (0)	0.0 (0)	30.0 (3)	6.6 (1)	0.0 (0)	14.0 (8)
Total	100.0 (4)	100.0 (3)	100.0 (22)	100.0 (1)	100.0 (1)	100.0 (10)	100.0 (15)	100.0 (1)	100.0 (57)

*The N in parentheses refers to cases where the defendant was sentenced to death at penalty phase. Every verdict of death was imposed by a jury at penalty phase.

TABLE 50

INDIVIDUAL STATUTORY AGGRAVATING FACTORS: PROBABILITY OF PROGRESSING TO NEXT CAPITAL CASE PROCESSING STAGE

	Aggravating Factors							
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
Factor Served (N = 131)*	7	33	99	6	2	31	89	2
Capital Trial (N = 94)	85.7 (6/7)	81.8 (27/33)	69.7 (69/99)	66.7 (4/6)	100.0 (2/2)	77.4 (24/31)	59.6 (53/89)	100.0 (2/2)
Penalty Phase (N = 69)	100.0 (6/6)	59.3 (16/27)	66.7 (46/69)	75.0 (3/4)	50.0 (1/2)	75.0 (18/24)	67.9 (36/53)	100.0 (2/2)
Death Verdict (N = 25)	66.7 (4/6)	18.8 (3/16)	43.1 (22/46)	33.3 (1/3)	100.0 (1/1)	55.5 (10/18)	40.5 (15/36)	50.0 (1/2)

*The N in parentheses refers to the number of cases in that category.

TABLE 51

INDIVIDUAL STATUTORY MITIGATING FACTORS: SUBMITTED AT PENALTY PHASE AND FOUND AT PENALTY PHASE, FOR ALL PENALTY PHASE CASES AND BY DEATH VERDICT

	Mitigating Factors							
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
All Penalty Phase Cases (N = 69)*								
Submitted	41	5	48	47	7	39	4	57
Found	23	3	24	29	3	27	1	42
Not Found	18	2	24	18	4	12	3	15
Nondeath Verdict (N = 44)								
Submitted	25	3	34	30	6	25	4	35
Found	15	1	19	19	3	20	1	24
Not Found	10	2	15	11	3	5	3	11
Death Verdict (N = 25)**								
Submitted	16	2	14	17	1	14	0	22
Found	8	2	5	10	0	7	0	18
Not Found	8	0	9	17	1	7	0	4

*The N in parentheses refers to the number of cases in that category.

**Every verdict of death was imposed by a jury at penalty phase. A jury may find mitigating factors and nonetheless impose the verdict of death.

TABLE 52

INDIVIDUAL STATUTORY MITIGATING FACTORS: PERCENTAGE FOUND, ALL PENALTY PHASE CASES AND BY DEATH VERDICT

	Percentage Found, Penalty Phase (N = 69)*	Percentage Found, Nondeath Verdict (N = 44)	Percentage Found, Death Verdict (N = 25)**
(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution;	56.1	60.0	50.0
(b) The victim solicited, participated in, or consented to the conduct which resulted in his death;	60.0	33.3	100.0
(c) The age of the defendant at the time of the murder;	50.0	55.9	35.7
(d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution;	61.7	63.3	58.8
(e) The defendant was under unusual and substantial duress insufficient to constitute a defense to prosecution;	42.9	50.0	0.0
(f) The defendant has no significant history of prior criminal activity;	69.2	80.0	50.0

TABLE 52 (cont.)

	Percentage Found, Penalty Phase (N = 69)*	Percentage Found, Nondeath Verdict (N = 44)	Percentage Found, Death Verdict (N = 25)**
(g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder;	25.0	25.0	0.0
(h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.	73.7	68.6	81.8

*The N in parentheses refers to number of cases in that category.

**Every verdict of death was imposed by a jury at the penalty phase. A jury may find mitigating factors and nonetheless impose the verdict of death.

VIII. ANNOTATION OF DEATH-POSSIBLE CASES

Litigation challenging the reimposition of capital punishment has typically challenged the imposition of the death sentence at the final capital case processing stage. Yet long before a case reaches a penalty phase jury, outcome determinative case processing decisions have been made at the charging stage. This is the stage where the discretion of individual prosecutors is unfettered by statute. The stage analysis presented here demonstrates the funnel effect of capital case processing in its early stages.

Under the present New Jersey statute, many cases are death-possible.[745] The upper numerical limit of death-possible cases was 703, the total number of cases in the data base. The number of cases identified as death-possible by the respondents in interviews was 404. Of these, the county prosecutor served a notice of factors in 131 cases, or approximately 30%. A different group of respondents might have identified a larger or smaller number of death-possible cases. Some might disagree with the identification of an individual case. There is no dispute over the fact that the number of death-possible cases greatly exceeds the number of cases where the county prosecutor actually serves a notice of factors. The range of situations encompassed by the language of the statutory aggravating factors is such that many homicides could be declared death-eligible.

Every felony murder is potentially death-eligible for the person who commits the homicidal act.[746] Interpretations of the statutory

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745. "Death-possible" cases are defined in this study as those cases in which the underlying circumstances are such that the prosecution has a legitimate factual basis for serving a notice of factors. "Death-eligible" cases are those "death-possible" cases in which the prosecutor actually does serve a notice of factors, thereby announcing the intention to seek the death sentence at penalty phase.

746. On March 28, 1988, the Assembly Judiciary Committee heard testimony on A.B. 2186, an act concerning capital punishment and amending N.J. STAT. ANN. § 2C:11-3 to remove the "by his own conduct" language from the statute. This would have considerably broadened the application of the statute, not only to non-slayer participants in felony murders but also to accomplices who did not commit the homicidal act in murders judged "heinous, atrocious and cruel" and to accomplices where any other statutory aggravating factors were alleged. Data from this Study were submitted to the committee in support of the argument that this amendment would not only subject felony murder accomplices to the possibility of the death penalty, but it would impermissibly broaden the New Jersey capital punishment statute, even beyond what was envisioned in Tison v. Arizona, 107 S. Ct. 1676 (1987). In State v. Ramseur, 106 N.J. 123, 186, 524 A.2d 188, 218-19 (1987), the New Jersey Supreme Court found the narrowing of the class of death-eligible defendants to be constitutionally necessary. The Attorney General stated opposition to the bill on the grounds that it impermissibly broadens the statute. As of August of 1988, the status of the

language "grave risk of death to another" and "purpose to escape detection" can be very broad. Prosecutors may also be making judgments concerning the strength of statutory mitigating factors in their decision to declare a case death-eligible, even though technically the statutory mitigating factors do not come into play until penalty phase. Perhaps prosecutors select cases for capital prosecution by simply making a judgment about what cases they are likely to win.

The following case summaries from the present data base of 703 cases illustrate the wide range of interpretation which has been given to the language defining the statutory aggravating factors. Cases are grouped by their factual circumstances, although several cases could be placed in more than one category. These cases are concrete examples of the statistical discrepancies reported earlier. A more detailed and complete annotation of all of the death-possible cases in the present data base is included in the *Interim Report*.

A. *Cases Involving a Mentally Ill Defendant or the Presence of Mental Mitigating Factors*

In these cases, either the nature of the homicide or the defendant's behavior or psychiatric history indicated the presence of mental illness or disability. These are often cases where the bizarre or repellent nature of the crime might well trigger the serving of the (c) factor, that the homicide was outrageously or wantonly vile. These are also cases where the defense case may primarily consist of the presentation at penalty phase of evidence on the two mental mitigating factors (a) and (d).

These cases typically do not result in a verdict of not guilty by reason of insanity, although issues regarding intent will probably be central. Rarely is there any question about who committed the homicidal act. These cases raise the most difficult ethical issues for all participants. Defense counsel will present purportedly mitigating evidence of the defendant's mental and social history with the fear that such evidence will arouse only negative responses from the jury. Some prosecutors are inclined to offer pleas in these circumstances, others do not. At subsequent appeals, the question of the defendant's competency to be executed may well

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bill is that it is being held by the committee and has not been released to the full Assembly.

arise.

Case No. 005—Bergen County

A 34 year old white male with no prior record killed his mother, a teacher in her fifties. There were approximately 40 stab wounds. The prosecutor charged one count of purposeful and knowing murder by his own conduct with no contemporaneous offenses. No notice of factors was served. The case went to trial on the issue of insanity only. The defendant was found not guilty by reason of insanity.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 006—Bergen County

A 41 year old black male with no prior record shot his wife, a 40 year old black bank clerk. The prosecutor indicted for purposeful and knowing murder by his own conduct and two weapons counts. No notice of factors was served. The defendant had a significant history of prior institutionalizations for mental illness. He pled guilty to aggravated manslaughter and was sentenced to 20 years imprisonment with a mandatory minimum term of 10 years.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 134—Cape May County

A 25 year old black male stabbed to death a 22 year old black male and also attacked and wounded a 20 year old black male. The defendant lived in a rooming house with his children and their mother. Another resident was playing a radio loudly, and the defendant claimed his daughter wanted to sleep. The defendant pulled a knife and slashed one victim. He then stabbed the decedent victim five times after chasing him out of the house onto the street. The defendant had a history of prior institutionalization for mental illness. Others present jumped out of a window to escape the defendant. The prosecutor initially charged murder and aggravated assault for the attack on the second victim. No notice of factors was served. The defendant eventually pled guilty to a one count accusation for aggravated manslaughter and was sentenced to 20 years with a 9 year minimum.

The case was identified as death-possible on the grave risk of death to another factor.

Case No. 145—Atlantic County

A 17 year old white male with no prior record stabbed to death his mother, a 40 year old white female, in their home. The victim was stabbed once in the abdomen. The defendant was under the influence of drugs and had just been released from a psychiatric facility. The prosecutor charged murder. The case proceeded on a juvenile complaint. No notice of factors was served. The case went to trial on the issue of the defendant's sanity only. The defendant was initially found not guilty by reason of insanity. He was subsequently determined to be sane. He was then found guilty as charged, but disposition was suspended on the condition that he be placed under medical supervision. He was released from Trenton Psychiatric Hospital to be supervised by a treatment center.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 221—Monmouth County

A 61 year old Cuban male beat and stabbed his wife to death when she tried to prevent him from committing suicide. The victim was a 60 year old black female. There were multiple stab wounds with different knives. The defendant had no prior criminal record, but he had previously been institutionalized for mental illness. The prosecutor indicted for purposeful or knowing murder by his own conduct with no contemporaneous offenses. No notice of factors was served. The defendant pled guilty to aggravated manslaughter and was sentenced to 20 years with a minimum of 10 years.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 237—Morris County

A 28 year old white male with no prior record, but with a history of prior institutionalization for mental illness, shot and killed both of his parents. The victims were a white male and a white female, both 60 years old. The shooting occurred after a verbal altercation between the defendant and his parents. The defend-

ant was indicted for two counts of purposeful or knowing murder. The indictment did not specify by his own conduct. No notice of factors was served. At trial, the defendant was found guilty of both murders and sentenced to two concurrent life terms with two concurrent minimum terms of 30 years.

The case was identified as death-possible on the grave risk of death to another factor.

Case No. 267—Ocean County

A 23 year old white male with no prior record attacked his parents, a white man and woman in their fifties, in their home. The weapon was a machete, and the victims were stabbed 10 times. The defendant had a history of prior institutionalization. He inflicted injuries upon himself and had previously attempted suicide. The prosecutor indicted for purposeful or knowing murder by his own conduct for the offense against his father, and one count of aggravated assault for the offense against his mother. No notice of factors was served. The case went to trial without a jury, and the defendant was found not guilty by reason of insanity.

The case was identified as death-possible on the grave risk of death to another factor and the outrageously or wantonly vile factor.

Case No. 485—Monmouth County

A 37 year old white male, a dentist with no prior record, bludgeoned to death his wife, a 25 year old white female. The victim was hit repeatedly with a dumbbell, and the defendant then disposed of the body. The defendant had a history of prior institutionalization for mental illness. The prosecutor indicted for murder with no contemporaneous offenses. No notice of factors was served. The case went to trial, and the defendant was found guilty of murder. He was sentenced to life with a mandatory minimum of 30 years.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 675—Union County

A 48 year old white male was charged with killing a 39 year old white female. The victim and the defendant lived together. The victim disappeared and pieces of her body began turning up in

different parts of town. The victim was presumably killed by stabbing. The defendant had an extensive history of prior hospitalization for mental illness, including previous episodes of violent attacks. He claimed amnesia in connection with the event. The prosecutor indicted for purposeful and knowing murder by his own hand and two weapons counts. The filing of a notice of factors was postponed pending the submission of psychiatric reports. Two psychiatric reports agreed that the defendant suffered from severe mental illness. The defendant went to trial before a judge. He was found not guilty by reason of insanity.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 676—Bergen County

A 23 year old white male with no prior record was charged with killing his mother, a 64 year old white female, and his stepfather, a 74 year old white male. The stepfather was bludgeoned to death with a hammer in his home in the middle of the day. The stepfather's body was hidden, and the mother was strangled when she came home several hours later. Both bodies were then taken in the defendant's car and buried in a state park. Money and jewelry were missing from the house. The defendant had a history of prior institutionalization for mental illness.

The defendant was indicted for two counts of purposeful and knowing murder by his own conduct. No notice of factors was served. The case went to trial before a jury. The jury found the defendant guilty on both counts. He was sentenced by the judge to two concurrent life terms with two concurrent 30 year mandatory minimum terms.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 687—Ocean County

A 22 year old white male was charged with killing his wife, a 22 year old white female. The defendant stabbed the victim thirteen times in the presence of their two year old son. The defendant and victim were separated, and domestic violence complaints had been filed against the defendant. The homicide took place in the victim's kitchen. The defendant was civilly committed after his arrest for eleven months.

The defendant was indicted for one count of purposeful or knowing murder by his own conduct. No notice of factors was served. The defendant pled guilty during trial to aggravated manslaughter. He was sentenced to 20 years with a mandatory minimum of 10 years.

The case was identified as death-possible on the grave risk of death to another factor and the outrageously or wantonly vile factor.

These cases illustrate how cases which would seem to be death-eligible on their facts fall out of the capital case processing system. A death-eligible indictment is not returned, or no indictment is returned. The prosecutor accepts a plea to manslaughter. Is there any distinction, except the arbitrariness of luck or caprice, between the former cases and the following cases where a notice of factors was served?

Case No. 019—Camden County

A 35 year old white woman drowned her four children, a baby and three children aged three, five, and seven. The defendant had no prior record and no history of prior institutionalization, although there was a history of prior treatment for psychological problems. The prosecutor charged four counts of murder, two counts of hindering apprehension, and served a notice of factors on the outrageously or wantonly vile factor. The case went forward as a capital trial without a jury. The judge found the outrageously or wantonly vile factor and that it was outweighed by six statutory mitigating factors. The court found all the mitigating factors except the (b) factor concerning victim solicitation and the (g) factor, that the defendant assisted the State. The defendant was sentenced to four concurrent life terms with four concurrent mandatory minimum terms of 30 years.

Case No. 174—Passaic County

A 26 year old white male with no prior record was charged with killing a 21 year old white female. The defendant and the victim had previously been engaged. On the day of the homicide, the defendant came to the victim's house and they quarreled. The victim was stabbed 130 times. The defendant had a history of prior institutionalization for mental illness. The prosecutor charged

murder and robbery and served a notice of factors on the outrageously or wantonly vile factor. The defendant pled guilty to aggravated manslaughter and was sentenced to 20 years with a minimum of 10 years, to be served at a psychiatric facility. The notice of factors was withdrawn. The robbery count was dismissed.

Case No. 497—Union County

A 29 year old Hispanic male with no prior record beat to death a 43 year old Hispanic female. The homicide took place under a highway bridge. The victim was allegedly the defendant's girlfriend. The victim was beaten and also struck with a beer bottle. The defendant had a history of prior institutionalization for mental illness. The prosecutor charged murder with no contemporaneous offenses. A notice of factors was served on the outrageously or wantonly vile factor. The notice of factors was withdrawn, however, and the defendant pled to aggravated manslaughter, receiving a sentence of 20 years with a minimum of 10 years.

B. *Cases Involving Child Victims*

Cases involving child victims provoke a contradictory response in the legal system. They typically include facts which produce shock and outrage in the community, but their facts often also include mitigating circumstances which may arouse sympathy for the defendant. The pattern illustrated seems to be that these cases cluster at both ends of the spectrum. Either these defendants are treated very harshly or they are offered pleas to minimal sentences.

Case No. 034—Essex County

A 24 year old black female with no prior record was charged with killing her child, a male baby less than a year old. The child was smothered with a pillow at home. The prosecutor indicted for one count of purposeful or knowing murder by her own conduct. No notice of factors was served. The case went to trial. The defendant was found guilty of manslaughter and sentenced to 10 years with a minimum of 5 years.

The case was identified as death-possible on the grave risk of death to another factor.

