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Arbitratiness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the nebraska Experience (1973-1999) (comments)

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Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)

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PART A

I. INTRODUCTION[1]

Since 1973, Nebraska has had a "weighing" death penalty system. In this system, the sentencing court finds statutory aggravating and

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mitigating circumstances and bases its sentencing decision on a weighing of those factors. In Nebraska, judges have the exclusive sentencing authority.[2] This Article presents a legal and empirical analysis of the administration of that system through 1999. Our empirical analysis tracks 185 prosecutions in 175 death-eligible cases that resulted in 89 penalty trials and 29 death sentences, three of which have been executed.

The principal focus of this Article is on arbitrariness and comparative injustice in the administration of the death penalty.[3] As it has evolved since *Furman v. Georgia*,[4] the legal concept of arbitrariness may refer to one or more of the following features of a death penalty system:

- discrimination based on illegitimate and suspect factors, such as the race and socioeconomic status of the defendant and victim;
- geographic disparities in outcomes;
- random, inconsistent, and capricious outcomes.[5]

Nebraska; Joe Steele, State Court Administrator; State District Court Clerks and their staffs; State Probation Office Directors, Officers and their staffs; numerous Nebraska prosecutors and defense counsel; DeMaris Johnson, Executive Director, Nebraska County Attorneys Association; and Helga Kirst, Executive Director, Nebraska Criminal Defense Attorneys Association.

2. Nebraska's system is modeled after Florida's system. *See infra* note 37. In Florida, however, the judicial sentencing decision is based in part on an advisory jury verdict, which the court is free to accept or reject.

3. In this Article, we use interchangeably the terms arbitrariness, a legal concept, and comparative injustice, a philosophical concept. Robert F. Schopp, *Justifying Capital Punishment in Principle and in Practice: Empirical Evidence of Distortions in Application,* 81 NEB. L. REV. 805 (2002). Each addresses two separate types of capital charging and sentencing behavior. The first type is *discrimination* which is both arbitrary and comparatively unjust because it treats defendants differently on the basis of morally irrelevant factors such as the race and socioeconomic status of the defendant or victim or the county of prosecution. The second type involves the *inconsistent application* of substantive standards of noncomparative justice, which results in either the "dissimilar treatment of relevantly similar cases or similar treatment of dissimilar cases . . . ." *Id.* at 827.

4. 408 U.S. 238 (1972).

5. In terms of the "legal" issues they raise, state and federal courts view these sources of arbitrariness and comparative injustice quite differently, although in practice all are generally tolerated. Least acceptable are racial disparities held to be the product of discrimination deemed intentional, purposeful, or "disparate treatment." Random and unprincipled outcomes raise less concern even though they constituted a major factual foundation of the *Furman* holding.

Charging and sentencing disparities based on geography or decisions that reflect the socioeconomic status of the defendant and victim raise the least "legal" concern. When criminal defendants raise claims of socioeconomic and geographic discrimination, courts often dismiss them outright or on the grounds that the appellant provided inadequate evidence. *See, e.g.*, Woods v. State, No. CR-95-1797, 1998 Ala. Crim. App. LEXIS 117, at *13 (May 8, 1998) ("We are aware of no case in which a strike based on a venire member's economic status alone, which was not found to be a pretext for the exclusion on the basis of race, has been found to violate Batson and its progeny."); Thomas v. State, 421 So. 2d 160, 163

The need to avoid "arbitrariness" and promote comparative justice, therefore, shapes the following characteristics that one would expect to see in a system that is administered in an evenhanded, non-discriminatory manner:

- decisionmaking is substantially guided by legitimate case characteristics that are substantially related to the culpability of the offender;
- non-discriminatory decisionmaking;
- geographic uniformity in outcomes;
- death-sentencing outcomes that are consistent and limited to the most culpable offenders.

In addition, we focus on the implications of the Supreme Court's spring 2002 decision regarding the death penalty, *Ring v. Arizona*,[6] for the future of the Nebraska system. *Ring* requires the participation of juries in all capital trials, although the scope of that participation, beyond the jury's findings of statutory aggravating circumstances, is currently unclear. Against this background, we consider possible reforms of the Nebraska system that will meet the requirements of *Ring* while preserving the strengths of the Nebraska system that we document in this Article.

In the balance of this Part, we present a review of the literature and a legal analysis of Nebraska law and practice, with special reference to the features of the system that are likely to enhance or to reduce the risk of arbitrariness in the administration of Nebraska's death penalty. We also consider the extent to which the current system conflicts with the requirements of *Ring* and propose statutory modifications of the current system that likely would satisfy the requirements of *Ring*.

Part B describes our methodology and documents the impact of legitimate case characteristics on charging and sentencing outcomes in

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(Fla. 1982) (rejecting petitioner's claims of geographic and economic discrimination on the basis that "the appellant's allegations of discrimination do not constitute a sufficient preliminary factual basis upon which to state a cognizable claim"); State v. Williams, No. 03C01-9302-CR-00050, 1996 Tenn. Crim. App. LEXIS 211, at *23 (April 2, 1996) ("[T]he Tennessee Supreme Court has summarily dismissed claims regarding economic, gender, and geographic discrimination in the imposition of the death penalty."). Our research has not located any case in which a criminal defendant successfully appealed a conviction based on a claim of socioeconomic or geographic discrimination.

It is noteworthy, however, that legislatures have specifically protected criminal defendants from socioeconomic discrimination. For example, the U.S. Congress requires that the United States Sentencing Commission "assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d) (2001); *see, e.g.*, United States v. Stout, 32 F.3d 901 (5th Cir. 1994) (holding that socioeconomic factors were not valid grounds for increasing the sentence of a tax evasion defendant).

6. 122 S. Ct. 2428 (2002). The changes adopted by the Nebraska Legislature in 2002 to comply with *Ring* are described *infra* note 395.

the Nebraska system. Appendix A presents additional detail on methodology. Parts C through E present empirical evidence of arbitrariness in the system. In doing so, we present both statewide data and data from the major urban counties and the counties of greater Nebraska.[7] In addition, we assess the extent to which any evidence of arbitrariness (a) appears to be the product of prosecutorial charging decisions, judicial sentencing decisions, or both, and (b) is concentrated in particular case categories, such as those with low, medium, or high levels of defendant culpability. Part F, which presents a summary of our findings and policy recommendations, can be viewed as an executive summary.

There are three main themes to this Article. The first theme is that the Nebraska death penalty system shows no significant evidence of purposeful "disparate treatment" discrimination based on the race of the defendant or the victim.[8] However, evidence of arbitrariness in the system exists with respect to three of the arbitrariness issues listed above, although, as we discuss below, several findings that bear on these issues are open to more than one interpretation. Throughout, we seek to explain our findings, but leave it to our readers to assess their legal, ethical, and moral significance.[9]

A second main theme of this Article is that there are three underlying *legal* sources of arbitrariness that we document. The first source is the breadth of the Nebraska statute's definition of death-eligible murder, which results in capital prosecutions in many cases in which death sentences are rarely imposed and, to date, have never been affirmed on appeal. It is among these cases that the evidence of excessiveness is concentrated. The second legal source of arbitrariness is the breadth of prosecutorial charging discretion under Nebraska law, which contributes to geographic and race disparities and inconsistency in charging and sentencing outcomes. The third source of arbitrariness is ambiguity under state law concerning the right of prosecutors to waive the death penalty in cases that result in a first-degree murder conviction and the scope of discretion that sentencing

7. The major urban counties include Douglas (City of Omaha), Sarpy (City of Bellevue and parts of Omaha), and Lancaster (City of Lincoln). The counties of "greater Nebraska" embrace the balance of the state.

8. Our findings document adjusted race-of-victim disparities in judicial death sentencing decisions in the major urban counties, *infra* section VII.C, that are consistent with a pattern and practice of disparate impact based on the race of the victim. These disparities are also consistent with race-of-victim disparities documented in many states. *Infra* note 11 and accompanying text. However, because the disparities are based on small samples and are not statistically significant, they will not support an inference that a pattern and practice of race-of-victim discrimination actually exists in Nebraska's major urban counties.

9. See Schopp, *supra* note 3, for a useful discussion of the limitations of empirical studies of death-sentencing systems as a basis for assessing the constitutionality and morality of individual death-sentencing systems in practice.

judges have when the prosecution seeks to waive the death penalty in first-degree murder cases.

A third main theme of this Article is that the effectiveness of the system could be significantly improved through legislative ratification of current Nebraska practices or adoption of procedures currently in place or proposed in other jurisdictions. This theme concludes in Part F with a series of policy recommendations that we believe can reduce the level of arbitrariness in Nebraska's charging and sentencing system. We also present proposals that we believe would meet the requirements of *Ring* while maintaining the strengths of Nebraska's judicial sentencing system that we document in this Article.

II. REVIEW OF THE LITERATURE

An extensive body of academic literature has developed over the last twenty-five years addressing whether, and to what extent, the consideration of non-legitimate factors influences the administration of the death penalty.[10] The debate over this matter includes a lively discussion on both theoretical and methodological dimensions. One significant concern raised by this literature is the degree to which decisions of prosecutors and juries are influenced by the race or socioeconomic status (SES) of the defendant or the victim. On the question of race, most studies indicate that the race of the defendant does not affect the likelihood that the defendant will receive the death penalty.

However, a number of studies suggest that the odds of receiving the death penalty are enhanced if the victim is white as opposed to another race.[11] For example, the Baldus-Woodworth-Pulaski study of the administration of capital punishment in Georgia from 1973-1980 found that, after adjusting for the presence or absence of hundreds of

10. *See* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings From Philadelphia*, 83 CORNELL L. REV. 1638, 1792 (1998) (summarizing studies) [hereinafter *Philadelphia Study*]; U.S. GEN. ACCT. OFF., DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (GAO/GGO-90-57) (1990) (summarizing studies through 1989).

11. *See* U.S. GEN. ACCT. OFF., *supra* note 10, at 5-6 ("In 82% of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving a death sentence, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks. This finding was remarkably consistent across data sets, states, data collection methods, and analytic techniques. The finding held for high, medium, and low quality studies."). The empirical studies published/reported before 1990 are summarized in DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 254-67 (1990) [hereinafter EJDP]. The empirical studies published or reported since 1990 reflect the same pattern noted in the GAO report. They are summarized in David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT app. B (James R. Acker et al. eds., 2d ed. forthcoming 2003).

variables for legitimate case characteristics, such as the level of violence and the defendant's prior record, defendants whose victims were white, on average, faced odds of receiving a death sentence that were 4.3 times higher than similarly situated defendants whose victims were black.[12]

Studies that have addressed race disparities in sentencing have not consistently found racial disparities. Rather, these studies indicate that race disparities in sentencing are highly sensitive to locality and vary significantly. For example, Professors Baldus and Woodworth's study of Colorado's capital punishment administration determined that there were no statistically significant race-of-defendant effects, and no statistically significant race-of-victim effects in sentencing decisions.[13] In a Philadelphia study, however, there were findings of both race-of-victim and race-of-defendant effects in jury death-sentencing decisions.[14]

Where race effects are present, these studies generally report that the principal source of these race effects is the prosecutorial decision to seek or waive the death penalty in death-eligible cases. The literature also suggests that, in terms of offender culpability, the race effects are concentrated in the mid-range of cases where the facts permit the greatest room for the exercise of discretion. Finally, the literature suggests that race effects are more likely to influence death penalty administration in suburban and rural rather than urban areas.

Some scholars have argued that there are methodological flaws in these studies.[15] At least two Justices of the United States Supreme Court have suggested that discrimination in the administration of the death penalty is inevitable.[16] To the extent possible, the research de-

12. EJDP, *supra* note 11, at 319-20.

13. *See* Scott Anderson, *As Flies to Wanton Boys: Death-Eligible Defendants in Georgia and Colorado*, 40 TRIAL TALK 9-16 (1991) (reporting no race-of-defendant effects and no statistically significant race-of-victim effects as found in DAVID C. BALDUS ET AL., ARBITRARINESS AND DISCRIMINATION IN COLORADO'S POST-FURMAN CAPITAL CHARGING AND SENTENCING PROCESS: A PRELIMINARY REPORT (1986) (on file with authors)).

14. *Philadelphia Study*, *supra* note 10 (finding no race-of-victim or defendant effects in prosecutorial decisionmaking, but race-of-defendant and race-of-victim effects in jury decisionmaking).

15. *See* Daniel E. Lungren & Mark L. Krotoski, *The Racial Justice Act of 1994 - Undermining Enforcement of the Death Penalty Without Promoting Racial Justice*, 20 U. DAYTON L. REV. 655, 662-63 (1995); John C. McAdams, *Racial Disparity and the Death Penalty*, 61 LAW AND CONTEMP. PROBS. 153 (1998); Stanley Rothman & Steven Powers, *Execution by Quota*, 116 PUBLIC INTEREST 3, 8 (1994).

16. McCleskey v. Kemp, 481 U.S. 279, 311-13 (1987) (citing viewpoints of Justices Brennan and Marshall in text and footnotes); *see also* David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 371 n. 46 (1994) (quoting Memorandum from Antonin Scalia,

sign we use in this research attempts to address the concerns raised by critics of prior studies.

To date, there has been no systematic or comprehensive collection of information and analysis of the scope provided in this study conducted in Nebraska. Studies with varying levels of detail and methodological sophistication have been conducted[17] in Arizona,[18] California,[19] Colorado,[20] Georgia,[21] Illinois,[22] Kentucky,[23] Maryland,[24] Mississippi,[25] New Jersey,[26] North Carolina,[27] Philadelphia,

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Justice, United States Supreme Court to the Conference of the Justices, United States Supreme Court 1 (Jan. 6, 1987) (stating that "[s]ince it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need is more proof")) [hereinafter *Inevitability*].

17. *Philadelphia Study*, *supra* note 10 (surveying studies through 1998); U.S. GEN. ACCT. OFF., *supra* note 10 (summarizing findings of studies through 1989).
18. PEG BORTNER & ANDY HALL, ARIZONA FIRST-DEGREE MURDER CASES SUMMARY OF 1995-1999 INDICTMENTS: DATA SET II RESEARCH REPORT TO ARIZONA CAPTIAL CASE COMMISSION (2002) (reporting unadjusted race-of-victim effects in charging and judicial sentencing decisions but no race-of-defendant effects) (available in the University of Nebraska Law College Library).
19. Stephen P. Klein & John E. Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 JURIMETRICS J. 33 (1991) (finding no race-of-defendant effects, but significant race-of-victim effects).
20. *See* Anderson, *supra* note 13.
21. EJDP, *supra* note 11 (finding no statewide race-of-defendant effects, but finding race-of-victim effects in prosecutor and jury decisionmaking).
22. GLENN L. PIERCE & MICHAEL L. RADELET, RACE, REGION AND DEATH SENTENCING IN ILLINOIS, 1988-1997, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT tech. app. I, Report A (April 14, 2002).
23. Thomas J. Keil & Gennardo F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: 1976-1991*, 20 AM. J. CRIM. JUST. 17 (1995) (finding no race-of-defendant effects, but significant race-of-victim effects).
24. David C. Baldus & George Woodworth, Race-of-Victim and Race-of-Defendant Disparities in the Administration of Maryland's Capital Charging and Sentencing System (1978-1999) (finding white-victim and black-defendant/white-victim effects in charging and sentencing decisions after adjustment for the number of statutory aggravating circumstances charged in the case, but no independent black defendant effects) (unpublished manuscript available in the University of Nebraska Law College Library).
25. RICHARD BERK & JOSEPH LOWERY, FACTORS AFFECTING DEATH PENALTY DECISIONS IN MISSISSIPPI (June 1985) (finding no overall race-of-defendant effects, but race-of-victim effects).
26. *See* State v. Marshall, 613 A.2d 1059 (N.J. 1992); DAVID S. BAIME, REPORT TO THE SUPREME COURT SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2000-2001 TERM (June 1, 2001); Leigh Bienan et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTG. L. REV. 27 (1988) (finding race-of-victim effects and no race-of-defendant effects in prosecutorial decisionmaking, and race-of-defendant effects but no race-of-victim effects in jury decisionmaking).
27. BARRY NAKELL & KENNETH A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY (1987) (finding statewide race-of-victim effects, no race-of-defendant effects).

Pennsylvania,[28] South Carolina,[29] Texas,[30] and Virginia.[31]

In this study, we have used the most advanced analytical methodology developed in the conduct of prior similar studies. The analysis builds on the insights of these studies and seeks to refine the measures of criminal culpability and other controls that have emerged as these studies have become more sophisticated.

III. LAW AND PRACTICE IN THE NEBRASKA DEATH PENALTY SYSTEM

A Nebraska penalty-trial court stated in 1989 that "the state's policy is to impose the death penalty *sparingly* and *uniformly*."[32] This aspiration states what appears to be the goal of the Legislature,[33] the Nebraska Supreme Court,[34] and the penalty-trial sentencing judges who have addressed the issue. In this section, we analyze the core features of Nebraska law and practice that are likely to enhance or impede the realization of those goals or are otherwise relevant to the risk of arbitrariness. In this regard, we consider the death penalty legislation, the jurisprudence of the Nebraska Supreme Court, and the charging and sentencing practices of Nebraska's prosecutors and judges. At a number of points, we contrast the Nebraska system with those of other American death-sentencing jurisdictions. In the analysis, we consider the implications of Nebraska law and policy for what we are likely to find in our empirical study of the system. We also identify a series of narrower questions that we address empirically in subsequent portions of this Article.

Our survey of Nebraska law and practice has benefited greatly from an interview with Nebraska State Senator Ernie Chambers[35]

28. *Philadelphia Study*, *supra* note 10 (finding no race-of-victim or defendant effects in prosecutorial decisionmaking, but finding race-of-defendant and victim effects in jury decisionmaking).

29. Raymond Paternoster & Ann Marie Kazyaka, *The Administration of the Death Penalty in South Carolina: Experiences Over the First Few Years*, 39 S.C. L. REV. 245 (1988) (finding no race-of-defendant effects, but race-of-victim effects).

30. Deon Brock et al., *Arbitrariness in the Imposition of Death Sentences in Texas: An Analysis of Four Counties by Offense Seriousness, Race of Victim, and Race of Offender*, 28 AM. J. OF CRIM L. 43 (2000) [hereinafter *Texas Study*].

31. JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION OF THE VIRGINIA GENERAL ASSEMBLY, REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT (2002) [hereinafter VIRGINIA STUDY].

32. State v. Boppre, Case No. 35847, p. 8 (Scotts Bluff Co. Dist. Ct. 1987) (emphasis added). All unreported decisions of the Nebraska District Courts cited herein are available in the University of Nebraska Law College Library.

33. *See infra* note 90 and accompanying text.

34. *See* State v. Simants, 197 Neb. 549, 569, 250 N.W.2d 881, 893 (1977).

35. Interview with Senator Ernie Chambers, District 11, Nebraska Unicameral, Lincoln, Nebraska (October 18, 2001) [hereinafter Chambers Interview].

and an extensive joint interview that we conducted with three retired Nebraska trial court judges.[36]

At first blush, Nebraska appears to be a typical "weighing" state. The legislation includes nine aggravating circumstances and seven mitigating circumstances, which are listed in Table 1.[37] Upon a finding of liability for first-degree murder,[38] the statute establishes a three stage penalty-trial process in which the sentencing authority determines whether (a) statutory aggravating circumstances are present in the case, or (b) statutory mitigating circumstances are present, and (c) if they are, whether "the aggravating circumstances . . . outweigh the mitigating circumstances."[39] Only when aggravating circumstances outweigh mitigating circumstances may a death sentence be imposed.[40] On closer examination, however, one sees that the Nebraska system is far from typical and that it implicates the issue of arbitrariness at more levels than any other death penalty system of which we are aware.

A. Judicial Sentencing

A significant feature of Nebraska's statute that distinguishes it from most weighing statutes is that penalty-trial sentencing is performed exclusively by trial court judges. Only four other states have taken this course.[41] The Nebraska statute is unique even when com-

36. Interview with three retired Nebraska judges, Lincoln, Nebraska (October 19, 2001) [hereinafter Judges Interview]. The former judges, who had participated in a number of penalty trials, requested anonymity, a request we honor in this Article.

37. This weighing model roughly follows the Florida legislation found constitutional in *Proffitt v. Florida*, 428 U.S. 242 (1976).

38. The first element of capital murder in Nebraska is liability for first-degree murder (M1). The key elements of M1 are (a) killing another person with a mens rea (mental state) defined as "purposely and with deliberate and premeditated malice" or (b) killing "in the perpetration of or attempt to" commit one of a series of violent felonies. NEB. REV. STAT. § 28-303 (Reissue 1995). Deliberation and premeditation also embrace the statutory elements of "administering poison or causing the same to be done or if by willful and corrupt perjury or subornation of the same, he purposely procures the conviction and execution of any innocent person." *Id.* The second element of a capital murder is a presence in the case of one or more of the statutory "aggravating circumstances" listed in Table 1. § 29-2523 (Reissue 1995). All of the aggravators in Table 1, with small technical changes, were in the original statute with the exception of § 29-2523 (1) (i), which became effective July 15, 1998.

39. NEB. REV. STAT. § 29-2519 (Reissue 1995).

40. *Id.*; NEB. REV. STAT. § 29-2522 (Reissue 1995).

41. Among states with exclusively judicial death sentencing, Arizona, Montana, and Idaho assign the sentencing responsibility to the guilt-trial judge. Colorado assigns it to a panel of three judges. ARIZ. REV. STAT. ANN. § 13-703 (West 2000); COLO. REV. STAT. ANN. § 16-11-103 (West 2000); IDAHO CODE § 19-2515 (Michie 2000); MONT. CODE ANN. § 46-18-301 (2000). *See generally* Roxane J. Perruso, *And Then There Were Three: Colorado's New Death Penalty Sentencing Statute*,

TABLE 1

NEBRASKA STATUTORY AND MITIGATING CIRCUMSTANCES

NEB. REV. STAT. § 29-2523 (Reissue 1995). Aggravating and mitigating circumstances, as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a public servant having lawful custody of the offender or another in the lawful performance of his or her official duties and the offender knew or should have known that the victim was a public servant performing his or her official duties;

(h) The murder was committed knowingly to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws; or

(i) The victim was a law enforcement officer engaged in the lawful performance of his or her official duties as a law enforcement officer and the offender knew or reasonably should have known that the victim was a law enforcement officer.

The facts upon which the applicability of an aggravating circumstance depends must be proved beyond a reasonable doubt.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his or her participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

pared to these four states, however, because it gives the guilt-trial judge the power to conduct the penalty trial alone or to request the Nebraska Supreme Court to appoint two other judges to share the duty.[42] On this issue, a recent decision of the Nebraska Supreme Court holds that when the trial court opts for a three-judge panel, a death sentence imposed by the panel must be unanimous to stand.[43]

This research, therefore, provides an opportunity to test the "consistency" hypothesis advanced in *Proffitt v. Florida*, namely that "judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury and therefore is better able to impose sentences similar to those imposed in analogous cases."[44] Implicit in this expectation is the further expectation that judicial sentencing systems carry a lower risk of discrimination on the basis of race and suspect factors, such as geography and the socioeconomic status of the defendant and victim, than do jury death-sentencing systems. To test these hypotheses, we compare the evidence of arbitrariness and discrimination in the outcomes of Nebraska's penalty trials with comparable evidence from New Jersey and Pennsylvania, both of which are weighing jurisdictions that rely on jury sentencing.[45]

The literature and Nebraska law suggest that the difference between a one- and three-judge sentencing court may have implications

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68 U. COLO. L. REV. 189 (1997). In Alabama, Delaware, Florida, and Indiana, judges impose a life or death sentence after receiving an advisory jury verdict. ALA. CODE §§ 13A-5-46, 13A-5-47 (1994); DEL. CODE ANN., tit. 11, § 4209 (1995); FLA. STAT. ANN. § 921.141 (West 2001); IND. CODE ANN. § 35-50-2-9 (Supp. 2001). Of course, all of these systems have been drawn into question by *Ring v. Arizona*, 122 S. Ct. 2428 (2002).

42. NEB. REV. STAT. § 29-2520 (Reissue 1995).

43. State v. Anderson & Hochstein (II), 262 Neb. 311, 328, 632 N.W. 2d. 273, 285 (2001). In 2002, the Nebraska Legislature made a three-judge panel mandatory for all cases. *Infra* note 395.

44. Proffitt v. Florida, 428 U.S. 242, 252 n.10 (1976) (drawing on an opinion of the Florida Supreme Court to the effect that a "trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants"). See Robert F. Schopp, *Reconciling "Irreconcilable" Capital Punishment Doctrine as Comparative and Noncomparative Justice,* 53 FLA. L. REV. 475, 517-24 (2001), for an elaboration of the reasons why judicial sentencing panels are likely to enhance consistency compared to juries. However, in *Ring,* the Supreme Court questioned the extent to which data supported the *Proffitt* hypothesis, stating that "the superiority of judicial fact finding in capital cases is far from evident," 122 S. Ct. at 2342, and ruled that, in any event, the Sixth Amendment concerns underlying *Ring* trump concerns about "rationality, fairness, or efficiency" in death sentencing outcomes. *Id.*

45. *See infra* subsection XI.B.2.

for the risk of arbitrariness in the system.[46] The Nebraska data indicate that three-judge panels are appointed 50% (44/88) of the time. In those cases, the death-sentencing rate is 51% (22/43), while in the solo-judge cases the rate is 16% (7/44).[47] When this disparity is adjusted to control for offender culpability, the disparity in the rates is much reduced, but it still suggests that the solo-judges are more selective in their sentencing than are the panels.[48] How or why could this be?

Our interviews with retired judges suggest two possible reasons why a guilt-trial judge may prefer a panel: (1) reduced scrutiny and (2) enhanced reliability. The reduced scrutiny theory suggests that when a guilt-trial judge thinks a death sentence in the case is likely, he or she may believe that a death sentence in the case will have more legitimacy and attract less legal and political scrutiny if it is imposed by a panel. The death sentence reversal rates in the Nebraska Supreme Court—57% (4/7) for the solo decisions versus 36% (8/22) for the panel decisions—supports this hypothesis, although the samples are small. Indeed, the possibility of greater deference by the Nebraska Supreme Court for panel-imposed death sentences may partially explain why all six of the Nebraska death sentences vacated in federal court were imposed by three-judge panels.[49]

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46. *See, e.g.*, MICHAEL J. SAKS, SMALL-GROUP DECISION MAKING AND COMPLEX INFORMATION TASKS 26 (February 1981) (stating that an extensive review of the literature suggests that, at least for complex decisionmaking, groups "perform better" than individuals by making "more accurate decisions and judgments"); Anderson & Hochstein (II), 262 Neb. 311, 632 N.W.2d 273 (holding based on assumption that there is less risk of arbitrariness in three-judge panels). *See also* Schopp, *supra* note 44, at 524 (arguing that judicial panels are likely to surpass both juries and solo trial judges "in providing deeper and broader understanding of the societal standards represented by the law and in "increasing consistency in the interpretation and application of the systemic principles and criteria of retributive justice applied across cases").

47. This 34-percentage point disparity in sentencing rates is significant at the .001 level. One penalty trial is excluded from this analysis because the court indicated that it had no discretion under the law because of an earlier Nebraska Supreme Court decision in the case.

48. When culpability is measured by the number of aggravating circumstances in the case, the disparity is 16 points (.43-.27), significant at the .03 level. When culpability is measured with a regression-based measure, the disparity is 26 points, significant at the .001 level.

49. State v. Moore (II), 250 Neb. 805, 553 N.W.2d 120 (1996), *rev'd sub nom.* Moore v. Kinney, 278 F.3d 774 (8th Cir. 2002); State v. Moore (I), 210 Neb. 457, 316 N.W.2d 33 (1982), *rev'd sub nom.* Moore v. Clarke, 904 F.2d 1226 (8th Cir. 1990); State v. Anderson & Hochstein (I), 207 Neb. 51, 296 N.W.2d 440 (1980), *rev'd sub nom.* Anderson v. Hopkins, 113 F.3d 825 (8th Cir. 1997), Hochstein v. Hopkins, 113 F.3d 143 (8th Cir. 1997); State v. Holtan, 197 Neb. 544, 250 N.W.2d. 876 (1977), *rev'd sub nom.* Holtan v. Black, 838 F.2d 984 (8th Cir. 1988); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977), *rev'd sub nom.* Rust v. Hopkins, 984 F.2d 1486 (8th Cir. 1993).

The retired judges whom we interviewed suggest that a more common reason a judge may prefer a panel is a desire for the enhanced reliability that a panel is likely to afford in *difficult, close* cases. This theory suggests that guilt-trial judges are more inclined to go solo if the outcome is clear—whether it be a life or death sentence. Two subsets of cases in Footnote Table 1[50] provide some support for this hypothesis: (1) the data in Row 2, Column B indicate that the panel appointment rate, .35, is lowest in the least aggravated (one-aggravator) cases and (2) the rate is higher, .60, in the mid-range of cases (Column B) in terms of offender culpability (two aggravators). However, in a third subset of cases (Column D), the data cut against the enhanced reliability hypothesis and lend support for the reduced scrutiny hypothesis. Namely, the panel appointment rate is the highest, .73, in the most aggravated cases (three or more aggravators), a case category in which the reliability hypothesis suggests the panel appointment rate should be low.[51]

Although the enhanced reliability hypothesis only partly explains the panel selection outcomes, the assumption that a panel is less likely to produce an inappropriate or arbitrary outcome is quite plausible. Indeed, the Nebraska Supreme Court's recent ruling that a three-judge panel may only impose a death sentence by a unanimous vote clearly reflects that perception.[52] Another virtue of a panel is that the augmenting judges are selected by the Chief Justice randomly from around the state. The resulting geographic diversity of

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FOOTNOTE TABLE 1

RATES AT WHICH THREE-JUDGE SENTENCING PANELS ARE APPOINTED, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: 1973-1999

	A	B	C	D	E
1	Number of Aggravating Circumstances and Number of Penalty-Trial Cases	1 (n=48)	2 (n=25)	3-6 (n=15)	All Cases (n=88)
2	Judicial Sentencing Panel Appointment Rate	.35 (17/48)	.60 (15/25)	.73 (11/15)	.49 (43/88)

51. Another possible explanation may be experience. Panels are used somewhat less frequently in the major urban counties, .46 (31/67), where penalty trials are quite common, than they are in greater Nebraska, .57 (12/21), where penalty trials are few in number. However, when the culpability of the offenders is taken into account, there is only a 4-percentage point difference (.48-.52) in the frequency with which panels are used in the two areas of the state.

52. State v. Anderson & Hochstein (II), 262 Neb. 311, 324, 632 N.W.2d 273, 282-83 (2001). The decision strongly supports the recent legislative decision to mandate three-judge panels. *Infra* note 395.

the panels may reduce the risk of geographic disparity in judicial decisionmaking.[53]

B. Death Eligibility, Fact Finding, and the Weighing of Aggravation and Mitigation

Nebraska has not followed the path of several legislatures of regularly increasing the number of homicides that are death-eligible.[54] In contrast, since 1973, the Nebraska Legislature has limited death eligibility in two ways that reduce the risk of excessive sentences. First, in 1982 it excluded offenders under age 18 from the risk of a death sentence[55] and, second, in 1999 it excluded mentally retarded offenders.[56] In the absence of these limitations in other jurisdictions, either youth or mental retardation may be important mitigators in both the charging and sentencing process. In the jurisdictions that do expose minors and mentally retarded defendants to the risk of a death sentence, death sentences are only occasionally imposed; however, when they are imposed, they often carry a high risk of being comparatively excessive because of their infrequency.[57]

A distinctive feature of the Nebraska statute is the much broader discretion it allows sentencing judges to impose a life sentence than it allows them to impose a death sentence. Compared to many other statutes, it appears to create a de facto presumption in favor of a life sentence outcome.

To impose a death sentence, the court must find that statutory aggravating circumstances "outweigh" any statutory mitigating circumstances.[58] The first issue, therefore, is whether any statutory aggravation is present in the case. Although the original statute was silent on the state's burden in proving aggravation, the Nebraska Su-

53. Contrary to our expectations, the retired judges we interviewed reported that the guilt-trial judge normally had no more influence in the sentencing decision than the two judges appointed by the Chief Justice.

54. *See, e.g.,* VA. CODE ANN. §§ 19.2-264.3, 18.2-31 (2001). The number of aggravators in Virginia increased from 6 in 1977 to 20 in 2002. *See* VIRGINIA STUDY, *supra* note 31, at 9-11.

55. Act of April 20, 1982, LB 787, 1982 Neb. Laws 859.

56. Act of April 18, 1998, LB 1266, 1998 Neb. Laws 760. As a result of the Supreme Court's decision in *Atkins v. Virginia,* 122 S. Ct. 2242 (2002), which held that the execution of mentally retarded defendants is barred by the Cruel and Unusual Punishment provision of the Eighth Amendment, this prohibition is now nationwide.

57. For examples of death sentences of young and mentally retarded offenders from Nebraska, see *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990), *State v. Simpson*, 200 Neb. 823, 265 N.W.2d 681 (1978), and *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977). An additional danger with mental retardation is that it may have an aggravating rather than a mitigating effect. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302 (1989).

58. NEB. REV. STAT. § 29-2519 (Reissue 1995).

preme Court required proof beyond a reasonable doubt.[59] In 1997, the Legislature ratified this standard,[60] which is a common requirement nationwide.[61] In Nebraska, this standard is often invoked by the sentencing court as the basis for finding no aggravation present in the case, even in the face of quite convincing evidence. This finding occurs most often when the state's case rests on a single statutory aggravator.[62]

Several of the statutory aggravating circumstances in the Nebraska statute are quite broad.[63] Prior to 1977, the trial courts had no guidance on their interpretation. However, commencing in 1977, the year its first death case was decided, the Nebraska Supreme Court has narrowed considerably the potential reach of several aggravators and has been quite willing to overturn lower-court findings on aggravation.[64] A particularly striking example appears in the Court's first death-sentencing decisions (a quartet) issued February 2, 1977. In

59. State v. Simants, 197 Neb. 549, 559, 250 N.W. 2d 881, 888 (1977).

60. Act of April 18, 1998, LB 422 § (h)(i), 1998 Neb. Laws 117.

61. In addition, *Ring v. Arizona*, 122 S. Ct. 2428 (2002), which builds on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that aggravating factors which expose the defendant to the risk of a heightened penalty are elements of the offense requiring proof beyond a reasonable doubt.

62. *See, e.g.*, State v. Jones, Docket 114, No. 158, p. 11 (Douglas Co. Dist. Ct. 1997); State v. Benzel, Docket 32, Page 81, pp. 5-6 (Hall Co. Dist. Ct. 1984); State v. Lopez, Docket 114, No. 521, p. 4 (Douglas Co. Dist. Ct. 1983); State v. Lynch, Docket 111, No. 475, p. 5 (Douglas Co. Dist. Ct. 1982).

63. The most indeterminate aggravators are: the "substantial prior criminal record" factor (a); the "heinous, atrocious, [and] cruel" factor (d); and the "great risk of death" to others factor (f). NEB. REV. STAT. § 29-2523 (Reissue 1995).

64. See for example, Max J. Burbach, *Prior Criminal Activity and Death Penalty Sentencing:* State v. Reeves, 24 CREIGHTON L. REV. 547 (1991); Jeanne A. Burke, *Nebraska's 'Exceptional Depravity' Language at Death's Door:* Moore v. Clarke, 24 CREIGHTON L. REV. 1019 (1991).

Cases construing the "especially heinous, atrocious, cruel, or manifested exceptional depravity" aggravator include: *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984); *State v. Moore* (I), 210 Neb. 457, 316 N.W.2d 33 (1982); *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *State v. Peery*, 199 Neb. 656, 261 N.W.2d 36 (1979); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977).

Cases construing the "offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity" aggravator include: *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982); *State v. Moore (I)*, 210 Neb. 457, 316 N.W.2d 33 (1982); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977).

Cases construing the "murder was committed knowingly to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws" aggravator include: *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977).

one of those cases, *State v. Stewart*, the trial court found six aggravators present, but the Nebraska Supreme Court struck most of them as unsupported by the evidence.[65] This decision sent a strong signal to the trial courts and the trend in trial-court findings of aggravating circumstances since then clearly indicates the extent to which the discretion of the trial courts has been limited. As a result, trial courts now find fewer aggravators: before 1978, the average number of aggravators found in the penalty-trial hearing was 4.2; since 1978, the average has been 2.3.[66]

Judicial comments in sentencing orders also reflect a perception that the Nebraska Supreme Court's decisions have significantly reduced trial-court sentencing discretion. This perception was apparent in the comments of a second sentencing panel following a remand from federal court in one particular Nebraska case. The defendant had been sentenced to death 22 years earlier. The court noted that it could not follow the lead of the original panel and impose another death sentence because the earlier panel "had to reach its conclusions without the benefit of the significant appellate guidance from the Nebraska Supreme Court with which we have been favored in the intervening years."[67] In short, on the same evidence, statutory aggravators that the court found to exist in the early years were simply not present or carried much less "weight" in later years.

Another distinctive feature of the Nebraska system is the discretion that it gives the sentencing court to impose a life sentence even when it finds aggravation but no mitigation in the case. One can reasonably argue that when no mitigation is present, any level of aggravation is sufficient to outweigh the mitigation. Indeed, in at least one

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Cases construing the "great risk of death to at least several persons" aggravator include: *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977).

Cases construing the "murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime" aggravator include: *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998); *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977).

65. State v. Stewart, 197 Neb. 497, 520-26, 250 N.W.2d 849, 863-66 (1977). In the *Stewart* opinion, it is a bit unclear if the court struck four or five of the aggravators.

66. In the cases originally death-sentenced that were retried after a judicial remand, the following changes occurred in terms of the number of a statutory aggravating circumstances found by the court: *Anderson* (2 to 1); *Bird Head* (3 to 2); *Drinkwalter* (2 to 1); *Hochstein* (2 to 1); *Holtan* (4 to 2); *Rust* (4 to 2).

67. State v. Rust, Docket 91, No. 555, p. 27 (Douglas Co. Dist. Ct. 1997); *see also* State v. Holtan, 197 Neb. 544, 250 N.W.2d. 876 (1977).

state, Pennsylvania, the statute mandates a death sentence when aggravation is found but mitigation is not found.[68] In Philadelphia County, 55% (63/114) of the death sentences are imposed under this circumstance.[69] If that rule had pertained in Nebraska during the period of this study, we could have seen 35 rather than the 29 death sentences actually imposed.[70]

As noted above, when both aggravation and mitigation have been found, the Nebraska statute permits the imposition of a death sentence only when the aggravation outweighs the mitigation. Those words do not specify explicitly the degree to which the aggravation must outweigh the mitigation. Nevertheless, the text of the statute also states that when both aggravation and mitigation are found, the court must first determine whether the mitigating circumstances "approach or exceed" the aggravation in the case.[71] The Nebraska Supreme Court made clear early on that mitigation which merely "approaches" the aggravation may justify a life sentence.[72] The practical effect of this rule is that the aggravation must substantially outweigh the mitigation in the case. A number of life sentences have been imposed on this ground.[73]

Another important issue concerns the minimal level of aggravation that must be present in the case to "justify" imposition of a death sentence within the meaning of section 29-2522(1). The specific question raised by its language is "[w]hether sufficient aggravating circumstances exist to *justify*" a death sentence (emphasis added). The use of the plural "circumstances" suggests that more than one aggravator is required to justify a death sentence. However, the Nebraska Supreme Court has repeatedly emphasized that the weighing issue is qualitative with respect to both the aggravators and mitigators.[74] Sentencing panels often quote the following language from the first quartet of 1977 decisions: "In the balancing of the aggravating and mitigating circumstances, we emphasize that a death penalty will not be imposed

68. 42 PA. CONS. STAT. § 9711(b) (1998); *see* Blystone v. Pennsylvania, 494 U.S. 299, 305 (1990) (sustaining the constitutionality of the provision).

69. *Philadelphia Study*, *supra* note 10, at 1645, fig. 1.

70. All the Nebraska cases with no mitigation advanced to a penalty trial. Two no-mitigation cases, *State v. Palmer (I)*, 210 Neb. 206, 313 N.W.2d 648 (1981), and *State v. Palmer (II)*, 215 Neb. 273, 338 N.W.2d 281 (1983), resulted in death sentences. Of course, in the face of such a rule, the Nebraska trial judges may have been more inclined to find mitigation present in the cases.

71. NEB. REV. STAT. § 29-2522(2) (Reissue 1995).

72. State v. Stewart, 197 Neb. 497, 526-27, 250 N.W.2d 849, 866 (1977).

73. *See, e.g.*, State v. Nielson, Case 8044, Page 124, Doc. Y, p. 2 (Wash. Co. Dist. Ct. 1978); State v. Schaeffer, Case No. 28-279, p. 11 (Hall Co. Dist. Ct. 1977).

74. The reference in subsection (2) to mitigating "circumstances" supports the Court's interpretation since a quantitative standard with respect to mitigation would require more than one mitigator to "approach" or exceed the "weight" of the aggravation in the case.

simply because the aggravating circumstances may *outnumber* the mitigating circumstances. Rather, the test is whether the aggravating circumstances in comparison *outweigh* the mitigating circumstances."[75] Nevertheless, the Nebraska Supreme Court vacated the death sentences in the two single-aggravator death cases it has reviewed.[76] Moreover, in single-aggravator cases, penalty-trial judges have routinely found that the aggravation failed to "justify" the imposition of a death sentence even in the absence of mitigation, and not uncommonly they pointedly note the "lone" or "only one" aggravator in the case.[77]

In spite of this evidence, the retired judges we interviewed completely rejected the suggestion that a "rule of one" or any other quantitative standards were perceived to exist or were applied by either the Nebraska Supreme Court or the trial courts. In stating this judgment, the former judges relied heavily on the language of the Nebraska Supreme Court that outcomes could not be based on mere counts, as well as their belief that the sentencing courts meticulously adhered to this rule. Against this background, our empirical study scrutinizes the extent to which the number of aggravating and mitigating circumstances, in fact, explain sentencing outcomes.[78]

Another feature of the system that, over the years, may have made both prosecutors and trial judges less prone to seek and impose death sentences is the significant rate at which death-sentenced offenders have avoided execution and have had their sentences reduced to life imprisonment or less. Of the 29 death sentences imposed (during the period of this study) against offenders who did not die on death row of natural causes, 77% (20/26) have been vacated in post-sentence judicial review. Thirteen of these death sentences were vacated in state court[79] and six were vacated in federal court.[80] Of course, the vaca-

75. State v. Simants, 197 Neb. 549, 569, 250 N.W.2d 881, 892 (1977)(emphasis added).

76. State v. Anderson & Hochstein (II), 262 Neb 311, 632 N.W.2d. 273, 284 (2001) (vacating both defendants' death sentences). In the third single-aggravator death case, the trial court vacated the death sentence on a post-trial motion. State v. Simpson, Docket 686, No. 192 (Lancaster Co. Dist. Ct. 1996) (court file sealed).

77. *See, e.g.,* State v. Carter, Docket 118, No. 337, p. 1 (Douglas Co. Dist. Ct. 1980); State v. Rehbein, Docket 113, No. 475, p. 17 (Douglas Co. Dist. Ct. 1983).

78. *See infra* section IV.B.

79. The death sentences of Anderson and Hochstein (I), Bird Head, Drinkwalter, Hunt, Anderson and Hochstein (II), Jones, Palmer (I), Palmer (II), Reeves, Sheets, Simants, Stewart, and Victor were vacated by the Nebraska Supreme Court, while Simpson's death sentence was vacated in the trial court. State v. Anderson & Hochstein (II), 262 Neb. 311, 632 N.W.2d 273 (2001); State v. Sheets, 260 Neb. 325, 618 N.W.2d 117 (2000); State v. Victor, 259 Neb. 894, 612 N.W.2d 573 (2000); State v. Drinkwalter, 242 Neb. 40, 493 N.W.2d 319 (1992); State v. Bird Head, 225 Neb. 822, 408 N.W.2d 309 (1987); State v. Hunt, 220 Neb. 707; 371 N.W.2d 708 (1985); State v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984); State v. Palmer (II), 215 Neb. 273, 338 N.W.2d 281 (1983); State v. Jones, 213

tion of a death sentence does not terminate all risk of an execution since the state normally can seek a death sentence in a subsequent prosecution. Nevertheless, of the 21 offenders sent to death row who did not die there of natural causes, 67% (14/21) have left death row. Three have been executed[81] and four remain on death row.[82]

There is evidence that the perceived difficulty of making death sentences "stick," combined with the high costs to the counties of post-conviction litigation, may also incline all of the actors in the system to attempt to limit death sentencing to the most culpable offenders.[83]

Finally, a less visible, but potentially important actor in the judicial sentencing process is the family of the victim. Since 1983, Nebraska legislation requires the trial court's presentence investigation report to include any "written statements submitted to the county attorney by a victim."[84] It appears that victim impact statements (VIS) in this form are almost always submitted to the county attorney and considered by the sentencing judge or panel before passing sentence in a penalty trial.[85]

Neb. 1, 328 N.W.2d 166 (1982); State v. Palmer (I), 210 Neb. 206, 313 N.W.2d 648 (1981); State v. Anderson & Hochstein (I), 207 Neb. 51; 296 N.W.2d 440 (1980); State v. Simants, 202 Neb. 828, 277 N.W.2d 217 (1979); State v. Stewart, 197 Neb. 497; 250 N.W.2d 849 (1977); State v. Simpson, Docket 686, No. 192 (Lancaster Co. Dist. Ct. 1996) (court file sealed).

80. State v. Moore (II), 250 Neb. 805, 553 N.W.2d 120 (1996); State v. Holtan, 216 Neb. 594, 344 N.W.2d 661 (1982); State v. Moore (I), 210 Neb. 457, 316 N.W.2d 33 (1982); State v. Anderson and Hochstein (I), 207 Neb. 51, 296 N.W.2d 440 (1980); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977). *See supra* note 49 for federal court citations. Reeves obtained judicial relief in both state and federal court. State v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984); Reeves v. Hopkins, 102 F.3d 977 (8th Cir. 1996).

81. Otey, Joubert, and Williams.

82. State v. Moore (I), 210 Neb. 457, 316 N.W.2d 33 (1982) (pending the state's decision in State v. Moore (II), 250 Neb. 805, 553 N.W.2d 120 (1996), from federal court Moore v. Kinney, 278 F.3d 774 (8th Cir. 2002)); State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989); State v. Lotter, 255 Neb. 450, 586 N.W.2d. 430 (1998); State v. Palmer (I), 210 Neb. 206, 313 N.W.2d 648 (1981).

83. The retired judges we interviewed perceive the financial cost of capital litigation outside the major urban counties as a major constraint on prosecutorial willingness to advance cases to penalty trial.

84. NEB. REV. STAT. § 29-2261. *See also* NEB. CONST. art. 1, § 28 (1996) (stating that victims have the right "to be informed of, be present at, and make an oral or written statement at sentencing . . . hearing").

85. In the experience of Jerry Soucie, an experienced Lincoln capital defense attorney, "there is at least one, and usually several VIS from various family and friends in every homicide PSI [presentence investigation] regardless of social and economic status." E-mail from Jerry Soucie to David Baldus, August 15, 2002 (on file with author) [hereinafter Soucie E-mail].

C. Comparative Proportionality Review

Since 1978, Nebraska law has imposed a comparative proportionality review requirement (a) on the trial court in each penalty trial and (b) on the Nebraska Supreme Court in its mandatory review of each death sentence imposed. The obligation to conduct such a review in the trial court *before* a sentence is imposed is unique to Nebraska, while the Nebraska Supreme Court's obligation to conduct such a review *after* a death sentence is imposed exists today in 18 other death-sentencing states.[86]

The two Nebraska proportionality review requirements adopted in 1978 were part of a legislative package drafted and sponsored by Senator Ernie Chambers, who had been concerned for a number of years with what he perceived to be significant geographic disparities in charging and sentencing practices.[87] Senator Chambers' perceptions of the operation of the Nebraska system since its adoption in 1973 were based on a database he personally created by systematically collecting newspaper accounts of the facts and outcomes of homicides throughout the state.[88] Senator Chambers concluded that both charging and sentencing practices were substantially more punitive in Omaha, his hometown, than they were in the rest of the state. He also perceived substantial inconsistencies throughout the state in death-

86. ALA. CODE § 13A-5-53(b)(3) (1994); DEL. CODE ANN. tit. 11, § 4209(g)(2)(a) (1995); GA. CODE ANN. § 17-10-35(c)(3) (1997); KY. REV. STAT. ANN. § 532.075(3)(c) (Michie 1999); LA. CODE CRIM. PROC. ANN. art. 905.9.1 § (1)(c) (West 1997); MISS. CODE ANN. § 99-19-105(3)(c) (1999); MO. ANN. STAT. § 565.035(3)(3) (West 1999); MONT. CODE. ANN. § 46-18-310(1)(c) (1999); NEB. REV. STAT. § 29-2521.03 (Reissue 1995); N.H. REV. STAT. ANN. § 630:5(XI)(c) (1996); N.J. STAT. ANN. § 2C:11-3(e) (West 1995); N.M. STAT. ANN. § 31-20A-4(C)(4) (Michie 2000); N.Y. CRIM. PROC. LAW § 470.30(2)(b) (McKinney Supp. 2001); N.C. GEN. STAT. § 15A-2000(d)(2) (1999); OHIO REV. CODE. ANN. § 2929.05(A) (Anderson 1999); S.C. CODE ANN. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. CODIFIED LAWS § 23A-27A-12(3) (Michie 1998); TENN. CODE ANN. § 39-13-206(c)(1)(D) (1997); WASH. REV. CODE ANN. § 10.95.130(2)(b) (West 1990). Florida established proportionality review as a matter of state constitutional law. *See* Sinclair v. State, 657 So. 2d 1138, 1142 (Fla. 1995) (stating that because it is clearly "unusual" to sentence a person to death where others in the same situation were not sentenced to death, proportionality review is required under Florida's constitutional prohibition against unusual punishments). The Illinois Supreme Court also conducts limited proportionality reviews under its statutory authority to review "any death sentence imposed." People v. Johnson, 538 N.E.2d 1118, 1128 (Ill. 1989). The 17 death penalty states currently without proportionality review are Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Indiana, Kansas, Maryland, Nevada, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Virginia, and Wyoming.

87. Chambers Interview, *supra* note 35.

88. *Id.*

sentencing outcomes among cases that were similarly situated in terms of offender culpability.[89]

Another feature of the Nebraska legislation that distinguishes it from any other death penalty statute known to us is a series of "legislative findings" drafted by Senator Chambers and enacted as part of the 1978 package of reforms,[90] which included:

> (a) a finding that "charges resulting from the same or similar circumstances have, in the past, not been uniform and have produced radically differing results";
> (b) an admonition that the law "should be applied uniformly throughout the state and since the death penalty is a statewide law, an offense which would not result in a death sentence in one portion of the state should not result in death in a different portion";
> (c) a finding of the importance of life and an admonition that the "state apply and follow the most scrupulous standards of fairness and uniformity" in the administration of the death penalty;
> (d) an endorsement of the principle that the death penalty "should never be imposed arbitrarily nor as a result of local prejudice or public hysteria"; and
> (e) a finding that "it is necessary for the Supreme Court to review and analyze all criminal homicides . . . to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances."[91]

The proportionality review provisions in Senator Chambers' legislative package appear to have been inspired by the appellate proportionality review provisions in Georgia's 1973 statute and the 1977 decision of the Nebraska Supreme Court to adopt a similar procedure in *State v. Simants*.[92] The Georgia statute had important visibility in 1978 because in *Gregg v. Georgia*,[93] which upheld the constitutionality of the Georgia legislation, the United States Supreme Court spoke glowingly of the statute as a safeguard against inconsistency. Indeed, for the next eight years, there was speculation that the Court might eventually require proportionality review or some similar safeguard against inconsistent death sentences.[94]

1. Proportionality Review in Penalty Trials

The 1978 amendments to the death penalty statute sponsored by Senator Chambers require sentencing judges to determine whether

89. *Id.*; *see also* State v. Palmer (III), 224 Neb. 282, 352-57, 399 N.W.2d 706, 750-52 (1986) (noting legislative history of Act of April 19, 1978, LB 711, 1978 Neb. Laws 621).
90. These findings were passed on April 19, 1978 over the Governor's veto. Act of April 19, 1978, LB 711, 1978 Neb. Laws 621.
91. NEB. REV. STAT. § 29-2521.01 (Reissue 1995). This latter finding is evident in the requirement that the Supreme Court conduct a comparative proportionality review of each death sentence imposed.
92. *See infra* note 110 and accompanying text.
93. 428 U.S. 153 (1976).
94. *Pulley v Harris*, 465 U.S. 37, 41-44 (1984), eventually held that such reviews are not required.

the imposition of a death sentence in the case would be "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[95] Since the 1970s, death sentences deemed to be excessive in this meaning of the term have come to be known as "comparatively excessive."

A review of the Nebraska penalty-trial sentencing orders before and after 1978 suggests that this requirement had an impact on sentencing practices, although the comparative review process applied by the courts is not what one might have expected to see.

a. Pre-1978

In the pre-1978 sentencing orders, there is no evidence of a comparative focus. These orders and our interview with retired judges strongly suggest that the sentencing judges considered each case on its own merits without any formal consideration of what was done in other cases.[96] This is a venerable common law tradition and it applies across both civil and criminal cases. Nevertheless, it was our assumption that judges would confer informally with colleagues locally or statewide at judicial functions about the characteristics of clear "life" and "death" cases. The retired judges with whom we spoke said that such practices did not exist before or after 1978. The strength of the "each case on its own merits" tradition is reflected in one sentencing order issued after the 1978 amendments had been adopted, but before July 1, 1978, when they became effective. Presented with comparative evidence, the court summarily dismissed the evidence as irrelevant because the new law was not yet effective.[97]

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95. NEB. REV. STAT. § 29-2522 (Reissue 1995). This language, which is drawn directly from the Georgia statute approved by the United States Supreme Court in *Gregg*, 428 U.S. 153, requires the sentencing court in Nebraska to conduct what is known as a "comparative" proportionality review of death as a possible sentence in the case. In 1978, this form of proportionality review existed in about 20 other states, including Georgia, but only at the "appellate" level, not at the trial court level.

Trial courts elsewhere have been resistant to the presentation of comparative excessiveness evidence and arguments to sentencing juries. Also, defense counsel have been concerned that any arguments to juries that death sentences are infrequently imposed in a given category of cases, which includes their client's case, may motivate the jury to impose a death sentence in the instant case to compensate for the other comparable cases in which a death sentence was not imposed. Nebraska has the only judicial sentencing statute of which we are aware that imposes a proportionality review obligation on the sentencing authority.

96. Obviously a court's prior experience in capital sentencing would have an impact on the way it views each case.

97. State v. Otey, Docket 101, No. 489 (Douglas Co. Dist. Ct. 1978). But in a similar case with similar timing, *State v. Williams*, Docket 49, No. 11, (Lancaster Co. Dist. Ct. 1978), the court considered the comparative evidence.

b. Post-1978

The Georgia legislation on which the Nebraska proportionality review provision is modeled contemplates a bottom line judgment about the comparative "culpability" and "deathworthiness" of a series of other offenders with whom the court is comparing the defendant.[98] (We refer to these offenders as the "near neighbors" of the defendant before the court.)

Twenty-five years of experience with proportionality review in state supreme courts around the country indicates that judges feel very uncomfortable and ill-equipped to make such judgments.[99] Nebraska trial judges appear to share this sentiment. For example, one Nebraska trial court perceived a problem with the statute because the language is "broad, vague and presents no definitive guidelines for the court to follow."[100] In spite of this sentiment, we found numerous statements by judges that a death sentence in the case would be "excessive or disproportionate to the penalty imposed in similar cases." However, in none of those cases was comparative excessiveness the sole ground or even a significant basis for declining to impose a death sentence. In each of those cases, the clear basis for the imposition of the life sentence was a determination that no aggravation existed in the case or some other rationale based on the "weight" of the aggravation or mitigation in the case—all more traditional issues of fact and statutory interpretation on which judges would feel completely comfortable basing a decision.[101]

This does not mean, however, that the Nebraska judges altogether ignored the consistency issue. On the contrary, in keeping with tradi-

98. GA. CODE ANN. § 17-10-35(c)(3)(2001).

99. The discomfort flows from a concern about making the raw life or death decision, the high visibility associated with the appellate review of death cases, and the political risk associated with the reversal of death sentences, especially those imposed by juries in states in which appellate judges must stand for re-election. Concerns also flow from a lack of consensus on the appropriate measures of defendant culpability to apply and on the level of infrequency in the imposition of death sentences among similarly situated offenders that may justify the vacation of a death sentence on the grounds of comparative excessiveness. Finally, most judges are unfamiliar with the type of data collection and analysis that is necessary to conduct comprehensive and thoroughgoing proportionality review. *See* David Baldus, *When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences,* 26 SETON HALL L. REV. 1582, 1583-88 (1996).

100. State v. Williams, Docket 49, Page 11, pp. 9-10 (Lancaster Co. Dist. Ct. 1978). Another court characterized as "obvious" the problem with "color-matching the [comparison cases] with the case at bar." State v. Anderson & Hochstein (I), Docket 99, No. 392, p. 17 (Lancaster Co. Dist. Ct. 1978).

101. Such cases typically do not reference cases on which the comparative judgment was based. Also, in many cases in which the sentence was based on an alternative ground, the court simply passed over the issue of comparative excessiveness as irrelevant.

tional common law reliance on precedent, many sentencing orders are replete with citations to and reliance on sentencing decisions in trial and appellate cases that bear on the evidence required to support factual findings. Examples of such findings include (a) whether a specific aggravating or mitigating circumstance was present in the case, (b) whether the aggravation had sufficient "weight" to justify a death sentence, (c) whether the mitigation "approached or exceeded" the aggravation in the case, and (d) whether the aggravation outweighed the mitigation. Comparative analyses of this sort were present in a substantial number of cases, although the level of detail in the analyses varied considerably from case to case. It is clear, therefore, that the spirit of comparative review is evident in many cases even though there is no evidence of the sort of bottom line comparative analysis based on overall offender culpability that characterized the holding of *Furman v. Georgia*[102] and was contemplated by the Georgia proportionality review statute.[103]

One court, in fact, described its perception of the impact of proportionality review at the trial court level. The case involved a remand from a federal court of a death sentence that had been imposed 13 years earlier, before the proportionality review requirement had been adopted. In an explanation of why it was imposing a life sentence in a case that had originally drawn a death sentence, the court noted that, in addition to changes in the law in the interim, the original sentence had been imposed "without the opportunity to consider sentences imposed in similar cases."[104] This case illustrates how the Nebraska Supreme Court's narrowing of the statutory aggravating circumstances has interacted with the process of proportionality review to reduce the number of death sentences imposed. With the court's decisions narrowing discretion under the statutory aggravators over time, death sentences became less frequent among the less aggravated cases and the death sentences affirmed by the court contained larger numbers of aggravating circumstances.

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102. 408 U.S. 238 (1972).

103. In terms of their completeness and usefulness as precedents for other courts to use in proportionality reviews, the orders in the death-sentenced cases vary in terms of the facts and reasoning on which the judgments are based. However, as precedent, these orders are less important than the orders in the life-sentenced cases because the death cases all result in opinions from the Supreme Court which are more detailed and authoritative. The opinions in the life-sentenced cases vary significantly in terms of the facts of the case and the court's reasoning. Some are merely single page orders with neither facts nor reasoning, some have reasoning only, and others are rich in details including citations to the comparative cases examined. In general, however, the orders in life-sentenced cases lack sufficient detail regarding the facts of the case to assess meaningfully the criminal culpability of the offender.

104. State v. Holtan, Docket 92, No. 634, p. 20 (Douglas Co. Dist. Ct. 1989).

Proportionality review also has implications for geographic disparities in sentencing outcomes. The retired judges we interviewed indicated that sentencing judges generally have limited knowledge of the pattern of prosecutorial charging decisions in their counties, and even less idea of what transpires in other areas of the state. Moreover, sentencing judges are not likely to have much knowledge of judicial sentencing patterns outside their own county. A properly conducted proportionality review, therefore, has the potential of bringing to the court's attention evidence on the outcomes of similarly situated cases from around the state. To the extent that a court relies on such cases, an increase in geographic uniformity might occur; however, the orders we have read provide an insufficient basis for assessing the extent to which information on similar cases is systematically brought to the court's attention. What is clear is that without the availability of such information, the potential of proportionality review to enhance uniformity in judicial sentencing decisions will be minimal.[105]

2. *Proportionality Review in the Nebraska Supreme Court*

a. *Pre-1978*

Throughout the post-*Furman* period, Nebraska law has mandated an appeal to the Nebraska Supreme Court in all death-sentenced cases to review the case for possible legal error in either the guilt or penalty trial.[106] In addition, the literature suggests that in death penalty appeals generally, offender culpability affects the likelihood that the death sentence will be vacated or the conviction reversed for legal error.[107] This process may be usefully described as an informal form of proportionally review. In section XI below, we consider the extent to which this process appears to hold in Nebraska death cases.

From 1973 to 1978, the Nebraska Supreme Court heard appeals in five death-sentenced cases and reviewed the sentence in each for evidence of "excessiveness" under two doctrines. The first is the traditional doctrine of excessiveness. Longstanding Nebraska legislation

105. As we discuss below in our consideration of proportionality review in the Nebraska Supreme Court, there is always a question in such reviews of what comparison cases the court should consider. The most basic issue on this question is whether the court should limit its inquiry to other death cases or should also consider similar cases in which life sentences were imposed. Since *Palmer (III)*, the Nebraska Court has limited its pool of comparison cases to death cases, although it has made no effort to limit the practices of the trial courts in their proportionality reviews. As a consequence, since 1986 some sentencing courts have limited their review cases to death cases but other courts also include life-sentenced cases in their proportionality reviews. It is clear that the limitation of comparison cases by the sentencing courts to death cases minimizes the capacity of trial court proportionality to maintain consistency in sentencing outcomes.

106. NEB. REV. STAT. § 29-2524 (Reissue 1995).

107. *Supra* notes 76-78.

applicable to all criminal appeals empowers the Nebraska Supreme Court to vacate a sentence it considers "excessive" and to reduce the sentence to the level that it believes is "warranted by the evidence."[108] In applying this doctrine, the court relies on its experience and judgment without explicit reference to sentences in any other cases. In a 1977 case, the facts supported such an excessiveness claim and the court emphasized its power to vacate death sentences on that ground.[109] However, it reduced the sentence to life imprisonment on the more conventional ground that the aggravation in the case lacked sufficient weight to support a death sentence—a course of action likely explained by a concern about encouraging claims under the quite subjective excessiveness standard.

The court's second doctrine to address excessiveness, which it announced in *State v. Simants*,[110] contemplated proportionality reviews along the lines of the Georgia statute, even in the absence of "statutory guidelines" on the subject:

> While we do not have the Georgia provision for proportional review, every capital case where there can be the slightest question will be considered in comparison with other capital cases. In other words, we will compare each captial case under review with those previous cases in which the death penalty has or has not been imposed under the new statute. By this means review by this court guarantees that the reasons present in one case will reach a similar result to that reached in similar circumstances in another case.[111]

In its affirmance of Simants' death sentence, the court held the sentence to be not "excessive" or disproportionate in comparison with the three other death sentences decided the same day.[112] In three other pre-1978 cases, the court reached the same conclusion with respect to both excessiveness doctrines.[113]

b. Post-1978

In 1978, as part of its reform package, the Legislature directed the court to conduct a comparative proportionality review in each death sentence case to "determine the propriety of the sentence of each case . . . by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than

108. NEB. REV. STAT. § 29-2308 (Reissue 1995).
109. State v. Stewart, 197 Neb. 497, 526, 250 N.W.2d 849, 865 (1977) (involving two mitigating circumstances and one or at "the very most two" aggravating circumstances where the Court reduced the death sentence to life imprisonment because the mitigators "approached" the aggravators even though they did not exceed them).
110. 197 Neb. 549, 250 N.W.2d 881 (1977).
111. *Id.* at 563-64, 250 N.W.2d at 890.
112. *Id.* at 571, 250 N.W.2d at 894. These cases included no comparative analysis of the facts of the comparison cases.
113. State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977); State v. Peery, 199 Neb. 656, 261 N.W.2d 95 (1977).

those imposed in other cases with the same or similar circumstances."[114] The 1978 legislation also required the Nebraska Supreme Court to collect information on all cases involving criminal homicides committed after the effective date of the Nebraska death penalty statute in 1973.[115]

The first intention of the 1978 legislation was to ratify the *Simants* comparative proportionality review procedure and bring Nebraska in line with approximately 20 other states with *legislation* that required comparative proportionality review like the Georgia law. The 1978 legislation also sought to prescribe the approach and methodology the court used in its proportionality reviews. Specifically, the 1978 amendments sought to require the Nebraska court to apply what has come to be known as the "frequency" approach. Under this approach, the court would (1) examine the facts of *all* cases with the "same or similar circumstances" as the death case under review, not simply those that advanced to a penalty-trial or resulted in a death sentence,[116] and (2) calculate the frequency with which death sentences were imposed among those cases.

Since the court had already committed itself to conduct proportionality reviews along the lines of the Georgia model, it had no objection to statutory codification of that requirement. Also, such legislation could be perceived as having added legitimacy to Nebraska death penalty law, since it was unclear at that time whether the United States Supreme Court might hold that the Eighth Amendment requires proportionality reviews.[117] A problem arose, however, from the Legislature's attempt to prescribe the court's methodology in conducting its proportionality reviews, i.e., the "all homicides" universe of potentially comparable cases, an analysis of the frequency of death sentencing among similar cases, and an apparent attempt to bar completely the imposition of a death sentence in a case if a life sentence had been imposed earlier in a similar case.

Death-sentenced appellants continued to raise the methodological issues suggested by the 1978 legislation and Chief Justice Krivosha, who joined the court that year, became a strong supporter of using an expansive universe of comparison cases and the frequency approach to proportionality review. In addition, the Chief Justice developed a broad-based database of homicide cases and used it to apply the fre-

114. NEB. REV. STAT. § 29-2521.03 (Reissue 1995). The statute actually extends the requirement of proportionality review to all criminal homicide convictions.

115. NEB. REV. STAT. § 29-2521.02 (Reissue 1995).

116. Among the state supreme courts that conduct proportionality reviews, most limit the universe of cases considered in such reviews to these two pools of cases. The New Jersey court is the only one of which we are aware that routinely conducts a close factual analysis of all death-eligible cases. *See* State v. Papasavvas, 790 A.2d 798, 806 (N.J. 2002); State v. Marshall, 613 A.2d 1059 (N.J. 1992).

117. *Pulley v. Harris*, 465 U.S. 37 (1984), held that such reviews were not required.

quency approach in the death cases that came before the court. In the ten death sentences that were affirmed on his watch, he dissented in seven on the ground that the individual death sentences were both comparatively excessive under the statute and violative of "the federal and state constitutions" because they were imposed "in an arbitrary and capricious manner."[118] The Chief Justice believed that the principal sources of arbitrariness in the system were inconsistent charging practices by Nebraska prosecutors.[119]

The majority of the court, however, did not perceive the inconsistencies pointed out by the Chief Justice to be a problem. It was also not persuaded as to the propriety of his proposed methodology. In that regard, it first ruled that the Legislature lacked the power to define the universe of comparison cases considered by the court or to prescribe the kind of data that the court must consider in its reviews. In *Moore (I)*, the majority limited the pool of potential comparison cases to death-eligible first-degree murder cases.[120] Until 1986, however, it continued to consider life-sentenced cases in its reviews, albeit in an unsystematic and minimally documented fashion.

There are several plausible explanations for the Chief Justice's failure to persuade the court to accept a frequency approach to proportionality review. First, appellate courts nationwide have been extremely reluctant to exercise legislatively granted powers to overturn death sentences as comparatively excessive. Judges are uncomfortable with (a) decisions that are this close to life/death value judgment, (b) the fact-based methodology required for such reviews, and (c) the absence of clear standards for assessing when a death sentence is excessive in a comparative sense. In the late 1970s and early 1980s, no

118. The seven dissents were in *State v. Palmer (III)*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984); *State v. Moore (I)*, 210 Neb. 457, 316 N.W.2d 33 (1982); *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981); *State v. Peery*, 205 Neb. 271, 287 N.W.2d 71 (1980); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); and *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). He found the death sentences in *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986), and *State v. Anderson & Hochstein (I)*, 207 Neb. 51, 296 N.W.2d 440 (1980), not to be excessive. He applied the frequency approach with varying degrees of explicitness. In his dissenting opinions, the Chief Justice relied on a series of comparison cases, while in his affirming opinions, he did not. *See Joubert*, 224 Neb. at 443, 339 N.W.2d at 257 (stating there are "no other cases with which a comparison can be made"); *Anderson & Hochstein (I)*, 207 Neb. at 74, 296 N.W. 2d at 453 (stating appellants "absolute and total disregard for the value of human life . . . makes it separate and different from any other case previously considered by this court").

119. *See, e.g., Harper*, 208 Neb. at 583, 304 N.W.2d at 671 (Krivosha, C.J., dissenting) ("One need only examine two of the cases released by this court this day to note how the matter of prosecutorial discretion of necessity results in the death penalty being arbitrarily imposed.").

120. *Moore (I)*, 210 Neb at 471-78, 316 N.W.2d at 42-45 (1982) (limiting the pool of comparison cases to first-degree murder death-eligible cases).

other state supreme court used the frequency approach, and in 1984, the United States Supreme Court held that there was no constitutional requirement to conduct any kind of proportionality review.[121]

All of these considerations likely influenced the Nebraska Supreme Court. In addition, the methodology applied by the Chief Justice in his dissents may not have substantially alleviated concerns arising from an unfamiliarity with comparative factual judgments and the absence of clear standards. A third consideration is that application of the Chief Justice's approach would have invalidated a high percentage of the death sentences appealed.

Shortly before Chief Justice Krivosha left the court,[122] the majority adopted in *Palmer (III)* the narrowest form of proportionality review in use nationwide—a process in which the universe of potential comparison cases is limited to death-sentenced cases.[123] The question in such proportionality reviews is whether the culpability of the offender before the court is equal to or higher than the culpability of the least culpable offender who has already been sentenced to death.[124]

As noted above, the Nebraska Supreme Court's jurisprudence has likely enhanced consistency and geographic uniformity by narrowing the scope of the statutory aggravating circumstances and its possible willingness to identify legal error in cases that appear to be excessive or otherwise inappropriate. Also, the court has given maximum discretion to the trial courts in their conduct of proportionality review.[125] However, it is hard to see how the court's *formal* system of appellate proportionality review could have had much, if any, impact on consistency or geographic uniformity in the state.

One lesson from Nebraska is that proportionality reviews appear to be a much more effective tool for promoting consistency and geographic uniformity when conducted by sentencing judges than when conducted by an appellate court. One reason for this comparative advantage is that the trial court has more discretion as a fact finder. But most importantly, unlike an appellate court, the trial court's ruling that a death sentence would be comparatively excessive if it *were* im-

121. Pulley v. Harris, 465 U.S. 37 (1984).

122. He resigned July 31, 1987.

123. State v. Palmer (III), 224 Neb. 282, 325-31, 399 N.W.2d 706, 735-38 (1986).

124. In its application of this standard, the court's opinions normally give no detail on the comparison cases on which it relies to support its judgment that the death sentence in the case before it is not comparatively excessive.

125. For example, while the Nebraska Supreme Court limited the universe of potential comparison cases to death-sentenced cases, the court has imposed no such requirement on the trial court judges. As a consequence, while some trial courts continue to consult both life and death cases in their comparative reviews, other trial courts follow the Nebraska Supreme Court's lead in limiting the review to other death cases.

posed does not require the judicial reversal of a death sentence that *was* imposed earlier by a lower court.

In our empirical study reported below, we test empirically the validity of the Legislature's perceptions of the system prior to 1978.[126] We also assess the extent to which the data suggest that (a) defendant culpability may have influenced the outcomes of judicial review, and (b) proportionality review at the trial court level affected the level of selectivity, consistency, and geographic uniformity of the system.[127] We also replicate Chief Justice Krivosha's frequency analyses of the death-sentenced cases that he heard while on the court.[128]

D. Prosecutorial Charging Practices

Unlike sentencing decisions of judges, the charging decisions of Nebraska prosecutors are not normally subject to direct legal oversight and judicial review. Nor are there charging guidelines in Nebraska that limit the exercise of prosecutorial discretion or provide any form of oversight of charging decisions.

Nebraska prosecutors also have broad discretion to reduce the charges in cases originally charged with first-degree murder (M1).[129] However, once a first-degree murder conviction is obtained, by plea or trial, section 29-2520 states that a sentencing hearing "shall" be held, while section 29-2521 provides that in the hearing:

> evidence *may* be presented as to any matter that the court deems relevant to sentence, and *shall* include matters relating to . . . aggravating and mitigating circumstances. (emphasis added).

This language raises two interpretive issues. The first issue under section 29-2520 is whether the word "shall" means that the state "must" present aggravation in the sentencing hearing of a death-eligible case or whether the word "may" that precedes the "shall" confers on the state the discretion to waive consideration of the death penalty by presenting no evidence of aggravation. The second issue concerns the obligation of the court when the state seeks to waive consideration of the death penalty by failing to present evidence of aggravating circumstances. May the court simply enter a life sentence or must it, on its own motion, consider aggravation and mitigation and exercise its discretion on the life or death sentencing issue?

On the first issue, some prosecutors appear to believe that the statute requires them to present evidence of aggravation in all death-eligi-

126. The "differing results" perceived by the Legislature in 1978 refer to the charging and sentencing outcomes in Nebraska's death penalty system from April 1973 to April 1978.

127. *Infra* sections XI.B and XI.C.

128. *Infra* subsection XI.B.1.c.

129. In the 174 cases charged with M1, 30% were reduced to second-degree murder (M2) or less.

ble cases that result in an M1 conviction, even though the statute does not state that the prosecution "shall" present evidence of statutory aggravating circumstances in every sentencing hearing.[130] This "narrow" discretion approach is exemplified by the Office of the Douglas County Attorney. During the period covered by this study, 96% (54/56) of that county's M1 convictions advanced to a penalty trial. However, prosecutors who adhere to the narrow discretion approach often waive the death penalty in death-eligible cases by reducing a M1 charge or charging less than M1 in the first instance as part of a plea agreement. For example, in Douglas County 34% (25/73) of all death-eligible cases did not advance to a penalty trial.

Other Nebraska prosecutors believe they have discretion to waive consideration of the death penalty in a M1 sentencing hearing unless the court insists upon doing so on its own motion.[131] This "broad discretion" approach is exemplified by the Office of the Lancaster County Attorney. Prosecutors there take the view that they have the discretion to waive the death penalty unilaterally or as part of a plea bargain in death-eligible cases when they believe that a sentence less than death is appropriate. Prosecutors base these judgments on the perceived likelihood that the court will impose a death sentence if the case advances to a penalty trial and on the prosecutor's considered judgment of whether the facts justify the imposition of a death sentence. During the period covered by this study, in 59% (19/32) of the death-eligible cases in Lancaster County, prosecutors offered to waive the death penalty or did so unilaterally. Only 41% (13/32) of the county's death-eligible cases advanced to a penalty trial.[132]

As noted above, the second issue concerns the court's obligation when the state seeks to waive the court's consideration of the death penalty. Some courts insist on going forward with a consideration of the death penalty even if the state seeks to waive it. In one case, a prosecutor negotiated a guilty plea with a stipulation that the state would "not even acquiesce to the convening of a three-judge panel" and that it would advise the court that there was "no need" to consider aggravating circumstances and the death penalty option in the sentencing hearing.[133] The court ruled that the state could not "bargain away" its consideration of a death sentence and that it would be "exceedingly bad precedent to allow either or both parties . . . to decide

130. However, the language that the evidence which "may" be presented "shall" include aggravating circumstances can be construed to impose such a requirement.

131. When such a waiver occurs, the court foregoes consideration of the aggravating and mitigating circumstances and simply enters a life sentence.

132. In such cases, the prosecution usually abstains from presenting an argument in favor of a death sentence.

133. State v. Anissen, Case 2687, Docket 8, Page 19, p. 2 (Richardson Co. Dist. Ct. 1995).

the scope" of the section 29-2520 hearing.[134] In most counties, however, it appears that the court will defer to the state's desire to waive the death penalty in M1 cases.

When the state abstained from presenting aggravation and the court considered aggravation and mitigation on its own motion, the outcome in every case was a life sentence.[135] It is for this reason that we limit our definition of a "penalty trial" to a sentencing hearing in which the state presents evidence of aggravation,[136] which is generally accompanied with a request that the court impose a death sentence.[137]

In the exercise of their discretion, Nebraska prosecutors have no duty to consider how likely it is that a penalty trial in the case will result in a death sentence that will be affirmed on appeal. However, interviews with Nebraska prosecutors suggests that these considerations, in fact, impact the exercise of discretion by some Nebraska prosecutors.[138] Prosecutors also have no duty to consider whether the interests of justice would be served by the imposition of a death sentence, although, as noted above, it is clear that some Nebraska prosecutors are sensitive to this issue.[139] Under current law prosecutors also have no duty to look, nor do they routinely look, to charging and sentencing practices in other jurisdictions for guidance in promoting geographic uniformity in their decisionmaking.

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134. *Id.* at p. 4.

135. In one case the court declined to find the multiple-victim aggravator present in a two-victim murder case because the state had not presented that factor. State v. Waldner, Docket 2, No. 530, p. 3 (Colfax Co. Dist. Ct. 1990).

136. Evidence of statutory aggravation presented in the sentencing hearing may take the form of evidence beyond the guilt-trial record, such as detail on the defendant's criminal history, or it may be limited to the submission of the guilt-trial record, which may contain a basis for finding that one or more statutory aggravators are present in the case, e.g., multiple victims.

137. We identified one death-eligible case in which the state presented evidence of aggravation but abstained from requesting that the court impose a death sentence. There may be additional such examples of which we are not aware, however, because we typically did not have notes of testimony from the penalty trial and could not discern the state's argument concerning the death penalty.

We also identified 14 convictions in which the facts did not support the presence of a single aggravating factor in the case (and therefore a classification of the case as death-eligibile), but in the sentencing hearing, which is required for all M1 convictions (whether or not the case is death-eligible), the court referred to statutory aggravating and mitigating circumstances. We classified these cases as not death-eligible despite the court's reference to the aggravation and/or mitigation.

138. Telephone Interview with Gary Lacey, Lancaster County Attorney, by Gary Young, Research Director of this project (April 17, 2001).

139. Nebraska prosecutors also have no duty to assess the risk that the imposition of a death sentence in the case would be comparatively excessive when compared with the sentences imposed in similar cases.

Finally, in the exercise of their discretion, prosecutors are required to consider the opinions of the victim's family. Since 1983, Nebraska law has required a prosecutor in M1 cases to consult with family members if he or she is considering a possible reduction of charges or a waiver of the death penalty if it is given in exchange for a guilty plea.[140] Although the statute does not expressly give family members a veto power over prosecutorial decisions, in practice they exercise considerable leverage over prosecutorial decisions and some prosecutors are reluctant to reduce charges or waive the death penalty when faced with the opposition of family members.[141]

E. The Implications of *Ring v. Arizona* for Capital Sentencing in Nebraska

Ring v. Arizona[142] invalidated the Arizona death penalty system on Sixth Amendment grounds because, like in the current Nebraska system, factual findings of statutory aggravation were strictly a judicial function. *Ring* holds that because the presence of statutory aggravation in a capital case exposes the defendant to the risk of raising the maximum penalty to a death sentence, the statutory aggravating circumstances are an "element of the offense" that requires jury fact-finding beyond a reasonable doubt. It was clear, therefore, that the Nebraska statute had to be amended to allocate that fact-finding responsibility to the jury—either as part of its guilt trial fact-finding or in a separate penalty trial, although a Nebraska capital defendant may waive his or her Sixth Amendment right to jury participation.[143]

140. NEB. REV. STAT. § 23-1201 (Reissue 1995) (stating that prior to reaching plea agreement, the prosecutor "shall consult" with the victim "regarding the content of and reasons for such plea agreement"). Section 29-119 defines a "plea agreement" as existing when "as a result of a discussion between the defense counsel and the prosecuting attorney: (a) A charge is to be dismissed or reduced; or (b) A defendant, if he or she pled guilty to a charge, may receive less than the maximum penalty permitted by law," Attorney Jerry Soucie states that prosecutorial consultation with family members of homicide victims is a long tradition that predates this legislation. Soucie E-mail, *supra* note 85.

