

Report to the New Jersey Supreme Court



SYSTEMIC PROPORTIONALITY REVIEW PROJECT 2004-2005 TERM

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I. INTRODUCTION

In 2000, the Supreme Court adopted a comprehensive methodology designed to determine whether the administration of New Jersey's capital punishment laws was infected by racial or ethnic bias. This is our fifth report dealing with the question of systemic proportionality. As in the past, we have examined the data utilizing three modes of analysis – bivariate studies, multivariate regression runs, and case-sorting techniques. Our most recent conclusions mirror those articulated in prior reports. More specifically, we find no consistent, significant statistical evidence of unlawful discrimination. The evidence abounds the other way. Our findings may be summarized as follows:

(1) Although our bivariate studies disclose that White defendants advance to penalty trial and are sentenced to death at higher rates than African-American or Hispanic defendants, this finding is not sustained when employing the multivariate regression and case-sorting approaches. Simply stated, there is no solid evidence that the race of the defendant affects whether a case advances to a penalty trial or whether a death sentence is ultimately imposed.

(2) Similarly, there is no consistent, significant statistical evidence that the race or ethnicity of the victim is an important factor in determining which defendants are sentenced to death. Penalty trial defendants who kill White victims and penalty trial defendants who

kill minority victims are sentenced to death at approximately the same rate. Death-eligible defendants who kill White victims are sentenced to death at a higher rate than death-eligible defendants who kill minority victims, but this inference disappears when other salient factors are taken into account.

(3) Some statistical evidence indicates that cases involving White victims advance to a penalty trial at a higher rate than cases involving African-American victims. This inference is not sustained, however, when other factors are taken into account. Specifically, White victim cases are concentrated in counties having high rates of capital prosecutions. Minority victim cases are concentrated in counties having low rates of capital prosecutions. There is no statistically significant evidence of intra-county disparity in the rates in which White victim cases and minority victim cases are treated. There is thus strong evidence that the higher rate in which White victim cases proceed to a penalty trial is the function of inter-county disparity in capital prosecutions. Moreover, there is a correlation between the higher rate that White defendant cases advance to penalty trial and the higher rate that White victim cases advance to penalty trial. Statistical evidence indicates that African-American defendant cases involve both White victims and African-American victims, while White defendant cases almost exclusively involve White victims.

Because White defendant cases advance to a penalty trial at a higher rate than African-American defendant cases, it follows that a higher proportion of White victim cases proceed to the penalty stage than African-American victim cases.

(4) County variability, i.e., the disparity in the rates that death-eligible cases are capitally prosecuted in the various vicinages, continues to be a major concern in the administration of our death penalty laws. The county in which a death-eligible case is prosecuted is a key factor in determining whether the defendant faces a death penalty trial.

(5) There has been a marked decline in capital prosecutions since 1988. This decline has accelerated during the past few years.

It is significant that this year's findings strongly confirm those made in our earlier reports. While few cases have been added to our penalty stage database in recent years and we would thus be surprised if our findings were significantly different from those made in the past, it is nonetheless important to emphasize that our conclusions have remained consistent year after year. The consistency of these findings reinforces our conclusion that race or ethnicity does not play an important role in the administration of our capital punishment laws. Further supporting that conclusion is the fact that we have applied additional statistical and analytical methods each year, and yet our findings have remained the same notwithstanding these refinements. In sum, we are confident that New Jersey's capital punishment system is not infected with racial or ethnic prejudice.

II. METHODOLOGY

We continue to utilize the multifaceted monitoring system adopted by our Supreme Court in In re Proportionality Review, 165 N.J. 206 (2000). This monitoring system consists of three components: (1) bivariate analyses, (2) regression studies, and (3) case-sorting techniques. The system rests on the thesis that no single method is sufficiently reliable to provide convincing evidence respecting whether or not racial or ethnic discrimination exists in death penalty prosecutions or sentencing. In New Jersey, we deal with a comparatively small data set. Wholly apart from the danger of statistical manipulation, special care must be taken to insure that a particular result is real and not a mere artifact. Thus, a defendant must relentlessly document the risk of racial or ethnic disparity in order to establish systemic disproportionality. The test requires a substantial converging of outcomes produced by the three different modes of analysis.

Our approach seeks to isolate and describe potential racial or ethnic discrimination at various critical stages in death penalty proceedings. All three modes of analysis--bivariate, regression and case-sorting--are applied to three decision points: (1) death verdicts at penalty trial, (2) death verdicts among all death-eligible cases, and (3) advancement of death-eligible cases to penalty trials. We consider possible disparities in terms of both the race or ethnicity of the defendant and the race or ethnicity of the victim. We examine three identifiable groups: (1) African-Americans, (2) Whites, and (3) Hispanics. Because the

number of cases involving Hispanic defendants or Hispanic victims is relatively few, we diverge from that approach when necessary to provide meaningful analysis.