Case No. 040—Essex County

A 22 year old Puerto Rican woman with no criminal record killed her nine month old daughter. The victim had a fractured skull and extensive burns from scalding; either injury would have been sufficient to cause death. The child died in the hospital two days after the incident. The prosecutor indicted for purposeful or knowing murder by her own conduct and endangering the welfare of a child. No notice of factors was served. The case went to trial without a jury. The defendant was found guilty of reckless manslaughter and sentenced to a 7 year term with no mandatory minimum. The count for endangering the welfare of a child was merged.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 085—Camden County

A 20 year old black woman with no prior record was charged in connection with the death of her child, a three year old boy. She was also charged with abuse of her two other children, a two year old girl and a six year old boy. The defendant had recently given birth to her fourth child.

The defendant claimed the child fell out the window. She placed the child in a trash bag, and the body was never recovered. There was substantial evidence of abuse to the other children, including prior complaints to welfare agencies and physical evidence of abuse. The prosecutor indicted for aggravated manslaughter, two counts of aggravated assault for offenses against the two other children, three counts of endangering the welfare of children, and one count of hindering apprehension by suppressing evidence of the crime of manslaughter. The defendant pled guilty to aggravated assault and was sentenced to 10 years with a 5 year minimum. She also pled guilty to one count of endangering the welfare of children and received a consecutive term of 5 years on that count. She pled guilty to hindering apprehension and received a 5 year concurrent term on that count. Her total sentence was 15 years with a minimum of 5 years. The homicide charge and the remaining counts were dismissed.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 105—Cape May County

A 27 year old white male with no prior record killed his three daughters, a three year old, and eight month old twins. The defendant allegedly was despondent over a pending domestic violence action brought by his separated wife and by the possibility of termination of parental rights. The children were living with him. He suffocated the children one after another, marked their time of death, then placed them in their beds and joined their hands so that they could go to heaven together. The defendant was taken to the hospital after a car accident which was apparently a suicide attempt. The defendant did not have a history of prior institutionalization for mental illness. The prosecutor charged three counts of purposeful or knowing murder. No notice of factors was served. The defendant pled guilty to three counts of murder and was sentenced to three concurrent terms of 30 years, each with a 30 year minimum term.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 130—Salem County

A 25 year old black male with no prior record was charged in connection with the death of a two year old black male child. The defendant was living with the child's mother. The child was brought to the hospital with liver and kidney damage and a ruptured spleen. The defendant admitted hitting the child with his fist and with a switch, but the defendant claimed the child fell against an open drawer. The prosecutor originally charged murder. No notice of factors was served. The defendant eventually pled to a one count accusation for aggravated manslaughter. He was sentenced to 20 years with no minimum.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 148—Mercer County

A 29 year old white male killed his wife, a 35 year old white female, and his two children, aged three and one years old, with a shotgun. The defendant was found hiding in the woods a day after the crime with a number of injuries to himself, including a serious stab wound to his eye. The prosecutor indicted for three counts of purposeful or knowing murder by his own conduct. No

notice of factors was served. Both the defense and prosecution psychiatrists agreed that the defendant was insane at the time of the offense. The defendant had been sexually abused as a child by members of his family. He claimed he killed his wife and child to protect them from abuse by him. The defendant was adjudicated not guilty by reason of insanity on all three counts and transferred to the State Forensic Psychiatric Hospital.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 257—Gloucester County

A 26 year old white male was alone with the two year old daughter of his white girlfriend. The defendant allegedly struck the child, causing a head injury. Then he suffocated her with a doll. The head injury was the cause of death. The autopsy indicated that the child had been previously abused. The prosecutor indicted separately for purposeful or knowing murder, purposeful or knowing murder by his own conduct, and aggravated manslaughter. No notice of factors was served. The defendant went to trial before a jury on the murder count and was acquitted. A previous trial on the count for purposeful or knowing murder by his own conduct had resulted in a mistrial.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Once again, there seems to be nothing systematic which distinguishes the cases where no notice of factors was served from the following cases involving child victims, where a notice of factors was served.

Case No. 097—Essex County

A 20 year old black female with no prior record and a co-defendant were charged in connection with the death of the defendant's three year old black male child. The child had been beaten to death. The prosecutor charged murder, aggravated assault, and a count of child abuse and neglect. A notice of factors was served on the outrageously or wantonly vile factor. The case went to trial as a capital case. At guilt phase, the defendant was found guilty of murder, aggravated assault, and abuse and neglect. At penalty phase, the jury found the aggravating factor and mitigating fac-

tors. The defendant was sentenced to life with a minimum of 30 years on the murder. She was sentenced to consecutive terms of 10 years with a 5 year minimum and 3 years with a 3 year minimum on the abuse charge. The defendant's total sentence was life with a minimum of 38 years. The co-defendant was convicted of manslaughter and sentenced to 20 years with a 10 year minimum.

Case No. 467—Somerset County

A 45 year old white male beat to death his girlfriend's child, a four year old white male. The child was beaten, and fell and split his head open. The prosecutor indicted for one count of murder and served a notice of factors on the outrageously or wantonly vile factor. The case went to trial as a capital case, and the defendant was found guilty of capital murder. At penalty phase, the jury did not find either the heinous factor or any mitigating factors. Therefore, they could not find the aggravating factor outweighed the mitigating factor. The defendant was sentenced to 30 years with a minimum of 30 years.

Case Nos. 506 and 567—Somerset County

A 21 year old white female with no prior record and her boyfriend, the co-defendant, were drinking at his house. The co-defendant accused the defendant's four year old son of stealing his ruler. The defendant and the co-defendant left the house, and when they returned the co-defendant again accused the child. The defendant went back to her home and left the child with the co-defendant. The co-defendant beat the child to death. There was a history of prior abuse of the child by the co-defendant. The prosecutor indicted the mother for murder. No notice of factors was served against the mother. The mother pled to a subsequently drafted accusation for aggravated manslaughter, and the indictment was dismissed. The mother was sentenced to 15 years with a minimum of 8 years. The co-defendant was charged with capital murder and found guilty of murder at trial. He was sentenced to life.

C. *Felony Murders*

Technically, every person who is accused of committing a homicidal act while even marginally involved in a felony is eligible to have the felony factor served against him. Nor is there any statu-

tory language precluding the serving of a notice of factors against two or more co-defendants in a single felony murder. The interpretation of this statutory aggravating factor has varied widely from county to county, as the following cases illustrate.

Some county prosecutors routinely indict all co-defendants in a felony murder for purposeful or knowing murder by his own conduct. A notice of factors may then be served against all, one, or none. Some prosecutors routinely indict all co-defendants, or the single defendant, for felony murder only, thereby precluding the serving of a notice of factors on the felony factor or any other factor. The prosecutor's discretionary decision to indict only for felony murder is unreviewable. There are no statutory or administrative guidelines governing that decision. The decision to indict only for felony murder immediately exempts a case from capital case processing. The individual county prosecutor, and not the penalty phase jury, unilaterally makes the threshold decision of who shall be eligible for the death sentence for felony murder.[747] The statutory structure created by the legislature placed that decision squarely before the death qualified jury.

The special procedures outlined in great detail in the capital punishment statute were designed to guarantee that the life/death decision would be made objectively and fairly. Yet, as these cases demonstrate, an individual county prosecutor has the unreviewable authority to unilaterally channel defendants out of the capital case processing system. The individual county prosecutor accounts to no one on the decision as to the form of the initial charge and the decision to offer and accept a plea. The form of the charge itself is often a matter of intense plea negotiation.

In some counties prosecutors do no pre-indictment screening, seeming to take the position that plea negotiations or the jury will sort out who committed the homicidal act. In other counties, the prosecutor will screen co-defendant cases and only indict one defendant for purposeful or knowing murder by his own conduct.

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747. In State v. Smith, 202 N.J. Super. 578, 495 A.2d 507 (Law Div. 1985), the factual record, that there were several other indistinguishable death-possible felony cases which were not declared death-eligible, was never refuted. One county prosecutor has been quoted as saying that county prosecutors are "making a mistake" by not seeking executions in every case in which aggravating factors exist. " 'I say if one county does not have the resources, then the cases should be spread around or a special unit in the Attorney General's office should be formed to prosecute them,' [Morris County Prosecutor Lee] Trumball said, 'I feel comfortable that in Morris County we are pursuing every appropriate case,' he added." Newark Star Ledger, Feb. 23, 1988, at 31, col. 4.

The threshold showing to indict for purposeful or knowing murder by his own conduct is minimal at the grand jury stage. Intent and by his own conduct are simply facts to be submitted to the jury at guilt phase. The following is an incomplete annotation of death-possible cases in this data set. It is offered to demonstrate that many prosecutors do not choose to prosecute all possible felony murders as death-eligible, whether for budgetary, administrative, or other reasons.

Case No. 016—Camden County

A 22 year old black male killed his girlfriend's mother, a 45 year old black woman, by beating her with a baseball bat, stabbing her, and drowning her. The prosecutor indicted for murder, aggravated sexual assault, robbery, burglary, a weapons charge, and two counts of hindering apprehension. No notice of factors was served. The defendant had no prior record and no history of prior institutionalization for mental illness. The defendant pled guilty to murder and was sentenced to life with a mandatory minimum of 30 years and to a consecutive term of 20 years with a 10 year mandatory minimum term for robbery. His total sentence was life with a mandatory minimum of 40 years.

The case was identified as death-possible on the outrageously or wantonly vile factor, the for gain factor, and the felony factor.

Case No. 096—Essex County

A 23 year old black male and a 24 year old black male were charged with killing a 20 year old black male during a robbery attempt. The first defendant was indicted for purposeful or knowing murder by his own conduct and for murder during flight from robbery. Both defendants were charged with armed robbery. The first defendant was also charged with two weapons counts. No notice of factors was served against either defendant. At trial, the first defendant was found guilty of aggravated manslaughter, robbery, and the weapons counts. The co-defendant was indicted for armed robbery and pled guilty to armed robbery, receiving a sentence of 10 years with no minimum term.

Case No. 096 was identified as death-possible on the felony factor.

Case Nos. 118 and 144—Hudson County

A 19 year old black male, an 18 year old black male, and two other black males were involved in the beating and robbery of a 42 year old Hispanic male. A second Hispanic male was also injured in the attack. A wallet was taken from one of the victims. The arresting papers charged murder. The first defendant was offered and accepted a plea of guilty to an accusation which charged two counts of robbery. The co-defendant was indicted for felony murder and robbery. He went to trial and was found guilty of felony murder and sentenced to 30 years with a 30 year minimum. The remaining two co-defendants pled to non-homicide charges.

Both cases were identified as death-possible on the felony factor and the purpose of escaping detection factor. In addition, Case No. 144 was identified as death-possible on the outrageously or wantonly vile factor.

Case Nos. 160, 189 and 232—Essex County

A 16 year old black male, a 19 year old black male, and a 14 year old black male were charged in connection with the death of an 83 year old white male. The defendants broke into the victim's apartment, severely beat the victim, who was disabled and physically helpless, and killed him by hitting him repeatedly with a board with a nail protruding from it. A television and other items were taken from the apartment. The prosecutor indicted two co-defendants for purposeful or knowing murder. All three defendants were indicted for felony murder with robbery as the predicate felony, burglary, armed robbery, aggravated assault, receiving stolen property and weapons offenses. No notice of factors was served against any of the three defendants. Two of the defendants went to trial and were convicted of murder. The third co-defendant was offered and accepted a plea of guilty to burglary. He was sentenced to five years.

All three cases were identified as death-possible on the felony factor and the outrageously or wantonly vile factor.

Case No. 176—Bergen County

A 19 year old white male killed a gas station attendant during the course of a robbery attempt. The defendant shot the attendant with a shotgun after the attendant filled up his car. The pros-

ecutor charged purposeful or knowing murder by his own conduct, felony murder with robbery as the underlying felony, and four weapons counts. No notice of factors was served. At trial the defendant was found guilty of felony murder and sentenced to 30 years with a 30 year minimum.

The case was identified as death-possible on the felony factor.

Case No. 185—Essex County

A Hispanic male was charged in connection with the death of a 78 year old black female. The defendant allegedly set fire to an apartment building to seek revenge against the owner of the building. The homicide victim was a tenant who died in the fire. The prosecutor indicted for murder and aggravated arson. No notice of factors was served. After the first trial resulted in a hung jury, the defendant pled to an accusation charging aggravated manslaughter and was sentenced to 30 years with a minimum of 15 years.

The case was identified as death-possible on the felony factor.

Case Nos. 314, 344 and 371—Essex County

Two Hispanic males, aged 28 and 29, and a 28 year old white male broke into the apartment of a 52 year old[748] white male. The decedent victim was tied to his bed and beaten with a phone receiver. He died of the injuries two days later. The victim's roommate was also beaten and died subsequently of unrelated causes. All three defendants were indicted for felony murder, robbery, burglary, and aggravated assault. No notice of factors was served. One defendant pled guilty to robbery, and the homicide charge was dismissed. Another defendant was convicted of robbery at trial. The third defendant was found guilty of felony murder, burglary and robbery, and was sentenced to 30 years with a 30 year minimum.

All three cases were identified as death-possible on the felony factor. Two cases were also identified as death-possible on the outrageously or wantonly vile factor, and one case additionally identified the purpose of escaping detection factor.

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748. Two of the case summaries list the victim's age as 50; one case summary states 52. The case summaries list the charges somewhat differently. This summary was made with reference to the indictment.

Case Nos. 321 and 486—Bergen County

Two black males robbed the apartment of a 63 year old black woman. During the course of the robbery the victim was tied up and gagged and also allegedly beaten. The first defendant was charged with purposeful and knowing murder by his own conduct, robbery and possession of a controlled dangerous substance. The second defendant was charged with felony murder and other charges. No notice of factors was served against either defendant. Both defendants pled guilty to felony murder. The first defendant was sentenced to life with a minimum of 30 years. The co-defendant was sentenced to a mandatory 30 years. This term was concurrent to a prior unexpired term for robbery.

Case No. 321 was identified as death-possible on the felony factor and the outrageously or wantonly vile factor.

Case Nos. 342 and 573—Essex County

Two Hispanic males, aged 21 and 23, were accused of killing a 45 year old white male. The victim, who ran a plumbing and appliance store, was tied up with a wire or cord around his neck and feet and placed upside down in a walk-in refrigerator. The defendants took items from the store and sold them. Later the defendants came back and placed the defendant's body in a large metal drum, which was left on the street. One defendant was indicted for murder, felony murder, robbery and a weapons charge. The second defendant was charged with felony murder, robbery and a weapons count. No notice of factors was served against either defendant. At trial one defendant was convicted of felony murder and the other was convicted of aggravated manslaughter.

The cases were identified as death-possible on the felony factor and on the outrageously or wantonly vile factor.

Case No. 360—Hudson County

A 24 year old black male stabbed to death a 28 year old white female. The defendant worked for the victim's father, and the victim was a bookkeeper at the same place of business. The victim was stabbed 28 times at her workplace. The prosecutor charged purposeful or knowing murder by his own conduct, felony murder, robbery, and a weapons count. No notice of factors was served. The defendant was offered and accepted a plea to felony murder. He was sentenced to 40 years with a minimum of

30 years.

The case was identified as death-possible on the felony factor and the outrageously or wantonly vile factor.

Case Nos. 390 and 410—Hunterdon County

A 38 year old white male and a 31 year old white male were charged with killing two 25 year old Hispanic males. Both victims were shot, and their bodies were disposed of in a remote area. There were allegations that drugs were stolen as part of the offense. Both defendants were charged with two counts of purposeful or knowing murder and two counts of felony murder. No notice of factors was served. Both defendants were convicted at trial of two counts of purposeful and knowing murder and received two concurrent life terms.

The cases were identified as death-possible on the felony factor.

Case No. 392—Essex County

A 16 year old white male and two co-defendants allegedly forced their way into the apartment of the decedent victim, a 77 year old black male, and his wife, a 72 year old black female. The decedent victim was beaten and died of a heart attack. His wife was beaten with the butt of a pistol but survived. The defendant was a juvenile who was tried as an adult. The prosecutor indicted the defendant for purposeful or knowing murder by his own conduct, felony murder, burglary, robbery, aggravated assault against the non-decedent victim, and two weapons charges. No notice of factors was served. At trial this defendant was acquitted of all charges.

The case was identified as death-possible on the grave risk of death to another factor, the outrageously or wantonly vile factor, and the felony factor.

Case Nos. 431 and 458—Essex County

An 18 year old black male and a 21 year old black male co-defendant went to the apartment of their neighbor, an 87 year old white woman, to commit burglary. Both the defendant and the co-defendant beat the victim who died in the hospital two days later. The prosecutor indicted both defendants jointly for felony murder and burglary. No notice of factors was served. The case

went to trial and both defendants were found guilty of felony murder and of burglary. Both were sentenced to life with a minimum of 30 years.

Both cases were identified as death-possible on the outrageously or wantonly vile factor and the felony factor.