141. Attorney Jerry Soucie states: "My experience is that most county attorneys do allow significant victim involvement and communication in homicide cases . . . [and that] victims do have a great deal of influence on plea bargains." Soucie E-mail, *supra* note 85. Statutory consultative rights arise only after charges have been filed but family members sometimes seek to influence that decision as well. The statute gives consultative rights to only a single member of the immediate family, NEB. REV. STAT. § 23-119 (2) (stating that "victim shall include at least one family representative"), but in practice many family members and friends are permitted to participate in the process.

142. 122 S. Ct. 2428 (2002).

143. *Id.* at 2430 ("Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of a greater offense' . . . the Sixth Amendment requires that they be found by a jury."). The Nebraska Legislature made exactly this type of change in November 2002. *Infra* note 395.

Ring does not specify the extent to which jury involvement in the Nebraska system must be enlarged beyond the narrow requirement of finding aggravating circumstances. The case clearly does not hold that death sentencing in its entirety is exclusively a jury function, as has been urged under the Eighth Amendment for many years without success.[144] Furthermore, *Ring* does not require a jury role on the issue of statutory mitigation,[145] nor does it appear to require that the conduct of comparative proportionality review by the sentencing authority, a distinctly legal determination, be considered an element of the offense. It appears, therefore, that Nebraska's unique tradition of trial court proportionality review would not be disturbed if the Legislature desired to keep it in place.

The more difficult issue under the Nebraska statute, therefore, is whether the sentencing authority's finding that statutory aggravating circumstances outweigh the statutory mitigating circumstances is an element of the offense that must be decided by a jury.[146] The pre-*Ring* case law construing *Apprendi*[147] in other jurisdictions suggests that this is a close question. Although, thus far, no case has held the weighing decision to be a factual rather than a legal decision, a strong argument can be made that the weighing decision calls for an "ultimate finding of fact"[148] that greatly enhances the defendant's risk of a heightened penalty.

If *Ring* is construed to embrace the weighing decision, there are two alternatives available to meet its requirements. One alternative would be to allocate the weighing decision (as well as the findings of aggravation and mitigation) to Nebraska juries. However, this would leave little room for the exercise of judicial discretion and would argue for allocating the entire decision to the juries, as Arizona and Colorado have recently done.[149] However, we believe that a return to the pre-*Furman* Nebraska system of exclusively jury sentencing would have unnecessarily abandoned the settled law, tradition, and expectations

144. *See, e.g.*, Spaziano v. Florida, 468 U.S. 447 (1984). In spite of this authority, Justice Breyer, in *Ring*, concurred on the ground that the Eighth Amendment requires exclusively jury death sentencing. *Id.* at 2446-48.

145. *Id.* at 2437 n.4 (noting the distinction in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), between the necessity for jury findings on aggravation versus the necessity for jury findings on mitigation).

146. *Ring* is silent on this issue. *See id.*

147. *See, e.g.*, Borchardt v. Maryland, 786 A.2d 631 (2001) (providing an exhaustive review of the cases).

148. *Id.* at 671 (Raker, J., Bell, C.J., Eldridge, J., dissenting).

149. Legis. Serv. SB 1001 (West), 2002 Ariz.; Colorado HB 02S-1005 (Act Concerning Determination of the Death Penalty by a Jury), Approved by Colorado House and Senate, July 10-11, 2002. Unlike Nebraska, judicial sentencing in Colorado is a recent development, existent only since 1995. Moreover, the sentencing courts in Colorado did not conduct a proportionality review as part of the penalty trial as is done in Nebraska.

that have evolved over the last twenty-five years in the administration of Nebraska's death-sentencing system (which we document in this Article) and could introduce into the system a significant risk of uncertainty, arbitrariness, and discrimination.

Another drawback to an all-jury sentencing system would be the obliteration of the current recess that now occurs in Nebraska between the end of the guilt trial and the commencement of the penalty trial. The typical (median) recess is seven weeks, which gives the parties a window of time in which to focus exclusively on the penalty trial.[150] Under exclusively jury sentencing systems, the penalty trial normally commences immediately upon the entry of a capital murder conviction. Experience in such jurisdictions indicates that under the pressure of an impending capital guilt trial, defense counsel is often inadequately prepared to move immediately into a penalty trial.[151] Moreover, the necessity of pre-trial preparation for a possible penalty trial (by both the prosecution and defense counsel) in each potentially capital trial may increase substantially the cost of capital litigation. By limiting the jury's role to the narrow function of finding statutory aggravating circumstances, it would be possible to preserve the current practice of declaring a substantial recess between the guilt trial and the judicially conducted penalty trial. The recess would also limit the necessity for prosecutors and defense counsel to prepare for a penalty trial only in cases that actually result in a M1 conviction and the prosecution, having heard the guilt-trial evidence, continues to believe that a death sentence is appropriate in the case.

A second alternative would be to retain judicial sentencing but delete the weighing decision from the statute and adopt the Georgia decisionmaking model or some variant of it. Under the Georgia model, the sentencing authority makes findings on the statutory aggravators alleged by the State and then "consider[s]" and bases its decision on those factors and "any mitigating or aggravating circumstances otherwise authorized by law."[152] This approach would appear to (a) limit the factual elements of the offense to the statutory aggravating circumstances and (b) treat the other "considerations" beyond the statutory aggravators as "sentencing factors" that do not require jury participation. Except for jury findings on the statutory aggravating circumstances, this approach would leave the death penalty decision

150. In terms of duration, the recess at the 10th percentile is two weeks and at the 90th percentile it is 17 weeks.

151. With the jury standing by to hear the penalty trial, courts are naturally reluctant to declare a recess in the proceedings and often insist that the penalty trial must go forward with or without all of the mitigation witnesses defense counsel would like to present.

152. GA. CODE ANN. § 17-10-30(b) (2001). The Georgia law provides for comparative excessiveness review but only on appeal in the state supreme court. GA. CODE ANN. § 17-10-35(c)(3) (2001).

in judicial hands, much as it currently is. The drawback of this approach is that it would lose the focus, discipline, and sensitivity that the weighing decision has brought to judicial decisionmaking in Nebraska death penalty cases, features that are clearly apparent from a reading of the judicial sentencing orders issued since 1973. On balance, therefore, we believe that the most prudent reform of the Nebraska system would limit the jury's role to the bare minimum requirement of *Ring*, i.e., the jury finding the statutory aggravating circumstances charged in the case, with the remaining fact-finding and sentencing responsibilities left to the court as they are under current law. In subsection XII.B.1 we consider legislation to implement this approach and contrast it with the measures adopted by the Nebraska Legislature to comply with *Ring*.

F. Conclusion

We have presented above a road map of Nebraska law and practice. What does Nebraska law and practice and our review of the literature suggest that we are likely to find in our empirical study of charging and sentencing outcomes in Nebraska?

On the question of race-of-defendant and race-of-victim discrimination in charging and sentencing outcomes, Nebraska law and practice give prosecutors and judges broad discretion, but the law requiring evenhanded treatment is well-known and the issue is politically sensitive in the state.[153] Some studies in other states have documented race effects at both these levels of decision, while others have not.

The issue of discrimination on the basis of the socioeconomic status of the defendant and victim is different because such discrimination is the subject of no explicit legal prohibitions and the question has low political visibility.

The issue of geographic disparities in charging and sentencing outcomes has high political visibility but no legal status. Trial-level proportionality review and three-judge sentencing panels may minimize geographic disparities in sentencing; however, no legal mechanism speaks directly to the issue and neither the Nebraska Supreme Court nor any other state agency monitors geographic disparities in outcomes.

Several features of Nebraska law and practice and the trend of decisions that we describe are likely to reduce the number and frequency of death sentences imposed. The first is the legislation excluding minors and mentally retarded offenders from the pool of death-eligible defendants. Second are the provisions of the 1973 legislation that create a de facto presumption in favor of a life sentence. Third are the

153. The retired judges that we interviewed indicate that sentencing judges are particularly "sensitive" about treating minority defendants fairly.

trial court system of proportionality review, the trend of Nebraska Supreme Court decisions narrowing the scope of important statutory aggravators, and the substantial record of both the Nebraska Supreme Court and the federal courts in vacating death sentences for legal error. To the extent that prosecutorial charging decisions bear on death-sentencing frequencies, the policies of counties like Douglas that opt for death in a very high proportion of M1 cases would appear to cut against the infrequency goal, while the more selective policies of many other counties would tend to promote it.

Although this review of Nebraska law and practice suggests a likely decline in the number of death sentences imposed over time, we have no basis for predicting how selective the system has been in terms of limiting death sentences to the most culpable offenders.

Another issue is consistency. *Furman v. Georgia* teaches that infrequent death sentencing can create a serious risk of inconsistent outcomes. However, the Nebraska Supreme Court's policy of narrowing the breadth of the statutory aggravators should have the effect of enhancing consistency, as should proportionality review by sentencing judges. Prosecutorial policies in counties like Douglas that advance nearly all M1 convictions to penalty trial may enhance consistency, while the more selective prosecutorial policies of many other counties may reduce it.

Our empirical study examines the Nebraska data relevant to these broad questions. In addition, we test the *Proffitt v. Florida* hypothesis that judicial sentencing produces more consistent results than jury sentencing by comparing the Nebraska results with those from other states.

We also closely examine five questions that are relevant to the issue of arbitrariness in the Nebraska system. First, how accurate was the Legislature's perception in 1978 that the system was producing "radically differing results" in different parts of the state? Second, to what extent do the data suggest the application of de facto sentencing policies based on specific case characteristics? Third, to what extent does offender culpability impact the outcomes of judicial review in the Nebraska Supreme Court and the federal courts? Fourth, how valid were the proportionality reviews conducted by Chief Justice Krivosha as a member of the court? Fifth, what is the comparative level of consistency of the death sentences affirmed and vacated by the Nebraska Supreme Court?

PART B

IV. METHODOLOGY, RESEARCH DESIGN, AND MEASURES

A. Introduction

The principal focus of this research is on the disposition of death-eligible defendants, regardless of how the prosecutor charged them and whether or not their cases advanced to a penalty trial. The Data Collection Instrument (DCI) used to code these cases is a modified version of instruments developed in other similar studies. It includes quantifiable measures of the strength of evidence for each of the statutory aggravating and mitigating circumstances. These measures allow us to examine the impact of statutory aggravating and mitigating circumstances on both prosecutorial and judicial decisionmaking. A second and subsidiary part of the research embraces non-capital homicides. We coded these cases with a smaller data collection instrument that was completed in the process of screening all the cases to identify those that were death-eligible.

In Appendix A, we describe in detail the case-screening protocol that we used, our data sources, and our data coding and entry procedures. In the balance of this section, we describe the measures that we used to assess defendant culpability and geographic disparities. Each of our measures of defendant culpability is based on a different but legally relevant foundation, and each provides an independent basis for estimating the scope and magnitude of geographic, race, and socioeconomic status (SES) disparities in the system after controlling for defendant culpability.[154]

B. Measures of Defendant Culpability

As Professor Robert Schopp properly points out, an "evaluation of comparative justice" of the type we present in this study requires two comparisons. The first is a comparison of the individuals involved in the analysis of the "applicable criteria" of noncomparative justice; the second is a comparative analysis of individuals who are similarly situated with respect to those criteria.[155] For the purposes of the first comparison, the criteria of noncomparative justice are the characteristics of the cases that implicate the goals of retribution (guilt, desert, and culpability) and deterrence.[156] Here we draw on the widely recognized concept of "criminal culpability," which embraces the defen-

154. There is considerable overlap in the measures because of the important role of the statutory aggravating circumstances in each.

155. Schopp, *supra* note 3, at 826. ("[N]oncomparative justice requires that each individual receive treatment appropriate to that individual's merit or desert.").

156. The second step of an evaluation of comparative justice involves comparisons of the treatment of discrete groups of persons defined in terms of race, ethnicity, gender, and other illegitimate or suspect classifications.

dant's moral blameworthiness and character and the degree of victimization inherent in the offense.[157] Indicators of moral blameworthiness reflect the extent to which the murder was premeditated and planned and the defendant's personal responsibility for and role in the murder or any contemporaneous crimes. The defendant's character refers to his or her prior criminal record, other unrelated acts of violence, remorse, and cooperation with the authorities. The degree of victimization refers to the number of victims killed and injured and the severity of their injuries, pain, and suffering. Our measures of defendant culpability represent different and overlapping approaches to the measurement of criminal culpability.

A study's measures of defendant culpability are important because they provide an objective basis to define groups of similarly situated offenders. With such groups defined, comparisons can be made to determine if similarly situated offenders are treated differently because of their race or SES or the race or SES of their victims. These assessments provide the basis for assessing concerns about *disparate treatment* in the system. Disparate treatment exists when prosecutors or sentencing judges, in the exercise of their discretion, treat similarly situated offenders differently on the basis of illegitimate or suspect factors. In contrast to disparate treatment, *disparate impact* exists when the evenhanded application of a facially neutral policy disadvantages a particular group.[158] Geographic disparities are another common form of disparate impact. They may arise, for example, when the prosecutors in some counties are more aggressive in advancing cases to penalty trial than are their counterparts in other parts of the state.[159]

Our measures of defendant culpability also enable us to define groups of similarly situated offenders as a foundation for addressing concerns about consistency and comparative excessiveness in the system, without regard to the race and SES of defendants and victims. In such analyses, the issues are (a) how frequently similarly situated of-

157. *See, e.g.*, State v. Papasavvas, 790 A.2d 798, 808-09 (N.J. 2002) (defining and applying the criminal culpability model in a proportionality review of a death sentence).

158. *See infra* notes 209-19 and accompanying text for detail and authority supporting these legal theories.

159. Recently documented examples are Virginia and New Jersey, where the evidence indicates that suburban prosecutors are more punitive in suburban counties than are their counterparts in the major urban centers. *See* BAIME, *supra* note 26, at 53, tbl. A (finding penalty-trial rate of .21 in the three largest countries versus .42 in the balance of the state); VIRGINIA STUDY, *supra* note 31, at 39, fig. 15 (finding the rates with which prosecutors seek the death penalty are .16 in high density counties, .45 in medium density counties, and .34 in low density counties from 1995 to 1999).

fenders are sentenced to death and (b) to what extent the system limits death sentences to the most culpable death-eligible offenders.[160]

Because of the crucial role of defendant culpability in this research, we used the following four independent measures of defendant culpability that have been utilized with success in other similar studies.

1. *The Number of Statutory Aggravating Circumstances Found or Present in the Cases*

The first measure of defendant culpability is the number of statutory aggravating circumstances found by the court in penalty trial cases or present in the non-penalty trial cases. This is a particularly useful measure in this research because of its legal relevance and its very significant strength in explaining charging and sentencing outcomes in Nebraska.[161]

2. *Number of Statutory Aggravating and Mitigating Circumstances Found or Present in the Cases*

The second measure is the number of both aggravating *and* mitigating circumstances found by the court in penalty trial cases and present in non-penalty trial cases, e.g., two aggravators and one mitigator. This measure is also easily understood, has strong legal relevance, and has been used by state courts in the conduct of proportionality reviews.[162] Its limitation is that it does not account for the differing weights that prosecutors and sentencing authorities may place on different aggravators and mitigators.

3. *The Salient Factors Measure*

The third, "salient factors" measure of culpability classifies each case initially in terms of its most prominent statutory aggravating circumstance and then subclassifies it on the basis of other statutory aggravating and mitigating circumstances in the case. The salient factors measure we rely on in this research (presented in Appendix A) is modeled on a measure developed for proportionality review in 1999 by Judge David S. Baime, Special Master to the New Jersey Supreme Court. This measure shares the strengths of the measures based on counts of aggravating and mitigating circumstances and is used by some state courts in their proportionality reviews of death-sentenced defendants.[163] It can also reflect the different weights placed on indi-

160. In more popular parlance, the most culpable offenders are often referred to as the "worst of the worst."

161. *See infra* Table 4, Row 1a (providing logistic regression results).

162. *See, e.g.*, State v. Marshall, 613 A.2d 1059, 1076-78, 1091 (N.J. 1992); Commonwealth v. Pirela, 507 A.2d 23, 32 (Pa. 1986).

163. *See, e.g.*, State v. Papasavvas, 790 A.2d 798, 805-07 (N.J. 2002).

vidual aggravators and mitigators by prosecutors and sentencing authorities.

4. Logistic Regression-Based Measures

This set of measures is based on the results of logistic multiple regression analyses that estimate the impact of case characteristics (legitimate, illegitimate, and suspect) on charging and sentencing outcome decisions in capital cases. However, the culpability scales developed in this analysis reflect only the impact of the legitimate case characteristics.

We first developed a logistic regression model of death sentences imposed among all death-eligible cases. The regression coefficients estimated in this analysis reflect the combined impact of all decisions taken by prosecutors and sentencing judges.

We also estimated "decision-point" logistic regression models that focus on the successive stages at which prosecutors and judges advance the cases through the system. For example, what case characteristics best explain which cases (a) advanced to a penalty trial with the state seeking a death sentence, and (b) resulted in a death sentence being imposed.

In each of these models, we first examined the impact of the number of statutory aggravating and mitigating circumstances (Model 1). Next, we conducted systematic screening procedures to determine what other legitimate aggravating and mitigating case characteristics included in the DCI improved the predictive power of the analyses (Model 2).[164] We then added variables for geography, race, and SES of both the defendant and victim (Model 2RS). The regression coefficients estimated for the geographic, race, and SES variables (after controlling for all of the other variables included in the analysis) provide a useful measure of their average impact on outcomes.

The final models for the four key decision points, which include variables for legitimate, illegitimate, and suspect case characteristics, are shown in Table 4.[165] The number of variables for legitimate case

164. In the development of each of these regression models, we screened for possible inclusion over 300 variables related to background and criminal record of the defendant, the victim's background, and the characteristics of the offense, including each of the individual statutory aggravating and mitigating circumstances. In the first stage of the screen we examined crosstabulations between each variable in the DCI for an association with the outcome variable of at least 10 percentage points. For example, if a characteristic of the offense, such as the use of a bizarre weapon showed an unadjusted 10-percentage-point higher outcome than we observed in the cases without the characteristic, we created a recoded variable that was suitable for inclusion in the regression analysis. This process produced a pool of over 200 candidate variables.

165. The legitimate variables in the model beyond the number of statutory aggravating and mitigating circumstances were either statistically significant beyond the

characteristics in these models is distinctly smaller than what we have observed in earlier research. This is explained in part by the small number of death-eligible cases and death sentences in the database.[166] The principal explanation for the small number of additional legitimate variables in the models is the overwhelming explanatory power of the number of statutory aggravating circumstances, especially in the judicial sentencing decisions. When that variable is in the analysis, the many other variables that were candidates for inclusion in the analysis simply had nothing additional to add in terms of explaining the charging and sentencing outcomes.

Logistic regression analyses also produce for each explanatory variable a coefficient and an "odds-multiplier," which estimates the extent to which, on average, the presence of a case characteristic increases or decreases the odds that an outcome will occur. For example, in Georgia research presented to the U.S. Supreme Court in *McCleskey v. Kemp*, the data suggested that a defendant's odds of receiving a death sentence were enhanced, on average, by a factor of 4.3 if the victim was white. (These statistics for the four most important decision points in this research are presented in Table 4.)

Finally, one may depict the results of the regression with scales that reflect the level of criminal culpability estimated for each defendant in the analysis by virtue of the presence or absence in his or her case of each of the aggravating and mitigating circumstances included in the regression models. Thus, a defendant with many aggravating and few mitigating circumstances present in his or her case will be ranked among the most aggravated cases, while a defendant with few aggravators and many mitigators will be placed among the least aggravated cases.[167] The scales we created for this research, which have from four to seven culpability levels, enable us to estimate the magnitude of the geographic, race, and SES disparities at each culpability level and overall. Such an analysis may document, for example, an overall average difference in adjusted death-sentencing rates (e.g., 8-percentage points) between white and minority defendants after con-

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.05 level in one of the models or conceptually significant with a coefficient in the expected direction, e.g., "victim bound and gagged." The variables for the race and SES of the defendant and victim were included in each analysis. The geography variable was both included in and excluded from each model to demonstrate the impact of geography on the variables for the race and SES of the defendant and victim.

166. However, in a study of the New Jersey system over a nine-year period with 227 death-eligible cases and 34 death sentences, the same screening process used in this research identified a large number of legitimate case characteristics with explanatory power in regression analyses. *See* DAVID C. BALDUS, SPECIAL MASTER, DEATH PENALTY PROPORTIONALITY REVIEW PROJECT, FINAL REPORT TO THE NEW JERSEY SUPREME COURT tech. app. 10 (Sept. 24, 1991) [hereinafter NEW JERSEY REPORT] (available in the University of Nebraska Law College Library).

167. Figure 6, p. 559-60 *infra* presents examples for three of the models in Table 4.

trolling for the defendant culpability levels estimated in the regression analysis that underlies the scale. This approach also can indicate the ratio between the death-sentencing rates for the two groups of cases after adjustment for the levels of defendant culpability. An important advantage of this measure is that it is easier to interpret than the odds-multipliers referred to above.[168]

C. A Measure of Geographic Disparity

Our principal measure of geographic disparity contrasts Nebraska's three largest and most urban counties (Douglas County (including the City of Omaha), Lancaster County (including the City of Lincoln), and Sarpy County (including the City of Bellevue and parts of Omaha)), with the rest of the state, which we describe as "greater Nebraska." The three counties we define as major urban centers contained 49% of the state's population in 2000.[169] They also account for 67% (366/548) of the state's non-capital homicides, 61% (113/185) of the state's death-eligible murders, 75% (67/89) of the state's penalty trials, and 69% (20/29) of the state's death sentences.

The distinction we draw here and below between the major urban centers of the state and greater Nebraska is not an "urban" v. "rural" distinction. Greater Nebraska, as we define it, contains a number of smaller cities and major suburban areas.[170] We also recognize that there are important differences, some of which we noted above, in prosecutorial charging and plea bargaining practices in Nebraska's two largest urban areas—Douglas and Sarpy counties on the one hand and Lancaster County on the other hand.[171] When our substantive analysis reveals important differences between these two metropolitan areas, we note them.

D. A Note on Unadjusted and Adjusted Disparities

In the course of this report, we often refer to "unadjusted" and "adjusted" disparities in charging and sentencing outcomes as they relate to the race and the SES of the defendant and the victim. An unadjusted disparity refers to a difference in a charging or sentencing out-

168. Figure 9, p. 571 *infra* presents an example.

169. With 836,431 people, Nebraska's 3 major urban counties (Douglas, Lancaster, and Sarpy) accounted for 49% of the total population of 1,711,263 in 2000. Nebraska's projected 2001 population is estimated to be 1,713,235. POPULATION DIVISION, U.S. CENSUS BUREAU, Table CO-EST2001-07-31 Time Series of Nebraska Population Estimates by County: April 1, 2000 to July 1, 2001 (Released April 29, 2000), *available at* http://eire.census.gov/popest/data/counties/tables/CO-EST2001-07-31.php.

170. There are sizeable cities in many Nebraska counties.

171. *See supra* section III.D for a description of differential approaches in the two groups of counties to plea bargaining in capital murder cases.

come that is associated with a particular characteristic of a defendant or victim, without any controls for defendant culpability. For example, the overall rate at which cases advance to a penalty trial is .43 (56/131) in white-defendant cases and .54 (25/46) in minority-defendant cases. The 11-percentage point difference (.43-.54) in these two rates is an unadjusted disparity.

In contrast, an adjusted disparity measures the association between case characteristics and charging and sentencing outcomes after controlling for defendant culpability. Odds-multipliers, say for the defendant's race estimated in a logistic regression analysis that controls for defendant culpability, are an example of an adjusted disparity.[172] For example, an odds-multiplier of 1.5 for the white-defendant variable might tell you that after controlling for defendant culpability, on average the *odds* that a white defendant will receive a death sentence in a penalty trial are 1.5 times higher than the odds faced by similarly situated minority defendants.

Experience has taught us, however, that odds-multipliers are subject to frequent misinterpretation.[173] For that reason, we more commonly report adjusted disparities that control for defendant culpability on a *culpability scale*, such as the number of aggravating circumstances in the cases or a regression-based culpability scale. Of course, adjustments of this type would be unnecessary if *all* of the members of two groups being compared, say white and minority defendants, had the same culpability levels or the same distribution of culpability scores when we apply our culpability measures. In that situation, the average outcome for the members of the two groups would give a valid picture of how similarly situated offenders are being treated.

However, we know that the distribution of culpability scores among different groups of offenders can vary substantially, a condition that will create a risk of faulty inference concerning the treatment of similarly situated offenders if adjustments for defendant culpability are not introduced into the analysis. For example, if all of the white defendants in an analysis had cases with high culpability levels and all of the minority defendants had cases of low culpability levels, a comparison of the average death-sentencing rates for the two groups would be quite misleading. The adjustment procedure that we use throughout this report estimates disparities after it reconfigures that data so that the members of the two groups being compared have similar distributions on the culpability scale being applied. An example of such adjusted disparities would be a 10-percentage point (.40-.30) difference in the *adjusted* rates that death-eligible cases advance

172. Odds-multipliers are also known as odds-ratios.

173. The most common error is to interpret the statistic as a multiplier of "probabilities" rather than "odds."

to a penalty trial or a 1.3 (.40/.30) ratio of those rates.[174] In Appendix E, we describe the adjustment procedure in more detail.

E. Convergent Validity and Triangulation of Empirical Findings

This Article addresses five issues related to arbitrariness and comparative injustice in prosecutorial charging and judicial sentencing decisions. The first four focus on (1) race-of-defendant and race-of-victim disparate treatment discrimination, (2) adverse disparate impact on minority defendants, (3) disparate treatment discrimination based on the SES of the defendant and victim, and (4) geographic disparities.

On each of these issues, we evaluate adjusted disparities that we estimated with the four measures described above. In so doing, we apply the concept of "convergent validity," which has been described as "using a number of approaches . . . to converge (or triangulate) on an understanding or explanation" of the empirical issues.[175] The focus is on the consistency of the adjusted disparities in terms of their direction, magnitude, and statistical significance.

The results presented in this Article's numerous figures are principally based on the first measure described above—the number of statutory aggravating circumstances in the case. Several figures are also based on regression-based scales. We prominently feature the measure based on the number of statutory aggravators because of its legal relevance, understandability, and substantial power in explaining charging and sentencing decisions.[176] However, on each disparity issue, we present the results estimated with supplemental culpability measures by way of a table, figure, or footnote.[177]

The fifth issue concerns the selectivity and consistency of the charging and sentencing decisions. The analysis of these questions

174. *See* Figure 12 for an example of charging and sentencing outcomes adjusted for defendant culpability.

175. Jennifer K, Robbennolt, *Evaluating Empirical Research Methods: Using Empirical Research in Law and Policy,* 81 NEB. L. REV. 777, 800 (2002).

176. Also, the measures based on the number of statutory aggravating circumstances and the regression-based scales embrace all of the cases in each analysis. In contrast, the salient factors scale and the scale based on the number of aggravating and mitigating circumstances have many more levels. As a result, it is not uncommon in analyses involving small samples to find, for example, a white defendant case classified at a level at which there is no comparable minority defendant. When this occurs, the information on that case becomes non-informative and the analysis loses statistical power. This is another reason why, when dealing with small samples, we place more weight on the disparities that are estimated controlling for the measures of culpability based on the number of aggravating circumstances and the regression-based scales.

177. For a few examples of our presentation of the results based on supplemental measures, see *infra* notes 222-23, 225-26, 236-37, 238-39, 241-42, 246, 249, and 247-77.

also rests on an application of the four measures of defendant criminal culpability described above. Specifically, for each death-sentenced case, we used the four measures to estimate the frequency with which death sentences were imposed among defendants with comparable levels of culpability. We then averaged those four estimates for each death-sentenced case to produce two overall estimates of the frequency with which death sentences were imposed among similarly situated defendants.[178]

F. Omitted Variables

In spite of the very large amount of information we have on each case and the substantial effort that we devoted to the measurement of defendant culpability, it is clear that our analyses do not account for all of the circumstances of the cases that decisionmakers may take into account, such as defendant demeanor. Nor can we account for other factors that may influence the charging and sentencing outcomes, such as juror attitudes or attorney argument styles. The issue concerning omitted variables is how probable it is that any such omissions biased our estimates concerning the presence or absence of disparities based on race, geography, and SES. The bottom line question is not whether there is a lack of precise correspondence between all of the facts of each case and the database, but rather whether the *systemic* effects that we did or did not estimate were biased by the omitted variables. For example, what plausible theory would suggest that the introduction of controls for "judicial attitudes" or "attorney argument styles" would explain away the victim SES effects or the geography effects, which our data clearly document? Furthermore, how plausible is it that the inclusion of those variables in the analysis would uncover evidence of systemic race-of-defendant or race-of-victim disparate treatment that our analysis fails to document? In making this assessment, recall that an omitted variable can bias the analysis only if it is correlated with both the outcome variable, such as sentence imposed, *and* the illegitimate or suspect variable, such as the defendant's race. For the omitted variables of which we are aware, with one exception,[179] we consider it quite unlikely that both of those conditions would be satisfied in the Nebraska data for any of our core analyses.

178. Appendix C, Columns L and M present the overall estimates; the Column L estimate is based on an analysis of penalty-trial cases only, while the Column M estimate is based on an analysis of all death-eligible cases.

179. *Infra* note 279 and accompanying text, which discusses the implications for our findings of disparate treatment based on the SES of the victim of missing data on victim impact statements and communications between prosecutors and family members.

V. THE DISPOSITION OF HOMICIDE CASES: 1973-99

A. Capital and Non-Capital Cases

Table 2 first divides the cases by decade and then sorts, on an annual basis, the number of capital and non-capital homicide convictions.[180] For each year, we report the total number of convictions and the number and proportion of them that we have classified as "death-eligible."

The data in Table 2 indicate that the number of homicide convictions has been stable over time, about 27 per year. The number of death-eligible offenses has been about 7 a year, ranging from 3 to 15. The proportion of death-eligible cases has declined from .27 and .30 in the 1970s and 1980s, respectively, to .20 in the 1990s.

B. The Disposition of Capital Cases

As noted above, we identified Nebraska's 175 death-eligible cases by screening 689 homicides prosecuted during the period of this research that were potentially death-eligible.[181] These cases resulted in

180. As explained *infra* note 181 and accompanying text, this table excludes 203 homicide convictions that were not potentially death-eligible. The most serious form of *non-capital* homicide in Nebraska is first-degree murder (M1) in cases that do not include a statutory aggravating circumstance that would qualify the case as capital murder. Non-capital M1 carries a mandatory sentence of life imprisonment.

The next most serious category of non-capital homicide is second-degree murder (M2). The principal distinction between M1 and M2 is the defendant's mens rea (mental state). While M1 requires a mens rea of purpose, deliberation, and premeditation, M2 requires only that the defendant caused the victim's death "intentionally, but without premeditation." In spite of the facial clarity of this distinction, there was an ongoing dispute in the Nebraska Supreme Court during the last decade about whether proof of "malice" is also required to establish a M2 conviction. Upon a M2 conviction, the sentencing judge has discretion to sentence the offender to life imprisonment or to a term of years that can range from 20 years to life imprisonment.

The third major category of non-capital murder in Nebraska is manslaughter, which follows the classic pattern. Manslaughter may involve what would be murder but for the presence of a "sudden quarrel." Manslaughter may also exist when the killing is caused "unintentionally while in the commission of an unlawful act." The punishment for manslaughter is a prison sentence up to 20 years (which can include probation with no time served), a fine up to $25,000, or both.

181. The project initially reviewed a total of 892 homicide cases to arrive at the universe of 689 cases that we screened for death-eligibility. We excluded from the screen 203 cases as not death-eligible as a matter of law or because we had insufficient information to conduct a screen. First, we excluded 67 homicides committed by persons under 18 after the effective date of legislation that excluded those cases from death-eligibility. Second, we excluded 52 cases that resulted in acquittals, dismissals, or judgments of not guilty by reason of insanity. Third, we excluded 26 motor vehicle homicides. Fourth, we excluded 44 M2 retrials for cases in which the initial trial had been included in the study but the conviction was reversed or vacated during the ongoing dispute in the Nebraska Supreme

TABLE 2

NEBRASKA CRIMINAL HOMICIDE CONVICTIONS AND THE PROPORTION AND NUMBER OF CAPITAL MURDER CASES, BY YEAR: 4/20/73 TO 12/31/99[1]

1970s			1980s			1990s		
A	B	C	D	E	F	G	H	I
Year	Number of Convictions	Proportion & Number of Death-Eligible Cases	Year	Number of Convictions	Proportion & Number of Death-Eligible Cases	Year	Number of Convictions	Proportion & Number of Death-Eligible Cases
1973-74	19	.21 (4)	1980	32	.31 (10)	1990	19	.32 (6)
1975	21	.43 (9)	1981	30	.17 (5)	1991	19	.16 (3)
1976	27	.15 (4)	1982	23	.17 (4)	1992	35	.17 (6)
1977	31	.35 (11)	1983	23	.43 (10)	1993	36	.17 (6)
1978	26	.27 (7)	1984	26	.58 (15)	1994	28	.21 (6)
1979	21	.19 (4)	1985	21	.29 (6)	1995	28	.39 (11)
			1986	37	.24 (9)	1996	27	.22 (6)
			1987	23	.26 (6)	1997	25	.12 (3)
			1988	27	.22 (6)	1998	24	.17 (4)
			1989	27	.33 (9)	1999	34	.15 (5)
Sub-Totals	145	.27 (39/145)		269	.30 (80/269)		275	.20 (56/275)
Grand Total (1973-1999)		.25 (175/689)						

[1] This table reports the number of defendants rather than prosecutions; 44 cases involved two or more prosecutions. *Supra* note 181 and accompanying text.

185 prosecutions in which the death penalty was a possible outcome (10 prosecutions involved a second or third prosecution in the case). The test we used to identify death-eligible cases has two parts. The first part focuses on first-degree murder (M1) convictions. We classified a M1 case as death-eligible if it (a) advanced to a sentencing hearing under section 29-2520 of the Nebraska Statutes, (b) there was some evidence of statutory aggravation in the case, and (c) the court addressed the issue of whether the sentence should be life or death.[182] For M1 convictions that did not advance to a sentencing hearing because of a waiver of the death penalty by the state, we classified the case as death-eligible only if the facts clearly established that one or more statutory aggravating circumstances were present in the case.

Second, we classified cases as death-eligible when they resulted in a conviction for a crime less than M1 only if (a) the conviction was pursuant either to an initial charge of less than M1 or a plea bargain that reduced an initial M1 charge to the lesser offense, and (b) the facts clearly established the presence of the mens rea (mental state) required for M1 and one or more statutory aggravating circumstances in the case.[183] We classify as death-eligible a number of cases that did not result in a M1 conviction when the circumstances of the case strongly suggest that the prosecutorial decision to charge or accept a plea to less than M1 was based on a deathworthiness judgment rather than a factual determination that the elements of M1 were not present in the case. In contrast, when a jury or judge decision in a guilt

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Court during the last decade whether proof of "malice" is also required to establish a M2 conviction. *See, e.g.,* Richard E. Shugrue, *The Second Degree Murder Doctrine in Nebraska,* 30 CREIGHTON L. REV. 29 (1996). Finally, we excluded 14 cases for which we were unable to collect sufficient information to support an informed judgment of death-eligibility. The large majority of these cases were homicides in which the defendant was found guilty of manslaughter and sentenced to probation with no time served in a Department of Correctional Services facility.

The analysis of non-capital cases embraces 548 prosecutions, 34 of which were second prosecutions. The entire study, therefore, included 689 defendants and 733 prosecutions—185 capital and 548 non-capital.

182. If there was no evidence of statutory aggravation in the case, we did not classify it as death-eligible even if the court made reference to statutory aggravation and/or mitigation.

183. For this purpose, potential liability for M1 could be based on a theory of premeditated murder or felony murder. Cases tried for M1 that resulted in a guilt trial conviction of less than M1 were not classified as death-eligible because the fact finder determined that the mens rea or felony murder required to support a conviction for M1 was not present, regardless of how strong the evidence of death-eligibility might have been in the case. In short, for a defendant convicted of less than M1 to be considered death-eligible, for the purpose of this study, the decision on liability had to have been made by the prosecution on an initial charge of less than M1 or a subsequent charge reduction, typically by way of a plea agreement.

trial results in less than a M1 conviction, we treat that judgment as a factual finding that the elements of M1 were not present in the case.

Figure 1 presents an overview of the disposition of Nebraska's death-eligible cases. Part I, box 1 includes 185 prosecutions against 175 death-eligible defendants over the period 1973-1999. Box 2A includes 89 cases in which the state sought a death sentence, while box 2B includes the 96 cases in which the state waived the death penalty either unilaterally or by way of a plea bargain. An offender who avoided the risk of a penalty trial could do so in a number of ways.

First, in cases charged as M1, prosecutors always have the authority to reduce the charges to M2 or less, either unilaterally or as part of a plea bargain, in which event there can be no penalty trial.[184] Second, for the cases in which the prosecution believes that a M1 conviction (with a mandatory life sentence) is appropriate but that a death sentence is either excessive or unlikely to be imposed by the court, there are three options. The first option is to enter into a formal plea bargain to M1 with a complete waiver of the death penalty, in which event the court dispenses with a consideration of aggravation and mitigation and imposes a life sentence.[185] The second option is a unilateral waiver of the death penalty after a M1 conviction is obtained by plea or trial. The third option is for the prosecutor and defendant to enter into a plea agreement for an M1 guilty plea with the understanding that the prosecutor will present no aggravating evidence in the sentencing hearing or make no argument in favor of a death sentence.[186]

Of the 89 penalty trials shown in Part 1, box 2A, in which the state sought a death sentence, 50% were heard by the guilt trial judge alone and 50% were heard by a three-judge panel. The death-sentencing rate among all of these penalty trials was 33% (29/89).

For the 17 penalty-trial cases in which the defendant pled guilty, the death-sentencing rate was 12% (2/17), while in the cases that resulted in a guilt trial conviction, the rate was 37% (27/72). The overall

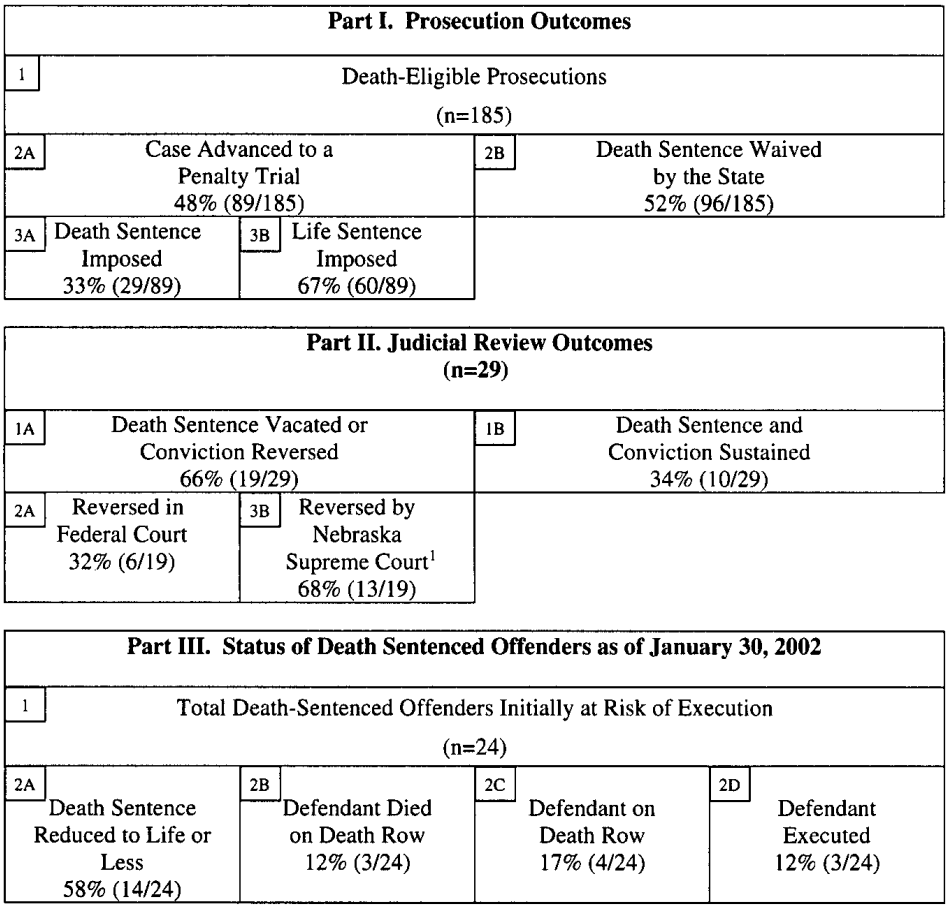
184. We identified six death-eligible cases that were originally charged M2 or less. It is likely that some of these charges were filed pursuant to a pre-indictment plea agreement.

185. We found at least two cases in which such a plea bargain was rejected by the trial court and a penalty trial was held.

186. These pre-trial outcomes may be based on explicit agreements or implicit understandings. Our research has documented a broad array of approaches prosecutors use to waive the death penalty with varying degrees of explicitness. In this regard, we appreciate the willingness of prosecutors and defense attorneys in over 100 cases to describe over the telephone and/or via a questionnaire the process of negotiation and agreement when the records in the case were unclear about what had transpired in this regard.

FIGURE 1

THE OUTCOMES OF 185 PROSECUTIONS OF DEATH-ELIGIBLE OFFENDERS: NEBRASKA, 1973-1999



[1]One death sentence, *State v. Simpson*, was vacated by the trial court before an appeal was taken.

death-sentencing rate among all death-eligible prosecutions was .16 (29/185).[187]

Part II of Figure 1 indicates the outcomes of judicial review of the 29 death-sentenced cases. Box 1A indicates that 66% (19/29) of the death sentences were vacated. Boxes 2A and 2B indicate that of those orders, 68% (13/19) were decisions of the Nebraska Supreme Court either on direct appeal or in post-conviction proceedings, while 32% (6/

187. We omit from subsequent analyses of death-sentencing rates one penalty-trial case included in Figure 1 in which the court believed it had no legal authority to impose a death sentence and therefore exercised no discretion concerning the deathworthiness of the defendant.

19) of the orders issued from a federal court. In addition, one death sentence was vacated by the trial court without an appeal.

Part III of Figure 1 reports the status of the death-sentenced offenders as of January 30, 2002. Boxes 2A-2D indicate that of the 24 offenders sentenced to death, 58% (14/24) had their death sentences vacated and ultimately left death row alive, 12% (3/24) died on death row of natural causes, 17% (4/24) remain on death row, and 12% (3/24) have been executed. Overall, 29% (7/24) of the originally death-sentenced offenders have been executed or remain on death row at risk of execution.

Table 3 presents data in five-year intervals on the three principal charging and sentencing outcomes in the capital murder cases that we examine in this report.[188] Column B indicates the rates at which death-eligible cases advance to a penalty trial with the state seeking a death sentence. The Column B analysis embraces all of the death-eligible cases in the study; we sometimes also refer to that outcome as the "penalty-trial rate." This outcome is to be distinguished from the measure reported in Column C—the rate at which "death sentences are imposed in penalty trials." The Column C outcome excludes cases that did not advance to a penalty trial and is sometimes referred to as the "penalty-trial death-sentencing rate." Finally, Column D reports the "death-sentencing rate among all death-eligible cases." This analysis embraces all of the death-eligible cases, i.e., the penalty-trial cases shown in Column C as well as the cases that did not advance to a penalty trial.

The brackets within each column in Table 3 aggregate the data for subgroups of years to highlight the changes that have occurred since 1987. The data indicate that statewide, since 1987, fewer cases have advanced to a penalty trial and that in these hearings, the death-sentencing rate has declined.[189] Specifically, Column B documents that since 1987 the rate at which cases advance to a penalty trial with the state seeking a death sentence declined 14% (7/51).[190] There has also been a 25% (9/36) decline from .36 to .27 in the penalty-trial death-sentencing rate. The combined effect of these two trends has been a 29% (5/17) decline in the rate that death sentences were imposed among all death-eligible cases from .17 to .12. These data support the expectation that the Nebraska Supreme Court's decisions narrowing statutory aggravating circumstances and the introduction of proportionality review would reduce the frequency with which death sentences were imposed.

188. In the text below, we refer to these outcomes as "our three principal outcomes."

189. These results are not adjusted for the culpability of the offender.

190. The numerator is the difference in the two rates (.51 and .44); the denominator is the earlier .51 rate.

TABLE 3

DISPOSITION OF NEBRASKA CAPITAL MURDERS, IN 5-YEAR PERIODS: NEBRASKA, 1973 TO 1999

A	B	C	D
Year of Sentence[1]	Rates at which Death-Eligible Cases Advance to a Penalty Trial with the State Seeking a Death Sentence[1]	Rates that Death Sentences are Imposed in Penalty Trials[2]	Death-Sentencing Rates Among All Death-Eligible Cases[2]
A. 1973-1977	.50 (14/28)	.36 (5/14)	.18 (5/28)
B. 1978-1982	.55 (18/33) .51 (56/110)	.56 (10/18) .36 (20.55)	.30 (10/33) .17 (20/109)
C. 1983-1987	.49 (24/49)	.22 (5/23)	.10 (5/48)
D. 1988-1992	.38 (11/29)	.18 (2/11)	.07 (2/29)
E. 1993-1999	.48 (22/46) .44 (33.75)	.32 (7/22) .27 (9.33)	.15 (7/46) .12 (9.75)
Total 1973-1999[a]	.48 (89/185)	.33 (29/88)[a]	.16 (29/184)[a]

[1] The Table includes 10 subsequent prosecutions for nine defendants whose death sentences were vacated or whose first-degree murder convictions were reversed on appeal. One defendant had two such subsequent prosecutions. Row E includes seven years.
[2] Column C excludes cases that did not advance to a penalty trial, while Columns B and D include all death-eligible cases.
[a] Column B includes one case in which the prosecutor perceived the defendant to be death-eligible and advanced the case to a penalty trial but the sentencing judge believed the defendant was not death-eligible. Accordingly, that case is excluded from Columns C and D and all other analyses of judicial sentencing decisions presented in this report.

VI. EVIDENCE OF THE IMPACT OF DEFENDANT CULPABILITY ON PROSECUTORIAL AND JUDICIAL DECISIONMAKING

In this section we apply measures of defendant culpability to evaluate the extent to which culpability explains the key outcomes, i.e., the rates at which cases advance to a penalty trial and result in the imposition of a death sentence. The association between defendant culpability, as determined by our core measures, and the key charging and sentencing outcomes suggest the degree to which the system operates in a principled manner, given the statutory and non-statutory aggravating and mitigating circumstances in the cases.

As noted above,[191] our measures of defendant culpability also lay the foundation for the analyses presented below in which we evaluate evidence of a) disparities in these outcomes based on the race (sections VII-VIII) and socioeconomic status (SES) of the defendant and victim (section IX), (b) geographic disparities in charging and sentencing outcomes (section X), and (c) inconsistency and comparative excessiveness in death-sentencing outcomes (section XI). Each of these inquiries requires the identification of sub-groups of death-eligible offenders with comparable levels of culpability as measured by our principal measures of defendant culpability.

A. The Impact of Individual Statutory Aggravating and Mitigating Circumstances

Figure 2 presents data on the individual impact of each aggravating and mitigating circumstance on death sentences imposed among all death-eligible cases. Part I focuses on the impact of the individual statutory aggravating circumstances, while Part II focuses on the impact of the individual mitigating circumstances. Each column presents the data for a single aggravator and mitigator, i.e., the death-sentencing rate when the factor is present or found in the case (the shaded bars) and the death-sentencing rate for other cases in which the factor was not found in a penalty trial or not present in a non-penalty trial case. The dotted line across each set of bars indicates the .16 overall death-sentencing rate for all cases. The asterisks indicate the level of statistical significance between the rates when the factor is present and when it is not.

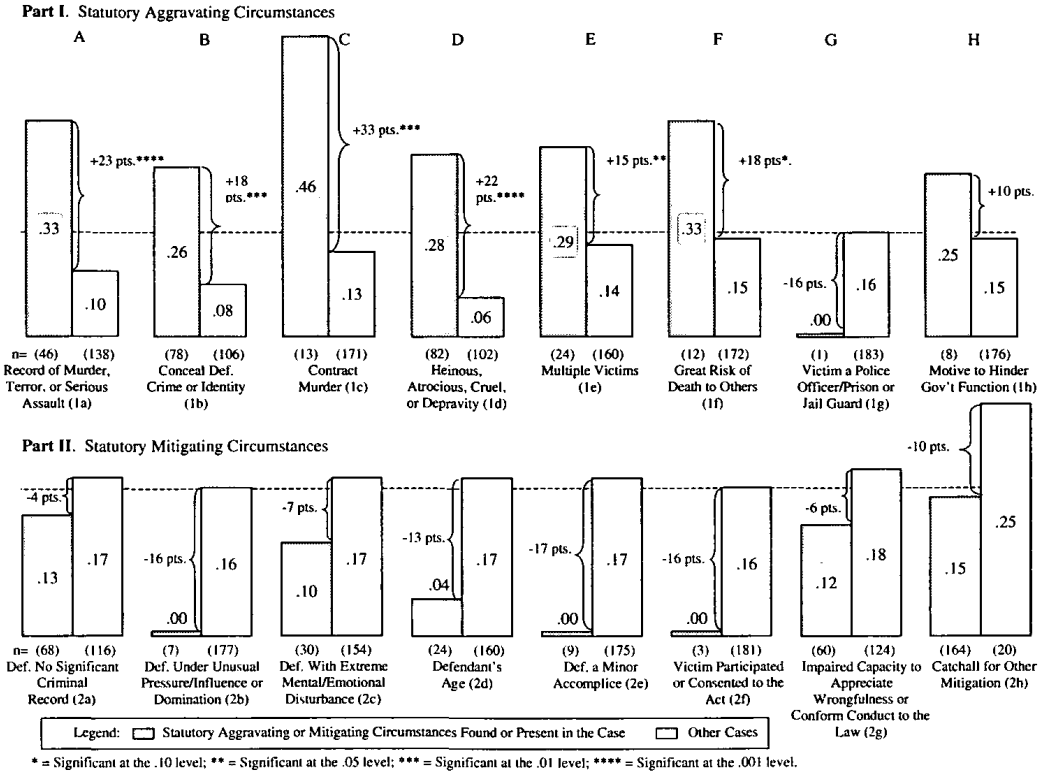
For example, Column A in Part I indicates that when the "1(a)" factor (defendant record of murder, terror, or serious assault) is present in the case, the death-sentencing rate among all death-eligible cases is .33, which is 23 points above the rate when it is not present

191. *Supra* notes 155-60 and accompanying text.

FIGURE 2

THE IMPACT OF STATUTORY AGGRAVATION AND MITIGATION ON DEATH-SENTENCING RATES AMONG ALL DEATH-ELIGIBLE DEFENDANTS: NEBRASKA, 1973-1999

(the bars indicate the death-sentencing rates for the subgroups of cases)



* = Significant at the .10 level; ** = Significant at the .05 level; *** = Significant at the .01 level; **** = Significant at the .001 level.

and 17 points above the .16 average rate among all death-eligible offenders.[192]

Part I of Figure 2 indicates that seven of the statutory aggravators are associated with death-sentencing rates well above both the .16 average rate and the rates in the cases in which the factor is not present. Also, six of these aggravators, (1(a) through 1(f)), have a statistically significant effect in explaining death-sentencing outcomes among all death-eligible defendants. The results of a multiple regression analysis show comparable results.[193]

Part II of Figure 2 indicates that while the presence of individual mitigating circumstances draws down the death-sentencing rates among all death-eligible cases, the impacts are much less substantial than the impact of the aggravating circumstances, and none of the mitigating factors has a statistically significant effect.[194] This result is also confirmed in a multiple regression analysis.[195]

B. The Number of Statutory Aggravating and Mitigating Circumstances in the Cases

1. The Number of Aggravating Circumstances

The most significant factor explaining the pattern of capital charging and sentencing outcomes in Nebraska is the number of statutory aggravating circumstances in the cases. Figure 3 documents their impact on our three principal outcomes: the rates that death-eligible cases advance to a penalty trial (Column A), the rates that death sentences are imposed in penalty trials (Column B), and death-sentencing rates among all death-eligible cases (Column C). For each of these outcomes, the four bars document the applicable rates in cases with one, two, three, and four or more aggravating circumstances. Column A documents that the rate at which death-eligible cases advance to a penalty trial rises from .41, for the single-aggravator cases, to 1.0, or 100%, for the cases with four-or-more aggravating circumstances. Column B indicates that the sentencing courts are even more

192. The numbers assigned to each aggravator and mitigator, at the foot of each bar, are drawn from the statutory aggravating and mitigating circumstances identified in Table 1, *supra*.

193. In explaining death-sentencing rates among all death-eligible offenders, the following statutory aggravators were significant beyond the .05 level: 1(a) – 1(e). In explaining the rates that cases advanced to a penalty trial, only factor 1(c) was significant beyond the .05 level. These results are not shown in Figure 2.

194. The lack of significance in several of the categories with substantial disparities, e.g., Columns B, E, and F, is explained by the small number of cases in which the factor is present.

195. In the model of death-sentencing outcomes among all death-eligible cases, none of the statutory mitigators was significant at the .05 level. In the analyses of the cases that advanced to a penalty trial, the catch-all mitigator was significant at the .001 level.

sensitive to the number of aggravators. In the single-aggravator cases, death sentences are rare, in the two-aggravator cases life or death is a close issue, while in cases with three-or-more aggravators, there appears to be a strong presumption in favor of a death sentence. Finally, the data in Column C, which reflects the impact of both prosecutorial charging and judicial sentencing decisions, reveals a very strong association between the risk of a death sentence among all death-eligible cases and the number of statutory aggravators in the cases. Cases with three-or-more aggravators, shown in Columns B and C, account for 48% (14/29) of the total number of death sentences imposed. Moreover, among these cases, the death-sentencing rate is 74% (14/19).

The striking impact of the number of aggravating circumstances on sentencing outcomes is also apparent in the logistic regression models presented in Table 4 (Row 1a). No other variable comes close to it in explaining the charging and sentencing outcomes.

The most plausible explanation for the significant role of the number of aggravating circumstances in predicting the outcomes of the cases is that the Nebraska system allocates the death-sentencing responsibility exclusively to judges while the statute requires the sentencing judges to assure themselves that any death sentences they impose are proportionate to the "penalty imposed in similar cases, considering both the crime and the defendant."[196] The judges have access to all of the reported death-sentenced cases and defense counsel regularly present information on other comparable cases sentenced to life or less in the sentencing hearings. For a rule of thumb in defining similar cases, the measure of the number of aggravating circumstances in the case has a firm foundation in the statute and is relatively easy to apply. As noted above, the retired judges whom we interviewed deny that trial judges consciously apply quantitative standards based on the number of statutory aggravators in the case. Nevertheless, the data are consistent with the application of a de facto rule that for cases with three or more aggravators, a death sentence is almost certain, .93 (14/15); for the two-aggravator cases, it is a close issue, .48 (12/25); and for the single-aggravator cases, there is a substantial presumption against a death sentence, .06 (3/48).

The data in Figure 3 suggest that the number of aggravating circumstances has considerably less impact on prosecutorial decision-making than it does on judicial death-sentencing decisions. Indeed, in the single-aggravator category, in which a death sentence is a rare event, 41% of the cases advance to a penalty trial. The regression results in Table 4 tell a similar story.[197]

196. NEB. REV. STAT. § 29-2522(3) (Reissue 1995).

197. The regression coefficient for the number of statutory aggravators in the model for the judicial decisions (2.9: Row 1a, Column F) is 5.7 times higher than the .51

FIGURE 3

CHARGING AND SENTENCING OUTCOMES AMONG ALL DEATH-ELIGIBLE CASES, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES FOUND OR PRESENT IN THE CASES: NEBRASKA, 1973-1999

(the three columns of bars represent the rates at which death-eligible cases advance to a penalty trial (Column A), the rates that death sentences are imposed in penalty trials (Column B), and the death-sentencing rates among all capital cases (Column C))

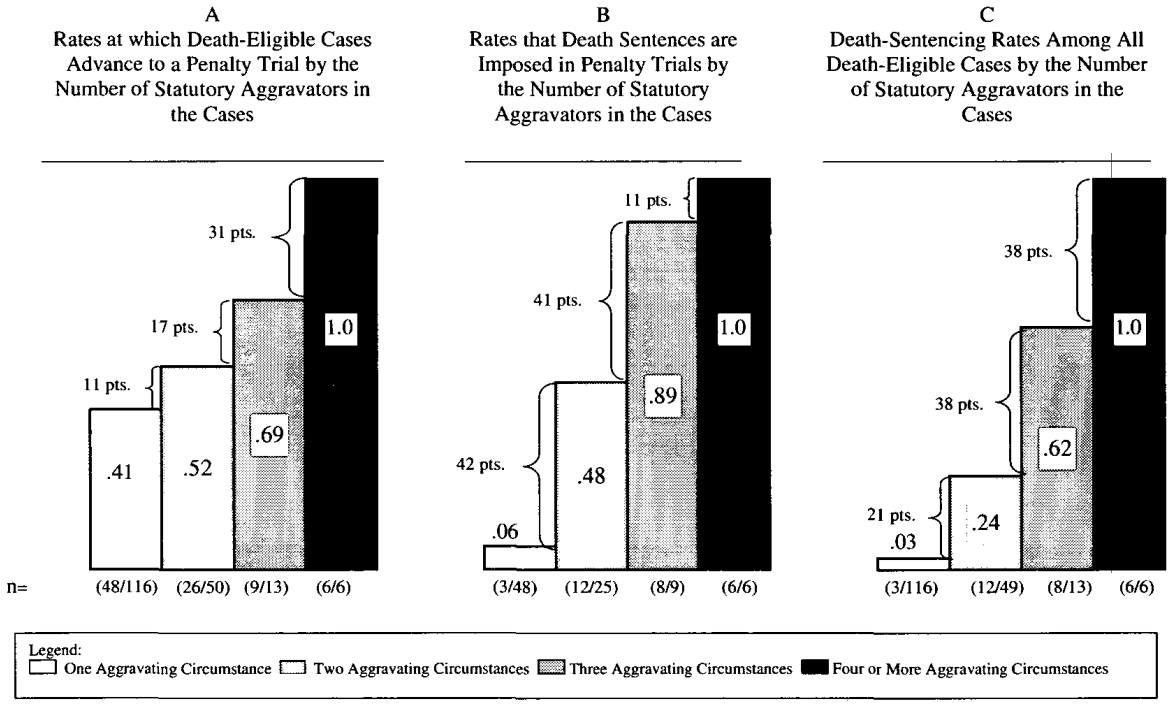


TABLE 4

LOGISTIC REGRESSION MODELS OF FOUR CHARGING AND SENTENCING OUTCOMES

(the number in the Columns are logistic odds-multipliers and regression coefficients (in parenthesis) estimated for the applicable explanatory variables in Column A; there are two models for each outcome—the first with the geography variable (2.e) omitted and the second with it included)

A	B	C	D	E	F	G	H	I
Explanatory Variables	Death Sentence Waived by Plea/Unilateral Decision		Death-Eligible Cases Advanced to Penalty Trial w/ State Seeking a Death Sentence		Death Sentences are Imposed in a Penalty Trial		Death Sentence Imposed Among All Death-Eligible Cases	
1. Legitimate Case Characteristics								
a. Number of Statutory Aggravating Circumstances	.53 (–.64)*	.48 (–.72)*	1.67 (.51)*	1.75 (.56)*	18.1 (2.9)*	18.1 (2.9)*	12.2 (2.5)*	12.2 (2.5)*
b. Number of Statutory Mitigating Circumstances	1.26 (.23)	1.23 (.21)	.83 (–.19)	.83 (–.19)	.72 (–.13)	.72 (–.13)	.58 (–.16)	.54 (–.17)
c. Victim Bound and Gagged	—	—	1.31 (.27)	1.72 (.54)	—	—	—	—
d. Def. Killed Two or More Victims[1]	.41 (–.90)	.35 (–1.05)*	1.97 (.68)	2.46 (.90)	—	—	—	—
e. Guilty Plea	—	—	—	—	.11 (–2.2)*	.12 (–2.1)	.04 (–3.3)*	.05 (–3.1)*
f. Def. Committed an Additional Crime	—	—	—	—	—	—	4.48 (1.5)	4.95 (1.4)*
g. Defendant Confession	3.2 (1.14)*	3.7 (1.3)*	—	—	—	—	—	—
2. Illegitimate/Suspect Variables								
a. White Def.	1.95 (.67)	1.46 (.38)	.63 (–.45)	.73 (–.31)	1.61 (.48)	1.55 (.44)	1.40 (.33)	1.40 (.33)
b. White Victim	.97 (–.03)	.76 (–.27)	.92 (–.09)	.97 (–.03)	1.03 (.03)	1.03 (.03)	.86 (–.15)	.88 (–.12)
c. Def. SES Scale (High, Middle, Low)	1.21 (.20)	1.08 (.08)	.72 (–.33)	.72 (–.33)	.86 (–.15)	.87 (–.14)	.55 (–.58)	.86 (–.14)
d. Victim SES Scale (High, Middle, Low)	1.82 (.72)*	2.03 (.71)*	.55 (–.59)*	.54 (–.61)*	.30 (–1.2)*	.30 (–1.2)*	.27 (–1.3)*	.30 (–1.2)*
e. Geography Variable 1=Major Urban County 0=Other County	—	.27 (–1.3)*	—	2.8 (1.03)*	—	.95 (–.05)	—	.93 (.08)

[1] In multiple victim cases, in terms of aggravation in the case, the model reflects the more or most aggravated murder, as the case may be.

* = indicates a level of confidence in the estimate that, in Bayesian terms, is the analogue to statistical significance at the .05 level or beyond in frequenist terms.

2. The Number of Statutory Aggravating and Mitigating Circumstances

In contrast to the results shown in Figure 3 and Table 4 (Row 1a, Columns B through I), an analysis of the impact of the number of mitigating circumstances in the cases indicates that they have much less impact on outcomes. The regression results shown in Table 4 (Row 1b, Columns B through I) document a weak, non-significant association among all of the cases.

The much weaker impact of the statutory mitigating circumstances on death-sentencing outcomes is also highlighted in Figure 4, which breaks down all of the death-eligible cases according to the number of aggravating and mitigating circumstances in the cases. The rows (Parts I-IV) group the cases according to the number of aggravating circumstances, while the Columns (B through G) group the cases according to the number of mitigators in the cases.

The data in Figure 4 indicate, first, that death sentences are quite rare in the cases with three or more mitigators (Columns E through G), although these cases account for only 26% (47/184) of the total. It is also useful to look at the interaction between the impact on mitigation and the number of aggravators in the cases. The Part I data (one aggravating circumstance) suggest a slight effect for the mitigators since the three death sentences imposed in that category had only one or two mitigators. In Part II (two aggravating circumstances), there is an apparent effect with the rates declining as the number of mitigators increases from one to five. In Parts III and IV, which contain the highly aggravated cases, small differences in mitigation have no effect at all.[198] Thus, it is only in the few close cases in Part II that we can perceive a meaningful effect from mitigation (a result consistent with the expectation that individual case characteristics have their greatest impact in the mid-range of cases where the room for the exercise of discretion is greatest).[199] In the single-aggravator cases (Part I), there is little to mitigate in the first place, while in the most aggravated cases (Parts III and IV), the aggravation overwhelms fairly significant levels of mitigation, i.e., the death-sentencing rates are very high in the face of two or three mitigating circumstances.[200]

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coefficient for that variable in the model for the prosecutorial decisions (.52: Row 1a, Column D).

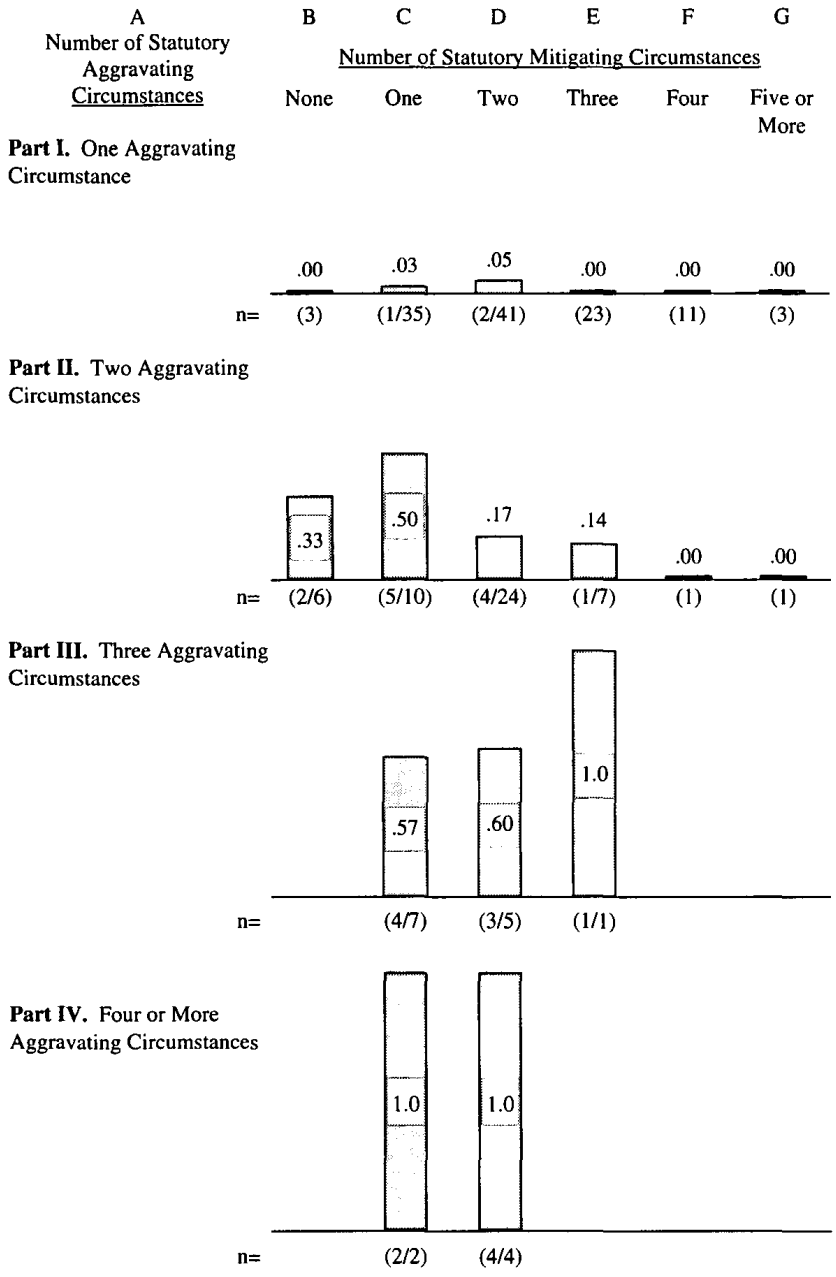
198. However, none of these cases had four or five mitigators, which might make a difference. Figure 4 omits one penalty trial case in which the sentencing judge did not believe he had the authority to impose a death sentence.

199. "Mid-range" refers to the mid-range in terms of defendant culpability.

200. However, the three-mitigator category in Part III contains only one case.

FIGURE 4

DEATH-SENTENCING RATES AMONG ALL DEATH-ELIGIBLE CASES, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING AND MITIGATING CIRCUMSTANCES FOUND OR PRESENT IN THE CASES: NEBRASKA, 1973-1999



C. Salient Factors of the Cases

We next applied the salient factors of the cases measure of culpability, which is presented in Appendix B. This measure assigns each case to a single category identified by its most serious aggravating circumstance.

Column B, Parts I-IV of Figure 5 documents a significant impact of three of the statutory aggravating circumstances (1(a), 1(c), and 1(e)) when they are accompanied by another statutory aggravating circumstance and two or fewer mitigating circumstances. For example, Part II, Column B indicates that among the "1(e)" multiple-victim cases with low mitigation and an additional aggravating circumstance, the death-sentencing rate was .43 (6/14). However, Column A, Parts V and VI indicate that two of the aggravators most commonly charged and found (1(b) and 1(d)) have average death-sentencing rates that are lower than the overall average (.16) and have only a marginal impact on charging and sentencing outcomes, even in the presence of additional aggravation and low mitigation (Column B).

Figure 5 also demonstrates that the highest death-sentencing rate is only .43 (Part II, Column B) among any of the five salient factors categories (with more than 5 cases). Thus, in terms of distinguishing the cases that result in death sentences from those that do not and identifying the most deathworthy offender, the salient factors measure does less well than the measure based on the number of statutory aggravating circumstances in the cases.

D. Regression-Based Measures and Scales

We also conducted multiple regression analyses of the key charging and sentencing outcomes. The models are presented in Table 4.[201] With them, we also created culpability scales that reflect the impact of the legitimate factors only in explaining charging and sentencing outcomes. We used the regression results for three outcomes to create the scales shown in Figure 6. Each level of the scale groups together cases that are similar in terms of the predicted probability that the case would result in a death sentence or advance to a penalty trial, as the case may be.

Part I presents the results for death sentences imposed among all death-eligible cases, controlling for defendant culpability on a four-level culpability scale. These outcomes reflect the prosecutorial charging decisions *and* the judicial sentencing decisions. In contrast, Parts II and III focus separately on the judicial decisions (Part II) and prosecutorial decisions (Part III). The results for judicial decision-making shown in Part II document a strong relationship between the

201. *See supra* subsection IV.B.4 and accompanying text for a description of the screening process used to create the regression models.

FIGURE 5

DEATH-SENTENCING RATES AMONG ALL DEATH-ELIGIBLE CASES, CONTROLLING FOR THE CLASSIFICATION OF EACH CASE UNDER THE SALIENT FACTORS MEASURE OF DEFENDANT CULPABILITY: NEBRASKA, 1973-1999[1]

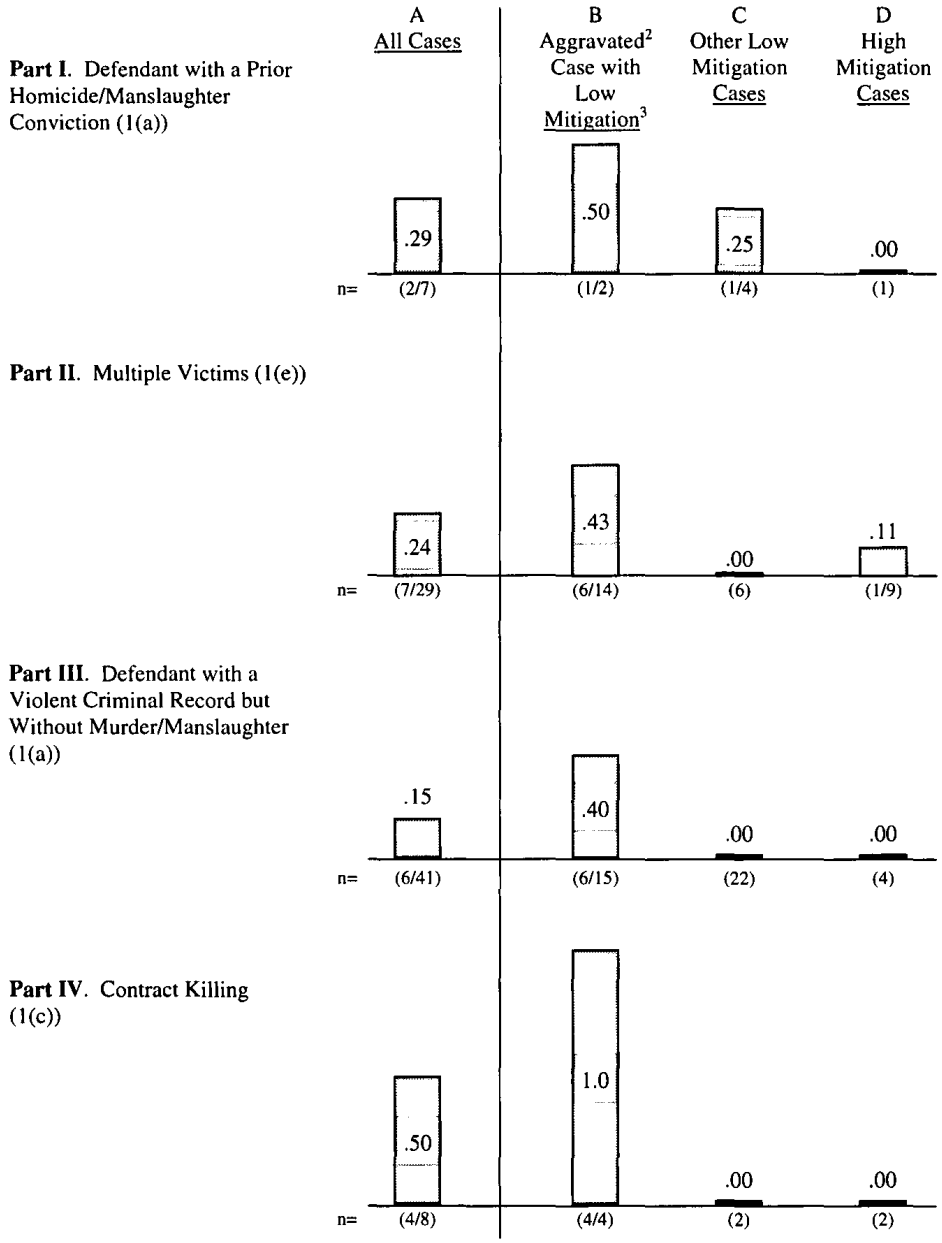


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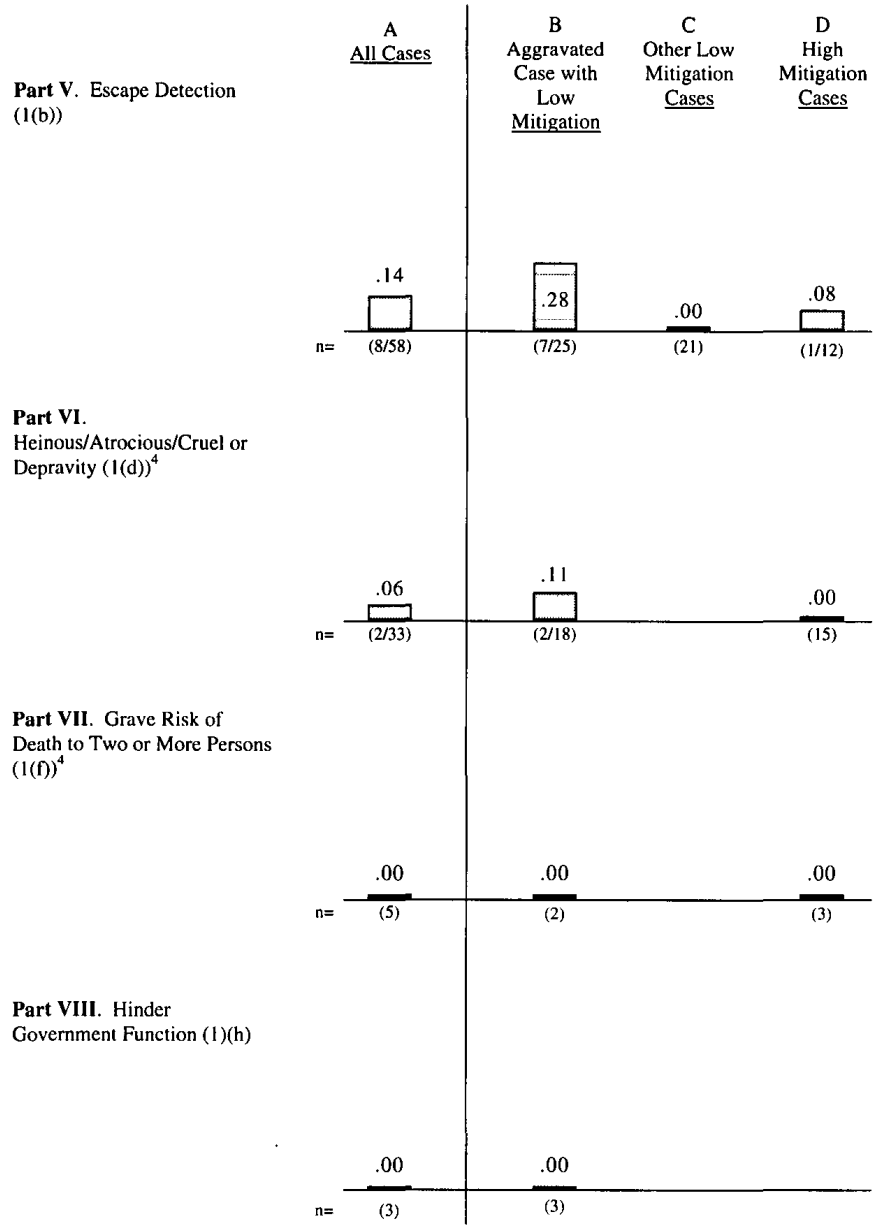
FIGURE 5 (CONTINUED)



[1] The designation at the conclusion of each part's description indicates the principal statutory aggravating circumstance in these cases, e.g., for Part I cases, the principal aggravator is (1(a)). See Table 1 for a list of the statutory aggravators.

[2] An "aggravated" case includes one or more additional aggravating circumstances, except for Part II, in which "aggravated" refers to the presence of a contemporaneous felony, such as robbery or arson.

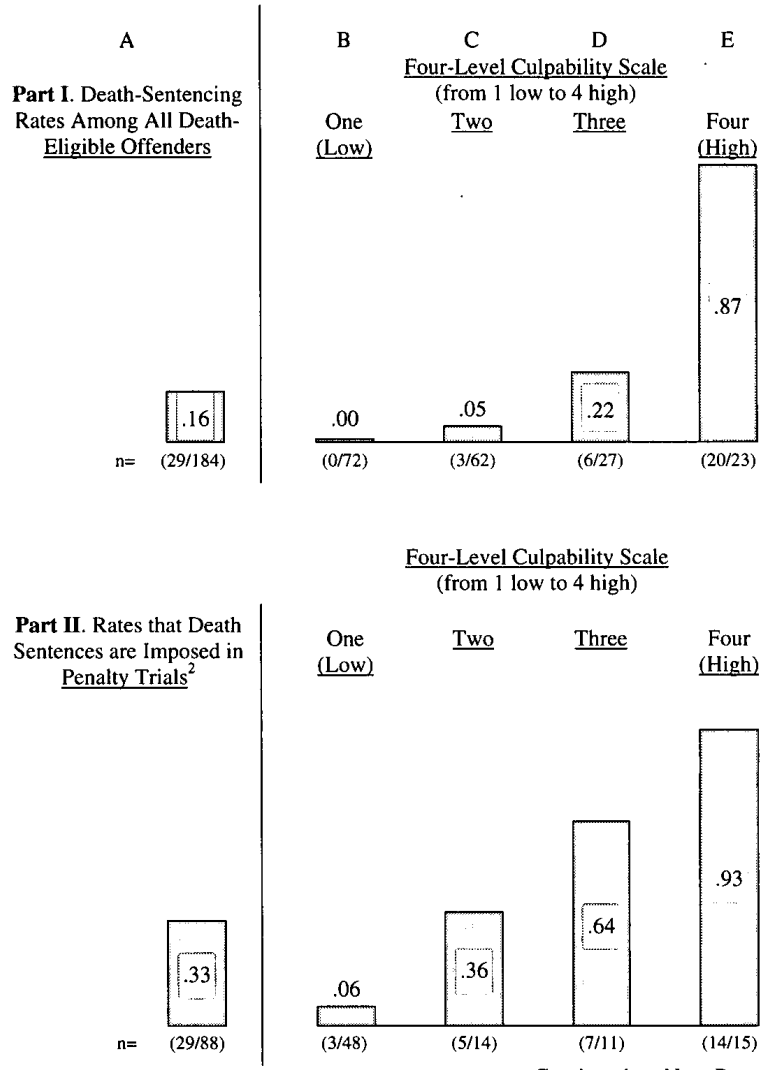
[3] A low mitigation case has two or fewer statutory mitigating circumstances (a) found or recognized by the court in a penalty trial case or (b) present in a non-penalty trial case.