Several prefatory comments are in order. Perhaps the most important step in developing a system of proportionality review is establishing the appropriate “universe” or pool of cases as sample data. Obviously, the actual decisions of juries must be assessed in determining whether nongermane racial or ethnic considerations affect the outcome of cases. Thus, the need to examine cases within the “death penalty universe” is abundantly clear. Perhaps less obvious is our reason for examining the “death-eligible universe.” This sample consists of all cases in which the facts support the legal elements of a capital prosecution, whether or not a capital prosecution was actually pursued.

The issue was discussed by Professor David Baldus in his report to the Supreme Court.¹ There, the professor observed, “[w]ithout knowledge of the life sentenced cases, [a court] would be unable to determine whether there is a ‘meaningful basis’ for distinguishing death sentences it reviews from the ‘many cases’ in which lesser sentences are imposed”.² Although these comments were made in the context of developing a system of individual proportionality review, i.e., assessing whether a particular death sentence is excessive in terms of other

¹ David C. Baldus, Death Penalty Proportionality Review Project: Final Report to the New Jersey Supreme Court 44 (September 24, 1991) (hereinafter Baldus, Final Report).

² Id.

factually similar cases, they apply with equal force to the issue at hand. Arbitrarily limiting the pool to death sentenced cases would present a distorted picture in determining whether race or ethnicity has an impact in the administration of our capital punishment laws. Limitation of the universe to penalty trials would ignore the significant role of prosecutorial discretion. This question has particular meaning in New Jersey, where county prosecutors have formed committees to determine whether cases should be capitally prosecuted based upon their “deathworthiness,” a careful examination of the evidence to determine whether a capital prosecution would probably be successful if the death penalty were sought.

Although favored by many legal commentators,³ other experts have questioned whether “death-eligibility” of a case can fairly be determined from the

³ See James R. Acker, When the Cheering Stopped: An Overview and Analysis of New York’s Death Penalty Legislation, 17 Pace L. Rev. 41, 189-90 (1996) (illustrating the dangers of a restricted universe); Linda Burgess, Criminal Procedure: Comparative Proportionality Review of Death Sentences: Is It a Meaningful Safeguard in Oklahoma?, 38 Okla. L. Rev. 267, 277-78 (1985) (concluding that the most appropriate universe of cases for comparative proportionality review is all first degree murder convictions); Rhonda G. Hartman, Critiquing Pennsylvania’s Comparative Proportionality Review in Capital Cases, 52 U. Pitt. L. Rev. 871, 905 (1991) (explaining that by including plea bargained cases, “the universe of similar cases for comparison would be more comprehensive and would better ensure uniform application of the death penalty”); Lawrence S. Lustberg & Lenora M. Lapidus, The Importance of Saving the Universe: Keeping Proportionality Review Meaningful, 26 Seton Hall L. Rev. 1423, 1430-31 (1996) (emphasizing the need for an expansive universe of cases); Joseph H. Rodriguez et al., Proportionality Review in New Jersey, an Indispensable Safeguard in the Capital Sentencing Process, 15 Rutgers L.J. 399, 429, 441 (1984) (asserting that the universe of comparison cases should be all homicide cases whether or not capitally prosecuted); Steven M. Sprenger, Note, A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases, 73 Iowa L. Rev. 719, 735-36, 739-41 (1988) (explaining that a universe of less than clearly “death-eligible” renders proportionality review meaningless); R. Van Duizend, Comparative Proportionality Review in Death Sentence Cases: What? How? Why?, 8 State Ct. J. 9, 11 (1985) (explaining that proportionality review must include review of life sentences to make “rational distinctions”); Donald H. Wallace & Jonathon R. Sorensen, Missouri Proportionality Review and Assessment of a State Supreme Court’s Procedures in Capital Cases, 8 Notre Dame J.L. Ethics &

vantage point of twenty-twenty hindsight. Professor Barry Latzer, for example, has pointed out several serious problems in utilizing a death-eligible sample:

First, it makes case collection exceedingly difficult, expensive and time consuming. Second, it injects uncertainty into the proportionality analysis because cases must be selected without the benefit of the full range of information available to prosecutors and without the certitude of prosecutorial judgments. In other words, a death-eligible universe raises doubts that the comparison cases are truly similar. Finally, because the process requires second-guessing of the state's prosecutors, it creates conflict between the executive and judicial branches of state government and raises separation of powers questions.⁴

Although these dangers are real, we have adopted procedures designed to inject a sense of reality in determining whether cases are “death-eligible” even though capital prosecutions were not pursued. The Administrative Office of the Courts (AOC) collects and screens all homicide cases for “deathworthiness”. Acquittals and all cases falling outside of potential capital prosecutions (i.e., juvenile defendants) are immediately eliminated. The remaining cases – pleas to murder, felony murder, and aggravated manslaughter when the original charge was murder and jury convictions for any form of murder, are examined by experienced members of the AOC under the supervision of the Standing Master. The entire case file is made available for this purpose. In addition, trial judges complete

Pub. Pol’y 281, n.105 (1994) (suggesting that the clearly “death-eligible” universe is “more appropriate” than a universe of capital cases where the jury returned a life or death sentence).