Case No. 453—Hudson County

A 19 year old Hispanic male and a juvenile co-defendant went to the home of the victim, a 70 year old Hispanic male. While the victim was taking pictures of them, they beat the victim with a hammer, brass knuckles and a chair, putting his eye out and killing him. They then robbed the victim. The prosecutor indicted for felony murder and robbery. No notice of factors was served. This defendant pled guilty to an amended indictment for aggravated manslaughter and was sentenced to 20 years with a ten year mandatory minimum term. The robbery count was dismissed.

The case was identified as death-possible on the outrageously or wantonly vile factor and the felony factor.

Case No. 469—Camden County

A 26 year old black male entered the apartment of his neighbor, a 56 year old black male. The victim, who was crippled, was tied to his wheelchair, bludgeoned over the head 14 times with a blunt instrument, and then stabbed. The prosecutor charged murder, robbery, and weapons counts. No notice of factors was served. At trial the defendant was found guilty of murder, robbery and a weapons count. He was sentenced to life.

The case was identified as death-possible on the felony factor and the outrageously or wantonly vile factor.

Case No. 483—Mercer County

An 18 year old white male attacked a 32 year old white female as she left the jewelry store she owned. The defendant hit the victim over the head with a length of lumber and stabbed her seven times. He then robbed her. The defendant was indicted for murder, felony murder, armed robbery, and a weapons charge. No notice of factors was served. At trial the defendant was found guilty of felony murder, armed robbery and a weapons count and sentenced to life.

The case was identified as death-possible on the felony factor,

the purpose of escaping detection factor, and the outrageously or wantonly vile factor.

Case Nos. 540, 541 and 682—Camden County

A 34 year old black female and a 23 year old black male lured a 69 year old black male into a hotel room. There he was tied up and forced to withdraw large amounts of money from his bank account and give it to them. The victim was a former lover of the female co-defendant. The defendants then decided to kill the victim so that he would not turn them over to the police. They took the victim out in a car, strangled the victim with a rope in the back seat and then dumped the body down an embankment. Neither of the defendants were indicted for murder and no notice of factors was served in the case. The first defendant pled guilty to an accusation for conspiracy to commit murder and kidnapping, receiving a total sentence of 25 years with a mandatory minimum of nine years. The co-defendant pled guilty to conspiracy to commit murder, murder, and robbery on an accusation. He was sentenced to 45 years with a 35 year minimum term. The third co-defendant, who drove the car, was indicted for murder as an accomplice. He pled guilty to robbery and was sentenced to a maximum of 12 years.

Case Nos. 540 and 541 were identified as death-possible on the felony factor and the purpose of escaping detection factor. Case No. 541 was additionally identified as death-possible on the outrageously or wantonly vile factor. Case No. 682 was not identified as death-possible.

Case No. 550—Essex County

A 20 year old black male and three co-defendants were walking down the street when they saw a man with change waiting at a bus stop. One of the defendants approached the 44 year old black man from the front and pointed a gun at him while the other three allegedly held him from behind. When the victim refused to give up his change, he was shot in the chest. This defendant was charged and found guilty of felony murder. Two co-defendants were also convicted of felony murder at trial. The third co-defendant pled to a non-homicide offense. No notice of factors was served against any defendant.

The case was identified as death-possible on the felony factor

and the outrageously or wantonly vile factor.

Case No. 567—Monmouth County

A 22 year old white male flagged down a passing motorist for a ride. He then killed the driver, pushed him out on the road, and stole the car. The victim, a 40 year old white male, had been shot five times. The defendant was indicted for murder, felony murder, armed robbery, theft, and a weapons count. No notice of factors was served. He was convicted on all counts at trial. He was sentenced to life with a minimum of 30 years for murder, with a consecutive term for the weapons count. The sentences on the other convictions were merged.

The case was identified as death-possible on the felony factor.

Case No. 601—Essex County

A 23 year old black male was charged with killing a 41 year old black male during the course of a robbery and burglary. Two others were involved in the offense, a juvenile who testified for the prosecution at trial and a second suspect who was not apprehended. The facts were alleged to be as follows: two men forced themselves into the victim's apartment with a gun, robbed the decedent victim and three additional non-decedent victims who were at the apartment. One of the robbery victims was the homicide victim's son. The homicide victim was shot in the chest when he woke up during the course of the robbery.

The prosecutor indicted this defendant for purposeful or knowing murder by his own conduct, felony murder with both burglary and robbery as underlying felonies, second degree burglary, first degree robbery, and two weapons counts. No notice of factors was served. The case went to trial and the jury found the defendant guilty of purposeful and knowing murder by his own conduct and of all other counts. He was sentenced to 30 years with a 30 year minimum for the murder, to a consecutive term of 15 years with a seven and one-half year minimum for robbery, to a concurrent four year term for unlawful possession of a weapon, and to a concurrent seven year term for possession of a weapon for an unlawful purpose. His total sentence was 45 years with a minimum of 37.5 years.

The case was identified as death-possible on the felony factor.

Case No. 709—Cape May County

A 39 year old black male with no prior record was charged with killing a 14 year old Vietnamese girl during the course of an aggravated sexual assault. The victim lived and worked at the same hotel where the defendant lived. The defendant was acquainted with the victim and her family. The victim was found in her room strangled with a pillow over her face. Her body was covered with bruises.

The defendant was indicted for purposeful or knowing murder, aggravated sexual assault and burglary. No notice of factors was served. The case went to trial before a jury. The defendant was found guilty of purposeful or knowing murder, guilty of aggravated sexual assault, and not guilty of burglary. He was sentenced to life with a minimum of 30 years for murder and to a concurrent term of 15 years for aggravated sexual assault.

The case was identified as death-possible on the felony factor, the outrageously or wantonly vile factor and the purpose of escaping detection factor.

What distinguishes these cases, where no notice of factors was served, from the following cases where a notice of factors was served on the felony factor? In the previous cases there was often sufficient evidence to sustain a jury verdict for both murder and a felony, as well as no ambiguity as to the factual basis for the predicate felony. The previous cases were typically as aggravated as the following cases where prosecutors elected to serve a notice of factors on the felony factor. For every felony case where a notice of factors was served, there is another case, uncannily similar, where no notice of factors was served.

Case Nos. 98 and 135—Atlantic County

Two 19 year old black males went to the house of a 51 year old black male. The alleged plan was that one defendant would engage in sexual activity with the victim while the second defendant committed a robbery. The victim was killed.

The case summaries alternatively list the cause of death as strangulation and beating the victim over the head with a hammer. Then the defendants took the victim's car and credit cards. The prosecutor indicted the first defendant for purposeful or knowing murder by his own conduct and indicted both defend-

ants for conspiracy and robbery, theft and credit card theft. A notice of factors was served on the felony factor against the first defendant and withdrawn as part of the plea bargain. Both defendants were offered and accepted pleas to felony murder.

Case No. 103—Cumberland County

A 20 year old Puerto Rican male and two co-defendants were charged with killing a 79 year old white male. The defendants went to the victim's home to burglarize it. They encountered the victim, threw him on the floor, and put him back in bed where he died of a heart attack. The prosecutor indicted for purposeful or knowing murder, burglary, robbery, two weapons counts, two counts of theft, and terroristic threats. A notice of factors was served on the outrageously or wantonly vile factor and the felony factor. The defendant pled guilty to aggravated manslaughter, burglary, and theft, and the other counts were dismissed. The defendant simultaneously pled to 18 other indictments and received concurrent sentences for those convictions. The defendant was sentenced to 20 years with a mimimum of ten years. Two co-defendants also pled to manslaughter. One was sentenced to 20 years, the other to 18 years.

Case No. 233—Mercer County

A 29 year old black male entered the victim's liquor store to commit a robbery. The victim, a 58 year old black male, resisted the robbery and pulled out his own handgun, firing twice at the defendant. The defendant fired back with his handgun, hitting the victim once and killing him. The defendant was indicted for purposeful or knowing murder by his own conduct, felony murder, robbery, and unlawful possession of a weapon. A notice of factors was served on the felony factor. The case went to trial as a capital case. The jury found the defendant guilty of felony murder, not capital murder, at the guilt phase of the capital trial. He was also found guilty of robbery and the weapons charges. There was no penalty phase. The defendant was sentenced to life with a mandatory minimum of 30 years.

Case No. 324—Monmouth County

A 31 year old black male and a female co-defendant, who worked at a motel, planned to rob one of the motel's customers, a

76 year old white male. The co-defendant let the defendant into the victim's motel room. When the victim awakened and called for help, the defendant smothered him with a pillow. The prosecutor charged purposeful or knowing murder by his own conduct, felony murder, robbery, and two counts of burglary. A notice of factors was served on the felony factor only. The defendant pled guilty to capital murder and waived his right to a trial by jury. The trial judge issued a special verdict finding the aggravating factor and that it was outweighed by three mitigating factors. The mitigating factors which were submitted to the judge were: that the defendant had no significant history of prior criminal activity; that the defendant rendered substantial assistance to the State in the prosecution of another person for murder, and the catch-all, any other factor. The defendant was sentenced to life with a minimum of 30 years on the homicide charge. The counts for the contemporaneous offenses were dismissed. The co-defendant was indicted as an accomplice.

Case No. 688—Burlington County

A 22 year old black male was charged with killing a 32 year old white female during the course of a robbery. The victim was a clerk in a convenience store. The victim was found in the cold storage area of the store. The register had been shot open. The defendant was indicted for purposeful or knowing murder by his own conduct, knowing murder by his own conduct, felony murder with robbery as the underlying felony, armed robbery, and two counts of weapons possession. A notice of factors was served on the outrageously or wantonly vile factor, the purpose of escaping detection factor, and the felony factor. The case went to trial as a capital case. At guilt phase the jury found the defendant guilty on all counts.

At penalty phase, the defendant requested that the defense be precluded from introducing mitigating evidence on his behalf. The trial court judge ruled that defense counsel was required to abide by the defendant's request. The decision was reversed by the appellate division on interlocutory appeal. At the penalty phase, the defendant exercised his right of allocution and stated that he wished to be sentenced to death. Evidence concerning the following mitigating factors was nonetheless submitted: that the defendant was under the influence of extreme mental or emotional disturbance; the age of the defendant; the defendant's ca-

pacity to appreciate the wrongfulness of his conduct; that the defendant had no significant history of prior criminal activity; and the "any other" mitigating factor.

At penalty phase, the jury found all three aggravating factors. They found only one of the four mitigating factors submitted, the "any other" factor. The factual basis for this factor was that the defendant had been a victim of child abuse. The jury found that the aggravating factors were not outweighed by the mitigating factor. They returned the death penalty. The judge did not sentence the defendant on the contemporaneous offenses.

D. *Cases Involving Co-defendants*

Felony murder cases often involve co-defendants, and this circumstance becomes another source of discrepancy in charging. These examples illustrate how prosecutorial decision-making in serving a notice of factors is essentially unfettered, and charging practices vary widely throughout the state. Some prosecutors indict all co-defendants with the death-eligible form of the indictment, purposeful or knowing murder by his own conduct. Sometimes prosecutors will serve a notice of factors against one or more co-defendants, or threaten to serve a notice of factors to force a plea agreement. Or, a prosecutor may serve no co-defendants with a notice of factors.

Case Nos. 20, 78, 84, 108 and 110—Camden County

Five black males shot a 47 year old white male during the course of a robbery at a furniture store. The victim, the proprietor of the furniture store, was shot in the face. The prosecutor indicted one defendant for purposeful or knowing murder by his own conduct and indicted the other four co-defendants for knowing murder without the "by his own conduct" language. All five co-defendants were also indicted for two counts of robbery, two counts of burglary, conspiracy to commit burglary or robbery, weapons offenses and for hindering apprehension. No notice of factors was served against any defendant. All five co-defendants accepted plea bargains. One co-defendant pled guilty to aggravated manslaughter and was sentenced to 20 years with a ten year minimum with a consecutive 16 year term for robbery. The remaining co-defendants pled guilty to non-homicide offenses.

The case was identified as death-possible on the felony factor

and the purpose of escaping detection factor.

Case Nos. 77, 88, 89 and 154—Camden County

A 25 year old black male, a 22 year old black male, a 19 year old black male, and a 23 year old black male, robbed and murdered a 61 year old black male who was allegedly a numbers runner. The prosecutor indicted the defendant in Case No. 88 separately for purposeful and knowing murder by his own conduct and additionally indicted all four co-defendants for knowing murder. The four co-defendants were also indicted for robbery and conspiracy to commit robbery. Additional counts included weapons charges and hindering apprehension. No notice of factors was served against any defendant. All four co-defendants were offered and accepted pleas to non-homicide offenses. The longest sentence was a 30 year sentence for robbery and other offenses with a minimum of 15 years.

All four cases were identified as death-possible on the felony factor.

Case Nos. 103, 132 and 256—Cumberland County

A 17 year old Hispanic male, a 20 year old Hispanic male and a 22 year old Hispanic male broke into the home of the victim, a retired white male aged 79. The victim came upon the defendants during the course of the burglary. The defendants either threw the victim on the floor or otherwise traumatized him. The victim died of a heart attack. The prosecutor initially charged purposeful or knowing murder, felony murder, burglary, theft and robbery against the first defendant in Case No. 103. That defendant pled to aggravated manslaughter, theft, and burglary and was sentenced to 20 years with no minimum for manslaughter and to a concurrent term of three years on the other charges. The same defendant also pled to nine counts on three other separate indictments. A notice of factors had been served against the defendant in Case No. 103 on the outrageously or wantonly vile factor and the felony factor. The notice of factors was withdrawn. The other two co-defendants both pled to manslaughter and received sentences of 20 years and 18 years.

Both Case No. 132 and Case No. 256 were identified as death-possible on the felony factor.

Case Nos. 139, 140, 142 and 478—Hudson County

A 17 year old Hispanic male and three co-defendants were charged with felony murder in connection with the stabbing of the proprietor of a liquor store, a 63 year old white male, during the course of the robbery. The victim was stabbed and put in a freezer. He died 14 days later. A 14 year old boy in the store was also threatened. The prosecutor charged one defendant with felony murder and robbery. No notice of factors was served. That defendant went to trial and was found guilty of felony murder. He was sentenced as a juvenile to a 20 year maximum term with no minimum. The other three co-defendants all pled guilty to robbery and each received seven year terms with no minimum.

Case No. 142 was identified as death-possible on the grave risk of death to another factor and the felony factor. None of the co-defendant cases were identified as death-possible.

Case Nos. 252, 275, 283, 316 and 379—Ocean County

A 23 year old black male and four black male co-defendants became involved in an altercation outside of a bar with the 30 year old black male victim. Earlier in the day, the victim had allegedly threatened two of the defendants. The defendants armed themselves, went looking for the victim and found him outside a bar. The defendants stabbed and clubbed the victim to death. Four of the five defendants were jointly indicted for purposeful or knowing murder by their own conduct. The fifth defendant was indicted as an accomplice to murder. No notice of factors was served against any defendant. The homicide charge was dismissed in a plea bargain against the first defendant who was convicted of aiding and abetting aggravated assault. That defendant was sentenced to the 315 days he had already served in county jail. One co-defendant pled guilty to aggravated manslaughter on an accusation and was sentenced to 15 years with a four year minimum. Another co-defendant pled guilty to manslaughter and was sentenced to seven years. A third co-defendant pled guilty to aggravated assault and was sentenced to one year. The fourth co-defendant pled to a weapons offense and was sentenced to less than a year.

Case Nos. 275, 316 and 379 were identified as death-possible on the outrageously or wantonly vile factor.

These cases illustrate the discrepancies in charging practices throughout the state. Cases in urban jurisdictions seem to be more likely to be disposed of by plea agreement. Cases involving co-defendants may be especially likely to result in a plea agreement. Cases involving white victims, or middle class victims, seem to be less likely to be disposed of by a plea. The statistical findings and the case narratives point to this conclusion: the factual presence of aggravating factors will not determine whether a case is designated capital. Arbitrary and seemingly impermissible factors will play a role. Contrast the preceding cases with the following cases where a notice of factors was served.

Case Nos. 161 and 30 (NIDB, NIDB)[749]—Essex County

An 18 year old black male, a 22 year old black male and two co-defendants were charged with the murder and robbery of a 55 year old black male. The victim was shot to death on the street during the course of a robbery. The defendant in Case No. 30 was indicted for murder and a notice of factors was served. The prosecutor indicted the remaining three co-defendants for felony murder, robbery and a weapons count. No notice of factors was served against the defendant in Case No. 161. That case went to trial. The defendant was found guilty of felony murder and sentenced to life with a minimum of 30 years. He was also found guilty on the robbery count and sentenced to a consecutive term of 15 years with a five year minimum. The weapons count was dismissed. His total sentence was life with a minimum of 35 years.

The defendant in Case No. 30 went to trial for capital murder and was found guilty. The factors served were the outrageously or wantonly vile factor and the felony factor. At penalty phase, the jury found the felony factor and did not find the outrageously or wantonly vile factor. They also found mitigating factors. The defendant was sentenced to life. Another co-defendant pled guilty to robbery and was sentenced to one year. The third co-defendant, who was a juvenile, was sentenced to a probationary term.