[4] These cases are subclassified only in terms of high and low mitigation.

FIGURE 6

DEATH-SENTENCING RATES AMONG ALL DEATH-ELIGIBLE CASES (PART I) AND IN PENALTY TRIALS (PART II), AND THE RATES THAT CASES ADVANCE TO PENALTY TRIAL (PART III), CONTROLLING FOR DEFENDANT CULPABILITY ON REGRESSION-BASED CULPABILITY SCALES[1]

(the bars indicate the death-sentencing rates among each category of cases defined in terms of defendant culpability estimated on a regression-based scale)



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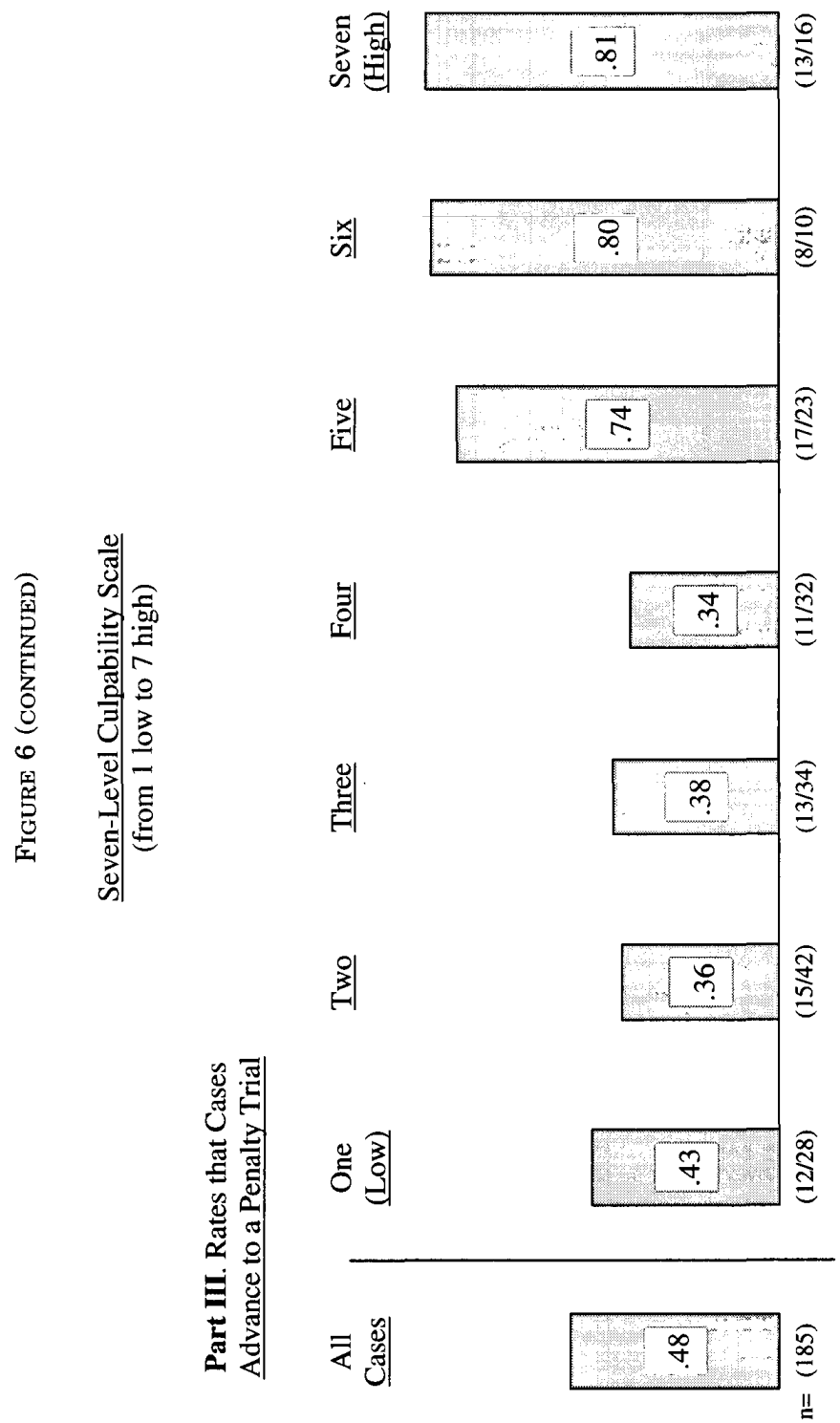
[1]The-regression-based scales used in this Figure are based on the models presented in Table 4 without a control for the geography variable.

[2]This Figure does not include one death-eligible case in which the sentencing court did not believe it had discretion to impose a death sentence.

FIGURE 6 (CONTINUED)



defendant culpability and the likelihood that death sentences will be imposed, i.e., a steady increase in the death-sentencing rate as the cases become more aggravated.[202] The results for prosecutorial decisionmaking shown in Part III present a quite different picture. Among the cases at levels one through four, which account for 78% (144/185) of the prosecutions, there appears to be no relationship between the culpability level of the cases and likelihood that they will advance to a penalty trial. Only among the most aggravated cases at levels five through seven does the risk of a penalty trial become substantial.[203] These findings provide support for Chief Justice Krivosha's belief[204] that the exercise of prosecutorial discretion was the principal source of inconsistency in death-sentencing outcomes that he perceived in the system.

In *McCleskey v. Kemp*, Justice Powell commented that the data before the Court concerning charging and sentencing decisions in Georgia's capital charging and sentencing system "results in a reasonable level of proportionality among the class of murderers eligible for the death penalty."[205] We think the same can be said of Nebraska's penalty-trial death-sentencing decisions depicted in Part II of Figure 6. Indeed, the levels of defendant culpability measured appear to explain the death-sentencing outcomes of the Nebraska system even better than they did in the Georgia data.[206] This result is most likely attributable to the fact that the crucial penalty-trial death-sentencing decisions are made by experienced judges, many of whom are likely aware of the pattern of death-sentencing rates in cases with varying levels of culpability. Moreover, as noted above, the Nebraska statute imposes on the sentencing judges an obligation to consider the risk of comparative excessiveness in any death sentences they impose. However, the results for the prosecutorial decisionmaking in Nebraska

202. The R^2 for the judicial sentencing model was .52. R^2 is a measure of the power of all of the variables in a multiple regression model to explain variations in the defendant/outcome variable on a scale from .00 (low) to 1.0 (high). In comparison to other sentencing research, an R^2 of .52 is quite respectable.

203. The R^2 for the prosecutorial charging model was only .19.

204. *Supra* note 118 and accompanying text.

205. McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (stating that "the system sorts out cases where the sentence of death is highly likely and highly unlikely, leaving a midrange of case where the imposition of the death penalty in any particular case is less predictable").

206. For the jury death-sentencing model, the R^2 in the Georgia research was .42, EJDP, *supra* note 11, at 645, while the comparable measure for the Nebraska judicial death-sentencing model was .52. *See infra* subsection XI.B.2 for a comparison of the level of consistency in Nebraska's judicial sentencing system with the New Jersey jury sentencing system, which imposes death sentences at about the same rate as Nebraska.

show much less proportionality than did their counterparts in Georgia.[207]

We note, also, the teaching of *McCleskey* that a death-sentencing system which results in a reasonable level of proportionality can also be heavily influenced by illegitimate case characteristics. Specifically, in spite of the evidence of proportionality to which Justice Powell referred, the data in *McCleskey* showed substantial and statistically significant race-of-victim disparities that were consistent with a pattern and practice of race-of-victim disparate treatment in the cases.[208]

PART C

VII. EVIDENCE OF DISPARATE TREATMENT IN CHARGING AND SENTENCING OUTCOMES BASED ON THE RACE OF THE DEFENDANT AND VICTIM

A. Disparate Treatment and Disparate Impact Legal Theories

In an evaluation of race disparities in a capital sentencing system, it is useful to consider the concepts of "disparate treatment" and "disparate impact." These legal theories are used in the courts in a variety of different contexts, such as employment and housing discrimination cases[209] and important consequences turn on whether

207. An analysis of prosecutorial decisions to advance death-eligible cases to penalty trial in Georgia produced an R^2 of .45. EJDP, *supra* note 11, at 643. The R^2 in the comparable Nebraska model of prosecutorial decisionmaking is .15. A comparable 39 variable model in the Georgia research for the imposition of death sentences among all death-eligible cases, which reflects the impact of both charging and sentencing decisions, produced an R^2 of .35. *Id.* at 631. The R^2 for the corresponding Nebraska model is .51.

208. The Court did not question the validity of those findings of the Georgia research. It rejected the petitioner's claims on the ground that he had not shown purposeful discrimination in his case and that the risk of race-of-victim discrimination in his case was not strong enough to constitute a violation of the Eighth Amendment of the United States Constitution.

209. For an extensive collection of employment discrimination cases raising disparate treatment and disparate impact theories, see Linda Hamilton Kreiger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995). For a similar collection of cases concerning fair housing and fair lending, see Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409 (1998). Another example of cases in which these theories have been used is the public school finance litigation both in federal and state courts. *See* Randal S. Jeffery, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. J. 239 (1999) (collecting and discussing state cases challenging public school financing schemes on the basis of disparate treatment and disparate impact); Jonathan M. Purver, *Validity of Basing Public School Financing System on Local Property Taxes*, 41 A.L.R.3d 1220 (1972) (collecting early constitutional challenges to public school financing schemes).

documented race disparities are held to constitute disparate treatment or disparate impact.[210] The United States Supreme Court and many state courts have raised a high bar for parties advancing claims based on these theories.[211] We emphasize, however, that these legal theories have nothing to do with the discretion of state legislatures to shape their death penalty laws as they see fit.[212] Legislatures have

210. Most importantly, in many cases, a party must be able to establish disparate treatment in order to set forth a discrimination claim under the Equal Protection Clause. See, for example, *Washington v. Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which both held that to show a violation of the Equal Protection Clause, a party must show a discriminatory intent or purpose. Many civil rights statutes, however, expressly allow plaintiffs or criminal defendants to state a claim based on disparate impact as well as disparate treatment. For example, the Americans with Disabilities Act includes disparate impact expressly in its definition of discrimination. 42 U.S.C. § 12112(b)(3) (1994).

211. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court established a burden of proof for establishing disparate treatment claims in the capital sentencing context that is impossible to meet in the absence of direct admissions of discriminatory intent by prosecutors or jurors. The Supreme Court has also made disparate impact claims more difficult to raise by increasing the evidentiary requirements for discrimination claims. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (making a Title VII employment discrimination disparate impact claim much more difficult to establish); Guardians Ass'n. v. Civil Serv. Comm'n, 463 U.S. 582 (1983) (requiring a plaintiff to make a showing of intentional discrimination to succeed on a Title VII claim).

212. In an analogous situation, on several occasions the United States Congress has expanded a civil rights statute after the Supreme Court issued a restrictive reading. *See* Serena J. Hoy, *Interpreting Equal Protection: Congress, the Court, and the Civil Rights Acts*, 16 J. L. & POL. 381 (2000) (discussing the Pregnancy Discrimination Act of 1978, the Voting Rights Act of 1982, and the Civil Rights Act of 1991 as three cases in which Congress expanded civil rights acts in response to Supreme Court decisions construing previous statutes narrowly). In a particularly pointed example, Congress codified the disparate impact claim for employment discrimination claims in the 1991 amendments to Title VII. *See* Donald O. Johnson, *The Civil Rights Act of 1991 and Disparate Impact: The Response to Factionalism*, 47 U. MIAMI L. REV. 469, 493 (1992) (noting that "Congress stated its clear intent 'to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination" (citing Civil Rights Act of 1991 § 3(4))); Michael J. Zimmer, *Individual Disparate Impact Law: On the Plain Meaning of the 1991 Civil Rights Act*, 30 LOY. U. CHI. L.J. 473, 473 (1999) ("Congress intended to fix the damage to disparate impact law caused by the Supreme Court in Wards Cove Packing Co. v. Atonio, [490 U.S. 642 (1989)]."). The U.S. Supreme Court has also recognized that, pursuant to Title VII, federal agencies have the authority to promulgate regulations that support disparate impact claims. *See* Guardians Ass'n. v. Civil Serv. Comm'n, 463 U.S. 582, 584 n.2, 591-92, 623 n.15 (1983); *see also* Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475, 540-42 (2001) (explaining the plaintiffs Title VII claim and its basis in Department of Education regulations).

State courts and legislatures also have the discretion to respond to discrimination or to correct inequities working with and based on their own constitutions and statutes. William J. Brennan, Jr., *State Constitutions and the Protection of*

the authority to correct disparities in charging and sentencing outcomes, whether or not the data establishing them would support a disparate treatment or disparate impact legal claim in a court of law. Nevertheless, these two ways of conceptualizing disparities in capital charging and sentencing outcomes based on the race and SES of defendants and victims, and the place of prosecution are helpful in understanding the Nebraska system and what our data demonstrate.

By disparate treatment we refer to the differential treatment of similarly situated defendants at *discretionary* points of decision in the charging and sentencing system on the basis of the race or SES of defendants or their victims. Disparate treatment is sometimes referred to as "purposeful" or "invidious" discrimination. The Fourteenth Amendment of the United States Constitution prohibits disparate treatment on the part of governmental bodies when it is based on race. In the context of capital sentencing, the Eighth Amendment also prohibits disparate treatment on the basis of race.[213]

It is important to note that the statistical methodology we apply in this study, which has been employed in numerous similar studies, can only detect systemic disparate treatment when there is a *pattern and practice* of discrimination across many cases in a discretionary decisionmaking system. If disparate treatment occurs in only a few cases, the methodology that we apply will not detect it.

In contrast to disparate treatment, disparate impact arises when a decision rule that is facially neutral with respect to group status, such as race or gender, is applied evenhandedly but its application produces an adverse impact on a protected group.[214] This can take place in either a discretionary or non-discretionary decisionmaking sys-

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Individual Rights, 90 HARV. L. REV. 489 (1977) (noting that state courts can interpret state constitution provisions to give more protection than similar provisions of the federal constitution). This independent discretion has been particularly evident in nationwide cases concerning public school financing. Even though claims based on the Federal Constitution are extremely difficult to raise, state courts have upheld claims under equal protection provisions in state constitutions. *See* Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 241 (1999) (noting that state courts had found state constitutional violations in seven out of 22 equal protection-based education financing cases).

213. *But see* McCleskey v. Kemp, 481 U.S. 279 (1987). While the United States Supreme Court has recognized basic rights of indigent criminal defendants, such as the right to counsel, it has never recognized wealth or poverty as suspect classifications under the Equal Protection Clause. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 323 (1980) ("[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification."). As discussed above, *supra* note 5, claims based on socioeconomic or geographic discrimination are difficult to bring.

214. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (noting that Title VII, which prohibits employment discrimination, "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

tem.[215] The focus of disparate impact theory is not on the differential treatment of individuals. Rather, it is on the protection of groups, such as racial minorities and women, when they are given protected status under the law.

The concept of adverse disparate impact has emerged in several areas of anti-discrimination law over the last 30 years.[216] A common example arises in employment law when an employer adopts a job qualification that is applied evenhandedly to all job applicants, but its application excludes a disproportionately high proportion of minorities or women. A good example is a minimum height and weight requirement of, say, 5 feet 8 inches and 150 pounds. Because, on average, women are shorter than and weigh less than men, a higher proportion of women than men are excluded by the evenhanded application of this otherwise facially-neutral job qualification.[217] The adverse impact is not intentionally caused. It exists because, on average, men and women are physically different.

Under the anti-discrimination laws that recognize the theory of disparate impact, a facially-neutral policy that produces an adverse impact is not per se invalid. Its continued use will be permitted if the policy at issue meets the test of necessity. In the employment and housing contexts, the test is whether the policy producing the adverse impact can satisfy the test of "business necessity."[218]

Public education provides an example of an adverse impact on minorities that is produced by state law and policy. In most states, fund-

215. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 988 (1988). In *Watson*, Justice O'Connor provides examples of discretionary and non-discretionary systems. Non-discretionary decisionmaking systems that have had a disparate impact include written aptitude tests, *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), written tests of verbal skills, *Washington v. Davis*, 426 U.S. 229 (1976), height and weight requirements, *Dothard v. Rawlison*, 433 U.S. 321 (1977), and a rule against employing drug addicts, *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979). Some discretionary decisionmaking systems include hiring decisions based on personal knowledge of candidates and recommendations, *Furnco. Constr. Corp. v. Waters*, 438 U.S. 567 (1978), discretionary promotions, *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), and management decision based on perceptions of relations between co-workers, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

216. *See, e.g., supra* note 209.

217. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977).

218. Under this test, proof of an adverse disparate impact gives rise to a burden on the employer or landlord to justify the policy producing the adverse impact in terms of "business necessity." Griggs v. Duke Power, 401 U.S. 424, 431 (1971). If such a justification is forthcoming, such as the need for minimum height and weight requirements for firefighters, the policy may stand. If the requirement "cannot be shown to be related to job performance," *id.*, it may not be used. *See also* Albermarle Paper Co. v. Moody, 422 U.S. 405, 425-26 (1975). If the employer meets this burden, the plaintiff must show that an alternative requirement exists that substantially meets the employer's needs and has less of an adverse impact.

ing of public schools is primarily a local responsibility, and funding levels per student vary widely across many states. If minorities largely reside in communities with per student appropriation for public education that are below the statewide average, they experience an adverse disparate impact by virtue of where they reside and the state laws that delegate discretion for school financing to local officials.[219]

In the balance of this section, we examine evidence of disparate treatment based on the race of the defendant and victim. In section VIII, we consider two forms of disparate impact that adversely affect minority defendants. The first is a statewide adverse impact on minority defendants in the rates that cases advance to penalty trial. The second is an adverse impact on minority defendants in the rates that death-sentenced offenders are executed. In section IX, we examine evidence of disparate treatment based on the SES of the defendant and victim. In section X, we examine geographic disparities that produce an adverse impact on offenders in major urban counties.

B. Evidence of Disparate Treatment Based on the Race of the Defendant

1. *Unadjusted Statewide Minority-Defendant Disparities in Charging and Sentencing Outcomes*

The issue of race-of-defendant discrimination in Nebraska's capital charging and sentencing system is raised by straightforward demographics. Racial minorities constitute approximately 10% of the population of the state of Nebraska.[220] Yet, as indicated in Part I of Figure 7, they are dramatically overrepresented at each stage in its capital charging and sentencing system.[221]

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219. *See* JEAN ANYON, GHETTO SCHOOLING: A POLITICAL ECONOMY OF URBAN EDUCATIONAL REFORM (1997); Linda Darling-Hammond, *Inequality and Access to Knowledge*, *reprinted in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 465 (James A. Banks & Cherry A. McGhee eds., 1995).

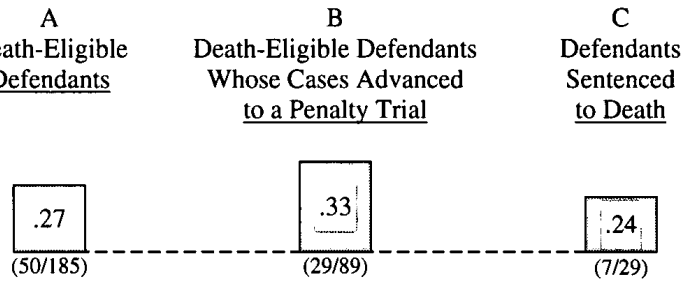
220. The 2000 census reports 90.8% white, 4.4% African American, 1.6% Asian, 1.3% Native American, .1% Native Islander, and 3.3% "some other race." U.S. CENSUS BUREAU, CENSUS 2000 TABLE DP-1- PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: NEBRASKA 2000 (2001), *available at* http://www.census.gov/prod/cen2000/dp1/2kh31.pdf.

221. The overrepresentation of minorities in the population of death-eligible offenders is largely the product of the overrepresentation of minorities among individuals arrested for homicide. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 1999 354, tbl. 4.10 (2000) (reporting nationwide, blacks constituted 54% (5,868/10,850) of persons arrested for murder and non-negligent manslaughter in 1998). We identified the death-eligible offenders by screening all Nebraska homicide convictions. *See supra* note 181 and accompanying text. The only way bias could have enhanced the proportion of minorities among those arrested for homicide would be if similarly situated white defendants had not been arrested, prosecuted, and convicted of homicide. To our knowledge there are no data available to test that hypothesis.

FIGURE 7

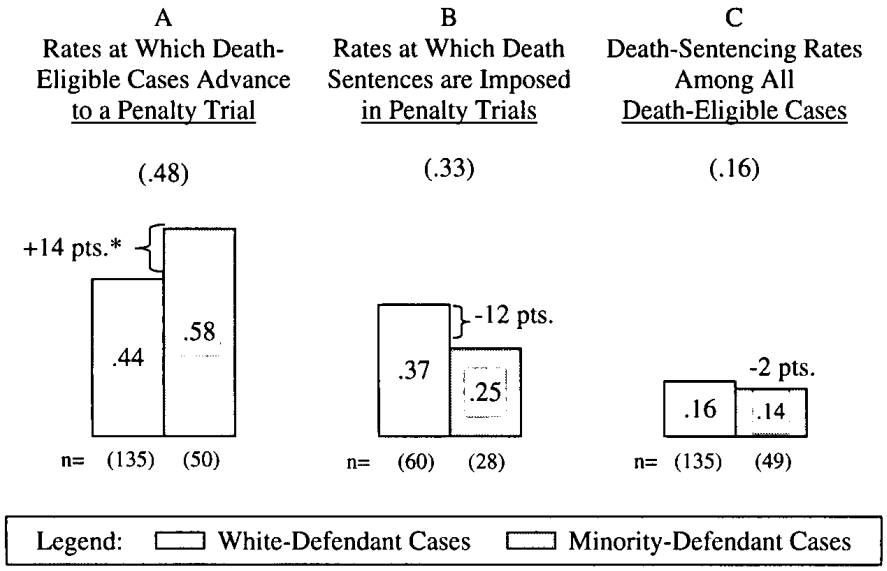
RACE-OF-DEFENDANT DISPARITIES IN CAPITAL CHARGING AND SENTENCING DECISIONS: NEBRASKA, 1973-1999

Part I. Proportion of Minority Defendants at Successive Stages in the Process



Part II. Unadjusted Minority-Defendant Disparities in Capital Charging and Sentencing Outcomes

(the number in parenthesis above each set of bars is the average rate for all cases)



Level of Significance of Disparity: *=.10.

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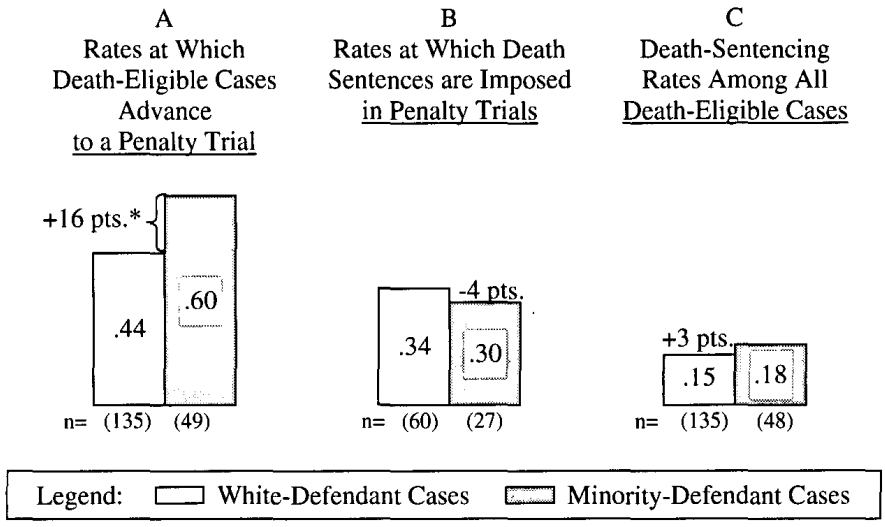
FIGURE 7 (CONTINUED)

Part III. Minority-Defendant Disparities in Capital Charging and Sentencing Decisions after Adjustment for the Number of Statutory Aggravating Circumstances in the Cases

(the number in parenthesis above each set of bars is the average rate for all cases)



Part I indicates that minorities represent 27% of the death-eligible offenders and account for 33% of the offenders whose cases advance to a penalty trial, but only 24% of the offenders who were sentenced to death. These numbers, which are not adjusted for defendant culpability, indicate that the cases of minorities are more likely to advance to a penalty trial than are whites, but are less likely to receive death sentences. Part II of Figure 7 presents the differential selection rates that shape the representation rates in Part I. Specifically, Column A documents a statistically significant 14-percentage point (.58-.44) statewide disparity in the rates that minorities advance to a penalty trial. However, Column B reports a 12 percentage-point (.37-.25) lower death-sentencing rate for minority defendants. The combined effects of these two decision points are shown in Part II, Column C, which indicates that among all death-eligible cases, the death-sentencing rate is 2 percentage points *lower* for minorities. Of these disparities, the only one consistent with a pattern and practice of disparate treatment is the 14-percentage point minority-defendant disparity in the rates that cases advanced to penalty trial (Column A). For this reason, we consider that decision point in more detail below in analyses that control for the culpability of the offenders and the geographic location of their prosecution.

2. *Statewide Minority-Defendant Disparities in Charging and Sentencing Decisions Controlling for Offender Culpability*

Part III of Figure 7 presents statewide race-of-defendant disparities adjusted for offender culpability as measured by the number of statutory aggravating circumstances in the cases. Column A documents a 16-percentage point (.60-.44) minority-defendant disparity in the rates that cases advance to a penalty trial.[222] These results are consistent with a statewide pattern and practice of disparate treatment in the exercise of prosecutorial discretion. In contrast, the capital sentencing data reported in Columns B and C reveal only small disparities that could easily arise by chance.[223]

Figures 8 and 9 indicate that the race effects in prosecutorial decisionmaking are concentrated in the low and mid-range cases in terms of defendant culpability. Figure 8, Column B, documents significant effects in the one-aggravator category in which 63% (116/185) of the state's death-eligible defendants are prosecuted. Figure 9 controls for offender culpability with a 7-level scale based on the logistic regression analyses presented in Table 4. It indicates that the race effects are most prominent in the mid-range cases ranging from levels 2 to 5 on the two scales.

---

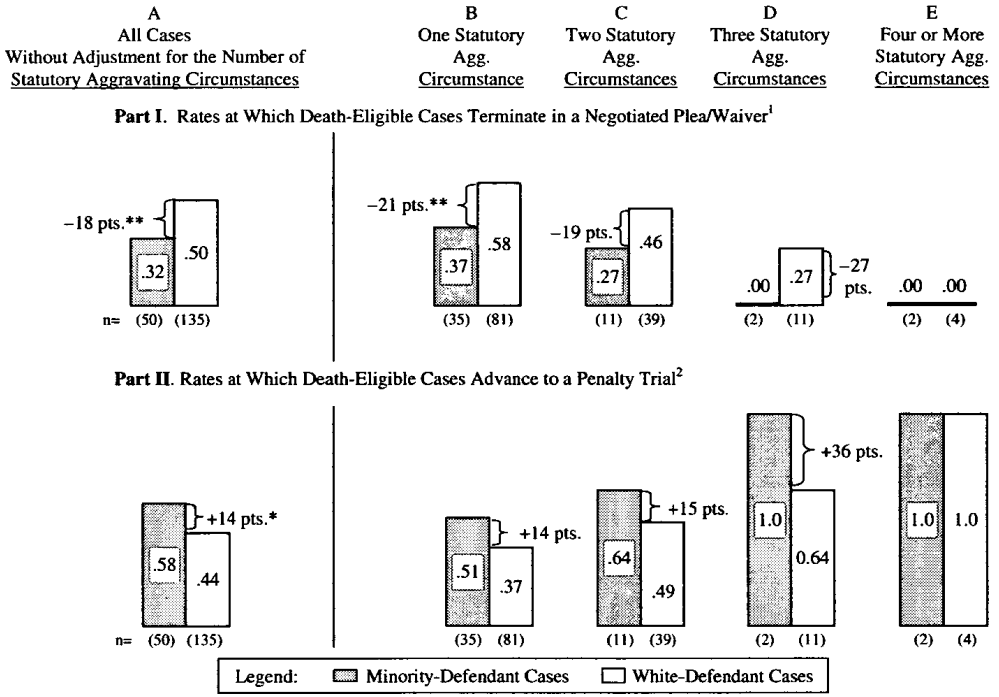
222. Estimates based on alternative measures of defendant culpability were as follows: concerning minority-defendant disparities in the rates that cases advance to penalty trial, controlling for the number of aggravating and mitigating circumstances in the cases, the statewide minority-defendant disparity is 4 points (p=.10); controlling for the salient factors measure, the disparity is 7 points (p=.04); controlling for the regression-based scale, the disparity is 10 points (p=.06); in the logistic regression analysis in Table 4, Column D, the coefficient for the white defendant variable is .63, which results in a minority defendant odds multiplier of 1.6 that is not statistically significant (NS).

223. For judicial death-sentencing rates, controlling for the number of aggravating and mitigating circumstances, the minority-defendant disparity is −19 points and not significant (NS); controlling for the salient factors measure, the disparity is −2 points (NS); controlling for the regression-based scale, the disparity is −14 points (NS); in the logistic regression analysis in Table 4, Column F, the coefficient for the white defendant variable is .48, which results in a minority-defendant odds multiplier of .62 (NS).

For death sentences imposed among all death-eligible cases, controlling for the number of aggravating and mitigating circumstances, the minority-defendant disparity is −6 points (NS); controlling for the salient factors measure, there is no disparity; controlling for the regression-based scale, the disparity is 1 point (NS). In the logistic regression analysis in Table 4, Column H, the coefficient for the white victim variable is .33, which results in a minority-defendant odds multiplier of .62 (NS).

FIGURE 8

STATEWIDE MINORITY-DEFENDANT DISPARITIES IN THE RATES AT WHICH DEATH-ELIGIBLE CASES TERMINATE IN A NEGOTIATED PLEA/WAIVER (PART I) AND ADVANCE TO A PENALTY TRIAL (PART II), CONTROLLING FOR THE NUMBER OF AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999

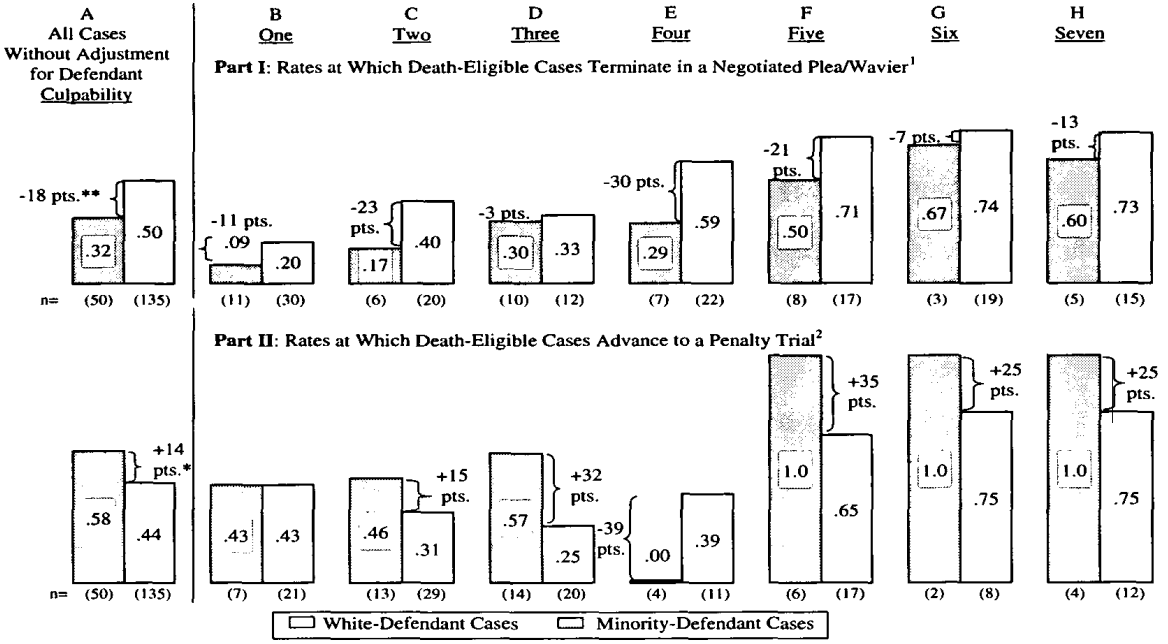


[1] After adjustment for the number of statutory aggravating circumstances, the overall minority-defendant disparity was -19 percentage points (.32 - .51), significant at the .01 level.
[2] After adjustment for the number of statutory aggravating circumstances, the overall minority-defendant disparity was +15 percentage points (.59 - .44), significant at the .06 level.
Level of Significance or Disparity: * = .10; ** = .05.

FIGURE 9

STATEWIDE MINORITY-DEFENDANT DISPARITIES IN THE RATES AT WHICH DEATH-ELIGIBLE CASES (A) TERMINATE IN A NEGOTIATED PLEA/WAIVER AND (B) ADVANCE TO A PENALTY TRIAL, CONTROLLING FOR DEFENDANT CULPABILITY WITH A REGRESSION-BASED SCALE: NEBRASKA, 1973-1999

(the height of each bar indicates the negotiated plea and penalty trial rates for the subgroup of cases at each level of culpability estimated with a regression-based scale; the culpability levels are from "one," low to "seven," high)



Level of statistical significance: * = .10; ** = .05

[1]The overall adjusted minority-defendant disparity is –16 percentage points (.34 - 50), significant at the .04 level.

[2]The overall adjusted minority-defendant disparity is +10 percentage points (.54 - 44), significant at the .06 level.

3. Race-of-Defendant Disparities in the Exercise of Prosecutorial Discretion After Adjustment for the Place of Prosecution (in Major Urban Counties v. the Counties of Greater Nebraska)

Without more, the statewide race effects presented above suggest a distinct possibility of a pattern and practice of the disparate treatment of minority offenders in the exercise of prosecutorial discretion. At first blush, this interpretation appears plausible because the disparities are concentrated in the low to middle level range of defendant culpability where there is the greatest room for the exercise of discretion.[224] An alternative possibility is that these disparities are explained by something other than differential treatment of similarly situated white and minority defendants. This alternative is exactly what emerged as a more plausible explanation when we estimated the race effects separately for the major urban counties and greater Nebraska.

The results of that analysis are presented in Figure 10. Part 1 presents the minority representation rates at the three key stages in the process, without adjustment for defendant culpability. For the major urban counties, where 90% of the prosecutions against minorities occur, a comparison of the data in Columns A and B in Part I, Row A suggests no disparity in the rates that cases advance to penalty trial and a comparison of the data in Columns C and B suggests a lower death-sentencing rate for minority defendants. The data in Part I, Row B for greater Nebraska tell a similar story but the samples are too small to support any inferences about the impact of race on the exercise of discretion.

Part II of Figure 10 presents the data based on comparative charging and sentencing rates for white- and minority-defendant cases after adjustment for offender culpability measured by the number of statutory aggravating circumstances in the cases. Panel A presents the results for the major urban counties. Column A of these data reports a slightly higher penalty-trial rate (5 percentage points) in the minority-defendant cases and a slightly lower minority death-sentencing rate (Column B), which combine to produce parity in the death-sentencing rate among all death-eligible cases (Column C). The 5-point disparity in the rates that cases advance to a penalty trial is consistent with a pattern and practice of disparate treatment, but the low magnitude of the disparity and its lack of statistical significance do not support that inference.

Panel B presents the results for greater Nebraska. It shows, in Column A, a *lower* penalty-trial rate in the minority defendant cases and the number of minority-defendant cases that advanced to a pen-

224. See, for example, Columns B and C of Figure 8.

FIGURE 10

RACE-OF-DEFENDANT DISPARITIES IN NEBRASKA'S CAPITAL CHARGING AND SENTENCING SYSTEM, CONTROLLING FOR WHETHER THE PROSECUTION IS IN A MAJOR URBAN COUNTY OR A COUNTY OF GREATER NEBRASKA: NEBRASKA, 1973-1999

Part I. Proportion of Minority Defendants at Successive Stages in the Process

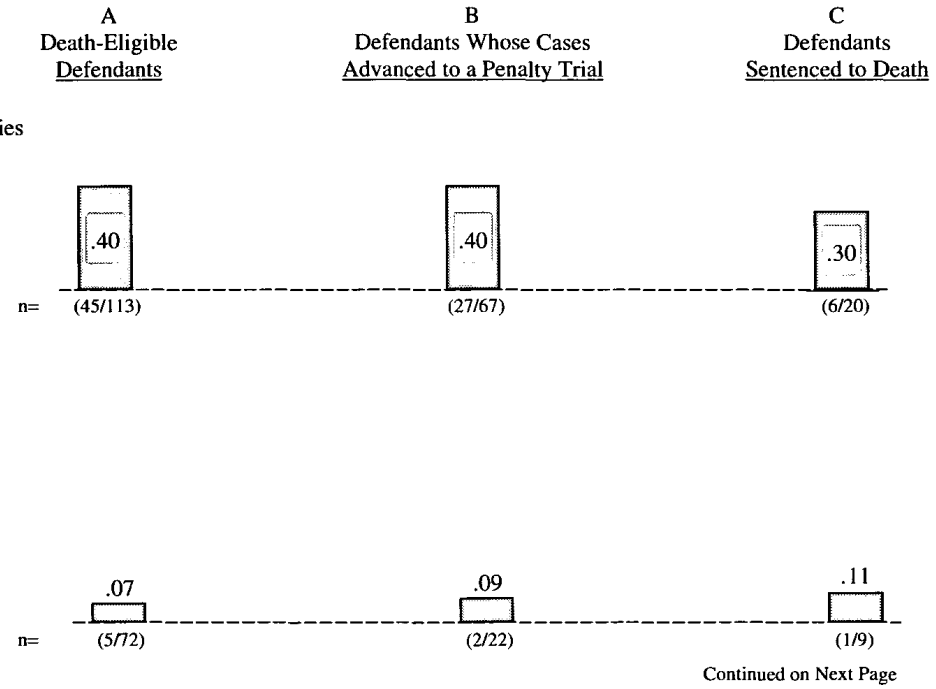


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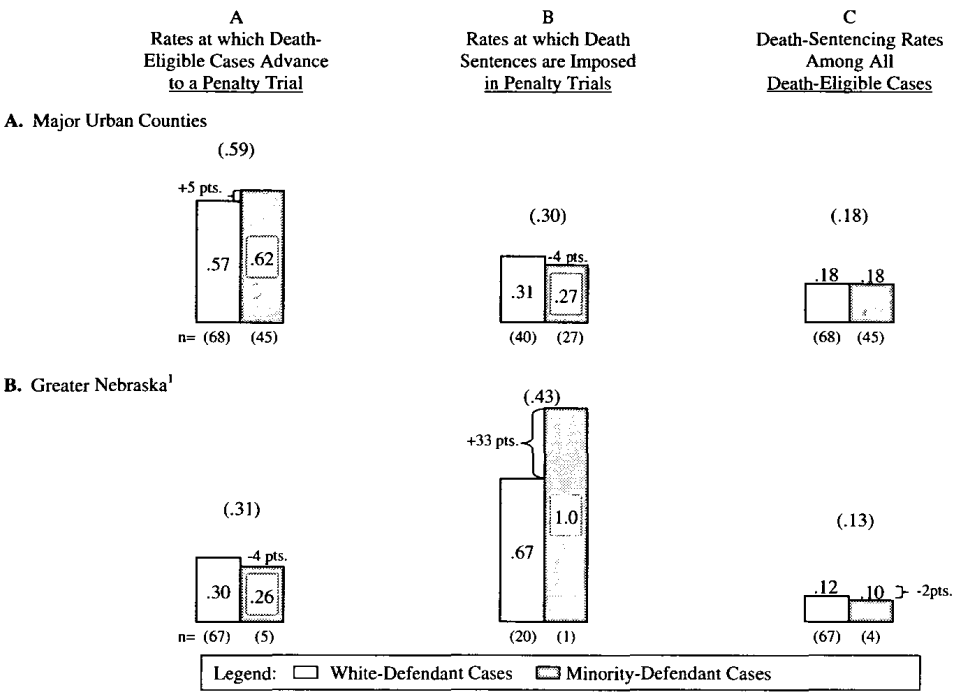
FIGURE 10 (CONTINUED)

Part II. Minority-Defendant Disparities in Capital Charging and Sentencing Outcomes After Adjustment for the Number of Statutory Aggravating Circumstances in the Cases

(the number in parenthesis above each set of bars is the average rate for all cases)



[1]One minority-defendant case included in Column A is excluded from Columns B and C because the sentencing court in his penalty trial case did not believe it had the discretion to impose a death sentence in the case.

alty trial (n=1), thus making meaningful analysis of the sentencing decisions impossible.

Figure 11 presents a more detailed analysis of prosecutorial decisionmaking controlling for the place of prosecution. Column A, Part I indicates that without adjustment for defendant culpability, in the major urban counties, there is a 1-percentage point minority-defendant disparity. After controls for culpability are introduced, white defendants appear to enjoy a slight advantage in three subgroups of cases (Columns B, C, and D). However, the effects are small, and in Columns C and D, the sample sizes are also small. If there were a significant minority-defendant effect in the major urban counties, it almost certainly would have appeared in the one-statutory aggravator cases with good sample size that are shown in Part I, Column B.

For greater Nebraska, Column A, Part II shows an unadjusted disparity that is consistent with disparate treatment favoring white defendants. However, when controls for defendant culpability are introduced, the results are mixed, not significant, and the samples are very small. Therefore, in both areas of the state, the evidence does not support an inference of differential treatment on the basis of the race of the defendant.

Figure 12 expands the major urban counties versus greater Nebraska analysis to embrace minority-defendant effects in the three key outcomes after adjustment for defendant culpability using regression-based culpability scales. Part I documents the minority-defendant effects in the major urban counties. Figure 12, Part I shows no effects in the charging and plea bargaining decisions (Column B), a higher penalty trial death-sentencing rate for whites (Column C), and a comparable disparity among all death-eligible cases (Column D).[225] In greater Nebraska (Part II), white-defendants fared better in pen-

225. When we disaggregate the data for the major counties and we compare Lancaster County with Douglas and Sarpy Counties combined, the sample sizes are small in Lancaster County. In each place, the adjusted disparity is a higher rate for white defendants and not statistically significant, i.e., 9 points (p=.38) in Douglas/Sarpy and 5 points (p=.47) in Lancaster County.

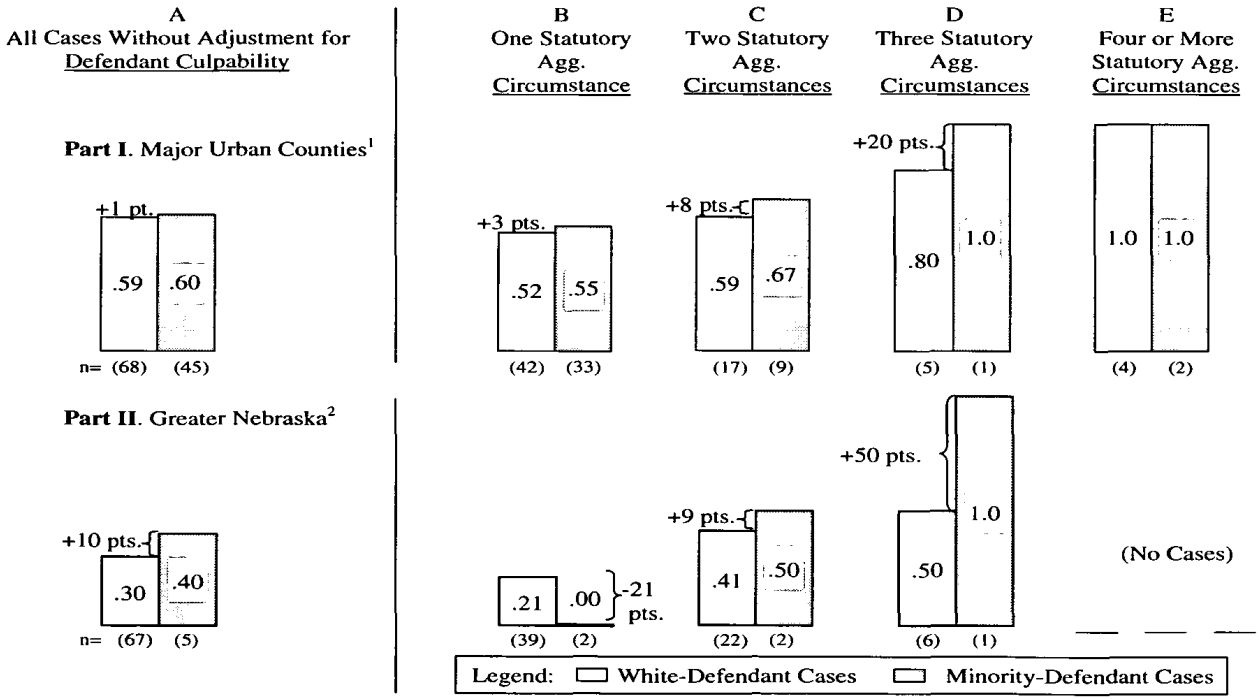
The results of supplemental analysis in the major urban counties, using alternative measures of defendant culpability, were as follows: Concerning the impact of the race of the defendant on the rates that cases advance to penalty trial in the major urban counties, controlling for the number of aggravating and mitigating circumstances in the cases, the minority-defendant disparity is 5 points (NS); controlling for the salient factors measure, the disparity is –7 points (NS).

For the judicial death-sentencing rates in the major urban counties, controlling for the number of aggravating and mitigating circumstances, the minority-defendant disparity is –15 points (NS); controlling for the salient factors measure, the disparity is –9 points (p=.09).

For death sentences imposed among all death-eligible cases in the major urban counties, controlling for the number of aggravating and mitigating circumstances, the minority-defendant disparity is –7 points (NS); controlling for the salient factors measure, the disparity is –6 points (NS).

FIGURE 11

MINORITY-DEFENDANT DISPARITIES IN THE RATES AT WHICH DEATH-ELIGIBLE CASES ADVANCE TO A PENALTY TRIAL, CONTROLLING FOR THE PLACE OF DECISION (MAJOR URBAN COUNTIES V. GREATER NEBRASKA) AND THE NUMBER OF AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999

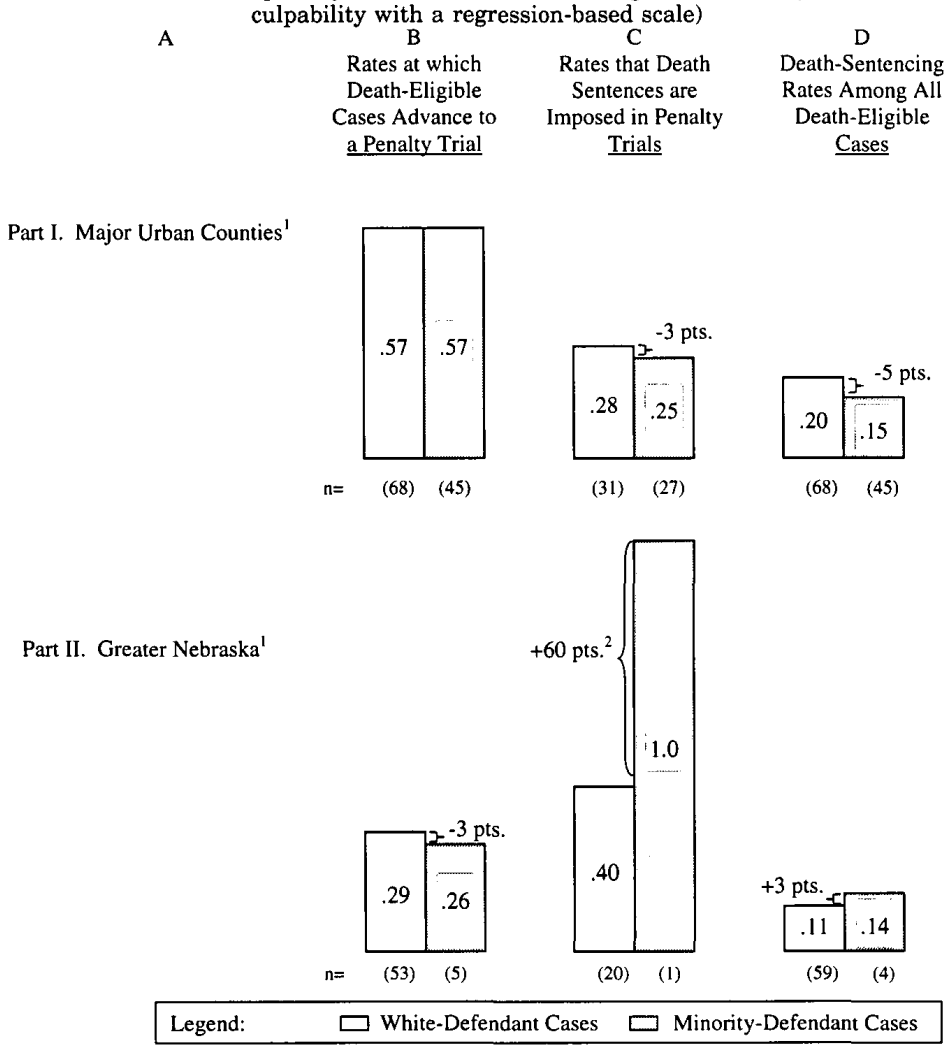


[1] After adjustment for the number of statutory aggravating circumstances, the overall minority-defendant disparity was 5 percentage points (.62 - .57), significant at the .68 level.
[2] After adjustment for the number of statutory aggravating circumstances, the overall minority-defendant disparity was -4 percentage points (.26 - .30), significant at the .84 level.

FIGURE 12

MINORITY-DEFENDANT DISPARITIES IN CHARGING AND SENTENCING DECISIONS IN MAJOR URBAN COUNTIES AND GREATER NEBRASKA, CONTROLLING FOR DEFENDANT CULPABILITY USING A REGRESSION-BASED SCALE

(the bar indicates the penalty trial and death-sentencing rates after adjustment for culpability with a regression-based scale)



[1] The sample sizes in Columns B and D may vary because cases are omitted from the adjusted analysis if there is not at least one case in each racial category (e.g., white v. minority defendants) for a given culpability level.
[2] Because of the sparseness of the data in the adjusted analyses, the effects reported in Part I, Column C and Part II, Column C are unadjusted disparities.

alty trials (Column C), but there was only one minority defendant and the disparity is not statistically significant.[226] None of the disparities in Figure 12 is statistically significant and none suggests a pattern and practice of more punitive treatment of minority defendants in either area of the state. The results estimated with two other measures of defendant culpability are to the same effect.

The weak minority-defendant disparities in both areas of the state suggest that the statewide race effects documented in prosecutorial decisionmaking are primarily a byproduct of the greater rate that cases advance to a penalty trial in the major urban counties. Specifically, 90% of the prosecutions against minority defendants, statewide, are conducted in the major urban counties.[227] The foregoing demonstrates, therefore, the risk of error that can arise when important and relevant variables are omitted from a quantitative analysis.

If this explanation of the statewide race effects in prosecutorial decisionmaking documented in Figures 10, 11, and 12 is correct, it presents a classic example of Simpson's paradox. This paradox exists when a strong association between two variables, suggesting a causal relationship between them, is substantially reduced or reversed when the data are disaggregated on the basis of a third variable.[228] Here we initially see strong statewide race disparities in prosecutorial charging and plea bargaining practices, but these perceived disparities virtually evaporate when we distinguish between and control for the differing practices of prosecutors in the major urban and other counties.[229] The foregoing demonstrates, therefore, the risk of error

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226. The results of supplemental analysis in greater Nebraska using alternative measures of defendant culpability were as follows: Death-eligible cases in greater Nebraska involved only 5 minority defendants (compared to 45 in the major urban counties), and only one of these cases advanced to a penalty trial. For the rates that cases advance to penalty trials in greater Nebraska, controlling for the number of aggravating and mitigating circumstances in the cases, the minority-defendant disparity is –18 points (NS); controlling for the salient factors measure, the disparity is –7 points (NS).

Because only one minority defendant case advanced to a penalty trial, we conducted no further analyses of that outcome.

For death sentences imposed among all death-eligible cases in greater Nebraska, controlling for the number of aggravating and mitigating circumstances, the minority-defendant disparity is –6 points (NS); controlling for the salient factors measure, the disparity is –1 point (NS).

227. Figure 12 Parts I and II, Column B (dark bars) indicate a statewide total of 50 (45+5) minority defendants with 45 prosecuted in the major urban counties.

228. E.H. Simpson, *The Interpretation of Interaction in Contingency Tables*, B13 J. ROY. STAT. SOC. 238 (1951).

229. A particularly striking and comparable example of Simpson's paradox is a study in the 1970s, which documented that, overall, women applicants to graduate programs at the University of California-Berkeley were rejected at a much higher rate than the male applicants. However, closer scrutiny revealed that the women tended to apply to the more selective departments (such as English and history) and the men tended to apply to the less selective departments (such as science

that can arise when important and relevant variables are omitted from a quantitative analysis.

C. Evidence of Disparate Treatment Based on the Race of the Victim

The race-of-victim issue applies only in the major urban counties. The reason is that a minority victim was present in only 16% (30/185) of the cases statewide and 93% (28/30) of those prosecutions took place in the major urban counties. Moreover, the three death sentences imposed in minority-victim cases were imposed in those counties. Accordingly, we limit our race-of-victim analysis to the major urban counties.[230]

Even though the sample of minority-victim cases is small, an assessment of the issue is important for two reasons. First, it is the most commonly documented form of race discrimination in U.S. capital charging and sentencing systems. When race-of-victim discrimination does exist, it typically results in more punitive charging and sentencing outcomes in white victim cases.

Second, the presence of race-of-victim discrimination in a system can bias downward estimates of minority-defendant disparities in analyses that do not also control for the race of the victim. The reason for such bias is that the vast majority of homicides in America are intra-racial vis-á-vis the defendant and victim. This means that because defendants in most white victim cases are also white, the usual form of race-of-victim discrimination, which treats white victim cases more punitively, has the effect of enhancing death-sentencing rates in the white defendant cases, not because of the defendant's race but because of the victim's race. Also, since the defendant in most minority-victim cases is a racial minority, race-of-victim discrimination biases downward the death-sentencing rate in the minority-defendant cases because the system treats minority-victim cases less punitively than it does white-victim cases.[231] It is important, therefore, (a) to assess any

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and mathematics). When the study disaggregated the data by the department of application, the selection rate for female applicants was higher than it was for male applicants both in the individual departments and overall. Peter J. Bickel et. al., *Sex Bias in Graduate Admissions: Data from Berkeley*, *reprinted in* STATISTICS AND PUBLIC POLICY 113-30 (William B. Fairley & Frederick Mosteller eds., 1977).

230. The two minority-victim cases prosecuted in greater Nebraska involved white defendants and neither advanced to a penalty trial. The race-of-victim analysis in the report of this research that we submitted to the Nebraska Commission on Law Enforcement and Criminal Justice, *supra* note 1, differs somewhat from the analysis in this section because its focus is statewide rather than on the major urban counties.

231. Research from Georgia in the 1970s clearly reflects this pattern. Those data documented substantial race-of-victim effects. As a result, the unadjusted data

evidence of race-of-victim discrimination in Nebraska's major urban counties and (b), if such disparities are found to exist, to estimate minority-defendant disparities after controlling for the race of the victim.

In the major urban counties of Nebraska, the distribution of death-eligible cases on the basis of the defendant/victim racial combination differs from the usual pattern in that nearly one-half of the minority-defendant cases involved a white victim.[232] However, there is evidence of the usual pattern in which minority-victim cases are treated less punitively than white-victim cases, an outcome that reduced somewhat the overall death-sentencing rate in the black-defendant cases. However, the adjusted white-victim disparities are based on small samples and are not statistically significant. For that reason they do not support an inference of disparate treatment based on the race of the victim.

Figure 13 presents the evidence. Part I documents the key charging and sentencing outcomes controlling for the defendant/victim racial combination, while Parts II and III report the unadjusted and adjusted white-victim disparities among all of the cases. The place to begin is Column C, Row 5, which indicates an overall death sentencing rate of .18 (20/112) among all death-eligible cases. Within Column C, a comparison of Rows 1 and 2 (minority defendants) with Rows 3 and 4 (white defendants) documents higher death sentencing rates in the white-defendant cases than in the black-defendant cases, which is consistent with the race-of-defendant findings reported above.[233] In addition, a comparison of Column C, Rows 1 and 2 reveals a partial explanation for the lower death-sentencing rate in the minority-defendant cases, i.e., the .09 (2/23) rate in the minority-defendant/minority-victim cases (Row 2) is one-half the .18 rate reported for the minority-defendant/white-victim cases (Row 1).[234] However, this unadjusted 9-

showed a considerably *lower* death-sentencing rate in the black-defendant cases than in white-defendant cases. EJDP, *supra* note 11, at 315, tbl. 50, n.1 (among all death-eligible cases, the unadjusted death-sentencing rate for the white-defendant cases was .10 versus .07 for the minority defendant cases). However, upon the introduction of controls for the race of the victim, black defendants faced only a slightly reduced risk of being sentenced to death, while a substantial white-victim effect persisted in the data. In a logistic regression analysis, which controlled for 39 non-racial variables, the black-defendant effect was slightly negative (an odds multiplier of .94, $p.=.88$), while the race-of-victim effect was strongly positive (an odds multiplier of 4.3, $p.=.003$). *Id.* at pp. 319-20, tbl. 52.

232. 49% (22/45) of the minority-defendant cases involved a white victim, while only 7% (5/67) of the white-defendant cases had a minority victim. As noted above, we limit this analysis to the major urban counties of the state because only two white-victim cases were prosecuted in greater Nebraska.

233. *Supra* subsection VII.B.3.

234. If the death sentencing rate in the minority-defendant/minority-victim cases had been the same as the rate in the minority-defendant/white-victim cases, the overall black-defendant death sentencing rate would have been .18 (8/45) instead of

percentage point white-victim disparity is based on small samples and is not statistically significant.

Columns A and B of Part I document that the principal source of the less punitive treatment in the minority-defendant/minority-victim cases is the judicial death-sentencing decisions. Specifically, Row 2, Column A, indicates that these cases advanced to a penalty trial at only a slightly lower rate, .57, than the .60 overall average rate shown in Row 5. In contrast, Column B, Row 2, reports a judicial death-sentencing rate of .15, which is only one-half the .30 overall rate shown in Row 5. It was the combined effects of these two outcomes that produced the .09 overall death-sentencing rate reported in Column C, Row 2 for the minority-defendant/minority-victim cases, which is one-half the overall rate of .18 (20/112) shown in Row 5.

Part II of Figure 13 presents the unadjusted white-victim disparities among all cases in the major urban counties. The results show weak race-of-victim effects (5 percentage points) in the prosecutorial decisions (Column A) and a slightly larger effect in the judicial decisions (9 percentage points). The overall unadjusted white-victim disparity among all death-eligible cases shown in Column C is 9 points and the ratio of the death-sentencing rates is 1.8 to 1 (.20/.11).

The adjusted race-of-victim effects shown in Part III of Figure 13 tell a similar story. With the introduction of controls for offender culpability, the white-victim disparity in the prosecutorial decisions is 7 points (Column A). In the judicial decisions (Column B), the disparity is 13 points with a 1.7 to 1 ratio (.31/.18). These results are consistent with a pattern and practice of disparate treatment based on the race of the victim. They are also consistent with a pattern of race-of-victim effects documented in many states.[235] However, because of the small samples involved none of the disparities is statistically significant.[236]

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the actual rate of .13 (6/45), both of which are lower than the overall rate in the white defendant cases of .21 (14/67).

235. *Supra* note 11.

236. As is suggested by the data in Part I of Figure 13, race-of-victim effects are concentrated in the minority-defendant cases for which we have a sample of 45 cases that are almost evenly split between the white victim (n=22) and minority-victim (n=23) cases. The adjusted white-victim disparities in the rates that these cases advance to penalty trial are 7 points (.60 v. .53) controlling for the number of aggravating circumstances in the cases and 19 points (.63 v. .44) controlling for the regression-based scale. Neither of these adjusted disparities is statistically significant. Nor are the adjusted white-victim disparities in the judicial death-sentencing decisions statistically significant. Those disparities are 24 points (.33 v. .09) controlling for both the number of aggravating circumstances in the cases and the regression-based scale. For the death-sentencing rates among all death-eligible cases, the disparities controlling for these two measures are 4 points (.12-.08) and –3 points (.11-.14) respectively.

For the white-defendant cases with only 5 minority victim cases, controlling for the two measures of offender culpability applied above, the adjusted disparities in the rates that cases advance to penalty trial are 3 points (.59-.56) and 13

FIGURE 13

CHARGING AND SENTENCING OUTCOMES CONTROLLING FOR THE DEFENDANT/VICTIM RACIAL COMBINATION (PART I) AND WHITE-VICTIM DISPARITIES (PARTS II & III) IN NEBRASKA'S MAJOR URBAN COUNTIES: NEBRASKA, 1973-1999

Part I. Charging and Sentencing Outcomes Controlling for the Race of the Defendant and Victim

	A Rates at Which Death-Eligible Cases Advance to a Penalty Trial	B Rates at Which Death Sentences are Imposed in Penalty Trials	C Death-Sentencing Rates Among All Death Eligible Cases
1. Minority Defendant/ White Victim	.64 (14/22)	.29 (4/14)	.18 (4/22)
2. Minority Defendant/ Minority Victim	.57 (13/23)	.15 (2/13)	.09 (2/23)
3. White Defendant/ White Victim	.60 (37/62)	.35 (13/37)	.21 (13/62)
4. White Defendant/ Minority Victim	.60 (3/5)	.33 (1/3)	.20 (1/5)
5. All Cases	.60 (67/112)	.30 (20/67)	.18 (20/112)

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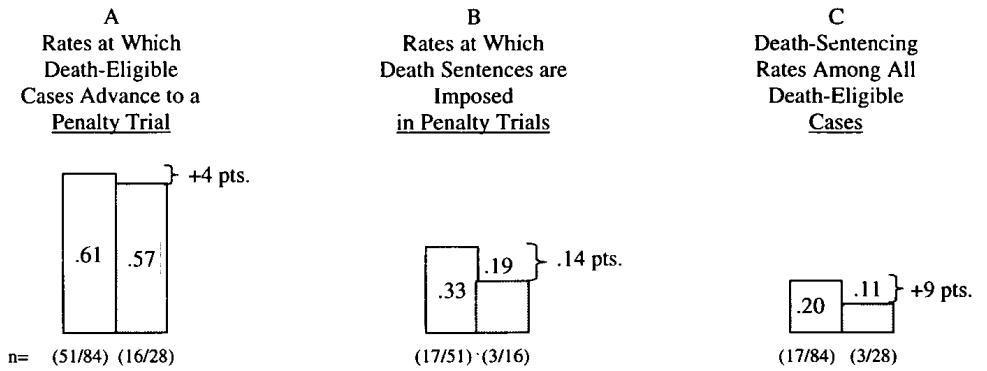
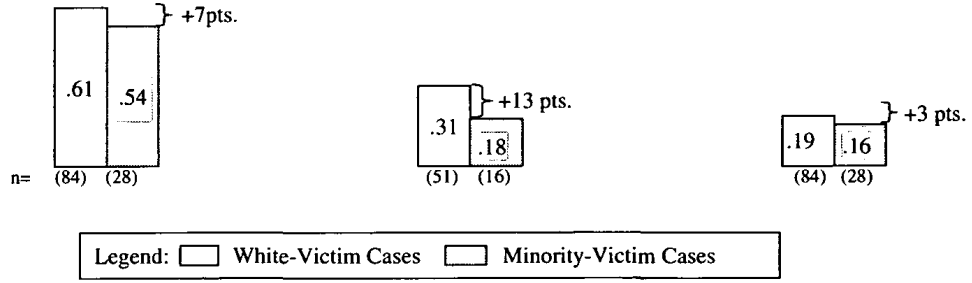
FIGURE 13 (CONTINUED)

Part II. Unadjusted White-Victim Disparities



Part III. White-Victim Disparities Adjusted for Offender Culpability Measured with Regression-Based Scales



For the bottom line of death sentencing among all death-eligible cases in the analysis (Column C), the disparity is only 3 points and the ratio of the rates declined to 1.2 to 1 (.19/.16).[237]

We also estimated race-of-defendant effects in the major urban counties, controlling for the race-of-the victim. The results of those analyses, which are consistent with the data in Part I of Figure 13, revealed no significant minority-defendant effects in either charging or sentencing outcomes.[238]

The data, therefore, do not support a finding that a pattern and practice of race-of-victim discrimination exists in either charging or sentencing decisions in the major urban counties. These results also indicate that the absence of data suggesting a pattern and practice of disparate treatment based on the race of the defendant is not an artifact of a failure to control for the race-of-victim effects in the system.

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points (.59-.46) respectively; the adjusted disparities in the judicial death-sentencing rates are 8 points (.33-.25) and 12 points (.34-.22); and the adjusted death sentencing disparity among all death-eligible cases are –5 points (.20-.25) and 8 points (.21-.13) respectively. None of these disparities is statistically significant.

237. Supplemental estimates computed with three alternative measures of defendant culpability reveal similar results with respect to both charging and sentencing decisions. Concerning race-of-victim effects in the rates that cases advance to penalty trial in the major urban counties, controlling for the number of aggravating circumstances, the white-victim disparity is 7 points (NS); controlling for the number of aggravating and mitigating circumstances in the cases, the white-victim disparity is 21 points (NS); controlling for the salient factors measure, the disparity is 14 points (NS).

For the judicial death-sentencing rates in the major urban counties, controlling for the number of aggravating circumstances in the cases, the white-victim disparity is 18 points (NS); controlling for the number of aggravating and mitigating circumstances, the white-victim disparity is 24 points (NS); controlling for the salient factors measure, the disparity is 20 points (NS).

For death sentences imposed among all death-eligible cases in the major urban counties, controlling for the number of aggravating circumstances in the cases, the white-victim disparity is 6 points (NS); controlling for the number of aggravating and mitigating circumstances, the white-victim disparity is 14 points (NS); controlling for the salient factors measure, the disparity is 12 points (NS).

238. Among the white-victim cases, there are 62 white defendants and 22 minority defendants. After adjustment for the number of aggravating circumstances in the cases and the regression-based scales, the adjusted minority-defendant disparities in the rates that cases advance to penalty trial are 3 points (.62-.59) and (.61-.58) respectively. However, the adjusted minority-defendant disparities in the judicial sentencing decisions are mixed: +8 points (.41-.33) and –9 points (.25-.34). The adjusted minority-defendant disparities among all death-eligible cases are zero points (.20-.20) and –8 points (.14-.22) using the two measures of offender culpability referred to above, none of which is statistically significant.

Among the minority-victim cases (n=28), the sample of white defendants (n=5) is too small to support a meaningful analysis. To the extent that adjusted disparities exist in these cases, if anything, they suggest more punitive treatment of the white defendants, although none of them is significant.

D. Evidence of Minority-Defendant/White-Victim Disparate Treatment

Research in other jurisdictions and many legal practitioners suggest that even if the data fail to support "main" race-of-defendant or race-of-victim effects in the system, one is likely to see a significant race effect when minorities cross the racial divide and kill whites.

The data in Figure 14 test the hypothesis that minorities who kill whites are treated more punitively than are all other racial combinations of defendants and victim. The unadjusted disparities in Part I, Column A support this hypothesis with respect to the prosecutorial charging decisions, i.e., a 16-percentage point higher penalty-trial rate for minority defendants with white victims. However, Column B shows no race effects in the sentencing decisions. The combined effect of these two decision points produces the 5-percentage point minority-defendant/white-victim disparity among all death-eligible cases shown in Column C.

The adjusted effects shown in Part II are comparable to the Part I results, except for the 13-point disparity shown in Column B; however, the bottom line in Column C shows no effect at all.[239] These data, therefore, fail to support an inference of disparate treatment in judicial sentencing decisions. Nevertheless, because the statewide results of the prosecutorial charging decisions (Part I, Column A) are consistent with a pattern and practice of disparate treatment, we gave them closer scrutiny in Figures 15 and 16.

The Figure 15 data—Part I (plea bargains) and Part II (advancing to penalty trial)—show more punitive effects for minority defendants with white victims. The disparities are primarily concentrated in the single aggravator category (Column B) where the disparities are large and statistically significant.

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239. The adjusted disparities computed with our supplemental measures of offender culpability are to the same effect. Concerning the impact of the defendant/victim racial combination on the rates that cases advance to penalty trial, controlling for the number of aggravating and mitigating circumstances in the cases, the statewide black-defendant/white-victim disparity is –2 points (NS); controlling for the salient factors measure, there is no disparity; controlling for the regression-based scale, the disparity is 7 points (p=.09).

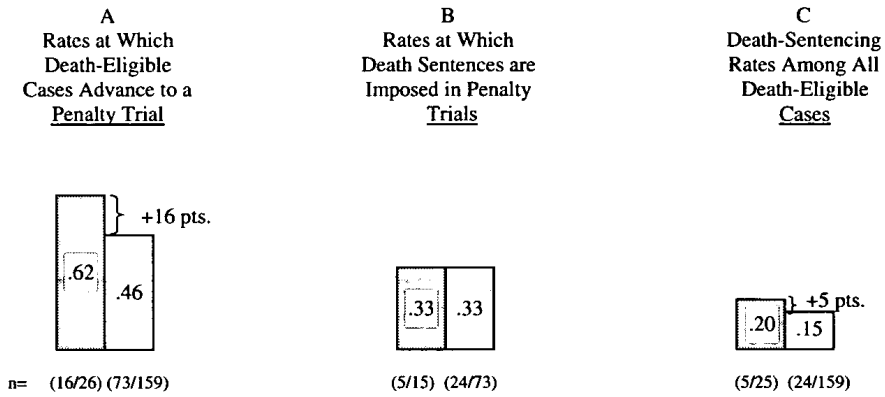
For the judicial death-sentencing rates, controlling for the number of aggravating and mitigating circumstances, the minority-defendant/white-victim disparity is –14 points (NS); controlling for the salient factors measure, the disparity is 6 points (NS); controlling for the regression-based scale, the disparity is –3 points (NS).

For death sentences imposed among all death-eligible cases, controlling for the number of aggravating and mitigating circumstances, the minority-defendant/white-victim disparity is –4 points (NS); controlling for the salient factors measure, the disparity is 3 points (NS); controlling for the regression-based scale, the disparity is –4 points (NS).

FIGURE 14

MINORITY-DEFENDANT/WHITE-VICTIM DISPARITIES IN CAPITAL CHARGING AND SENTENCING OUTCOMES: NEBRASKA, 1973-1999

Part I. Unadjusted Disparities



Part II. Disparities Adjusted for Number of Aggravating Circumstances

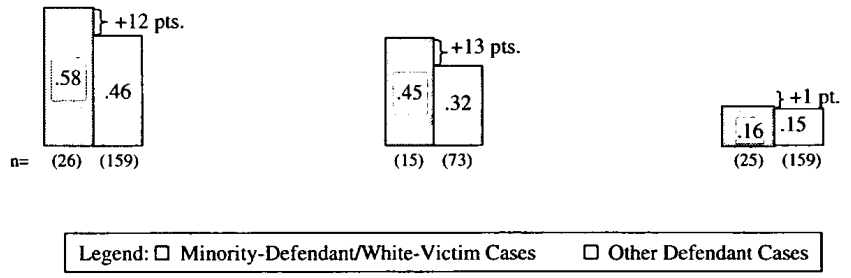
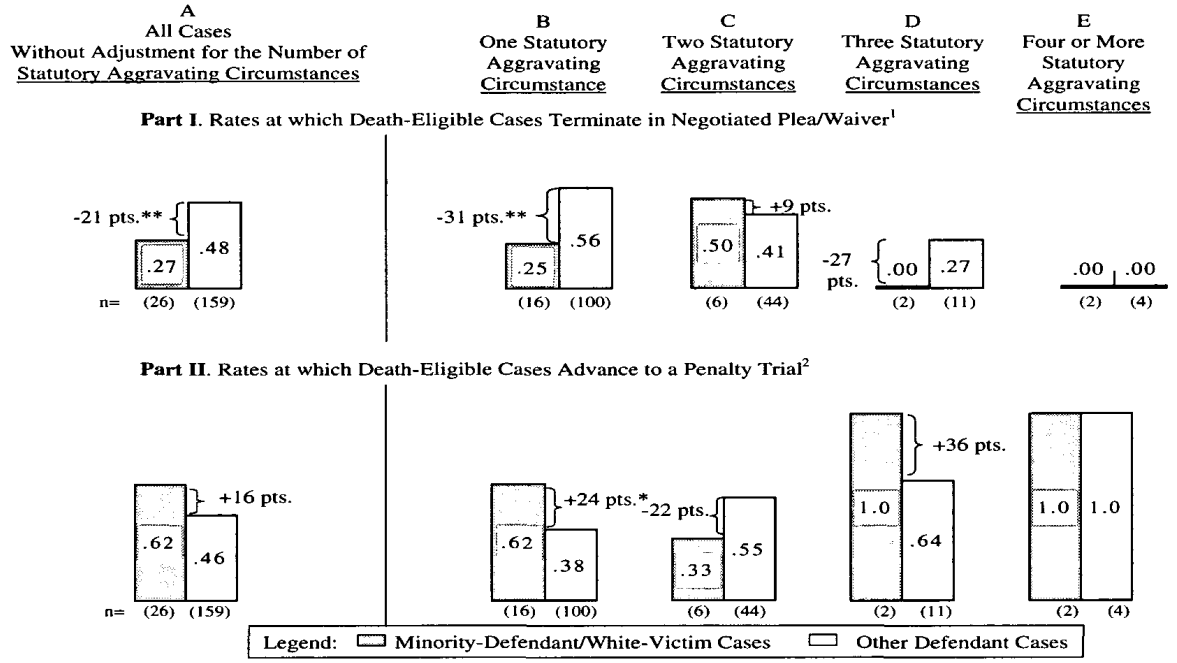


FIGURE 15

STATEWIDE MINORITY-DEFENDANT/WHITE-VICTIM DISPARITIES IN THE RATES AT WHICH DEATH-ELIGIBLE CASES (PART I) TERMINATE IN A NEGOTIATED PLEA/WAIVER AND (PART II) ADVANCE TO A PENALTY TRIAL, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999



[1] The overall average minority-defendant/white-victim disparity controlling for the number of statutory aggravating circumstances is -19 percentage points (.29 - .48), significant at the .06 level.

[2] The overall average disparity controlling for the number of statutory aggravating circumstances is +12 percentage points (.58 - .46), significant at the .18 level.

Level of Significance of Disparity: * = .10; ** = .05.

Figure 16 introduces controls for the place of prosecution. In the major urban counties (Part I), there is a modest, but not significant, effect in the rates that minority-defendant/white-victim cases advance to a penalty trial (Column B) as well as in the penalty trial death-sentencing rates (Column C).[240] However, Column D indicates that after adjustment for defendant culpability in a scale based on an analysis of death sentences imposed among all death-eligible cases, the death-sentencing rate is lower for minority defendants in white-victim cases than it is for all other defendant/victim racial combinations.[241]

The data for greater Nebraska (Part II) show minority-defendant/white-victim effects that are consistent with a theory of disparate treatment (Column D), but because of the small disparities based on very small samples, they fall well short of establishing a pattern and practice of differential treatment of similarly situated defendants.[242]

240. When the comparison is between Douglas/Sarpy Counties and Lancaster County, the data indicate a 10 pt. non-significant (p=.44) disparity in Douglas/Sarpy with a higher penalty-trial rate in the minority-defendant/white-victim cases. In Douglas County, the rate for the minority defendants with white victims is 5 points lower (p=.86).

241. The disparities estimated with our supplemental measures of culpability, the results are comparable. Concerning the impact of the defendant-victim racial combination on the rates that cases advance to penalty trial in major urban counties, controlling for the number of aggravating and mitigating circumstances in the cases, the minority-defendant/white-vicitm disparity is –8 points (NS); controlling for the salient factors measure, the disparity is –17 points (NS); controlling for the regression-based scale, the disparity is +3 points (NS). For the judicial death-sentencing rates, controlling for the number of aggravating and mitigating circumstances, the minority-defendant/white-victim disparity in the major counties is –7 points (NS); controlling for the salient factors measure, the disparity is –6 points (p=.01); controlling for the regression-based scale, the disparity is –3 points (NS).

For death sentences imposed among all death-eligible cases, controlling for the number of aggravating and mitigating circumstances, the minority-defendant/white-victim disparity in the major urban counties is –6 points (NS); controlling for the salient factors measure, the disparity is –5 points (NS); controlling for the regression-based scale, the disparity is –6 points (NS).

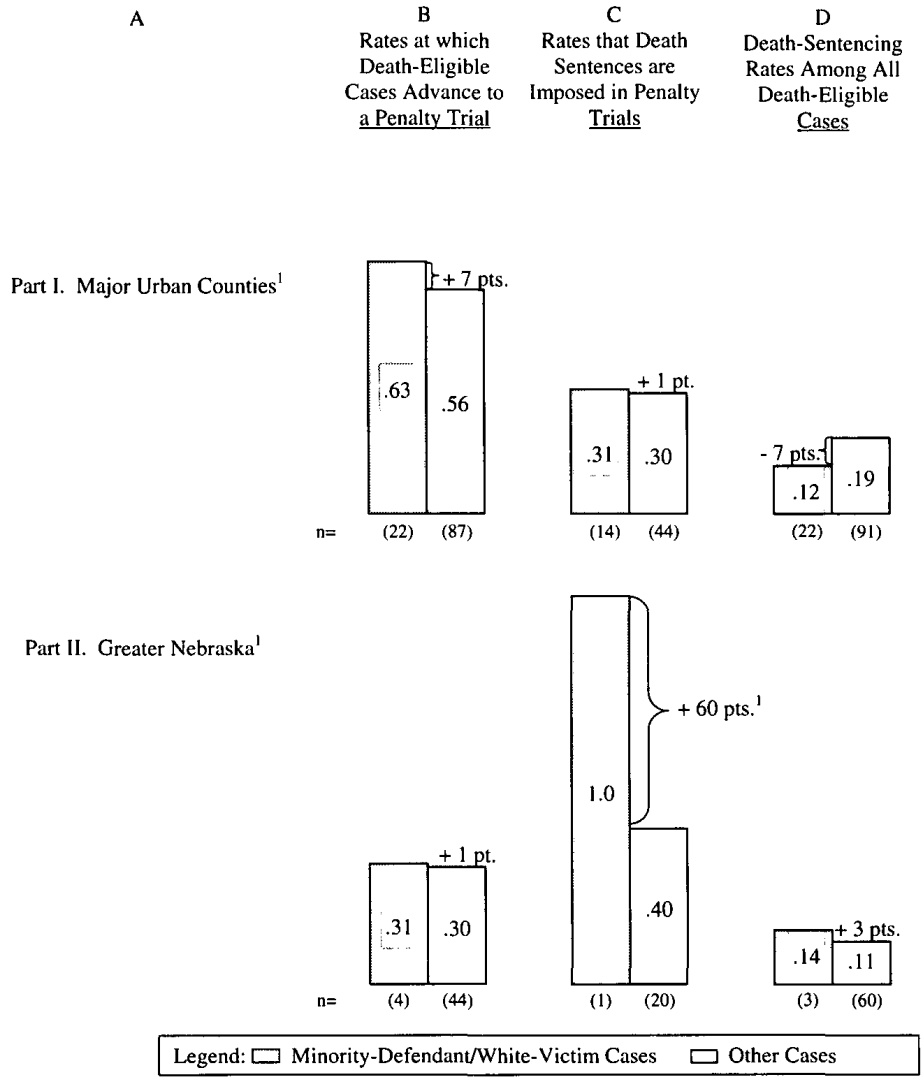
242. The disparities estimated in greater Nebraska with controls for our supplemental measures of offender culpability are comparable. Note that there were four minority-defendant/white-victim cases, one of which advanced to a penalty trial, and resulted in a death sentence. Concerning the impact of the defendant-victim racial combination on the rates that cases advance to penalty trial in greater Nebraska, controlling for the number of aggravating and mitigating circumstances in the cases, the minority-defendant/white-victim disparity in greater Nebraska is –18 points (NS); controlling for the salient factors measure, the disparity is –7 points (NS); controlling for the regression-based scale, the disparity is –9 points (NS).