Why should the previous case be considered serious enough to be capital, whereas the next case resulted in pleas to manslaughter? True, the defendants were juveniles, but the Essex County

749. The cases of all four co-defendants are not in the data base. NIDB means the co-defendant's case is not in the data base.

Prosecutor had charged the juvenile defendant in *State v. Smith*[750] with death-eligible murder.

Case Nos. 208 and 209 (NIDB, NIDB)—Essex County

An 18 year old black male and a 15 year old black male and two co-defendants, who were charged as juveniles, were charged with killing an 84 year old white female. The victim was tied to her bed, gagged, robbed and hit on the head with a hammer or monkey wrench.[751] The prosecutor indicted for murder, robbery, and conspiracy to commit robbery. One defendant was offered and accepted a plea to aggravated manslaughter and was sentenced to 20 years with a minimum of ten years. The robbery count was dismissed, and the defendant was sentenced to a concurrent seven year term for conspiracy to commit robbery. The co-defendant was waived to adult court and tried for murder, felony murder, and conspiracy to commit robbery. He was sentenced to a maximum term of 20 years for aggravated manslaughter with a consecutive term of ten years for conspiracy to commit robbery. The other two co-defendants were sentenced as juveniles and each received an indeterminate sentence of 15 years.

Both cases were identified as death-possible on the felony factor and the outrageously or wantonly vile factor.

Case Nos. 294 and 304—Camden County

A 27 year old white male and a co-defendant were charged with murdering a 50 year old white female during the course of a burglary and robbery. The victim was tied up and shot with a gun found in the house. The prosecutor indicted the defendant in Case No. 294 for being an accomplice to capital murder, murder as an accomplice, felony murder, burglary, conspiracy, theft and weapons counts. The defendant in Case No. 304 was indicted for purposeful and knowing murder by his own conduct. A notice of factors was served against him on the outrageously or wantonly vile factor, the for gain factor, the purpose of escaping detection factor and the felony factor. The defendant in Case No. 304 was also indicted for aiding and abetting murder and for felony murder. Both defendants were offered and accepted pleas to felony

750. 202 N.J. Super. 578, 495 A.2d 507 (Law Div. 1985).

751. The case summary says "hammer"; the presentence report says "monkey wrench."

murder and were sentenced to 40 year terms. The notice of factors was withdrawn.

In the previous case, the prosecutor not only exercised his discretion to serve a notice of factors, he served a notice of four aggravating factors. Then he offered and accepted pleas to felony murder for both co-defendants. By contrast, in the following two cases involving co-defendants, no notice of factors was served.

Case Nos. 340 and 476—Essex County

A black male and his sister were charged with killing a 47 year old black male by hitting him over the head with a piece of wood.[752] The defendants took the victim's TV and other belongings. The prosecutor charged both defendants with purposeful and knowing murder by their own conduct, felony murder, and robbery as well as other charges. No notice of factors was served. Both defendants went to trial. One was found guilty of aggravated assault and the other was found guilty of manslaughter.

The case was identified as death-possible on the felony factor.

Case Nos. 422, 447 and 454—Hudson County

Three black males, aged 19, 19 and 27, broke into the apartment of a 54 year old[753] black male who was terminally ill with cancer. The victim was tied up, gagged, and beaten to death with a baseball bat. The defendant in Case No. 422 was charged with purposeful or knowing murder by his own conduct. All three defendants were charged with two counts of felony murder, two counts of burglary (one count was for the burglary of another apartment in the same building on the same evening) and robbery. No notice of factors was served against any defendant. The defendant in Case No. 422 pled guilty to felony murder. The second defendant pled to robbery, and the felony murder count and burglary counts were dismissed. The third defendant pled guilty to kidnapping on an accusation, and the indictment was dismissed.

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752. One case summary refers to a board with a nail; the other refers to fire logs. This inconsistency reflects different responses in the interview.

753. One of the case summaries lists the victim's age as 59; the other two state the victim's age as 54. The case summaries list the charges somewhat differently. This summary was made with reference to the indictment.

The case was identified as death-possible on the felony factor and on the outrageously or wantonly vile factor.

In the next case a notice of factors was served, but a plea to manslaughter was accepted.

Case Nos. 472, 504 and 527—Cumberland County

A 24 year old white male and three co-defendants planned to rob the home of a 65 year old white female, the aunt of one of the co-defendants. The defendant and two of the three co-defendants went to the house, burglarized it, tied up the owner and suffocated her when she screamed. The defendant in Case No. 504 was indicted for purposeful or knowing murder by his own conduct, and the other defendants were charged with felony murder. For the defendant who was indicted for death-eligible murder, a notice of factors was served on the felony factor. That defendant was offered and accepted a plea to aggravated manslaughter, receiving a sentence of 20 years with a mandatory minimum of ten years. Another co-defendant pled to aggravated manslaughter. The third co-defendant pled to tampering with witnesses and was sentenced to a probationary term. The fourth co-defendant's case resulted in a mistrial and was pending at the time of this analysis.

Case No. 527 was also identified as death-possible on the felony factor.

E. *Pleas to Manslaughter*

Another area in which prosecutorial discretion is unfettered is the decision to offer a plea to manslaughter or a lesser offense in circumstances where there is a factual basis for the serving of factors. These cases illustrate how much flexibility there is in these charging and plea decisions. The case may never appear as an indictment for homicide. There may never be formal charges for contemporaneous offenses suggesting the presence of a factual basis for statutory aggravating factors such as the felony factor. These cases illustrate why the net to find comparable or similar cases must be cast wide. If the formalities of an indictment were the sole criteria, many of these death-possible cases would not be identified.

Case No. 007—Bergen County

An 18 year old white female with no prior record or history of mental illness set fire to her own house by pouring gasoline on the house and setting it alight at three in the morning. The fire killed her nine year old brother and injured her mother, father, and another brother. The fire was allegedly set after an argument with her parents over a boyfriend. The prosecutor charged purposeful and knowing murder by her own conduct and felony murder in a single count and aggravated arson. No notice of factors was served. The defendant pled guilty to manslaughter in the second degree with a non-custodial disposition, on the condition that she live in a restricted environment in a religious institution. For the manslaughter conviction she was sentenced to a five year maximum term, which was suspended, and to five years probation. The count for aggravated arson was dismissed.

The case was identified as death-possible on the grave risk of death to another factor and the felony factor.

Case No. 049—Essex County

A 29 year old Hispanic male was fighting with his grandfather when a bystander, a 44 year old Hispanic male, intervened. The defendant took a bat from the grandfather and beat the bystander, killing him. The grandfather also suffered injuries. All three had been drinking alcohol. The prosecutor charged murder and assault. No notice of factors was served. The defendant pled guilty to aggravated manslaughter and was sentenced to a 15 year term with a mandatory minimum term of five years.

The case was identified as death-possible on the grave risk of death to another factor.

Case No. 066—Hudson County

A 32 year old black male stabbed to death his 73 year old grandmother and stuffed her body in a closet. The alleged reason for the killing was that he had asked her for money which she refused to give him. The complaint charged murder. A plea bargain was accepted to a one count accusation for felony murder. The defendant was sentenced to 30 years with a minimum of 30 years.

The case was identified as death-possible on the felony factor, the outrageously or wantonly vile factor, and the for gain factor.

Case No. 102—Cumberland County

A 16 year old white male killed his 86 year old great-grandmother. She had tissues stuffed up her nostrils and in her mouth. She had been strangled, beaten, and sexually assaulted. Her empty wallet was found on the bed. A complaint charged murder, robbery and sexual assault. No indictment was filed. No notice of factors was served. The defendant pled guilty to an accusation for aggravated manslaughter and robbery and was sentenced to 30 years with a 15 year minimum.

The case was identified as death-possible on the felony factor.

Case No. 117—Somerset County

A 25 year old Hispanic male beat to death a 50 year old Hispanic male in the victim's apartment. The victim and defendant had allegedly been involved in a homosexual relationship. The victim was reported to have threatened to expose the relationship if the defendant left him. The defendant severely beat the victim with a bottle and with a large glass ashtray. The prosecutor charged aggravated manslaughter, first degree robbery, and theft of a motor vehicle. No notice of factors was served. The defendant pled guilty on an accusation to aggravated manslaughter, first degree robbery, and theft and was sentenced to 20 years for aggravated manslaughter, to a consecutive term of 20 years for the robbery count, and to a consecutive count of five years for theft. His aggregate sentence, therefore, was 45 years with 22.5 years without parole.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 223—Camden County

A 25 year old black male killed his 86 year old grandfather. The victim was hit over the head with a table leg brace. The prosecutor indicted for knowing murder, felony murder, armed robbery, and a weapons charge. No notice of factors was served. The defendant was offered and accepted a plea of guilty to aggravated manslaughter. He was sentenced to 20 years with a ten year minimum.

The case was identified as death-possible on the felony factor.

Case Nos. 229 and 490—Passaic County

A 23 year old black male and a 30 year old black male were sitting on the steps in front of the house of the victim, a 50 year old black female. As the victim's son was leaving the house with a friend, some insults were exchanged and a fight occurred. The decedent victim tried to intervene on her son's behalf and was beaten on the head with a baseball bat. The husband then intervened and was also hit on the head and back with a baseball bat, suffering serious injuries requiring hospitalization.

The defendants were indicted jointly for aggravated assault upon the husband and a weapons count. One defendant was indicted separately for purposeful or knowing murder by his own conduct. The co-defendant was indicted separately and alternatively for purposeful or knowing murder and as an accomplice to murder. No notice of factors was served against either defendant.

One defendant pled guilty to aggravated manslaughter of the mother and to the charge of aggravated assault upon the husband. He was sentenced to a 15 year term with a seven year mandatory minimum on the manslaughter and to a concurrent seven year term for the assault. The weapons charge was dismissed. The co-defendant pled guilty to the aggravated assault charge and was sentenced to five years.

Case No. 229 was identified as death-possible on the grave risk of death to another factor and the outrageously or wantonly vile factor.

Case No. 234—Mercer County

A 33 year old black male with no prior convictions got into an argument with a 38 year old black female in her apartment. The defendant and victim had a prior sexual relationship. During the argument, the defendant severely beat the victim. He left her in the apartment where she subsequently died from the injuries inflicted. No notice of factors was served. The defendant pled guilty to aggravated manslaughter on an accusation. He was sentenced to a maximum term of 20 years with a ten year mandatory minimum.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 242—Monmouth County

A 20 year old white male met the victim, a 24 year old white male, in a bar. They left the bar and went to the defendant's apartment where the victim allegedly made sexual advances toward the defendant. The defendant grabbed a knife and stabbed the victim ten times. The defendant pled guilty to an accusation charging aggravated manslaughter and received a sentence of 20 years with a ten year minimum term.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 246—Monmouth County

A 23 year old black female started a fire in a closet in her house because she was angry at her boyfriend. The homicide victim was a 23 year old black male who lived in the house with the defendant and her boyfriend. The prosecutor indicted for felony murder, aggravated manslaughter, arson, and aggravated arson. No notice of factors was served. The defendant was offered and accepted a plea of guilty to aggravated manslaughter. She was sentenced to 15 years with no minimum.

The case was identified as death-possible on the felony factor.

Case No. 282—Union County

A 25 year old white male killed his grandmother, a 72 year old white female. The police went to the victim's house in response to a call about a prowler in the area. The police found the defendant in the bushes, wearing an army helmet. He was allegedly under the influence of "angel dust." He was arrested for resisting arrest and being under the influence of drugs. The victim was later found dead in her home. The cause of death was multiple trauma with a blunt instrument. The defendant was re-arrested and charged with murder.

The prosecutor indicted for purposeful or knowing murder by his own hand and aggravated assault, in addition to the previous charges for possession of drugs. No notice of factors was served. The defendant pled guilty to manslaughter and was sentenced to ten years with a mandatory minimum of five years. The charges of aggravated assault and resisting arrest were dismissed. The defendant also pled guilty to the drug charge, but received no sentence for that offense.

Case Nos. 346, 347, 512 and NIDB[754]—Hudson County

A 26 year old black male, a 30 year old black male, a 25 year old black male, and a co-defendant were involved in three robberies on three separate nights. The victims were all shot with a sawed-off shotgun. The homicide victim was a 40 year old black male. A non-decedent victim was also shot. In addition, there were non-decedent victims who were robbed. All four co-defendants were charged with murder on a complaint. No indictment was returned. No notice of factors was served. These three defendants all accepted plea offers and pled guilty on an accusation. The first two defendants pled guilty to three counts of robbery and were sentenced to a total of 45 years. The third co-defendant pled guilty to armed robbery and conspiracy to commit murder. He was sentenced to 15 years. The fourth co-defendant pled guilty to murder and was sentenced to life.

Case No. 346 was identified as death-possible on the felony factor and on the grave risk of death to another factor. Cases Nos. 347 and 512 were identified as death-possible on the felony factor.

Case No. 353—Union County

A 33 year old black male with no prior record stabbed to death a 38 year old black male, the defendant's estranged wife's lover. The defendant was separated from his wife; there was a prior history of domestic violence. The incident took place in the wife's home. The decedent victim was stabbed six times; the wife was stabbed twice. The prosecutor indicted for purposeful or knowing murder by his own hand and two weapons charges. No notice of factors was served. The defendant pled guilty to aggravated manslaughter and to the assault and weapons counts. The defendant was sentenced to 17 years with a minimum of seven years for aggravated manslaughter, to a consecutive term of eight years with a minimum of three years for aggravated assault as a lesser included offense of attempted murder, and to a consecutive term of five years with a two year minimum for one of the weapons counts. The second weapons count merged. His total sentence was 30 years with a 12 year minimum term.

The case was identified as death-possible on the grave risk of

754. The fourth co-defendant pled guilty to murder and was sentenced to life.

death to another factor.

Case No. 388—Hudson County

A 17 year old black male and a co-defendant became involved in an argument over sunglasses with the victim, a 23 year old black male. The co-defendant pulled out a handgun and shot in the air. The victim ran away. This defendant then grabbed the gun and shot the victim three times in the back. The crime occurred on the street. The defendant was a juvenile who was tried as an adult. The prosecutor charged murder on a juvenile complaint and a weapons charge. No notice of factors was served. The defendant pled to aggravated manslaughter and was sentenced to 20 years with a minimum of ten years. The co-defendant pled to an accusation charging á weapons offense and was sentenced to seven years.

The case was identified as death-possible on the outrageously or wantonly vile factor.

Case No. 488—Passaic County

A 44 year old white male with no prior record, who was a part-time worker at a hotel, set fire to the third floor of the hotel after a dispute with the hotel management. The fire spread throughout the building. Sixteen people were killed and 50 people were injured. The injuries were serious enough to result in hospitalization in many cases. The prosecutor indicted for 14 counts of felony murder, one count of arson, and one count of aggravated assault for the offenses against the 50 non-decedent victims. No notice of factors was served. The case went to trial as a non-capital case and resulted in a hung jury. The defendant then simultaneously pled guilty to an accusation stipulating one count of aggravated manslaughter and to the one count of arson in the indictment. He was sentenced to 20 years with a minimum of 10 for the aggravated manslaughter and to a concurrent term of 20 years with a minimum of ten years for the arson. The aggravated assault charge was dismissed. The other 13 counts for felony murder were dismissed.

The case was identified as death-possible on the grave risk of death to another factor.

Case No. 529—Mercer County

A 19 year old black male was fighting with his girlfriend on the street. He picked up a bed slat and hit the girlfriend. The homicide victim, a 28 year old black male, was a passerby who told the defendant to "cool it." The defendant followed the passerby up the street and hit him over the head with the bed slat, killing him. The prosecutor charged murder, aggravated assault for the offense against the girlfriend, and a weapons count. No notice of factors was served. The defendant was offered and accepted a plea of guilty to aggravated manslaughter and was sentenced to 15 years.

The case was identified as death-possible on the felony aggravating factor.

Case No. 545—Camden County

An 18 year old black male killed a 32 year old Hispanic female. The defendant went to the victim's house. She let him into the house, but rejected his sexual advances. He then beat her and stabbed her to death. There were ten stab wounds. After the killing, the victim's daughter came home from school with another child, a ten year old Hispanic girl. The defendant put the daughter upstairs in a room, took the second child down to the basement where he strangled her until she lost consciousness. The prosecutor indicted for purposeful and knowing murder by his own conduct, felony murder, attempted aggravated sexual assault, hindering apprehension, aggravated assault, kidnapping, and weapons charges. No notice of factors was served. The defendant was offered and accepted a plea of guilty to murder and was sentenced to life with a minimum of 35 years.

The case was identified as death-possible on the felony aggravating factor, the grave risk of death to another factor, and the outrageously or wantonly vile factor.

Case No. 642—Morris County

A 19 year old white female, a 26 year old Hispanic male, and a third Hispanic male were charged with killing a 51 year old white male in a fire they started. Two of the co-defendants lived in a cottage which was rented from the victim and his ex-wife. The defendants had been evicted from the cottage. With the third co-defendant they went drinking and decided to burn down the cot-

tage. The three of them went out to buy gasoline. The ex-husband of the owner of the cottage crawled into the cottage to sleep off his drunkenness. The three defendants went back to the cottage, broke a window, stuck a hose through the window, and fed the gasoline into the building. They then ignited it and left. The landlord's ex-husband died in the fire.

All three defendants were indicted for felony murder and aggravated arson. No notice of factors was served. Because a conflict of interest arose, the case was prosecuted by the Attorney General's office, not the county prosecutor. All three defendants pled to aggravated manslaughter and were sentenced as for a second degree offense. Two of the co-defendants were sentenced to seven year maximum terms, and the female co-defendant was sentenced to a maximum term of six years.

All three cases were identified as death-possible on the felony factor.

Case Nos. 670, 672 and 678—Bergen County

A 30 year old Hispanic male, a 26 year old white female, and a 28 year old Hispanic male were charged with killing a 60 year old white male. The victim and the defendants had been staying in the same house. The victim had agreed to drive the defendants to New York in his car. The victim was shot three times in the head while in the car. The car with the body was left in a parking lot. It was alleged that the defendants also robbed the victim of money he had just received from cashing his unemployment checks.

One defendant was indicted for purposeful or knowing murder, felony murder, armed robbery, possession of a weapon, hindering apprehension, and unlawful possession of a weapon. The female co-defendant was indicted for murder, felony murder, robbery, two weapons counts, and three counts for possession of drugs. The third co-defendant was indicted for aggravated manslaughter, felony murder, robbery, two weapons counts, and two counts for possession of drugs. No notice of factors was served against any of these defendants.

All three defendants accepted plea bargains. One pled guilty to one count of aggravated manslaughter, and all other counts were dismissed. He was sentenced to 15 years with a minimum of seven and one-half years. The female co-defendant pled guilty to one count of possession of narcotics and was sentenced to 360 days in

the county jail. All other counts against her were dismissed. The third co-defendant pled guilty to aggravated manslaughter. All other counts against him were dismissed. He was sentenced to 40 years with a 20 year mandatory minimum term for aggravated manslaughter as an extended term.

The case was identified as death-possible on the basis of the felony factor, the for-gain factor, and the outrageously or wantonly vile factor.

IX. CONCLUSION

The July 29, 1988 Order of the Supreme Court of New Jersey offers a unique opportunity to examine judicial and prosecutorial decision-making in capital case processing using the most sophisticated and advanced techiques and approaches which have been developed by lawyers, statisticians, and social scientists. The appointment of a highly respected expert in the field indicates that the Supreme Court of New Jersey intends to address the complex and difficult constitutional issues raised by the reimposition of capital punishment. The data set created under the supervision of Professor Baldus will presumably be the most comprehensive data set on homicide ever assembled in New Jersey. It will serve as both a model and as a data resource for researchers from this and other jurisdictions.

This Article concentrates upon the earliest stage of capital case processing, the stage where prosecutors have the most discretion and the stage where there is no guidance for their exercise of discretion. The Supreme Court of New Jersey recognized the seriousness of this problem most recently in *State v. Koedatich*, when it urged county prosecutors to develop guidelines for the selection of death-eligible cases.[755] This Article has described the structure of the capital case processing system and how prosecutorial decision-making operates within that structure. Prosecutorial decision-making is most unbridled at the early stages of capital case processing. In the early stages of capital case processing, the prosecutor can unilaterally exempt a case from the system. At capital trial and penalty phase the jury is the decision-maker, although the jury can only decide the case based upon the information and arguments presented by the prosecution and defense.

755. State v. Koedatich, No. A-1, slip op. (N.J. Aug. 3, 1988).

The results reported here indicate clear and significant discrepancies in the treatment of potentially capital cases when cases were differentiated by race of defendant and victim and county of jurisdiction. These county and race effects persisted even after the logistic regression analysis took into account over one hundred potential explanatory variables, such as the defendant's prior record and the presence of a contemporaneous offense. In the opinion of the authors, this statistical evidence is sufficiently compelling to shift the burden to the State to come forward with evidence that the system of selecting cases for capital prosecution does not operate in a manner which offends constitutional principles.

The Supreme Court of New Jersey has stated that it will continue to consider the results of this Study.[756] The evidence presented here suggests that individual prosecutors are engaging in decision-making which varies greatly across counties and results in an overall capital case processing system which is impermissibly arbitrary under standards long recognized by the Supreme Court of New Jersey. In the words of Justice Handler: "I believe the Study's preliminary evidence is sufficiently strong to warrant a showing by the State that no bias in charging exists."[757]

756. State v. Zola, No. A-30, slip op. at 68-69 (N.J. Aug. 16, 1988).

757. State v. Koedatich, No. A-1, slip op. at 53 (N.J. Aug. 3, 1988) (Handler, J., dissenting).

APPENDIX A

DATA COLLECTION, VERIFICATION, AND METHODOLOGY

1. *Identification of Cases*

Cases are identified at the earliest stage of formal charging, *i.e.*, the police complaint, indictment, or accusation. The anticipated data base will include all cases of homicide, except vehicular manslaughter, where the homicide occurred after August 6, 1982, the effective date of the capital punishment statute. If a case involves co-defendants, and some co-defendants are indicted for homicide and some are not, only those co-defendants formally charged with a homicide offense are included in the study. The criteria for inclusion in the data base are a formal charge for a homicide offense by the State and a final disposition of that charge at the trial court level.[1]

Cases involving multiple victims are included as a single case when they are prosecuted as a single case resulting in a single dispositional event. Separate prosecutions against a single defendant are treated as separate cases when they result in distinct dispositions. When the case reaches final judgment or disposition at the trial level, an interview is scheduled with the attorney, private counsel or public defender, who represented the defendant at trial, or at plea and sentencing. Final judgment is defined as the final dismissal of formal charges, a trial which resulted in a judgment, including a judgment of acquittal, or a plea followed by a sentence. A case does not enter the data base until it is completely disposed of at the trial level. That stage will be marked by a judgment of conviction followed by a judgment of sentence, a judgment of acquittal, or a final judicial or administrative dismis-

1. In the Spring of 1987 a letter was sent to all 21 county prosecutors and to the Attorney General of the State of New Jersey, asking each individual county prosecutor and the Attorney General to verify the list of cases included in this data base of 703 cases. Only three prosecutors answered the letter; and only two supplied the requested information. The Attorney General of the State replied that the Office of the Attorney General would not cooperate with this data collection effort, nor would the State assist in any way in efforts to identify eligible cases or to verify cases already included. See letter of Attorney General Cary Edwards to Leigh Bienen, dated June 30, 1987, on file at the author's office. At oral argument before the New Jersey Supreme Court in *State v. Koedatich*, No. A-1, slip op. (N.J. Aug. 3, 1988), the State reasserted this position: the State had not and would not assist or cooperate with this or any other effort to collect data on homicide cases since the reimposition of capital punishment. *See* statement of Deputy Attorney General Katherine Foddai, New Jersey Newark Star Ledger, Sept. 29, 1987, at 40.

sal of the homicide charge.

Figure 1 sets out the case processing stages which result in the disposition of homicide charges.

If a case goes to trial and the result is a hung jury or a mistrial, that case is included only when it is retried and results in a judgment, or is dismissed, or a subsequent plea is entered. The procedure varies somewhat when a hung jury occurs at penalty phase in a capital trial. In that event, a life sentence is imposed by the trial court judge. A case which goes up on interlocutory appeal will be included after remand when the trial is completed or a judgment of dismissal is entered. The present data base does not include results after trial. A death sentence which has subsequently been reversed will still appear as a death sentence in this data base. At a later point we will record reversals and modifications of sentence on appeal, at least for cases which went to capital trial.

Verification of the data base is an ongoing part of this research. The project director has obtained from the New Jersey State Police Headquarters copies of the Supplemental Homicide Reports for the years 1982, 1983, 1984, and 1985.[2] The Supplemental Homicide Reports include basic information on race, sex, and age of the victim and of the defendant in cases where an arrest has been made. These data were obtained from the original microfilm records at the State Bureau of Identification. The data were then coded to conform as closely as possible with our coding procedures. These data will be used to identify new cases and to verify the accuracy of information obtained from interviews with defense attorneys. The project also obtained the computer tapes of New Jersey homicides that are part of a national data file prepared from Supplemental Homicide Reports by Professors William I. Bowers and Glenn L. Pierce at Northeastern University.[3]

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2. The Supplemental Homicide Reports were obtained from the microfilm files at State Police Headquarters in Trenton. The authors wish to thank Lt. Nicholas V. DeLuca, Assistant Bureau Chief, Criminal Justice Records Bureau and Joyce Allen, Supervisor, Micrographics Unit, both of the New Jersey State Police, for their assistance. Thanks also to Edward Singletary, Esq., Robert Bradford, Princeton University, 1987, N.Y.U. School of Law, 1990; Alan Schwartz, Princeton University, 1988; Stephanie Rubin, Princeton University, 1989, for their assistance in the verification process.

3. Although these data do not fully overlap with our period of analysis, they provide yet another independent source of verification. We are grateful to Professors William J. Bowers and Glenn L. Pierce at Northeastern University and thank them for their support and assistance.

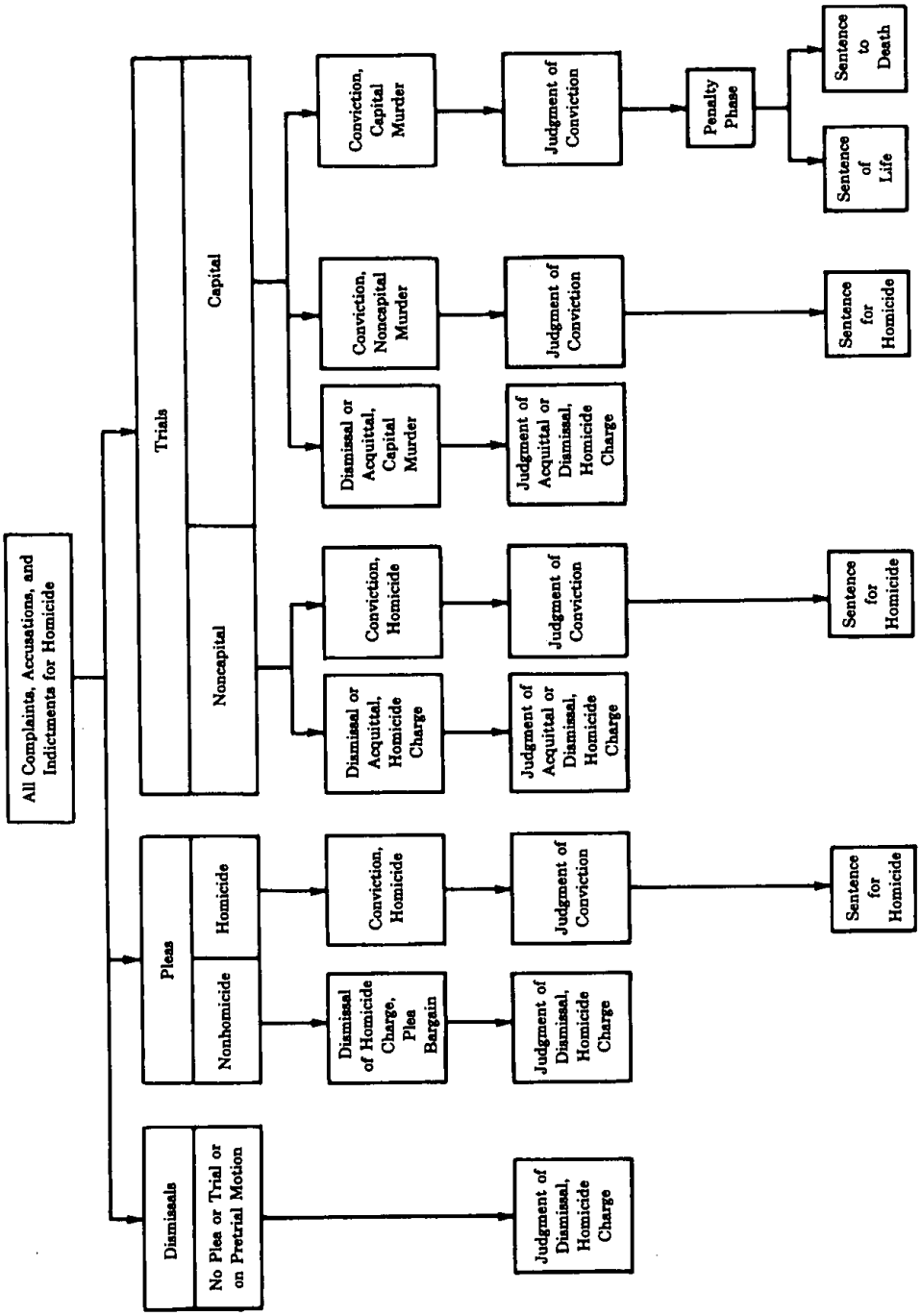

Figure 1
DISPOSITION OF NEW JERSEY HOMICIDE CHARGES

The New Jersey Administrative Office of the Courts provided us with their original file of homicide sentences for the years 1982, 1983, 1984, 1985, and 1986.[4] These data include the identification of the defendant and the indictment number for all homicide sentences during the relevant period. They are yet another independent source of verification of information in the present data base.

Data from the New Jersey State Police includes a greater number of homicide cases than the set of cases identified at the trial court disposition stage.[5] Their data include homicides where no arrest has been made, cases which do not result in a formal charge of homicide, cases which are pending, or cases which never reach final disposition at the trial stage, *e.g.*, because the defendant is incompetent to stand trial or because the charge is dismissed after a determination that the homicide was justified. The data on homicide sentences from the Administrative Office of the Courts, on the other hand, is a smaller data set than ours and does not include persons who are formally charged with homicide but do not receive a sentence for homicide. This may result because they were acquitted of the homicide, or the homicide charge was dismissed or downgraded to a non-homicide offense as part of a plea bargain, or for some other reason.

2. *Data Collection and Training of Field Attorneys*

Data are collected on a structured interview schedule which includes over 700 discrete pieces of information comprising over one hundred study variables. The interview schedule[6] was developed after extensive consultation with researchers who collected the

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4. We wish to thank Jack McCarthy, Jr., Assistant Director of Criminal Practice, Administrative Office of the Courts, and Joseph J. Barraco, Chief of Criminal Court Services, Administrative Office of the Courts, for their continued cooperation and assistance.

5. The FBI reports that approximately 75% of all homicide cases are cleared by arrest. Not all of these result in a formal charge for a homicide offense. *See, e.g.*, N.J. STATE POLICE, UNIFORM CRIME REPORTS, 1986. The State Medical Examiner performs 5,000 autopsies a year and receives 23,000 calls to its office every year. All violent deaths result in an autopsy. The over 400 homicides a year reported by the New Jersey State Police are a small fraction of the 5,000 autopsies. The State Medical Examiner is the source of the statistics for homicide which are reported by the United States Government as a vital statistic. Source: Robert Goode, M.D., State Medical Examiner, Public Defender Training Seminar, Sept. 15, 1987.

6. The interview schedule was developed in 1983 by former Assistant Public Defender John M. Cannel and former Field Representative Marguerite Rosenthal. It was subsequently modified and adapted to conform with ongoing decisions regarding methodology.