Because only one minority-defendant/white-victim case advanced to a penalty trial, we conducted no additional analyses of that outcome.

For death sentences imposed among all death-eligible cases, controlling for the number of aggravating and mitigating circumstances, the minority-defendant/white-victim disparity in greater Nebraska is –7 points (NS); controlling for

FIGURE 16

MINORITY-DEFENDANT/WHITE-VICTIM DISPARITIES IN CHARGING AND SENTENCING DECISIONS IN MAJOR URBAN COUNTIES AND GREATER NEBRASKA, CONTROLLING FOR DEFENDANT CULPABILITY WITH A REGRESSION-BASED SCALE: NEBRASKA, 1973-1999



[1] The unadjusted disparity is 21 percentage points — .50 (2/4) for the minority-defendant/white-victim cases v. .29 (20/68) for the "other cases." Twenty-four "other cases" were omitted from the adjusted analysis reported here because of an absence of minority-defendant/white-victim cases at the same level of culpability.

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the salient factors measure, the disparity is –2 points (NS); controlling for the regression-based scale, the disparity is 1 point (NS).

Our overall conclusion is that the minority-defendant/white-victim disparities in the statewide data are a byproduct of the fact that 85% (22/26) of the minority defendants with white victims are prosecuted in the major urban counties, which advance all cases to penalty trial at much higher rates than is the case in the counties of greater Nebraska. Just as it did in the analysis of the main minority defendant effects in statewide prosecutorial decisionmaking, the introduction of controls for the place of prosecution explains away the minority-defendant/white-victim effect.

Finally, what is a likely explanation for the failure of our findings to support an inference of a pattern and practice of disparate treatment on the part of Nebraska's prosecutors and judges? One possibility is weak methodology and insufficient data on the cases. We consider this implausible because the same methodology has documented compelling evidence of disparate treatment in other jurisdictions and it has produced striking evidence in this study of disparate treatment based on the SES of the victim. However, as noted earlier, the statistical methodology that we used cannot detect disparate treatment in a small number of cases. To detect disparate treatment there must be a quite strong pattern and practice of it across a substantial number of cases.

Another possible explanation is that prosecutors and sentencing judges are sensitive to the danger of unconscious bias and make a conscious effort to treat cases evenhandedly. Race discrimination is widely perceived to be an important legal and political issue in capital sentencing and, at least with respect to race-of-defendant discrimination, the law on the issue is clear. A plausible explanation, therefore, is that the law has had a deterrent effect in controlling the impact of any bias, conscious or unconscious, that may have otherwise been reflected in the decisions.

The results of this analysis stand in sharp contrast to data from Georgia and Philadelphia, which document race-of-defendant and race-of-victim effects in jury sentencing.[243] The Nebraska results, therefore, support the *Proffitt* hypothesis that judicial sentencing is likely to be more principled and consistent than jury sentencing in capital cases.

VIII. EVIDENCE OF THE DISPARATE IMPACT OF STATE LAW AND POLICY ON MINORITY DEFENDANTS

The preceding analysis does not support a theory of disparate treatment in capital charging and sentencing decisionmaking on the

243. *See* EJDP, *supra* note 11 (detailing race-of-victim effects in jury and prosecutorial decision making); *Philadelphia Study*, *supra* note 10 (detailing race-of-defendant and race-of-victim effects in jury sentencing decisions).

basis of the race of the defendant or victim. However, the impact of differential prosecutorial charging policies in the major urban counties and greater Nebraska presents a good example of an "adverse disparate impact" on racial minorities statewide. The adverse impact exists even though there is no significant evidence of the disparate treatment of minorities within either the major urban counties or greater Nebraska. We consider those results in section A below.

Also, among the 24 offenders who have been sentenced to death in Nebraska, in terms of the three such defendants from that group who have been executed to date, there is a disparity that adversely affects minority defendants. We consider those results in section B below.

A. Evidence of a Statewide Disparate Impact on Minority Defendants in the Rates that Death-Eligible Cases Advance to Penalty Trial

The data document a statewide adverse disparate impact on minority defendants that flows from a combination of three things: (1) state law, which delegates to local prosecutors broad discretion in the prosecution of death-eligible cases, (2) a significant difference between the major urban counties and the counties of greater Nebraska in the rates that prosecutors advance death-eligible cases to penalty trials, and (3) the fact that 90% of Nebraska's minority defendants in death-eligible cases are prosecuted in the major urban counties of the state.

Nebraska law and the law of all other states of which we are aware delegates extremely broad discretion to prosecutors in capital charging decisions.[244] In Nebraska, as noted above, prosecutorial discretion appears to be exercised without regard to charging practices in other counties. As a result, there is significant variation in the rates at which prosecutors advance cases to penalty trial.[245]

Most striking in this regard is the difference in those rates between the major urban counties and greater Nebraska in terms of the rates that the death penalty is waived and cases are advanced to penalty trials. For both outcomes, Figure 17 documents the unadjusted disparities as well as the disparities computed after adjustment for offender culpability. The bottom line is that after adjustment for offender culpability, Part II, Column B indicates that death-eligible defendants in the major urban counties are more than twice as likely (.58/.28) to advance to a penalty trial.[246]

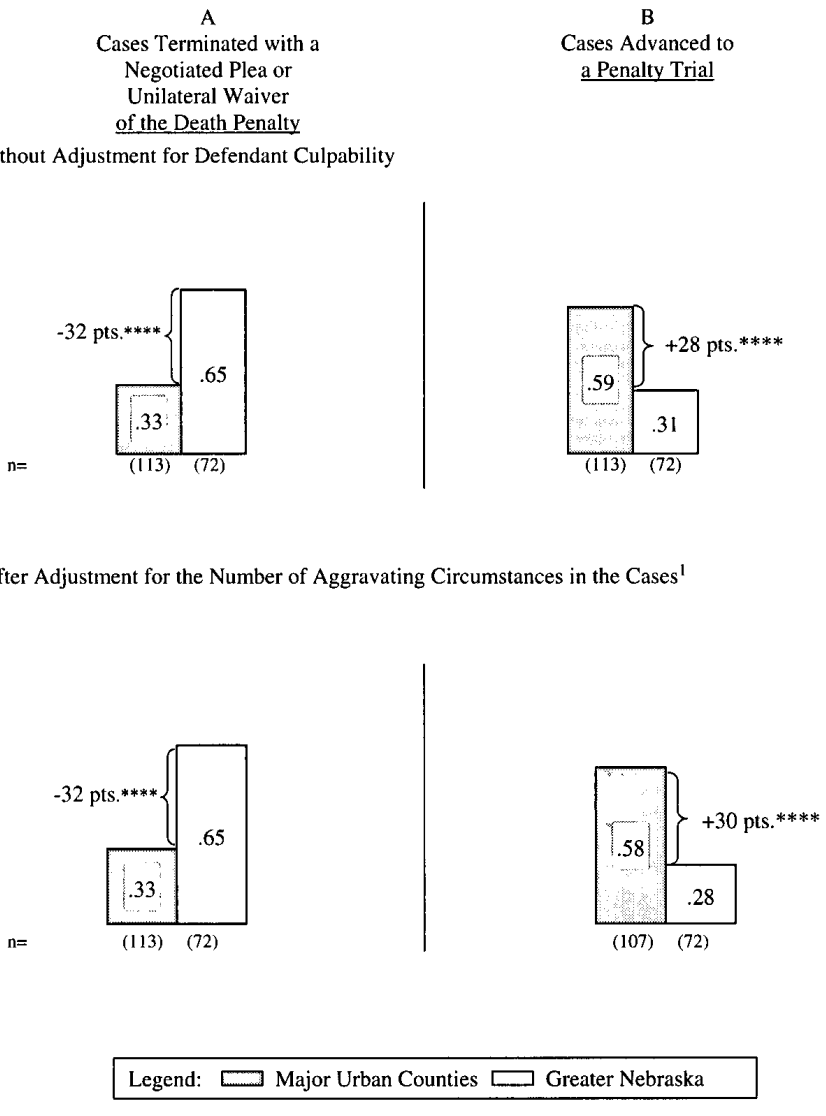
244. There is precedent in the employment context for treating the impact of a discretionary stage in a decisionmaking system as a source of disparate impact. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

245. Among the 31 counties with one or more death-eligible cases, the average penalty-trial rate was .48 (89/185) ranging from .66 (48/73) to .0 (in 14 counties).

246. The disparities estimated with our supplemental measures of offender culpability are to the same effect. Geographic disparities in prosecutorial charging and plea

FIGURE 17

GEOGRAPHIC DISPARITIES IN THE RATES THAT CASES (A) TERMINATE IN A NEGOTIATED PLEA OR UNILATERAL WAIVER OF THE DEATH PENALTY AND (B) ADVANCE TO A PENALTY TRIAL: NEBRASKA, 1973-1999



Level of Significance of Disparity: ****=.0001

[1]*See infra* Figure 29, page 625, note 4 for an explanation of the disparity between the sample sizes in Column B, Parts I and II of this Figure.

The second relevant datum is that 90% (45/50) of the minority death-eligible defendants are prosecuted in Nebraska's major urban counties. Figure 18 documents the consequences of the interaction between (a) the higher penalty-trial rates in the major urban counties and (b) the disproportionate concentration of minority defendants in those counties. The result shown in Column B is a substantially higher penalty-trial rate in minority-defendant cases statewide, i.e., 32% (14/44) higher without adjustment for defendant culpability (Part I) and 36% (16/44) higher when the rates are adjusted for defendant culpability (Part II). This adverse impact occurs in spite of the evidence presented above suggesting a policy of evenhanded treatment of minority defendants in both areas of the state.[247]

Figure 19 indicates that the disparate impact against minority defendants is concentrated in the cases with one or two aggravating circumstances. The minority-defendant disparity among these cases is the principal source of the overall 14-point minority-defendant disparity shown in Column A of the figure.[248]

This adverse impact on minorities is analogous to the adverse impact on minorities, noted above, that exists in states in which the level of expenditures for public education are almost solely within the discretion of local school boards and there is wide variation in the tax bases available to support public education. This often results in lower expenditures per pupil in predominately minority communities than in predominately white communities.

Given the adverse impact of prosecutorial charging decisions on minorities, statewide, one could reasonably expect to see an adverse impact against minorities in the imposition of death sentences among all death-eligible cases. Indeed, if sentencing judges imposed death

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bargaining decisions are substantial after adjustment for all of our measures of defendant culpability. For the rates that cases result in a negotiated plea, controlling for the number of aggravating and mitigating circumstances in the cases, the disparity in rates between the major urban counties and greater Nebraska is −31 points (p=.0001); controlling for the salient factors measure, the disparity is −29 points (p=.0001); controlling for a regression-based scale, the disparity is −34 points (p=.0001); in the logistic regression analysis in Table 4, Column C, the odds multiplier for the major urban county variable is .27 and statistically significant.

Concerning the rates that cases advance to penalty trial, controlling for the number of aggravating and mitigating circumstances, the major urban county disparity is 31 points (p=.0002); controlling for the salient factors measure, the disparity is 31 points (p=.0001); controlling for the regression-based scale, the disparity is 32 points (p=.0001); in the logistic regression analysis in Table 4, Column E, the odds multiplier for the major urban county variable is 2.8 and statistically significant.

247. *Supra* subsection VII.B.3.

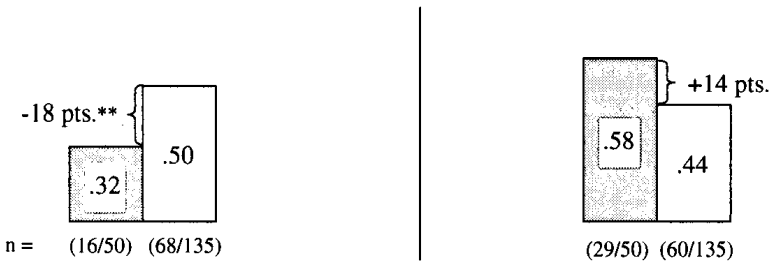
248. When the regression-based scale is used, the data document a similar effect concentration of disparities among the cases with weak and middling levels of culpability.

FIGURE 18

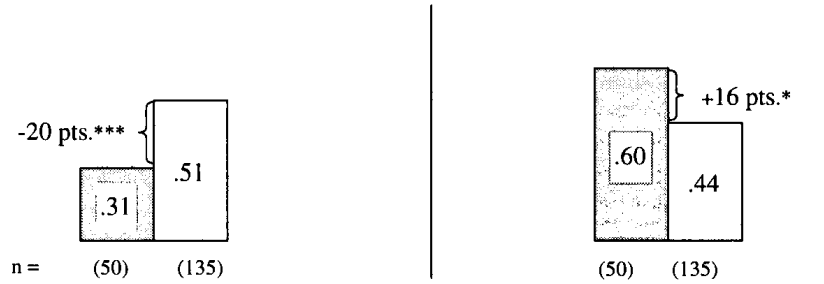
STATEWIDE MINORITY-DEFENDANT DSPARITIES IN THE RATES THAT DEATH-ELIGIBLE CASES TERMINATE IN A NEGOTIABLE PLEA OR A UNILATERAL WAIVER OF THE DEATH PENALTY (COLUMN A) AND ADVANCE TO A PENALTY TRIAL (COLUMN B): NEBRASKA, 1973-1999

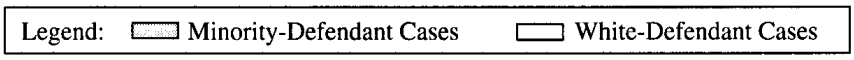
A	B
Cases Terminated with a Negotiated Plea or a Unilateral Waiver of the Death Penalty	Cases Advanced to a Penalty Trial

Part I: Without Adjustment for Defendant Culpability



Part II: After Adjustment for the Number of Aggravating Circumstances in the Cases



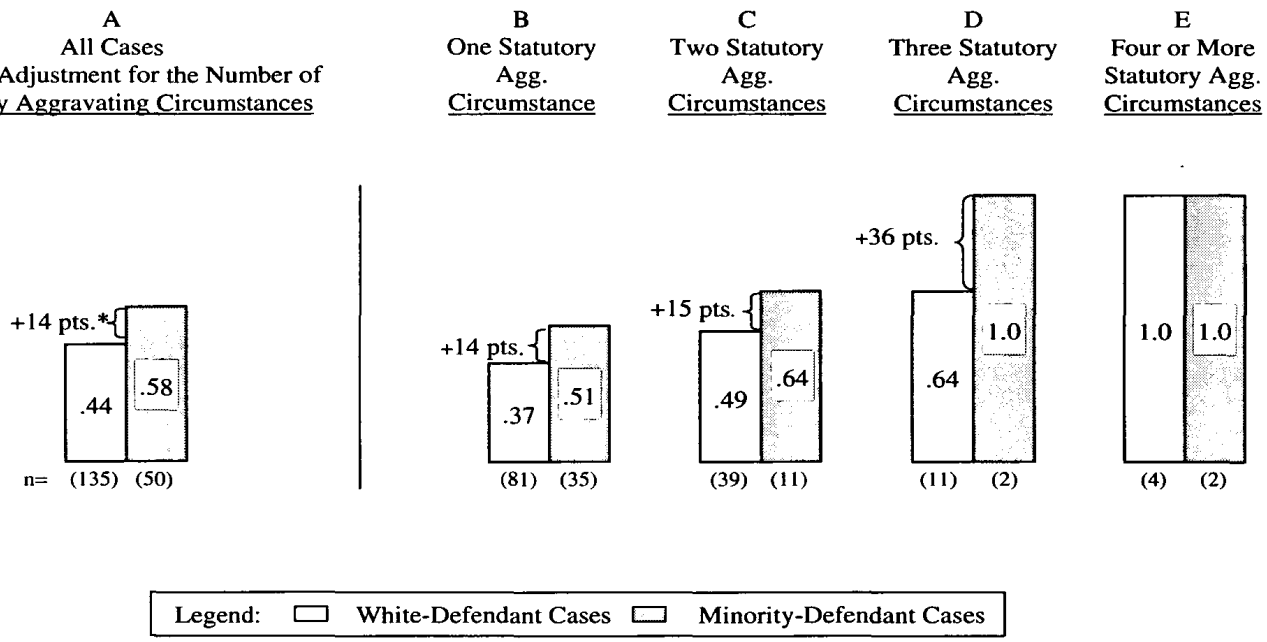


Level of Significance of Disparity: *= .10; ** = .05; *** =.01.

FIGURE 19

MINORITY-DEFENDANT DISPARITIES IN THE RATES THAT CASES ADVANCE TO A PENALTY TRIAL, CONTROLLING FOR THE NUMBER OF AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999

(the numbers in the bars indicate the rates at which death-eligible cases advance to a penalty trial[1])



[1]After adjustment for the number of statutory aggravating circumstances, the overall white-defendant disparity was -15 percentage points (.44 - .59), significant at the .06 level.
Level of Significance of Disparity: * = .10.

sentences at comparable rates in white- and minority-defendant cases, this is exactly what one would see. However, as the data in Parts I and II of Figure 7 indicate, this does not occur. The reason it does not is that in spite of the more punitive treatment of the minority defendants statewide (Column A), the penalty-trial judges sentence minority defendants to death at a *lower* rate than they do white defendants (Column B). The bottom line results for the state as a whole are shown in Column C. These data reveal only small, non-significant and *inconsistent* disparities on the order of 2 and 3 percentage points. These results clearly indicate that the race-of-defendant disparities in the rates that cases advance to penalty trial statewide do not produce a statewide adverse impact in the rates that death sentences are imposed among all death-eligible cases.[249]

What then are the implications of the adverse impact on minorities flowing from the sharp disparities in the rates that death-eligible cases advance to penalty trial in the major urban counties as contrasted to greater Nebraska? Under existing law, the adverse impact raises no legal claim. But does it have moral implications? One view is that the adverse disparate impact on minority defendants *is not* a matter of moral concern because it is merely an anomaly resulting from the fact that racial minorities primarily reside in the state's major urban areas.

An alternative view is that the disparate impact *is* a matter of moral concern for two reasons. The first is that, notwithstanding its demographic origins, the adverse impact places a significant and disproportionate burden on minority defendants.[250] The second concern is that the breadth of discretion permitted prosecutors under state law, which is the legal source of the disparate impact, has not been justified in terms of necessity. One possible justification for existing law is a long tradition supporting the broad exercise of prosecutorial

249. On the issue of geographic disparities in sentencing outcomes, we estimated similar results controlling for alternative measures of defendant culpability. Controlling for the number of aggravating and mitigating circumstances in the cases, the major urban county disparity in judicial death-sentencing rates is 5 points (NS); controlling for the salient factors measure, there is no disparity; controlling for the regression-based scale, there is no disparity; in the logistic regression analysis in Table 4, Column G, the odds multiplier for the major urban county variable is .95, and is not statistically significant. For death sentences imposed among all death-eligible cases, controlling for the number of aggravating and mitigating circumstances, the major urban county disparity is 9 points (NS); controlling for the salient factors measure, the disparity is 6 points (NS); controlling for the regression-based scale, the disparity is 4 points (NS). In the logistic regression analysis in Table 4, Column I, the odds multiplier for the major urban county variable is .93, and is not statistically significant.

250. In employment and housing discrimination law, a substantial adverse disparate impact against a protected group will not stand unless it can be justified by a compelling business interest.

discretion in all cases. However, given the severity of the penalty of death and the consequences of advancing a case to a penalty trial, one can legitimately question whether the cost can be justified by tradition alone.

Another possible justification for the disparate impact is the importance of penalty trials as a vehicle for delivering justice, i.e., death sentences in truly deathworthy cases. In this regard it is important to distinguish between cases involving a single aggravating circumstance and cases involving two or more aggravators. Figure 19 documents minority-defendant disparities in the rates that cases advance to a penalty trial, controlling for the number of aggravating circumstances in the cases. Column A reports an unadjusted disparity of 14 percentage points in all cases, a population that includes 50 minority and 135 white defendants. Column B documents the disparity in the one-aggravator cases, which embrace 63% (116/185) of the death-eligible cases and 70% (35/50) of the minority-defendant cases. Among this substantial group of cases, there is a significant disparate impact that contributes substantially to the overall disparity reported in Column A.

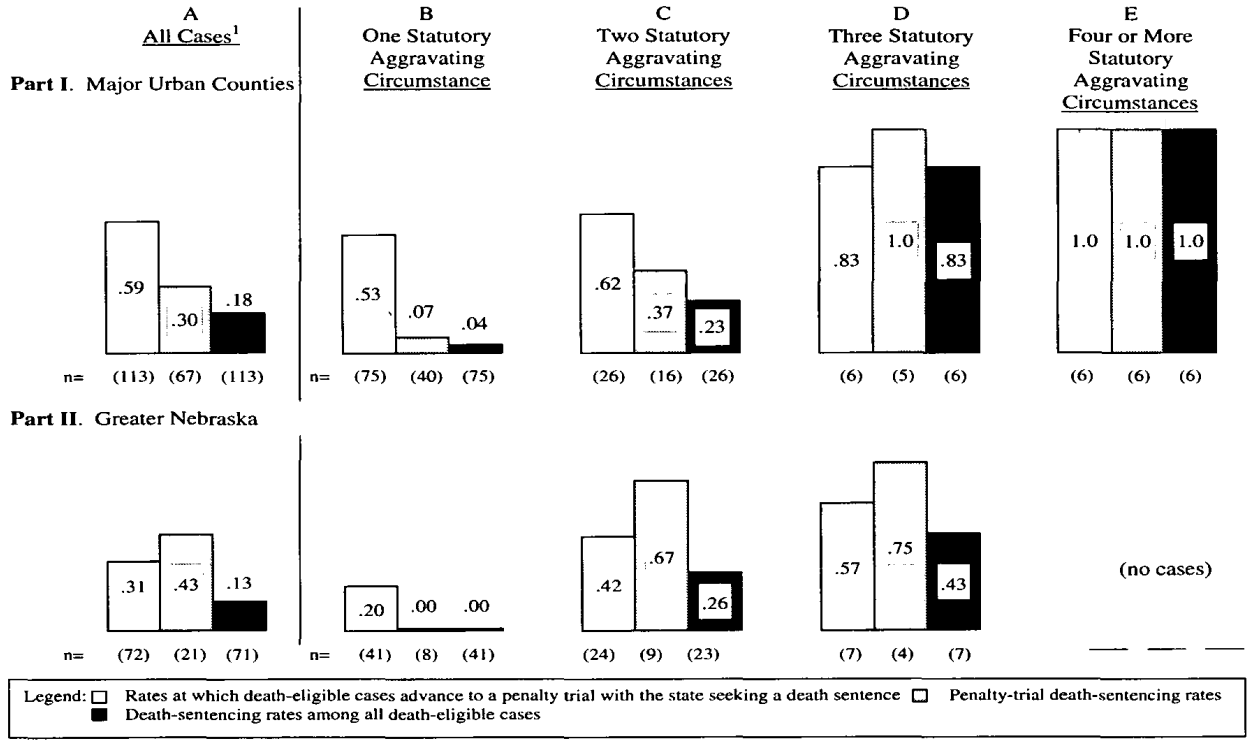
Figure 20 breaks down charging and sentencing outcomes by geography and the number of aggravating circumstances in the cases. Part I presents the results for the major urban counties and Part II presents the data for greater Nebraska. The data in Column B present the outcomes of the one-aggravator cases. Part II indicates that in greater Nebraska, 20% (8/41) of the single-aggravator cases advanced to penalty trial and none resulted in a death sentence. Part I indicates that in the major urban counties, 53% (40/75) of the single-aggravator death-eligible cases advanced to a penalty trial. But as is shown in Part I, Column B (darkest bar), only three of those 40 penalty trials resulted in a death sentence, yielding a death-sentencing rate of 4% (3/75). Moreover, each of those death sentences was reduced to a life sentence in the Nebraska courts.[251] The one-aggravator cases, which are a significant source of the disparate impact in the rates that cases advance to penalty trials, contribute, therefore, very little to the overall level of death penalty imposition in Nebraska as a whole and in the major urban counties.

The data underlying Figure 19 indicate that there is also a significant adverse impact among the 69 cases involving two or more aggravating circumstances. Specifically, there is a 19-percentage point (.74-.55) average minority-defendant disparate impact among those cases (not shown in Figure 19). However, there is a much stronger justification for the adverse impact on minority defendants in these cases be-

251. *Supra* note 76. *See infra* note 413 for evidence of concern in the Nebraska Legislature about the adverse disparate impact on minority defendants in the rates that similarly situated death-eligible cases advance to penalty trial.

FIGURE 20

CHARGING AND SENTENCING OUTCOMES IN MAJOR URBAN COUNTIES AND GREATER NEBRASKA, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999



[1] After adjustment for the number of aggravating circumstances in the cases: (a) the death-sentencing rate among all death-eligible cases was .15 in the major urban counties and .10 in greater Nebraska (p=.31); the penalty-trial death-sentencing rate was .27 in the major urban counties and .29 in greater Nebraska (p=.67); and the rate at which cases advance to a penalty trial was .58 in the major urban counties and .28 in greater Nebraska (p=.0001).

cause they produce 90% (26/29) of the death sentences that are imposed statewide and 85% (17/20) of the death sentences imposed in the major urban counties (not shown in Figure 19).

B. Evidence of an Adverse Impact on Minority Defendants in the Execution of Death-Sentenced Offenders

Among the 24 Nebraska offenders sentenced to death from 1973 through 1999, the data document a minority-defendant disparity in terms of the three defendants who have actually been executed. Specifically, the population of offenders sentenced to death consists of 7 minorities and 17 whites, while the population of defendants actually executed consists of one white defendant (Joubert) and two minority defendants (Williams and Otey).[252]

Figure 21 presents an overview of the minority defendant disparities in execution rates. The most striking statistic is shown in Part I, Column C: minority defendants constitute 67% (2/3) of the offenders who have been executed to date. When compared to their 33% (7/21) representation rate (Column A) among all defendants sentenced to death (who did not die on death row of natural causes), that statistic suggests that death-sentenced minority defendants face a higher risk of execution than do death-sentenced defendants who are white.

We recognize the small numbers underlying these statistics, but in terms of public perceptions, executions are the most visible and important outcome of the process. Of the three persons thus far executed, the two black defendants had white victims and the one white defendant had two white victims.[253]

In spite of the findings presented above, there is no compelling evidence of disparate treatment on the basis of the race of the defendant or the victim in Nebraska's charging and sentencing system. One would never know it, however, on the basis of these three cases. Though they may fail as proof of racial discrimination, their symbolic force is substantial. The political salience of these two executions motivates us to assess the extent to which it reflects a pattern and practice of disparate treatment against minority offenders or disparate impact against minority offenders who have been sentenced to

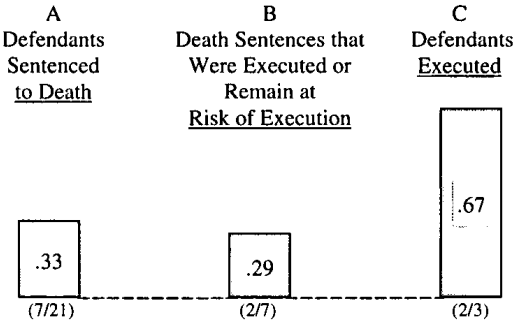
252. Four white offenders, Palmer, Moore, Ryan, and Lotter, remain on death row, and three white offenders died on death row of natural causes. The three white offenders on death row who died of natural causes are Harper, Perry, and Bjorklund. Unless otherwise indicated, as in Figure 23, these cases are excluded from the balance of this analysis. For the disposition of the death-sentenced cases without regard to race see *supra* Figure 1.

253. In an October 2001 hearing on the findings of this research in the Judicial Committee of the Nebraska Legislature, Senator Ernie Chambers focused on that statistic as the most graphic evidence of what he believed to be the racist character of the Nebraska system of capital punishment.

FIGURE 21

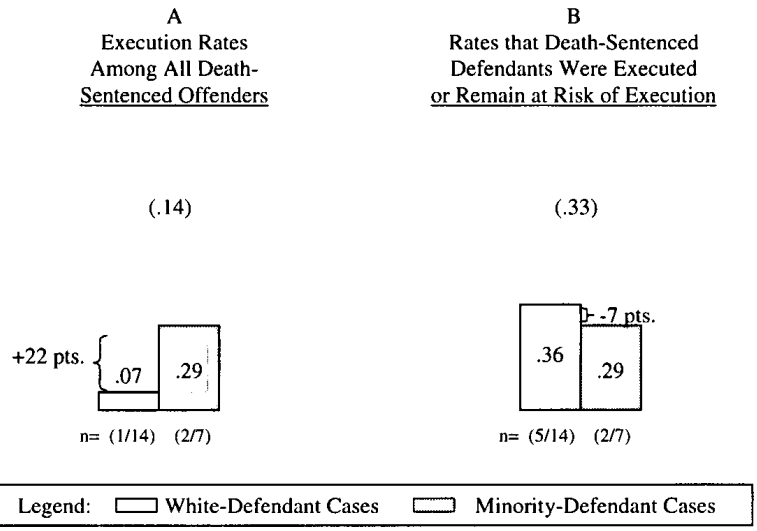
RACE-OF-DEFENDANT DISPARITIES IN EXECUTION RATES AMONG DEATH-SENTENCED OFFENDERS: NEBRASKA, 1973-1999[1]

Part I. Proportion of Minority Defendants at Successive Stages in the Post-Sentencing Process



Part II. Unadjusted Minority-Defendant Disparities in the Risk of Execution Among Death-Sentenced Offenders

(the number in parenthesis above each set of bars is the average rate for all cases)



[1]Three defendants, all white, who died of natural causes on death row (Harper, Perry, Bjorklund) are excluded from this Figure. The seven minorities sentenced to death were: Bird Head, Jones, Otey, Reeves, Stewart, Victor, and Williams. Otey and Williams were executed. There are no minorities currently on death row. The fourteen white defendants sentenced to death, who did not die on death row of natural causes, were: Anderson, Drinkwalter, Hochstein, Holton, Hunt, Joubert, Lotter, Moore, Palmer, Rust, Ryan, Sheets, Simants, and Simpson. Of the whites sentenced to death, Joubert was executed and four remain on death row: Lotter, Moore, Palmer, and Ryan.

death. In this section, therefore, we seek to explain and understand why of the 7 minorities sentenced to death during the 25 year period of our study, two black offenders with white victims have been executed while, during the same period, of the 11 white offenders sentenced to death, only one was executed and he is widely considered to be the "worst of the worst" Nebraska offender during the entire period of this study.[254]

Part I, Column B of Figure 21 indicates that if the focus shifts to death-sentenced offenders who have either been executed *or* remain at risk of execution on death row, the picture is quite different. Minorities constitute 29% (2/7) of this group, a figure that is quite comparable to the 33% (7/21) minorities among the whole pool of death-sentenced offenders shown in Column A. However, two white death row members included in this tabulation have, by Nebraska standards, been on death row only a short while, thereby reducing the imminence of their risk of execution.[255] Otey and Williams are the two minorities in this pool, as there are no minorities on death row from the period covered by this study.[256]

Part II of Figure 21 presents the same data in terms of selection rates. Column A documents a 4.1 (.29/.07) times higher execution rate in the minority-defendant cases. While Column B indicates that, in terms of the rates that offenders were executed or remain at risk of execution, the rate is slightly lower for the minority offenders.

There are several possible explanations for the minority-defendant disparity described above. The first is the offender's length of time on death row. Williams and Otey were on death row for a very long time: Otey for 16 years and Williams for 13 years. To put this theory in perspective, it is useful to compare them with white offenders who were on death row for comparable periods of time and avoided execution. For this purpose, we focus on the white offenders who were sentenced to death in 10-year periods before and after Otey and Williams were sentenced, but have not been executed. In the earlier 10-year period, two death sentences were imposed against white offenders who remained on death row for many years, i.e., Rust (19 years) and Holton (13 years). In the 10 years after Otey and Williams went to death row, they were joined by eight white offenders, who also spent

254. The black offenders are Otey (who raped and murdered a woman), executed September 1994, and Williams (who murdered two women, one of whom he raped), executed December 1997. State v. Otey, 205 Neb. 90, 287 N.W.2d 36 (1979); State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979). The white offender is Joubert (who methodically murdered two children), executed July 1996. State v. Joubert, 224 Neb. 411, 399 N.W.2d 237 (1986).

255. Lotter has been there about 7 years and Ryan has been there about 15 years. The other whites are long-time death row inmates—Moore (21 years) and Palmer (21 years).

256. Nor have any racial minorities been sentenced to death since January 2000.

long periods of time there, i.e., Anderson (22 years), Hochstein (22 years), Palmer (21 years), and Moore (21 years).[257] It is clear, therefore, that years on death row alone does not explain why Otey and Williams were executed while none of the white offenders were.

What then distinguishes the white offenders, with many years on death row, from Otey and Williams? The short answer is judicial relief in the Nebraska Supreme Court or the Eighth Circuit Court of Appeals. A significant proportion of the white offenders got such relief while Otey and Williams did not.

Relief from either the Nebraska Supreme Court or the Eighth Circuit may have two consequences relevant to avoiding execution. If, on remand, another death sentence is imposed, the offender's clock for filing appeals starts anew. This re-start extends his time on death row, with a greatly diminished risk of execution for many years. If, on remand, the offender is sentenced to life imprisonment or less, he leaves death row altogether. The white offenders with whom we are comparing Otey and Williams were very successful on both of these fronts.[258] In contrast, Otey and Williams were completely unsuccessful at the first step of obtaining any form of judicial relief. Their "clocks" for filing appeals were never re-set. As a result, their cases moved steadily along toward execution.

The question, therefore, is how likely it is that the race of the defendant played a role in Otey's and Williams' failure to secure any form of judicial relief. One possibility is that unconscious bias in the courts affected their cases. To address this question, we first computed unadjusted race-of-defendant disparities in appellate outcomes in the Nebraska Supreme Court and in the Eighth Circuit, which are presented in Figure 22. The Part I results are based on the outcomes for both courts, while Parts II and III present separate results for the two courts. The samples are quite small, but they suggest that in general minority defendants do better than white defendants on appeal (Part I), particularly in the Nebraska Supreme Court (Part II).

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257. In this later period, two minorities (Jones and Reeves) were sentenced to death. Jones's sentence was remanded by the Nebraska Supreme Court, *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982), and he was later sentenced to life; Reeves remained on death row for 20 years before having his sentence remanded by the Nebraska Supreme Court, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), followed by a prosecutorial waiver of his death sentence.

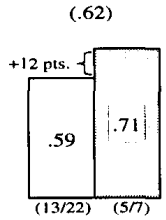
258. Anderson, Hochstein, Palmer, and Moore obtained new trials in which new death sentences were imposed. Anderson v. Hopkins, 113 F.3d 825 (8th Cir. 1997); Hochstein v. Hopkins, 113 F.3d 143 (8th Cir. 1997); Palmer v. Grammer, 863 F.2d 588 (8th Cir. 1988); Moore v. Kinney, 119 F.Supp. 2d 1022 (D. Neb. 2000). Rust and Holtan received life sentences on remand. State v. Rust, Docket 91, Page 555, p. 28 (Douglas Co. Dist. Ct. 1994); State v. Holtan, Docket 92, No. 634, p. 20 (Douglas Co. Dist. Ct. 1989). Anderson and Hochstein ultimately had their sentences reduced to life by the Nebraska Supreme Court. State v. Anderson & Hochstein (II), 262 Neb. 311, 632 N.W.2d 273 (2001).

FIGURE 22

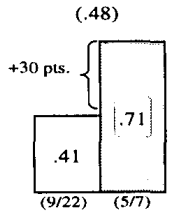
UNADJUSTED MINORITY-DEFENDANT DISPARITIES IN THE RATES THAT DEATH SENTENCES ARE REVERSED/VACATED IN JUDICIAL REVIEW: NEBRASKA, 1973-1999[1]

(the number in parenthesis above each pair of bars is the average of all cases)

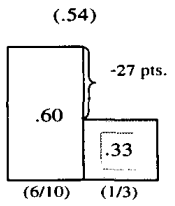
Part I: Sentences Vacated/Convictions Reversed by the Nebraska Supreme Court or a Federal Court[2]

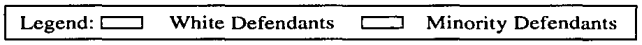


Part II: Sentences Vacated/Convictions Reversed in the Nebraska Supreme Court on Direct Appeal in Post-Conviction Proceedings or in the Trial Court[3]



Part III: Rate That Sentences Are Vacated/Convictions Reversed in the 8th Circuit Federal Court of Appeals[4]





[1] The unit of observation in this Figure is death sentences imposed (n=29) rather than death-sentenced offenders (n=24). Three offenders received two death sentences (Anderson, Hochstein, and Moore) and one (Palmer) received three.

[2] White defendants Anderson and Hochstein obtained relief in both state and federal court as did minority defendant Reeves.

[3] Eight white defendants with death sentences reversed/vacated in the Nebraska Supreme Court are: Simants, Hunt, Sheets, Drinkwalter, Palmer (I), Palmer (II), Hochstein (II), and Anderson (II). This tabulation also includes a ninth white defendant, Simpson, whose sentence was vacated in the trial court on the grounds of mental retardation. The thirteen white defendants denied relief in the Nebraska Supreme Court are Palmer (III), Moore (I), Moore (II), Ryan, Lotter, Harper, Perry, Bjorklund, Anderson (I), Hochstein (I), Holton, Rust, and Joubert.

The five minority defendants with sentences vacated in the Nebraska Supreme Court are Stewart, Bird Head, Reeves, Victor, and Jones. The two minority offenders denied relief are Otey and Williams, who have been executed.

[4] Part III is limited to cases that have been reviewed by the Eighth Circuit. The six white defendants with sentences vacated are: Holtan, Rust, Anderson (I), Hochstein (I), Moore (I), and Moore (II). The four white defendants denied relief are Joubert, Harper, Ryan, and Palmer (III). The one minority defendant granted relief was Reeves (who later also obtained relief in the Nebraska Supreme Court); Otey and Williams were denied relief and executed.

It is in federal court (Part III) that minorities do less well. The 30-percentage point minority-defendant disparity is consistent with disparate treatment, but the sample sizes are too small to support such an inference even if all of the cases were factually and legally identical and had equally competent counsel. Of course, the cases are not identical and we lack the capacity to compute adjusted disparities holding constant many legitimate case characteristics (e.g., the law, the facts of the cases, and the trial court decisions that underlie the appellate claims) that normally determine appellate outcomes.

However, there is one possibly relevant characteristic for which we do have data—the culpability of the offender. The literature and practitioners suggest that offender culpability is often a factor in appellate decisions.[259] We see a similar effect in the Nebraska data with the most highly aggravated death-sentenced cases being less likely to prevail on appeal and ultimately less likely to avoid the risk of execution.[260] When we adjust the race disparities in Figure 22 for offender culpability, the race disparities are reduced. Moreover, the facts of *Otey* and *Williams* could appear to the court as particularly aggravated—violent rape murders. (The same can be said of the *Joubert* case with two child victims).[261] In contrast, the culpability levels of white-defendant cases with which we are comparing Otey and Williams could be perceived as somewhat less severe.[262]

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259. *See, e.g.,* EJDP, *supra* note 11, at 214, tbl. 46 (reporting that on a six-level culpability scale, the reversal rate of death sentences on procedural grounds in the Georgia Supreme Court during the 1970s was .39 (7/18) among the two least aggravated levels and .22 (8/36) among the two most aggravated levels); JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT ii, 183, 320 (2002), *available at* http://www.law.columbia.edu/brokensystem2 (finding that at the federal habeas stage, for each additional aggravating factor, the reversal rate drops by 15%).

260. We classified the cases in terms of culpability with a four-level culpability scale based on a logistic regression model. The following statistics indicate the disparity in rates between the most aggravated level of cases and the three less aggravated levels of death-sentenced cases: obtaining judicial relief in state or federal court (.50 [7/14] v. .75 [9/12]); obtaining relief in the Nebraska Supreme Court (.29 [4/14] v. .53 [8/15]); avoiding the risk of execution completely (.46 [6/13] v. .82 [9/11]).

261. When *State v. Otey*, 205 Neb. 90, 287 N.W.2d. 36 (1979), and *State v. Williams*, 205 Neb. 56, 287 N.W.2d. 18 (1979), are viewed in the context of other rape murder and multiple victim cases, their distinctive level of aggravation is less obvious. *See infra* Appendix D, Categories G.1 (includes rape murders) and D.1 (includes multiple victim cases).

262. State v. Moore (I), 210 Neb. 457, 316 N.W.2d 33 (1982) (finding defendant robbed and shot two victims on two separate occasions who were older cab drivers responding to defendant's request for pickup); State v. Palmer, 210 Neb. 206, 313 N.W.2d 648 (1981) (finding defendant beat and strangled his victim-pawn dealer who purchased coins and silver from the defendant in the past); State v. Anderson & Hochstein (I), 207 Neb. 51, 296 N.W.2d 440 (1980) (finding defendant paid another $1,500 to kill defendant's boss because defendant was dissatisfied with

To explore further the possible impact of race in the ultimate disposition of death-sentenced cases, we estimated race-of-defendant disparities in the rates that offenders who obtained judicial relief on appeal were ultimately able to obtain complete relief from the risk of execution and leave death row with a sentence of life imprisonment or less.

Complete relief from the risk of execution was obtained in two ways. In a few cases, after the Nebraska Supreme Court vacated the death sentence, it proceeded to reduce the sentence to life imprisonment thereby removing the offender from death row.[263] More commonly, complete relief was obtained on remand through an acquittal, a prosecutorial decision to drop charges or waive the death penalty, or a penalty-trial life sentence.[264]

Figure 23 presents unadjusted race disparities in the rates that death-sentenced offenders have avoided the risk of a death sentence and left death row alive. Part I embraces all of those decisions, while Part II is limited to prosecutorial and judicial decisions on remand that removed the offender from death row. In each analysis, minority offenders have been more successful in avoiding the risk of execution.

The data suggest that the minority-defendant disparity in the actual execution rate (two of the three offenders thus far executed were black defendants with white vicims) reflects the failure of Otey and

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his working conditions); State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977) (finding defendant robbed a bar at gunpoint and shot victim after herding the victim and others into the bathroom where they were tied up by the eventual victim); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977) (finding defendant and others robbed a grocery store, and during a pursuit by police, defendant killed a civilian who came to the assistance of the pursuing police).

263. Examples are *State v. Anderson & Hochstein (II)*, 262 Neb. 311, 632 N.W.2d 273 (2001), *State v. Victor*, 259 Neb. 894, 612 N.W.2d. 513 (2000), and *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977). We also include in the analysis one case, *State v. Simpson*, 200 Neb. 823, 265 N.W.2d 681 (1978), in which final relief from the death sentence was granted by the trial court before an appeal was taken to the Nebraska Supreme Court.

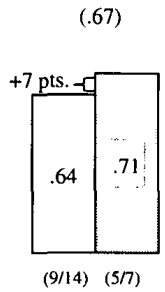
264. Examples are Simants (found not guilty by reason of insanity on retrial); Sheets (The Nebraska Supreme Court vacated Sheets' conviction on hearsay grounds because a taped statement of a co-perpetrator implicating Sheets, which the co-perpetrator had given to the police in exchange for a waiver of the death penalty in his case, was played to the jury in Sheets' trial after the co-perpetrator had committed suicide thereby denying Sheets an opportunity to cross examine him. Without the taped statement, the prosecutor believed the case against Sheets was too weak to take to a jury and dismissed the charges, whereupon Sheets was released from death row, a free man. Scot Bauer, *Nebraska Death-Row Inmate Set Free*, THE GRAND ISLAND INDEPENDENT (Neb.), June 13, 2001, *at* http://www.theindependent.com/stories/061301/new_deathrow13.html); Reeves and Drinkwalter (death sentence waived); and Jones, Bird Head, Holton, and Rust (resentenced to life imprisonment). As noted above, *supra* note 258, on remand the following were resentenced to death: Anderson and Hochstein (I), Moore (I), Palmer (I), and Palmer (II).

FIGURE 23

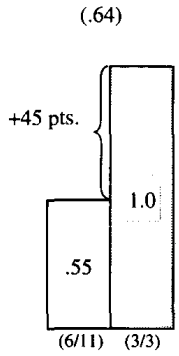
UNADJUSTED MINORITY-DEFENDANT DISPARITIES IN THE RATES THAT DEATH-SENTENCED DEFENDANTS AVOID THE RISK OF EXECUTION: NEBRASKA, 1973-1999[1]

(the number in parenthesis above each pair of bars is the average rate for all cases)

Part I: The Risk of Execution Avoided Regardless of the Source of Relief[2]



Part II: The Risk of Execution Avoided Through Prosecutorial and Judicial Sentencing Decisions Following a Judicial Remand[3]



Legend: White Defendants Minority Defendants

[1]The unit of observation in this Figure is the death-sentenced offender regardless of how many death sentences were imposed in his case. Three white defendants who died on death row of natural causes are excluded from the Figure.

[2]Death-sentenced whites who avoided the risk of execution are Holtan, Rust, Anderson, Hochstein, Simpson, Simants, Sheets, and Drinkwalter. Whites who did not avoid risk of execution are: Joubert (executed) and Ryan, Moore, Lotter, and Palmer (on death row). Death-sentenced minorities who avoided the risk of execution are Stewart, Victor, Jones, Bird Head, and Reeves. Otey and Williams were executed. Of the fourteen defendants who avoided execution, the Nebraska Supreme Court reduced the sentence to life in four cases: Stewart, Anderson, Hochstein, and Victor. A trial court set the sentence to life as to Simpson.

[3]In nine cases, the risk of execution was avoided by a prosecutorial charging or judicial sentencing decision on remand from a Nebraska Supreme Court or federal court decision reversing the conviction or vacating the death sentence: Simants, Hunt, Jones, Sheets, Drinkwalter, Bird Head, Reeves, Holton, and Rust.

Williams to obtain judicial relief that would have slowed down their movement toward execution or have resulted in remands that may have taken them off death row entirely. We find no race-of-defendant disparities in the appellate decisions of the Nebraska Supreme Court or in the charging and sentencing decisions of Nebraska prosecutors and sentencing judges in the cases that are remanded by the courts. The rate of success in federal courts is associated with the race of the defendant, but because of the small samples and the lack of controls for many legitimate case characteristics, the data do not support an inference of bias in the Eighth Circuit. It also appears that offender culpability may have contributed to Otey's and Williams' lack of success in federal court. One, therefore, can plausibly characterize the disparity as an adverse impact of an unpredictable discretionary process that performs a vital criminal justice function in reducing the risk of error and arbitrariness in the system. From this perspective, the adverse impact would be clearly justified.

Finally, it is useful to consider how likely it is, as the years go by, that the minority disparate impact in the rate of actual executions (among the 21 offenders sentenced during the period of our study) will persist, diminish, evaporate, or reverse. The foregoing analysis indicates that this will depend on the outcomes of judicial appeals and possible remand and commutation decisions for the four white offenders currently on death row. (As noted above, there are no minorities on death row for the period covered by this study or otherwise.)

If one of the four white offenders currently on death row is executed, the comparative execution rates will be .29 (2/7) for minorities versus .14 (2/14) for whites (a +15 point disparity). If two of the white offenders on death row are executed, the disparity will be +8 points (.29-.21); if three are executed, there will be no disparity (.29-29); and if all four are executed, there will be a -7 point disparity (.29-.36).

PART D

IX. EVIDENCE OF DISPARATE TREATMENT IN CHARGING AND SENTENCING OUTCOMES BASED ON THE SOCIOECONOMIC STATUS (SES) OF THE DEFENDANT AND VICTIM

We measure the socioeconomic status of defendants and victims in terms of their occupations. There is a substantial literature on the importance of different occupations and the prestige associated with each.[265] For this analysis, we drew on the results of a nationwide 1989 opinion poll that asked a "representative sample of non-institutional-

265. The literature is summarized well in Keiko Nakao & Judith Treas, *Updating Occupation Prestige and Socioeconomic Scores: How the New Measures Measure Up*, *in* 24 SOCIOLOGICAL METHODOLOGY 1-72 (Peter V. Marsden ed., 1994).

ized adults to evaluate the prestige of occupational titles."[266] We used these scores to rank-order the occupations reported in our case records for defendants and victims and created a three-level scale of high, middle, and low SES for each.[267]

A. Defendant SES

The statewide data document no significant disparities in charging and sentencing outcomes on the basis of the SES of the defendant. That is, there is no evidence that defendants are treated differently because of their SES. Nor are such effects apparent when we focus separately on the major urban counties and greater Nebraska.[268]

B. Victim SES

266. *Id.* at 5. The scores are reported at *id.* at 42-69. Sociologists also use prestige scores to estimate a "socio-economic index" (SEI) by regressing the prestige scores on the education and income levels of the people who are employed in the different occupations. These scores appear to be the preferred measures in sociological studies of "occupational mobility and related process of status allocation" because they are better predictors of these outcomes than are the unadjusted prestige scores. David L. Featherman & Robert M. Hauser, *Prestige or Socioeconomic Scales in the Study of Occupational Achievment*, *in* 4 SOCIOLOGICAL METHODS & RESEARCH 403, 405 (1976). However, we believe that the unadjusted prestige scores are more relevant to our research because they reflect the perceived "standard of living, power and influence over other people, level of qualifications, and the value to society" of people in different occupations. *Id.* at 404.

267. Although we obtained a prestige score for each victim, we were guided in our three-level classification by the codes for Questions 50 (defendants) and 82 (victims) in the DCI, which were as follows: High SES: Professional and Managerial (professional [doctor, lawyer, etc.], executive or business person, small business person or farmer [other than farm worker], judge, legislator, government official, and military officer); Law Enforcement and Military (police officer and military officer), and Government Officer; Middle SES: White-Collar (office worker, apartment/hotel manager, store manager, secretary, government employee), Misc. (juvenile, student, retired persons, homemaker, supported by family, disabled), Enlisted Military Personnel; and Low SES: Blue-collar and unskilled laborers including farm workers, Service Workers (including security guard, store clerk, service station attendant, waiter, waitress, domestic, custodian, etc.), Unstable or Extralegal (including drifter, professional criminal (organized crime), prostitute or pimp, individual criminal (e.g., thief), drug dealer, sporadic odd jobs, no particular skill, chronically unemployed (including recipient of public assistance)).

268. There were five high SES defendants. One of them advanced to a penalty trial and received a life sentence, for an overall death-sentencing rate among high SES death-eligible offenders of .00 (0/5). The comparable rate for the mid-range SES defendants was .32 (7/22). However, the rate for low SES defendants was .14 (20/145). The comparison of low SES defendants versus all others showed no significant effects before or after adjustment for defendant culpability. The number of high SES defendants was too small to support a meaningful analysis of high SES offenders versus others.

1. Statewide Disparities

A "high victim SES effect" means there is a greater risk of a penalty trial and death sentence for the defendant when his or her victim has high SES. A "low victim SES effect" means there is a reduced risk of a penalty trial and death sentence when the victim has low SES.

The statewide data document disparities in charging and sentencing outcomes based on the SES of the victim both before and after adjustment for defendant culpability. The evidence of both high and low victim SES effect appears throughout the state.

Part I of Figure 24 presents adjusted data on the statewide impact of victim SES, while controlling for the number of aggravating circumstances in the cases.[269] Column A indicates the impact on the rates that death-eligible cases advance to a penalty trial, while Columns B and C indicate the impact on penalty trial death-sentencing rates and death-sentencing rates among all death-eligible cases. In each column the incremental increase in the relevant rate is indicated. For example, Column C indicates that for death-sentencing rates among all death-eligible cases, the disparity between the low and middle victim SES categories is 10-percentage points, a ratio of 3.0 (.15/.05), and that the disparity between the middle and high victim SES categories is 13-percentage points, a ratio of 1.9 (.28/.15). The death-sentencing rate in the high victim SES cases is 5.6 (.28/.05) times higher than it is in the low victim SES cases. In each column the association between the outcome variable and three victim SES levels is statistically significant at the .01 level or higher.

The practical significance of victim SES in the system is suggested by a comparison of the data in Part I of Figure 24 with the data in Part II of the figure, which document the impact that the number of statutory aggravating circumstances has on charging and sentencing outcomes.[270] The comparison indicates that the impact on charging and sentencing outcomes of each increment in victim SES level (shown in Part I) is quite comparable to the impact of each additional statutory aggravating circumstance in the case (shown in Part II).

The practical importance of victim SES is also reflected in the regression models in Table 4 (Row 2.d)[271]; it is useful here to compare the regression coefficient for victim SES with the coefficient for the number of statutory aggravating circumstances in the two models for prosecutorial decisionmaking (Columns B to E). The coefficients for victim SES (disregarding the sign of the coefficient) range from .59 to .72, while the coefficients for the number of aggravating circum-

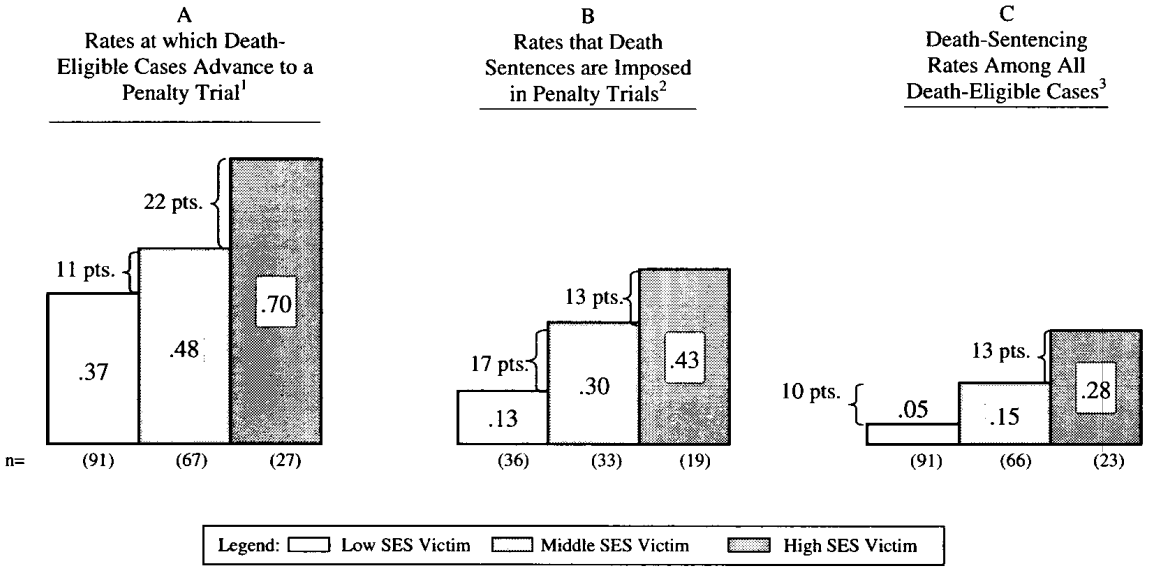
269. These data are comparable to those presented in Figure 19, Column A, but after adjustment for defendant culpability.
270. These data are drawn from Figure 3 *supra.*
271. *See* Table 4 *supra* p. 553.

FIGURE 24

VICTIM SOCIOECONOMIC STATUS (SES) EFFECTS IN CHARGING AND SENTENCING OUTCOMES, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999

(the bars indicate the death-sentencing rate in each subgroup of cases adjusted for the number of aggravators in the cases)

PART I: THE IMPACT OF VICTIM SES ON CHARGING AND SENTENCING OUTCOMES

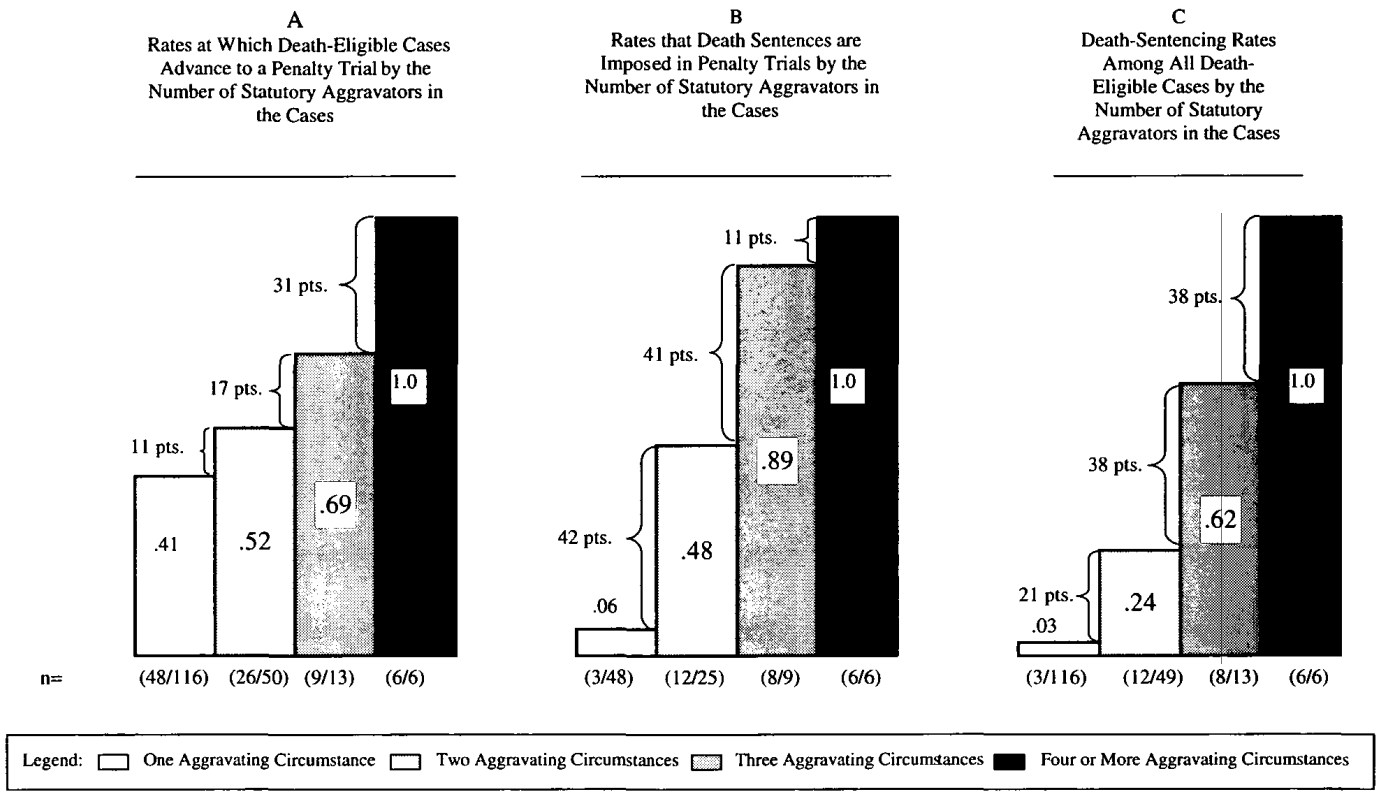


[1] The victim SES effects are significant at the .002 level after adjustment for defendant culpability.
[2] The victim SES effects are significant at the .01 level after adjustment for defendant culpability.
[3] The victim SES effects are significant at the .001 level after adjustment for defendant culpability.

Continued on Next Page

FIGURE 24 (CONTINUED)

PART II: THE IMPACT OF THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES ON CHARGING AND SENTENCING OUTCOMES



stances in Row 1a range from .51 to .72. This suggests that each change in victim SES had an impact on prosecutorial decisionmaking that was comparable to the impact of each additional statutory aggravating circumstance in the cases.[272]

Figures 25 and 26 present statewide data on the impact of high and low victim SES before and after adjustment for the number of statutory aggravators in the cases. Figure 25 presents the data on victims with high SES. Part I, Column A reports an unadjusted disparity of 17 percentage points. The effects are almost exclusively concentrated in the two-aggravator cases (Column C), where the room for the exercise of discretion is broad.

Part II offers a picture of the impact of high victim SES on (1) the rates cases advance to a penalty trial (Column A), (2) judicial sentencing decisions (Column B), and (3) death-sentencing among all death-eligible cases, after adjustment for the number of aggravating circumstances in the cases (Column C). The data indicate statewide victim SES effects in both charging decisions (Column A shows 28 percentage points) and sentencing decisions (Column B shows 23 percentage points). It is the presence of disparities at both of these decision points that produces the overall 20-point impact among all death-eligible cases shown in Part II, Column C.

Figure 26 presents a comparable analysis of low victim SES disparities, a category of cases in which eight death sentences were imposed. Part I (Column A) indicates an unadjusted −12-percentage point disparity in death-sentencing rates among all death-eligible cases, while footnote 2 reports a statistically significant −15-percentage point disparity after adjustment for the number of aggravating circumstances in the cases. Columns C and D identify the two- and three-aggravator cases as the principal types of cases in which these disparities appear.

Part II of Figure 26 indicates that the disparities appear in both the prosecutorial charging (Column A) and judicial sentencing decisions (Column B), which combine to produce the −14-percentage point impact among all death-eligible cases (Column C).[273] The data also document that the disparities are concentrated in the cases involving one and two statutory aggravating circumstances.

We estimated the impact of victim SES with a variety of measures of defendant culpability. The results show a pattern of statewide

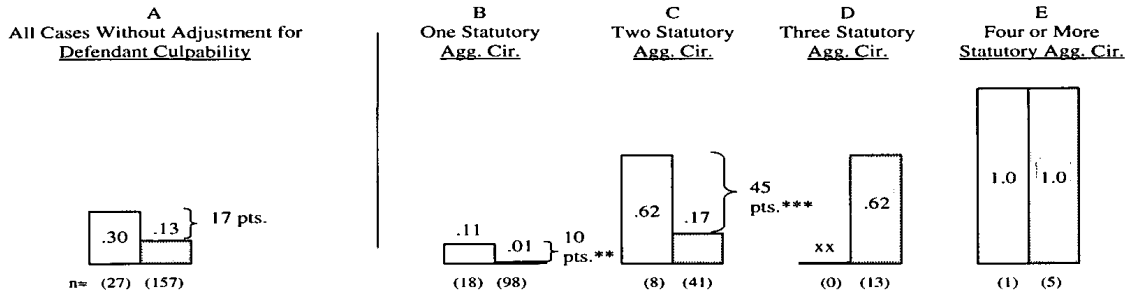
272. A similar analysis of judicial sentencing decisions (Columns F and G) reveals a statistically significant victim SES coefficient, but the magnitude of the victim SES variable is only 41% (1.2/2.9) of the size of the coefficient for the number of aggravating circumstances in the cases.

273. In the analysis of minority-defendant effects, the disparities appeared in the prosecutorial decisions but not in the judicial sentencing decisions.

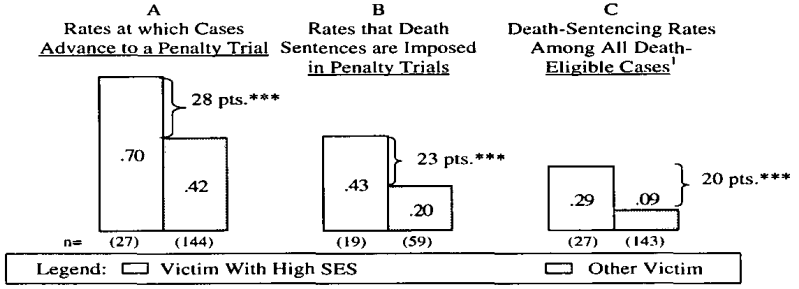
FIGURE 25

STATEWIDE HIGH VICTIM SOCIOECONOMIC STATUS (SES) DISPARITIES IN CHARGING AND SENTENCING OUTCOMES, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999

Part I. High Victim SES Effects in Death-Sentencing Rates Among All Death-Eligible Cases, Controlling for the Number of Statutory Aggravating Circumstances (Columns B to E)



Part II. High Victim Disparities in Charging and Sentencing Outcomes Adjusted for the Number of Aggravating Circumstances in the Cases

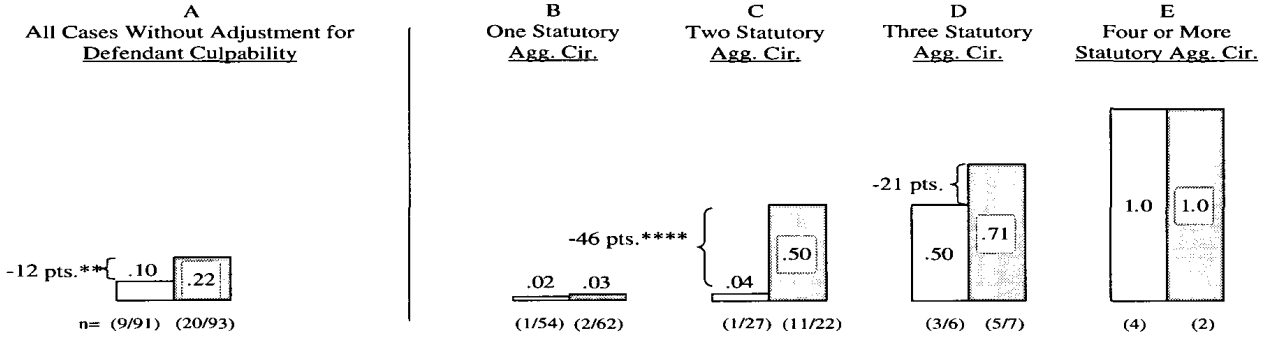


[1] The 14-case difference in the "Other Victim" category in Part I, Column A and Part II, Column C is explained by the absence of both high SES cases and other victim cases in the three-aggravator category (13 cases) and the six aggravator category (one case). This also reduces the sample size in Part II, Column A.
*=significant at the .10 level; **=significant at the .05 level; ***=significant at the .01 level.
xx Indicates no cases in the category.

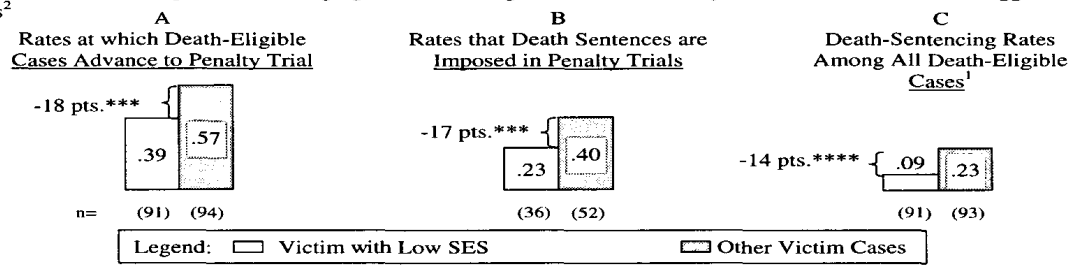
FIGURE 26

STATEWIDE LOW VICTIM SOCIOECONOMIC STATUS (SES) DISPARITIES IN CHARGING AND SENTENCING OUTCOMES, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999

Part I. Low Victim SES Disparities in Death-Sentencing Rates Among All Death-Eligible Cases[1]



Part II. Overall Low Victim SES Disparities in Charging and Sentencing Outcomes After Adjustment for the Number of Aggravators in the Cases[2]



[1] The one case difference between the number of low victim SES cases in Part I, Column A and in Part II, Column C is explained by the fact that there is a single low victim SES case with six aggravators for which there is no comparison case in the "Other Victim Cases" category.

[2] The overall low victim SES disparity in the death-sentencing rate among all death-eligible defendants is –15 percentage points (.08 - .23), significant at the .002 level.

*= significant at the .10 level; **=significant at the .05 level; ***=significant at the .01 level; ****=significant at the .001 level.

high[274] and low[275] victim SES effects that is consistent with the data in Figures 25 and 26.

Overall, these results are consistent with a pattern and practice of disparate treatment on the basis of victim SES. However, the results of the race analysis presented above suggest caution in inferring that such a pattern exists, in fact, without introducing controls for the place of prosecution. In the next section, we test the hypothesis that the statewide victim SES disparities we have documented are a by-product of differential charging and sentencing practices in the major urban counties and greater Nebraska, even though these practices are, in fact, evenhanded in each place with respect to victim SES.

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274. Concerning statewide high SES victim disparities in the rates that cases advance to penalty trial, controlling for the number of aggravating and mitigating circumstances in the cases, the statewide high SES victim disparity is 12 points (p=.01); controlling for the salient factors measure, the disparity is 16 points (NS); controlling for the regression-based scale, the disparity is 25 points (p=.01); in the logistic regression analysis in Table 4, Column D, the odds multiplier for the victim SES variable is .55 (from high to middle to low), which is statistically significant.

For judicial death-sentencing rates, controlling for the number of aggravating and mitigating circumstances, the high SES victim disparity is 3 points (p=.01); controlling for the salient factors measure, the disparity is 6 points (NS); controlling for the regression-based scale, the disparity is 21 points (p=.01); in the logistic regression analysis in Table 4, Column F, the odds multiplier for the victim SES variable is .30, which is statistically significant.

For death sentences imposed among all death-eligible cases, controlling for the number of aggravating and mitigating circumstances, the high SES victim disparity is 7 points (p=.01); controlling for the salient factors measure, the disparity is 7 points (p=.08); controlling for the regression-based scale, the disparity is 15 points (p=.04).

275. Concerning statewide low SES victim disparities in the rates that cases advance to penalty trial, controlling for the number of aggravating and mitigating circumstances in the cases, the statewide high SES victim disparity is −20 points (p=.01); controlling for the salient factors measure, the disparity is −11 points (NS); controlling for the regression-based scale, the disparity is −17 points (p=.05).

For the judicial death-sentencing rates, controlling for the number of aggravating and mitigating circumstances, the low SES victim disparity is −19 points (p=.03); controlling for the salient factors measure, the disparity is −20 points (p=.05); controlling for the regression-based scale, the disparity is −18 points (p=.05).

For death sentences imposed among all death-eligible cases, controlling for the number of aggravating and mitigating circumstances, the low SES victim disparity is −14 points (p=.01); controlling for the salient factors measure, the disparity is −13 points (p=.01); controlling for the regression-based scale, the disparity is −10 points (p=.01).

2. *Disparities in the Major Urban Counties and Greater Nebraska*

Recall that the race-of-defendant effects documented statewide in prosecutorial charging and plea bargaining decisions were largely the product of evenhanded but different charging and plea bargaining practices in the major urban counties and greater Nebraska. In this section we examine that possibility with respect to victim SES.

Figure 27 separately replicates the three-level victim SES analysis presented in Figure 24 for the major urban counties and greater Nebraska. The victim SES effects are apparent in both areas of the state. The specific patterns of SES effects in prosecutorial charging and judicial sentencing decisions vary in the two areas, but the bottom line of disparities among all death-eligible cases is strong and consistent in both areas.

Figure 28 highlights these patterns by focusing separately on the high and low victim SES effects in the major urban counties and greater Nebraska after adjustment for the number of aggravating circumstances in the cases. The data in Part I, which focus on the high SES victim effects, document patterns in both parts of the state that are quite comparable in terms of magnitude and levels of statistical significance.[276] Part II tells a similar story for the low SES victim

276. High victim SES effects in the major urban counties: Concerning high SES victim disparities in the rates that cases advance to penalty trial, controlling for the number of aggravating and mitigating circumstances in the cases, the high SES victim disparity in the major urban counties is –5 points (NS); controlling for the salient factors measure, the disparity is –5 points (NS); controlling for the regression-based scale, the disparity is 7 points (NS).

For the judicial death-sentencing rates, controlling for the number of aggravating and mitigating circumstances, the high SES victim disparity in the major urban counties is –8 points (p=.04); controlling for the salient factors measure, the disparity is –5 points (NS); controlling for the regression-based scale, the disparity is 14 points (p=.02).

For death sentences imposed among all death-eligible cases, controlling for the number of aggravating and mitigating circumstances, the high SES victim disparity in the major urban counties is 1 point (NS); controlling for the salient factors measure, the disparity is –5 points (NS); controlling for the regression-based scale, the disparity is 13 points (p=.08).

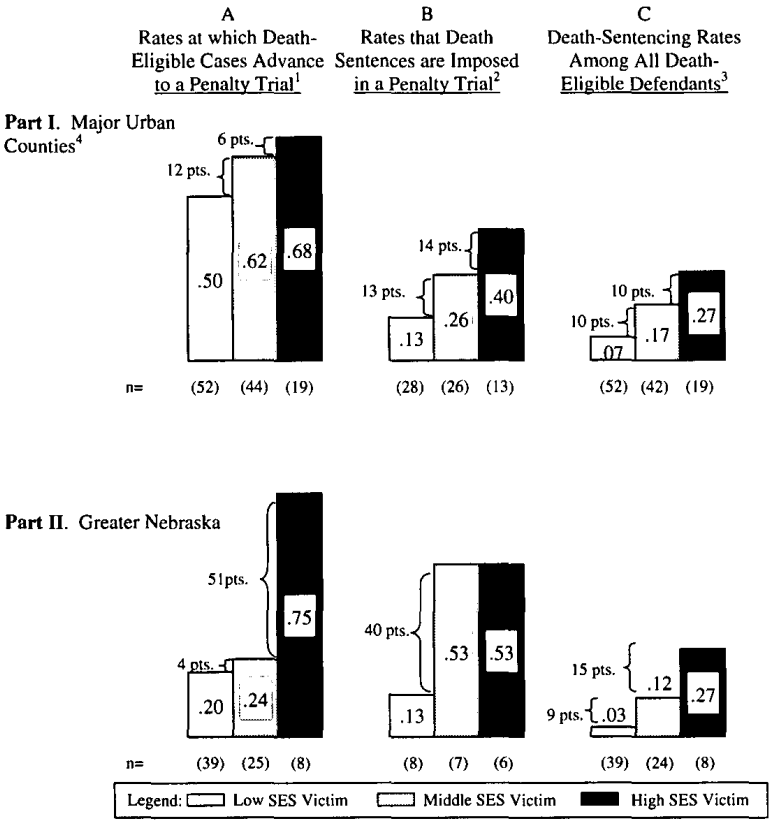
High victim SES effects in greater Nebraska: Concerning high SES victim disparities in the rates that cases advance to penalty trial, controlling for the number of aggravating and mitigating circumstances in the cases, there is no high SES victim disparity in greater Nebraska. Controlling for the salient factors measure, the disparity is –4 points (NS); controlling for the regression-based scale, the disparity is 22 points (p=.03).

For the judicial death-sentencing rates, controlling for the number of aggravating and mitigating circumstances, the high SES victim disparity in greater Nebraska is –14 points (NS); controlling for the salient factors measure, the disparity is –9 points (NS); controlling for the regression-based scale, the disparity is –24 points (NS).

FIGURE 27

VICTIM SOCIOECONOMIC STATUS (SES) EFFECTS IN CHARGING AND SENTENCING OUTCOMES IN MAJOR URBAN COUNTIES AND GREATER NEBRASKA, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999

(the bars indicate penalty-trial rates (Column A) and death-sentencing rates (Columns B & C))



[1] The victim SES effects in Part I for this outcome are not significant (p=.15), while the effects in Part II are significant at the .01 level.

[2] The victim SES effects in Part I for this outcome are significant at the .01 level and the effects in Part II are significant at the .08 level.

[3] The victim SES effects in Parts I and II for this outcome are significant at the .01 level.

[4] In Lancaster County, there are no statistically significant victim SES effects in either charging or sentencing outcomes. In Douglas and Sarpy Counties, there are significant victim SES effects in the rates that cases advance to a penalty trial (low .50; medium .76; high .80) (p=.02) and in penalty-trial death-sentencing rates (low .00; medium .20; high .37) (p=.01). In death sentencing among all death-eligible cases in Douglas and Sarpy Counties, the victim SES effects are significant at the .001 level (low .00; medium .18; high .31).

effects.[277] These data strongly suggest that defendants whose crimes are comparable in terms of their criminal culpability are treated differently on the basis of the SES of their victims by both prosecutors and sentencing judges.

The victim SES effects that we have documented indicate that a morally irrelevant circumstance of the cases unrelated to the culpability of the defendant may be (1) an important factor in prosecutorial and judicial decisionmaking and (2) that the system denies the equal standing of all victims.[278] However, we add the following caveat on this finding.

For death sentences imposed among all death-eligible cases, controlling for the number of aggravating and mitigating circumstances, the high SES victim disparity in greater Nebraska is –1 point (NS); controlling for the salient factors measure, there is no disparity; controlling for the regression-based scale, the disparity is 2 points (NS).

277. Low victim SES effects in the major urban counties: Concerning low SES victim disparities in the rates that cases advance to penalty trial, controlling for the number of aggravating and mitigating circumstances in the cases, the low SES victim disparity in the major urban counties is –9 points (NS); controlling for the salient factors measure, the disparity is –1 point (NS); controlling for the regression-based scale, the disparity is –11 points (NS).

For the judicial death-sentencing rates, controlling for the number of aggravating and mitigating circumstances, the low SES victim disparity in the major urban counties is –13 points (NS); controlling for the salient factors measure, the disparity is –14 points (NS); controlling for the regression-based scale, the disparity is –17 points (p=.04).

For death sentences imposed among all death-eligible cases, controlling for the number of aggravating and mitigating circumstances, the low SES victim disparity in the major urban counties is –8 points (NS); controlling for the salient factors measure, the disparity is –5 points (NS); controlling for the regression-based scale, the disparity is –6 points (NS).

Low victim SES effects in greater Nebraska: Concerning low SES victim disparities in the rates that cases advance to penalty trial, controlling for the number of aggravating and mitigating circumstances in the cases, the low SES victim disparity in greater Nebraska is –15 points (NS); controlling for the salient factors measure, the disparity is –27 points (p=.04); controlling for the regression-based scale, the disparity is –21 points (p=.04).

For the judicial death-sentencing rates, controlling for the number of aggravating and mitigating circumstances, the low SES victim disparity in greater Nebraska is –37 points (NS); controlling for the salient factors measure, the disparity is –31 points (NS); controlling for the regression-based scale, the disparity is –30 points (NS).

For death sentences imposed among all death-eligible cases, controlling for the number of aggravating and mitigating circumstances, the low SES victim disparity is –12 points (p=.08); controlling for the salient factors measure, the disparity is –17 points (NS); controlling for the regression-based scale, the disparity is –14 points (p=.01).

278. As Robert Schopp argues, a system's reliance on such factors violates the principal of "comparative justice" and remains a "serious defect in the institution . . . because it constitutes a failure of the institutional structure to conform to the principles that justify that structure . . . . [And] it represents a failure of the institutional function of disciplining the manner in which the state exercises co-

Although the disparities on the impact of victim SES effects are adjusted for offender culpability, we have no data on the process of communication between the family members of the victims and the prosecutor and the judge. This has relevance to the interpretation of our data for two reasons. First, there is evidence that the influence of family members with prosecutors is associated with the SES of the victim, with the higher status family members receiving more deference.[279] To the extent that this is the case, it may explain, at least in part, the more punitive practices of prosecutors in cases with high SES victims and their less punitive practices in cases with low SES victims.[280] Second, there is evidence that the relevance and persuasiveness of the family member written submissions to the sentencing judge may be also be associated with victim SES.[281] The reason appears to be that writers with higher education and social status focus more effectively on the virtues of the decedent and the resulting loss of the survivors. To the extent the victim impact statements affect judi-

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ercive force against its citizens." Schopp, *supra* note 3, at 825-26. A comparable rationale underlies the Fourteenth Amendment prohibition against race-of-victim discrimination. *See* McCleskey v. Kemp, 481 U.S. 279, 292 n.8 (1987) (claiming standing based on the argument that application of the State's statute has created a classification that is "an irrational exercise of governmental power" . . . because it is not "necessary to the accomplishment of some permissible state objective"). Professor Schopp expresses a further concern that disparate treatment based on victim SES

> discriminates against the victims (immediate and extended) whose murders are treated as less important than other similar murders in that their murderers receive lesser penalties. . . . If the state refrains from prosecuting and punishing crimes against some classes of victims, such as prostitutes or transients, the state effectively denies the equal standing of those victims, and of others who share the traits that define those classes.