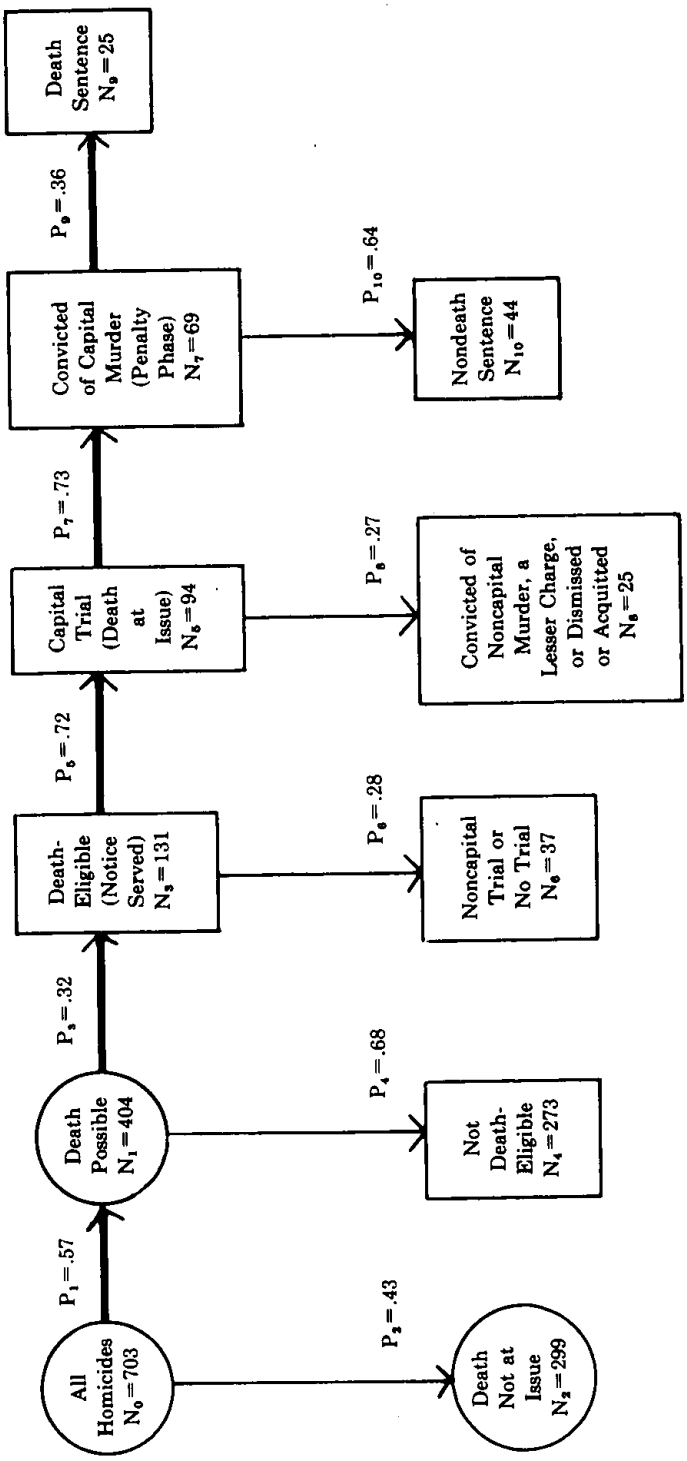

Figure 2

NEW JERSEY CAPITAL CASE PROCESSING STAGES FROM INDICTMENT TO DEATH SENTENCE*

*This figure represents the flow of homicide cases at four decisionmaking and case processing points in New Jersey's judicial system. Each box represents a decision or processing option made for a case. The top set of horizontally aligned boxes indicates cases advancing sequentially further into the system based on judicial decisions and processing options. The vertical flows indicate decisions that remove a case from further advancement into the judicial system at each point in the system. The number ("N") of cases at each stage is listed in the circle or box. Above or to the right of each case flow arrow is the probability ("P") that the cases flow in the indicated direction. This depiction of the system provides a departure point for later analyses. Central to these analyses will be the identification of case characteristics that influence the flow of cases at each flow point.

data on capital punishment in Georgia and other jurisdictions. The schedule was then adapted to take into account specific provisions of New Jersey law. The interview schedule is included as Appendix A of the *Interim Report* on file at the Rutgers-Newark Law Library. The interview schedule was designed to record precise and detailed information on the characteristics of the defendant and victim, a factual description of the homicide, the stages of case processing, and the legal outcome at the trial stage. The schedule includes demographic and circumstantial data, a series of critical case processing dates, the status of the homicide charge at different stages, and disaggregated data on charge, conviction, and sentence. A detailed description of pretrial procedures is provided in the narrative.

Early in the data collection stage the project engaged as consultants criminologists from the University of Pennsylvania's Sellin Center for the Study of Criminology and Criminal Law, an expert on statistical methodology from the University of Pennsylvania Sociology Department, and statisticians from Computing and Information Technology at Princeton University Research and Information Services. Refinements in the interview schedule took place in a series of meetings between public defender attorneys, the project staff members, statistical experts, and criminologists. Codes were designed to distinguish precisely between different procedural events and results. A series of data cleaning programs was developed, and problems of coding and scaling of variables were addressed in consultation with the project's statisticians and criminologists. Data cleaning and verification procedures were continuous and remain ongoing.

The study design incorporated procedures which precisely identified all the stages of capital case processing prior to final trial court disposition. These capital case processing stages are set out in Figure 2, with the number of cases at each stage and the probability of advancing to the next capital case processing stage.

The first stage is entry into the data base, which includes all 703 cases in this data set. The next stage represents those cases of the 703 which were identified as death-possible. This information was obtained by asking the defense attorneys whether the case had a factual or circumstantial basis for being declared death-eligible. Defense attorneys were also asked to identify which statutory aggravating factor(s) might have been served under the factual circumstances of the case. These cases were identified as

death-possible cases. There are 404 death-possible cases in the data set.

The next stage is defined by the prosecutor's decision to serve a formal notice of factors. This stage is designated death-eligible. There are 131 death-eligible cases in this data set. When a notice of factors is served, each statutory aggravating factor is individually identified.

The next capital case processing stage is capital trial. This stage identifies those cases which reached trial before a death-qualified jury or a judge, where the notice of factors remains in effect during the trial. There are 96 capital trials in this data set. The next stage identifies convictions of death-eligible murder, or cases which progress to penalty phase before a death-qualified jury or a judge. There are 69 cases which went to penalty phase in this data set. The final stage identifies cases where the death sentence was imposed. There are 25 cases in this final category.

When a case reaches a final judgment at the trial level, an interview is scheduled with the attorney who represented the defendant. The project's interviewers, or field attorneys, are typically recent law school graduates awaiting bar results or permanent placement. In addition to receiving individual oral and written instructions, the field attorneys are trained on the coding of the interview schedule and on the substantive and procedural requirements of the capital statute. A field attorney typically accompanies an experienced interviewer before doing an interview herself.

The field attorneys receive training on the alternative procedural case processing stages, the legal issues which might arise prior to indictment, plea, or trial, and the possible dispositional outcomes for the homicide charge. The discretionary stages of capital case processing are identified. The field attorneys are instructed to ask detailed questions about the procedures in every case and to record county-by-county discrepancies in practice. Special instructions are given on the precise coding of the statutory aggravating and mitigating factors. The field attorneys are trained to probe for information about plea negotiations, especially in cases where the serving of a notice of factors was at issue.

The field attorneys have three separate tasks: to identify cases at the charging stage, to track identified cases through trial court disposition, and to conduct an in-depth personal interview with the defense attorney when the trial stage is complete. The diffi-

culty of these three tasks varies greatly from case to case and from county to county. In rural or small counties where there are less than a half dozen homicide cases in a year, almost every lawyer in criminal practice knows the present status of every homicide case. In the high volume counties, on the other hand, simply tracking the homicide indictments through disposition requires many hours of research in the office of the county clerk. The work is often complicated by clients having similar names, cases being transferred from court to court, and long delays from indictment to disposition. Then the individual defense attorneys must be identified and contacted.[7]

The trial defense attorney is interviewed in person by the field attorney after final trial disposition of the case. Data is recorded on the structured interview schedule. The defense attorney is interviewed with the case file at hand and refers to the file for specific information. The field attorneys request a copy of the indictment or accusation, the judgment sheet, and the penalty phase verdict sheet. The field attorneys request but do not always receive a copy of the presentence report. All documents are filed by case study number and used for verification when the case summary is written, or if a question arises about the facts or outcome of the case at any point in the research.

During the interview the defense attorney is asked about errors or ambiguities in the presentence report. The interview schedule is designed to record the defense attorney's responses. The defense attorney, of course, may choose not to answer certain questions about the defendant or the defense strategy. If the attorney refuses to answer or cannot provide critical information, such as the race of the victim, the case cannot be included in the data base. Other data points may be coded as unavailable or unknown. It is the defense attorney's interpretation, not the field attorney's opinion, which is recorded. The field attorney does not make the judgment that a factual basis existed for the serving of a notice of factors. The defense attorney makes that judgment.

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7. There have been very few attorney refusals. When an attorney refuses to cooperate or grant an interview, a letter explaining the study is sent from the Assistant Public Defender or the project director. If the attorney continues to refuse to cooperate, the case is labeled as attorney refusal and is not included in the data base. In some cases of attorney refusal, or when the trial attorney has left the jurisdiction or is otherwise unavailable, the field attorneys have been able to conduct an interview with the appellate defense attorney and then include the case in the data base. The fact that the appellate attorney was interviewed is indicated on the interview schedule.

The field attorneys ask for detailed information about the individual circumstances of each case. The narratives written by the field attorneys provide qualitative, in-depth information about each homicide. The field attorney always attempts to obtain information on the following questions: if the case was not a capital case but there was a factual basis for serving a notice of factors, why, in the defense attorney's opinion, was the case not designated a capital case by the prosecutor; were there plea offers; how the case was structured prior to trial or plea; how the prosecutor's office viewed this case; if there was significant pretrial publicity; what the defense strategies were; what the prosecutor's theory of the case was; if the defendant made a statement, was the statement admitted; and what other factors the attorney believed to be important in the disposition of this particular homicide case.

The field attorneys record with precision the procedural formalities and legal events prior to formal disposition. It is noted whether a case began with an indictment which was later replaced by an accusation after plea negotiations, or whether there was never an indictment; if there was pre-indictment or pre-accusation plea bargaining; if there were amendments or changes to the charging instrument prior to trial or plea, or during trial; how many charging instruments there were; if there was a motion to dismiss aggravating factors; if there were negotiations over the actual filing of the aggravating factors; if all co-defendants were tried together; and what plea offers were made to co-defendants during the negotiation stage. Early in the research we learned that pretrial procedures and practices varied enormously across counties. The field attorneys are trained to be sensitive to procedural differences between counties, to anticipate inconsistencies and contradictions in county practices, and to obtain as accurate a description as possible of the procedures in every case. We began to pay close attention to the form of the indictment itself. Some counties use a specially worded indictment only for death-eligible cases. Other counties simply indict every homicide as purposeful or knowing murder by his own conduct, even when the prosecutor does not intend to consider serving a notice of factors.

The field attorneys elicit as much information as possible on pretrial maneuvering and the stages of plea bargaining, especially in capital cases. They inquire about delays and administrative obstacles to disposition. The field attorneys record how each individual statutory aggravating factor survives to each case process-

ing stage. If the case is a death-possible case, the coding of the aggravating factor variables will always be specifically discussed when the field attorney submits the interview schedule to the project director. If the case is death-eligible, the field attorney obtains the notice of factors. If the case went to penalty phase the field attorney obtains the penalty phase verdict sheet. The field attorney records the factual basis for each statutory aggravating factor and the factor's status at each capital case processing stage. She also precisely indicates if the factor was dismissed before capital trial and whether the case ever reached penalty phase. Procedural technicalities and the specifics of the indictment and the statutory aggravating factors are set out in the field attorney's narrative, in addition to being formally coded on the interview schedule.

If there is contradictory or ambiguous information, or missing data, the defense attorney may be contacted again by telephone, or the field attorney will be sent back to the courthouse for additional documents, or to obtain missing information. If the data are incomplete and it is impossible to obtain the missing information, that fact will be recorded and the data will be coded as missing. The frequency tables on each study variable report the number of missing values for each variable. The full set of frequencies is included as Appendix B in the *Interim Report* on file at the Rutgers Law Library.

3. *Data Entry and Error Checks*

When the completed schedule is submitted by the field attorney and all questions and ambiguities that can be resolved are resolved, the case is assigned a study number and brought to Princeton University Research Services for data entry. There is no rank order to the study numbers. Before entry the data are once again checked by the project director for internal logical consistency and for coding accuracy. The coding of key groups of variables is checked independently on a case-by-case basis. These variables include the codes for procedural case processing, the charge and sentence for homicide, and any contemporaneous offenses; race, sex, and age of defendant and victim; prior record; the co-defendant variables; and the statutory aggravating and mitigating factors. Data are then entered and independently verified. Special training procedures for data entry have been instituted at Research Services at Princeton University.

If the data cleaning programs turn up inconsistencies or errors in data collection, the project director will refer for verification to the available documents on file, such as the presentence report, the indictment, the judgment sheet, or the police report. The defense attorney may be contacted again at this point, either by the field attorney or by the project director. If the missing information still cannot be found, at this point the data will be entered as missing. If missing data on a co-defendant's sentence is received at some later point, for example, it will be entered as part of the ongoing process of data cleaning and updating.

4. *Coding of Data on Co-Defendants and Cases Involving Multiple Victims and Non-Decedent Victims*

Each defendant is assigned a separate case study number. If, for example, three co-defendants commit a single homicide and are all charged with homicide, they will be entered as three separate homicide cases with three separate study numbers. Three separate interviews will be conducted with the three separate defense attorneys. If two co-defendants are charged with homicide and a third is charged with a non-homicide offense, the two defendants charged with homicide will become separate cases in the study. The case of the co-defendant who was not charged with homicide will not enter the study. Basic information on the outcome of the case involving the co-defendant charged with the non-homicide offense will be entered on the co-defendant variables. A cross reference index for co-defendants in the data base has been established.

Co-defendants in a particular case could exist but not be included in the present data base for several reasons: because the co-defendant was never charged with a homicide offense; because the co-defendant's case was pending at the time of the interview; because the attorney for the co-defendant refused to cooperate or was unavailable for an interview; or the co-defendant's case is among those cases entered after the last case in the file at this point. If there is a co-defendant who is not included in the data base, the presence of a co-defendant is recorded for the co-defendant variables. Data on the result of the co-defendant's case is recorded if the attorney has the information. If the attorney does not know the outcome of the co-defendant's case, the presence of a co-defendant is entered and the remaining information on the co-defendant's case is coded as missing. Co-defendant cases can

be easily identified. Each disposition for a co-defendant is a separate case entry, regardless of whether the co-defendants went to trial together or separately, and irrespective of whether some co-defendants entered a guilty plea and some went to trial. The sequential ordering of co-defendants in the data base does not correspond to the dates of disposition of co-defendant cases.

If a single defendant commits two successive homicides and each homicide is disposed of by a separate judgment or legal proceeding, that defendant's two cases appear as two separate cases in the study. If a defendant kills more than one victim and the case is disposed of in a single trial or plea, the case appears as a single case in the Study and is coded as having more than one homicide victim. Separate data are entered for each decedent victim for up to three decedent victims. Data on each sentence for homicide are entered for up to three homicide sentences.

If a homicide case includes non-decedent victims, data for at most three non-decedent victims are separately entered. The charges for the offenses against non-decedent victims are entered for the contemporaneous offense variables. Those charges are also precisely identified in the narrative and case summary. Non-decedent victims are included only if the offenses against them resulted in a formal charge against the defendant. For example, if a defendant is indicted for murder involving circumstances where a gun was pointed at another person or at a crowd, data on a non-decedent victim are entered only if there is a formal charge for a threat or an assault or an attempted murder or another contemporaneous offense against a non-decedent victim.

In co-defendant cases where both defendants are jointly indicted for an offense against a non-decedent victim, both co-defendant cases will include data on that non-decedent victim. If only one of several co-defendants is charged with an offense against a non-decedent victim, only that co-defendant's case will include data on the non-decedent victim.

The prosecutor's charging decision is reflected in the list of contemporaneous offenses. The case summaries resolve, where possible, discrepancies or seeming contradictions in the factual narrative and give a general description of the circumstances surrounding the case.

The total number of cases included in the data base and used for analysis is less than the highest chronological case number because the following types of cases were excluded after initial data

entry: no true bills of indictment; cases where the defendant was found incompetent to stand trial; duplicate cases entered inadvertently; cases entered with a post-August 1982 indictment for homicide where the homicide occurred prior to August 6, 1982; cases where there was insufficient or unverifiable information on the race or sex of the defendant or the victim or the circumstances of the homicide; and homicide charges against a corporate defendant.

"No bills", which are homicide cases submitted to the grand jury but for which an indictment was not returned, were initially included, but the information on those cases was typically incomplete and inadequate. Those few entered in the early stages of data collection were subsequently removed. Data collection on no bills was discontinued. On the other hand, dismissals of a homicide charge after a formal indictment are included in the data base, unless there was another reason for non-inclusion, e.g., insufficient information on the critical variables concerning the defendant, the victim, or the circumstance of the homicide. Cases which were entered and then removed from the data base are identified in the chronological case summaries along with the reason for the removal of the case.

5. *Data Processing*

When a group of cases has been entered and verified, a series of specially designed data-cleaning computer programs is run. These programs search for internal and logical inconsistencies and missing data, as well as factual contradictions. The program ascertains that all the critical dates and data points are recorded. These specially designed computer programs identify problems in coding and data entry. They print out the identifying case numbers and the problem variables. At that point the project director goes back to the interview schedule to determine if data are missing or miscoded on key variables, such as the race of the defendant or victim, the date of the offense, sex of the defendant or victim, or the factual presence of an aggravating factor. The key procedural data points are checked against the interview schedule for coding accuracy or to see if an incorrect entry caused the error or inconsistency.

SPSS X[8] was used for the initial processing, recording, and

8. SPSS X USER'S GUIDE, edition 2 (1986).

cleaning of data to produce basic frequencies and cross tabulations. A special file was created to transfer clean recorded data to SAS.[9] We used the SAS LOGIST[10] procedure which fits a multiple regression model to a single binary dependent variable. Two dependent variables were defined: the plea/trial decision and the decision to serve a notice of factors.

The data-cleaning programs do not merely institute internal or implicit checks for logical consistency and identify contradictory or missing data. Data-cleaning programs have been designed to explicitly list key sets of variables so that they can be checked individually for logic and completeness. Data entry and verification were individually checked by the project director on the following sets of variables: all procedural case processing variables; all capital case processing identifiers; sentence variables for the homicide and contemporaneous offenses; race, sex, and age for defendants and victims; prior record variables; co-defendant variables; and variables indicating the presence of an aggravating factor. Data analysis did not begin until inconsistencies and ambiguities were resolved.

As data collection and cleaning progressed, qualitative and descriptive data on case processing practices and procedures became increasingly important. Early in the data collection process, it was clear that the initial set of procedural and result codes could not accommodate all of the variations in charging and dispositional practices in the 21 county jurisdictions. Procedural codes were adapted to record procedural events as precisely as possible, with the field attorney's narrative spelling out the individual idiosyncracies.

For analytical purposes, we distinguish broad procedural categories for the stages of capital case processing. The case summaries precisely describe the procedural and dispositional details for each individual case. The case summaries include qualitative data on case outcome and procedure which could not be consistently or precisely distinguished in the result codes. For example, if a case had four separate indictments, with each subsequent indictment replacing the former, the case would be coded on the charge code for the indictment which was the dispositional instrument. The

9. SAS USER'S GUIDE, Version 5 edition (1985).

10. Harrell, *The Logist Procedure*, in SUGI SUPPLEMENTAL LIBRARY USER'S GUIDE, Version 5, 269-93 (1986).

case summary would report that there were four superseding indictments and describe the significant differences between them. Verifying the case summaries continues to be a critical concern.

6. *Verification Procedures*

Approximately 85% of all homicides in New Jersey are public defender staff cases or public defender pool assignment cases. It is exceptional for a public defender's office to be a statewide agency. The mandate of the Office of the Public Defender is to represent all indigent defendants in New Jersey accused of an offense which carries the possibility of incarceration.

In addition to the cases handled by staff attorneys at the 21 regional trial divisions, the regional Office of the Public Defender also assigns pool counsel, or private counsel, in those cases where the defendant is indigent but there is a conflict of interest. This typically occurs in cases involving co-defendants. The assignment of a pool attorney, or private counsel, may also occur because the large volume of cases in the region necessitates it.

The Office of the Public Defender in New Jersey has a centralized appellate section which operates its own pool assignments, and a centralized administrative office, including the Special Projects Section which is conducting this study. The centralized institutional structure of the Office of the Public Defender has provided a unique opportunity for a comprehensive study of capital case processing throughout the state. There has been an unusual and remarkable degree of statewide cooperation with this study from defense attorneys, both public defenders and private counsel.

The type-of-attorney designation refers to representation at the trial stage. Occasionally a case will begin as a private counsel case and subsequently become a public defender case, and occasionally a case will begin as a public defender case and later become a private counsel case. There were very few such changes. Those cases were coded for representation at the conviction stage.

The statewide character of the Office of the Public Defender allowed for the implementation of extensive verification procedures. When cases are entered in the computer and data cleaning is completed, a list of each county's cases with case summaries is sent back to the Deputy Public Defender in charge of the county trial office. The list includes all of that county's cases which are then in the data base and identifies those cases where a notice of

factors was served, those cases which went to trial as capital cases, and those cases which went to penalty phase. The regional deputy is asked to verify that capital cases have been correctly identified, and that the stages of capital case processing have been accurately recorded. The data base is continually updated to reflect corrections to the data.

As the study progressed, the collection of qualitative data became increasingly important. Ambiguities in coding and study design were resolved in consultation with the project's criminologists and statistical experts. Data collection and interviewing techniques were refined and improved. The field attorneys were instructed to gather as much information as possible about how the case was regarded by the defense attorney, the prosecutor, and the court. Our intent and practice was to preserve as much qualitative information as precisely as possible. For this reason it was decided to include a short narrative description of the procedural events and factual circumstances of each case in the data base as a critical part of our analysis.

7. *Preparation of Case Summaries*

The case summary is written by the project director after all ambiguities and questions concerning data collection and data entry have been resolved to the furthest extent possible. A 170-page annotation of the 273 death-possible cases where no notice of factors was served is included in the *Interim Report* on file at the Rutgers-Newark Law Library. These cases are annotated in Part VIII of this Article. The *Interim Report* also includes the case summaries on the 131 death-eligible cases in the present data base. Case summaries have been prepared on all 703 cases in this data base.

The case summary is written using the data on the interview schedule, the field attorney's narrative, the indictment and the judgment sheet, the police reports, and the presentence report, if it is available. The case summaries include only verified or uncontradicted factual information in the description of the homicidal incident. The case summaries record basic and uncontradicted information on the demographic data concerning the defendant and victim, the circumstances of the homicide, the procedural history of the case, and its final outcome at the trial stage.

If a defendant has been convicted of a homicide offense, but continues to deny his guilt, the case summary indicates that a

court judgment has determined that he was found guilty of a homicide offense. If a defendant is acquitted of homicide, the case summary indicates that the defendant was charged with a homicide offense and found not guilty of a homicide which took place under documented circumstances. If a defendant pleads guilty to a homicide offense, the case summary indicates the facts which were the admitted factual basis for the plea agreement. In the description of sentence, the case summary indicates the maximum sentence and the minimum sentence for the homicide charge and aggregate and individual sentences for the contemporaneous offenses. If the defendant simultaneously pleads guilty to charges involving another incident, that is also indicated in the case summary. The case summary further indicates the result in any co-defendant's case, if that information is available. Case summaries are periodically updated with data on co-defendants' dispositions and corrected when established errors are identified.

The case summaries for each region with the identifying names are sent to the Deputy Public Defender in each trial region for verification. When corrections are noted, the case summaries are returned. Corrected case summaries are then prepared. Corrections continue to be made as verified errors are brought to our attention from any source. Because the case summaries do not include information which is contradicted or cannot be verified, they do not include data on plea offers or refusals. They do not include the defense attorney's comments or opinions on the character of the case, or evaluations or opinions on the nature and quality of the State's case. Without the cooperation of the State, the case summaries are necessarily limited to the facts of the case provided by the defense attorneys and the information available from court documents.

APPENDIX B: FREQUENCY DISTRIBUTIONS OF STUDY VARIABLES

Table

B-20 Method of Killing

B-21 Number of Gunshot or Stab Wounds

B-22 Location of Homicide

B-23 Defendant's Motive

B-24 Employment Status of Defense Attorney

B-25 Statutory Aggravating Factors

B-26 Statutory Mitigating Factors

APPENDIX B

FREQUENCY DISTRIBUTIONS OF STUDY VARIABLES*

TABLE B-1

COUNTY (v. 2)**

	N	%
Atlantic	31	4.4
Bergen	22	3.1
Burlington	10	1.4
Camden	70	10.0
Cape May	11	1.6
Cumberland	17	2.4
Essex	208	29.6
Gloucester	16	2.3
Hudson	98	13.9
Hunterdon	5	.7
Mercer	35	5.0
Middlesex	12	1.7
Monmouth	31	4.4
Morris	13	1.8
Ocean	26	3.7
Passaic	47	6.7
Salem	4	.6
Somerset	7	1.0
Sussex	1	.1
Union	38	5.4
Warren	1	.1

*All tables are based on 703 homicide cases for which the homicide occurred after the reenactment of the New Jersey Death Penalty Statute on August 6, 1982, and for which a final disposition has been reached at the trial court stage.

**Refers to the labels used to identify the variables in the interview schedule.

TABLE B-2

PLEA OR TRIAL (v. 3)

	N	%
Trial	325	46.2
Plea to Manslaughter	251	35.7
Plea to Capital Murder	8	1.1
Plea to Non-Capital Murder	37	5.3
Other Plea	74	10.5
Dismissal of All Charges, No Plea/No Trial	8	1.1

TABLE B-3

YEAR OF HOMICIDE (v. 6)

	N	%
1982	126	17.9
1983	257	36.6
1984	227	32.3
1985	81	11.5
1986	12	1.7

TABLE B-4

YEAR OF HOMICIDE INDICTMENT OR ACCUSATION (v. 15)

	N	%
1982	50	7.1
1983	259	36.8
1984	230	32.7
1985	132	18.8
1986	25	3.6
Unknown	7	1.0

TABLE B-5

PROCEDURAL HISTORY

	Charge on Accusation (v. 37)*		Charge on Indictment (v. 38)		Charge at Disposition, Plea, or Trial (v. 39)		Charge at Sentencing Stage (v. 40)	
	N	%	N	%	N	%	N	%
Murder with Death an Issue, Notice Served	--	--	131	18.6	94	13.4	69	9.8
Murder Non-Death	58	8.3	396	56.3	219	31.2	94	13.4
Felony Murder	6	.9	49	7.0	44	6.3	50	7.1
Aggravated Manslaughter	10	1.4	22	3.1	183	26.0	219	31.2
Manslaughter	10	1.4	16	2.3	89	12.7	114	16.2
Other	3	.4	2	.3	66	9.4	83	11.8
Dismissal	--	--	--	--	8	1.1	74	10.5
Not Applicable	616	87.6	87	12.4	--	--	--	--

*Includes nine homicides by juveniles in which the case proceeded on a complaint without either an accusation or an indictment.

TABLE B-6

BAIL STATUS (v. 42)

	N	%
No Bail Permitted	84	11.9
Bail Amount Set	488	69.5
Released on Own Recognizance (ROR)	15	2.1
Unknown	116	16.5

TABLE B-7

RESULT ON FIRST HOMICIDE CHARGE (v. 47)*

	N	%
General Categories		
Trials	325	46.2
Pleas	311	44.2
Dismissals	67	9.5
Specific Categories		
TRIAL		
Trial, Not Guilty	58	8.3
Trial, Guilty to Homicide Charge	169	24.0
Trial, Guilty to Lesser Included Offense	84	11.9
Trial, Acquitted on Motion at End of State's Case	4	.6
Trial, Defendant Not Guilty by Reason of Insanity	10	1.4
PLEA		
Plea of Guilty to Indictment	28	4.0
Plea of Guilty to Downgraded Indictable Offense	204	29.0
Plea of Guilty to Accusation	76	10.8
Defendant Pled during Course of Trial	3	.4
DISMISSAL		
Dismissed on Motion of Prosecutor	62	8.8
Dismissed after Other Pretrial Motion	5	.7

*For those cases in which there was more than one decedent victim, the result reported here is for the first homicide charge.

TABLE B-8

MAXIMUM AND MINIMUM SENTENCE ON HOMICIDE CHARGE

	Maximum Sentence (v. 49)		Minimum Sentence (v. 48)	
	N	%	N	%
Death	25	3.6	--	--
Life	119	16.9	--	--
≥40*	14	1.9	3	.3
31-39	1	.1	1	.1
30	53	7.5	170	24.2
21-29	4	.5	3	.4
20	105	14.9	2	.3
11-19	88	12.4	7	.9
10	54	7.7	84	11.9
1-9	87	12.4	150	21.3
No Prison Sentence	153	21.8	283	40.3
Unknown	--	--	1	.1

*Numbers denote sentence in years.

TABLE B-9

TOTAL NUMBER OF YEARS MAXIMUM SENTENCE AND TOTAL NUMBER OF YEARS MINIMUM SENTENCE FOR CONTEMPORANEOUS OFFENSES

	Maximum Sentence for Contemporaneous Offenses (v. 89)		Minimum Sentence for Contemporaneous Offenses (v. 90)	
	N	%	N	%
Death	--	--	--	--
Life	1	.1	--	--
≥40	10	1.4	1	.1
31-39	1	.1	--	--
30	10	1.4	2	.3
21-29	6	.7	6	.8
20	21	3.0	2	.4
11-19	38	5.3	19	2.6
10	53	7.5	21	3.0
1-9	175	24.9	153	21.8
No Prison Sentence	377	53.6	488	69.4
Unknown	11	1.6	11	1.6

TABLE B-10

TOTAL NUMBER OF YEARS MAXIMUM SENTENCE AND TOTAL NUMBER OF YEARS MINIMUM SENTENCE FOR HOMICIDE AND CONTEMPORANEOUS OFFENSES COMBINED

	Maximum Sentence for Homicide and Contemporaneous Offenses Combined (v. 92)		Minimum Sentence for Homicide and Contemporaneous Offenses Combined (v. 93)	
	N	%	N	%
Death	35	3.6	--	--
Life	120	17.1	--	--
≥40	23	3.3	20	2.6
31-39	8	1.1	24	3.3
30	63	8.9	133	18.9
21-29	29	4.1	5	.7
20	82	11.7	2	.3
11-19	94	13.4	51	7.3
10	56	8.0	64	9.1
1-9	112	15.9	172	24.5
No Prison Sentence	91	12.9	226	32.1
Unknown	--	--	6	.9

TABLE B-11

RELATION OF CONTEMPORANEOUS OFFENSE SENTENCE TO HOMICIDE SENTENCE (v. 91)

	N	%
Consecutive	71	10.1
Concurrent	164	23.3
Partially Consecutive	34	4.8
Unknown	7	1.0
Not Applicable	427	60.7

TABLE B-12

DEFENDANT'S RACE (v. 98)

	N	%
White	174	24.8
Black	398	56.6
Hispanic	131	18.6

TABLE B-13

DEFENDANT'S OCCUPATIONAL STATUS (v. 109)

	N	%
General Categories		
Professional and Managerial	9	1.3
Law Enforcement and Military	14	2.0
White Collar	24	3.4
Blue Collar and Unskilled	393	56.0
Service Workers	47	6.6
Unstable or Extra-Legal	71	10.1
Outside of Work Force	90	12.7
Other	55	7.9

TABLE B-14

DEFENDANT ON PROBATION OR PAROLE (v. 151)

	N	%
None	535	76.1
Probation	66	9.4
Parole	67	9.5
Pretrial Intervention (P.T.I.)	1	.2
Unknown	34	4.8

TABLE B-15

TOTAL NUMBER OF DECEDENT VICTIMS AND NONDECEDENT VICTIMS

	Decedent Victims (v. 284)		Nondecedent Victims (v. 285)	
	N	%	N	%
1	676	96.2	65	9.2
2	19	2.7	17	2.4
3	6	.9	11	1.6
≥4	2	.2	7	.9
Not Applicable	--	--	603	85.8

TABLE B-16

VICTIM'S GENDER (v. 286)*

	N	%
Male	526	74.8
Female	177	25.2

*This table is based on the first decedent in all homicide cases. The following tables are also based on date for the first decedent victim.

TABLE B-17

VICTIM'S RACE (v. 292)

	N	%
White	236	33.6
Black	349	49.6
Hispanic	114	16.2
Other	4	.6

TABLE B-18

VICTIM'S AGE (v. 298)*

	N	%
0-1	9	1.3
2-12	24	3.4
13-15	11	1.6
16-17	14	2.0
18-25	180	25.6
26-30	99	14.2
31-35	76	10.7
36-40	71	10.0
41-45	45	6.4
46-50	32	4.6
51-55	31	4.4
56-60	27	3.9
61-65	35	5.0
66-70	18	2.5
71-75	9	1.3
76-80	7	.9
81-85	7	.9
≥86	8	1.0

*Twelve unknown victim ages were assigned the mean value of 36.

TABLE B-19

VICTIM/DEFENDANT RELATIONSHIP (v. 322)

	N	%
General Categories		
Intimate or Relative	210	29.9
Friend or Acquaintance	273	38.9
Stranger	215	30.6
Missing	5	.7

TABLE B-20

METHOD OF KILLING

	Primary (v. 370)		Secondary (v. 376)	
	N	%	N	%
General Categories				
Firearm	251	35.7	2	.2
Knife or Other Sharp Instrument	224	31.8	27	3.9
Beating	126	17.9	120	17.0
Other	102	14.5	36	5.0
Unknown	--	--	5	.7
Not Applicable	--	--	513	73.0

TABLE B-21

NUMBER OF GUNSHOT OR STAB WOUNDS (v. 382)

	N	%
0	207	29.4
1	231	32.9
2	81	11.5
3-5	102	14.6
6-10	34	4.8
11-15	8	1.1
16-20	9	1.3
$\geq$21	16	2.3
Unknown	15	2.1

TABLE B-22

LOCATION OF HOMICIDE (v. 406)

	Homicide Location (v. 406)	
	N	%
General Categories		
Residence	345	49.1
Business	70	10.0
Public Place or Public Institution	277	39.4
Other	9	1.3
Unknown	2	.3

TABLE B-23

DEFENDANT'S MOTIVE (v. 448)*

	N	%
General Categories		
Hatred or Revenge	120	17.0
Money	156	22.2
Rage or Irrational	208	29.6
Sexual	56	8.0
Other Crime	50	7.1
Other	103	14.7
Unknown	10	1.4

*This is the prosecutor's theory of the defendant's motive in the case as reported by the defense counsel.