Schopp, *supra* note 3, at 830-31.

279. In the opinion of Attorney Jerry Soucie, at least in Omaha and Lincoln, high SES family members are generally more effective than low SES family members in terms of bringing pressure to bear on the office of the county attorney if they disagree with a plea bargain: "A lower SES victim's family might get a single shot on the 10 o'clock news, but that would be it. The VP of an advertising firm will have rallies, posters, letters to the editor, etc." Soucie E-mail, *supra* note 85.

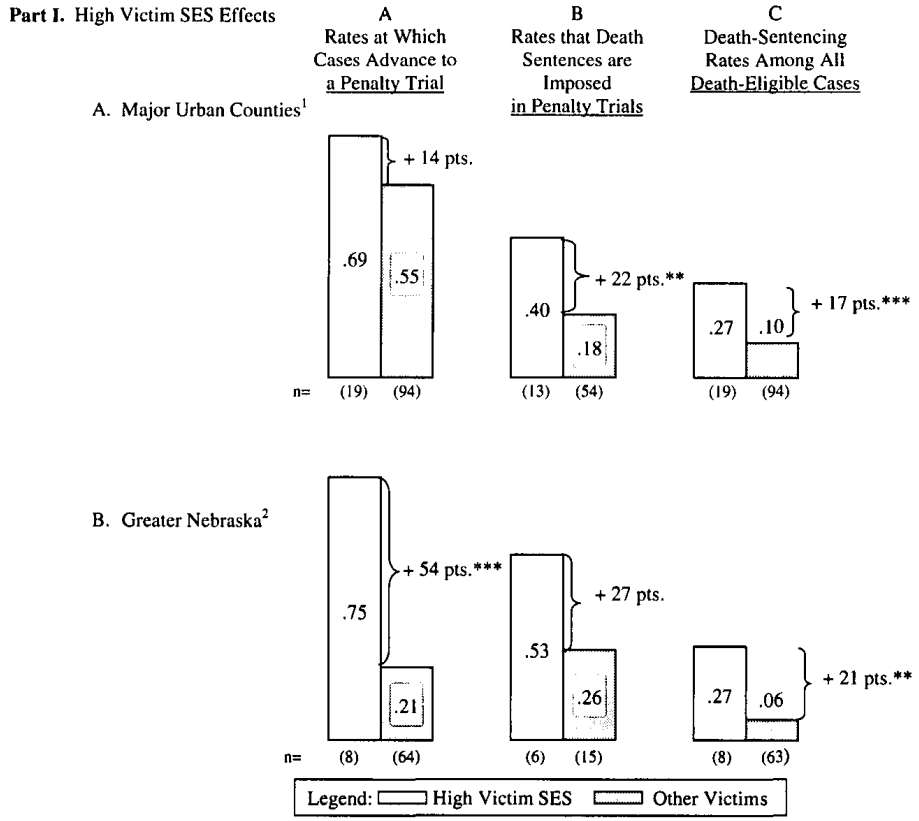
280. Also, several of the high status victims are police officers, who are a protected class under the Nebraska death-sentencing statute, i.e., the murder of a police officer may implicate statutory aggravating circumstances 1(g), 1(h), or 1(i). *See* Table 1 *supra*. However, none of the three police victim death-eligible cases resulted in a death sentence.

281. Attorney Jerry Soucie reports that lower SES writers tend to dwell on sentencing dispositions ("I hope he is executed or never let out of prison") in their impact statements, which in his opinion "don't . . . have much of an impact on the sentencing judge. They are seen as a way for the family to vent their frustrations"; in contrast, "[h]igher SES statements tend to be longer and more reflective of the loss. They tend not to focus on the disposition, but discuss hurt, loss, etc. They may have slightly greater impact, but I don't know that for sure." Soucie E-mail, *supra* note 85.

FIGURE 28

HIGH (PART I) AND LOW (PART II) VICTIM SOCIOECONOMIC STATUS (SES) DISPARITIES IN CHARGING AND SENTENCING OUTCOMES IN MAJOR URBAN COUNTIES AND GREATER NEBRASKA, ADJUSTED FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999

(the bars indicate the penalty trial (Column A) and death-sentencing rates (Columns B & C) after adjustment for the number of statutory aggravating circumstances in the cases)[1]



[1] The source of the high victim SES disparities shown in this panel are Douglas and Sarpy Counties where there is a 20 point disparity (.80 v. .60) (p = .18) in the adjusted rates that cases advance to a penalty trial; a 26 point disparity (.37 v. .11) (p = .02) in penalty trial death-sentencing rates; and a 25 point disparity (.31 v. .06) (p = .01) in the rates death sentences are imposed among all death-eligible cases. In Lancaster County, the charging and sentencing rates are *lower* in the high victim-SES cases than in the other cases.

[2] The discrepancies in case counts between Part II, Columns A and C reflect the fact that in one case the sentencing court believed it had no discretion to impose a death sentence under the law. Accordingly, that case is omitted from Columns C.

*=significant at .10 level; **=significant at .05 level; ***=significant at the .01 level.

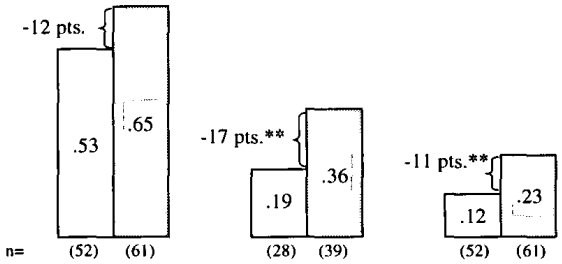
Continued on Next Page

FIGURE 28 (CONTINUED)

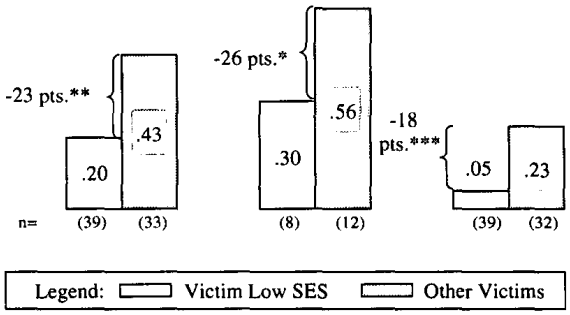
Part II. Low Victim SES Effects

A	B	C
Rates at Which Cases Advance to a Penalty Trial	Rates that Death Sentences are Imposed in Penalty Trials	Death-Sentencing Rates Among All Death-Eligible Cases

A. Major Urban Counties[3]



B. Greater Nebraska[4]



[3] Douglas and Sarpy Counties are the source of the low victim SES adjusted disparities shown in this panel. For those two counties, the overall disparity in the adjusted rates at which cases advance to penalty trial is -26 points (.52 v. .78), (p = .02); the penalty-trial death-sentencing disparity is -25 points (.06 v. .31) (p = .02); the overall adjusted disparity in death sentences imposed among all death-eligible cases is -22 points (.04 v. .26) (p = .001). In Lancaster County, the adjusted charging and sentencing rates are *higher* in the cases with low SES victims.

[4] The discrepancies in case counts between Part II, Columns A and C reflect the fact that in one case the sentencing court believed it had no discretion to impose a death sentence under the law. Accordingly, this case is omitted from Columns C.

*=significant at .10 level; **=significant at .05 level; ***=significant at the .01 level; ****=significant at the .001 level.

cial sentencing decisions, they may partly explain the association we have documented between victim SES and those outcomes.

Because the level of victim SES is associated with the influence of their surviving family members in the charging and sentencing process, adjustment for that influence would likely reduce the magnitude of the SES disparities that we document.[282] The amount of that effect is unknown, but given the magnitude of the victim SES effects that we have documented, we consider it unlikely that the control would explain away all or even a significant part of the disparity. Moreover, even if it did explain away the effect statistically, there remains the question of whether that adjustment would cure the defect in the system associated with the victim SES disparities—discrimination against victims (immediate and survivors) whose murders are treated, in fact, as less important because of the SES of decedents and their survivors.

The victim SES effects documented in the Nebraska death-sentencing system are consistent with findings of other studies.[283] The literature suggests that such effects in prosecutorial decisionmaking may be explained by the perceived impact that victim SES may have on prospects for either a jury guilt-trial conviction and/or the court's imposition of a death sentence. In addition, press coverage and manifestations of community concern about a homicide are often correlated with the victim's SES. The impact of victim SES on both prosecutors and judges may also reflect differential identification, generally unconscious, with high and low status victims.

Finally, what could explain the differences in the results of our race and victim SES findings? Each analysis was conducted with the same database and methodology, yet the results are quite different. One explanation may be that prosecutors and judges are not sensitive

282. The impact of the control is likely to be greater on the prosecutorial disparity than on the judicial disparity. We also tested the hypothesis that the victim SES effects may reflect (a) a *greater* willingness on the part of the sentencing judges to find statutory mitigation present in low victim SES cases, when the evidence would support such a finding, and/or (b) a *reduced* willingness to find statutory mitigation present in high victim SES cases, when the evidence would support such a finding. A correlation analysis of trial court findings of statutory mitigation when the evidence of statutory mitigation was either "strong" or "sufficient" to support a finding of the presence of statutory mitigation by a "preponderance" of the evidence does not support the hypothesis. Specifically, the willingness of the sentencing judges to find mitigation when the evidence supported such a finding was slightly *higher* (r=.08) in the high victim SES cases and slightly *lower* (r=–.05) in the low victim SES cases, with neither effect being statistically significant.

283. *See, e.g.*, EJDP, *supra* note 11, at 588 (reporting that research from Georgia, 1973-1978, presents a logistic regression coefficient of –2.63 and an odds multiplier (p=.001) for a low SES victim effect in an analysis of death-sentencing rates among death-eligible defendants convicted of murder).

to the issue of SES discrimination. We noted above that race discrimination is widely perceived to be an important political and legal issue in capital sentencing. As a result, prosecutors and sentencing judges appear to be sensitive to the question. In contrast, there is no law that specifically addresses the defendant and victim SES issues. Also, prosecutors and judges may not be aware of the biases that may have produced these results. Recall that in the 1970s, the issue of race-of-victim discrimination was not widely perceived as an issue. Indeed, not until *McCleskey* did the Supreme Court rule that race-of-victim discrimination was unlawful. In Georgia, statewide data from the 1970s, on the one hand, revealed evenhanded treatment of black and white offenders, but, on the other hand, the same data documented race-of-victim disparities comparable to the victim SES disparities we see in Nebraska.

The results may also reflect a more subtle effect of bias based on victim SES. It is possible that most prosecutors and judges are less aware of such bias and as a consequence are less likely to be deterred in acting on it even if they perceive it as inappropriate. We consider it instructive in this regard that the retired judges whom we interviewed could offer no explanation for the victim SES effects in our results and did not appear to regard such discrimination as a particularly important issue.

X. EVIDENCE OF GEOGRAPHIC DISPARITIES IN CHARGING AND SENTENCING OUTCOMES

A. Unadjusted and Adjusted Geographic Disparities

In this section, we examine further the impact of geography on charging and sentencing outcomes in Nebraska.[284] We document disparities in prosecutorial charging and judicial sentencing practices in the state's major urban counties vis-á-vis greater Nebraska.[285] Our findings indicate that these disparities are concentrated in the cases with low to median offender culpability. We consider several possible explanations for the disparities.

Figure 29, Part I, presents unadjusted geographic disparities in charging and sentencing outcomes between the major urban counties and greater Nebraska for the entire 1973-1999 period. Column A documents a 28-percentage point disparity in the rates that death-eligible cases advanced to a penalty trial. This means that the risk of a penalty trial was 1.9 (.59/.31) times higher in the major urban counties

284. We examined above, section VIII.A, the process by which more punitive prosecutorial policies in the major urban counties produce an adverse impact on minority defendants.

285. *See supra* note 169-71 and accompanying text for a definition of the major urban counties.

than it was in greater Nebraska. In contrast, the penalty-trial death-sentencing rate, shown in Part I, Column B was 13 percentage points (.43-.30) higher in greater Nebraska than it was in the major urban counties. The combined effect of these two decision points is shown in Part I, Column C: a 5-percentage point higher death-sentencing rate in the major urban counties than in greater Nebraska.

Part II of Figure 29 presents the statewide results after adjustment for defendant culpability, measured by the number of aggravating circumstances in the cases. Column A shows a slightly larger geographic disparity in the rates that cases advance to a penalty trial, but Column B documents penalty-trial death-sentencing rates that are quite comparable: .27 and .29. The bottom line is shown in Column C of Part II, a 5-percentage point higher death-sentencing rate among all death-eligible cases in the major urban counties. Although this disparity is not statistically significant, in practical terms it means that over the 27-year period covered by this research, the risk of a death sentence for death-eligible offenders has been 50% (5/10)[286] higher in the major urban counties than it has been in greater Nebraska, although for the average death-eligible offender in each locale, the difference has been only 5 percentage points (.15-.10).[287]

Figure 30 presents data on the relationship between the magnitude of the geographic disparities and the culpability levels of the cases. Part I, which focuses on the prosecutorial charging decisions, reports in Column A a 30-percentage point (.58 -.28) adjusted disparity between the major urban counties and greater Nebraska in the rates that cases advance to penalty trial. Columns B through E report disparities controlling separately for the number of aggravating circumstances in the cases. The data show sharp disparities across every culpability level. In contrast, Part II, which presents comparable results for the judicial decisions, shows mixed results across culpability levels, which explains why the overall disparity in Column A, controlling for offender culpability, is so small.

B. Geographic Disparities Over Time

Figure 31 depicts Nebraska charging and sentencing practices in the major urban counties and greater Nebraska counties in five-year intervals since 1973. The vertical bars for each time period from left to right present (a) the rates at which cases advance to a penalty trial (the penalty-trial rate), (b) the judicial penalty-trial death-sentencing

286. The denominator is the death-sentencing rate in greater Nebraska and the numerator is the difference in the rates between the two parts of the state.

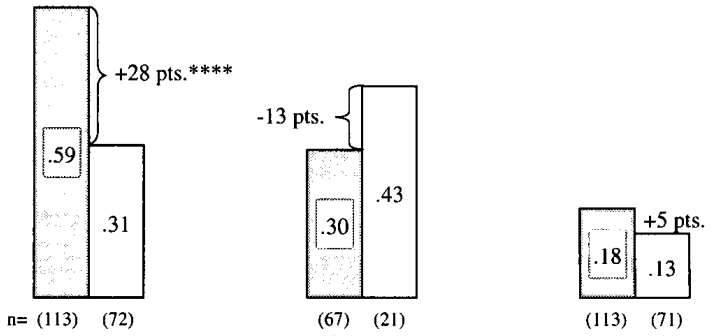
287. We conducted a variety of supplemental analyses in which we estimated geographic disparities controlling for other measures of offender culpability. The results concerning the rates that cases advance to penalty trial are reported in the text accompanying note 246, *supra*.

FIGURE 29

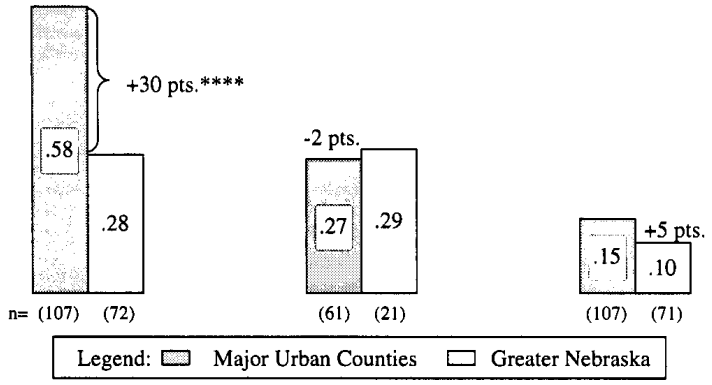
UNADJUSTED AND ADJUSTED DISPARITIES BETWEEN MAJOR URBAN COUNTIES AND GREATER NEBRASKA IN CAPITAL MURDER CHARGING AND SENTENCING OUTCOMES: NEBRASKA, 1973-1999

A	B	C
Rates at which Cases Advance to a Penalty Trial With the State Seeking a Death Sentence[1]	Rates that Death Sentences are Imposed in Penalty Trials[2]	Death-Sentencing Rates Among All Death-Eligible Cases[3]

Part I. Unadjusted Geographic Disparities



Part II. Geographic Disparities Adjusted for the Number of Aggravating Circumstances in the Cases[4]



**** = disparity significant at the .001 level

[1] The penalty-trial rates were .67 (54/81) in Douglas and Sarpy Counties; .41 (13/32) in Lancaster County; and .31 (22/72) in greater Nebraska.

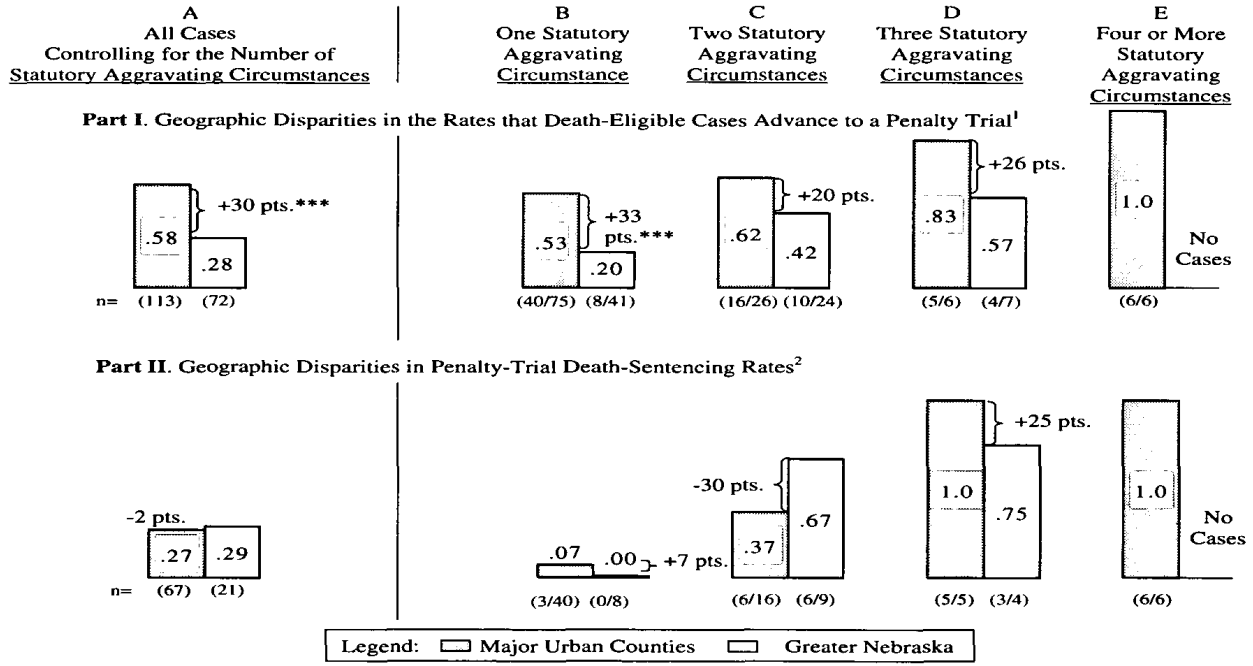
[2] The penalty-trial death-sentencing rates were .28 (15/54) in Douglas and Sarpy Counties; .38 (5/13) in Lancaster County; and .43 (9/21) in greater Nebraska.

[3] The death-sentencing rates among all death-eligible offenders were .19 (15/81) in Douglas and Sarpy Counties; .16 (5/32) in Lancaster County; and .13 (9/71) in greater Nebraska.

[4] The reduced number of major urban county cases in Part II is explained by the fact that all cases with four or more aggravators (n=6) were prosecuted in major urban counties. Because there are no greater Nebraska cases with comparable levels of culpability these six cases are omitted from the adjusted rates calculation in Part II.

FIGURE 30

GEOGRAPHIC DISPARITIES IN CHARGING AND SENTENCING OUTCOMES, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999



[1] The overall geographic disparity in penalty-trial rates controlling for the number of statutory aggravating circumstances in the cases is 31 percentage points (.59-.28).

[2] The overall geographic disparity in penalty-trial death-sentencing rates controlling for the number of statutory aggravating circumstances in the cases is 5 percentage points (.32-.27) significant at the .67 level.

Level of Significance of Disparity: * = .10; ** = .05; ***=.01; ****=.001.

rate, and (c) the death-sentencing rate among all death-eligible cases, without adjustment for defendant culpability. The data reveal three striking patterns. First, in the major urban counties (Part I), the judicial death-sentencing rates (middle bars) are uniformly lower than the rates at which prosecutors advance cases to a penalty trial (left bars). However, in greater Nebraska (Part II), with the single exception of the first five years (Column B), the penalty-trial death-sentencing rate has approximated (Column C) or exceeded (Columns D to F) the rate at which prosecutors advance cases to a penalty trial. This suggests that outside the major urban counties, prosecutors are more discriminating in advancing to penalty trial cases that are likely to result in a death sentence.[288]

The second pattern of interest in Figure 31 is the sharp decline in judicial death-sentencing rates in the major urban counties since 1982, while in greater Nebraska the average rate has increased, although the sample sizes are small. The third pattern of interest in Figure 31 is a sharp decline in greater Nebraska in the rate that cases have advanced to a penalty trial since 1987, while the penalty-trial rate has remained stable and much higher in the major urban counties during this same period.

Figure 31 sheds light on another issue: the Legislature's perception in early 1978 of "radically differing results" in different parts of the state.[289] A comparison of Column B in Part I and Part II suggests what the Legislature may have had in mind.[290] This contrast documents judicial death-sentencing rates in the major urban counties for the period 1973-1977, which are twice as high as the rates in greater Nebraska (.44 v. .20). The disparity in the unadjusted rates that cases advanced to a penalty trial was substantially higher in the major urban centers (.56 v. .42). Moreover, the death-sentencing rate among all death-eligible offenders was 3.1 (.25/.08) times higher in the major urban counties.

In Figure 32, we focus more sharply on the trends suggested by Figure 31 by disaggregating the data before and after 1983, when the decline in penalty-trial death-sentencing rates in the major urban counties began. The data in Figure 32 present unadjusted geographic

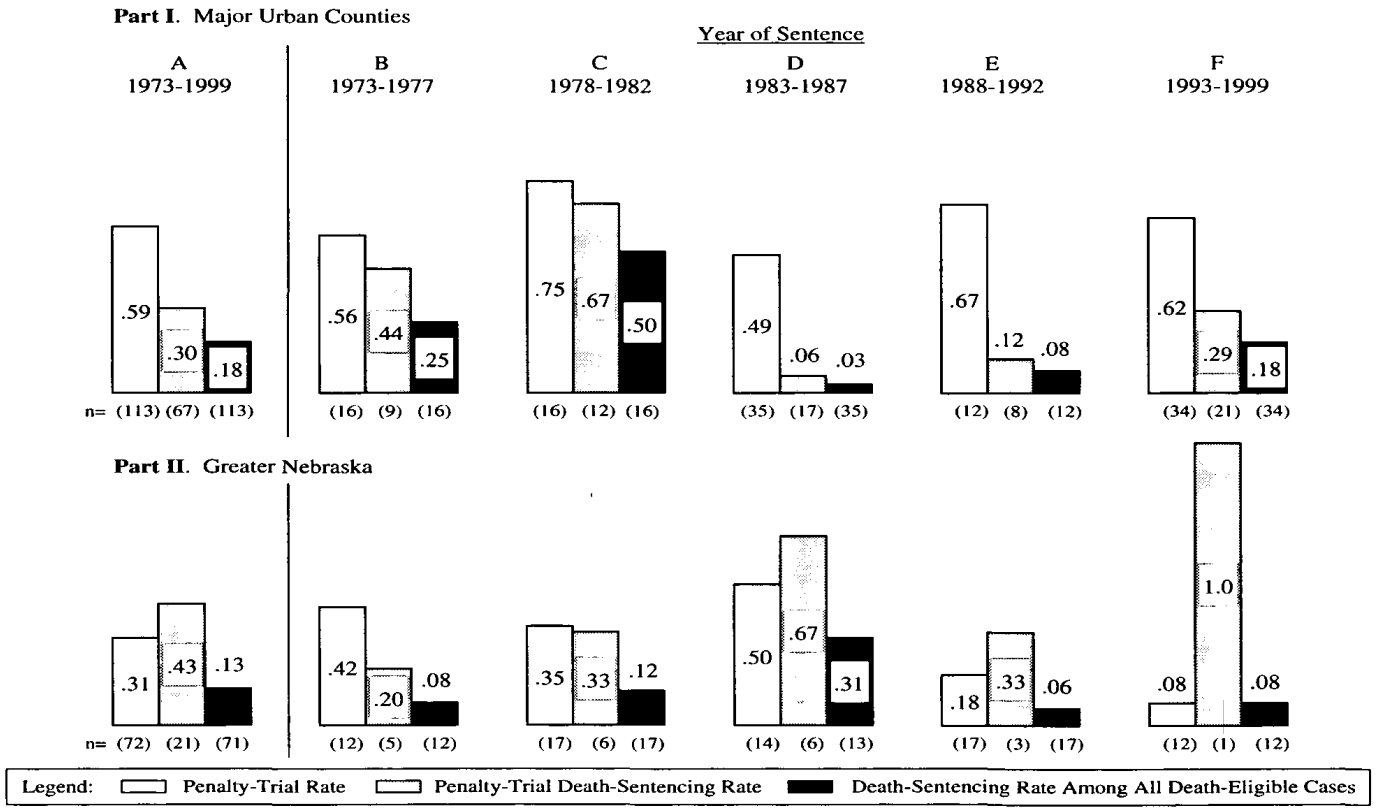
288. We are modeling a case winnowing process. The penalty-trial death-sentencing rates vis-á-vis the rate at which cases advance to a penalty trial is a measure of how discriminating prosecutors are in advancing cases to penalty trials in terms of the criteria the judges use in imposing death sentences.

289. *See supra* note 87 and accompanying text.

290. Because the Legislature was unlikely to have had any substantial information on the culpability of the individual death penalty defendants, it is likely that the disparities unadjusted for defendant culpability present the best picture of the Legislature's perceptions. In fact, the disparities perceived by the Legislature were based on Senator Ernie Chambers' analysis of a database he created from newspaper reports of homicide prosecutions in Nebraska.

FIGURE 31

UNADJUSTED CHARGING AND SENTENCING OUTCOMES IN CAPITAL MURDER CASES IN MAJOR URBAN AND GREATER NEBRASKA COUNTIES, OVER TIME: NEBRASKA, 1973-1999



disparities for our three principal outcomes. Part I presents data on prosecutorial decisionmaking. A comparison of Columns B and C of Part I indicates that in both geographic areas a smaller proportion of cases advanced to a penalty trial after 1982, but the unadjusted geographic disparity is essentially the same in each time period: 28 and 31 percentage points, both statistically significant.

Part II shows disparities in penalty-trial death-sentencing rates for both periods. Note that the direction of the disparities changed completely. In the earlier period (Column B) the rate was nearly twice as high (.57 v. .27) in the major urban counties while in the later period (Column C) it was more than 3 times (.60 v. .17) higher in greater Nebraska.

The data in Part III depicting death-sentencing rates among all death-eligible cases show the effects of the changes in penalty-trial death-sentencing rates in the major urban counties documented in Part II. Again, the disparities reversed. In the earlier period, the death-sentencing rate among all death-eligible cases was 3.7 (.37/.10) times higher in the major urban counties while in the later period it was 1.4 times (.14/.10) higher in greater Nebraska.

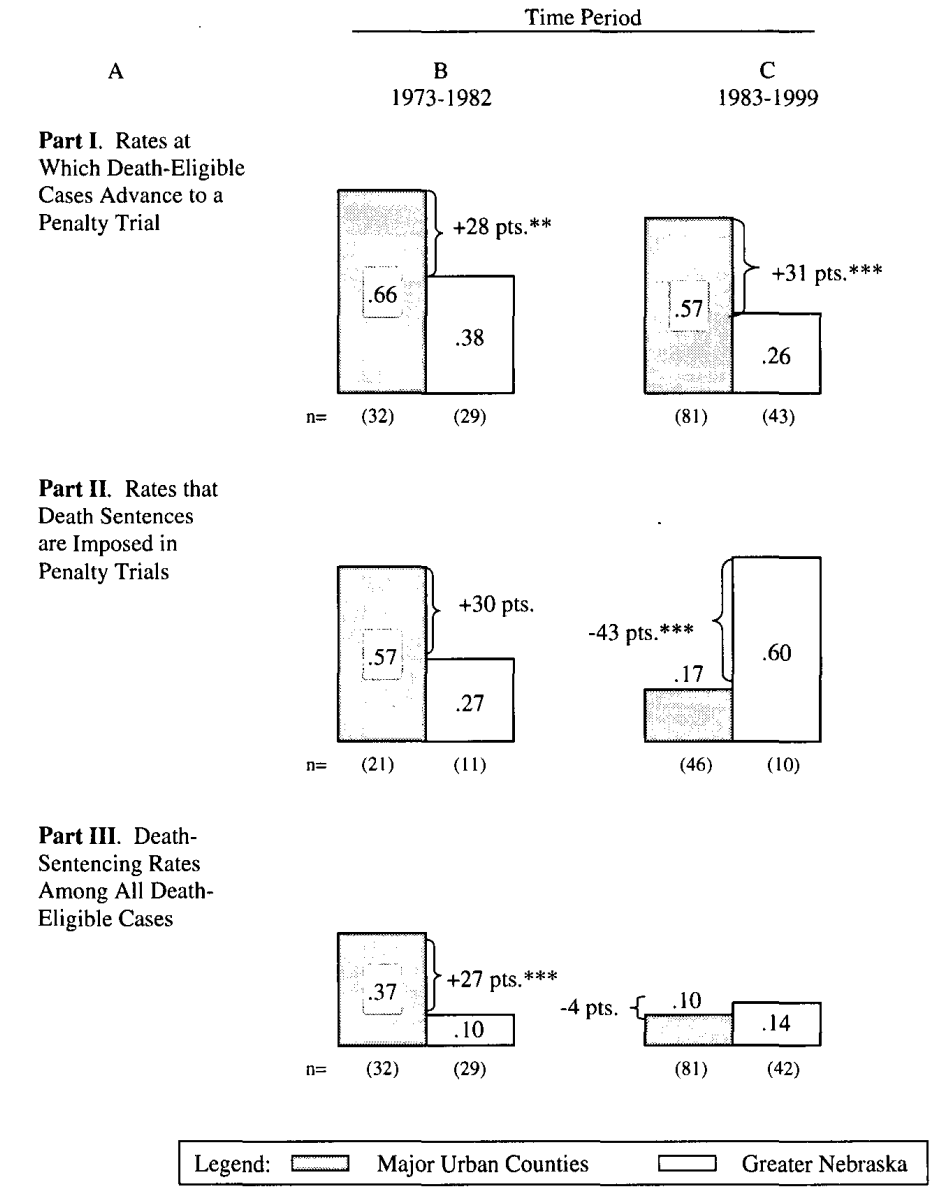
In Figure 33, we again disaggregate the data into pre- and post-1983, and estimate geographic disparities after adjustment for defendant culpability. The measure of defendant culpability in Figure 33 is the number of statutory aggravating circumstances in the cases. A comparison of Columns B and C of Part I indicates that after controlling for defendant culpability, the geographic disparities in the rates at which cases advance to a penalty trial are in the same direction and somewhat more pronounced and statistically significant in the post-1982 period.

Part II confirms that the direction of the geographic disparity in judicial death-sentencing is different in the two periods. But after adjustment for defendant culpability, the disparities are dramatically reduced and no longer statistically significant. We have rarely seen the introduction of controls for defendant culpability have such a substantial effect on an unadjusted disparity of the magnitude shown in Figure 32, Part II.

Part III presents the adjusted geographic disparities in the rates that death sentences were imposed among all death-eligible cases. Column B indicates that in the earlier period, the death-sentencing rate in the major urban counties was substantially higher (15 percentage points) than it was in greater Nebraska. In the later period, the disparity changes direction and is much smaller, declining from 15 percentage points to a non-significant 1 point. These results indicate the importance of evaluating sentencing practices on the basis of death-sentencing outcomes that have been adjusted for defendant culpability. The results (Figure 33, Part II, Column B) also suggest that

FIGURE 32

UNADJUSTED GEOGRAPHIC DISPARITIES IN CHARGING AND SENTENCING OUTCOMES: NEBRASKA, 1982 AND EARLIER V. 1983-1999

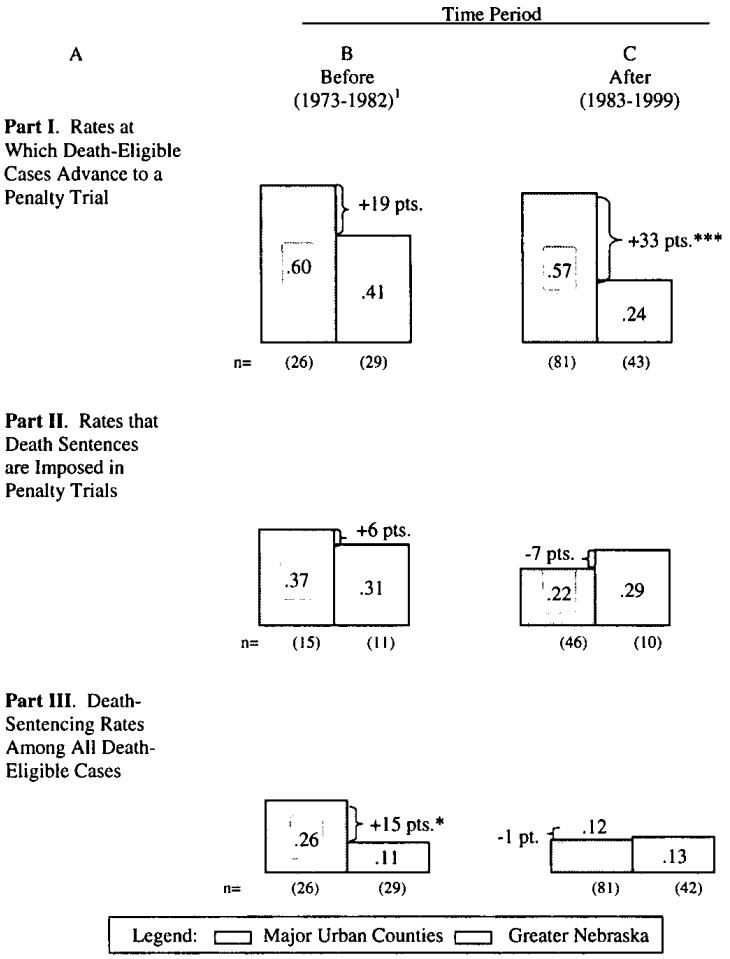


Level of statistical significance of disparity: *=.10; **=.05; ***=.01 and beyond.

FIGURE 33

GEOGRAPHIC DISPARITIES IN CHARGING AND SENTENCING OUTCOMES: NEBRASKA, 1982 AND EARLIER V. 1983-1999, CONTROLLING FOR THE NUMBER OF AGGRAVATING CIRCUMSTANCES IN THE CASES

(the bars indicate the penalty-trial rates (Part I) and death-sentencing rates (Parts II & III) after adjustment for the number of statutory aggravating circumstances in the cases)



[1] The 1982 and earlier cases reported below do not include six death-sentenced cases from the major urban counties because those cases involved four or more aggravating circumstances and there were no cases with more than three aggravators in greater Nebraska.

Level of statistical significance of disparity: *=.10; **=.05; and ***=.01

both before and after 1982, judges in the major urban counties and greater Nebraska shared a comparable conception of what constituted a "death case," although in the post-1982 period, the data (Part II, Column C) document somewhat higher judicial death-sentencing rates in greater Nebraska.

Our first conclusion is that adjustment for defendant culpability does not explain the geographic disparities in the rates that capital cases advance to a penalty trial either before or after 1983 (Figure 33, Part I). Moreover, during the pre-1983 period, defendant culpability does not explain the geographic disparities in the rates that death sentences are imposed among all death-eligible cases (Part III, Column B), even though it does explain the disparities in penalty-trial death-sentencing rates during this period (Part II, Column B). During the post-1983 period, defendant culpability explains[291] a significant portion of the geographic disparities in both sentencing rates (Part II, Column C) and in the rates that death sentences are imposed among all death-eligible cases (Part III, Column C).

Our second conclusion is that since 1982, judicial sentencing policies have tended to offset and partially cancel out prosecutorial charging and plea bargaining practices. Specifically, the higher rates at which death-eligible cases advance to a penalty trial in the major urban counties appear to have been offset somewhat by sentencing rates of the judges in the major urban counties that are slightly below the statewide norm. Similarly, the practices of prosecutors in greater Nebraska in advancing death-eligible cases to a penalty trial at rates below the statewide norm are offset, in part, by the sentencing practices of the judges in those counties that are slightly above the statewide norm.

The changes documented above since the early 1980s suggest that the 1978 amendments to the death-sentencing statute (requiring comparative proportionality review at the trial court level) and the Nebraska Supreme Court's narrowing of the scope of several statutory aggravating circumstances and limiting death sentencing statewide likely influenced the decline of death-sentencing rates in the major urban counties. These factors may also have contributed to the emergence statewide of a de facto "two aggravator" rule as a presumptive threshold for the imposition of a death sentence. Changes of this magnitude do not normally occur by chance.

These data raise some obvious questions about the reasons for the persistent geographic disparities in prosecutorial decisionmaking. In the balance of this section, we consider the possible differences in the

291. What we mean by "explain" is that when the analysis takes into account different levels of criminal culpability of the defendants in the two different parts of the state, what initially appear to be large differences in sentencing practices turn out to be only modest non-significant differences or no differences at all.

two geographic areas that could explain the disparities. Our analysis on each of these issues presented below indicates that none of these factors explain away the geographic disparities in prosecutorial charging and plea bargaining practices (measured by the rates at which cases advance to a penalty trial with the state seeking a death sentence). We also consider other qualitative explanations that appear more plausible.

C. Alternative Explanations for Geographic Disparities in the Rates that Cases Advance to a Penalty Trial

One plausible theory to explain the geographic disparities in the rates that cases advance to a penalty trial is that prosecutors outside the major urban counties are more conservative than their counterparts in the major urban counties in their assessment of the level of deathworthiness in a death-eligible case that is required to justify the state's seeking a death sentence. Another possibility is that prosecutors in the two areas may differ in terms of the discretion they believe they have under the law to waive the death penalty in first-degree capital murder cases unilaterally or in a plea bargain.[292]

Knowledgeable Nebraska legislators, judges, prosecutors, defense counsel, and others have suggested several other possible explanations:[293]

1. More resources are available to prosecutors in large urban counties to prosecute capital cases.
2. Prosecutors in the major urban counties have more experience with capital prosecutions and therefore are more inclined on the basis of this experience to advance a case to penalty trial than are their counterparts in greater Nebraska.
3. Judicial attitudes about the deathworthiness of an individual case may have a significant effect on the willingness of a prosecutor to advance a capital case to a penalty trial.
4. Prosecutors may be influenced in their decisions to advance a capital case to a penalty trial by the imminence of their re-election.
5. Differences in the frequency with which problems of proof "compel" a waiver of the death penalty in order to obtain a conviction.
6. Different levels of violent crime that influence prosecutorial charging policies.
7. Traditions in prosecutorial charging practices that reflect different public expectations in predominately stranger versus more closely knit communities.
8. Differences in support for capital punishment on the part of individual prosecutors.

We have developed measures that permit us to test empirically the plausibility of several of these alternative explanations for the geo-

292. Interviews with prosecutors in the Douglas County Attorney's Office suggest that such a perception may exist in that office.

293. We appreciate the helpful comments and suggestions of County Attorneys at the 2001 Annual Meeting of the Nebraska County Attorneys Association.

graphic disparities in the rates at which cases advance to penalty trial. However, some of the more plausible explanations are not susceptible to empirical testing.

1. Disparities in Financial Resources

It is commonly believed throughout the country that small counties can be adversely affected if they are required to independently finance complex, long-term criminal trials, an apt description of many capital prosecutions.[294] Accordingly, one reasonably might expect to see fewer capital cases advance to a penalty trial in counties with fewer prosecutorial resources.[295] Capital litigation requires prosecutorial resources, compensation for the attorneys of indigent defendants, and juror fees.

We tested in two ways the hypothesis that disparities in prosecutorial resources explain geographic disparities in the rates that cases advance to penalty trials in Nebraska. We first developed a series of quantitative measures of prosecutorial resources[296] and correlated them with the rates that cases advance to a penalty trial. The only measure that showed a significant relationship to the penalty trial outcome was the variable for the County Attorney's overall budget, which is substantially higher in the major urban counties.[297]

Next, we introduced that variable into a logistic regression analysis designed to explain which cases advanced to a penalty trial. The model also included variables for defendant culpability, the race and SES of the defendant and victim, and whether the case was prosecuted in a large urban or other county (the "geography" variable). In this analysis, the variable for the magnitude of the prosecutorial budget was statistically significant, but it suggested that after controlling for geography and defendant culpability, the larger the prosecutorial budget on average, the *less* likely the cases were to ad-

294. In Nebraska, for example, many counties in the state are currently staffed by a part-time County Attorney. Senator Ernie Chambers and the retired judges we interviewed share the judgment that prosecutors in smaller counties are substantially deterred from pursuing death-eligible cases capitally because of their financial implications. We heard stories of counties that were taken to the edge of bankruptcy financing capital litigation. The case of *State v. Ryan*, 222 Neb. 875, 387 N.W.2d 705 (1986), was one example given.

295. There is also an issue of caseload. In a number of major urban counties in this country that have substantial prosecutorial resources, the case load is so high that there are few resources available to finance capital trials and plea bargains are a common means for disposing of capital cases.

296. The measures are: (a) the County Attorney budget for 1997-98, (b) the salary of the County Attorney, and (c) the salaries of the Deputy County Attorneys in the county, all of which are derived from the County Budget Reports to the Nebraska State Auditor: 1997-98 (1999).

297. The Pearson correlation coefficient was .21, significant at the .01 level.

vance to a penalty trial.[298] In addition, the "geography" variable, which distinguishes between the rates at which cases advance to a penalty trial in large urban and other counties, remained substantial and significant.[299]

Our second approach was to consider the availability of resources from the Attorney General's Office to assist small counties in the conduct of complex criminal cases. In a number of states, including Nebraska, the Office of the Attorney General offers prosecutorial services to assist smaller counties in the conduct of complex criminal cases. The Nebraska experience has been that smaller counties request such assistance in criminal prosecutions approximately 5 to 8 times a year.[300] Requests routinely are made for such assistance in homicide cases, although the exact number is unknown. According to Assistant Attorney General William Howland, no such request for assistance in the prosecution of a complex case, capital or non-capital, has ever been denied by the Office of the Nebraska Attorney General.[301]

These analyses suggest that differences in prosecutorial resources do not explain the differences in the rates at which capital cases advance to penalty trial in Nebraska's major urban counties and greater Nebraska. However, the costs of litigation involve considerably more than prosecutorial resources—most notably attorneys' fees for defendants and juror fees which can put a serious strain on the budget of a small county. Moreover, the availability of support in the Office of the Attorney General does not mean that smaller communities necessarily will request assistance as an alternative to waiving the death penalty. In many smaller counties, there appears to be significant resistance to "outside" intervention from the Office of the Attorney General. To the extent that these factors contribute significantly to the geographic disparities in penalty-trial rates that we have documented, they are unlikely to change in the foreseeable future.

2. *The Experience of Prosecutors in Capital Litigation*

The hypothesis that the experience of prosecutors in handling capital cases could explain the differences in the rates that cases advance to penalty trial is entirely plausible. Capital trials with the state seeking a death sentence are a significant test for lawyers on both sides. It would be understandable if prosecutors with less experience

298. The regression coefficient was –.01, significant at the .05 level.
299. The regression coefficient for prosecution in a major urban county was 3.8, significant at the .01 level, which is larger than the 1.1 coefficient estimates in our core models reported in Table 4.
300. Interview with William Howland, Assistant Attorney General, Nebraska Attorney General's Office, at the annual meeting of the Nebraska County Attorneys Association (March 20, 2001).
301. *Id.*

were more inclined to waive the death penalty unilaterally or by way of a plea agreement, than their counterparts with more years of experience in capital litigation.

To test this hypothesis, we developed a series of measures of the experience of prosecutors in handling homicide cases in general and capital cases in particular during the time period covered by this project. The measures distinguish between simply handling a homicide prosecution and trying the case.[302]

The measure of prosecutorial experience revealing the strongest correlation with whether a death-eligible case advanced to a penalty trial is the number of capital trials the prosecutor conducted.[303] It indicates that, on average, the higher the number of capital trials, the higher the likelihood that a prosecutor's cases will advance to a penalty trial. This result is consistent with expectations since the larger number of penalty trials in the major urban counties would naturally result in more experience with such litigation for the prosecutors in those counties.

The next step of the analysis was to include the variable for prosecutor experience in trying capital cases in the regression analysis designed to explain which capital cases advanced to a penalty trial. In that analysis, the variable for prosecutorial experience did not emerge as a significant predictor in explaining which cases advanced to a penalty trial, and its inclusion in the analysis did not weaken the strong effect of the geography variable, which distinguishes between the large urban counties and the counties of greater Nebraska.[304]

It is interesting to note that prosecutorial experience in trying capital cases is also strongly correlated with the imposition of a death sentence in a penalty trial. The data suggest that the more capital trials a prosecutor has conducted, the greater the likelihood the court will return a death sentence.[305] One might expect to see this on the assumption that the more experienced prosecutors would be assigned to the most aggravated cases, which have a greater likelihood of a

302. The measures are based on counts of prosecutor and defense attorney names among the over 700 cases in our larger universe of homicide cases from which we culled the death-eligible cases. The record of each of those cases indicates the names of the lawyers on each side and whether the case was tried or resulted in a guilty plea. With this information, we created a measure of how many homicide and capital cases each prosecutor and defense counsel handled from 1973 to 1999 and how many of those cases were tried. One limitation of these measures is that they cover the entire period of the study and are not tailored to the prior experience of each prosecutor and defense attorney at the time of each prosecution.

303. The correlation coefficient was .22, significant at the .001 level.

304. The regression coefficient for the prosecutorial experience in trying capital cases variable was .31, significant at the .26 level. The regression coefficient for the major urban counties versus greater Nebraska counties variable was 1.3, significant at the .01 level.

305. The simple correlation coefficient is .26, significant at the .02 level.

death sentence. However, after adjustment for defendant culpability in a regression analysis, the association between prosecutorial experience and the death-sentencing outcome continues to hold.[306]

Also of interest is the apparent impact of defense counsel's experience on the likelihood of a penalty trial and a death sentence in a penalty trial. Contrary to expectations, the more experienced the defense counsel, the higher the risk of a penalty trial,[307] even after controlling for defendant culpability and the place of the trial. The experience of defense counsel showed no unadjusted association with the death-sentencing outcome, and there was no effect apparent in the regression analysis, which controlled for defendant culpability.[308]

This analysis suggests that the experience of the prosecution in conducting capital litigation, especially trying capital cases, may have some effect on the frequency with which capital cases advance to a penalty trial. However, it does not significantly explain the documented disparity in the rates at which cases advance to a penalty trial in the major urban counties and the counties of greater Nebraska.

We noted above that one way smaller counties can compensate for a lack of prosecutorial experience in handling capital litigation is to seek assistance from the Office of the Attorney General. However, we also noted, in this regard, that in many smaller counties there is significant resistance to that course of action.

3. *Judicial Sentencing Practices as a Proxy for Judicial Attitudes*

Some have suggested that in the exercise of discretion concerning the advancement of cases to penalty trial, prosecutors are constrained by their perceptions of the trial judge's attitude regarding the propriety of the death penalty in the case. On the one hand, if the prospects are high that the judge will impose a life sentence, economy may suggest that a faster way to get there is simply to waive the death penalty and avoid the risk of irritating the court with an unnecessary sentencing hearing. On the other hand, there are cases in which the prosecutor wants to waive the penalty trial in a plea bargain but the court expressly refuses to countenance the agreement and insists on a sentencing hearing.[309]

306. In this analysis, the coefficient for the number of capital trials conducted is 3.4, significant at the .02 level, a very large effect.

307. r=.32, p=.0001.

308. r=.11, p=.36. In the regression analysis, the coefficient for the experience of defense counsel in trying capital cases was .66 (p=.24).

309. Our records document two such cases in which the court records clearly indicate that the court insisted on conducting a penalty trial when the prosecutor sought to waive the death penalty as part of a plea bargain. There may be other occurrences of this that were not apparent on the records in our files.

To test this hypothesis we ideally need a measure of the trial judge's attitude about the appropriateness of the death penalty in each case. However, we have no factual basis for creating that measure. What we have instead is the basis for creating a measure of judicial penalty-trial voting practices that likely reflects the culpability levels of the cases heard by each judge (i.e., the more aggravated the case, the more likely it is that death is the result).

Our principal measure of judicial attitudes was the proportion of penalty-trial cases in which each judge had been involved (for judges with participation in three or more sentencing hearings) that resulted in a death sentence. Because of the small number of judges who had heard three or more cases, we developed alternative measures that count the number of cases in which each judge participated and the result was a death sentence.[310] The measures also distinguished between cases in which the judge had presided alone or had empanelled a three-judge court. We developed these measures on the basis of the information in the DCI indicating the name(s) of the judges who participated in each sentencing hearing.[311]

None of the measures of judicial attitudes showed a significant relationship with the rate that prosecutors advanced cases to a penalty trial, either with or without controls for defendant culpability.[312] In fact, the data are consistent with a greater likelihood of a penalty trial when the judge has participated in more cases that resulted in a life rather than a death sentence.[313] We are inclined to discount, therefore, the likelihood that the geographic disparities in the rates that

310. We prepared a similar measure of the number of times a judge's case resulted in a life sentence.

311. These measures have limitations, i.e., we have small samples for many judges and there is a distinct correlation between the number of cases heard with either sentencing outcome and the number of years the judge has been on the bench, although it is unclear the bias this may introduce. Another possible concern is that we have no controls for the relative culpability levels of the defendants in cases that each judge hears. For example, the judges associated with many life-sentenced cases may have participated in a disproportionate number of cases with low levels of culpability. However, we consider it reasonable to assume that there is a random distribution among the judges in terms of the culpability levels of the cases that they hear.

312. The simple correlation, r, of our principal measure, the death-sentencing rate among all cases heard by each judge, was $-.07$, $p=.39$. There is a weak non-significant positive correlation between the number of solo penalty trials of the judges that resulted in a death sentence and the advancement of cases to a penalty trial ($r=.12$, $p=.16$). However, there is also a similar weak positive correlation between the number of solo penalty trials and the advancement of cases to a penalty trial ($r=.12$, $p=.16$).

313. In the regression analysis, the coefficient for the number of life sentence outcome cases in which the judge has participated was .21, $p=.03$. This may reflect the fact that the judicial death-sentencing rates are lower in the major urban counties where the cases are most likely to advance to a penalty trial, although the place of prosecution was controlled for in the regression. In addition, the

capital cases advance to a penalty trial are the product of judicial influence over prosecutorial decisions.

4. The Imminence of Prosecutorial Elections

Because of the political salience of the death penalty in many jurisdictions, the record of an elected prosecutor or elected judge in prosecuting and sentencing in capital cases is sometimes a salient factor in their re-election campaigns. It is commonly believed, therefore, that in some jurisdictions, elected prosecutors and judges may be influenced in their decisionmaking by the imminence of their re-election.

We tested this hypothesis by first creating a measure of the time between the date of conviction of each capital case and the prosecutor's next election. (We did not apply this analysis to the sentencing judges because they are appointed.) We then correlated this measure with the rate that prosecutors advance cases to penalty trial. We also created a scale that classified the cases in one-to-four year periods between the prosecutor's next election and the date of conviction. Statewide, and at the local level, these measures showed no effect in bivariate analyses or in logistic regression analyses.

Finally, we conducted a logistic regression analysis that (in addition to measures for defendant culpability, the race of the defendant and the victim, and the SES of the defendant and victim) included variables for (a) judicial propensity to impose a death sentence, (b) county attorney budgets, (c) the experience of the prosecutor and defense counsel, and (d) the imminence of prosecutorial elections. In terms of explaining the rates at which cases advance to a penalty trial, only the experience of defense counsel variable had a significant coefficient.[314] The coefficient for the geography variable remained substantial and significant beyond the .10 level.[315]

5. Differences in the Frequency of Problems of Proof that "Compel" Plea Bargains

The data in this study concerning prosecutorial charging and plea bargaining practices are limited to the information available to us in court records and pre-sentence investigation reports (PSI).[316] Also,

probability of a penalty trial is lower for judges with higher levels of participation in cases that result in a death sentence (the logistic coefficient is –1.4 (p=.17)).

314. b=1.0, p=.02.

315. b=2.7, p=.07.

316. At the proposal stage of the study, we intended to request the individual prosecutors who handled guilty pleas to provide us with their comments on their motivations for entering the pleas, if collecting that information was feasible. However, subsequent discussions with members of the Crime Commission Subcommittee that supervised the study indicated that it was probably unreasonable to expect that much fruitful information would be provided to us on this issue. These dis-

for 100 cases where it was unclear if a plea-bargain offer had been made by the prosecution, we inquired of both the prosecutor and defense counsel if such an offer had been made. However, neither of these sources identify proof problems that may have "compelled" a waiver of the death sentence and the offer of a plea bargain as the exclusive means of obtaining a conviction.[317] In such cases, the decision to waive the death penalty would not necessarily reflect a discretionary decision concerning the deathworthiness of the defendant, but rather may reflect a practical judgment informed by the need to obtain a guilt-trial conviction.

We do not believe it plausible that our inability to distinguish between "compelled" and "non-compelled" plea bargain agreements has biased our documented geographic disparities concerning the rates that cases result in plea bargains and advance to penalty trials. Such bias would occur only if the compelled plea bargains were a much more common phenomena in greater Nebraska (where plea bargains are more common and penalty trials are less common) than they are in the major urban counties, particularly Douglas County, which advances death-eligible cases to penalty trial at a higher rate than any other county in the state. We consider it more likely that the incidence of compelled plea bargains is randomly distributed throughout the state. In this regard, recall that the geographic disparity in the rates that cases advance to penalty trial is very large. Accordingly, bias in our finding as a result of this omitted variable would require a significantly higher incidence of compelled plea bargains outside Nebraska's major urban counties than occurs in the major urban centers. We consider this unlikely.

The upshot of our analyses is that none of the rival hypotheses offered to explain the geographic disparities in the rates at which cases

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cussions raised the concerns that County Attorneys would be uncomfortable providing us their mental impressions regarding the strength of their cases, the quality of evidence used to convict defendants or as the factual bases for pleas, and similar information. Such mental impressions would ordinarily not be discoverable by defendants because they would be subject to a work-product privilege. A concern was raised that if these matters were disclosed for this study, the disclosure would constitute a waiver of the attorney's work-product privilege over those mental impressions, and defendants may be able to seek discovery of that information to support litigation in their cases. We also raised the possibility of collecting this type of information at the annual meeting of the Nebraska County Attorneys Association held in March of 2001, and requested that County Attorneys advise us if, in their judgment, County Attorneys would be willing to disclose this information. Discussions with County Attorneys at that meeting did not allay the concerns raised earlier regarding discovery of that information. None of the County Attorneys with whom we spoke at that time indicated that they would be willing to provide that information.

317. A classic example is when the testimony of a co-perpetrator is the only source of information available in a case and a condition for the co-perpetrator's cooperation is a plea bargain including the waiver of a death sentence.

advance to penalty trial appear plausible. Our conclusion, therefore, is that those geographic disparities are more likely explained in the two ways suggested above. The first possibility is different prosecutorial perceptions of the breadth of prosecutorial discretion under the law to waive the death penalty in capital prosecutions.[318] The second possibility is differential perceptions of the degree of culpability and deathworthiness of similarly situated death-eligible offenders that needs to exist before a case is advanced to a penalty trial with the state seeking a death sentence. What might explain these different perceptions in the major urban counties and greater Nebraska?

The disparities in prosecutors' policies may reflect differences in community attitudes and concerns about crime and the necessity of prosecuting capital murder cases to the full extent of the law. Certainly, Nebraska's major urban counties have higher crime and homicide rates than do the other counties.[319] Prosecutors in the major urban counties may well be reacting to those community attitudes and concerns.

Additional explanations that have been offered to explain the geographic disparities in penalty trial rates are less susceptible to empirical testing but they may provide the most plausible explanations for the disparities. An explanation offered by state Senator Ernie Chambers is that because smaller communities are more closely knit, offenders there are more likely to be known in the community and less likely to be viewed as demonized by the community than is the case in the major urban counties where offenders are more likely to be viewed as strangers whom few people know and with whom even fewer people identify. The argument posits that these differences have an impact

318. *See supra* note 129 and accompanying text for a description of the different legal interpretations.

319. In the Nebraska "metropolitan" statistical areas, where 864,156 persons reside, the FBI "Crime Index Total" was 46,775 in 1999 (5.4 %). The crime index total is "composed of selected offenses used to gauge fluctuations in the overall volume and rate of crime reported to law enforcement. The offenses included are the violent crimes of murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault, and the property crimes of burglary, larceny-theft, motor vehicle theft, and arson." In the cities outside metropolitan areas, where 392,151 persons reside, the crime index total was 15,923 (4.1%). In rural areas, where 409,693 persons reside, the crime index total was 5,746 in 1999 (1.4%). FBI, UNIFORM CRIME REP., INDEX OF CRIME BY STATE (1999).

Because of the concentration of minority defendants in the major urban areas, where cases advance to a penalty trial at a higher rate, there is a significant correlation between the proportion of minority homicide defendants (capital and non-capital) in the county and the frequency with which death-eligible cases advance to a penalty trial (r=.27, significant at the .0001 level). The death-sentencing rate among all death-eligible cases is also positively associated with the proportion of minority homicide defendants in the county but the correlation is weak and not statistically significant (r=.11, p=.16).

on prosecutorial perceptions of offender culpability and deathworthiness and impact their willingness to seek death sentences in death-eligible cases.

Senator Chambers also suggested that outside the major urban counties there are prosecutors who are personally opposed to capital punishment and that those sentiments interact with concerns about the cost of capital litigation and the lack of prosecutorial experience in capital litigation to hold down the rate at which death-eligible cases advance to penalty trial.

The foregoing analysis suggests that a combination of factors appears to explain the differences in penalty-trial rates ranging from differing perceptions about prosecutorial authority to waive the death penalty in first-degree murder cases, finances available to support capital litigation, prosecutorial experience trying homicides, perceptions of community support for aggressive charging practices in death-eligible cases, and a tradition of resistance in smaller counties to requesting the assistance of the Office of the Attorney General in the conduct of capital litigation. To the extent that this analysis is correct, it appears unlikely that charging practices in greater Nebraska are likely to come into line with those of the major urban counties. A reduction of these geographic disparities is more likely, therefore, to arise from changes in charging practices in the major urban counties.

Finally, what are the legal and moral implications of the geographic disparities we have documented in the rates that death-eligible cases advance to penalty trial? As we noted above,[320] this evidence will not support a legal claim in Nebraska or any other jurisdiction of which we are aware. However, from the perspective of comparative justice the problem is clear. Compared to offenders prosecuted in greater Nebraska, death-eligible defendants in the major urban areas are subjected to a much higher risk that their cases will advance to a penalty trial solely by reason of where they are prosecuted. The place of prosecution is a morally irrelevant factor that has nothing whatsoever to do with a defendant's criminal culpability and deathworthiness. This, of course, was the reason that in 1978 the Nebraska Legislature expressed its concern about the lack of geographic uniformity in the state's administration of the death penalty.[321] It is clear, however, that in the absence of further legislative or judicial action, the geographic disparities documented in this study will persist.

320. *Supra* note 5.
321. *Supra* note 91 and accompanying text.

PART E

XI. EVIDENCE OF CONSISTENCY AND SELECTIVITY IN CHARGING AND SENTENCING OUTCOMES

A. Introduction

In this section we assess the extent to which the charging and sentencing outcomes of the Nebraska death penalty system are consistent and selective. By "consistency" we refer to the frequency with which penalty trials are conducted and death sentences are imposed in cases with comparable levels of defendant culpability. By "selectivity" we refer to the extent to which penalty trials and death sentences are limited to the most aggravated and deathworthy cases. Concerns about consistency and selectivity flow from the principle of comparative justice, which condemns "either dissimilar treatment of relevantly similar cases or similar treatment of relevantly dissimilar cases."[322]

1. Consistency

Consistency addresses the issue of *horizontal* equity[323] that underlies the arbitrariness rationale of *Furman v. Georgia*. In Justice Stewart's explanation of why the death sentences before the Furman Court were "cruel and unusual in the same way that being struck by lightning is cruel and unusual," he noted that "of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."[324] He concluded that the Eighth Amendment of the United States Constitution cannot tolerate "legal systems that permit this unique penalty to be so wantonly and freakishly imposed."[325]

In this research, we define a death sentence in an individual case as "inconsistent" and "comparatively excessive" if there exist many other cases involving defendants with comparable levels of criminal culpability that result in life sentences or less. We refer to the other defendants with comparable levels of criminal culpability as the defendant's "near neighbors." For example, if it can be demonstrated that a death-sentenced defendant has a large number of near neighbors in terms of their criminal culpability and none of those offenders has been sentenced to death, the logic of *Furman v. Georgia* suggests

322. As noted above, Schopp, *supra* note 3, and accompanying text, the principle of comparative justice also condemns discrimination on the basis of the race and SES of defendants and victims "because it differentiates among offenders on the basis of morally irrelevant factors . . . ." *Id.* at 827.
323. Horizontal equity calls for similar treatment of relevantly similar cases.
324. Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).
325. *Id.*

that this defendant's death sentence is inconsistent and comparatively excessive.

There are at least three levels of concern about inconsistency in capital charging and sentencing. First, inconsistent outcomes are unprincipled. Second, they undercut any deterrent effect the death penalty may have. Third, they reflect an insufficient community consensus on the level of culpability that is required to justify the execution of a fellow citizen.[326]

The level of consistency of an individual death sentence determines the risk that it is "comparatively excessive," while the level of consistency across all charging and sentencing outcomes in a system is a measure of the risk that the system as a whole is "arbitrary and capricious."[327]

Inconsistency and comparative excessiveness are relative matters and one's assessment of the risk of such sentences depends on two things. First is the level of frequency with which death sentences are imposed among a death-sentenced defendant's near neighbors. For example, if the death-sentencing rate among a defendant's near neighbors is above 80%, the system is operating quite consistently and there is no risk of comparative excessiveness in that death sentence. However, if the death-sentencing rate among a defendant's near neighbors

326. Justice White addressed these concerns in *Furman,* 408 U.S. at 311-12, by stating:

> [W]hen imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked. Most important, a major goal of the criminal law—to deter others by punishing the convicted criminal—would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others."

In *Gregg v. Georgia*, 428 U.S. 153, 222 (1976), Justice White, concurring, also emphasized the link between the frequency with which death sentences are imposed and the deterrent effect of capital punishment.

327. *Furman,* 408 U.S. at 309-10 (Stewart, J., concurring). Beyond the infrequency of death sentencing perceived by the *Furman* Court, the crucial flaw in the death-sentencing systems declared unconstitutional in *Furman* was the complete absence of legislative standards to guide the discretion of the sentencing authorities. The death-sentencing amendments adopted in every death sentencing state after *Furman*, including Nebraska, provide these standards in the form of statutory aggravating circumstances. For this reason, a claim of comparative excessiveness in a jurisdiction with sentencing standards no longer implicates the Eighth Amendment under current law. *Gregg*, 428 U.S 153. However, many state legislatures, including the Nebraska Legislature, have expressed concern about inconsistency in death sentencing in general and comparatively excessive death sentences in individual cases.

is 2%, the level of consistency is very low and the risk is very high that his death sentence is comparatively excessive.

The second consideration is one's normative judgment concerning the degree of inconsistency that is acceptable from a moral and legal perspective. Some might consider unacceptable any death sentence imposed in a case in which the death-sentencing rate among that defendant's near neighbors is not well-above 50%.[328] Another quite different view might consider death sentences unacceptable only if the death-sentencing rate among each defendant's near neighbors is less than 10%. With these two considerations in mind, it is possible to classify death-sentenced cases on a continuum that reflects the level of death-sentencing among each death-sentenced offender's near neighbors. The degree of one's concern about the overall consistency of the system produced by such evidence will reflect his or her judgment of the degree of inconsistency that is morally and legally acceptable.

2. Selectivity

Selectivity focuses on the extent to which penalty trials and death sentences are limited to the most culpable cases. It reflects another goal of *Furman v. Georgia*, which is reflected in the observation of Justice White that he could perceive no "meaningful basis for distinguishing the few cases in which [a death sentence] is imposed from the many cases in which it is not."[329]

328. Few state courts have given extended consideration of the minimal level of death sentencing required among a death-sentenced defendant's near neighbors to rule out concerns about comparative excessiveness. One state justice who has addressed the issue under a frequency system of proportionality review believes that the law requires a death-sentencing frequency among near neighbors that is well above 50% to negate concerns about comparative excessiveness. State v. Jeffries, 717 P.2d 722, 744 (Wash. 1986) (Utter, J., dissenting) (stating that the death-sentencing rate among similar cases should be "significantly greater than 50 percent"). To the same effect one could argue that a 50% chance of a death sentence among similar cases is equivalent to the toss of a coin and that a much higher level of consistency is required. *Coley v. State*, 204 S.E.2d 612 (Ga. 1974), a capital rape case, suggests that a death-sentencing frequency below 25% among similar cases raises serious concerns about comparative excessiveness. This case can also be read to imply that a death-sentencing rate above 25% among a defendant's near neighbors is sufficient to satisfy concerns about comparative excessiveness.

329. *Furman*, 408 U.S. at 313. A violation of the principle of vertical equity involves the imposition of death sentences for offenders with relatively low levels of criminal culpability and the imposition of life sentences or less for considerably more culpable offenders, including the most culpable defendants.

Among both the public and the courts there is substantially greater support for the goal of selectivity than there is for the goal of consistency. For example, in its proportionality reviews of death sentences, the New Jersey Supreme Court pays lip service to the goal of consistency, but is very much concerned about the selectivity of the death sentences it reviews. *See, e.g.*, State v. Papasavvas, 790 A. 2d 798, 807 (N.J. 2002) ("Although precedent-seeking review [which focuses on

Figure 34, which documents the distribution of life and death sentences, controlling for offender culpability, provides a sense of the system's selectivity. The four levels of offender culpability, based on a logistic regression model of death sentencing outcomes among all death-eligible cases, are indicated on the horizontal axis. The number of life and death sentenced cases at each level of culpability is shown on the vertical axis. The life and death sentences at each culpability level are consistent with a reasonably selective system, i.e., there appear to be relatively few death sentenced cases in which the offender's level of culpability is lower than an offender who received a life sentence.

We measure selectivity in two ways. The first is the frequency of penalty trials and death-sentencing outcomes over time. We also compare Nebraska frequencies with comparable data from other jurisdictions for which we have data. The assumption here is that less frequent death sentencing is more selective death sentencing. However, this assumption needs to be tested since it is always possible that, even though death sentences are infrequently imposed, they may not be allocated to the most aggravated and deathworthy cases. Indeed, this is exactly what characterized the Georgia system that the court invalidated in *Furman v. Georgia*—in terms of culpability, the few cases that resulted in death sentences could not be meaningfully distinguished from the many cases that did not result in a death sentence.

The second component of a selectivity analysis, therefore, calls for a measure of culpability that enables one to identify the most aggravated cases in the system and to assess the extent to which death sentences are limited to those cases. We do this in three ways. Our first measure of culpability is the frequency of death sentencing among similarly situated offenders, whom we characterize as the defendant's near neighbors. This approach assumes that if a very high proportion of an offender's near neighbors are also sentenced to death, his case is highly aggravated and deathworthy. However, this may not always be true.

An alternative approach is to apply an a priori measure of culpability that is based on a legislative judgment of culpability. For this purpose we use the number of aggravating circumstances in the case.

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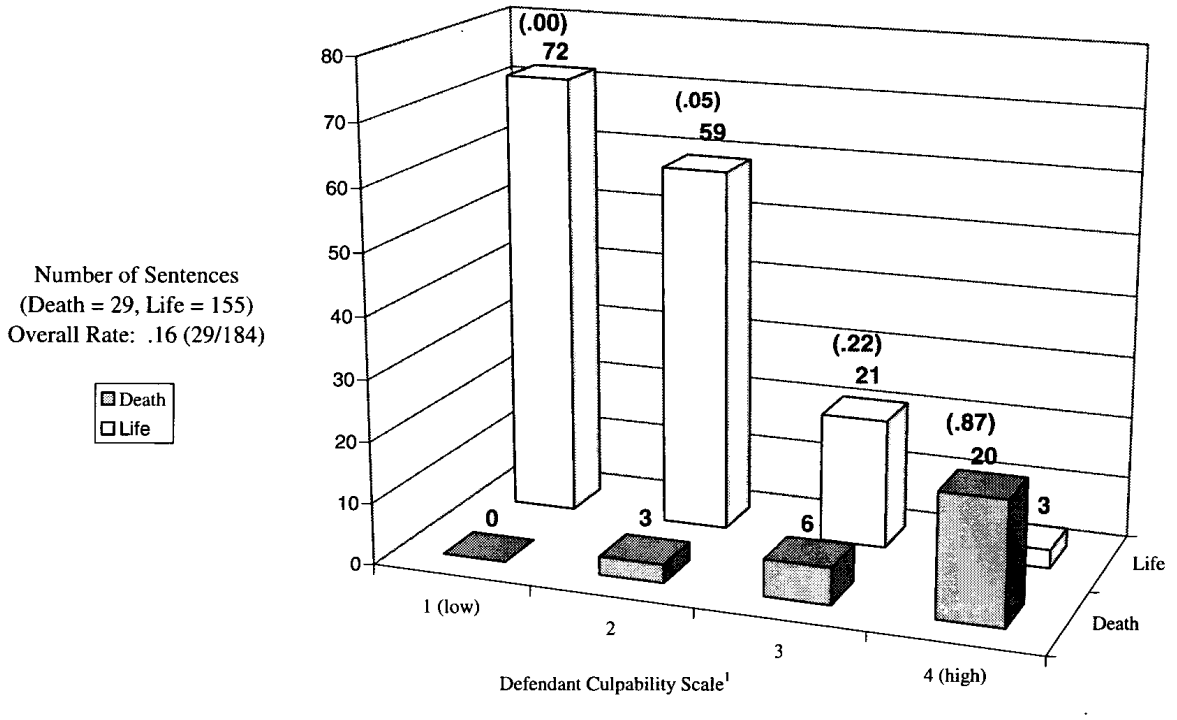
the selectivity issue] is intended to complement frequency analysis [which focuses on the consistency issue] . . . we traditionally have placed greater reliance on precedent-seeking review."). The proportionality reviews of the Florida Supreme Court focus exclusively on the selectivity issue. The court does not even address the issue of consistency in its analyses, which are limited to a comparative analysis of appealed death sentenced cases. *See, e.g.*, Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999) (the goal of the review process is to "reserve" the death penalty for crimes that fall "within the category of *both* (1) the most aggravated, and (2) the least mitigated of murders").

FIGURE 34

NEBRASKA (1973-1999): DISTRIBUTION OF LIFE AND DEATH SENTENCES AMONG ALL DEATH-ELIGIBLE CASES, CONTROLLING FOR DEFENDANT CULPABILITY

(death-sentencing rates are in parentheses)



[1]The regression-based scale underlying this Figure is described in Figure 6, Part I and accompanying text.

Our second alternative measure reflects the judgments of prosecutors and judges in seeking and imposing death sentences. For this purpose, we rank the cases in terms of culpability as estimated in a logistic regression analysis.

Our third measure of selectivity identifies the number and proportion of *death sentences* imposed in cases with a level of criminal culpability that is equal to or less than the culpability level of the 95th percentile *life-sentenced* case. In an ideal system, no offender with a level of criminal culpability less than the most culpable life-sentenced offender would be sentenced to death. Although this goal is probably beyond reach under current conditions, the extent to which a system approximates this norm is relevant evidence of the level of selectivity of a death sentencing system.

B. Evidence of Inconsistency and Comparative Excessiveness

The following analysis has two parts. First, we present evidence of the consistency of the Nebraska system in imposing 29 death sentences during the period covered by this study. The approach we apply is known as the "frequency approach" to proportionality review. It is the approach that was urged on the Nebraska Supreme Court in the 1980s by Chief Justice Krivosha.[330] The frequency approach is factually based and attempts to estimate for each death-sentenced offender the frequency with which death sentences are imposed among his or her near neighbors.[331] The estimates produced for each case in this manner provide a basis for assessing how consistently the system as a whole imposes death sentences. These data also lay the foundation for assessments of whether individual death sentences are comparatively excessive.

Second, we test the *Proffitt* hypothesis by comparing the Nebraska record on consistency with comparable evidence from New Jersey, a state with jury sentencing.

1. The Nebraska Data

a. Quantitative Analysis

The data we have developed on the consistency of Nebraska's death-sentencing system are presented in Figure 35, Table 5, and Appendix C. Figure 35 provides an overview of the death-sentencing

330. *See supra* note 118 and accompanying text.

331. David Baldus, *When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences,* 26 SETON HALL L. REV. 1582, 1595-1606 (1996) (discussing the distinction between the frequency approach and the "precedent seeking approach" that is applied by most appellate courts that conduct proportionality reviews, including the Nebraska Supreme Court).

rates among the cases that we define as near neighbors to each of Nebraska's death-sentenced offenders. Part I presents near neighbor death-sentencing rates among the other defendants *whose cases advanced to a penalty trial* with the state seeking a death sentence. This part reflects only the degree of consistency of judicial penalty-trial sentencing decisions. Part II broadens the inquiry and focuses on the death-sentencing rates among near neighbors who were selected from the universe of *all death-eligible offenders* in this study. This part reflects the impact on the consistency of outcomes of both prosecutorial charging and judicial sentencing decisions. It also documents the fact that a number of offenders whose cases did not advance to a penalty trial have levels of criminal culpability that are comparable to the defendants who were sentenced to death.

We calculated the frequency of death sentencing among each death-sentenced defendant's group of near neighbors by utilizing an average estimate based on our principal measures of defendant culpability: (a) the number of aggravating circumstances in the case, (b) the number of aggravating and mitigating circumstances in the case, (c) the salient factors of the case measure, and (d) a regression-based culpability scale.[332] For each death sentence imposed, these measures identify eight overlapping but different groups of near neighbors. The first four groups of cases consist of near neighbors whose cases advanced to a penalty trial, while the second four groups of cases consist of near neighbors identified among all death-eligible cases regardless of whether they advanced to a penalty trial. Each of these frequencies presents a different estimate of the death-sentencing rate among a group of offenders with levels of culpability comparable to each death-sentenced offender. We then averaged those groups of four estimates for each death-sentenced case—one group based on the penalty-trial near neighbors and one group based on the near neighbors among all of the death-eligible defendants.[333] Those two averages determine where each death-sentenced case is classified in Part I (penalty-trial near neighbors) and Part II (near neighbors identified among all death-eligible cases) of Figure 35.

Part I, Column I indicates that when the analysis is limited to penalty-trial near neighbors, for 38% (11/29) of the death-sentenced defendants, the average death-sentencing rate among the cases we classified as comparable in terms of culpability was above .80.[334] We

332. *Supra* section IV.B.

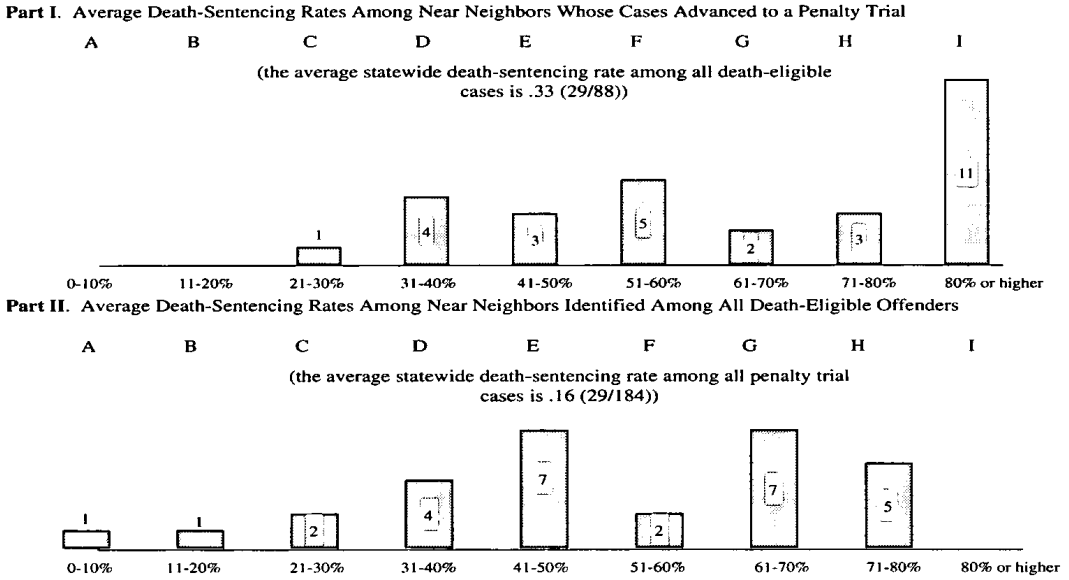
333. The estimate for each offender under each measure is presented in Appendix C. Column L of the Appendix presents the average of the four estimates based on the penalty-trial near neighbors, while Column M presents the average of the four estimates based on the near neighbors drawn from all death-eligible cases.

334. The numbers above .80 are the average of four different estimates of death-sentencing rates among similarly situated offenders in categories on the culpability scale in which there were three or more offenders. The estimates for each death-

FIGURE 35

EVIDENCE OF INCONSISTENCY AND COMPARATIVE EXCESSIVENESS IN NEBRASKA DEATH-SENTENCED CASES, 1973-1999: A CLASSIFICATION OF DEATH-SENTENCED OFFENDERS ACCORDING TO THE DEATH-SENTENCING RATE AMONG CASES WITH COMPARABLE LEVELS OF CULPABILITY ("NEAR NEIGHBORS"), MEASURED WITH AN AVERAGE OF FOUR DIFFERENT MEASURES OF DEFENDANT CULPABILITY[1]

(the bars indicate the number of death-sentenced offenders with the death-sentencing rates among near neighbors that is indicated at the foot of each bar)[2]



[1] The measures of culpability are the number of aggravating circumstances, the number of aggravating and mitigating circumstances, the salient factors of the case measure, and regression-based scales measures. *See supra* section IV.B for a description of the measures. Detail on the death-sentencing rates among each death-sentenced offender's near neighbors is presented in Appendix C.

[2] For example, Part I, Column F indicates that for five death-sentenced offenders our data show that the death-sentencing rate among near neighbors was between 51% and 60%.

characterize these death sentences as presumptively or *prima facie* evenhanded and comparatively non-excessive. A final judgment on the issue would require close analysis of the records of the cases that we have identified as near neighbors to assure that they are properly classified as comparable in terms of defendant culpability.[335]

Appendix C, Column L also identifies three death-sentenced cases in which the average death-sentencing rate estimated among near neighbors was less than or equal to the .33 average death-sentencing rate among all penalty-trial cases.[336] We classify these three death sentences, which fall in Part I, Columns C and D of Figure 35, as presumptively or *prima facie* comparatively excessive because .33 is in the range of death sentencing that one would expect to see if the death sentences were randomly assigned among all of the penalty-trial cases. Again, close analysis of the records of the cases that we have identified as their near neighbors (with our four measures of defendant culpability) may indicate that, in fact, the cases of those offenders were actually much less culpable than these death-sentenced defendants, which would explain the low death-sentencing rate among their near neighbor cases. If that were the case, good practice would call for the identification of the near neighbors who were in fact most comparable to these defendants in terms of their criminal culpability.