TABLE B-24

EMPLOYMENT STATUS OF DEFENSE ATTORNEY (v. 521)

	N	%
Public Defender Staff	434	61.7
Pool Attorney, Public Defender	139	19.8
Private Attorney	130	18.5

TABLE B-25

STATUTORY AGGRAVATING FACTORS

	Factor Not Present		Factor Present and Served: Death-Eligible		Factor Present But Not Served: Not Death-Eligible	
	N	%	N	%	N	%
(a) The Defendant Has Been Convicted, at Any Time, of Another Murder. For Purposes of This Section, a Conviction Shall Be Deemed Final When Sentence Is Imposed and May Be Used as an Aggravating Factor Regardless of Whether It Is on Appeal (v. 624)*	693	98.6	7	1.0	3	.4
(b) In the Commission of the Murder, the Defendant Purposely or Knowingly Created a Grave Risk of Death to Another Person in Addition to the Victim (v. 625)	597	84.9	33	4.7	73	10.4
(c) The Murder Was Outrageously or Wantonly Vile, Horrible or Inhuman in That It Involved Torture, Depravity of Mind, or an Aggravated Assault to the Victim (v. 626)**	444	63.2	99	14.1	160	22.8
(d) The Defendant Committed the Murder as Consideration for the Receipt, or in Expectation of the Receipt of Anything of Pecuniary Value (v. 627)	679	96.6	6	0.9	18	2.5
(e) The Defendant Procured the Commission of the Offense by Payment or Promise of Payment of Anything of Pecuniary Value (v. 627a)	701	99.7	2	0.3	--	--

TABLE B-25 (cont.)

	Factor Not Present		Factor Present and Served: Death-Eligible		Factor Present But Not Served: Not Death-Eligible	
	N	%	N	%	N	%
(f) The Murder Was Committed for the Purpose of Escaping Detection, Apprehension, Trial, Punishment or Confinement for Another Offense Committed by the Defendant or Another (v. 628)	645	91.7	31	4.4	27	3.9
(g) The Offense Was Committed while the Defendant Was Engaged in the Commission of, or an Attempt to Commit, or Flight after Committing or Attempting to Commit Murder, Robbery, Sexual Assault, Arson, Burglary, or Kidnapping (v. 629)***	492	70.0	79	11.3	132	18.9
(h) The Defendant Murdered a Public Servant, as Defined in 2C:27(1), while the Victim Was Engaged in the Performance of His Official Duties, or Because of the Victim's Status as a Public Servant (v. 630)	701	99.7	2	.3	--	--

*Prior to the 1985 amendment, this section read: The defendant has previously been convicted of murder. Amended by L. 1985, c. 178.

**Prior to the 1985 amendment, this section read: The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Amended by L. 1985, c. 178.

***The 1985 amendment added murder to the list of crimes. Amended by L. 1985, c. 178.

TABLE B-26

STATUTORY MITIGATING FACTORS (v. 693-700)

	Not Present		Present*	
	N	%	N	%
General Categories				
(a) The Defendant Was under the Influence of Extreme Mental or Emotional Disturbance Insufficient to Constitute a Defense to Prosecution (v. 693)	474	67.4	229	32.6
(b) The Victim Solicited, Participated in or Consented to the Conduct Which Resulted in His Death (v. 694)	517	73.5	186	26.5
(c) The Age of the Defendant at the Time of the Murder (v. 695)	343	48.8	360	51.2
(d) The Defendant's Capacity to Appreciate the Wrongfulness of His Conduct or to Conform His Conduct to the Requirements of the Law Was Significantly Impaired as the Result of Mental Disease or Defect or Intoxication, But Not to a Degree Sufficient to Constitute a Defense to Prosecution (v. 696)	372	52.9	331	47.1
(e) The Defendant Was under Unusual and Substantial Duress Insufficient to Constitute a Defense to Prosecution (v. 697)	588	83.6	115	16.4
(f) The Defendant Has No Significant History of Prior Criminal Activity (v. 698)	246	35.0	457	65.0
(g) The Defendant Rendered Substantial Assistance to the State in the Prosecution of Another Person for the Crime of Murder (v. 699)	622	88.5	81	11.5

TABLE B-26 (cont.)

	Not Present		Present*	
	N	%	N	%
(h) Any Other Factor Which Is Relevant to the Defendant's Character or Record or to the Circumstances of the Offense (v. 700)	81	11.5	622	88.5

*Includes a value of 1, 2, or 3 on each of these factors. "Present" means that there was a factual basis for the factor, although the factor may not have been presented to a penalty-phase jury or to the judge at sentencing.

APPENDIX C

Death Sentences Imposed, by Date of Imposition†

Case No.	Name of Defendant	Type of Attorney	County	Date	Race of Def. and Victim
44	Thomas Ramseur	S	Essex	5/17/83*	B/B
290	Richard Biegenwald	PC	Monmouth	12/8/83*	W/W
260	Marko Bey	S	Monmouth	1/27/84*	B/B
225	James Williams	S	Mercer	2/11/84	B/B
24	James Hunt	P	Camden	2/21/84	B/B
254	Walter Gerald	P	Atlantic	5/19/84*	B/W
200	James Zola	S	Mercer	6/6/84*	W/W
262	Benjamin Lodato	S	Ocean	7/13/84*	W/W
261	Marko Bey	S	Monmouth	9/24/84*	B/B
338	James Koedatich	P/S	Morris	10/30/84*	W/O(coded W)
207	Marie Moore	P	Passaic	11/19/84*	W/W
336	Roy Savage	PC	Essex	1/28/85	B/B
305	Darryl Pitts	PC	Camden	2/22/85	W/W
315	Bryan Coyle	S	Middlesex	3/19/85	W/W
355	Steven Davis	PC	Atlantic	5/10/85	W/W
442	Teddy Rose	S	Essex	6/12/85*	W/W
441	Walter Johnson	S	Gloucester	8/16/85	W/W
517	Ronald Long	P	Atlantic	10/24/85	B/W
640	Robert Marshall	PC	Ocean	3/5/86	W/W
626	Walter Oglesby	PC	Camden	3/18/86	B/B
610	Anthony McDougald	S	Essex	4/4/86	B/B
679	James Clausell	PC	Burlington	4/21/86	B/B
696	Nathaniel Harvey	P	Middlesex	10/17/86	B/W
688	Jacinto Hightower	P	Burlington	11/10/86	B/W
733	Philip Dixon	PC	Camden	2/3/87	B/B
[749]**	Kevin Jackson	S	Ocean	2/7/87	B/W
	Raymond Kise	P	Warren	3/13/87*	W/W
[787]**	Arthur Perry	P	Camden	5/22/87	B/B
	Dominick Shiavo	PC	Gloucester	5/28/87	W/W
	Frank Pennington	S	Bergen	6/15/87	W/W
	Samuel Moore	S	Essex	6/30/87	B/B
	Samuel Erazo	S	Essex	10/21/87	H/H
	Anthony Difrisco	PC	Essex	1/25/88	W/W

Type of Attorney

PDS = S - Public Defender Staff
PDP = P - Public Defender Pool Attorney
Private Counsel = PC

† As of October 19, 1988
* Death sentence vacated

** Not included in the data base of 703 cases which was analyzed in the Interim Report filed with the New Jersey Supreme Court in January of 1988.

APPENDIX D

NEW JERSEY CAPITAL PUNISHMENT STATUTE

SUBTITLE 2. DEFINITION OF SPECIFIC OFFENSES

PART 1. OFFENSES INVOLVING DANGER TO THE PERSON

CHAPTER 11. CRIMINAL HOMICIDE

Section:

2C:11-1. DEFINITIONS

In chapters 11 through 15, unless a different meaning plainly is required:

a. "Bodily injury" means physical pain, illness or any impairment of physical condition;

b. "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;

c. "Deadly weapon" means any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used, is known to be capable of producing death or serious bodily injury or which in the manner it is fashioned would lead the victim reasonably to believe it to be capable of producing death or serious bodily injury.

2C:11-2. CRIMINAL HOMICIDE

a. A person is guilty of criminal homicide if he purposely, knowingly, recklessly or, under the circumstances set forth in section 2C:11-5, causes the death of another human being.

b. Criminal homicide is murder, manslaughter or death by auto.

2C:11-2.1. ELAPSE OF TIME BETWEEN ASSAULT AND DEATH, PROSECUTION FOR CRIMINAL HOMICIDE

The length of time which has elapsed between the initial assault and the death of the victim shall not be a bar to prosecution of the actor for criminal homicide.

2C:11-3. MURDER

a. Except as provided in section 2C:11-4 criminal homicide constitutes murder when:

(1) The actor purposely causes death or serious bodily injury resulting in death; or

(2) The actor knowingly causes death or serious bodily injury resulting in death; or

(3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping or criminal escape, and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants, except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant;

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

b. Murder is a crime of the first degree but a person convicted of murder shall be sentenced, except as provided in subsection c. of this section, by the court to a term of 30 years, during which the person shall not be eligible for parole or to a specific term of years which shall be between 30 years and life imprisonment of

which the person shall serve 30 years before being eligible for parole.

c. Any person convicted under subsection a. (1) or (2) who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value shall be sentenced as provided hereinafter:

(1) The court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or pursuant to the provisions of subsection b. of this section.

Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt, except that, for good cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding. Where the defendant has entered a plea of guilty or has been tried without a jury, the proceeding shall be conducted by the judge who accepted the defendant's plea or who determined the defendant's guilt and before a jury empaneled for the purpose of the proceeding. On motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury. Nothing in this subsection shall be construed to prevent the participation of an alternate juror in the sentencing proceeding if one of the jurors who rendered the guilty verdict becomes ill or is otherwise unable to proceed before or during the sentencing proceeding.

(2)(a) At the proceeding, the State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors set forth in paragraph (4) of this subsection. The defendant shall have the burden of producing evidence of the existence of any mitigating factors set forth in paragraph (5) of this subsection but shall not have a burden with regard to the establishment of a mitigating factor.

(b) The admissibility of evidence offered by the State to establish any of the aggravating factors shall be governed by the rules governing the admission of evidence at criminal trials. The defendant may offer, without regard to the rules governing the admission of evidence at criminal trials, reliable evidence relevant to any of the mitigating factors. If the defendant produces evidence in mitigation which would not be admissible under the rules governing the admission of evidence at criminal trials, the State may

rebut that evidence without regard to the rules governing the admission of evidence at criminal trials.

(c) Evidence admitted at the trial, which is relevant to the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection, shall be considered without the necessity of reintroducing that evidence at the sentencing proceeding; provided that the fact finder at the sentencing proceeding was present as either the fact finder or the judge at the trial.

(d) The State and the defendant shall be permitted to rebut any evidence presented by the other party at the sentencing proceeding and to present argument as to the adequacy of the evidence to establish the existence of any aggravating or mitigating factor.

(e) Prior to the commencement of the sentencing proceeding, or at such time as he has knowledge of the existence of an aggravating factor, the prosecuting attorney shall give notice to the defendant of the aggravating factors which he intends to prove in the proceeding.

(f) Evidence offered by the State with regard to the establishment of a prior homicide conviction pursuant to paragraph (4)(a) of this subsection may include the identity and age of the victim, the manner of death and the relationship, if any, of the victim to the defendant.

(3) The jury or, if there is no jury, the court shall return a special verdict setting forth in writing the existence or nonexistence of each of the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection. If any aggravating factor is found to exist, the verdict shall also state whether it outweighs beyond a reasonable doubt any one or more mitigating factors.

(a) If the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death.

(b) If the jury or the court finds that no aggravating factors exist, or that all of the aggravating factors which exist do not outweigh all of the mitigating factors, the court shall sentence the defendant pursuant to subsection b.

(c) If the jury is unable to reach a unanimous verdict, the court shall sentence the defendant pursuant to subsection b.

(4) The aggravating factors which may be found by the jury or

the court are:

(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;

(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;

(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping; or

(h) The defendant murdered a public servant, as defined in N.J.S. 2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.

(5) The mitigating factors which may be found by the jury or the court are:

(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution;

(b) The victim solicited, participated in or consented to the conduct which resulted in his death;

(c) The age of the defendant at the time of the murder;

(d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution;

(e) The defendant was under unusual and substantial duress

insufficient to constitute a defense to prosecution;

(f) The defendant has no significant history of prior criminal activity;

(g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or

(h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.

d. The sentencing proceeding set forth in subsection c. of this section shall not be waived by the prosecuting attorney.

e. Every judgment of conviction which results in a sentence of death under this section shall be appealed, pursuant to the Rules of Court, to the Supreme Court. Upon the request of the defendant, the Supreme Court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. In any instance in which the defendant fails, or refuses to appeal, the appeal shall be taken by the Office of the Public Defender or other counsel appointed by the Supreme Court for that purpose.

f. Prior to the jury's sentencing deliberations, the trial court shall inform the jury of the sentences which may be imposed pursuant to subsection b. of this section on the defendant if the defendant is not sentenced to death. The jury shall also be informed that a failure to reach a unanimous verdict shall result in sentencing by the court pursuant to subsection b.

g. A juvenile who has been tried as an adult and convicted of murder shall not be sentenced pursuant to the provisions of subsection c. but shall be sentenced pursuant to the provisions of subsection b. of this section.

2C:11-4. MANSLAUGHTER

a. Criminal homicide constitutes aggravated manslaughter when the actor recklessly causes death under circumstances manifesting extreme indifference to human life.

b. Criminal homicide constitutes manslaughter when:

(1) It is committed recklessly; or

(2) A homicide which would otherwise be murder under section 2C:11-3 is committed in the heat of passion resulting from a reasonable provocation.

c. Aggravated manslaughter is a crime of the first degree and upon conviction thereof a person may, notwithstanding the provisions of paragraph (1) of subsection a. of N.J.S. 2C:43-6, be sen-

tenced to an ordinary term of imprisonment between 10 and 30 years. Manslaughter is a crime of the second degree.

2C:11-5. DEATH BY AUTO

a. Criminal homicide constitutes death by auto when it is caused by driving a vehicle recklessly.

b. Death by auto is a crime of the third degree and, notwithstanding the provisions of 2C:43-2, the court may not suspend the imposition of sentence on any defendant convicted under this section, who was operating the vehicle under the influence of an intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, and any sentence imposed under this section shall include either a fixed minimum term of 270 days' imprisonment, during which the defendant shall be ineligible for parole, or a requirement that the defendant perform a community related service for a minimum of 270 days.

c. For good cause shown, the court may, in accepting a plea of guilty under this section, order that such plea not be evidential in any civil proceeding.

2C:11-6. AIDING SUICIDE

A person who purposely aids another to commit suicide is guilty of a crime of the second degree if his conduct causes such suicide or an attempted suicide, and otherwise of a crime of the fourth degree.

APPENDIX E

ORDER, NEW JERSEY SUPREME COURT, JULY 29, 1988

SUPREME COURT OF NEW JERSEY

It is ORDERED that David C. Baldus is hereby appointed as a Special Master for the Supreme Court to make recommended findings of fact and recommended conclusions of law relating to proportionality in the administration of cases subject to capital punishment in New Jersey.

It is FURTHER ORDERED that the Special Master shall develop and analyze data for purposes of statutory comparative proportionality review as set forth in *N.J.S.A.* 2C:11-3e. The Special Master shall produce for the Court a data base and files sufficient to enable the Supreme Court to conduct proportionality reviews as required by statute. In this connection, the Special Master may consider and assess the validity and utility for comparative proportionality review purposes of the data base that formed the basis of the report of the New Jersey Public Defender entitled "the Re-Imposition of Capital Punishment in New Jersey."

It is FURTHER ORDERED that the Special Master shall conduct this review using all available data and reports, and, with the assistance of the Administrative Office of the Courts, collect such additional data and conduct such additional analysis as may be needed.

It is FURTHER ORDERED that the Special Master shall invite the participation of interested parties, including the Public Defender, County Prosecutors, and the Attorney General, with respect to the relevant issues, and to present their positions on the development of a comparative proportionality review system under *N.J.S.A.* 2C:11-3e.

It is FURTHER ORDERED that in order to promote an orderly approach to comparative proportionality review and make the data accessible to all parties and interested persons and to the public, the Special Master shall develop a public data file that may include the data bases of the Public Defender, other available data, and a record of dispositions of all relevant homicide cases.

It is FURTHER ORDERED that in order to enable the Special Master to carry out his duties, the Special Master shall have the following authority: conduct hearings, procure expert technical advice, call witnesses, and request public records and any other

relevant information.

It is FURTHER ORDERED that the Special Master shall file a report consisting of recommended findings of fact and recommended conclusions of law. The report of the Special Master shall be submitted to the parties who shall have the opportunity to respond and to state exceptions thereto in such form as they desire.

It is FURTHER ORDERED that the within Order may be supplemented by additional orders or directives as may be appropriate on the Court's own motion, or on application of the Special Master, or on application of any party. Nothing in this Order should be construed by the Special Master or the parties to represent a position of the Court on any issue, nor shall the recommended findings and conclusions of law of the Special Master include any determination concerning the excessiveness or disproportionality of any death sentence imposed in any case.

For the Court
C.J.

DATED: July 29, 1988