The data in Part II of Figure 35 reflect the impact of both judicial sentencing decisions and prosecutorial charging decisions. Because the data suggest that prosecutorial decisionmaking statewide is considerably less discriminating in terms of defendant culpability than is judicial decisionmaking,[337] we would expect to see considerably less consistency in the results that reflect the influence of prosecutorial decisionmaking. That is exactly what we see in the results presented in Part II, i.e., the system appears considerably less discriminating in terms of limiting death sentences to the most aggravated cases. None of the death sentences in Part II is classified in Column I where the death-sentencing rate among near neighbors is 80% or higher. In ad-

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sentenced defendant under each measure are presented in Appendix C. We used only estimates based on three or more near neighbor cases.

335. This analysis is exactly what counsel for the defendant and the state do when this approach is used in a judicial proportionality review. The cases are distinguished on their facts to persuade the court to select what each side considers the appropriate group of near neighbor comparison cases. If such an analysis reveals a misclassification, the death-sentencing rates among the properly defined category of near neighbors would provide the basis for assessing the level of death sentencing among the defendant's similarly situated near neighbors.

336. See cases 2, 8, and 26, Appendix C, Column L.

337. As noted above, *supra* notes 206-07, the results of multiple regression analyses are much more predictable in the analysis of judicial decisionmaking than they are in the analysis of prosecutorial decisionmaking. This finding should not be surprising given the substantial geographic disparities we have documented in the rates that cases advance to penalty trial. *See infra* sections X.A and XII.B.

dition, 52% (15/29) of the death cases are in categories in which fewer than 50% of the defendant's near neighbors received a death sentence (Columns A to E). However, in only one case is the death-sentencing rate among near neighbors less than the average rate (.16).

Assuming the validity of the culpability classifications of each of the death-sentenced cases shown in Figure 35, what do these data tell us about the extent to which the system as a whole produces consistent results? In such a system one would find that virtually all death sentences were limited to defendants in culpability categories in which 80-100% of similarly culpable offenders received a death sentence, i.e., they would be classified in Column I in Part I of Figure 35. This would mean that all of the sentencing judges applied a common conception of which offenders were truly deathworthy. Similarly, in Part II nearly all of the cases would be classified in Column I, which would mean that, statewide, both the sentencing judges *and* the prosecutors shared a conception of which offenders were the worst of the worst.[338] The Nebraska system falls short of that model of consistency since only 38% (11/29) of death sentences in Part I fall into such a highly selective category and none of the death sentences in Part II fall into that category.

What about the other extreme—a substantially random system in which the culpability and deathworthiness of the offenders had little or nothing to do with who received a death sentence? In such a system, each group of near neighbors would approximate a random sample of all of the cases in each analysis. In Part I, all of the cases would be more or less equally distributed above and below Column D, which embraces the .33 average penalty-trial death-sentencing rate.[339] In Part II, the cases would be distributed among the bars above and below Column B, which embraces the .16 average death-sentencing rate among all death-eligible cases.

The data in Parts I and II of Figure 35 indicate that the system clearly does *not* allocate death sentences *randomly* in terms of criminal culpability. All but one of the death sentences imposed are classified in a category in which the death-sentencing rate among the

338. Of course, the sentencing judges make no formal determination of the deathworthiness of the death-eligible cases that do not advance to a penalty trial. The impact of prosecutorial decisionmaking is felt in every case.

It is important to note that the approach we use here for estimating death-sentencing rates among similar cases can be viewed as biasing the results somewhat in the direction of suggesting more consistency than actually exists. The reason for this is that in each category of cases in which a death-sentenced offender was classified, we counted that defendant's death sentence as a death sentence that was imposed among similarly situated cases.

339. If the average death-sentencing rate were .35 and there were 10 near neighbor cases, the standard deviation around .35 would be plus or minus 15 percentage points and one case in 20 would be in the .65 or the .05 category.

defendant's near neighbors is higher, and often very much higher, than the average death-sentencing rate among all cases.

However, even in Part I, the data suggest that many more death sentences are imposed in categories in which the death-sentencing rate among the defendant's near neighbors is well below .80. Moreover, in both Parts I and II there are a number of death-sentenced cases classified in and around (Column E) the category in which 50% of the defendant's near neighbors are sentenced to death. In assessing consistency, a 50% probability of receiving a death sentence is important because it approximates the outcome of a coin toss. Death sentences are imposed with this level of frequency or less among near neighbors (Columns A to E) in 28% (8/29) of the cases in Part I and 52% (15/29) of the cases in Part II.

Even though we base our estimates on four different measures of defendant culpability, Table 5 indicates that the average of those estimates is highly correlated with the number of aggravating circumstances in the cases. Column A classifies the cases in terms of the number of aggravating circumstances. For each of those subgroups of cases, Columns B and C list the average rate that death sentences are imposed among each death-sentenced defendant's near neighbors; Column B presents the estimates based on the penalty-trial near neighbors; and Column C presents the estimates based on near neighbors among all death-eligible cases. For example, Row 2, Column B indicates that for the cases with two aggravating circumstances, death sentences are imposed on average 54% of the time among penalty-trial near neighbors. (The parenthetical below the 54% estimate indicates that the range of estimates for the 12 cases in this category was from 40% to 62%.)

The differences between the estimates in Columns B and C parallel the differences between the estimates shown in Parts I and II of Figure 35; i.e., the Column B estimates reflect the impact of judicial penalty-trial decisionmaking alone, while the Column C estimates reflect the impact of both judicial and prosecutorial decisions among all death-eligible cases.

The data in Table 5 clearly indicate that the greatest risk of inconsistency and comparative excessiveness exists in cases involving one or two aggravating circumstances. For cases with three or more aggravating circumstances, there is a very high level of consistency when the point of comparison is the treatment of other penalty-trial defendants (Column B) and a consistent level of sentencing above .50 when the point of comparison is all death-eligible cases (Column C).

b. Qualitative Analysis

Another way to assess the consistency of outcomes of a death penalty system is to compare narrative summaries of the cases that re-

TABLE 5

ESTIMATED DEATH-SENTENCING RATES FOR DEFENDANTS WITH COMPARABLE LEVELS OF DEFENDANT CULPABILITY IN 29 NEBRASKA DEATH-SENTENCED CASES, CONTROLLING FOR THE NUMBER OF STATUTORY AGGRAVATING CIRCUMSTANCES IN THE CASES: NEBRASKA, 1973-1999[1]

A	B	C
Number of Aggravating Circumstances and Number of Death-Sentenced Cases	Comparable Penalty-Trial Cases	Comparable Cases Among All Death-Eligible Defendants
1 (n=3)	29% (.22-.33)	9% (.09-.28)
2 (n=12)	54% (.40-.62)	39% (.80-.51)
3 (n=8)	82% (.79-.87)	61% (.42-.66)
4-6 (n=6)	87% (.79-.90)	75% (.70-.79)

[1] The second line of data in each box indicates the range of estimates for death sentences imposed among near neighbors for the cases classified in that box.

sulted in death sentences with narrative summaries of factually comparable cases that received a sentence of life imprisonment or less. The vehicle for this approach is presented in Appendix D, which classifies each of the 185 death-eligible cases identified in this research in terms of its "salient factor," as those factors are enumerated in Appendix B. For each case under each salient factor category, we identify the county in which the case was prosecuted and present a brief factual and procedural summary of the case. Under each sub-heading, we first present narrative summaries for the cases that resulted in a death sentence; these are followed by the cases that advanced to a penalty trial with the state seeking a death sentence and the court returned a life sentence, and those cases are followed by the cases that did not advance to a penalty trial.

For example, Salient Factor category D ("Multiple Victims") embraces 25 cases in which the most prominent statutory aggravating circumstance in the case was multiple victims, which are further subclassified according to the following levels of criminal culpability:

1. Aggravated with Low Mitigation (n=13)
2. Aggravated with High Mitigation (n=3)
3. One Statutory Aggravator with Low Mitigation (n=4)
4. One Statutory Aggravator with High Mitigation (n=5)

A review of the narrative summaries indicates that death sentences were limited to five cases in the most aggravated category—

D.1. We invite the reader to scrutinize the facts of all of these cases to assess the extent to which (a) the five cases that resulted in death sentences can be meaningfully distinguished from the cases that did not and (b) the cases that did not advance to a penalty trial can be meaningfully distinguished from those that did.

c. *A Note on Proportionality Review in the Nebraska Supreme Court*

We described above how, since 1986, the Nebraska Supreme Court basically has abandoned the field when it comes to formal comparative proportionality reviews.[340] The reviews conducted since then have been strictly pro forma and of little consequence in terms of promoting consistency in the system. One wonders, therefore, whether that process would have been significantly improved if the Court had followed the lead of Chief Justice Krivosha in the 1980s in his application of a frequency approach to the review process along the lines required by the Legislature's 1978 amendments. In six cases he would have vacated the death sentence as comparatively excessive while, in three, he would have affirmed.

Our analysis of these nine cases indicates that the level of consistency measured by the defendant's rate of death sentencing among "near neighbors" was actually *higher* for the death sentences that he would have reversed as comparatively excessive than it was for the death sentences that he would have affirmed as not comparatively excessive.[341] The most likely explanation for the differences in his results and ours is that the Chief Justice's universe of comparison cases was not limited to death-eligible cases as we have defined that term; it was limited to homicides from the 1970s and 1980s, and he lacked measures of criminality that would have enabled him to distinguish finely between the culpability levels of the cases.[342] In short, these results confirm the critical importance to the meaningful conduct of

340. *Supra* note 120 and accompanying text.

341. In our analysis of the seven cases that he would have reversed as comparatively excessive, the average level of death sentencing among the defendant's near neighbors among all death-eligible cases over the entire period 1973-1999 was .67 (ranging from .47 to .79), while in the cases he would have affirmed as not excessive, the comparable statistics were .41 (ranging from .41 to .42). If the analysis is limited to penalty-trial near neighbors, for the death sentences he deemed to be excessive, the average death-sentencing rate among near neighbors was .82 (ranging from .59 to .90), while for the three death sentences he considered not to be excessive, the average death-sentencing rate among near neighbors was .64 (ranging from .57 to .79).

342. The 1978 statute contemplated a universe of comparison cases that embraced all criminal homicides, rather than only those that were death-eligible. For example, approximately 50% of the comparison cases used in the Chief Justice's dissenting opinion in *Palmer (III)* did not meet the test of death eligibility that we applied in the research.

proportionality review of good data on potential near neighbors and good measures of defendant culpability.

2. *Testing the* Proffitt *Hypothesis with a Comparative Assessment*

How well does the Nebraska system work in comparison to systems in other jurisdictions? We have comparable data on the consistency of penalty-trial sentencing outcomes only for the New Jersey system (1983-1991).[343] Nebraska and New Jersey have similar lists of statutory aggravating and mitigating circumstances. The principal distinction between them is that New Jersey has almost exclusively jury death sentencing while Nebraska has exclusively judicial death sentencing conducted by appointed judges. In addition, as noted above, the Nebraska judges operate under a statute that requires them to consider the risk of comparative excessiveness when they impose death sentences. Against this background, we should expect to see less risk of comparatively excessive death sentences in the Nebraska system in the penalty-trial decisions and we could also expect this effect to result in a level of consistency among all death-eligible cases that is higher in Nebraska than it is New Jersey. As we explain below, the data are consistent with these expectations.

We compare the two systems with three measures. The first is the proportion of death sentences that are imposed in cases in which 70% or more of the defendant's near neighbors receive a death sentence. The second and third measures are the proportion of the death sentences imposed in cases in which the death-sentencing rate among the death-sentenced offender's near neighbors is (a) *lower than* 50% or (b) *lower than* the average death-sentencing rate among all cases considered in the analysis. The analysis below documents that when the focus is exclusively on penalty-trial decisions, the Nebraska system is distinctly superior, but when the analysis reflects the impact of judicial sentencing decisions *and* prosecutorial charging decisions, the systems are quite comparable.

a. *Death-Sentenced Cases in Which 70% or More of the Defendant's Near Neighbors Receive a Death Sentence*

When we limit the first measure to penalty-trial near neighbors, the Nebraska system appears to be more consistent than the New Jersey system. Specifically, in 48% (14/29) of death sentences imposed in Nebraska, the death-sentencing rate among penalty-trial near

343. NEW JERSEY REPORT, *supra* note 166.

neighbors is 70% or higher. The comparable figure in New Jersey is 29% (10/34).[344]

When the near neighbors are drawn from the universe of all death-eligible cases and the numbers reflect the impact of both prosecutorial charging and penalty-trial sentencing decisions, the Nebraska and New Jersey systems are comparable. In Nebraska, 17% (5/29) of the death sentences meet the 70% standard while in New Jersey 15% (5/34) meet it.[345]

b. Death-Sentenced Cases in Which Fewer than 50% of the Defendant's Near Neighbors Receive a Death Sentence

On the second issue, concerning the proportion of death sentences imposed in cases in which the rate of sentencing among near neighbors is below 50%, the Nebraska system is also more effective than the New Jersey system. When the focus is limited to death-sentencing rates among near neighbors whose cases advanced to a penalty trial, the death-sentencing rate among near neighbors is less than fifty percent only 21% (6/29) of the time in Nebraska and 35% (12/34) of the time in New Jersey.

When the focus expands to embrace death-sentencing rates among comparable defendants in the entire population of death-eligible offenders, the death-sentencing rate among near neighbors is less than 52% (15/29) of the time in Nebraska death cases and 62% (21/34) of the time in the New Jersey death cases.

c. Death-Sentenced Cases in Which the Death-Sentencing Rate Among the Defendant's Near Neighbors is Less than the Overall Average Rate

The third issue focuses on the proportion of death sentences imposed in cases in which the rate of sentencing among the defendant's near neighbors is below the average death-sentencing rate. Here, we find that the overall average death-sentencing rates in Nebraska and New Jersey are comparable. The penalty trial death-sentencing rates are 33% in Nebraska and 30% in New Jersey. For death sentencing among all death-eligible cases, the rate is 16% in Nebraska and 15% in New Jersey. When the near neighbors are limited to penalty-trial defendants, the death-sentencing rate among near neighbors is less than the overall average 3% (1/29) of the time in Nebraska and 9% (3/34) of the time in New Jersey.

When the near neighbors are drawn from all death-eligible cases, the death-sentencing rate among near neighbors is less than the over-

344. *Id.* at Tbl. 19.
345. *Id.* at Tbl. 20.

all average 3% (1/29) of the time in Nebraska and 6% (2/34) of the time in New Jersey.

Overall, these comparative data suggest that New Jersey and Nebraska are quite effective in avoiding clearly excessive death sentences, i.e., those with death-sentencing rates among near neighbors that are well below the overall average for all cases in the analysis.[346] In terms of limiting death sentences to the most aggravated cases, the penalty-trial outcomes in Nebraska are clearly superior, but when the analysis embraces the impact of judicial sentencing decisions *and* prosecutorial charging decisions, the results are only slightly better in Nebraska.[347]

As suggested above, the greater consistency of the Nebraska penalty-trial decisions vis-á-vis New Jersey is most likely the product of Nebraska's system of exclusively judicial sentencing under a statute that requires the sentencing judges to assess the risk of comparative excessiveness associated with each death sentence they impose. The New Jersey penalty-trial decisions, in contrast, are almost entirely jury decisions. However, when the impact of prosecutorial charging decisions is added to the analysis, the risk of comparative excessiveness in the two systems appears to be quite comparable in terms of the imposition of death sentences among all death-eligible cases.

C. Evidence of Selectivity in the Imposition of Death Sentences

1. Quantitative Analysis

We focus here on the extent to which death sentencing is limited to the most aggravated cases—the "worst of the worst" as they are commonly described in the Nebraska media. We also examine the extent to which the process of appellate review in the Nebraska Supreme Court appears to enhance or diminish the selectivity of the system as the death-sentenced cases move toward execution.

We have documented that death sentencing has become less frequent over the last twenty-five years. We believe this is, in significant part, because of the narrowing of statutory aggravators by the Nebraska Supreme Court and the conduct of proportionality review in sentencing hearings. A good example in this regard is the 1977 case of Rodney Stewart, in which the trial court found six aggravators present. The Nebraska Supreme Court found only one present and reduced the death sentence to life imprisonment. This is a strong model for greater selectivity.

To expand this inquiry, we need a more systematic measure of offender culpability. Our first measure in this regard is the frequency of

346. *See supra* discussion in this subsection.
347. *See supra* subsections XI.B.2.a and XI.B.2.b.

death sentencing among similarly situated cases. A high frequency of death sentencing among a death-sentenced defendant's near neighbors reflects a strong consensus on the part of prosecutors and judges that this defendant's case is particularity deathworthy, while a low rate of death sentencing among his near neighbors reflects a weaker consensus about the deathworthiness of his case. Because a high or low rate of death sentencing among similarly situated cases also implicates the level of consistency that we discussed in the previous section, the concepts of consistency and selectivity are closely related.

We first revisit Figure 35, which classifies the cases in terms of the frequency of death sentencing among similarly situated offenders. Part I, which is limited to a comparative analysis of only penalty-trial cases, indicates that in 48% (14/29) of the cases the death-sentencing rate among the defendant's near neighbors is greater than .70. Part II reflects the judgments of both judges *and* prosecutors. From that perspective, in only 17% (5/29) of the death-sentenced cases is the rate of death sentencing among similarly situated offenders greater than .70. Figure 35 also indicates that there are a significant number of death sentences imposed among cases in which there appears to be a quite low level of consensus on the deathworthiness of the offender.

Next, we consider the extent to which the Nebraska Supreme Court appears to respond to offender culpability in its assessments of "legal" error in the cases and to strive informally to limit executions to the most aggravated cases. By finding legal error more often in less aggravated death-sentenced cases, a court can weed out some portion of the least aggravated cases and keep in the system the more aggravated cases for which there is a stronger consensus on the offender's culpability. We noted above that there does appear to be an impact, as has been documented in other research.[348] Specifically, when we focus on cases affirmed and reversed, we see that among the cases affirmed, the average rate of death sentencing among the defendant's near neighbors is .75 (ranging from .49 to .90) whereas among the cases vacated the average is 20 percentage points lower, .55 (ranging from .33 to .82).[349] Thus, even though the Nebraska Supreme Court may not formally conduct meaningful proportionality reviews, it appears that offender culpability may be a distinct factor in its decisionmaking.

We evaluated selectivity in three other ways. First we examined the distribution of death-sentenced cases in terms of the number of statutory aggravating circumstances in the cases. Recall that in terms of predicting who is sentenced to death the number of ag-

348. *Supra* notes 13, 14 and accompanying text.

349. Among the offenders who have been executed the statistics are .75 (ranging from .59 to .88) and for those currently on death row, the statistics are .69 (ranging from .49 to .85).

gravators in the case is, by far, the best predictor. This is consistent with the legislative policy; i.e., if one aggravator is sufficient to justify a death sentence, that justification must surely rise as the number of aggravators in the case increases. We found that 48% (14/29) of the death sentences were imposed in cases with three or more aggravators, 41% (12/29) were imposed in two-aggravator cases, and 10% (3/29) were imposed in single-aggravator cases.

We also rank ordered the cases in terms of their predicted probability of receiving a death sentence. When the predictions were based on an analysis of penalty trials, 45% (13/29) of the defendants had a predicted likelihood of being sentenced to death that was over .90 and when the analysis was based on death sentencing among all death-eligible cases, those same 13 offenders had a predicted probability of .80 or higher. These were the defendants with three or more aggravating circumstances in their cases. For the remainder of the cases, with the exception of the single-aggravator cases, the estimates were between .50 and .70 (For the one-aggravator cases, the estimates were below .10).

When we focus on the five defendants executed or currently on death row, the predicted probabilities for only two (Williams and Lotter) are in the top, most aggravated category. Among the 12 most aggravated cases by this measure, three died on death row of natural causes and eight others have left death row alive. Among this top group, only Williams was executed.

Among the least aggravated of the two-aggravator cases and the single-aggravator cases, all have left death row alive.

As noted above, our third measure of selectivity focuses on the percentage of death sentences that possess criminal culpability scores that are equal to or less than the culpability score of the 95th percentile life-sentenced case. Among all death-eligible cases, 28% (8/29) of the Nebraska death sentences are in that category. As a point of comparison, based on comparable methodology, among post-*Furman* Georgia cases that resulted in a jury guilt-trial conviction between 1973 and 1979, 29% of the death sentences fell into this category, while in the pre-*Furman* period, 61% of the Georgia death sentences fell into this category.[350]

The upshot of these findings is that while death sentences are imposed in highly aggravated cases with reasonable regularity, many death sentences are also imposed in less aggravated cases. Moreover, those executed thus far and those now remaining on death row are not necessarily the most culpable offenders, many of whom had their sentences vacated and left death row alive.

350. EJDP, *supra* note 11, at 91.

2. Qualitative Analysis

Another way to assess the consistency of outcomes of a death penalty system is to compare narrative summaries of the cases that resulted in death sentences with narrative summaries of factually comparable cases that received a sentence of life imprisonment or less. The vehicle for this approach is presented in Appendix D, which classifies each of the 185 death-eligible prosecutions identified in this research in terms of its "salient factor," as those factors are enumerated in Appendix B. For each case under each salient factor category, we identify the county in which the case was prosecuted and present a brief factual and procedural summary of the case. Under each subheading, we first present narrative summaries for the cases that resulted in a death sentence; these cases are followed by the cases that advanced to a penalty trial with the state seeking a death sentence and the court returned a life sentence, and those cases are followed by the cases that did not advance to a penalty trial.

For example, salient factor category D ("Multiple Victims") embraces 25 cases in which the most prominent statutory aggravating circumstance in the case was multiple victims, which we further subclassified according to the following levels of criminal culpability:

1. Aggravated with Low Mitigation (n=13)
2. Aggravated with High Mitigation (n=3)
3. One Statutory Aggravator with Low Mitigation (n=4)
4. One Statutory Aggravator with High Mitigation (n=5)

A review of the narrative summaries indicates that death sentences were limited to five cases in the most aggravated category—D.1. We invite the reader to scrutinize the facts of all of these cases to assess the extent to which (a) the five cases that resulted in death sentences can be meaningfully distinguished from the cases that did not and (b) the cases that did not advance to a penalty trial can be meaningfully distinguished from those that did.

PART F

XII. SUMMARY OF PRINCIPAL FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

A. Principal Findings and Conclusions

1. Race-of-Defendant and Race-of-Victim Disparate Treatment

Our first finding is that there is no significant evidence of systemic disparate treatment on the basis of the race of the defendant or the race of the victim in either the major urban counties or the counties of greater Nebraska on the part of either prosecutors or judges.[351] In

351. *See supra* section VII.

the major urban counties, where 93% (28/30) of the prosecutions in minority-victim cases took place, the data document white-victim disparities in judicial sentencing decisions that are consistent with a pattern and practice of race-of-victim discrimination. However, because these disparities are based on small samples and are not statistically significant, they do not support a conclusion that sentencing judges in Nebraska's major urban counties systemically treat offenders differently on the basis of the victim's race.[352]

These findings suggest that prosecutors and judges are sensitive to the issue of racial equity and that the law prohibiting racial discrimination has had a deterrent effect. Our findings also provide support for the *Proffitt* hypothesis that judicial sentencing is superior to jury sentencing in terms of arbitrariness and comparative justice. In contrast to our Nebraska results, data from Pennsylvania, a state with a weighing system similar to Nebraska, document evidence of disparate treatment in jury penalty trials based on the race of the defendant and the victim.[353]

2. *Adverse Disparate Impact on Minority Defendants*

Our second finding is that state law, which authorizes broad discretion in prosecutorial charging decisions and the differential charging and plea bargaining practices of prosecutors in the major urban counties and the counties of greater Nebraska, produces a statewide "adverse disparate impact" on racial minorities.[354] This adverse impact flows from more punitive prosecutorial charging practices for *all* cases in the major urban counties. As noted in the preceding section, the data indicate that prosecutors in the major urban counties of Nebraska treat whites and minorities evenhandedly. However, the data also indicate that after adjustment for defendant culpability, those prosecutors advance all death-eligible cases to penalty trials at a substantially higher rate than do their counterparts in greater Nebraska. Because 90% of the minority defendants charged with capital murder in Nebraska are prosecuted in the major urban counties, minorities are more impacted than whites by the greater willingness of prosecutors in these counties to advance death-eligible cases to penalty trials. Therefore, by virtue of the counties in which their crimes are committed and/or prosecuted, minority defendants, statewide, face a higher risk that their cases will advance to penalty trials (with the state

352. To the extent that there may be race-based disparate treatment in the system, it does not occur with sufficient frequency for our analytic methods to detect.

353. *Philadelphia Study*, *supra* note 10, at 1686-87 (race-of-victim effects), 1688-89, 1758-59 tbls. 6 & E1 (race-of-defendant effects).

354. *See supra* section VIII.A.

seeking a death sentence) than do similarly situated white defendants statewide.[355]

The sources of this adverse impact, therefore, are (a) state law, which delegates to local prosecutors broad discretion in the prosecution of death-eligible cases, (b) significant differences in the rates that cases advance to penalty trial in the major urban counties and the counties of greater Nebraska, and (c) the fact that 90% of minority defendants in death-eligible cases are prosecuted in the major urban counties of Nebraska. This adverse impact on minorities is analogous to the adverse impact on minorities that exists in states where local appropriations for the support of public education are lower in predominately minority communities than they are in predominately white communities. This finding does not suggest or intimate that the Nebraska death-sentencing system is racially biased. Our findings are quite to the contrary.

What are the implications of this adverse disparate impact? From a legal standpoint, it is clear that this evidence would not support a legal claim under existing law. But what are the moral implications? One view is that the adverse disparate impact on minority capital defendants that we have documented *is not* a matter of moral concern because it is merely an anomaly resulting from the fact that minorities primarily reside in the state's major urban counties. An alternative view is that the adverse impact *is* a matter of moral concern because it places a significant, disproportionate, and unjustified burden on minority defendants.[356]

From this perspective, there are two possible justifications for statewide adverse impact on minorities in the rates that cases advance to penalty trials. The first is tradition, as the charging practices in the major urban counties have been more punitive in their practices than in greater Nebraska since 1973. A second, more important justification for the adverse impact is the necessity of aggressive charging practices as a vehicle for delivering justice. This justification lacks force in cases with only one aggravating circumstance because death sentences are rarely imposed in those cases. However, in cases with two or more aggravators, there is a substantial justification for any adverse impact caused by aggressive charging practices because many death sentences are imposed in those cases.

Given the adverse impact of prosecutorial charging decisions on minorities statewide, one would reasonably expect to see a statewide

355. The discretion of prosecutors to which we refer has nothing to do with non-capital homicide; it pertains strictly to the discretion authorized with respect to cases that are death-eligible under Nebraska law.

356. In employment and housing discrimination law, a substantial adverse disparate impact against a protected group will not stand unless it can be justified by a compelling business interest.

adverse impact against minorities in the imposition of death sentences. Indeed, if the sentencing judges imposed death sentences at the same rate across the state, this is exactly what one would see, because statewide, a higher proportion of minority defendants advance to penalty trials. However, this does not occur. The reason it does not is that the penalty-trial judges in the major urban counties, where all but one of the minority defendant penalty trials were held, sentence white defendants to death at a higher rate than they do minority defendants. As a consequence, the statewide data document only small, non-significant, and *inconsistent* race-of-defendant disparities on the order of 2 and 3 percentage points in the rates that death sentences are imposed among all death-eligible cases.[357] These disparities do not constitute a significant adverse impact against minorities, statewide, in the rates that death sentences are imposed among death-eligible cases.

3. *Minority-Defendant Adverse Impact Among Death Row Prisoners Executed*

The data reveal an adverse impact on minority offenders in the frequency with which death-sentenced offenders are actually executed.[358] Specifically, of the seven minority offenders sentenced to death, two (Otey and Williams) have been executed. Of the seventeen white defendants sentenced to death, only one (Joubert) has been executed. This disparity is not explained by the number of years the offenders have been on death row, for there are a number of white defendants who either were or have been on death row far longer than Otey and Williams. The explanation is that white offenders on death row were more successful in obtaining judicial relief in federal court than Otey and Williams, who were denied such relief.

In general, the evidence indicates that black offenders have been less successful than white offenders in obtaining relief in federal court, although they have been more successful than white offenders in obtaining relief in the Nebraska Supreme Court. However, because of the small number of cases in the analysis and the lack of controls for legitimate case characteristics (concerning the strength of post-conviction claims), the data do not support an inference of the disparate treatment of minority offenders in federal court. Moreover, the perceived severity of Otey's and Williams' offenses may have contributed to their lack of success in federal court. Whether the adverse impact on minority offenders in execution rates persists over time with respect to the men sentenced to death between 1973 and 1999, however, will depend on the outcomes of appeals and possible re-

357. *See supra* Figure 7, Parts II & III, Column C.
358. *See supra* section VIII.B.

mands in the cases of the four white offenders currently on death row, as there are no blacks offenders now on death row.

4. Disparate Treatment Based on the Socioeconomis Status (SES) of the Defendant and Victim

The data provide no evidence of systemic differential treatment of defendants on the basis of their SES. The data do, however, document substantial statewide disparities in charging and sentencing outcomes based on the SES of the victim. Since 1973, defendants whose victims have high SES have faced a significantly higher risk of advancing to a penalty trial and receiving a death sentence than have other defendants. Specifically, defendants with high SES victims were 1.7 (.70/.42) times more likely to advance to a penalty trial, 2.1 (.43/.20) times more likely to be sentenced to death in a penalty trial, and 3.2 (.29/.09) times more likely to be sentenced to death among all death-eligible defendants.[359] Defendants with low SES victims faced a substantially reduced risk of advancing to a penalty trial and of being sentenced to death. These defendants were .68 (.39/.57) less likely to see their cases advance to a penalty trial, .57 (.23/.40) less likely to receive a death sentence in a penalty trial, and .39 (.09/.23) less likely to receive a death sentence among all death-eligible defendants.[360] All of these victim SES disparities are statistically significant. Furthermore, when the focus shifts from the state as a whole to SES effects estimated separately within the major urban and other counties, both high and low victim SES effects are apparent throughout the state.[361]

What are the implications of these findings? As noted above,[362] under current law, the evidence developed here will not support a legal claim. However, from a moral perspective, we agree with Robert Schopp's view[363] that disparate treatment of the type we have documented violates the principal of "comparative justice" and is a "serious defect . . . because it constitutes a failure of the institutional structure to conform to the principles that justify that structure . . . . [And] it represents a failure of the institutional function of disciplining the manner in which the state exercises coercive force against its citizens." We also share his concern that it "discriminates against the victims (immediate and extended) whose murders are treated as less important than other similar murders . . . ."[364]

359. *See supra* Figure 25, Part II.

360. *See supra* Figure 26, Part II.

361. *See supra* Figures 27 & 28.

362. *Supra* note 5.

363. Schopp, *supra* note 3, at 825-26.

364. *Id.* at 830.

5. A Trend of Declining Death-Sentencing Rates

The data document a significant decline in death-sentencing rates since 1982. This trend reflects a slight decline in the rates at which prosecutors seek death sentences. However, it is principally the product of diminished judicial death-sentencing rates since 1978. This sentencing trend appears largely to be the product of (a) interpretations of the Nebraska Supreme Court narrowing the scope of a number of statutory aggravating circumstances and (b) the 1978 requirement of comparative proportionality review in penalty trials. This trend appears to have reduced geographic disparities in death-sentencing outcomes, and enhanced consistency in death-sentencing outcomes among similarly situated cases.

6. Geographic Disparities in the Exercise of Prosecutorial Discretion

Our sixth finding is that the Nebraska system is characterized by sharp disparities in charging and plea-bargaining practices in the major urban counties vis-á-vis the counties of greater Nebraska.[365] The data also document less prominent but important geographic disparities in judicial death-sentencing rates.

In the major urban counties, prosecutors appear to apply quite different standards than do their counterparts elsewhere in the state in terms of their willingness to waive the death penalty unilaterally or by way of a plea bargain. The difference is captured in the fact that after adjustment for the culpability of the offender, death-eligible cases in the major urban counties are more than twice (.58/.28) as likely as comparable cases in greater Nebraska to advance to a penalty trial with the state seeking a death sentence.[366] The geographic disparities in prosecutorial charging decisions have existed since 1973 and have grown larger since 1982.[367]

These disparities are not explained by differing levels of defendant culpability. Nor are they explained by differences in prosecutorial resources, by prosecutorial experience in handling and trying capital cases, or the attitudes of the trial judge about the death penalty.[368] However, it is widely perceived in Nebraska that the overall resources of smaller counties, which affect their ability to compensate defense counsel for indigent offenders and pay jurors, affect prosecutorial decisionmaking. Specifically, these concerns are believed to create an incentive for prosecutors in smaller counties to negotiate pleas and waive the death penalty in cases that would be likely to advance to a

365. *See supra* section X.
366. *See supra* Figure 29, Part II, Column A.
367. *See supra* Figures 32 & 33.
368. *See supra* section X.C.

penalty trial in major urban counties. It is important that, when requested, the Office of the Nebraska Attorney General will provide prosecutorial assistance in the litigation of capital cases; however, it appears that in many smaller counties, there is significant reluctance to rely on "outside" support of this sort. If this explanation for the comparatively low rate that capital cases advance to penalty trial in greater Nebraska is correct, it is unlikely that capital charging practices in those counties will change in the foreseeable future.

As suggested above, geographic disparities in the rates that penalty-trial judges impose death sentences are less pronounced. During the entire period of this study, the adjusted difference in judicial death-sentencing rates is only 2 percentage points: .27 in the major urban counties compared to .29 in greater Nebraska.[369] However, this overall disparity masks significant differences before and after 1983. Before 1983, in the major urban counties, the unadjusted death-sentencing rate was more than twice as high (.57 v. .27) as it was in greater Nebraska.[370] The geographic disparities, both in charging and sentencing practices in this earlier period, are consistent with the perceptions of Senator Ernie Chambers when he wrote and promoted the sentencing reforms that were adopted by the Legislature in 1978. However, since 1982, there has been a reversal in the geographic disparities in penalty-trial death-sentencing rates. Since then, the unadjusted death-sentencing rate in the counties of greater Nebraska has been 3.5 (.60/.17) times higher than the rate in the major urban counties.[371]

Most of the geographic disparities in penalty-trial death-sentencing rates are explained by differing levels of defendant culpability. After adjustment for defendant culpability, before 1983 the death-sentencing rate in the major urban areas was 6 percentage points higher (.37 v. .31) than it was in greater Nebraska; since 1982 it has been 7 points lower (.22 v. .29).[372]

What impact have these changes in judicial death-sentencing practices had on geographic disparities in the rates that death sentences are imposed among all death-eligible cases? Over the entire period of this study, the rate that death sentences were imposed among all death-eligible cases was 5 percentage points (.15 v. .10) higher than the rate in the major urban counties.[373] However, the system has been far from stable. Pre-1983, both penalty trial and death-sentenc-

369. *See supra* Figure 29, Part II, Column B.
370. *See supra* Figure 32, Part II, Column B.
371. *Id.* at Part II, Column C.
372. *See supra* Figure 33, Part II.
373. *See supra* Figure 29, Part II, Column C. This disparity represents a 50% (5/10) higher rate in the major urban counties (the denominator is the rate in greater Nebraska and the numerator is the difference in the rates for the two areas over the course of this study).

ing rates were higher in the major urban counties than they were in greater Nebraska. This produced a death-sentencing rate among all death-eligible cases that was 2.4 times (.26 v. .11) higher in the major urban counties than it was in greater Nebraska.[374] But, since 1982, there has been a shift in judicial sentencing practices—a substantial (15-percentage point) decline in the rate in the major urban counties and a slight (2-point) decline in greater Nebraska.[375]

A significant consequence of these changes is that since 1982 they have tended to minimize the effects of the geographic disparities in prosecutorial decisions that have continued since 1973. Specifically, the penalty-trial death-sentencing rates in the major urban counties have minimized the effect of the higher rates at which cases advance to penalty trials in those counties. Similarly, the higher-than-average judicial sentencing practices in the counties of greater Nebraska offset the effects of the lower-than-average penalty-trial rates of their prosecutors. The bottom line since 1982 is that among all death-eligible cases, the death-sentencing rates in the two areas of the state have been quite comparable: .12 for the major urban counties compared to .13 for greater Nebraska.[376]

This "canceling out" effect of the judicial sentencing decisions does not change the fact, however, that since 1982 similarly situated offenders in major urban counties face a 33-percentage point (.57-.24) and 2.4 (.57/.24) times higher risk of advancing to a penalty trial strictly by virtue of where they are prosecuted than do similarly situated offenders in greater Nebraska.[377] Also, of the death-eligible cases that have advanced to a penalty trial since 1982, those tried in greater Nebraska have faced a 7-percentage point (.29-.22) and 1.3 (.29/.22) times higher risk of receiving a death sentence than have similarly situated offenders prosecuted in the major urban counties.[378]

As noted, under current law, the evidence of geographic disparities that we have documented in the administration of Nebraska's death penalty will not support a legal claim in Nebraska or any other jurisdiction of which we are aware. However, from a moral perspective, the problem is clear. Solely by virtue of where they reside and/or are charged, death-eligible defendants prosecuted in the major urban areas face a much higher risk of being subjected to a penalty trial and

374. *See supra* Figure 33, Part III, Column B.
375. The decline in judicial sentencing rates in the major urban counties in the 1980s appears to reflect the statewide decline in death-sentencing rates produced by (a) the Nebraska Supreme Court's narrowing of several statutory aggravating circumstances and (b) the 1978 legislative introduction of comparative proportionality review in penalty trials.
376. *See supra* Figure 33, Part III, Column C.
377. *See supra* Figure 33, Part I, Column C.
378. *See supra* Figure 33, Part II, Column C.

the concomitant risk of being sentenced to death. An offender's county of prosecution is a morally irrelevant factor that has nothing whatsoever to do with his or her criminal culpability and deathworthiness. And it is for exactly that reason that the Legislature in 1978 condemned geographic disparities in the administration of Nebraska's death penalty—disparities that have grown stronger since that time.

7. *Consistency and Selectivity of Charging and Sentencing Outcomes*

Our findings provide support for the *Proffitt* hypothesis in terms of its claim of greater consistency in judicial sentencing compared to jury sentencing. Specifically, the consistency of the Nebraska penalty-trial decisionmaking appears to be greater than the level of consistency in jury decisionmaking in New Jersey,[379] a state whose death penalty system is quite comparable to Nebraska's except for the jury sentencing. However, the data do not support a conclusion that the death-sentencing outcomes of the system are uniformly consistent or that the system limits death sentencing and executions to the most culpable death-eligible offenders, the group often referred to in popular parlance as the "worst of the worst."[380]

The level of consistency in the Nebraska system suggested by our data depends on the range of cases one considers in the analysis. In that regard, there are at least two possible options. One is to limit the focus to the outcomes of penalty trials, which are strictly a product of judicial sentencing decisions. A second option is to expand the focus to embrace the imposition of death sentences among all death-eligible cases, outcomes that are the product of both judicial sentencing decisions *and* prosecutorial charging decisions.

When one's focus is limited to penalty-trial outcomes, the system appears to work well when compared, for example, to New Jersey, a state in which penalty-trial death sentencing is almost exclusively a jury responsibility. (Our principal measure of consistency in each death-sentenced case is the percentage of defendants with comparable levels of criminal culpability, the death-sentenced defendant's "near neighbors" who were sentenced to death.) In Nebraska penalty trials, 48% (14/29) of the death sentences were imposed in cases in which the death-sentenced defendant's near neighbors were sentenced to death more than 70% of the time. In New Jersey, the comparable figure is 29% (10/34).[381]

The Nebraska Supreme Court (as do all other state courts of which we are aware) resists the adoption of a quantitative standard for as-

379. *See supra* note 343 and accompanying text.
380. *See supra* section XI.
381. *See supra* Figure 35, Part I and note 344 and accompanying text.

sessing aggravation, insisting that it is not the "number" but the "weight" of the aggravation that counts. The lower courts also use this approach. Nevertheless, the data are consistent with the application of a de facto penalty-trial standard to the effect that for cases with three or more statutory aggravating circumstances, a death sentence is almost certain; for cases with two aggravators, the outcome could go either way, depending on the facts of the case; and for cases with only a single aggravator, there is a very strong presumption in favor of a life sentence.

In spite of this penalty trial performance, the data on those cases suggest that a number of death sentences may have been imposed in cases that are clearly not among the worst of the worst.[382] Specifically, the data suggest that 28% (8/29) of the death sentences were imposed in cases in which the defendant's penalty-trial near neighbors were sentenced to death half or less of the time, and in 45% (13/29) of the death-sentenced cases, the defendant's near neighbors were sentenced to death 60% or less of the time. However, in only one death-sentenced case was the death-sentencing rate among penalty-trial near neighbors below the average death-sentencing rate for all penalty trials, which is .33.

When the comparative proportionality analysis is expanded to embrace death sentencing among all death-eligible cases, the results look less favorable than they do when the analysis is limited to penalty-trial near neighbors.[383] In that analysis, we find that in only 17% (5/29) of the Nebraska death-sentenced cases were death sentences imposed in cases in which the defendant's near neighbors were sentenced to death more than 70% of the time. In 52% (15/29) of death-sentenced cases, a death sentence was imposed among the defendant's near neighbors 50 percent or less of the time. However, only one death sentence was imposed in a case in which the death-sentencing rate among the death-sentenced defendant's near neighbors was less than .16, which is the average death-sentencing rate among all death-eligible offenders.

Of the 24 offenders sentenced to death during the period from 1973-1999, three died on death row of natural causes (they were highly aggravated cases). Of the remaining 21 defendants, 67% (14/21) have left death row alive as a result of appellate court decisions and favorable outcomes on remand. Three offenders were executed and four remain on death row. With two exceptions, the defendants executed and currently on death row are not among the most aggravated cases. Those who have left death row alive include most of the

382. *See supra* Figure 35, Part I.

383. *See supra* Figure 35, Part II.

least aggravated cases and nearly all of the most highly aggravated cases.

8. Legislative Ambiguity Concerning Prosecutorial Charging and Judicial Sentencing Discretion

Our final finding is that there exists in section 29-2521 of the Nebraska Statutes an ambiguity concerning the right of prosecutors to waive the death penalty in sentencing hearings in death-eligible cases that result in a first-degree murder conviction. There is also an ambiguity under this provision when the state seeks to waive the death penalty in first-degree murder cases by not presenting evidence of aggravation. The ambiguity in this situation concerns the obligation of the sentencing court to make findings on statutory aggravating and mitigating circumstances and consider the option of a death sentence in the case.

B. Policy Recommendations

In this section we present two sets of legislative recommendations. The first set in subsection XII.B.1 addresses the requirements of *Ring v. Arizona* with a minimum possibility of increasing the risk of arbitrariness and discrimination in the system. The second set addresses the distortions that this study has documented in the application of the Nebraska death penalty system since 1973.[384] The objective of these recommendations is to promote comparative justice in the system by (a) enhancing its selectivity, consistency, and geographic uniformity and (b) reducing the risk that the race or socioeconomic status of the offender or victim are factors in charging and sentencing decisions. Each of these recommendations is based on current Nebraska practice, or law and policy either currently in place in other jurisdictions or recommended elsewhere.

1. Legislative Amendments to Satisfy the Requirements of Ring v. Arizona

A principal finding of this research is that compared to the other American death-sentencing systems of which we are aware, the Nebraska system has considerable strengths in terms of its capacity to limit death sentencing to the most aggravated cases and to minimize the risk of arbitrariness and discrimination in charging and sentencing outcomes. Important sources of these strengths are judicial sentencing, Nebraska statutory and case law which regulates the

384. Professor Schopp provides a useful framework for evaluating claims that evidence of distortion in application can justify abolition of capital punishment. Schopp, *supra* note 3, at 833-38. In this section we limit ourselves to recommendations that limit the level of distortion in practice.

weighing of aggravating and mitigating circumstances, and the requirement that the sentencing judges conduct a comparative proportionality review before they impose a sentence. Accordingly, we believe that statutory modifications required to meet the requirements of *Ring* should strive to maintain these strengths to the greatest extent possible.

For this reason, we believe that a return to the pre-*Furman* Nebraska system of exclusively jury sentencing would unnecessarily abandon the settled law, tradition, and expectations that have evolved over the last twenty-five years in the administration of Nebraska's death-sentencing system and could introduce into the system a significant risk of uncertainty, arbitrariness, and discrimination. Rather, we believe that the requirements of *Ring* would be satisfied if the jury's role were limited to findings of statutory aggravating circumstances in the form of a special verdict at the guilt trial or in a bifurcated hearing on the statutory aggravating circumstances. The following new section would define the jury's role in a capital prosecution:

> PROPOSED NEW SECTION – NEB. REV. STAT. § 29-2523.1 – Jury Fact-Finding Role in Capital Prosecutions.
>
> (1) Whenever the state seeks a death sentence in a first-degree murder case, the statutory aggravating circumstances on which it intends to rely shall be charged as an element of the offense in the indictment or information as the case may be.
>
> (2) When a statutory aggravating circumstance is an element of a first-degree murder charge, subject to the limitations of paragraphs (3) and (4) below, the state may present evidence of the aggravating circumstance in a jury guilt trial and request a jury instruction on the aggravating circumstance, in which event the court shall instruct the guilt-trial jury to make a special finding of fact on the presence of the aggravating circumstance charged by the state. The jury shall be instructed that a finding that a statutory aggravating circumstance is present in the case must be proven beyond a reasonable doubt and that a jury finding that the circumstance is present in the case must be unanimous.
>
> (3) Before trial, the defendant in a case in which the state is seeking a death sentence may waive his or her right to a jury finding of the presence of an aggravating circumstance in his or her case, in which event the court will make findings of fact pursuant to section 29-2521 on the presence of any aggravating circumstances charged by the state for which the defendant has waived his or her right to jury fact-finding. The defendant may also waive his or her right to a jury guilt trial, in which event the court will decide both the defendant's guilt or innocence under the murder charge and the presence of statutory aggravating circumstances if the defendant is convicted of first-degree murder.
>
> (4) Before trial, a defendant may request the bifurcation of the jury's first-degree murder guilt determination and its finding(s) of statutory aggravation, in which event, upon a defendant's conviction for first-degree murder, the court shall promptly conduct a separate aggravation hearing before the same jury to determine if a statutory aggravating circumstance is present in the case. In such a hearing, the state and the defendant may present evidence relevant to the existence of the aggravating circumstance at issue, as well as

arguments for and against a finding that the aggravating circumstance has been proven beyond a reasonable doubt. Evidence concerning the presence of statutory mitigating circumstances will not be presented or argued in the aggravation hearing. A defendant may also stipulate to the presence of a statutory aggravating circumstance in the case, in which event the jury will not be instructed on the issue and it will be treated by the sentencing court as having been proven beyond a reasonable doubt.

(5) At the commencement of voir dire in a capital case, potential jurors shall be advised by the court that the state is seeking a death sentence in the case.

(6) A guilt- or post-guilt-trial jury, as the case may be, shall also be instructed that (a) its finding that an aggravating circumstance is present in the case may provide the basis for the imposition of a death sentence by the court in a sentencing hearing that will be conducted at the conclusion of the defendant's guilt trial if he or she is found guilty of first-degree murder, (b) that a jury finding that the aggravating circumstance is not present in the case will limit the discretion of the sentencing judge and require the court to impose a sentence of life imprisonment, and (c) that if the jury finds a statutory aggravating circumstance present in the case, the sentencing court at a sentencing hearing may impose a death sentence if it finds, on the basis of all of the evidence in the case, which may include mitigating evidence that the jury has not heard, that sufficient aggravating circumstances exist to justify the imposition of a sentence of death.

(7) Nothing in this section shall be deemed to preclude the state from determining that a death sentence shall not be sought in the case.

Section (1)'s charging requirement meets the requirement of *Ring* that a statutory aggravating circumstance, which serves as a basis for a capital prosecution, must be charged as an element of the offense.[385]

385. The proposal does not exclude the prior-record statutory aggravating circumstance (section 29-2523(1)(a)) from the jury fact-finding requirement. The two prongs of this aggravator are that the defendant was (a) "previously convicted of another murder or a crime involving the use or threat of violence to the person" or (b) has a "substantial history of serious assaultive or terrorizing criminal activity." An exclusion of this aggravating circumstance from *Ring's* requirements is suggested by language in *Apprendi v. New Jersey,* 530 U.S. 466, 488 (2000), on which *Ring* is based, that excludes from the jury fact-finding requirement "the fact of a prior conviction." However, that decision and *Almendarez-Torres v. United States,* 523 U.S. 224 (1998), suggest that the exclusion is limited to non-discretionary ministerial findings based on a simple reading of a defendant's prior record. The elements of the Nebraska (1)(a) aggravator involve a much more discretionary judgment than was contemplated in those Supreme Court decisions. Moreover, Justice Thomas' concurrence in *Apprendi,* a 5-4 decision which he joined, suggests that the entire "prior record" exclusion, even when it involves a simple reading of a defendant's prior record, may not be good law over the long run. *See Apprendi,* 530 U.S. at 507-08 (arguing that the historical record clearly establishes that "when a statute increases punishment of some core crime based on the fact of a prior conviction, the core crime and the fact of the prior crime together create a new, aggravated crime"). Prudence, therefore, calls for the inclusion of all of the statutory aggravators under Nebraska's jury fact-finding model. To the extent that this raises questions about the presentation of prejudicial evidence in the guilt trial, such as the defendant's prior record, when it would not otherwise be admissible, sections (3) and (4) of the proposal provide three defendant options to reduce the risk of prejudice.

Section (2), which provides for jury guilt-trial findings on statutory aggravating circumstances, obviates the need for a separate jury penalty trial[386] and the guilt-trial jury would be death qualified as it is under current practice with only a slight modification.[387]

Sections (3) and (4) address the issue of possible prejudice to the defendant that may arise from the jury's consideration of both the defendant's guilt *and* statutory aggravation in a single proceeding. Section (3) enables the defendant to have a jury guilt trial and waive his or her rights under *Ring*, which will empower the sentencing court to make all findings of statutory aggravation as is now done under Nebraska law. The section also enables a defendant to waive a jury guilt trial in which event the penalty trial will also be conducted by the court if the defendant is convicted of first-degree murder.

Section (4) permits a defendant found guilty of first-degree murder to request a bifurcated "aggravation" hearing at the conclusion of the guilt trial. This section also authorizes a defendant to stipulate to the presence of a statutory aggravating circumstance, thereby avoiding the risk that jury fact-finding on aggravation may prejudice the jury on the guilt issue, a risk that is particularly evident when the (1)(a) prior-record aggravator is charged.[388] The four options in sections (3) and (4) will minimize the risk of unnecessarily recreating the pre-*Furman* dangers associated with unitary capital trials.[389]

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386. Under current practice, with the exception of the prior-record statutory aggravating circumstance, (1)(a), the evidence offered to establish statutory aggravating circumstances is normally presented in the guilt trial and incorporated in the record of the sentencing hearing by reference thereto. This part of our proposal is also consistent with the suggestion of Justice Scalia in *Ring* that "[t]hose States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." *Ring v. Arizona*, 122 S. Ct. 2428, 2445 (2002).

387. The Nebraska statutes permit voir dire challenges for cause in capital cases when the venire member's "opinions are such as to preclude him from finding the accused guilty of an offense punishable with death." This section should be expanded to include guilt- and penalty-trial "findings of the presence of a statutory aggravating circumstance." NEB. REV. STAT. § 29-2006(3) (Reissue 1995).

388. The bifurcated trial and stipulation provisions of our proposal are consistent with Justice Thomas' perception, stated in *Apprendi*, of possible alternatives to minimize jury prejudice with respect to proof of a defendant's prior record in a guilt trial. *Apprendi*, 530 U.S. at 520 n.10 (stating that it has been common practice to address concerns about jury prejudice by "permitting the defendant to stipulate to the prior conviction" or to "bifurcate the trial"). We propose providing the defendant these options with respect to all of the statutory aggravating circumstances, not merely the (1)(a) aggravator based on the defendant's prior record.

389. *See* McGautha v. California, 402 U.S. 183, 220, 228 (1971) (Douglas, J., dissenting). In a unitary trial, the defendant would face a dilemma in terms of whether his testimony on the presence of the statutory aggravating circumstances would prejudice him in the guilt decision and the unitary trial would conflate a purely

Sections (5) and (6) require jury instructions on the capital nature of the prosecution and the implications for the possible imposition of a death sentence of the jury's fact findings on aggravating circumstances. These sections would ensure that jurors were fully informed of the consequences of their fact-finding responsibilities.[390] Furthermore, the instructions would recognize, as has been documented elsewhere, that findings of aggravation and mitigation may reflect the sentencing authority's judgment of the defendant's deathworthiness.[391] The instructions would further recognize that sentencing jurors commonly make up their minds on the life/death-sentencing outcome by the close of the guilt trial, without the benefit of any evidence on mitigation.[392] Finally, the jury role recommended here would introduce the values of the community into the sentencing process, an important Eighth Amendment interest.[393]

Section (7) would underscore the right of the state to waive the death penalty at any stage of a capital prosecution.

Under this proposal, the trial court in a section 29-2521 sentencing hearing would be in a position to take into account jury fact findings

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factual question on guilt with a potentially value-laden judgment on the presence of statutory aggravating circumstances.

390. *See* Lowenfield v. Phelps, 484 U.S. 231, 246, 258 (1988) (holding that the "narrowing function" of a finding of statutory aggravation may be "performed by jury findings at either the sentencing phase of the trial or at the guilt phase," but three dissenting justices criticized the holding because at the guilt phase of a capital trial, the jury has not been adequately instructed to ensure the "appropriate awareness of its 'truly awesome responsibility'").

391. *See Philadelphia Study*, *supra* note 10 (finding that Philadelphia juries who are advised that their failure to find mitigation after they have found aggravation will result in a mandatory death sentence, commonly find an aggravator present and no mitigation present in the case even though the evidence would clearly support a finding of mitigation). Nebraska's death qualification of guilt-trial jurors in capital trials under current law reflects a perception of the extent to which attitudes on a defendant's deathworthiness may influence jury factual findings of the defendant's guilt or innocence. *Supra* note 387.

392. In a study of 894 capital jurors, Bowers and Steiner found that nearly half (48.3%) of the jurors who were questioned thought they knew what sentence should be imposed during the guilt trial before the sentencing phase began. Of the jurors who thought they knew what sentence should be imposed during the guilt trial, 64.1% said they were "absolutely convinced" of what the punishment should be before the sentencing phase began and 41.3% said they were "pretty sure" of what the punishment should be before the sentencing phase began. Bowers and Steiner's study also indicates that the propensity to make sentencing decisions during the guilt trial stems from jurors discussing sentencing during guilt-trial deliberations. William J. Bowers & Benjamin D. Steiner, *Choosing Life or Death: Sentencing Dynamics in Capital Cases*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 325-26 (J.R. Acker et al. eds., 1998).

393. Ring v. Arizona, 122 S. Ct. 2428 (2002) (Breyer, J., concurring) (stating that juries are "more likely to express the conscience of the community on the ultimate question of life or death" (citations omitted)).

on statutory aggravation[394] and defendant stipulations on the presence of aggravation and then proceed to exercise its sentencing discretion in a manner that is quite comparable to current practice. The court would make findings on statutory mitigation, which is permissible under *Ring*, weigh the statutory aggravating and mitigating circumstances, conduct a comparative proportionality review, and impose a life or death sentence. In our judgment, no further changes in Nebraska law would be needed to satisfy the requirements of *Ring v. Arizona*.[395]

2. *Legislation to Clarify the Scope of Prosecutorial and Judicial Discretion Under Section 29-2521, Which Defines the Procedure for a First-Degree Murder Sentencing Hearing*

There is ambiguity under current law concerning a prosecutor's discretion to waive the death penalty in a death-eligible first-degree murder case. Although most prosecutors believe they have such discretion, some do not and believe that section 29-2521 requires them to present evidence of a statutory aggravating circumstance in the sentencing hearing if it is present in a case. The second ambiguity concerns the obligation of the trial court to conduct a penalty trial in a death-eligible first-degree murder case when the prosecutor seeks to waive the death penalty. Although most Nebraska courts acquiesce in the prosecution's waiver, some judges press ahead and conduct a penalty trial in spite of the stated preference of the prosecution for a life sentence. The data indicate, however, that in these cases the court ultimately acquiesces in the state's desire and imposes a life sentence.

394. Nebraska Revised Statute section 29-2521, which describes the evidence to be considered by the sentencing court would require a slight amendment along the following lines: The court shall consider "any jury findings of fact or any defendant stipulations concerning the presence of statutory aggravating circumstances in the case" that are presented by the state as well as any "matters presented that relate to any of the mitigating circumstances set forth in section 29-2523, and if the defendant waives his or her right to jury participation in the proceedings the court shall consider evidence presented by the state that relates to any statutory aggravating circumstances charged in the case." (new matter underlined).

395. *Supra* note 145. A fall 2002 special session of the Nebraska Legislature amended the penal law to conform it to the requirements of *Ring*, by providing for a post guilt trial "aggravation hearing" in which the guilt-trial jury will make findings on the statutory aggravating circumstances alleged by the state. Findings of statutory mitigating circumstances, the weighing decision, and the imposition of a death or life sentence will remain in judicial hands via a three-judge sentencing panel; solo-judge sentencing is no longer an option in Nebraska. Act of Nov. 22, 2002, LB 1, 2002 Neb. Laws _____, sec. 5, § 29-1603(2) (Ninety-Seventh Leg., 3d Spec. Sess.) (providing for notice of aggravation in the charging information), sec. 11, § 29-2520 (instituting procedure for the jury aggravation hearing to be presided over by a three-judge panel that includes the guilt-trial judge).

One consequence of the currently conflicting interpretations of the code is that in counties where prosecutors believe they lack the authority to waive the death penalty, many penalty trials are held in cases with low levels of aggravation and with virtually no prospect that a death sentence will be imposed. The proposed amendment would make clear that prosecutors have the discretion to waive the death penalty in death-eligible cases, as they do in every other American death penalty system of which we are aware. The proposal would also make clear that the prosecution's desire to waive a death sentence in the case controls.

The data indicate, therefore, that the interests of geographic uniformity and consistency[396] would be served by the following amendment to the Nebraska statute:[397]

> (2) In a first-degree murder prosecution, the State may, in its discretion, try a defendant non-capitally, notwithstanding the presence of an aggravating circumstance in the case, in which event a defendant convicted of first-degree murder will be sentenced to life imprisonment.

The proposed amendment would make clear that the prosecution has the discretion to waive the death penalty in a death-eligible case and that the court's obligation to consider death as a sentencing option depends on the state's decision to seek a death sentence. This would eliminate the risk of tension between the court and the prosecution, as well as the need for consideration of death as a sentencing option when there is no prospect that a death sentence will be imposed.

3. *Legislation to Limit the Power of the Court to Impose a Death Sentence to Cases in Which It Believes That the Facts of the Case "Clearly Justify" the Imposition of a Death Sentence and That as a "Matter of Law" the Statutory Aggravating Circumstances "Substantially [or Clearly] Outweigh" the Statutory Mitigating Circumstances*

As a condition for the imposition of a death sentence, section 29-2522 currently requires the sentencing court to determine that the statutory aggravating circumstances in the case are sufficient "to justify imposition of a sentence of death." A requirement that the court believes the aggravating circumstances "clearly" justify the imposition of a death sentence would reinforce the Legislature's intention that

396. *Supra* section X.

397. This proposal, which is modeled in part on a recent North Carolina amendment (N.C. GEN. STAT. § 15A-2004(a) (2001)), would be added as a new paragraph (2) to section 29-2520. The existing language of section 29-2520 would be renumbered paragraph (1).

death sentences be limited to the most aggravated death-eligible cases.[398]

We suggest further that the current judicial "weighing" standard be amended to require a finding that the statutory aggravation "clearly" or "substantially" outweighs the mitigation to support the imposition of a death sentence.[399] Under current law, there is ambiguity concerning the degree to which aggravation must outweigh mitigation, although the case law clearly suggests that statutory aggravation must outweigh mitigation by more than a trivial amount.[400] The "clearly" or "substantially" requirement that we propose would reinforce the Legislature's intention that death sentences be limited to the most aggravated cases.[401]

We also recommend a characterization of the weighing decision as a "matter of law" to make plain that this is the core value judgment for the court that determines the life or death sentencing outcome.

4. *Legislation to Limit the Power of Prosecutors to Seek a Death Sentence to Cases in Which the Prosecutor Believes That the Facts of the Case "Justify" or "Clearly Justify" the Imposition of a Death Sentence*

Under current law, prosecutors may seek a death sentence in a death-eligible case regardless of the offender's level of criminal culpability. As a consequence, death sentences are sought by the state in cases with quite low levels of criminal culpability in which it is extremely unlikely that the court will impose a death sentence. However, this is not the statewide practice. In a number of counties, more than death eligibility is required to trigger a decision to seek a death sentence in the case. One such factor is the prosecutor's belief that the facts of the case justify the imposition of a death sentence. The

398. The proposed amendment would be to section 29-2522(1), underlined here, as follows: [the sentencing judge's decision shall be based on the following considerations:] "(1) Whether sufficient aggravating circumstances exist to clearly justify imposition of a sentence of death."

399. The proposed amendment would be to section 29-2519, underlined here, as follows: "The Legislature therefor determines that the death penalty should be imposed only . . . when as a matter of law the aggravating circumstances existing in connection with the crime substantially [or clearly] outweigh the mitigating circumstances. . . ." The New York statute, N.Y. CRIM. PROC. 400.27(11)(a) (2001), is precedent for this standard. (providing that the statutory aggravation must "substantially outweigh" the mitigation in the case).

400. *Supra*, note 71 and accompanying text.

401. As a means of limiting death sentencing to the most aggravated cases, we believe that a "substantially outweigh" requirement is preferable to a requirement that the statutory aggravation outweighs the statutory mitigation beyond a reasonable doubt because it emphasizes that the weighing decision is a legal value-based judgment rather than a finding of fact that must be allocated to a jury under *Ring*.

amendment proposed here would require the existence of such a prosecutorial belief as a predicate to a prosecutorial demand for a death sentence in a death-eligible case.[402] The application of this standard would promote the interests of selectivity and consistency by bringing the standards guiding the exercise of prosecutorial discretion into conformity with the standards guiding the exercise of judicial discretion.[403]

There is important precedent for this requirement outside Nebraska as well. Specifically, the federal death penalty law authorizes the government to seek a death sentence in death-eligible cases only when "the attorney for the government believes that the circumstances of the offense are such that a sentence of death is *justified* under the [law]."[404] Department of Justice data indicate that in their application of this section United States Attorneys seek a death sentence in 27% of the cases that are death-eligible under federal law.[405] A similar provision in Nebraska that required the prosecution to believe that a death sentence in the case was "justified" or "clearly justified," could reduce significantly the level of geographic disparity in prosecutorial decisionmaking that we have documented in this study.

5. *Legislation to Limit Death Sentencing to Cases in Which the Defendant Had a Substantial Level of Mental Culpability (Mens Rea)*

One risk of arbitrariness under the Nebraska statute is its failure to require a level of mental culpability that is higher than the minimum level required by the United States Constitution, i.e., recklessness.[406] Under Nebraska's felony-murder doctrine, a defendant with

402. The amendment would add the following language, underlined here, to section 29-2521, which regulates the conduct of penalty trials: "In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and, if the County Attorney believes that the circumstances of the offense are such that a sentence of death is justified [or clearly justified] under the law, shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. . . ."

403. If the Legislature were to establish a "clearly justified" standard for the judicial imposition of a death sentence, as we have suggested in the preceding section, geographic uniformity would be promoted if a similar standard were applied to limit the exercise of prosecutorial discretion. The evidence is clear that a major source of inconsistency in the current system is the deviation between the standards applied by prosecutors and judges in their evaluation of death-eligible cases.

404. 18 U.S.C.A. § 3593(a) (2000) (emphasis added), *amended by* 116 Stat. 1758 (Nov. 2, 2002).

405. UNITED STATES DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000) 7 (Sept. 12, 2000) (available in the University of Nebraska Law College Library).

406. Tison v. Arizona, 481 U.S. 137, 157-58 (1987) (stating "we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities

only a *Tison* level of recklessness may be sentenced to death. Our review of the Nebraska capital cases indicates that all of the defendants thus far sentenced to death had a mens rea that was substantially more culpable than recklessness, i.e., knowledge or intention to kill.[407] Nevertheless, the breadth of Nebraska's current first-degree murder statute, as limited only by *Tison*, puts defendants with a mens rea of recklessness at risk of a penalty trial and death sentence.

Accordingly, we recommend that the mens rea for death-eligibility be heightened to knowing or intentional killing. The proposed amendment based on the New Jersey statute[408] would be to section 29-2521, which regulates the conduct of penalty trials, with new matter underlined:

> In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence and, if the defendant (a) committed the homicidal act by his own conduct, (b) was an accomplice who procured the commission of the offense by payment or promise of payment or anything of pecuniary value, or (c) was the leader of a conspiracy who commanded or by threat or promise solicited the commission of the homicide, shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. . . .

6. *Legislation to Limit Death Sentencing to Cases in Which the Defendant's Level of Criminal Culpability is Comparable to That Historically Found in Cases with Two or More Statutory Aggravating Circumstances*

This amendment would add to the trial court's comparative proportionality review procedure a presumption against the imposition of a death sentence in cases with a single aggravating circumstance. Our empirical findings support such a rule in two ways. First, with few exceptions, both trial courts and the Nebraska Supreme Court have applied such a rule de facto for over twenty-five years. As a consequence, during the entire period of this research only three death sentences were imposed in single-aggravator cases and none of those offenders was executed or remains on death row. The proposed legislation would ratify that rule by adding the following additional standard (underlined) under section 29-2522 (3), which imposes on the trial courts its proportionality review requirement:

> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, and in the course of this review, the court, in cases involving one statutory aggravating circumstance, will apply a presumption in favor of a life sentence

known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result").

407. See the narrative summaries of the death-sentenced cases in Appendix D.

408. This proposal is modeled after N.J. STAT. ANN. § 2C: 11-3 c. (2002).

> unless the level of criminal culpability in the case is comparable to that present historically in Nebraska capital cases involving two or more statutory aggravating circumstances.[409]

This new standard would create an additional comparative proportionality review requirement in cases with a single statutory aggravating circumstance. It would also create a presumption in favor of a life sentence in those cases. A death sentence would be appropriate in single-aggravator cases only if the statutory aggravating circumstance has exceptional weight and there is little or no mitigation in the case. The legislative history of this amendment should indicate that the level of "criminal culpability" underlying the new standard embraces (a) the defendant's "moral blameworthiness," (b) the "degree of victimization," and (c) the "character of the defendant."[410]

This standard would underscore the Legislature's commitment to selectivity in death sentencing without limiting the capacity of the system to deliver justice. The standard would also reduce the amount of capital litigation by approximately 50%, yielding considerable financial savings.[411] The proposed limitation may also improve the strength of the capital cases that are prosecuted, thereby enhancing the likelihood that the death sentences imposed will be sustained on appeal.

The proposed limitation would reduce substantially the level of arbitrariness in the system,[412] which flows principally from geographic

409. The other two standards in section 29-2522 are (1) "Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death" and (2) "Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances."

410. State v. Papasavvas, 790 A.2d 798, 808 (N.J. 2002) (propounding death sentence comparative proportionality decision with the following detail on the three elements of criminal culpability: "Moral blameworthiness – motive, premeditation, justification or excuse, evidence of mental disease, defect or disturbance, knowledge of victim's helplessness or effect on nondecedent victims, defendant's age and involvement in planning the murder; Degree of victimization – violence and brutality of the murder, injury to nondecenent victims; Character of the defendant – prior record, other unrelatied acts of violence, remorse, and capacity for rehabilitation").

411. 55% (48/88) of the state's penalty-trial cases involved one statutory aggravating circumstance and a death sentence was imposed in three of them: *State v. Hochstein*, 262 Neb. 311, 632 N.W.2d 273 (2001), *State v. Andersen*, 216 Neb. 521, 344 N.W.2d 473 (1984), and *State v. Simpson*, 200 Neb. 823, 265 N.W.2d 681 (1978).

412. Important precedent for this proposal is the policy applied by the Florida Supreme Court in its proportionality reviews of death sentences, designed to limit death sentencing to the most aggravated and least mitigated cases. *See supra* note 329. In pursuit of that goal the Florida court applies a presumption that death sentences will be vacated by the court as disproportionate if they involve "a single-aggravator case where there is substantial mitigation." Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998). During the 2002 session of the Nebraska Legislature, Senator Kermit A. Brashear, Chair of the Judiciary Committee, introduced legislation along this line. His proposal goes beyond a presumption and limits

disparities in the rates that cases advance to penalty trial.[413] Our findings indicate that these effects are heavily concentrated in the single-aggravator cases and, to a lesser extent, in the two-aggravator cases. Accordingly, the proposed rule would limit geographic disparities in the rates that prosecutors advance cases to penalty trial. Sec-

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death sentencing to death-eligible cases involving at least two statutory aggravators or the "heinous, atrocious, and cruel" aggravator. LB 1281, sec. 4, 97th Leg., 2d Reg. Sess. (Neb. 2001), *available at* LEXIS 2001 Bill Text NE L.B. 1281 (proposing amendments to section 29-2522). See *infra* note 413 for a description of the Senator's rationale for this proposal.

413. Concern about the level of adverse disparate impact on minorities is a principal justification for the proposal of Nebraska Senator Kermit Brashear. As he explains in a statement of intent for his proposal:

> [W]ithout dispute, there exists an adverse impact on minority defendants in capital cases.
>
> . . . .
>
> The source of the adverse impact is state law, which gives prosecutors broad discretion in prosecution of death-eligible cases, and that racial minorities principally reside in the major urban counties of Nebraska.
>
> . . . .
>
> The data from the study clearly indicate that the source of the racial impact comes from cases in which only one aggravating circumstance is present. . . . In order to direct attention to this fact pattern and promote debate thereon, LB 1281 requires proof of the existence of at least two (2) aggravating factors in order for a death sentence to be imposed unless one such proved aggravator is that the murder was "especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality."

Introducer's Statement of Intent LB 1281, 97th Leg., 2d Reg. Sess., p. 3 (Neb. 2001), *available at* http://www.unicam.state.ne.us/PDF/StatementOfIntent_LB1281.pdf.

Senator Brashear's objective of limiting death sentencing to the most aggravated cases as a means of reducing race effects in the system is consistent with the recommendation of Justice Stevens in *McCleskey v. Kemp*, 481 U.S. 279 (1987). In that case the evidence documented significant disparate treatment based on the race of the victim that was concentrated in the mid-range of cases in terms of offender culpability. The data also established that there were no significant race effects among the most aggravated cases. Accordingly, Justice Stevens proposed the following solution: "If Georgia were to narrow the class of death-eligible defendants to those [most aggravated] categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated." *Id.* at 366.

Senator Brashear's recommendation is also consistent with a recommendation of the Governor's Commission on Capital Punishment, appointed by Illinois Governor George Ryan in 2000. A majority of this commission concluded that the "death penalty has been applied too often in Illinois since it was reestablished in 1977" and recommended that death-eligibility be limited to cases in which the "defendant has murdered two or more persons, or where the victim was either a police officer or a firefighter; or an officer or inmate of a correctional institution; or was murdered to obstruct the justice system; or was tortured in the course of the murder." GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, RECOMMENDATIONS ONLY i, ii (2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf (available in the University of Nebraska Law College Library).

ond, it would reduce the level of adverse disparate impact against minority offenders in the rates that cases advance to penalty trial. Third, the proposed rule would reduce the impact of the socioeconomic status of victims on charging and sentencing outcomes. Fourth, the proposal would enhance the consistency and selectivity of the system and reduce the risk of comparative excessiveness in death-sentencing outcomes.

7. *Legislation (a) to Require the Development of Statewide Standards for the Exercise of Prosecutorial Discretion in Capital Cases, and (b) to Require Prosecutorial Consultation with a Prosecutorial Advisory Committee as a Condition for the Court's Convening of a Penalty Trial*

A significant finding of this research is a striking lack of consistency in prosecutorial decisions to seek death sentences.[414] The principal explanation for this inconsistency is a tradition among Nebraska prosecutors to set and apply their own countywide standards of deathworthiness without regard to prosecutorial policies and practices in other parts of the state. The legislation proposed here would result in the establishment of statewide standards for the evaluation of the deathworthiness of death-eligible defendants beyond those included in existing law.[415] These proposals are based on existing

414. *Supra* section X.

415. The proposal would add the following new paragraph to section 23-1213:

> There is hereby created within the Nebraska County Attorney Standards Advisory Council a Death Penalty Advisory Committee (the "committee") consisting of the four county attorney members of the Council. Within one year of the appointment of this committee, it shall, in consultation with the Attorney General, the Nebraska County Attorney's Association and the Nebraska Association of Criminal Defense Lawyers, promulgate guidelines to guide the exercise of discretion of county attorneys in their determinations of whether to seek a death sentence in death-eligible cases. The committee will also entertain requests from county attorneys for confidential advisory opinions on the appropriateness of seeking death sentences in individual cases. In this process of review, the committee shall also invite from defense counsel a written submission, and the committee may solicit from the county attorney and defense counsel any other information it considers relevant. The committee shall render its advisory opinions in writing within three months of its receipt of submissions from the county attorney and defense counsel. In its deliberations on requested advisory opinions, the committee shall consider the aggravating and mitigating circumstances of the case, relevant decisions of the United States and Nebraska Supreme Court, its own prosecutorial guidelines for seeking a death sentence in death-eligible cases, and the pattern of prosecutorial charging and judicial sentencing cases in comparable cases since 1973. Under no circumstances will the committee or the county attorney who requested the opinion disclose the nature of the opinion to the defendant, the media, or any other person.

practices both in the states[416] and in the federal death penalty system.[417]

This proposal contemplates an expansion of the responsibilities of the Nebraska County Attorney Standards Advisory Council, a legislatively created body consisting of four county attorneys or deputy county attorneys (one each from Douglas and Lancaster counties and two from greater Nebraska), a law professor, and two county commissioners or supervisors.[418] The proposal would create a Death Penalty Advisory Committee (the "committee") within the Advisory Council, consisting of the four county attorney members of the Council.[419]

The committee would be charged with the responsibility for promulgating statewide standards for prosecutors to determine whether a death penalty in a death-eligible case is appropriate. The guidelines would be advisory in nature and would create no rights or duties in the state or capital defendants.

The committee would also review requests of county attorneys for confidential advisory opinions on the appropriateness of a capital prosecution in individual death-eligible cases. In its consideration of requests for such opinions, the committee would consider all evidence of aggravation and mitigation in the case submitted by the county attorney seeking the advisory opinion and defense counsel, as well as data on the disposition of Nebraska death-eligible cases since 1973. The advisory opinion of the committee would be issued in writing within three months of the final submission concerning the requested opinion. Under no circumstances would the committee or the county

416. New Jersey charging decisions are governed by the Guidelines for the Designation of Homicide Cases for Capital Prosecution, approved by the Attorney General and the County Prosecutors Association. *See, e.g.*, State v. Jackson, 607 A.2d 974, 978-79 (N.J. 1992) (discussing the impact of the guidelines). For examples of state peer review systems, see the Los Angeles County District Attorney's Office, Legal Policies Manual, Chapter III.E.10, "Appropriateness of Death Penalty in a Special Circumstances Case." The operation of the procedure is described in *Leo v. Superior Court of Los Angeles County*, 1986 Cal. App. 3d 274 (1986). Baltimore City, Maryland, has a similar review procedure. Lori Montgomery, MD, *Questioning Local Extremes on Death Penalty*, WASH. POST, May 11, 2002 at C1 ("[A] team of prosecutors conducts quarterly reviews of every murder case, reviewing the facts of the crime, the strength of the evidence, the criminal history of the killer and any aggravating or mitigating circumstances. Sometimes [Baltimore City State's Attorney Patricia Coats] Jessamy even invites defense attorneys 'to sit down with us and help us reach a conclusion.'").

417. The operation of the federal system is described in Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM L. REV. 347, 406-39 (1999).

418. NEB. REV. STAT. § 23-1213 (2001).

419. If the Legislature believed that a more representative panel of county attorneys was desirable, the number of county attorneys involved in the advisory committee could be expanded.

attorney who requested the advisory opinion reveal the nature of the committee's opinion. The experience of a similar committee in Los Angeles County, California, provides good precedent for the establishment of a Nebraska review committee.[420]

The proposal would also amend section 23-1218 of the Advisory Council legislation to charge the Nebraska Commission on Law Enforcement and Criminal Justice with the responsibility for providing the Advisory Committee with up-to-date information on all death-eligible homicides prosecuted in Nebraska since 1973.[421]

Finally, the proposal would add a requirement to the death penalty statute that a condition to the trial court's convening a penalty trial in a death-eligible case would be a certification by the county attorney's office that it had obtained an advisory opinion from the Death Penalty Advisory committee.[422]

8. Legislative Adoption of a "Fairness in Death Sentencing Act"

This proposal is based, in part on (a) a proposed federal law, (b) a proposed Florida judicial rule to reduce the risk of unfairness in capital charging,[423] and (c) the Kentucky Racial Justice Act[424] which may limit the exercise of prosecutorial discretion in certain circumstances. The following is the proposed language:

> PROPOSED NEW SECTION – NEB. REV. STAT. § 29-2523.2 – Fairness in Death Sentencing Act.
>
> (1) When the state announces its intention to seek a death sentence at the conclusion of a first-degree murder trial or a court imposes a death sentence, the defendant may challenge the charging or sentencing decision, as the case may be, on either of the following grounds:
>
> (a) A penalty trial or death sentence in a case with the defendant's level of criminal culpability would be geographically excessive and disproportionate

420. *See supra* note 416.

421. The proposal would add the following new paragraph to section 23-1218, which defines the support role of the crime commission for the County Attorney Standards Advisory Council:

> (10) Create, maintain, and update on a continuing basis for the use of the Death Penalty Advisory Committee, a machine-readable database and full narrative summaries of all Nebraska death-eligible cases prosecuted since 1973 and provide the Advisory Committee, as needed, with any additional information required for its review function.

422. This proposal would add the following sentence to section 29-2520, which provides for the convening of a sentencing hearing in death-eligible cases: "The court's convening of a sentencing hearing under this section is contingent upon the prosecution filing with the court a statement that it has received from the Death Penalty Advisory Committee an advisory opinion on the appropriateness of seeking a death penalty in the case pursuant to section 23-1213."

423. *Inevitability*, *supra* note 16, at 413-16, 420-25 (1994) (considering proposed Florida rule and proposed federal legislation).

424. KY. REV. STAT. ANN § 532.300 (Banks-Baldwin 1998) ("Prohibition Against Death Sentence Being Sought or Given on the Basis of Race: Procedures for Dealing with Claims").

> given the defendant's moral blameworthiness, the degree of victimization in the case, the character of the defendant, and the charging and sentencing practices of prosecutors and judges throughout the state in comparable cases since 1973.
>
> (b) The race or socioeconomic status of the defendant or victim, or any other characteristic of the defendant or victim, which is unrelated to the defendant's criminal culpability, was a factor in the decision to seek or impose a death sentence in the case, as the case may be.
>
> (2) If a claimant offers statistical evidence to support a claim under this Act, the validity, reliability, and relevance of such evidence and the inferences it may support will be assessed by generally accepted standards used to evaluate statistical evidence in employment and housing anti-discrimination litigation under federal law.

9. *Legislation to Require the Nebraska Law Enforcement and Criminal Justice Commission to Maintain a Database of All Death-Eligible Cases for Use by Courts, the State, Defense Counsel, and Scholars in the Field*

Our findings document the potential of proportionality reviews conducted by sentencing judges to enhance geographic uniformity in the imposition of the death penalty. However, the potential of such reviews in this regard depends on the availability to the court and the litigants of reliable statewide information on the facts and outcomes of death-eligible cases that are comparable to the case under review on whatever dimension the court applies its comparative focus. Such information is not currently available on all death-eligible cases. Specifically, for the death-eligible cases that did not advance to a penalty trial, very little information is publicly available and, if so, only at the county level. For the cases that advance to a penalty trial and result in a death sentence, there are good data available in the opinions of the Nebraska Supreme Court, which reviews all death-sentenced cases on appeal. However, for the penalty-trial cases that result in a life sentence, the trial court orders and opinions are normally quite thin on the facts of the cases and address the issues from a general perspective that focuses on the number and types of aggravators and mitigators in the case, with little reference to the underlying facts that are needed for a meaningful comparative review of those cases. The explanation for this situation is that the orders and opinions are addressed to the parties to the case and assume that they are fully aware of the underlying facts of the case.

For the conduct of meaningful comparative proportionality reviews, detailed information is required on all death-eligible cases. The availability of such data to scholars would also be in the public interest. To fill this gap, we propose the following amendment to section 81-1425, paragraph (7), that currently requires the Commission on Law Enforcement and Criminal Justice (a) to collect "criminal homicide" case data since 1973, which we compiled under contract with the

commission,[425] (b) to update the homicide database annually, and (c) to transmit the database to the Governor, the Legislature, and the Nebraska Supreme Court:

> The homicide database, which the commission will create, maintain, and update on a regular basis under this section, shall include machine-readable data and full narrative summaries of all Nebraska death-eligible homicides, with complete factual and procedural detail including for each case that advances to a first-degree murder sentencing hearing, any jury findings of fact and the trial court's findings of fact, conclusions of law, and sentencing order. In addition to the parties named in this subdivision, all of this information will be made available on request to trial courts, prosecutors, and defense counsel in death-eligible cases, as well as to scholars working in this area of the law. For the purpose of database disclosures made pursuant to this section, the confidentiality requirements of section 29-2261(6) limiting the disclosure of information in pre-sentence investigation reports (PSIs) that may be included in the criminal homicide database and narrative summaries are hereby waived, provided, however, that the commission may condition the release of the database and narrative summaries to scholars with the execution of an agreement that he or she will not, in any publication or otherwise, link to any individual defendant information obtained from a PSI that is not clearly in the public domain.[426]

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425. Thumbnail sketches of the 185 death-eligible prosecutions between 1973 and 1999 are included in Appendix D of this Article.

426. The Office of the Nebraska Attorney General has ruled that the requirement of section 29-2261 (6) prohibits the release of any information "found *only* in the PSI reports, or which one can ascertain has been derived from the PSI reports." Op. Att'y Gen. No. 01037 (Nov. 27, 2001) at 6. This opinion also ruled that the prohibition does not apply to information drawn from the PSIs that "may also be found in other non-confidential sources, such as court orders and appellate opinions." *Id.* at 7-8. Because the vast majority of the material in the database and narrative summaries is available in documents that are in the public domain, such as arrest, charging, guilt- and penalty-trial documents, appellate opinions, and the media, the prohibitions of section 29-2261 typically have little applicability to the information in the database and narrative summaries. Their principal application relates to information concerning the defendant's personal history with respect to such matters as sexual orientation, religious preference, education, occupation, employment history, criminal record, mental health and substance abuse, and mental illness and mental retardation, when that information has not been introduced in either the guilt trial or penalty trial, actions that would put the information in the public domain. Only when this kind of information is not part of the record of the case does the prohibition on dissemination apply. However, in some cases it is difficult to ascertain whether the information became a part of the record since the researchers did not have access to all of the papers in the case. This is where there may be a risk of a violation of the statutory limitation on disclosure. In our judgment, based on our extensive use of these records for this research project, we believe the amount of protected information in the database and narrative summaries is quite small but that the task of identifying what that information is in each case is administratively difficult in the absence of access to all of the papers in the case, which rarely occurs. Accordingly, we believe that the interests of the courts and parties in capital cases in having full information on the facts of the cases that bear on each death-eligible defendant's criminal culpability clearly outweigh any invasion of offender privacy interests that might be implicated by disclosure of protected data to the court and parties

in such cases. Moreover, the amendment would require, as a condition for the release of the database and narrative summaries to scholars working in this area of the law, the execution of an agreement that the investigator will refrain from disclosing any information about individual defendants that is not clearly in the public domain.

APPENDIX A

METHODOLOGY

1. Case Screening Plan and Data Sources

We identified the potential universe of Nebraska criminal homicide cases from April 20, 1973, to December 31, 1999, with a statewide case list and other case-identifying techniques. The primary source for identifying these cases was a list of Nebraska homicide cases generated by the Records Administrator for the Department of Correctional Services. According to the Department of Correctional Services, this list contained all criminal homicides for which a defendant was convicted and sentenced to serve any amount of prison time. In addition, we conducted a comprehensive electronic search of all reported Nebraska cases and reviewed the Criminal Homicide Reports that each County Attorney is required to file with the State Court Administrator's Office following the prosecution of each homicide. Finally, we requested each County Attorney to review our list of homicides that were committed during the study period and identify any cases that were not in our identified universe of cases. With this information, we developed a screening plan designed to identify (a) all of the homicides committed in Nebraska during the study period that resulted in a homicide conviction and (b) which of these cases were death-eligible under Nebraska law. For each of these cases we coded a 15-page data collection instrument, known as the Initial Screening Instrument ("ISI"). For each of the cases that we identified as death-eligible, we completed a detailed data collection instrument ("DCI").

A major challenge in this type of research is obtaining reliable data on the cases. A defendant's pre-sentence investigation report served as the first and best source of information regarding a particular defendant, the facts of a particular homicide, and witness information. A pre-sentence investigation report ("PSI") includes a detailed description of the defendant that is generated by a probation officer following a criminal conviction. In particular, the PSI will often contain descriptive information regarding the physical, mental, and emotional health of the defendant. It discusses the defendant's personal family history, ordinarily contains the defendant's personal criminal history, and sometimes contains a description of the victim. The PSI also often contains a description of the crime that is generated from the trial record, police reports, and interviews with the defendant.

At the outset of the study we attempted to collect a copy of the PSI and the Department of Correctional Services Classification Study for each defendant in our universe of potentially death-eligible cases from the Department of Correctional Services Records. In the cases in which the Department of Correctional Services did not have a PSI, we contacted each state probation district and requested a copy of the

pre-sentence investigation report. The PSIs were often available from the State Probation Offices; however, as a result of the document retention policies of the State Probation Office, PSIs were sometimes unavailable. In those cases, we requested the District Court where the case was originally tried to provide us with the original court record of the case and any bills of exception that were generated in the case.

We relied on the study files containing the information described above to screen cases for death eligibility. As each case was reviewed, law student coders completed the Initial Screening Instrument (ISI).

Once it was determined that a case was death-eligible, we undertook an additional stage of case file information development. For all penalty-trial cases, including death-sentenced cases, the most important additional data sources were the record of the trial and sentencing, if available, the opinion of the Nebraska Supreme Court, if the case was appealed, and the briefs of the State and the defendant.

We obtained information on the racial and social background of the defendant from the PSI and the Department of Correctional Services Classification Study. Death certificates provided the primary data source for information regarding the demographic background of the victim.

2. Data Coding and Entry

The case files described above provided the basis for the case coding process conducted in Lincoln, Nebraska, during the Summer and Fall of 2000. The data collection instrument for the non-capital cases—the ISI—contains 138 entries. In addition, the coders completed thumbnail sketches of each non-capital case. The data collection instrument used to code the capital murder cases—the DCI—contains over 500 entries for each case. Each coder also completed a detailed narrative summary and a 5- to 10-line "thumbnail sketch" for each case.

The procedural coding for each statutory aggravating and mitigating circumstance and its strength of evidence measure were individually reviewed and verified. Project staff handled all data entry for the ISI, DCI, and the narrative summaries. A project staff member not involved with the data entry visually checked the data entered against each DCI to flag data entry errors.

APPENDIX B

SALIENT FACTORS

Measure No. 2

HOMICIDE CASE TYPOLOGY BASED ON STATUTORY AGGRAVATING AND MITIGATING CIRCUMSTANCES:

VN606_____|_____
Letter No.

Coder Note: Enter one choice only. If more than one category applies, code the most aggravated category, with category A being the most aggravated and category J being the least aggravated category.

A low mitigation case refers to one with two or fewer statutory mitigating circumstances (a) found (or recognized with respect to the catchall factor) in penalty-trial cases or (b) present in non-penalty trial cases. However, catchall factors account for only one mitigator regardless of their number. A high mitigation case refers to one with three or more mitigating circumstances found (or recognized with respect to the catchall factor in penalty trials) or present in non-penalty-trial cases (with catchall factors counting as only one mitigator regardless of their number).

A. **PRIOR HOMICIDE** - Murder by a defendant with a prior murder or manslaughter conviction - 1(a):

1. Aggravated[1] Low Mitigation
2. Aggravated[1] High Mitigation
3. Other Low Mitigation
4. Other High Mitigation

B. **POLICE VICTIM** - Victim was a law officer killed in the line of duty and defendant knew or should reasonably have known that the victim was a law officer - 1(i):

1. Low Mitigation
2. High Mitigation

C. **JAILER VICTIM** - The victim was a law enforcement officer or public servant having the custody of the defendant or another - 1(g):

1. Low Mitigation
2. High Mitigation

D. **MULTIPLE VICTIMS** - Multiple-victim murder - 1(e):

1. Aggravated[2] Low Mitigation
2. Aggravated[2] High Mitigation
3. Other Low Mitigation
4. Other High Mitigation

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[1] Aggravated refers to the presence of an additional statutory aggravating circumstance.
[2] An aggravated multiple-victim case involves a contemporaneous felony (e.g., robbery, kidnapping) other than a drug crime, or an additional statutory aggravating circumstance.

E. **VIOLENT RECORD** - Murder by a defendant with a substantial history of serious assaultive or terrorizing criminal activity or with a prior conviction of a crime involving the use of a threat of violence to the person - 1(a):

1. Aggravated[1] Low Mitigation
2. Aggravated[1] High Mitigation
3. Other Low Mitigation
4. Other High Mitigation

F. **CONTRACT KILLING** - Murder for (a) hire by a principal or agent (shooter) or (b) for pecuniary gain - 1(c):

1. Aggravated[1] Low Mitigation
2. Aggravated[1] High Mitigation
3. Other Low Mitigation
4. Other High Mitigation

G. **ESCAPE DETECTION** - A murder committed in which the defendant's motive was an apparent effort to conceal either the commission of a crime or the identity of the perpetrator of a crime - 1(b):

1. Aggravated[1] Low Mitigation
2. Aggravated[1] High Mitigation
3. Other Low Mitigation
4. Other High Mitigation

H. **HAC OR DEPRAVITY** - Murder was especially heinous, atrocious, and cruel (HAC) or defendant manifested exceptional depravity by ordinary standards of morality and intelligence - 1(d):

1. Low Mitigation
2. High Mitigation

I. **GRAVE RISK** - A murder in which the defendant knowingly created a grave risk of death to at least two or more persons - 1(f):

1. Low Mitigation
2. High Mitigation

J. **HINDER GOVERNMENT FUNCTION** - The defendant committed the crime to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws - 1 (h):

1. Low Mitigation
2. High Mitigation

APPENDIX C

EVIDENCE OF COMPARATIVE EXCESSIVENESS IN NEBRASKA DEATH-SENTENCING DECISIONS (1973-1999): DEATH-SENTENCING RATES AMONG COMPARABLE CASES IN PENALTY TRIALS AND AMONG ALL DEATH-ELIGIBLE CASES

A	B	C		D	E		F	G		H	I	J	K	L	M
	Number of Aggravating Circumstances			Number of Aggravating & Mitigating Circumstances			Salient Factors Measure			Regression-Based Scales Based on:				Average Death-Sentencing Rate Among Penalty-Trial Near Neighbors	Average Death-Sentencing Rate Among Near Neighbors From All Death- Eligible Cases
										Penalty-Trial Sentencing Model		Death Sentence Imposed Among All Death-Eligible			
Defendant's Number	Case Classifi-cation	Death-Sentencing Rate in Classification		Case Classifi-cation	Death-Sentencing Rate in Classification		Case Classifi-cation	Death-Sentencing Rate in Classification		Case Classifi-cation	Death-Sentencing Rate in Classification	Case Classifi-cation	Death-Sentencing Rate in Classification		
		PT Cases[1]	D.E. Cases[2]		PT Cases[1]	D.E. Cases[2]		PT Cases[1]	D.E. Cases[2]		Among Penalty-Trial Cases[1]		Among All D.E. Cases[2]		
1. Anderson I	2	.48 (12/25)	.24 (12/49)	2,2	.44 (4/9)	.17 (4/24)	F1	1.0 (4/4)	1.0 (4/4)	2	.36 (5/14)	3	.22 (6/27)	.57	.41
2. Anderson II	1	.07 (3/41)	.03 (3/108)	1,2	.18 (2/11)	.05 (2/37)	F1	1.0 (4/4)	1.0 (4/4)	1	.06 (3/48)	2	.05 (3/62)	.33	.28
3. Bird Head	3	.89 (8/9)	.67 (8/12)	3,1	.80 (4/5)	.67 (4/6)	E1	.67 (6/9)	.40 (6/15)	4	.93 (14/15)	4	.87 (20/23)	.82	.65
4. Bjorklund	3	.89 (8/9)	.67 (8/12)	3,2	1.0 (3/3)	.60 (3/5)	E1	.67 (6/9)	.40 (6/15)	4	.93 (14/15)	4	.87 (20/23)	.87	.63
5. Drinkwalter	2	.48 (12/25)	.24 (12/49)	2,1	.71 (5/7)	.50 (5/10)	G1	.54 (7/13)	.28 (7/25)	3	.64 (7/11)	3	.22 (6/27)	.59	.31
6. Harper	4	1.0 (6/6)	.86 (6/7)	4,1	1.0 (6/6)	.67 (2/3)	D1	.60 (6/10)	.43 (6/14)	4	.93 (14/15)	4	.87 (20/23)	.88	.71
7. Hochstein I	2	.48 (12/25)	.24 (12/49)	2,2	.44 (4/9)	.17 (4/24)	F1	1.0 (4/4)	1.0 (4/4)	2	.36 (5/14)	3	.22 (6/27)	.57	.41
8. Hochstein II	1	.07 (3/41)	.03 (3/108)	1,2	.18 (2/11)	.05 (2/37)	F1	1.0 (4/4)	1.0 (4/4)	1	.06 (3/48)	2	.05 (3/62)	.33	.28
9. Holtan	4	1.0 (6/6)	.86 (6/7)	4,2	1.0 (6/6)	1.0 (3/3)	E1	.67 (6/9)	.40 (6/15)	4	.93 (14/15)	4	.87 (20/23)	.90	.78
10. Hunt	2	.48 (12/25)	.24 (12/49)	2,2	.44 (4/9)	.17 (4/24)	H1	.33 (2/6)	.11 (2/18)	2	.36 (5/14)	3	.22 (6/27)	.40	.18
11. Jones	2	.48 (12/25)	.24 (12/49)	2,1	.71 (5/7)	.50 (5/10)	D1	.60 (6/10)	.43 (6/14)	3	.64 (7/11)	4	.87 (20/23)	.61	.51
12. Joubert	3	.89 (8/9)	.67 (8/12)	3,3	1.0 (4/4)	.67 (4/6)	H1	.33 (2/6)	.11 (2/18)	4	.93 (14/15)	3	.22 (6/27)	.79	.42
13. Lotter	3	.89 (8/9)	.67 (8/12)	3,2	1.0 (3/3)	.60 (3/5)	D1	.60 (6/10)	.43 (6/14)	4	.93 (14/15)	4	.87 (20/23)	.85	.64
14. Moore I	3	.89 (8/9)	.67 (8/12)	3,1	.80 (4/5)	.67 (4/6)	G1	.54 (7/13)	.28 (7/25)	4	.93 (14/15)	4	.87 (20/23)	.79	.62
15. Moore II	3	.89 (8/9)	.67 (8/12)	3,2	1.0 (3/3)	.60 (3/5)	G1	.54 (7/13)	.28 (7/25)	4	.93 (14/15)	4	.87 (20/23)	.84	.60
16. Otey	2	.48 (12/25)	.24 (12/49)	2,1	.71 (5/7)	.50 (5/10)	G1	.54 (7/13)	.28 (7/25)	3	.64 (7/11)	4	.87 (20/23)	.59	.47
17. Palmer I	2	.48 (12/25)	.24 (12/49)	2,0	.33 (2/6)	.33 (2/6)	G1	.54 (7/13)	.28 (7/25)	3	.64 (7/11)	4	.87 (20/23)	.50	.43
18. Palmer II	2	.48 (12/25)	.24 (12/49)	2,0	.33 (2/6)	.33 (2/6)	G1	.54 (7/13)	.28 (7/25)	3	.64 (7/11)	4	.87 (20/23)	.50	.43
19. Palmer III	2	.48 (12/25)	.24 (12/49)	2,1	.71 (5/7)	.50 (5/10)	G1	.54 (7/13)	.28 (7/25)	3	.64 (7/11)	4	.87 (20/23)	.59	.47

APPENDIX C (Continued)

A	B	C		D	E		F	G		H	I	J	K	L	M
	Number of Aggravating Circumstances			Number of Aggravating & Mitigating Circumstances			Salient Factors Measure			Regression-Based Scales Based on:				Average Death-Sentencing Rate Among Penalty-Trial Near Neighbors	Average Death-Sentencing Rate Among Near Neighbors From All Death- Eligible Cases
										Penalty-Trial Sentencing Model		Death Sentence Imposed Among All Death-Eligible			
Defendant's Number	Case Classification	Death-Sentencing Rate in Classification		Case Classification	Death-Sentencing Rate in Classification		Case Classification	Death-Sentencing Rate in Classification		Case Classification	Death-Sentencing Rate in Classification	Case Classification	Death-Sentencing Rate in Classification		
		PT Cases[1]	D.E. Cases[2]		PT Cases[1]	D.E. Cases[2]		PT Cases[1]	D.E. Cases[2]		Among Penalty-Trial Cases[1]		Among All D.E. Cases[2]		
20. Perry	4	1.0 (6/6)	.86 (6/7)	4,1	1.0 (6/6)	.67 (2/3)	E1	.67 (6/9)	.40 (6/15)	4	.93 (14/15)	4	.87 (20/23)	.90	.70
21. Reeves	3	.89 (8/9)	.67 (8/12)	3,1	.80 (4/5)	.67 (4/6)	D1	.60 (6/10)	.43 (6/14)	4	.93 (14/15)	4	.87 (20/23)	.80	.66
22. Rust	4	1.0 (6/6)	.86 (6/7)	4,2	1.0 (6/6)	1.0 (3/3)	E1	.67 (6/9)	.40 (6/15)	4	.93 (14/15)	4	.87 (20/23)	.90	.78
23. Ryan	2	.48 (12/25)	.24 (12/49)	2,2	.44 (4/9)	.05 (2/37)	E1	.67 (6/9)	.40 (6/15)	2	.36 (5/14)	4	.87 (20/23)	.49	.39
24. Sheets	2	.48 (12/25)	.24 (12/49)	2,3	.56 (9/16)	.14 (1/7)	G2	.20 (1/5)	.14 (1/7)	2	.36 (5/14)	4	.87 (20/23)	.40	.35
25. Simants	3	.89 (8/9)	.67 (8/12)	3,1	.80 (4/5)	.67 (4/6)	D1	.60 (6/10)	.43 (6/14)	4	.93 (14/15)	4	.87 (20/23)	.80	.66
26. Simpson	1	.07 (3/41)	.03 (3/108)	1,1	.07 (1/14)	.03 (1/33)	A3	.67 (2/3)	.25 (1/4)	1	.06 (3/48)	2	.05 (3/62)	.22	.09
27. Stewart	6	1.0 (6/6)	.86 (6/7)	6,2	1.0 (6/6)	1.0 (1/1)	D2	.25 (1/4)	.20 (1/5)	4	.93 (14/15)	4	.87 (20/23)	.79	.73
28. Victor	2	.48 (12/25)	.24 (12/49)	2,1	.71 (5/7)	.50 (5/10)	A1	.67 (2/3)	.29 (2/7)	3	.64 (7/11)	3	.22 (6/27)	.62	.31
29. Williams	4	1.0 (6/6)	.86 (6/7)	4,2	1.0 (6/6)	1.0 (3/3)	D1	.60 (6/10)	.43 (6/14)	4	.93 (14/15)	4	.87 (20/23)	.88	.79

[1] "PT" and "Penalty Trial" cases refers to near neighbors whose cases advanced to a penalty trial.
[2] "D.E. Cases" refers to near neighbors among all death-eligible cases whether or not they advanced to a penalty trial.

APPENDIX D

DEATH-ELIGIBLE CASES CLASSIFIED BY A SALIENT FACTORS MEASURE OF OFFENDER CULPABILITY

Table of Contents — Page

[1] Aggravated refers to the presence of an additional statutory aggravating circumstance.
[2] *See infra* Part I, Item 10, pp. 697-98 for a description of "low" and "high" mitigation.
[3] An aggravated multiple-victim case involves either a contemporaneous felony (e.g., robbery, kidnapping) other than a drug crime, or an additional statutory aggravating circumstance.
[4] Defendants with a prior murder or manslaughter conviction are classified under salient factor category A.

Part I. A Guide to Appendix D Abbreviations

1 . *Defendant.* "D" stands for defendant. Unless otherwise indicated all defendants and victims are male. If a death-sentenced offender's sentence was vacated on appeal, the subsequent proceeding is designated with a suffix after his name, e.g., Drinkwalter (A) (first) and Drinkwalter (B) (second). If the offender committed two death-eligible offenses on different occasions, the different offenses are designated with a I or II suffix, e.g., Simpson (I) and Simpson (II).

2. *Co-Perpetrators.* "Co-P, Co-P2, Co-P3, etc." stand for the defendant's co-perpetrators.

3. *Victim(s).* "V, V1, V2, etc." stand for the victim and any additional victims; "NDV" refers to victims who were injured but not killed.

4. *Homicide Grade.* "M1, M2, or MS." stand respectively for murder 1, murder 2, or manslaughter.

5. *Charge and Conviction.* In an M1 prosecution, "Charge: M1" indicates that M1 was the original charge, while "Jury: M1," "Bench: M1,"or "Plea: M1" indicates the basis of an M1 conviction. The same nomenclature is used for M2 and MS charges and convictions.

6. *M1 Sentencing Hearings.* "P. Trial/D.P. Sought" indicates that a penalty trial was held in which the state presented evidence of statutory aggravating circumstances. "P. Trial/No Agg. Cir. Presented" means that a M1 sentencing hearing was held but the state presented no evidence of statutory aggravation.

7. *Statutory Aggravation and Mitigation.* "Agg. Cir." and "Mit. Cir." stand for the statutory aggravating and statutory mitigating circumstances (a) found in a penalty trial, unless "presented/not found" is indicated or (b) present in a non-penalty trial case. "Agg. Cir.: None" means no aggravation was found to be present by the sentencing court. The applicable statutory aggravators and mitigators are also described and identified by section numbers. See Table 1 for a complete list of the statutory aggravators and mitigators which underlie the salient factors classification system.

8. *Non-Statutory Mitigation.* "Non-Stat. Mit.: Present" indicates that non-statutory mitigation was presented and considered by the court in a M1 sentencing hearing or was present in a non-penalty trial case.

9. *Sentence Imposed.* "Life" and "Death" indicate that a life or death sentence was imposed for the homicide, while a term of years imposed for a homicide less than M1 is indicated by the length of the sentence imposed, e.g., 20-30 years, or merely "Term of Years."

10. *Mitigation in the Case.* A "low mitigation" case refers to one with two or fewer statutory mitigating circumstances (a) found (or recognized with respect to the catchall factor) in penalty-trial cases or (b)

present in non-penalty-trial cases. However, catchall factors account for only one mitigator regardless of their number. A "high mitigation" case refers to one with three or more mitigating circumstances found (or recognized with respect to the catchall factor in penalty trials) or present in non-penalty-trial cases (with catchall factors counting as only one mitigator regardless of their number).

Part II. Death Eligible Cases Classified by the Salient Factors Described in Appendix B.

A. **Prior Homicide —** *Murder by Defendant with a prior murder or manslaughter conviction* 1(a):

A. 1 — Aggravated[427] *With Low Mitigation*

1. Victor, Clarence — Douglas County — Penalty Trial — Death

12/26/87. D, 55 years old, had done yard work for V, an 82-year-old woman. On the afternoon in question, D showed up at V's home, carrying a metal pipe. V let D in and a struggle ensued. D beat V with his fists, and then with the pipe, resulting in 14 broken ribs and brain hemorrhaging. D lacerated V's throat with a knife 5 times and she subsequently died from blood loss. Throughout the assault, V was alive and screaming. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir: (1)(a)(convictions and substantial history); (1)(d)(HAC/depravity). Mit. Cir.: (2)(c)(mental/emotional disturbance–presented/not found); (2)(d)(age–presented/not found); (2)(g)(capacity impaired–presented/not found). Non-Stat. Mit.: Present. Death.

A. 3 — One Statutory Aggravator With Low Mitigation

1. Simpson, Jerry (II) — Lancaster County — Penalty Trial — Death

10/13/97. D, a 38-year-old, and V, a 27-year-old male, were inmates and D had threatened V over some stamps that V owed to him. The next day, D and Co-P, his cell mate, removed knives they had hidden in the light fixture of their cell, put on coats and gloves, and went to V's cell. V was then stabbed to death while he lay on his bed. D was previously convicted of M1. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(convictions and substantial history). Mit. Cir.: (2)(b)(pressures/influences-presented/not found); (2)(c)(mental/emotional disturbance-presented/not found); (2)(f)(victim participation/consent-presented/not found); (2)(g)(capacity impaired-presented/not found). Non-Stat. Mit.: Present. Death.

2. Bazer, Christopher — Douglas County — Penalty Trial — Life

02/18/88. D and Co-P1 planned to rob or burglarize V's candy shop. D, age 19, and 2 Co-P's drove to the shop when they were intoxicated. Armed with a .22 caliber pistol D and Co-P1 entered the shop demand-

427. Aggravated refers to the presence of an additional statutory aggravating circumstance.

ing cash from 78-year-old V, a female. V insisted she had no cash; and during a skirmish, D grabbed V by the hair and shot her in the back of the head. Charge: M1. Plea: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(convictions and substantial history–both presented/both not found). Non-Stat. Mit.: Present. Life.

3. Williams, Jimmie L. — Hamilton County — Penalty Trial — Life

04/22/89. D, 48 years old, and V, a 41-year-old male, were truck drivers who got into an argument over their CB radios. They both pulled their trucks over to the side of the road and got out. D had a rifle and shot V once, in the chest, killing him. D and his wife, the Co-P, then drove away. Several witnesses identified D as the killer of V. In 1972, D was charged and convicted in Texas of murder with malice. Charge: M1. Jury: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: (1)(a)(conviction and substantial history). Non-Stat. Mit.: Present. Life.

4. Cyrus, Andrew — Douglas County — No Penalty Trial — 10 years

06/12/76. V, a 35-year-old, was at a bar and decided to go outside and fight another patron. As the two were fighting, D, a 54-year-old male, walked by and became embroiled in the fight. V beat D and left him lying on the ground while V went back into the bar. D retrieved a handgun and then went into the bar where he shot V once in the chest. D had a prior conviction for manslaughter. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(a)(convictions). Mit. Cir.: (2)(c)(mental/emotional disturbance). Non-Stat. Mit.: Present. 10 years.

5. Fletcher, Stacey L. (II) — Lancaster County — No Penalty Trial — 25-35 years

10/13/97. Co-P and V, a 27-year-old male, were inmates and Co-P had threatened V over some stamps that V owed to him. The next day, Co-P and D, his 23-year-old cell mate, removed knives they had hidden in the light fixture of their cell, put on coats and gloves, and went to V's cell. V was then stabbed to death while he lay on his bed. D was previously convicted of M1. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(a)(convictions and substantial history). Non-Stat. Mit.: Present. 25-35 years.

6. Sheppard, Eugene Jr. — Douglas County — No Penalty Trial — 3-9 years

04/27/75. D, a 50-year-old, and V, an adult male, got into an argument at a friend's house over a craps game. D shot at V twice while they were in the house, and when V ran outside, D followed, firing three more shots. D went back inside to reload his pistol, and V collapsed on the front lawn from his injuries and subsequently died. D had a prior conviction for M2. Charge: MS. Plea: MS. No P. Trial.

Agg. Cir.: (1)(a)(convictions and substantial history). Non-Stat. Mit.: Present. 3-9 years.

D. **Multiple Victims** — *Multiple-victim murder* — 1(e):

D. 1 — Aggravated[428] *With Low Mitigation*

1. Harper, Steven Ray — Douglas County — Penalty Trial — Death

09/10/78. D, a 25-year-old, had difficulty in dealing emotionally with the breakup of his relationship with his ex-girlfriend, especially after she married V1. On one occasion D went so far as to shoot at and injure members of his ex-girlfriend's family. After his release from jail, D plotted to poison his ex-girlfriend and her family. D experimented by poisoning animals and told friends of his plans. D broke into his ex-girlfriend's house and poisoned the milk and lemonade in the refrigerator. During the next day V1 (a 24-year-old male), V2 (an 11-month-old boy), NDV1, NDV2 and NDV3 all drank either lemonade or milk and became gravely ill. V2 died two days later and V1 died eight days later. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(convictions); (1)(a)(substantial history—presented/not found); (1)(d)(HAC/depravity); (1)(e)(multiple victims); (1)(f)(death risk to several). Mit Cir.: (2)(a)(no sig. criminal history-presented/not found); (2)(b)(pressure/influences and/or domination-presented/not found); (2)(c)(mental/emotional disturbance-presented/not found); (2)(g)(capacity impaired-presented/not found). Non-Stat. Mit.: Present. Death.

2. Jones, Isaiah (A) — Douglas County — Penalty Trial — Death

12/07/79. The 36-year-old D murdered 12-year-old V1 and her mother, 44-year-old V2. The cause of V1's death was attributed to asphyxiation and the cause of V2's death was determined to be multiple wounds to the head with a blunt instrument. Their partially clothed bodies were found buried in shallow graves. V2's body was found dismembered, V2's head and limbs had been sawed off. Evidence suggested that the murders may have been motived by a debt that V2 owed D. D was previously convicted of mutilating a dead body and theft. He also was granted immunity for a murder he assisted in Iowa. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(substantial history); (1)(d)(HAC/depravity–presented/not found); (1)(e)(multiple victims). Non-Stat. Mit.: Present. Death. Subsequent Proceeding at D.3 (#1).

3. Lotter, John L. — Richardson County — Penalty Trial — Death

12/31/93. D, a 22-year-old , and Co-P, a 22-year-old, sexually assaulted V1, a 21-year-old female, and in order to silence V1's testi-

428. An aggravated multiple-victim case involves either a contemporaneous felony (e.g., robbery, kidnapping) other than a drug crime, or an additional statutory aggravating circumstance.

mony to the crime, D and Co-P planned to murder V1 by cutting her head and hands off. D and Co-P set out to murder V1on separate occasions, but they failed to locate her in their attempts. Finally, several days later, they found out that V1was staying at V3's residence. On their way to the murder scene, D and Co-P agreed that they would kill anyone else who was with V1. They found V1 hiding under a blanket in V3's bedroom. D shot V1 in the chin and then Co-P stabbed V1 to assure her death. Next, Co-P handed V3's baby to her, and then D shot V3, a 24-year-old female, in the abdomen before Co-P took her child back out of her arms. D then located V2, a 22-year-old male, and before shooting V2 in the head and chest, D shot V3 one more time in the eye. D then went around and shot 2 or 3 more times at the V's to assure of their death. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(substantial history–presented/not found); (1)(b)(conceal crime and/or perp); (1)(e)(multiple victims); (1)(h)(disrupt gov't function/law enforcement). Mit. Cir.: (2)(b)(pressure/influences and/or domination–presented/not found); (2)(c)(mental/emotional disturbance–presented/not found); (2)(d)(age–presented/not found); (2)(e)(accomplice and participation–presented/not found); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Death.

4. Reeves, Randolph — Lancaster County — Penalty Trial — Death

03/29/80. D, a 24-year-old, climbed through the window of V1 during the early morning hours. D sexually assaulted V1 and stabbed her 7 times in the chest. V2 walked in on the sexual assault of V1, and D fatally wounded V2 by stabbing her twice. V1 died hours later after being taken to the hospital. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal crime and perp); (1)(d)(HAC/depravity); (1)(e)(multiple victims). Mit. Cir.: (2)(g)(capacity impaired–presented/not found). Non-Stat. Mit.: Present. Death.

5. Simants, Erwin C.- Lincoln County — Penalty Trial — Death

10/18/75. After drinking at a bar, D, age 29, returned home and loaded a .22 caliber rifle. D went to a neighbor's house where he sexually assaulted V1, a 10-year-old female, shot her once in the head, and continued to sexually assault her. Five of V1's relatives, V2, V3, V4, V5, and V6, came home one by one. D shot them all and molested the two females, a 57-year-old, and a 7-year-old. D returned home, unloaded the rifle, and confessed to his parents. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal crime and perp); (1)(d)(HAC/depravity); (1)(e)(multiple victims). Mit. Cir.: (2)(g)(capacity impaired). Death.

6. Williams, Robert — Lancaster County — Penalty Trial — Death

08/10/77. D, a 41-year-old, entered the home of his 25-year-old, female friend, V2, with a revolver, intoxicated and contemplating suicide. V1, a 25-year-old female neighbor of V2's, arrived at V2's home.

In an attempt to calm D, the revolver exchanged hands between the V's and D. D then fatally shot V2 once in the head and twice in the neck. D ordered V1 to undress. He then sexually assaulted V1 before shooting her twice behind her left ear and once in the back. D had prior convictions of third degree robbery and assault with a deadly weapon. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(convictions and substantial history); (1)(b)(conceal perp); (1)(d)(HAC/depravity); (1)(e)(multiple victims). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Death.

7. Boppre, Jeff — Scotts Bluff County — Penalty Trial — Life

09/19/88 D and Co-P habitually bought cocaine and marijuana from V1. D suggested robbing and killing V1 to get drugs and money. Co-P agreed to ride along, but he refused to kill. D bought cocaine from V1; and D and Co-P used the cocaine, then went to D's house to get his .32 semiautomatic pistol. D and Co-P returned to V1's house, and D entered and shot V1 3 times in the trunk and once in the arm. D exited the house to reload and Co-P heard him mumble "eliminate witnesses." D re-entered the house and shot V2 3 times in the head and 4 times in the torso and arms. D took cocaine and cash and several other items. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(substantial history–presented/not found); (1)(b)(conceal crime and perp); (1)(d)(HAC/depravity–presented/not found); (1)(e)(multiple victims); (1)(f)(death risk to several–presented/not found). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. Life.

8. Hankins, Patrick H. — Douglas County — Penalty Trial — Life

10/04/87. 22-year-old D and 3 V's were sleeping at V2's apartment. The previous day D and V1 got into a minor dispute over a small amount of money. D awoke at about 6:30 a.m. and beat V1 over the head several times with a metal bar while V was asleep. D then went into the living room and beat V2 in the head with the bar while she was asleep on the couch. D then proceeded to beat V3 in a similar fashion as he slept on the floor in the living room. D then wiped the blood off the bar, covered the Vs' faces with pillows, dressed, packed, stole money from V1 and V2 and then left in V1's car. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal crime and/or perp–presented/not found); (1)(d)(HAC/depravity); (1)(e)(multiple victims). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(g)(capacity impaired). Life.

9. Kirksey, Eric T. — Douglas County — Penalty Trial — Life

01/01/94. D, a 21-year-old, shot V1, a 19-year-old female, twice in the head with two separate guns; one of the two shots only hit her ear, and the other was fatal. D shot 22-year-old V2 several times, resulting in his death. There was evidence showing that the murders were

committed during a robbery and that D did not expect V1 to be there. Both V's were shot from behind while they were sitting in the front seat of V2's car. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal perp); (1)(e)(multiple victims). Mit. Cir.: (2)(a)(no sig. criminal history–presented/not found). Non-Stat. Mit.: Present. Life.

10. Nissen, Thomas M. — Richardson County — Penalty Trial — Life

12/31/93. D, a 22-year-old and Co-P, a 22-year-old sexually assaulted V1, and in order to silence V1's testimony to the crime, D and Co-P planned to murder V1 by cutting her head and hands off. D and Co-P set out to murder V1 on separate occasions, but they failed to locate her in their attempts. Finally, several days later, they found out that V1 was staying at V3's residence. On their way, D and Co-P agreed that they would kill anyone else who was with V1. After breaking down the front door, they found V1 hiding under a blanket in V3's bedroom. Co-P shot V1 in the chin, and then D stabbed V1 to assure her death. Next, D handed V3's baby to her, and then Co-P shot V3 in the abdomen before D took the child back out of her arms. Co-P then located V2, and before shooting V2 in the head and chest, Co-P shot V3 one more time in the eye. Co-P then went around and shot 2 or 3 more times at the V's. Charge: M1. Jury: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: (1)(b)(conceal crime and/or perp); (1)(d)(HAC/depravity); (1)(e)(multiple victims); (1)(h)(disrupt gov't function/law enforcement). Non-Stat. Mit.: Present. Life.

11. Belmarez, Dustin L. — Red Willow County — No Penalty Trial — Life

05/18/90. D, a 19-year-old male, and Co-P were camping in a park, as were the two V's, 59-year-old twin brothers. The four became acquainted and began to drink together. V2 went to bed and the remaining three continued to drink. D claimed that Co-P became angry over something V1 said and began to hit him with a sign post. D hit V1 with the sign post 4 or 5 times as well. D and Co-P woke V2 and began to beat him with their fists and empty liquor bottles. D then began to hit V2 with a pickaxe blade. They hid his body in the bushes, leaving the pickaxe imbedded in his head, and took the Vs' truck and other belongings. Charge: M1. Plea: M1. No P. Trial. Agg. Cir.: (1)(b)(conceal perp); (1)(d)(HAC/depravity); (1)(e)(multiple victims). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

12. Schommer, Richard P. — Fillmore County — No Penalty Trial — 20 years

09/23/80. After a quarrel with family members, D, age 42, poured gas throughout his own home. The gas was ignited by an unknown cause, and two relatives, a 15-year-old female and a 39-year-old male, died in the resulting fire. In addition to the two V's, two NDV's were

injured. Charge: M1. Plea: MS. No P. Trial. Agg. Cir.: (1)(e)(multiple victims); (1)(f)(death risk to several). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. 20 years.

13. Wagner, Clyde W. — Red Willow County — No Penalty Trial — Life

5/18/90. D, a 32-year-old male, and Co-P were camping in a park when they met V1 and V2, who were 59-year-old twin brothers. The four began drinking together and eventually V2 went to bed. Both D and Co-P claimed that the other began to argue with V1 and then beat him with a signpost. Both D and Co-P then hid the body. They then woke V2 and hit him with a large liquor bottle, their fists and a pickaxe without the handle. They hid the body under some leaves, leaving the pickaxe still imbedded in V2's head. D and Co-P then stole V1 and V2's truck and belongings. Charge: M1. Plea: M1. No P. Trial. Agg. Cir.: (1)(b)(conceal perp); (1)(d)(HAC/depravity); (1)(e)(multiple victims). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

D. 2 — Aggravated With High Mitigation

1. Curtright, James D. — Lancaster County — Penalty Trial — Life

04/23/85. D, a 20-year-old, was angry with the lifestyle that V1, D's 22-year-old sister, and V2, D's 42-year-old mother, led. D claimed that God told him to kill V1 and V2. D set his alarm so that he could awake early and kill them. D, who lived with V1, went into her bedroom after his alarm went off and stabbed her repeatedly. D then drove to V2's house. After she let him in, he approached her from behind and stabbed her repeatedly until she fell to the ground. D then took V1's child, who had been staying with V2, and went to the police station where he confessed. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(d)(HAC/depravity); (1)(e)(multiple victims). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(c)(mental/emotional disturbance); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

2. Nokes, Harold — Red Willow County — Penalty Trial — Life

09/23/73. 44-year-old D, Co-P, V1 and V2 were in the basement of D and Co-P, D's wife. D and V2 got into an argument where V2 drew his fist back and came towards D. D pulled out a gun and fatally shot him. Screaming, V1 started up the stairs, and D fatally shot her in the back. D stated that he couldn't let her get away. D and his wife, Co-P, cut up the bodies and disposed of them in a lake. Charge: M1. Plea: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal crime and/or perp); (1)(e)(multiple victims). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(c)(mental/emotional disturbance). Non-Stat. Mit.: Present. Life.

3. Jacob, David H. — Gage County — No Penalty Trial — Life

01/19/86. After drinking at a bar, D, a 25-year-old male, Co-P and a friend went to a party at the home of V1, an 18-year-old female, and V3, a 22-year-old male, even though they were not invited. After approximately 30 minutes, they were asked to leave. An altercation broke out and V2, a 21-year-old male, struck D once in the face. D and Co-P made comments about "getting even" and then left the party. While leaving in their car, they tried but failed to run over a party goer. D and Co-P then dropped their friend off and drove approximately 45 miles to D's house where they obtained shotguns. D and Co-P then returned to the scene of the party. D first shot and killed V2 and then D and Co-P went into the bedroom where V1 and V3 were sleeping and shot and killed them. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity); (1)(e)(multiple victims). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

D. 3 — One Statutory Aggravator With Low Mitigation

1. Jones, Isaiah (B) — Douglas County — Penalty Trial — Life

12/07/79. 36-year-old D murdered a 12-year-old, V1, and her 44-year-old mother, V2. The cause of V1's death was attributed to asphyxiation and the cause of V2's death was determined to be multiple wounds to the head with a blunt instrument. Their partially clothed bodies were found buried in shallow graves. V2's body was found dismembered, with her head and limbs sawed off. Evidence suggested that the murders may have been motivated by a debt that V2 owed D. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(substantial history–presented/not found); (1)(d)(HAC/depravity–presented/not found); (1)(e)(multiple victims). Non-Stat. Mit.: Present. Life. Prior Proceeding at D.1 (#2).

2. Nielsen, Wilfred W. — Washington County — Penalty Trial — Life

11/19/77. After drinking most of the day, D went home and became involved in an argument with his wife. D stormed out and returned later to find that his wife and child were gone. The two V's were the parents of D's wife. D went to the Vs' farm looking for his wife and while arguing with V1, asked him to step outside. V's son, who was hiding upstairs, heard a shot and then a second shot and found the two V's dead on the front sidewalk. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(e)(multiple victims–presented/not found). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

3. Jacob, Steven M. — Lancaster County — Penalty Trial — Life

08/02/89. D, a 33-year-old, broke into the home of V1, D's ex-girlfriend, and V2, her 54-year-old new lover, during the early morning. D shot V2 3 or 4 times, killing V2. D then shot V1 in the side and

head. Before dying in the hospital several days later, V1 identified D as the killer. Charge: M1. Jury: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: (1)(e)(multiple victims). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. Life.

4. Rodriguez, Joseph D. — Hall County — No Penalty Trial — Life

01/10/88. D and his family were threatened at a bar by two V's. D stated that he had once testified against one of the V's, which resulted in the V's being incarcerated. D went home and got a gun saying: "It's me or them." D returned to the bar with his two sons who stayed in the back of the bar. D walked up to where the two V's sat and shot them both twice. Charge: M1. Plea: M1. No P. Trial. Agg. Cir.: (1)(e)(multiple victims). Mit. Cir.: (2)(c)(mental/emotional disturbance). Non-Stat. Mit.: Present. Life.

D. 4 — One Statutory Aggravator With High Mitigation

1. Arnold, Lamont E. — Douglas County — Penalty Trial — Life

09/24/95. D, a 22-year-old male, was involved in a fight with V1, a 34-year-old male, and V2, a 37-year-old male, and as a result D sustained a minor cut to his face. Later that day, D went to a party at Co-P1's home where he complained about the earlier fight. D and another then left the party to search for V1 and V2. After finding V1, D threw a brick into his head causing serious, perhaps even fatal, injuries. After they returned to the party, Co-P1 suggested they "go finish [V1] off." D, Co-P1, and Co-P2 returned to where V1 was lying on the ground. V1 tried to talk but Co-P2 kicked him and then Co-P1 took out a knife and stabbed V1 multiple times. D and his Co-P's hid when a car drove by, but afterwards returned to V1 and Co-P1 continued stabbing him while D rummaged through V1's pockets. V1 suffered 20 stab wounds. D and Co-P's returned to the party and decided to kill V2 because, they believed, he would be able to identify them as V1's killers. They proceeded to V2's apartment where, just before entering, D and Co-P1 decided D would kill V2. They then broke into the apartment. D first sprayed mace at V2 and then stabbed him 17 times. Co-P2 and Co-P3 beat NDV, a friend staying with V2. They then left the apartment, but Co-P1 returned and struck someone, though it is unclear who, in the head with a 2" x 4" board. The next day, D, laughing and giggling, related to two other Co-P's (later charged with accessory after the fact) how he and the others had handled the situation. Charge: M1. Plea: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal perp–presented/not found); (1)(e)(multiple victims–presented/not found). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(b)(pressure/influences and/or domination–presented/not found); (2)(e)(accomplice and participation–presented/not found); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

2. Smith, Scott L. — Sarpy County — Penalty Trial — Life

11/10/90. D, 19 years old, had been thinking about murdering his family for about a week. When he got into an argument with V1, his 14-year-old sister, over a newspaper, D got his father's gun and emptied it into V1. When V2, D's 42-year-old mother, came home, D emptied the gun into her as well. D then reloaded and waited for his father to come home, but his father managed to escape. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal crime and/or perp–presented/not found); (1)(d)(HAC/depravity–presented/not found); (1)(e)(multiple victims); (1)(f)(death risk to several–presented/not found). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(b)(pressure/influences and/or domination); (2)(c)(mental/emotional disturbance); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

3. West, Ben — Douglas County — Penalty Trial — Life

11/26/84. D had suspicions that V1, his live-in girlfriend, was having an affair with V2. D returned home to find V1's and V2's cars parked side-by-side outside the apartment he shared with V1. D left to purchase hollow-point bullets for his gun. D returned to the apartment but parked at a distance. D entered the apartment with the gun loaded and concealed and walked in on V1 and V2 having sexual intercourse. V2 requested more time with V1. D shot V2 twice and V1 four times. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(e)(multiple victims). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(c)(mental/emotional disturbance). Non-Stat. Mit.: Present. Life.

4. Waldner, Donald A. — Colfax County — Penalty Trial — Life

11/13/89. V1, a 25-year-old female, had served divorce papers on 25-year-old D two days before the incident. V1 and V2 were romantically involved and worked together at a factory from which D had recently been fired. D hid outside of the factory and surprised the 2 V's as they were about to enter. He shot both V's twice, killing them both. Charge: M1. Plea: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: (1)(e)(multiple victims). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(c)(mental/emotional disturbance); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

5. Baker, John — Gage County — No Penalty Trial — 40-80 years

07/17/81. D, a 21-year-old, entered his parents' bedroom and fatally wounded them both with a rifle. D first shot V1, his father, in the left eye. D then shot V2, his mother, once in the shoulder and once in the head. D then went down the hallway where he encountered his brother. D's brother wrestled D down, and then D left with his brother's car. D's record consisted of traffic violations. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(e)(multiple victims). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. 40-80 years.

E. **Violent Record (other than a prior murder or manslaughter conviction)**[429] — Murder by a defendant with a substantial history of serious assaultive or terrorizing criminal activity or with a prior conviction of a crime involving the use of a threat of violence to the person — 1(a):

E. 1 — Aggravated[1] With Low Mitigation

1. Bird Head, Hudson (A) — Sheridan County — Penalty Trial — Death

03/02/85. D, 46 years old, was pulled over by a police officer for driving V's car in an intoxicated manner. D had worked for V, an 85-year-old female, in the past doing odd jobs for her. In addition to the car, D was found with other belongings of V. Forensic evidence indicated that D came into V's home, knocked her down and tied her hands behind her back. D then raped, beat and strangled V, crushing her larynx. V eventually asphyxiated on her own blood. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir: (1)(a)(convictions); (1)(b)(conceal perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(g)(capacity impaired). Death. Subsequent Proceeding at G.1 (#8).

2. Bjorklund, Roger D. — Lancaster County — Penalty Trial — Death

09/23/92. 30-year-old D and 24-year-old Co-P drove around looking for a woman to rape. After a few hours of looking, they spotted V, an 18-year-old female, and they followed her car. D abducted V in her car at her parents' residence and drove her to another location. After abandoning V's car at a separate location, D and Co-P took turns sexually assaulting V. V's hands were bound and her eyes were partially covered with duct tape. D and Co-P then decided to kill V because she would otherwise be able to identify them. D walked her out into a field in a choke hold and fell on top of her. Co-P then shot V twice in the head. D later fired 5 rounds at V after realizing that she was still gasping for air. D and Co-P returned to the scene 2 days later and buried V's body. When her body was found, there was evidence of sexual torture. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(substantial history); (1)(b)(conceal crime and/or perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(b)(pressure/influences and/or domination–presented/not found); (2(c)(mental/emotional disturbance–presented/not found); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Death.

3. Holtan, Richard D. (A) — Douglas County — Penalty Trial — Death

11/01/74. D, a 39-year-old male, robbed at gunpoint a bar at which V, the 34-year-old male bartender, NDV1, V's girlfriend, and NDV2, a

429. Defendants with a prior murder or manslaughter conviction are classified under salient factor category A.

bar patron, were present. After emptying the cash register and taking the bar pistol, D herded his captives into the restroom where he forced V to tie up NDV1 and NDV2. D then fired 4 shots. Two bullets struck and killed V, a third struck and wounded NDV1 and the fourth missed everyone. D fled to Hawaii where he later surrendered himself to police. Charge: M1. Plea: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a) (convictions and substantial history); (1)(b)(conceal crime and perp); (1)(d)(HAC/depravity); (1)(f)(death risk to several). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Death. Subsequent Proceeding at E.1 (#9).

4. Moore, Carey D. (A) — Douglas County — Penalty Trial — Death

08/22/79 and 08/26/79. On the night prior to the first murder, D, a 22-year-old male, called several taxi companies from a phone booth and asked that they send a cab. When the cab arrived, he hid in the vicinity and tried to determine if the driver would make a suitable victim for the robbery/murder he was planning. D believed it would be easier for him to shoot an older man. On the night of the first killing, D called the taxi company for which V1, a 47-year-old-male worked. When V1 arrived, D determined V1 was a suitably-aged victim, and, along with Co-P, D got into the cab. D directed V1 to drive them to a certain rural location. When they arrived, D and Co-P robbed V1, and D then shot him 3 times. Four days later, D saw a lone cab with an older driver. D got into the cab and directed the driver, V2, a 47-year-old-male, on where to take D. Shortly thereafter, D shot V2 4 times and attempted to rob the cab, but found no money. Charge: M1. Bench: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(substantial history); (1)(b)(conceal perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(b) (pressures/influence and/or domination–presented/not found); (2)(c) (mental/emotional disturbance–presented/not found); (2)(d)(age–presented/not found); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Death. Prior Proceeding at E.1 (#5).

5. Moore, Carey D. (B) — Douglas County — Penalty Trial — Death

08/22/79 and 08/26/79. On the night prior to the first murder, D, a 22-year-old male, called several taxi companies from a phone booth and asked that they send a cab. When the cab arrived, he hid in the vicinity and tried to determine if the driver would make a suitable victim for the robbery/murder he was planning. D believed it would be easier for him to shoot an older man. On the night of the first killing, D called the taxi company for which V1, a 47-year-old-male worked. When V1 arrived, D determined V1 was a suitably-aged victim, and, along with Co-P, D got into the cab. D directed V1 to drive them to a certain rural location. When they arrived, D and Co-P robbed V1, and D then shot him 3 times. Four days later, D saw a lone cab with an older driver. D got into the cab and directed the driver, V2, a 47-year-old-male, on where to take D. Shortly thereafter, D shot V2 4 times

and attempted to rob the cab, but found no money. Charge: M1. Bench: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(substantial history); (1)(b)(conceal perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(b)(pressures/influence and/or domination–presented/not found); (2)(c)(mental/emotional disturbance–presented/not found); (2)(d)(age–presented/not found); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Death. Prior Proceeding at E.1 (#4).

6. Peery, Wesley H. — Lancaster County — Penalty Trial — Death

06/06/75. While robbing V's coin shop, 51-year-old D bound V's wrists and ankles and shot her 3 times. He shot her once between the eyes, once in the temple, and once through the roof of her mouth. V was helpless and posed no threat to D. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg.Cir.: (1)(a)(convictions and substantial history); (1)(b)(conceal crime and perp); (1)(c)(pecuniary gain); (1)(d)(HAC/depravity). Non-Stat. Mit.: Present. Death.

7. Rust, John E. (A) — Douglas County — Penalty Trial — Death

02/21/75. D, 23-year-old, and 2 Co-P's robbed a grocery store and fled from the scene with the police in pursuit. D and Co-P1 exchanged gunfire with police officers while driving through a populated residential area. When their car got stuck, they fled on foot between houses and through residential yards with the police officers pursuing on foot. They exchanged gunfire with the police while there were bystanders present, and they wounded 2 officers. V, a 21-year-old male, was a resident of the area who came out to assist the police in apprehending D and Co-P1. He ordered D to stop, and when D did not, he fired at D. D fired back, hitting V, and when V fell, D shot him 2 more times, killing him. D had a prior conviction for assault with intent to inflict great bodily injury. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(convictions); (1)(b)(conceal crime and/or perp); (1)(d)(HAC/depravity–presented/not found); (1)(f)(death risk to several); (1)(h)(disrupt gov't function/law enforcement). Mit. Cir.: (2)(c)(mental/emotional disturbance). Non-Stat. Mit.: Present. Death. Subsequent Proceeding at E.1 (#10).

8. Ryan, Michael W. — Richardson County — Penalty Trial — Death

04/29/85. D, a 36-year-old male, was the leader of a religious cult and V, an adult male, was a member of the cult who had fallen into disfavor with D. As punishment, D forced V to perform homosexual acts with another member of the group. Later, D and 4 Co-P's, who were also cult members, secured V to a crate and sodomized V repeatedly with a greased shovel handle, causing internal injuries. When V screamed because of this abuse, D kicked him in the head and put tape over his mouth. D and Co-P's then whipped V repeatedly over the course of 2 days. Afterwards, D and Co-P's shot off V's fingertips and D kicked and broke his arm. D then used a pair of pliers to pull

strips of skin off of V's leg and had 2 Co-P's break both of his legs. Finally, D stomped on V's chest, crushing it and causing his death. V was castrated either before or after his death. D had tortured V, NDV, and NDV's son prior to this homicide. NDV was a cult member and for a period of time the owner of the farm where the cult resided who also fell into disfavor with D. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(substantial history); (1)(b)(conceal perp–presented/not found); (1)(d)(HAC/depravity). Mit. Cir.: (2)(c)(mental/emotional disturbance); (2)(g)(capacity impaired—presented/not found). Non-Stat. Mit.: Present. Death.

9. Holtan, Richard D. (B) — Douglas County — Penalty Trial — Life

11/01/74. D, a 39-year-old male, robbed at gunpoint a bar at which V, the 34-year-old male bartender, NDV1, V's girlfriend, and NDV2, a bar patron, were present. After emptying the cash register and taking the bar pistol, D herded his captives into the restroom where he forced V to tie up NDV1 and NDV2. D then fired 4 shots. Two bullets struck and killed V, a third struck and wounded NDV1 and the fourth missed everyone. D fled to Hawaii where he later surrendered himself to police. D had an extensive criminal history. Charge: M1. Plea: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(convictions); (1)(a)(substantial history–presented/not found); (1)(b)(conceal crime and perp-both presented/both not found); (1)(d)(HAC/depravity–presented/not found); (1)(f)(death risk to several). Mit. Cir.: (2)(c)(mental/emotional disturbance–presented/not found); (2)(g)(capacity impaired–presented/not found). Non-Stat. Mit.: Present. Life. Prior Proceeding at E.1 (#3).

10. Rust, John E. (B) — Douglas County — Penalty Trial — Life

02/21/75. D, 23-year-old, and 2 Co-P's robbed a grocery store and fled from the scene with the police in pursuit. D and Co-P1 exchanged gunfire with police officers while driving through a populated residential area. When their car got stuck, they fled on foot between houses and through residential yards with the police officers pursuing on foot. They exchanged gunfire with the police while there were bystanders present, and they wounded 2 officers. V, a 21-year-old male, was a resident of the area who came out to assist the police in apprehending D and Co-P1. He ordered D to stop, and when D did not, he fired at D. D fired back, hitting V, and when V fell, D shot him 2 more times, killing him. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(convictions); (1)(a)(substantial history-presented/not found); (1)(b)(conceal perp-presented/not found); (1)(f)(death risk to several-presented/not found); (1)(g)(officer/public servant victim during custody-presented/not found); (1)(h)(disrupt gov't function/law enforcement). Mit. Cir.: (2)(b)(pressures/influences and/or domination-presented/not found); (2)(c)(mental/emotional disturbance); (2)(d)(age-

presented/not found); (2)(g)(capacity impaired-presented/not found). Non-Stat. Mit.: Present. Life. Prior Proceeding at E.1 (#7).

11. Bradford, Walter L. — Lancaster County — Penalty Trial — Life

12/02/82. D, a 25-year-old, and Co-P attempted to rob V, a 48-year-old male, who was Co-P's landlord. V struggled with D and Co-P, and was stabbed once and drug into his auto while still alive. D and Co-P drove V into the country, drug him into a ditch, and stabbed him multiple times. D had previous convictions for robbery and attempted sexual assault. Charge: M1. Plea: M1. P. Trial/No Agg. Cir. Presented. Agg Cir.: (1)(a)(conviction); (1)(b)(conceal crime and/or prep). Mit. Cir.: (2)(b)(domination–presented/not found); (2)(c)(mental/emotional disturbance–presented/not found); (2)(d)(age–presented/not found); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

12. Barney, Scott A. — Lancaster County — No Penalty Trial — Life

09/23/92. 24-year-old D and 30-year-old Co-P drove around looking for a woman to rape. After a few hours of looking, they spotted V, an 18-year-old female, and they followed her car. Co-P abducted V in her car at her parents' residence and drove her to another location. After abandoning V's car at a separate location, D and Co-P took turns sexually assaulting V. V's hands were bound and her eyes were partially covered with duct tape. D and Co-P then decided to kill V because she would otherwise be able to identify them. Co-P walked her out into a field in a choke hold and fell on top of her. D then shot V twice in the head. Co-P later fired 5 rounds at V after realizing that she was still gasping for air. D and Co-P returned to the scene 2 days later and buried V's body. Charge: M1. Plea: M1. No P. Trial. Agg. Cir.: (1)(a)(substantial history); (1)(b)(conceal crime and/or perp); (1)(d)(HAC/depravity). Non-Stat. Mit.: Present. Life.

13. Denman, David W. — Keith County — No Penalty Trial — 25 years

01/29/77. D, a 17-year-old male, and 2 Co-P's had been "working" their way across the country by robbing businesses and individuals. While at a highway rest stop, they sneaked up on V who was sitting in the cab if his truck, possibly asleep. When Co-P1 shot V through the truck's windshield, D pointed his gun and also fired at V. Co-P2 waited in the car and did not take an active part in the crime. Then Co-P1 and D robbed V of his wallet and CB. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(a)(substantial history); (1)(b)(conceal perp). Mit. Cir.: (2)(d)(age). Non-Stat. Mit.: Present. 25 years.

14. Herren, John — Scotts Bluff County — No Penalty Trial — 35 years

05/26/80. V, a 55-year-old male, was D's boss, and had made homosexual advances toward D. V had fired D the day before the offense

for drinking on the job. On the day of the offense, D went to the apartment of NDV, an acquaintance, twice and made advances toward her. NDV rejected D both times, and he got angry and left. D returned a third time; and during a discussion about his being fired, D remarked, "There's going to be one bloody killing." D then stabbed NDV in the chest, probed the wound with his fingers, kissed her, and left. D went to V's apartment and stabbed V in the neck, chest, shoulder, back, and hand–a total of 18 times, then slit V's throat. Police apprehended D in the parking lot. Charge: M1. Plea: M2. No P. Trial. Agg. Circ.: (1)(a)(convictions); (1)(d)(HAC/depravity). Mit Cir.: (2)(c)(mental/emotional disturbance). Non-Stat. Mit.: Present. 35 years.

15. Honeycutt, Nicodemus — Otoe County — No Penalty Trial — Life

09/10/83. V, and D became acquainted while they were staying in the same boarding house. D hit V, a 63-year-old man, in the head with a brick causing multiple skull fractures, and then robbed him and stole his car. D, a 40-year-old man, later told a friend that he hit an old man with a brick because he needed money. D had been convicted previously of aggravated robbery. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(a)(convictions); (1)(b)(conceal perp). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

16. Warford, Sherman — Gage County — No Penalty Trial — 6-12 years

04/13/80. 38-year-old D abducted V from her workplace during the early morning hours. D was seen driving off in his car with a passenger flailing arms and a commotion going on inside the car. V's body was found later in a field. Her hands and feet were tied behind her back with cloth and bailing wire, and she had been stabbed several times with a sharp instrument. She bled to death. D had previously been convicted of armed robbery. Charge: M1. Plea: MS. No P. Trial. Agg. Cir.: (1)(a)(conviction); (1)(d)(HAC/depravity). 6-12 years.

17. Womack, Arvie W. — Keith County — No Penalty Trial — Life

01/29/77. D, a 23-year-old male, and 2 Co-P's had been "working" their way across the country by robbing businesses and individuals. While at a highway rest area, they sneaked up on V, who was sitting in the cab of his truck, possibly asleep. D fired a shotgun at V through the truck's windshield, and Co-P1 fired his handgun at V. Co-P2 waited in the car and did not take an active part in the crime. After shooting V, D and Co-P1 robbed him of his money and CB radio. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(a)(substantial history); (1)(b)(conceal perp). Non-Stat. Mit.: Present. Life.

E. 2 — Aggravated With High Mitigation

1. Joubert, John J. — Sarpy County — Penalty Trial — Death

09/18/83. V1, a 13-yr-old boy, was kidnapped by D, a 20-year-old male, as V1 was delivering newspapers. D bound V1's hands and feet, put V1 in the trunk of D's car and drove to a remote area. D untied V1 long enough for him to undress down to his underwear and tied V1 up again. V1 began to beg for his life and struggle so D stabbed him, and eventually stabbed him a total of 11 times, 9 of which were inflicted before death. V1 died as a result of blood loss. About 3 months later, D kidnapped V2, a 12-year-old boy, as he was walking to school, and repeated the same basic scenario, stabbing V2 a total of 7 times and allowing him to die from loss of blood. Charge: M1 (2 cts.). Plea: M1 (2 cts.). P. Trial/D.P. Sought. Note: the plea was in exchange for dropping the other non-M1 counts and the prosecutors not arguing in favor of a death penalty but nonetheless presenting aggravation. Agg. Cir.: (1)(a)(substantial history); (1)(b)(conceal perp); (1)(d)(HAC/depravity); (1)(f)(death risk to several–presented/not found). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(b)(pressure/influences and/or domination–presented/not found); (2)(c)(mental/emotional disturbance); (2)(d)(age–presented/not found); (2)(g)(capacity impaired–presented/not found). Non-Stat. Mit.: Present. Death.

2. Sell, Dennis L. (I) — Dawson County — No Penalty Trial — Life

02/07/77. D, a 32-year-old male, developed urges to hurt and kill women when he felt he was under stress. On the day of the incident, he admitted that pressures were bothering him. He went to the home of the V, an adult female, whom he knew from a home decorating party she had given at the D's home. When she opened the door, the D grabbed her and beat her. He then took her into the country and shot her with a shotgun. The D had prior convictions for robbery and assault with intent to rape, both of which stemmed from the same incident. Charge: M2. Plea: M2. No P. Trial. Agg. Cir.: (1)(a)(convictions); (1)(d)(HAC/depravity). Mit. Cir.: (2)(c)(mental/emotional disturbance); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

3. Sell, Dennis L. (II) — Dawson County — No Penalty Trial — Life

09/23/77. D, a 32-year-old male, developed urges to hurt and kill women when he felt he was under stress. On the day of the incident, he admitted that pressures were bothering him. He went to the home of V, an adult female and when she came to the door he beat her. He then took her into the country. He then stabbed her twice with a pair of pliers. At some point, he also raped V. D had convictions for robbery and assault with intent to rape, both of which stemmed from the same incident. D also later plead guilty to a murder that he had committed six months prior to the killing of V. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(a)(convictions and substantial history); (1)(d)

(HAC/depravity). Mit. Cir.: (2)(c)(mental/emotional disturbance); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

E. 3 — One Statutory Aggravator With Low Mitigation

1. Benzel, Jeffrey — Hall County — Penalty Trial — Life

12/12/83. D, his girlfriend and another friend went to V's house to buy drugs. D's girlfriend had told D, untruthfully, that she had already paid for drugs. At V's house, D and his girlfriend began to argue and V told them to leave. D grabbed V's girlfriend and held a gun to her head. V, a 28-year-old male, then ran to a bedroom where he kept a shotgun, and D stated that he was going to kill V if V did what D thought he was going to do. V came out of the bedroom with a shotgun and D shot him in the mouth, killing him. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(conviction and substantial history–both presented/both not found). Mit. Cir.: (2)(b)(pressure/influences and/or domination–presented/not found). Non-Stat. Mit.: Present. Life.

2. Carter, George — Douglas County — Penalty Trial — Life

10/09/85. D, a 28-year-old and Co-P, a 27-year-old, stopped in front of the residence of a neighborhood rival. V and his companion were in the yard of the residence, and the companion threw a baseball bat at D and Co-P's car. D and Co-P got out of their car and started shooting at V and V's companion. V was fatally wounded by a bullet that entered his chest. There was some indication that the shooting was related to the rival being in D and Co-P's neighborhood and with their friends. D was previously convicted of the crime of robbery. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(convictions). Non-Stat. Mit.: Present. Life.

3. Carter, Victor — Douglas County — Penalty Trial — Life

10/09/85. D, a 27-year-old, and Co-P, a 28-year-old, stopped in front of the residence of a neighborhood rival. V, and 18-year-old male, and his companion were in the yard of the residence, and the companion threw a baseball bat at D and Co-P's car. D and Co-P got out of their car and started shooting at V and V's companion. V was fatally wounded by a bullet that entered his chest. There was some indication that the shooting was related to the rival being in D and Co-P's neighborhood and interfering with their friends. D was previously convicted of the crime of robbery. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(convictions). Non-Stat. Mit.: Present. Life.

4. Clausen, Timothy L. — Douglas County — Penalty Trial — Life

12/10/92. D met V and another outside a bar. D had been drinking. D, V, and the other went to the other's house. D believed V to be of the opposite sex of that which V really was. D and V engaged in

anal intercourse. Then, D realized V's true sex. D claimed V then wanted to engage in intercourse again. D refused. A struggle ensued. D was cut by V. D shot V twice killing V. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(conviction–presented/not found). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

5. Jones, Elijah — Douglas County — Penalty Trial — Life

11/19/92. Several days after V fired shots into D's apartment, narrowly missing occupants, D went looking for V. D checked at a card club twice. The second time V was there. D shot V several times in the chest and neck and several more times in the back as V crawled around on the floor. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(conviction and substantial history–both presented/both not found). Mit. Cir.: (2)(a)(no sig. criminal history). Life.

6. Lopez, James — Douglas County — Penalty Trial — Life

03/18/83. D killed V during the perpetration of a robbery by hitting V with a stick. Charge: M1. Bench: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(conviction and substantial history–both presented/both not found). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

7. Massey, Wesley L. — Douglas County — Penalty Trial — Life

05/23/77 45-year-old D and Co-P lured V into a hotel room to rob him. As Co-P walked into the room with V, D, who was lying in wait, hit V over the head with a glass bottle. After V denied having more than $5 on him, D started beating V with a gun. V escaped down the hallway into the elevator, as D chased him. A scuffle continued between D and V until the elevator stopped in the hotel lobby. V cried out to his friend for help, but D's gun scared the friend away. D then fatally shot V in the chest. D testified that he shot his weapon because he feared that he was going to get caught for robbery. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(conviction and substantial history); (1)(b)(conceal crime and/or perp–presented/not found); (1)(f)(death risk to several–presented/not found). Non-Stat. Mit.: Present. Life.

8. McLemore, Michael E. — Douglas County — Penalty Trial — Life

09/02/97 D, age 40, and V, age 39, had been boyfriend and girlfriend for about a month. D had become increasingly obsessive about the relationship and got angry when V stood him up on the night of the offense. D went to V's house and slashed her furniture with a knife. Neighbors observed D assaulting V outside her home then driving away with V in her car. D later stabbed and cut V a total of 54 to 56 times in the face, neck, chest, abdomen and arms, then abandoned her car with her body in the trunk. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(conviction). Life.

9. Sims, Ernest J. — Douglas County — Penalty Trial — Life

05/15/75. D and V were driving separate vehicles on the same street. D, age 27, passed V on the right and stopped abruptly in front of him. D exited his vehicle and accused V of nearly causing an accident. V pointed a revolver at D, and D left the area. D then returned with a sawed-off shotgun and confronted V, whose weapon was in his waistband. D shot V once in the abdomen while standing about 10 feet away from V. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(substantial history). Mit. Cir.: (2)(f)(victim participation/consent). Life.

10. Domingus, Alex P. — Lincoln County — Penalty Trial — Life

05/02/86. 32-year-old D bludgeoned V, a 25-year-old female, to death with a 1"x4" piece of wood. Evidence revealed defense wounds on V. D dragged V for a short distance after she had been beaten. D was previously convicted of first degree sexual assault and robbery. Charge: M1. Plea: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: (1)(a)(conviction and substantial history). Non-Stat. Mit.: Present. Life.

11. Lee, Edward E. — Douglas County — Penalty Trial — Life

08/07/82. D was a passenger in a car. V was in another car. V was "flirting" with the driver of the car D was in. D got out of the car and shot V once. Charge: M1. Jury: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: None. Life.

12. Barfield, Terry A. — Douglas County — No Penalty Trial — 10 years

02/08/93. The exact relationship between D, a 26-year-old, and Co-P and V, a 24-year-old male, is unclear. On the night in question, D and Co-P broke into the apartment at which V was staying, sought V out, and shot him several times. They then fled the apartment. D had a prior conviction for attempted robbery with a weapon. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(a)(convictions). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. 10 years.

13. Beagle, George — Douglas County — No Penalty Trial — 10 years

07/07/75. D, 40-year-old, got into an argument while in a cafe. He was intoxicated at the time. D left the cafe and returned five minutes later with a sawed-off shotgun. Another argument started and D shot V, an adult male. Charge: M2. Plea: MS. No P. Trial. Agg. Cir.: (1)(a)(conviction and substantial history). Mit Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. 10 years.

14. Brown, James A. — Douglas County — No Penalty Trial — Life

12/05/73. D, a 27-year-old, gave a ride to V, an 83-year-old female. D drove the car to a lake, and they both got out. D started discussing his financial problems, and V touched his elbow. D suddenly became

violent and struck V on the side of the head. She fell to the ground and started having convulsions. He shoved her into the lake water and took money from her purse. V had massive contusions to the neck and five cracked ribs. Her death was caused by shock from the injuries and asphyxia due to swelling of her larynx and immersion in water. Charge: M1. Plea: M1. No P. Trial. Agg. Cir.: (1)(a)(conviction). Life.

15. Buckman, Herman D.- Lancaster County — No Penalty Trial — Life

02/19/88. V, 25 years old, was shot twice in head at close range while in her vehicle. V was a drug dealer and was going to meet with D, 35 years old, and Co-P. D had a gun that night and Co-P was seen in the area were V was killed. D and Co-P were arrested later that day and had or had spent an amount of money comparable to what V had been carrying before her murder. Charge: M1. Jury: M1. No P. Trial. Agg. Cir.: (1)(a)(convictions and substantial history). Non-Stat. Mit.: Present. Life.

16. Escamilla, Mario — Lancaster County — No Penalty Trial — Life

07/03/86. D, a 20-year-old man, was walking down the street when V, a 71-year-old man, spoke to him. D asked if he could use V's phone. While doing so, D claimed V made sexual advances towards him. D grabbed a knife and stabbed V 12 times. D admitted that he then took money out of V's wallet. Charge: M1. Plea: M1. No P. Trial. Agg. Cir.: (1)(a)(conviction and substantial history). Non-Stat. Mit.: Present. Life.

17. Holloway, Keith D. — Douglas County — No Penalty Trial — 6-10 years

10/02/85. 23-year-old D aggressively approached V, a 27-year-old male, and shot him once in the chest with a .22 caliber pistol. Witnesses said D threatened V as he approached and shot him with no apparent provocation. D claimed that V "tried to cut him," but evidence showed V was unarmed. Charge: M1. Plea: MS. No P. Trial. Agg. Cir.: (1)(a)(convictions). Non-Stat. Mit.: Present. 6-10 years.

18. McClellen, William J. — Lincoln County — No Penalty Trial — 6 2/3-20 years

10/28/83 D, age 51, had been frequenting a rest stop daily during the two months prior to the offense. V, a 22-year-old male, was found at the rest stop, shot to death in his car. V was reportedly sleeping at the time of the shooting. A rifle cartridge found on the scene came from D's rifle. D had 2 prior convictions for robbery and 2 for escape. Charge: M1. Plea: MS. No P. Trial. Agg. Cir.: (1)(a)(convictions and substantial history). Non-Stat. Mit.: Present. 6 2/3-20 years.

E. 4 — One Statutory Aggravator With High Mitigation

1. Bussard, Jerry R. — Red Willow County — Penalty Trial — Life

08/27/79. D, a 24-year-old, shot V, a 22-year-old male, 10 times in the head, face and neck. There was evidence that indicated this shooting was committed in a robbery attempt. D had 3 prior convictions for misdemeanor assault, one of which was 'aggravated,' and one conviction for child abuse. Charge: M1. Plea: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(substantial history); (1)(d)(HAC/depravity–presented/not found). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(b)(pressure/influences and/or domination); (2)(c)(mental/emotional disturbance–presented/not found); (2)(d)(age); (2)(e)(accomplice and participation); (2)(f)(victim participation/consent); (2)(g)(capacity impaired–presented/not found). Life.

2. Ditter, David D. — Hall County — Penalty Trial — Life

01/23/79. D broke into residence of V, D's estranged spouse. D ordered friend of V to remove D and V's children form residence. D stripped V of her clothing. Police arrived and were threatened by D with a pistol. Police exited residence and D shot V 4 times in the chest. Charge: M1. Plea: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(substantial history–presented/not found); (1)(d)(HAC/depravity–presented/not found). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(b)(pressures/influences); (2)(c)(mental/emotional disturbance); (2)(d)(age); (2)(e)(accomplice and participation); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

3. Booth, Stephan M. — Dawson County — No Penalty Trial – 6 1/2-20 years

10/13/88. D, 35 years old, and V, a 40-year-old female, were in an abusive relationship and D had told a mutual friend that he would someday kill V. On the night in question, D and V were traveling by car and drinking. They got into an argument and V pulled the car over and got out. D drove off and shortly thereafter turned the car around and drove back. D saw V on the side of road, sped the car up and drove towards V. When V fled into a ditch, D drove the car into the ditch and struck V, killing her. There is evidence that as V's body lay on the road, it was hit by other vehicles. Charge: M2. Plea: MS. No P. Trial. Agg. Cir.: (1)(a)(convictions). Mit. Cir.: (2)(c)(mental/emotional disturbance); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. 6 1/2-20 years.

4. Rodriguez, Rafael — Lincoln County — No Penalty Trial — 40 years

05/12/98. D, a 36-year-old male, was the boyfriend of NDV. On the night in question, they went to the hotel room of the V, a 55-year-old male, and drank with him. At some point, D wanted to leave, but NDV wanted to stay and D became argumentative. D left for a time

and returned with a knife. He stabbed V once and NDV twice. Either before or after the stabbings, the phone lines to V's room had been cut with a knife. V died from his stab wound. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(a)(convictions). Mit. Cir.: (2)(c)(mental/emotional disturbance); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. 40 years.

F. **Contract Killing** - *Murder (a) for hire by a principal or agent (shooter) or (b) for pecuniary gain* — 1(c):

F. 1 — Aggravated[1] *Low Mitigation*

1. Anderson, C. Michael (A) — Douglas County — Penalty Trial — Death

10/29/75. 23-year-old D and 2 Co-P's planned the murder of V, D's employer, for one week. D disliked V and his unfair business dealings, and D wanted him dead. D agreed to pay Co-P1 $1500 to do the killing. After receiving the $1500, Co-P1 set up an appointment with V to look at a secluded piece of real estate with the intention of killing V. The plan was frustrated when two others came along with V. Co-P1 set up another appointment with V to look at the same real estate, but this time he fatally shot V in the head, back and neck. Co-P1 then called Co-P2 to pick him up. D then cashed a forged check he had written from V. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal crime–presented/not found); (1)(c)(D hired another); (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. Death. Subsequent proceeding at F.3 (#1).

2. Hochstein, Peter (A) — Douglas County — Penalty Trial — Death

10/29/75. 21-year-old D and 2 Co-P's planned the murder of V, Co-P1's employer, for one week. Co-P1 disliked V and his unfair business dealings, and Co-P1 wanted him dead. Co-P1 agreed to pay D $1500 to do the killing. After receiving the $1500, D set up an appointment with V to look at a secluded piece of real estate with the intention of killing V. The plan was frustrated when 2 others came along with V. D set up another appointment with V to look at the same real estate, but this time he fatally shot V in the head, back and neck. D then called Co-P2 to pick him up. Co-P1 then cashed a forged check he had written from V. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal crime–presented/not found); (1)(c)(D was hired); (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. Death. Subsequent proceeding at F.3 (#2).

3. Pope, Gary W. — Saunders County — Penalty Trial — Life

09/12/79. D, 32-year-old, and V, a 46-year-old male, were friends who had known each other for 3 years. On the day in question, D and V met in the country, possibly because V wanted to hire D to kill his

spouse. D shot V once in the head and took his money. D then dragged V's body up next to a barbed wire fence and covered it with weeds and brush. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal crime and/or perp); (1)(c)(pecuniary gain); (1)(d)(HAC/depravity–presented/not found). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(e)(accomplice and participation–presented/not found). Non-Stat. Mit.: Present. Life.

F. 2 — Aggravated[1] With High Mitigation

1. Wredt, Jerry — Otoe County — No Penalty Trial — Life

12/04/79 40-year-old V, D's father, had been threatening and abusing D's stepmother, Co-P. 16-year-old D was afraid of his father, not only because of possible harm to himself but because he was particularly worried about possible injury to Co-P. D and Co-P discussed how they should kill V on the day before the murder. The discussions about the murder revolved around the potential that D would inherit V's truck along with insurance money. D test-fired his gun to make sure it worked properly, and when V got home and was walking towards the house, D stepped out from the corner of the house, aimed, cocked, and fired on fatal shot into V's chest. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(c)(pecuniary gain); (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(d)(age). Non-Stat. Mit.: Present. Life.

F. 3 — One Statutory Aggravator With Low Mitigation

1. Anderson, C. Michael (B) — Douglas County — Penalty Trial — Death

10/29/75. 23-year-old D and 2 Co-P's planned the murder of V, D's employer, for one week. D disliked V and his unfair business dealings, and D wanted him dead. D agreed to pay Co-P1 $1500 to do the killing. After receiving the $1500, Co-P1 set up an appointment with V to look at a secluded piece of real estate with the intention of killing V. The plan was frustrated when 2 others came along with V. Co-P1 set up another appointment with V to look at the same real estate, but this time he fatally shot V in the head, back and neck. Co-P1 then called Co-P2 to pick him up. D then cashed a forged check he had written from V. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(c)(D hired another). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. Death. Prior proceeding at F.1 (#1).

2. Hochstein, Peter (B) — Douglas County — Penalty Trial — Death

10/29/75. 21-year-old D and 2 Co-P's planned the murder of V, Co-P1's employer, for one week. Co-P1 disliked V and his unfair business dealings, and Co-P1 wanted him dead. Co-P1 agreed to pay D $1500 to do the killing. After receiving the $1500, D set up an appointment with V to look at a secluded piece of real estate with the intention of

killing V. The plan was frustrated when 2 others came along with V. D set up another appointment with V to look at the same real estate, but this time he fatally shot V in the head, back and neck. D then called Co-P2 to pick him up. Co-P1 then cashed a forged check he had written from V. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(c)(D was hired). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. Death. Prior proceeding at F.1 (#2).

3. Burchett, Robin — Lancaster County — Penalty Trial — Life

05/11/83. V had been trying to get alimony from her ex-husband, Co-P1. On several occasions, Co-P1 asked D if he would dispose of a body for $5,000. D claimed not to take this offer seriously, though he was paid on this occasion not to discuss it with anyone else. A few days before the offense, Co-P1 invited D to meet him at a truck stop because he had some "farm work" for D to do. D asked Co-P2 to accompany him to the truck stop and offered him $200 without telling Co-P2 what he had to do to earn the money. The night before the offense, D drank heavily and used drugs. At the appointed time, D and Co-P2 met Co-P1 and V. They entered Co-P1's vehicle, and Co-P2 sat behind V. While Co-P1 drove on a country road, Co-P2 strangled V. Co-P2 testified that D instructed him to use D's belt, to sit behind V in the car, and to strangle her. D and Co-P2 disposed of the body in a creek, weighing it down with large pieces of concrete. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(c)(D was hired). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. Life.

4. Record, Robert — Douglas County — Penalty Trial — Life

10/12/75. D, a 19-year-old, and Co-P were driving around town and decided to shoot and rob someone. They picked up a friend and told her of their intentions. She asked to be dropped off and they complied. They then drove to a location on the edge of Omaha and waited for someone to drive by so they could shoot and rob him. V, an adult male, drove by and D and Co-P pursued him. D, the passenger hung out the window and fired a single shot into V's car. The shot struck V in the head, killing him instantaneously. D and Co-P returned to rob V but were frightened off by oncoming traffic. Later D and Co-P boasted about the killing to at least 5 people. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(c)(pecuniary gain). Mit. Cir.: (2)(d)(age). Non-Stat. Mit.: Present. Life.

5. Haselhuhn, Wayne — Lancaster County — No Penalty Trial — Life

05/11/83. V had been trying to get alimony from her ex-husband, Co-P1. On several occasions, Co-P1 asked Co-P2 if he would dispose of a body for $5,000. Co-P2 claimed not to take this offer seriously, though he was paid on this occasion not to discuss it with anyone else. A few days before the offense, Co-P1 invited Co-P2 to meet him at a

truck stop because he had some "farm work" for Co-P2 to do. Co-P2 asked D to accompany him to the truck stop and offered him $200 without telling D what he had to do to earn the money. The night before the offense, D drank heavily and did drugs. At the appointed time, Co-P2 and D met Co-P1 and V. They entered Co-P1's vehicle, and D sat behind V. While Co-P1 drove on a country road, D strangled V. D testified that Co-P2 instructed him to use Co-P2's belt, to sit behind V in the car, and to strangle her. D and Co-P2 disposed of the body in a creek, weighing it down with large pieces of concrete. Charge: M1. Plea: M1. No P. Trial. Agg. Cir.: (1)(c)(D was hired). Mit. Cir.: (2)(g)(capacity impaired). Life.

6. Rolenc, Clement — Lancaster County — No Penalty Trial — Life

05/11/83. V had been trying to get alimony from her ex-husband, D. On several occasions, D asked Co-P1 if he would dispose of a body for $5,000. Co-P1 claimed not to take this offer seriously, though he was paid on this occasion not to discuss it with anyone else. A few days before the offense, D invited Co-P2 to meet him at a truck stop because he had some "farm work" for Co-P2 to do. Co-P2 asked Co-P1 to accompany him to the truck stop and offered him $200 without telling Co-P1 what he had to do to earn the money. The night before the offense, Co-P1 drank heavily and did drugs. At the appointed time, Co-P2 and Co-P1 met D and V. They entered Co-P1's vehicle, and Co-P2 sat behind V. While D drove on a country road, Co-P2 strangled V. Co-P2 testified that Co-P1 instructed him to use Co-P1's belt, to sit behind V in the car, and to strangle her. Co-P1 and Co-P2 disposed of the body in a creek, weighing it down with large pieces of concrete. Charge: M1. Plea: M2. No P. Trial. Agg. Circ.: (1)(c)(D hired another). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(d)(age). Life.

G. **Escape Detection** — *A murder committed in which the defendant's motive was an apparent effort to conceal either the commission of a crime or the identity of the perpetrator of a crime* — 1(b):

G. 1 — Aggravated With Low Mitigation

1. Drinkwalter, Randy W. (A) — Cherry County — Penalty Trial — Death

11/01/89. D, a 27-year-old male, went to the home of V, his 87-year-old grandmother. The two had a brief conversation. D, who weighed 450 pounds, then cut the telephone wires, ripped off V's clothes, and raped her. He then went to the kitchen and retrieved a ball preen hammer. He returned to V, sat on her chest (his weight fractured several of her ribs) and struck her in the head and face with the hammer 10-20 times. D then jammed an ordinary table knife into V's face just below the eye, though by this time she was probably dead. D then took a different hammer and shattered several family pictures causing glass to fall on to V. D then left the scene. Charge: M1. Jury:

M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(b)(pressure/influences and/or domination–presented/not found); (2)(c)(mental/emotional disturbance–presented/not found); (2)(g)(capacity impaired–presented/not found). Death. Subsequent Proceeding at H.1 (#11).

2. Hunt, Robert E. — Madison County — Penalty Trial — Death

05/12/84. D had fantasized about having sex with a dead woman for many years and picked V as a likely subject. D watched V's trailer home and made other plans for carrying out the crime. D forced his way into V's home, tied her up and strangled her with nylon stockings. D than masturbated onto V and, though she was probably already dead, put her face down in a bathtub full of water. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. Death.

3. Otey, Harold L. — Douglas County — Penalty Trial — Death

06/11/77. D, 25-year-old, broke into V's home and stole her stereo. D re-entered the house and V, the female occupant of the home, woke up. D told V that he would rob and rape her. When V resisted, D cut her across her forehead with a knife. D then vaginally and anally raped V, and afterwards took her upstairs to get her money. D then stabbed V multiple times, struck her on the head multiple times with a hammer, and finally strangled her. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(substantial history-presented/not found); (1)(b)(conceal perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history-presented/not found); (2)(g)(capacity impaired-presented/not found). Non-Stat. Mit.: Present. Death.

4. Palmer, Charles J. (A) — Hall County — Penalty Trial — Death

03/06/79. D, age 40, and his wife, a Co-P, had sold coins and silver to V, a 59-year-old male, on previous occasions. During one such sale in V's home, D attacked V, bound him, beat him, ransacked his house for money and other valuables, and finally, after another beating strangled him with an electrical cord. About 2 weeks after the homicide, D and his wife fled to Texas, where they sold the coins they had stolen. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(conviction and substantial history–both presented/both not found); (1)(b)(conceal perp); (1)(d)(HAC/depravity). Death. Subsequent Proceedings at G.1 (#5 & #6).

5. Palmer, Charles J. (B) — Hall County — Penalty Trial — Death

03/06/79. D, age 40, and his wife, a Co-P, had sold coins and silver to V, a 59-year-old male, on previous occasions. During one such sale in V's home, D attacked V, bound him, beat him, ransacked his house for money and other valuables, and finally, after another beating,

strangled him with an electrical cord. About 2 weeks after the homicide, D and his wife fled to Texas, where they sold the coins they had stolen. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(conviction and substantial history–both presented/both not found); (1)(b)(conceal perp); (1)(d)(HAC/depravity). Death. Prior Proceeding at G.1 (#4). Subsequent Proceeding at G.1 (#6).

6. Palmer, Charles J. (C) — Hall County — Penalty Trial — Death

03/06/79. D, age 40, and his wife, a Co-P, had sold coins and silver to V, a 59-year-old male, on previous occasions. During one such sale in V's home, D attacked V, bound him, beat him, ransacked his house for money and other valuables, and finally, after another beating strangled him with an electrical cord. About 2 weeks after the homicide, D and his wife fled to Texas, where they sold the coins they had stolen. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(conviction and substantial history–both presented/both not found); (1)(b)(conceal perp); (1)(d)(HAC/depravity). Non-Stat. Mit.: Present. Death. Prior Proceedings at G.1 (#4 & #5).

7. Stewart, Rodney L. — Douglas County — Penalty Trial — Death

01/25/75. V, an 18-year-old male, and NDV had given drugs to D, a 16-year-old. D then sold the drugs and gave part of the money from the sales to V and NDV. D had also stolen drugs from V and NDV, and prior to the killing, V and NDV confronted D about his stealing. D formed a plan to steal more drugs from V and NDV. As part of the plan, D called V and NDV with information about a fictional buyer. D had gotten a gun and a can of gasoline in preparation for the theft. V and NDV picked D up in their van and drove with D to meet the buyer. Upon arrival at the meeting sight, D shot V once in the back of the head, killing him. D then shot NDV, who was seriously wounded, and spread gasoline in the van and lit it on fire. NDV escaped from the van and later identified D to the police. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(convictions and/or substantial history); (1)(b)(conceal crime and/or perp); (1)(c)(pecuniary gain); (1)(d)(HAC/depravity); (1)(e)(multiple victims); (1)(f)(death risk to several). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(d)(age–presented/not found); (2)(g)(capacity impaired–presented/not found). Non-Stat. Mit.: Present. Death.

8. Bird Head, Hudson (B) — Sheridan County — Penalty Trial — Life

03/02/85. D, a 46-year-old male, was pulled over by a police officer for driving V's car in an intoxicated manner. D had worked for V, an 85-year-old female, in the past doing odd jobs for her. In addition to the car, D was found with other belongings of V. Forensic evidence indicated that D came into V's home, knocked her down and tied her hands behind her back. D then raped, beat and strangled V, crushing her larynx. V eventually asphyxiated on her own blood. Charge: M1.

Jury: M1. P. Trial/D.P. Sought. Agg. Cir: (1)(b)(conceal perp); (1)(d)(HAC/depravity). Non-Stat. Mit.: Present. Life. Prior Proceeding at E.1 (#1).

9. Brewer, Wayne K. — Douglas County — Penalty Trial — Life

03/21/90. Co-P talked 18-year-old D into robbing a house with Co-P. Upon entering the house, Co-P went upstairs and raped V, Co-P's 17-year-old ex-girlfriend. Then D raped V who was bound and gagged. While D was in another room, Co-P began to stab V with a butcher knife until she eventually died. D and Co-P then left with stolen items from the house and a stolen car. V had been babysitting, and the child she was watching was left unharmed. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(b)(pressures/influences and/or domination– presented/not found); (2)(c)(mental/emotional disturbance–presented/not found); (2)(d)(age–presented/not found). Non-Stat. Mit.: Present. Life.

10. Joy, Carolyn A. — Douglas County — Penalty Trial — Life

04/11/83. D, a 29-year-old female, and 3 Co-P's were in a car drinking brandy. Earlier that day, D had used heroine and Valium. D and Co-P's saw V, an 18-year-old female, passing by and decided to rob her. D and Co-P's invited V into the car and then forced her to disrobe. D and Co-P's searched V's clothing and found $25.00. They also took V's necklace. D gave a straight edged razor to one of the Co-P's who cut the V's hair. Another Co-P gave V a minor cut with the razor and forced her to perform oral sex on D. A Co-P then "popped" the V with the razor. At a wooded park D and Co-P got V out of the car and beat her to death with a large stick and a baseball bat. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.:(1)(b)(conceal perp); (1)(d)(HAC/depravity). Life.

11. McDonald, Joseph — Douglas County — Penalty Trial — Life

07/04/74. D, a 16-year-old, and Co-P spent the evening drinking beer with their friends. After returning home to their trailer park, D and Co-P approached the 38-year-old V, who was drunk and sitting in his car. D and Co-P attempted to get money from V on the pretext that V had backed into D's brother's car. After their unsuccessful attempts at getting money from V, D and Co-P retrieved a shotgun barrel from Co-P's trailer and walked over to V, who was leaning over his trunk. There was conflicting testimony as to whether D or Co-P then hit V over the head with the gun barrel. The two stuffed V into the trunk of his car and shut the lid. Then either D or Co-P lit the car on fire after one of them had stolen V's wallet. V was still alive when the fire was lit, and he died of asphyxiation. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal crime and/or perp); (1)(d)(HAC/depravity). Life.

12. Privat, Clifford A. — Lancaster County — Penalty Trial — Life

08/04/93. D, a 19-year-old male, and Co-P needed money, so they decided to commit a robbery. D and Co-P had a history of "rolling gays" believing them to be "easy" targets. They went to a bar that catered to homosexuals and there they met V a 51-year-old male. Feigning friendship, they invited him back to their motel room. Upon arriving at the motel, they went to D's and Co-P's room and drank alcohol. After about 20 minutes, D noticed V had left so D and Co-P went to look for him. When they found V, they offered to give him a ride to his car. V accepted and got into D's and Co-P's car. Instead of taking V to his car, D and Co-P drove V to a secluded area. D took off his belt and gave it to Co-P who put it around V's neck. The two demanded V's wallet, but he refused. D then began beating V. He then dragged V from the car and kicked him and stomped on his throat. Co-P asked D what they were going to do and D replied that they were going to kill V. D then took out a pocket knife and cut V's throat. D handed the knife to Co-P who stabbed V in the stomach. V died from the stab wounds and injuries sustained during the beating. D and Co-P hid the body in nearby woods. Charge: M1. Plea: M1. P. Trial/D.P. Sought. Agg Cir.: (1)(b)(conceal crime and/or perp); (1)(d)(HAC/depravity). Life.

13. Silvers, Thomas J. — Buffalo County — Penalty Trial — Life

05/03/86. V was D's 16-year-old stepdaughter, living in the same house as D, age 30. D thought V was somewhat rebellious, and there was tension between them. On the evening of the offense, D drank 6 beers and found the bathroom door locked. D became very angry and confronted V. He then beat her with a bar. D thought he had killed V; so he poured gas on V and set her on fire to "cover things up." V suffered second and third degree burns to 90% of her body, as well as severe blows and lacerations to the head and liver. V died of the burns several days later. Charge: M1. Plea: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal crime and/or perp); (1)(d)(HAC/depravity); (1)(f) (death risk to several). Non-Stat. Mit.: Present. Life.

14. Williams, Jo Helen — Douglas County — Penalty Trial — Life

04/11/1983. D, a 24-year-old female, and 3 Co-P's were in a car drinking brandy. D and Co-P's saw V, an 18-year-old female, passing by and decided to rob her. A Co-P invited V into the car and then D forced her to disrobe. A Co-P took V's necklace, searched V's clothing and found $25.00. D got a straight edged razor from a Co-P and used it to cut V's hair. Another Co-P gave V a minor cut with the razor. D and Co-P's drove to a park and D forced V to perform oral sex on a Co-P. D then "popped" V in the mouth with the razor. D and Co-P got V out of the car and beat her to death with a large stick and a baseball bat. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b) (conceal perp); (1)(d)(HAC/depravity). Life.

15. Brunzo, Gary L. — Douglas County — Penalty Trial — Life

12/06/93. D, 21-year-old, and Co-P1 went looking for a vehicle to steal to use in a drive-by shooting, and they randomly chose the van that V, a 20-year-old male, was driving. V had just parked the van behind his home when 2 Co-P's forced him on to the floor of the van between the front seats, seated with hands behind his head. These Co-P's then drove the van to pick up 3 other Co-P's. They all started taunting and hitting V, and either D shot V once in the back of the head or he taunted Co-P3 into doing it. V was then thrown out of the van. Charge: M1. Jury: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: (1)(b)(conceal crime and/or perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. Life.

16. Eona, Daniel — Douglas County — Penalty Trial — Life

12/06/93. D, 21-year-old, and Co-P1 went looking for a vehicle to steal to use in a drive-by shooting, and they randomly chose the van that V, a 20-year-old male, was driving. V had just parked the van behind his home when 2 Co-P's forced him on to the floor of the van between the front seats, seated with hands behind his head. These Co-P's then drove the van to pick up 3 other Co-P's. They all started taunting and hitting V, and either Co-P1 shot V once in the back of the head or he taunted Co-P3 into doing it. V was then thrown out of the van. Charge: M1. Jury: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: (1)(b)(conceal crime and/or perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. Life.

17. Bishop, Allan L. — Lancaster County — No Penalty Trial — 6 2/3-20 years

05/08/86. V, a 24-year-old female, and Co-P1 had been dating but V planned on breaking off the relationship when they next met. V and Co-P1 met at a restaurant and were joined by Co-P2 and later D. They all went to D's house and when V rejected their sexual advances, the 3 men beat her into submission with their hands, feet, a large wooden dowel, and possibly another blunt instrument. V was anally and vaginally raped and then beaten some more. D then called Co-P3, his wife, who borrowed a pickup for transporting V. V was put in a sleeping bag, placed in the back of the truck, taken out to the country and dumped by the side of the road. Charge: M1. Plea: MS. No P. Trial. Agg. Cir.: (1)(b)(conceal perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. 6 2/3-20 years.

18. Carrera, Juan — Douglas County — No Penalty Trial — 20-30 years

12/06/93. Co-P1 and Co-P2 went looking for a vehicle to steal to use in a drive-by shooting, and they randomly chose the van that V, a 20-year-old male, was driving. V had just parked the van behind his

home when the 2 Co-P's forced him on to the floor of the van between the front seats, seated with hands behind his head. The Co-P's then drove the van to pick up D, a 21-year-old male, and 2 other Co-P's. They all started taunting and hitting V, and either Co-P2 shot V once in the back of the head or he taunted Co-P3 into doing it. V was then thrown out of the van. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(b)(conceal perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. 20-30 years.

19. Ellen, Richard E. — Madison County — No Penalty Trial — Life

07/19/89. D, 37 years old, Co-P, and V, an adult male, worked for the same carnival, and on the night in question, all 3 became intoxicated in a bar. D and V had a confrontation in the bar, and after returning to the carnival, D hit V repeatedly with a mallet handle, breaking his arm. When V complained to others in the carnival about this, D and Co-P placed him in D's truck on the pretense of taking him to the hospital. However, they drove V to a nearby area and pulled him out of the truck. V could not stand on his own. D and Co-P dragged him down a hill and beat him with a metal bar, penetrating his brain and killing him. Charge: M1. Plea: M2. No P. Trial. Agg Cir: (1)(b)(conceal perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

20. Garhart, Terry D. — Lancaster County — No Penalty Trial — 1-20 years

05/08/86. V, a 24-year-old female, had been romantically involved with Co-P1 but wanted to end the relationship. Co-P1 was aware of her plans. V met with Co-P1 and Co-P2 at a restaurant. At some point they were joined by D, and they all went to Co-P2's residence. When V refused their sexual advances, the 2 Co-P's and D beat V unconscious with a large wooden dowel and then took turns raping her both anally and vaginally, then beat her some more. There is some evidence that V may have still been alive when she was placed in a sleeping bag. Co-P3 was called and told to come with a pickup. They put V in the back of the truck, drove out into the country and dumped V off on the side of the road. Charge: M1. Plea: MS. No P. Trial. Agg. Cir.: (1)(b)(conceal perp); (1)(d)(HAC/depravity). Non-Stat. Mit.: Present. 1-20 years.

21. Harlan, Lance J. — Douglas County — No Penalty Trial — 12 years

07/12/86. Co-P's stole $11 from V, an adult male, along with his house keys. Later, D, 19 years old, and Co-P's went back to V's home and let themselves in with the keys. V woke up and, at first, attacked D. V was hit with a baseball bat, however, and ran upstairs. He was followed upstairs, beaten again with the bat, and chased downstairs. V was then beaten to death and a can of black paint was poured on

him. V's televison was stolen. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(b)(conceal perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. 12 years.

22. Lanzendorf, George — Hall County — No Penalty Trial — 25 years

05/18/77. D, a 16-year-old, and Co-P, decided to rob a hardware store. They parked behind the back of the store and waited until the employees left. When V, a 28-year-old male who was a manager of the store, came out with a money bag, Co-P hit him on the head, attempting to knock him out. V did not fall, however, and D and Co-P got V into their car instead. Co-P then drove them to a sandpit. When they arrived, D handed a gun to Co-P and Co-P fired all of the bullets in the clip into V. Co-P then went to the car, got another clip, and emptied that clip into V as well. V was shot 17 times. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(b)(conceal perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(d)(age). Non-Stat. Mit.: Present. 25 years.

23. LeGer, Eldon T. — Lancaster County — No Penalty Trial — 40 years

08/04/93. D, a 19-year-old and Co-P needed money and decided to commit a robbery. D and Co-P had a history of "rolling gays" believing them to be "easy" targets. They went to a bar that catered to homosexuals and there they met V, a 51-year-old male. Feigning friendship, they invited him back to their motel room. Upon arriving at the motel, they went to D's and Co-P's room and drank alcohol. After about 20 minutes, D noticed V had left so D and Co-P went to look for him. When they found V, they offered to give him a ride to his car. V accepted and got into D's and Co-P's car. Instead of taking V to his car, D and Co-P drove V to a secluded area. Co-P took off his belt and gave it to D who put it around V's neck. The two demanded V's wallet, but he refused. Co-P then began beating V. Co-P then dragged V from the car and kicked him and stomped on his throat. D asked Co-P what they were going to do and Co-P replied that they were going to kill V. Co-P then took out a pocket knife and cut V's throat. Co-P handed the knife to D who stabbed V in the stomach. V died from the stab wounds and injuries sustained during the beating. D and Co-P hid the body in nearby woods. Charge: M1. Plea: M2. No P. Trial. Agg Cir.: (1)(a)(substantial history–presented/not found); (1)(b)(conceal crime and perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. 10-40 years.

G. 2 — Aggravated[1] With High Mitigation

1. Sheets, Jeremy C. — Douglas County — Penalty Trial — Death

09/24/92. D, age 18, and Co-P planned to rape a woman. Earlier that day they had also discussed their mutual hatred for a certain race. D and Co-P abducted V, a 17-year-old female of the race they

hated, from a parking lot. They took V to a park where D raped and beat her while uttering racial slurs. After V lost consciousness, D deeply cut her throat. D and Co-P threw the knife into a river and moved V's body to a remote wooded area. D and Co-P removed blood from D's car and disposed of his bloody clothing. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(d)(age). Non-Stat. Mit.: Present. Death. Released after appeal. *See supra* note 264.

2. Roewert, Ricky E. — Platte County — Penalty Trial — Life

04/29/77. D and Co-P's were drinking at a bar when the V, who was very intoxicated, entered. D and one of the Co-P's noted that V had a large amount of money, and they decided to rob and kill him. They discussed the robbery with the other Co-P and 2 others. The Co-P agreed but the others wanted no part in it. As a ruse, D and Co-P's asked the V if he wanted to go to a party to which he agreed. After stopping on the way to get 2 knives, D and the Co-P's drove V to the city dump. The V "passed-out" and D and a Co-P pulled V out of the car and D slashed V's throat. D then cut off V's head and made multiple cuts in the back and front of V's body. They then hid the body. Charge: M1. Plea: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: (1)(b)(conceal crime and/or perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

3. Moore, Donald F. — Douglas County — No Penalty Trial — Life

08/22/79 and 08/26/79. Co-P suggested to D, a 15-year-old, that they rob a cab driver and D agreed. D was aware that Co-P had a gun and that there was a possibility that they might shoot the V. The two went to a restaurant and Co-P called the taxi company for which V, a 47-year-old, worked. They planned to rob a tax driver who was older. When V arrived, D told Co-P that V was the cab driver they would rob. They got into the cab and directed V to drive them to a certain rural location. When they arrived there D and Co-P robbed V and Co-P then shot him 3 times. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(b)(conceal perp); (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(b)(pressure/influence and/or domination); (2)(d)(age); (2)(e)(accomplice and participation). Non-Stat. Mit.: Present. Life.

G. 3 — One Statutory Aggravator With Low Mitigation

1. Kennedy, Paul L. — Lancaster County — Penalty Trial — Life

07/03/73. D, a 23-year-old, was experiencing financial difficulties and had recently written some insufficient funds checks on a friend's account. D decided to burglarize a home to get money. He went to a house with the intent of burglarizing it, but was scared away by dogs.

D then went to a lake where he planned to rob a fisherman. D decided that since many of the people who regularly fished at the lake knew him, he would have to kill whomever he robbed. After contemplating robbing some fishermen in one location along the lake, D decided there were too many people present and went to a different location where he found V, a 67-year-old male, fishing alone. D shot V 4 times and took V's money. Charge: M1. Plea: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal perp); (1)(d)(HAC/depravity-presented/not found). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. Life.

2. Myers, James E. — Douglas County — Penalty Trial — Life

09/18/95. V was an ex-girlfriend of 22-year-old D's who had witnessed a friend/crime associate of D's commit a prior murder. A witness testified that he and D pulled up in front of V's apartment, D got out of the van and witness heard a gun being cocked. When D returned he gave the gun to witness, telling him to get rid of it. V had been shot twice in the head at close range while she slept. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(convictions and substantial history–both presented/both not found); (1)(b)(conceal perp); (1)(d)(HAC/depravity–presented/not found); (1)(h)(disrupt gov't function/law enforcement–presented/not found). Mit. Cir.: (2)(a)(no sig. criminal history–presented/not found). Non-Stat. Mit.: Present. Life.

3. Schaeffer, Bernard — Hall County — Penalty Trial — Life

05/22/77. D, who was 16 at the time, and Co-P planned to rob a hardware store by hiding in the back lot and waiting for V, the manager, to come out with the money bag. The plan was to knock V out, but when D hit him, V did not fall down, so D forced V into D's car at gunpoint. D and Co-P drove V to a sandpit where D emptied the gun into him, went back to the car for another clip and emptied that into V as well. D shot V 17 times. Charge: M1. Plea: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal perp); (1)(d)(HAC/depravity-presented/not found). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(d)(age). Life.

4. Simpson, Jerry (I) — Kimball County — Penalty Trial — Life

11/12/76. D and Co-P, D's sister, were hitchhiking when they were picked up by V. D and Co-P planned to rob V, but when Co-P pulled a gun, V tried to grab it and Co-P shot him. V turned back towards the front of the car and Co-P shot V again. D and Co-P decided they had better finish the job because V could identify them, so D, as V pleaded for his life, aimed at V's head and fired twice. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Circ.: (1)(b)(conceal perp). Non-Stat. Mit.: Present. Life.

5. Smith, Loray S. — Douglas County — Penalty Trial — Life

04/11/83. D, a 25-year-old female, and 3 Co-P's were in a car drinking brandy. D and Co-P's saw V, an 18-year-old female, passing by and decided to rob her. D invited V into the car and then forced her to disrobe. D and Co-P's searched V's clothing and found $25.00. They also took V's necklace. With a straight edged razor, one Co-P cut V's hair. Another Co-P gave V a minor cut with the razor. One Co-P forced V to perform oral sex on another Co-P. A Co-P then "popped" V in the mouth with the razor. At a wooded area, two Co-P's removed V from the car and beat her to death with a large stick and a baseball bat. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal perp–presented/not found); 1(d)(HAC/depravity–presented/not found). Mit. Cir.: (2)(e)(accomplice and participation). Non-Stat. Mit.: Present. Life.

6. Ware, David E. — Douglas County — Penalty Trial — Life

12/20/83. D, an 18-year-old male, shot and killed V in V's store and then took V's wallet, keys and automobile. D later admitted that he shot V because he was going to call the police and would be able to identify D. Charge: M1. Bench: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal perp). Mit. Cir.: (2)(d)(age). Non-Stat. Mit.: Present. Life.

7. Perkins, Brian K. — Lancaster County — Penalty Trial — Life

12/02/82. D, a 21-year-old male, and Co-P attempted to rob V, a 48-year-old male, who was D's landlord. V struggled with D and Co-P, and was stabbed once and drug into his auto while still alive. D and Co-P drove V into the country, drug him into a ditch, and stabbed him multiple times. Charge: M1. Jury: M1. P. Trial/No Agg. Cir. Presented. Agg Cir.: (1)(b)(conceal crime and/or perp). Non-Stat. Mit.: Present. Life.

8. Price, James E. — Douglas County — Penalty Trial — Life

07/23/95. V, a 19-year-old male, was thought by D, a 20-year-old male, and 7 Co-P's to have stolen speakers belonging to one of the Co-P's. D and Co-P's pulled up in front of a house where V was visiting, blocking in V's car. They forced V into the van at gunpoint, took him to a remote area and robbed him. V agreed to take D and Co-P's to where the speakers could be reclaimed. V was forced into the trunk of a car stolen by a Co-P at the same time as V's kidnapping. D shot into the trunk of the car with an assault rifle, killing V. D then took the car, with V still in the trunk, to another location and set it on fire. Charge: M1. Jury: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: (1)(b)(conceal perp and/or crime). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. Life.

9. Armour, Kenneth — Douglas County — No Penalty Trial — 4-7 years

10/01/80. D, 27 years old, and 2 Co-P's were driving and saw V, an adult male, at a gas station and he appeared to be intoxicated. Co-P1 jumped out of their vehicle and into V's truck and drove it to a secluded place with D and Co-P2 following. Once there, Co-P1 stopped the truck and beat and kicked V to death. D stole gas from V's truck and set it on fire to destroy any fingerprints. Charge: M1. Plea: MS. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Mit. Cir.: (2)(e)(accomplice and participation). Non-Stat. Mit.: Present. 4-7 years.

10. Black Bonnette, Cornelius — Lancaster County — No Penalty Trial — Life

05/21/81. D, 36 years old, knocked on V's door and presented himself as a police officer. V, an 87-year-old female, let D inside and was told by D to go into her bedroom for her protection. D looked around V's home for something to steal, took a knife from the kitchen and went into V's bedroom and demanded money from her. When V said that she did not have any money, D stabbed her twice in the stomach. Then, because she was still alive and D was worried that she could identify him, D cut off a length of cord from a set of window blinds and strangled V. D stole V's radio, which he later sold, and a few days later he fled to South Dakota, where he was apprehended. Charge: M1. Plea: M1. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

11. Brick, Jacqueline S. — Cheyenne County — No Penalty Trial — 40 years

11/12/76. D, a 24-year-old female, was hitchhiking with Co-P, her sibling. They were picked up by V, an adult male, and they formed a plan to rob him. D, who was in the back seat, pulled out a gun and told V to stop the car. V reached into the backseat in an attempt to get the gun, and it discharged. V then turned around to face the front of the car and D shot him once more in the back, paralyzing him and inflicting a fatal wound. D and the Co-P then dragged V from the car, tied him to a fence by the roadside, robbed him, and agreed that they should finish him because he could identify them. Co-P took the gun and shot at V twice, aiming at his head but hitting him in the arm and leg. D and Co-P drove away in V's car and made their way to California, where they were arrested. Charge: M1. Plea: M2. No P. Trial. Agg Cir: (1)(b)(conceal perp). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. 40 years.

12. Brown, Samuel P. — Stanton County — No Penalty Trial — Term of Years

04/30/77. D, a 27-year-old, was drinking at a bar with Co-P1, Co-P2 and 2 other acquaintances. V, a 23-year-old male, was also at the

bar and D and Co-P1 noticed he had a large sum of money. D suggested they rob V and then kill V so he could not identify them and Co-P1 and Co-P2 agreed. V, who was extremely intoxicated, agreed to go with D and Co-P's to a party and they all left the bar. After stopping to get knives, D and Co-P's drove V into the country. Co-P1 slashed V's throat and cut off V's head after Co-P1 and D dragged V from the car after V passed out. D dragged V's torso to some bushes where he and Co-P's hid it. D kicked the torso and poured beer into V's body. Charge: M1. Plea: M2. No P Trial. Agg. Cir.: (1)(b)(conceal perp and/or crime). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat Mit.: Present. Term of Years.

13. Clark, Harry A. — Douglas County — No Penalty Trial — Life

03/12/83. D, 34 years old, attempted to steal V's truck, but accidentally ran it into another vehicle. D fled the scene, and V, a 40-year-old male, found out from Co-P where D lived. V and Co-P went to D's home and V and D amicably talked about the situation. When V went to shake D's hand, D hit him. D and Co-P then beat and kicked V until he was unconscious, and later put him in a trash bin. V died in the dumpster from his injuries. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Non-Stat. Mit.: Present. Life.

14. Clark, Lee L. — Douglas County — No Penalty Trial — Life

03/12/83. Co-P attempted to steal V's truck, but accidentally ran it into another vehicle. Co-P fled the scene, and V, a 40-year-old male, found out from D, a 25-year-old male, where Co-P lived. V and D went to Co-P's home and V and Co-P amicably talked about the situation. When V went to shake Co-P's hand, Co-P hit him. D and Co-P then beat and kicked V until he was unconscious, and later put him in a trash bin. V died in the dumpster from his injuries. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Non-Stat. Mit.: Present. Life.

15. Cook, Todd L. — Madison County — No Penalty Trial — Life

01/29/95. D and Co-Perp had discussed robbing a particular convenience store for about a week. On the way home from a party they decided this was the night. At the party, they had been drinking, smoking marijuana, and snorting methamphetamine. D went into the store first and took V, who was the clerk, into the back to try to remove the surveillance tape from the video camera. D could not remove the tape so he shot at it. D then shot V in the neck. Charge: M1. Plea: M1. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Mit. Cir.: (2)(d)(age). Life.

16. Davis, John R. — Sanders County — No Penalty Trial — Life

11/22/79. D, 21-year-old, and 2 Co-P's planned to rob someone so that they could have a party. They hitchhiked and were picked up by V, a 22-year-old male. V, D and the Co-P's spent some time drinking

together. When V was driving them home, D asked him pull the car over. D then dragged V out of the car, and V was beaten and put in the trunk. D and Co-P1 dropped off Co-P2, and then drove V into the country. They beat V with their fists and a steel bar, then stripped V and threw him in a water-filled ditch, where he drowned. D and Co-P1 kept V's car. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. 30 years - Life.

17. Epp, William A. — Gage County — No Penalty Trial — Life

11/24/77. 18-year-old D, in an apparent attempt to burglarize V's liquor store, shot out the front window. V, who lived next door, went to investigate with a shotgun. V confronted D and D shot V, who was able to describe D and give D's license plate number before he died. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Mit. Cir.: (2)(d)(age). Non-Stat. Mit.: Present. Life.

18. Fletcher, Stacey L. (I) — Lincoln County — No Penalty Trial — Life

02/19/92. D, 23 years old, and Co-P entered a convenience store to rob it. V, a 49-year-old female who worked in the store, started screaming and ran to or was dragged by D and Co-P to the back of the store. D and Co-P then beat V with tire irons until she stopped screaming, breaking V's wrist, fingers, teeth, jaw and skull. V died from her head wounds, and D and Co-P robbed the store and fled. Charge: M1. Plea: M1. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

19. Lara, Albino — Cherry County — No Penalty Trial — 30-50 years

11/04/93. 21-year-old D and 2 Co-P's befriended 55-year-old V at a bar with the intention of robbing him. D, the 2 Co-P's, and V left the bar together and went to a motel where some or all of them participated in homosexual activities. Intoxicated from a night of drinking, the 4 individuals drove V's car out to a secluded area to fulfill the perpetrators' plan of robbing V. The perpetrators forced V to the ground and kicked him in the head and face and upper body for an extended period of time. V suffered a broken jaw, multiple abrasions and bruising over his chest, head and neck area, serious lacerations, a near removal of his ear, and a severed artery in his brain. The perpetrators stripped V of his clothing and left him near a creek. As the perpetrators were walking away, D stepped down on V's throat and said, "I've got to kill this guy." The perpetrators then attempted to hide the car and their bloody clothing. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. 30-50 years.

20. Leon, Ira R. — Lincoln County — No Penalty Trial — Life

02/19/92. D, 20 years old, and Co-P entered a convenience store to rob it. V, a 49-year-old female who worked in the store, started screaming and ran to or was forcibly taken by D and Co-P to the back of the store. D and Co-P then beat V with tire irons until she stopped screaming, breaking V's wrist, fingers, teeth, jaw and skull. V died from her head wounds, and D and Co-P robbed the store and fled. Charge: M1. Plea: M1. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Non-Stat. Mit.: Present. Life.

21. Liebers, Anna M — Lancaster County — No Penalty Trial — Life

11/25/91. V a 32-year-old-female, D, Co-P and a fourth person all belonged to a burglary ring. V and a fourth person were caught and arrested. V stated that he was going to turn State's evidence against the fourth person in order to save himself. Co-P and D lured V out into the country and then beat him to death with crowbars because they feared the whole group would be caught. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Non-Stat. Mit.: Present. Life.

22. Reichwaldt, Ricky L. — Lancaster County — No Penalty Trial — Life

11/25/91. V, 30-year-old D, Co-P and a fourth person all belonged to a burglary ring. V and the fourth person were caught and arrested. V stated that he was going to turn State's evidence against the fourth person in order to save himself. Co-P and D lured V out into the country and then beat him to death with crowbars because they feared the whole group would be caught. Charge: M1. Plea: M1. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Life.

23. Shelley, Tyrus T. — Douglas County — No Penalty Trial — 25-30 years

01/20/95. 19-year-old D, and Co-P were holding up a fast food restaurant when D shot the 71-year-old V who was an employee. D stated that he thought V was going for a gun. When another employee came out and saw V on the floor, D tried to shoot the second employee, but the gun jammed. The second employee escaped and called police. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Non-Stat. Mit.: Present. 25-30 Years.

24. Taylor, Brian L. — Douglas County — No Penalty Trial — Life

03/24/75. D had been drinking and taking drugs when he picked up V, a hitchhiker. As V was exiting the car, D shot him in the left temple. D then went through V's pockets and took everything. D pushed V out of the car, got out, and shot V in the back of the head. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Life.

G. 4 — One Statutory Aggravator With High Mitigation

1. Larsen, Richard A. — Douglas County — Penalty Trial — Life

09/24/95. Co-P1 was involved in a fight with V1, a 34-year-old male, and V2 a 37-year-old male, and as a result Co-P1 sustained a minor cut to his face. Later that day, Co-P1 went to a party at D's home where he complained about the earlier fight. Co-P1 and another then left the party to search for V1 and V2. After finding V1, Co-P1 threw a brick into his head causing serious, perhaps even fatal, injuries. After they returned to the party, D suggested they "go finish [V1] off." D, Co-P1, and Co-P2 returned to where V1 was lying on the ground. V1 tried to talk but Co-P2 kicked him and then D took out a knife and stabbed V1 multiple times. D and his Co-P's hid when a car drove by, but afterwards returned to V1 and D continued stabbing him while D rummaged through V1's pockets. V1 suffered 20 stab wounds. D and Co-P's returned to the party and decided to kill V2 because, they believed, he would be able to identify them as V1's killers. They proceeded to V2's apartment where, just before entering, D and Co-P1 decided Co-P1 would kill V2. They then broke into the apartment. Co-P1 first sprayed mace at V2 and then stabbed him 17 times while the other Co-P's beat NDV unconscious. They then left the apartment, but D returned and struck someone, though it is unclear who, in the head with a 2″ x 4″ board. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal perp–presented/not found). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(b)(pressures/influences and/or domination–presented/not found); (2)(c)(mental/emotional disturbance); (2)(d)(age–presented/not found); (2)(e)(accomplice and participation–presented/not found); (2)(f)(victim participation/consent–presented/not found); (2)(g)(capacity impaired). Life.

2. Osborn, Jeremy P. — Douglas County — Penalty Trial — Life

12/13/93. D, a 19-year-old male, and V, a 19-year-old female, lived in the same apartment complex. D pried open the door to V's apartment and raped her. Worried about the consequences of sexual assault, D got a knife from the kitchen. D stabbed V in the neck and head, and V died of asphyxiation. Autopsy findings also produced evidence of strangulation and beating prior to death. D put the knife in the dishwasher before leaving. D claimed to have been drinking heavily that day. Charge: M1. Bench: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal perp); (1)(d)(HAC/depravity–presented/not found). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(d)(age–presented/not found); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

3. Rehbein, Cary N. — Douglas County — Penalty Trial — Life

09/06/81. Charge: M1. Plea: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(conviction–presented/not found); (1)(b)(conceal perp); (1)(d)(HAC/depravity–presented/not found); (1)(h)(disrupt gov't function/

law enforcement–presented/not found). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(b)(pressure/influences–presented/not found); (2)(c) (mental/emotional disturbance); (2)(g)(capacity impaired–presented/not found). Non-Stat. Mit.: Present. Life.

4. Thornton, Owen R. — Douglas County — Penalty Trial — Life

05/08/79. D, a 23-year-old, broke into an apartment to burglarize it, thinking no one was home. V, a female occupant of the apartment, awoke and began screaming. D attempted to gag V to stop her from screaming, and then he strangled V, killing her. Charge: M1. Plea: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(substantial history–presented/not found); (1)(b)(conceal perp). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(b)(pressures/influences–presented/not found); (2)(c)(mental/emotional disturbance–presented/not found); (2)(d)(age–presented/not found); (2)(e)(accomplice and participation); (2)(f)(victim participation/consent); (2)(g)(capacity impaired–presented/not found). Non-Stat. Mit.: Present. Life.

6. Soukharith, Anousone — Sarpy County — Penalty Trial — Life

05/23/95. D, a 20-year-old male, planned with friends to "hijack" V's car. D approached V's vehicle with a loaded gun. He ordered her to exit the car, then changed his mind and told her to get back in and drive. She complied and they traveled from Des Moines, Iowa, to the Omaha area of Nebraska. After exiting Omaha, D said he planned to tie V to a tree near the river and take her car to California. The two exited the vehicle in the area he chose, and as V was walking in front of D, she asked him several times not to shoot her. It was this, D claimed, that gave him the idea to shoot V. D fired once, striking V. D left V's body where it lay. He was apprehended the same day in Wyoming. Charge: M1. Jury: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: (1)(b)(conceal perp). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(c)(mental/emotional disturbance). Non-Stat. Mit.: Present. Life.

7. Laravie, Antonio A. — Knox County — No Penalty Trial — Life

08/18/73. D, a 15-year-old male, had been drinking with his friends for several hours into the early morning. D left his friends to make a phone call. He broke into a house to use the phone, and once in the house, he decided to rob it. D grabbed a knife from the kitchen in case someone woke up. V, a 2-year-old boy, woke up and made a noise. D put his hand over V's mouth and stabbed him twice in the chest, killing him. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Mit Cir.: (2)(d)(age); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

8. Lawson, Douglas E. — Douglas County — No Penalty Trial — 25 years

01/16/75. D, a 16-year-old, went into V's home to ransack it. V, a 7-year-old female, came home and asked D what he was doing. D said

that he had come in after V, and she seemed to accept this. V got a snack and started to watch television. D became frightened because of V's presence, however, and got a knife from the kitchen and stabbed her repeatedly. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(d)(age); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. 25 years.

9. Randall, Kevin D. — Saunders County — No Penalty Trial — Life

11/22/79 D, a 16-year-old male, and 2 Co-P's were hitchhiking when they were picked up by V. They all went to a bar where D and Co-P's, who had just taken L.S.D., decided that V had made a pass at one of them and they were going to "roll" him. After leaving the bar, a Co-P asked V to stop the car. Co-P jumped out, pulled V out of the car and beat and robbed him. They put V in the trunk and drove out into the country where they continued the beating with a steel bar. V was still alive when they dumped him off a bridge into a creek. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(b)(conceal perp). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(d)(age); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

H. **HAC or Depravity** - *Murder was especially heinous, atrocious, and cruel (HAC) or defendant manifested exceptional depravity by ordinary standards of morality and intelligence* — 1(d):

H. 1 — One Statutory Aggravator With Low Mitigation

1. Bronson, Clyde W. — Douglas County — Penalty Trial — Life

06/28/91. The 39-year-old D's neighbor, V, was found dead in her home with 16 stab wounds to her chest and stomach and 6 blunt injuries to her face and head. D's fingerprints were found in the blood. D had been asking several neighbors for money on the night of the murder, and V's purse was left out in the kitchen where she was found dead. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. Life.

2. Crisp, Harold W. — Douglas County — Penalty Trial — Life

04/05/84. D was convicted of homicide when he struck V, knocking her out, and sexually assaulted and mutilated the body. Evidence existed to suggest the D was under significant influence of drugs and/or alcohol at the time of the crime. Charge: M1. Bench: M1. P. Trial/D.P. Sought. Agg. Cir.: None. Mit. Cir.: (2)(g)(capacity impaired). Life.

3. Hargett, James F. — Sarpy County — Penalty Trial — Life

09/29/98. D, a 19-year-old and 5 Co-P's planned the murder of a 19-year-old male V, for about 2 weeks. Their plan was in response to allegations that V raped a Co-P during a sexual foursome involving V

and 3 of the other perpetrators. Five of the perpetrators, including D, drove to a park with V. One of the Co-P's remained in the car while D, V and 3 Co-P's walked down to an area under a bridge, and the 4 perpetrators all began stabbing V. The pathologist stopped counting the number of wounds at 69, 57 of them being stab lacerations. A Co-P also stated that they hit V over the head with bricks. During the murder, a Co-P said to D, "We have to finish this. [V's] not dead. [V's] going to know who we are." After the murder the perpetrators made comments about how V "screamed like a fucking girl" and how they were happy V was dead. Charge: M1. Plea: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(d)(HAC/depravity–presented/not found). Non-Stat. Mit.: Present. Life.

4. Lynch, Patrick B. — Douglas County — Penalty Trial — Life

10/01/82. D killed V by multiple stab wounds in what originally appeared to be a consensual homosexual encounter after V picked D up when he was hitchhiking. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: None. Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. Life.

5. Scott, Maurice L. — Lancaster County — Penalty Trial — Life

04/23/80. D, age 24, was living with V, a 22-year-old female. D became angry with V for leaving their young children with a neighbor one evening. For a prolonged period of time, D beat V with a belt with a metal buckle and a coffee table leg, and kicked her with metal-toed boots. V suffered multiple bruises, abrasions, broken ribs, and lacerations which were mostly confined to her scalp. V died of blood loss and shock. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(substantial history–presented/not found); (1)(d)(HAC/depravity). Mit. Cir.: (2)(c)(mental/emotional disturbance); (2)(g)(capacity impaired–presented/not found). Life.

6. Searles, Marvin D. — Lancaster County — Penalty Trial — Life

05/19/80. D, a 51-year-old, and the V, had been arguing over the use of a television set in the group apartment in which both were living. While V was on the balcony of the building, D stabbed V several times. Witnesses indicated that V was screaming during the attack. After the homicide, the D said to a few witnesses: "I stabbed her good; I hope I killed her." V later died in the hospital. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: None. Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

7. Wetherell, Niccole A. — Sarpy County — Penalty Trial — Life

09/29/98. D, an 18-year-old female, and 5 Co-P's planned the murder of V, a 19-year-old male, for about 2 weeks. Their plan was in response to allegations that V raped D during a sexual foursome involving D, V and 2 of the other Co-P's. Five of the Co-P's, including D, drove to a park with V. One of the Co-P's remained in the car while D,

V, and 3 Co-P's walked down to an area under a bridge, and the 4 perpetrators all began stabbing V. The pathologist stopped counting the number of wounds at 69, 57 of them being stab lacerations. D also stated that they hit V over the head with bricks. During the murder, D said, "We have to finish this. [V's] not dead. [V's] going to know who we are". After the murder, the Co-P's made comments about how V "screamed like a fucking girl" and how they were happy V was dead. Charge M1. Plea: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal perp–presented/not found); (1)(c)(D was hired, pecuniary gain, and/or D hired another–presented/not found); (1)(d)(HAC/depravity–presented/not found). Non-Stat. Mit.: Present. Life.

8. White, Joseph E. — Jefferson County — Penalty Trial — Life

02/05/85. The 26-year-old D, and group of 4 Co-P's had discussed robbing V, a 68-year-old woman on several occasions. D and 4 Co-P's forced their way into V's apartment. V refused to tell where she kept her money and was severely beaten and then raped by D and Co-P1. Co-P1 also sodomized V. During the sexual assaults, Co-P2 held a pillow over V's face to keep her quiet, causing V to suffocate. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(b)(conceal perp and/or crime–presented/not found); (1)(d)(HAC/depravity). Non-Stat. Mit.: Present. Life.

9. Barnes, Richard C. — Pierce County — Penalty Trial — Life

08/20/93. V, a 10-year-old male, and his friend were fishing at a park. They went into a bathroom, and when they exited, D was standing by the door. V and his friend went back to the pond, but D, 23 years old, yelled to V and told him that he had left a fish in the bathroom. V went to retrieve the fish and D followed him into the bathroom. D then stabbed V 22 times. After D left the bathroom, he told V's friend to help clean up the mess in the bathroom, but the friend refused. V's friend later identified D as the assailant. Charge: M1. Plea: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(c)(mental/emotional disturbance). Non-Stat. Mit.: Present. Life.

10. McHenry, Darrin J. — Lincoln County — Penalty Trial — Life

07/27/92. D, 27 years old, 2 Co-P's and V, a 38-year-old male were all drinking together under a bridge and D and Co-P's decided to rob V. When they could not find V's wallet, D and Co-P's beat V, causing severe injuries to his head and body. D and Co-P1 then orally and anally sodomized V, and he was finally strangled to death. Charge: M1. Jury: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

11. Davis, Stanley O. — Lancaster County — No Penalty Trial — 1-20 years

05/08/86. V, a 24-year-old female, was D's girlfriend, but she planned on ending the relationship. D and V met at a restaurant, joined by Co-P's 1 and 2. They all went to Co-P1's house. When V rejected the sexual advances of D and the 2 Co-P's, they beat her into submission with their fists and a large wooden dowel. V was then raped, both anally and vaginally, and then beaten some more. V was placed in a sleeping bag, and with help from Co-P3, was driven out to the country in the back of a pickup and dumped by the side of the road. Charge: M1. Plea: MS. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. 1-20 years.

12. Dean, James L. — Gage County — No Penalty Trial — 10 years

02/05/85 D, who was 21, was one of a group of 6 who planned the robbery of the 68-year-old V. In an effort to force her into telling where her money was kept, V was beaten, anally and vaginally raped, and finally suffocated with a pillow while D watched. D did not actually take an active part in the beating, sexual assaults, or suffocation. Charge: M1 Aid/Abet. Plea: M2 Aid/Abet. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(e)(accomplice and participation). Non-Stat. Mit.: Present. 10 years.

13. Drinkwalter, Randy W. (B) — Cherry County — No Penalty Trial — 6 2/3-20 years

11/01/89. D, a 27-year-old, went to the home of V, his 87-year-old grandmother. The two had a brief conversation. D, who weighed 450 pounds, then cut the telephone wires, ripped off V's clothes, and raped her. He then went to the kitchen and retrieved a ball preen hammer. He returned to V, sat on her chest (his weight fractured several of her ribs) and struck her in the head and face with the hammer 10-20 times. D then jammed an ordinary table knife into V's face just below the eye, though by this time she was probably dead. D then took a different hammer and shattered several family pictures, causing glass to fall on to the V. Charge: M1. Plea: MS. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. 6 2/3-20 years. Prior Proceeding at 41842A.

14. Estrada, Antonio — Lincoln County — No Penalty Trial — 6 2/3-20 years

07/27/92. D, 22 years old, 2 Co-P's and V, a 38-year-old male were all drinking together under a bridge and D and Co-P's decided to rob V. When they could not find V's wallet, D and Co-P's beat V, causing severe injuries to his head and body. Co-P's 1 and 2 then orally and anally sodomized V, and he was finally strangled to death. Charge:

M2. Plea: MS. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. 6 2/3-20.

15. Freeman, Thomas E. — Douglas County — No Penalty Trial — Life

01/01/77. 23-year-old D was visiting V, his girlfriend, in her bedroom. V's children heard her cry out, telling D to "stop." D went to the kitchen and returned to the bedroom with a knife. D stabbed V a total of 14 times in the face, neck, and body. Charge: M2. Jury: M2. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir. (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. Life.

16. Krimmel, Vern S. — Douglas County — No Penalty Trial — Life

11/04/82. D, a 20-year-old male, did odd jobs for V, an 84-year-old man. D believed V owed him money for some work he had done and went to V's home to demand the money. Before leaving, D took a paring knife from the Co-P's apartment. V allowed D to enter his home and D asked for the money. V offered D less than D believed he was owed. D became angry and stabbed V 25 times, placed V's body into the bathtub, and stole several small items including V's wallet. Later D and Co-P's hid the knife and the items stolen by D. Charge: M1. Jury: M1. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Non-Stat. Mit.: Present. Life.

17. Ladig, Frank E. — Lincoln County — No Penalty Trial — Life

07/27/92. D, 20-year-old, 2 Co-P's and V, a 38-year-old male were all drinking together under a bridge and D and Co-P's decided to rob V. When they could not find V's wallet, D and Co-P's beat V, causing severe injuries to his head and body. D and Co-P1 then orally and anally sodomized V, and he was finally strangled to death. Charge: M1 Aid/Abet. Plea: M2 Aid/Abet. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

18. Sapp, Michael J. — Lancaster County — No Penalty Trial – 6 1/2-20 years

04/27/84. D, age 22, often obtained drugs from Co-P, and the two did drugs together. Co-P wanted to kill his grandmother, the 83-year-old V, to receive his inheritance. Accordingly, Co-P offered D a large supply of drugs in exchange for killing her. After several weeks of discussing the murder and method, Co-P told D it was time to kill V. While on drugs, D went to V's house and deliberated for several minutes before smothering her with a pillow. Charge: M1. Plea: MS. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. 6 1/2-20 years.

19. Strohl, Daniel J. — York County — Penalty Trial — Life

12/21/95. V, a 51-year-old female, met D, 22 years old, in a bar and agreed to give him a ride home. At a nearby park, D sexually assaulted V and beat her with a blunt object. Then, while she was still alive, D ran over V with her own automobile, killing her. D drove V's car out of state, but was found by police in a motel room paid for with V's credit card. Charge: M1. Plea: M1. P. Trial/No Agg. Cir. Presented. Agg Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

20. Taylor, Ada Joann — Gage County — No Penalty Trial — 40 years

02/05/85. D, a 21-year-old female, and 3 Co-P's planned to rob V, a 68-year-old female. Co-P1 and Co-P3 expressed intentions to rape V. D and 5 Co-P's forced their way into V's apartment; and D and 2 Co-P's beat her, demanding money. Co-P's 1 and 3 took turns holding the blindfolded and bound V down while they raped and anally and orally sodomized her. D participated in the sexual assault and held a pillow over V's head until she suffocated. V also suffered several broken bones. After the assault, D and Co-P's took money from the apartment. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history). Non-Stat. Mit.: Present. 40 years.

21. Winslow, Thomas W. — Gage County — No Penalty Trial — 50 years

02/05/85. D and group of 4 Co-P's planned to rob a 68-year-old female V. D and Co-P's forced their way into V's apartment. V refused to tell where she kept her money and was severely beaten for a prolonged period. V was then forced to lay on the floor while D and Co-P1 took turns raping her. Co-P1 then held V down while D sodomized her. During the sexual assault, Co-P2 held a pillow over V's face to keep her quiet, which resulted in V's suffocation. Charge: M1. Plea: M2 Aid/Abet. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Non-Stat. Mit.: Present. 50 years.

H. 2 — One Statutory Aggravator With High Mitigation

1. Carter, Asa T. — Douglas County — Penalty Trial — Life

10/20/90. V, a 9-year-old female was staying at the apartment of D, a 35-year-old male and D's wife. D told his wife that he wanted to have sexual relations with V. His wife became frightened and left the apartment. While his wife was gone, D violently sexually assaulted V, subjecting her to both vaginal and anal penetration. V died from asphyxiation due to compression of the chest which prevented V from breathing. D then moved V's body to behind his apartment building and threatened to harm his wife if she told anyone about his involvement. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg Cir:

(1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(b)(pressures/influences and/or domination–presented/not found); (2)(c)(mental/emotional disturbance); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

2. Peverill, Douglas G. — Sarpy County — Penalty Trial — Life

01/04/85. D, who was 55, had purchased a shotgun and shells less than 8 hours before he confronted V1, a 27-year-old male, about not having a job. They argued violently and D went upstairs to get the shells, then came back downstairs and shot V1 twice. V1 was D's stepson. When V2, who was D's wife, came downstairs, D shot her also. D had been convicted previously of assault with intent to commit great bodily injury. Charge: M1. Plea: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(conviction and substantial history–both presented/both not found); (1)(b)(conceal crime and/or perp–presented/not found); (1)(d)(HAC/depravity); (1)(e)(multiple victims–presented/not found). Mit. Cir.: (2)(a)(no sig. criminal history–presented/not found); (2)(c)(mental/emotional disturbance); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

3. Seberger, Francis L. — Sarpy County — Penalty Trial — Life

05/31/97. D, 40 years old, and V, an adult female, were married but separated. Prior to the night in question, D had threatened V with violence on numerous occasions. On the night in question, D was drinking and went to a gas station where he purchased some gasoline that he placed in a plastic container. D then went to V's home and forced his way inside. While V was trying to contact the police, D poured gasoline over her body and lit her on fire. During and after his arrest, D commented several times that V had gotten what she deserved. V suffered severe burns, her leg had to be amputated, and she died from complications of her injuries. Charge: M1. Bench: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(substantial history–presented/not found); (1)(d)(HAC/depravity); (1)(f)(death risk to several–presented/not found). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(c)(mental/emotional disturbance–presented/not found); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

4. Lamb, David J. — Lancaster County — Penalty Trial — Life

07/14/80. D, 60-year-old, was the spouse of V, a 60-year-old female, and D had thought of killing V in the past. On the day in question, D went to a hardware store and purchased a rifle and ammunition. At home, D test fired the rifle to see if it worked. Later that day, while V slept, D shot her between the eyes, killing her. D then shot their 2 dogs, drank some whiskey and then called the police. Charge: M1. Jury: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(b)(pressures/in-

fluences); (2)(c)(mental/emotional disturbance); (2)(g)(capacity impaired–presented/not found). Non-Stat. Mit.: Present. Life.

5. Norfolk, Robert C. — Douglas County — Penalty Trial — Life

05/12/84. D, age 19, boarded with V, his 54-year-old aunt. After a night of drinking, D returned to V's home. He obtained a butcher knife and inflicted 1 to 3 superficial stab wounds on V before strangling her. Thinking V was dead, D had sex with her body. The phone lines in V's house had been cut. Charge: M1. Bench: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(d)(age–presented/not found); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

6. Baker, Mark E. — Lincoln County — No Penalty Trial — Life

09/16/91. D, age 31, entered the store where V, a 71-year-old female, was a bookkeeper and asked for directions. Upon seeing V had a cash box, D grabbed her by the throat and stabbed her 16 times in the face, neck, and chest, cutting through her ribs. D took the cash and left the store. He cleaned the blood from his vehicle and buried the knife. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(c)(mental/emotional disturbance); (2)(g)(capacity impaired). Life.

7. Gondringer, Daniel G. — Platte County — No Penalty Trial — 10 years - Life

05/17/90 (approx.). V, a 13-year-old-female, asked D, an 18-year-old male, if she could stay at his house during the day because she did not want her parents to know that she had been suspended from school. D agreed, and V spent the day at his house. During the day, D stabbed V in the stomach. He claimed the injury was accidentally inflicted while the two were playfully fencing. V lost consciousness and D then put her into the trunk of his car and drove her into the country. When he stopped, he found her awake and moved her into the field. D then cut her throat, but when this did not kill her, he struck her twice in the head with a pick ax. D claimed that V asked to die before he killed her. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(c)(mental/emotional disturbance); (2)(d)(age); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. 10 years - Life.

8. Gonzalez, Kathleen A. — Gage County — No Penalty Trial — 10 years

02/05/85. 4 Co-P's planned to rob V a 68-year-old female. Co-P1 and Co-P3 expressed intentions to rape V. After D, the 24-year-old female neighbor of V, gave a signal, D and 5 Co-P's forced their way into V's apartment and 3 Co-P's beat her, demanding money. Co-P's 1 and 3 took turns holding the blindfolded and bound V down while they raped and anally and orally sodomized her. Co-P4 held a pillow over V's head until she suffocated. V also suffered several broken bones.

After the assault, which D observed, D and Co-P's took money from the apartment. Charge: M1 Aid/Abet. Plea: M2 Aid/Abet. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(e)(accomplice and participation). Non-Stat. Mit.: Present. 10 years.

9. Haverkamp, Timothy — Richardson County — No Penalty Trial — Life

04/29/85. Co-P1 was the leader of a religious cult and V, an adult male, was a member of the cult who had fallen into disfavor. As punishment, Co-P1 forced V to perform homosexual acts with another member of the group. Later, D, 24 years old, Co-P1 and three other Co-P's, who were also cult members, secured V to a crate and sodomized V repeatedly with a greased shovel handle, causing internal injuries. When V screamed because of this abuse, Co-P1 kicked him in the head and put tape over his mouth. D and Co-P's then whipped V repeatedly over the course of 2 days. Afterwards, D and Co-P's shot off V's fingertips and Co-P1 kicked and broke his arm. Co-P1 then used a pair of pliers to pull strips of skin off of V's leg and had D and Co-P2 break both of his legs. Finally, Co-P1 stomped on V's chest, crushing it and causing his death. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(b)(pressure/influences and/or domination). Non-Stat. Mit.: Present. Life.

10. Kerr, Walter T. — Douglas County — No Penalty Trial — 20 years - Life

03/19/98. V, a male, was an acquaintance of D and Co-P. D and Co-P were at Co-P's residence doing drugs and drinking alcohol and V was also there. Co-P thought V was trying to steal from him, so D and Co-P planned to beat V. Co-P sprayed V with mace, the D and another assailant beat V with a bat. V was also subjected to electric shock with a "zapper" and pins and needles were stuck in his hands. A plastic bag was taped over V's head for an unknown length of time, and his hands and ankles were bound with tape and wire. V was shot with a pellet gun in the arm, leg and mouth and later died of blunt trauma to the head. Assaults on V lasted 5 hours before he was left to die. D and Co-P put V's body in a dumpster. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. 20 years - Life.

11. Patz, Donald — Dawes County — No Penalty Trial — Life

07/15/84. D, 20-year-old male, and V, a 25-year-old male, were at a bar drinking together. They had not previously known each other. After the bar closed, V suggested to D that they continue to drink so they went to the court house lawn. While there, V passed out, and then D

returned home. D got a knife and returned to the court house. He stabbed V 17 times, and then, believing V had marijuana, searched V's body, finding and taking $10. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(d)(age); (2)(g)(capacity impaired). Life.

12. Shelden, Debra K. — Gage County — No Penalty Trial — 10 years

02/05/85. 4 Co-P's planned to rob V, D's 68-year-old great aunt. Co-P1 and Co-P3 expressed intentions to rape V. After Co-P5, a neighbor of V, gave a signal, 26-year-old D, a female, and 5 Co-P's forced their way into V's apartment; and 3 Co-P's beat her, demanding money. Co-P's 1 and 3 took turns holding the blindfolded and bound V down while they raped and anally and orally sodomized her. Co-P4 held a pillow over V's head until she suffocated. V also suffered several broken bones. After the assault, which D observed, D and Co-P's took money from the apartment. Charge: M1 Aid/Abet. Plea: M2 Aid/Abet. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. . Cir.: (2)(a)(no sig. criminal history); (2)(e)(accomplice and participation). Non-Stat. Mit.: Present. 10 years.

13. Taylor, Terry H. — Lancaster County — No Penalty Trial — Term of Years

12/21/84. D, a 21-year-old, and V, an 18-year-old male, had been in a relationship that had ended, but they were still living together. On the night in question, D and V argued over some money that D had loaned to V and also V's infidelity. D stabbed V 51 times in the torso, head, and neck with a steak knife while V lay in bed, awake. D had previously intimated to a friend a desire to shoot V. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit Cir.: (2)(a)(no sig. criminal history); (2)(c)(mental/emotional disturbance). Non-Stat. Mit.: Present. Term of Years.

14. Valerio, Michael A. — Banner County — No Penalty Trial — 10-35 years

10/14/84. D, age 18, and 3 Co-P's kidnapped V, a male. V was beaten severely. After the beating, D set V's hair on fire and stabbed him twice. At the time of the offense, D was intoxicated and on amphetamines. Charge: M1. Plea: M2. No P. Trial. Agg. Cir.: (1)(d)(HAC/depravity). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(d)(age); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. 10-35 years.

I. **Grave Risk** - *A murder in which the defendant knowingly created a grave risk of death to at least two or more persons* - 1(f):

I. 1 — Aggravated With Low Mitigation

1. Ell, Ronald R. — Douglas County — Penalty Trial — Life

02/21/75. D, 29 years old, and 2 Co-P's robbed a grocery store and fled from the scene with the police in pursuit. D and Co-P1 exchanged gunfire with police officers while driving through a populated residential area. When their car got stuck, they fled on foot between houses and through residential yards with the police officers pursuing on foot. They exchanged gunfire with the police while there were bystanders present, and they wounded 2 officers. V, a 21-year-old male, was a resident of the area who came out to assist the police in apprehending D and Co-P1. He ordered Co-P1 to stop, and when Co-P1 did not, he fired at Co-P1. Co-P1 fired back, hitting V, and when V fell, Co-P1 shot him two more times, killing him. Charge: M1. Jury: M1. P. Trial/No Agg. Cir. Presented. Agg. Cir.: (1)(f)(death risk to several); (1)(h)(disrupt gov't function/law enforcement). Mit. Cir.: (2)(c)(mental/emotional disturbance). Non-Stat. Mit.: Present. Life.

I. 2 — One Statutory Mitigator With High Mitigation

1. Ruyle, Stanley — Lancaster County — Penalty Trial — Life

08/05/88. D, a 25-year-old male, had been romantically involved with a person who lived in the same apartment building as V. D had difficulty dealing with the breakup of the relationship and was arrested several times for harassing his ex-lover. After making bail for one such arrest, D returned to his ex-lover's apartment and started a fire with the intention of killing his ex-lover. The V was overcome by smoke inhalation and died. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(f)(death risk to several). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(d)(age); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

2. Sims, Michael J. — Douglas County — Penalty Trial — Life

03/25/97. D, age 20, and Co-P were driving around looking for an individual who had stolen marijuana from Co-P and a dealer that day. D and Co-P stopped in front of V's house where the thief was hiding. V, NDV, and a third person approached D's vehicle, side by side. V and NDV lifted their shirts, an ambiguous gesture indicating they were either armed or unarmed. D and Co-P opened fire, shooting V and NDV multiple times. During the shooting, several individuals, including V's children, were nearby in V's yard. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(f)(death risk to several). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(d)(age). Non-Stat. Mit.: Present. Life.

3. Owens, Daniel L. — Sarpy County — No Penalty Trial — 40 years

06/18/97. D, an 18-year-old male, and his girlfriend were driving down the road. D, the passenger, was shooting bottle rocket fireworks at passing cars, including the vehicle that V, a teenage male, was driving. There were 3 other passengers in V's vehicle and one of them called the police to report D's conduct. They believed they were in-

structed by the police to follow D's car and did so. Shortly thereafter, V pulled up next to D's car at a stoplight. D fired a gun once toward the back end of V's car. He then fired twice into the passenger, area hitting V once in the head. Charge: M2. Jury: M2. No P. Trial. Agg. Cir.: (1)(f)(death risk to several). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(d)(age). Non-Stat. Mit.: Present. 40 years.

4. Winefeldt, Harry R. — Douglas County — No Penalty Trial — 9-10 years

03/25/97. D, age 18, and Co-P were driving around looking for an individual who had stolen marijuana from D and a dealer that day. D and Co-P stopped in front of V's house where the thief was hiding. V, NDV, and a third person approached D's vehicle, side by side. V and NDV lifted their shirts an ambiguous gesture indicating they were either armed or unarmed. D and Co-P opened fire, shooting V and NDV multiple times. V's children, were nearby in V's yard. Charge: M1. Plea: MS. No P. Trial. Agg. Cir.: (1)(f)(death risk to several). Mit. Cir.: (2)(a)(no sig. criminal history); (2)(d)(age). Non-Stat. Mit.: Present. 9-10 years.

J. **Hinder Government Function** - *The defendant committed the crime to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws* — 1(h):

J. 1 — One Statutory Aggravator With Low Mitigation

1. Allen, Kevin L. — Douglas County — Penalty Trial — Life

08/20/95. D, an 18-year-old, and 3 Co-P's were driving around in a van. They were stopped by V, a 24-year-old male police officer who had noticed an abnormality on the van's license plate. D was wanted for first degree assault and feared V was going to arrest him. While V was notifying the police dispatcher from the radio in his police cruiser that he had stopped the van, D got out of the van and fired eleven shots at V's cruiser with an assault rifle. Four shots penetrated the windshield and struck V killing him. Charge: M1. Jury: M1. P. Trial/ D.P. Sought. Agg. Cir.: (1)(a) (substantial history–presented/not found); (1)(b)(conceal crime and perp–presented/not found); (1)(d)(HAC/depravity–presented/not found); (1)(g)(officer/public servant victim during custody–presented/not found); (1)(h)(disrupt gov't function/law enforcement). Mit. Cir.: (2)(a)(no sig. criminal history–presented/not found); (2)(b)(pressure/influences and/or domination–presented/not found); (2)(d)(age); (2)(e)(accomplice and participation–presented/not found). Non-Stat. Mit.: Present. Life.

2. Beers, Robert L. — Otoe County — Penalty Trial — Life

07/09/77. D, a 39-year-old male, was intoxicated and was driving around with a shotgun, looking for his wife and her boyfriend. A neighbor informed NDV and V (a 24-year-old male), who were police

officers, of D's actions. When the officers saw D driving by, they yelled at him to pull over. D did so and got out of truck with the shotgun in hand. When D was told to drop gun, he shot NDV and V. D then reloaded and fired again, missing both V and NDV. V died from the gunshot wound. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(h)(disrupt gov't function/law enforcement). Life.

J. 2 — One Statutory Aggravator With High Mitigation

1. Reynolds, Terry, L. — Lancaster County — Penalty Trial — Life

03/14/87. D, a 26-year-old male was drinking with his wife and 3 friends. D's wife accused him of flirting with one of the friends. This accusation angered D and he began beating his wife. The friends intervened and temporarily stopped the abuse. However, after the friends left, D became angry and beat his wife again. After beating her, D left his home, went to the residence of the friend with whom he had been flirting, and attempted to have sexual relations with her. When she refused, D hit her and then returned home. When arrived, he attacked several people who were trying to help his wife. D then pointed a gun at his wife and told her that if a law enforcement officer arrived he would kill his wife, his child, the law enforcement officer and himself. V, a 42-year-old sheriff, arrived and, after talking briefly with D and his wife, attempted to gain entry to the house. D shot V once in the chin, fatally wounding him. Charge: M1. Jury: M1. P. Trial/D.P. Sought. Agg. Cir.: (1)(a)(convictions and substantial history–both presented/both not found); (1)(b)(conceal crime and/or perp–presented/not found); (1)(f)(death risk to several–presented/not found); (1)(g)(officer/public servant victim during custody–presented/not found); (1)(h)(disrupt gov't function/law enforcement). Mit. Cir.: (2)(b)(pressure/influences and/or domination); 2(c)(mental/extreme disturbance); (2)(g)(capacity impaired). Non-Stat. Mit.: Present. Life.

APPENDIX E

DIRECT STANDARDIZATION PROCEDURES FOR ADJUSTMENT OF DEATH-SENTENCING RATES IN SUBPOPULATIONS OF CASES TO ACCOUNT FOR DIFFERENCES IN THE DISTRIBUTION OF DEFENDANT CULPABILITY LEVELS

A number of times in this Article we estimated death-sentencing rates for different subgroups of cases and compared the results of the different estimates. For example, as a basis for inferring the impact of the defendant's race on penalty trial sentencing decisions, we compared the death-sentencing rate in white-defendant cases with the rate for the minority-defendant cases. A possible problem with these comparisons is that the difference in death-sentencing rates that we documented may have reflected differences in the culpability levels of the defendants in the two subgroups rather than the impact of the defendant's race. An extreme form of the problem would exist if the defendants in one group of cases were the most aggravated in the sample while the defendants in the other group of cases were the least aggravated. In practice, disparities in the distributions of defendant culpability levels are never this extreme, but they are often sufficiently different to present a risk of an erroneous inference. To avoid the risks, we needed a procedure to control for the culpability of the defendant in each case.

One method to control for defendant culpability in these situations is to subject the cases to a logistic multiple regression analysis that takes into account, and controls for, the culpability level of each defendant. An alternative method, which we have found more accessible for this research, is a process of adjustment for case culpability known as "direct standardization."[430] It enabled us to estimate an overall

430. Joseph L. Fleiss, STATISTICAL METHODS FOR RATES AND PROPORTIONS 162-64 (1973) and Prithwis Das Gupta, STANDARDIZATION AND DECOMPOSITION OF RATES: A USER'S MANUAL, 23-186, (1993) present a more technical discussion of the issues and procedures involved with the use of the standardization procedure. We prefer the directly standardized results as the principal mode for the presentation of our findings because they are easier to depict and explain than are regression coefficients and odds multipliers estimated for race of defendant and victim variables. For this reason, they are widely used. *See, e.g.,* Alexa Beiser et al., *Computing Estimates of Incidence, Including Lifetime Risk: Alzheimer's Disease in the Framingham Study; The Practical Incidence Estimators (PIE) Macro*, 19 STATISTICS. IN MED. 1495 (2000) (direct standardization for age); Richard M. Bray, Ph.D., & Mary Ellen, Ph.D., Marsden, *Trends in Substance Use among U.S. Military Personnel: The Impact of Changing Demographic Composition*, 35 SUBSTANCE USE & MISUSE 949 (2000) (direct standardization for differences in demographics of military personnel); LESTER R. CURTIN & RICHARD J. KLEIN, U.S. DEP'T OF HEALTH AND HUMAN SERVS., DIRECT STANDARDIZATION (AGE-ADJUSTED DEATH RATES) (1995) (direct standardization for age); Seiji Nakata et al., *Trends and Characteristics in Prostate Cancer Mortality in Japan*, 7 INT'L J. UROLOGY 254 (2000) (direct standardization for age differences); Arlene C. Sena et al.,

death-sentencing rate for two or more groups of actual cases, on the assumption that the cases in each group have the same levels or distribution of defendant criminal culpability. For this purpose, our measures of defendant culpability are (a) counts of the number of statutory aggravating circumstances in the cases, (b) counts of the number of statutory aggravating and mitigating circumstances in the cases, (c) a multi-level salient-factors scale, and (d) multi-level scales built upon the results of logistic multiple-regression analyses of charging and sentencing decisions.[431]

The direct method of adjusting for differences among populations of defendants[432] focuses on computing the overall death-sentencing rate that would result for a subpopulation of defendants if, instead of having a different distribution of criminal culpability, both the whole population of defendants and the subpopulation of defendants being compared to the whole population had the same distribution of culpability.[433] Appendix E Table 1 illustrates the adjustment procedure. Our purpose there is to adjust the .42 (25/60) death-sentencing rate for the hypothetical subpopulation of 60 penalty trial cases shown in Column C, Row 3a. This rate is adjusted to the death-sentencing rate we would expect to see if the distribution of defendant culpability levels for the young defendants in Column C were the same as the distribution for the whole population of defendants shown in Column B. The adjusted rate of .37 is shown in Column C, Row 3b.

The first step in applying this technique is to identify the standard distribution of culpability levels for the whole population of defendants.[434] Column A of Appendix E Table 1 shows three levels of culpability[435] and Column B indicates the distribution of the whole population of defendants on that scale. We then calculate the number of death sentences that would have occurred in the subpopulation of

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Trends of Gonorrhea and Chlamydial Infection During 1985-1996 Among Active-Duty Soldiers at a United States Army Installation, 30 CLINICAL INFECTIOUS DISEASES 742 (2000) (direct standardization for age, sex, race/ethnicity).

431. The count of statutory aggravating circumstances is shown in Figure 3, p. 552. The count of aggravating and mitigating circumstances is shown in Figure 4, p. 555. The salient-factors scale is shown in Figure 5, pp. 557-58, while the regression-based measures of defendant culpability are shown in Figure 6, pp. 559-60.

432. To illustrate the process of direct adjustment, we draw on a presentation in a leading textbook by Professors Pagno and Gauvreau of the Harvard University Schools of Public Health and Medicine, respectively, which we have modified to fit the subject matter of this Article. MARCELLO PAGNO & KIMBERLEE GAUVREAU, PRINCIPLES OF BIOSTATISTICS 72-73 (2000).

433. *Id.* at 72. The same principles apply when the death-sentencing rates among multiple subgroups are being compared, as occurs in several Figures in this Article.

434. *Id.*

435. We use a three-level culpability scale here to simplify the explanation. As noted above, in the actual research, we used multi-level culpability scales.

APPENDIX E TABLE 1

DIRECT STANDARDIZATION PROCEDURE FOR ADJUSTMENT OF DEATH-SENTENCING RATES FOR A HYPOTHETICAL SUBPOPULATION OF YOUNG PENALTY-TRIAL DEFENDANTS, CONTROLLING FOR DEFENDANT CULPABILITY

A	B	C	D
1. Culpability Level	Whole Defendant Population	Subpopulations of Young Defendants Actual Death-Sentencing Rate	Expected Number of Death Sentences if the Whole Defendant Population (Col. B) Were Sentenced at the Same Rate as the Subpopulations of Young Defendants (Col. C)
a. (Low)	250	.10 (3/30)	25
b. (Med)	160	.50 (5/10)	80
c. (High)	100	.85 (17/20)	85
2. Total	510		190
3. Subpopulation Death-Sentencing Rates:			
a. Unadjusted Rate		.42 (25/60)	
b. Adjusted Rate		.37 (190/510)	

young defendants, assuming that the defendants in it had the same culpability distribution as the whole population of defendants, while retaining its own individual death-sentencing rates specific to each culpability level.[436]

The expected numbers of death sentences for the subpopulation of defendants are calculated by multiplying Column B by Column C, which produces a total expected pool of 190 death sentences. This result is shown in Column D, Row 2. The culpability-adjusted death-sentencing rate for the subpopulation of young defendants is then calculated by dividing its total expected number of 190 death sentences by the whole defendant population of 510, which is shown in Column B, Row 2.[437] This produces the culpability adjusted death-sentencing rate of .37 (190/510) for the subpopulation of young defendants in Column C.

This culpability-adjusted death-sentencing rate is the rate that would apply if both the young defendant subpopulation in Column C and the whole defendant population in Column B had the same culpability distribution.[438] The .37 adjusted rate is 5-percentage points lower than the .42 unadjusted rate because, as a comparison of the

436. PAGNO & GAUVREAU, *supra* note 432, at 73.
437. *Id.*
438. *Id.*

distribution of cases in Columns B and C reveals, the young defendant (Column D) subpopulaion is more heavily weighted toward the upper end of the culpability scale than are the cases in the whole population in Column B.

In the Figures presented in this Article, the adjusted death-sentencing rates that we report for each subpopulation of cases are based on a comparison of its distribution of culpability scores to the distribution of culpability scores for the whole population of death-eligible defendants in our universe.

One limitation of the direct standardization adjustment procedure illustrated in Appendix E Table 1 is a requirement that each subgroup of cases for which an adjustment is made contains one or more cases at each of the culpability levels involved in the analysis. This requirement becomes problematic when the subgroups being estimated are comparatively small.[439]

439. This problem is also more likely to occur in this research than in the hypothetical situation presented in Appendix E Table 1, because our adjustments are based on multi-level culpability scales, which tend to thin the data out more than does a three-level culpability scale. We report such data in the belief that doing so is more informative than no data, so long as the risks of unreliability are taken into account in their interpretation.