⁴ Barry Latzer, The Failure of Comparative Proportionality Review of Capital Cases (With Lessons From New Jersey) 64 Albany L. Rev. 1161, 1204 (2001)

questionnaires pertaining to death-eligibility. The parties are provided with the AOC's preliminary decisions and may file briefs where they disagree with the AOC's determinations. Arguments are heard by the Standing Master. These hearings are cloaked with confidentiality, and thus the parties are able to discuss the strengths and weaknesses of their cases in terms of death-eligibility with complete freedom. The Standing Master's decisions are in writing and contain a complete statement of reasons. Only "clearly" death-eligible cases are added each year to the universe. Death-eligibility is determined utilizing an evidentiary protocol designed to expose "proof problems" in the prosecutor's case. A case is considered death-eligible only if there exists "overwhelming" or "strong" evidence supporting the statutory elements. Other "extrajudicial" considerations play a part in determining whether a case is to be added to the death-eligible universe. The availability and credibility of witnesses, for example, are considered. "Provability" is thus taken into account.

One other point pertaining to our studies should be noted. When statistics enter the courtroom, the law must remain king. Legal principles must thus determine what statistical models are appropriate, what questions should be asked of the data and what inferences the statistical analyses ultimately yield. Having said this, our studies must be guided by reliable statistical methodology. One important statistical principle concerns the independence of each case for the purpose of statistical analysis.

Sound statistical practice requires that the cases examined in a single statistical analysis are independent one from the other. This assumption is seriously violated when the same murder case appears more than once in a single database, such as in instances in which death verdicts have been overturned and the defendants retried. We seek to avoid this problem by including each case only once for the purpose of analysis. We could find no convincing logic for choosing one case over another. We have thus created two samples. The first sample, which we have denominated the “first case sample,” includes only the first case for each defendant who was tried multiple times for the same murder. The “last case sample” includes the last murder trial or case disposition for each of these defendants.

We recognize the problems associated with examining the data utilizing so many alternate assumptions. The results are not wholly consistent, and perhaps there is no universal verity in the conclusions we have reached. We are nevertheless satisfied that the approaches we have taken provide fair and objective findings. While we acknowledge the danger of getting lost in the welter of statistics set forth in this report, we are confident that our methods are solid and our findings reliable. Our purpose is to tell the whole story and not merely a part of the story.

III. BIVARIATE ANALYSIS

As in earlier reports, we first examine the raw numbers. In a bivariate analysis, there is only one independent variable. Because we are testing for the presence of racial or ethnic discrimination, each factor--race or ethnicity--is the independent variable in our analysis.

We begin by noting the limitations inherent in bivariate analysis. Statisticians uniformly stress that “[u]nadjusted gross racial disparities in death sentence rates are a highly suspect basis for inferring racial discrimination in the treatment of similarly situated defendants. . . .”⁵ Nevertheless, raw numbers, percentages and fractions benefit from their transparency, and tell a tale that can easily be understood by laypersons. We thus consider bivariate analysis as an essential tool in our multifaceted system to detect the presence of racial or ethnic discrimination. We have included a separate table at the conclusion of this section for the convenience of the reader. We have also used the same descriptive format set forth in prior reports to enable the reader to compare this year’s results with those described in earlier studies.

⁵ David C. Baldus, 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, 1646 (1999).

A. PENALTY TRIAL UNIVERSE – RACE OF DEFENDANT

There is no statistically significant relationship between race or ethnicity of the defendant and the return of death penalty verdicts in penalty trials. This is true whether we examine the three main racial groups, only African-American and White defendants, or whether we examine the first or last case sample.

In the first case sample, approximately thirty-three percent of African-American defendants were sentenced to death. A much smaller proportion of Hispanic defendants were sentenced to death, approximately twelve percent. Approximately thirty-four percent of White defendants were sentenced to death. The last case sample contains fewer penalty trial cases, as several defendants who initially received death sentences did not face another capital trial when those verdicts were eventually overturned. Approximately eighteen percent of African-American defendants were sentenced to death. No Hispanic defendant was sentenced to death. Approximately twenty percent of White defendants were sentenced to death. Under each of the alternative hypotheses examined, our bivariate analysis discloses no evidence that race of the defendant plays a statistically significant role in determining whether a death sentence is returned at the penalty stage.

B. PENALTY TRIAL UNIVERSE – RACE OF VICTIM

The race of the victim is not significantly related to imposition of the death penalty. This is true whether we examine the three main racial groups, only African-American and White defendants, or whether we consider the first or last case sample. The results are similar to those dealing with the race of the defendant. In the first case sample, White and African-American victim cases have similar rates pertaining to death penalty verdicts. Specifically, thirty-one percent of the White victim cases resulted in death verdicts and thirty-four percent of African-American victim cases resulted in death verdicts. Hispanic victim cases yielded lower rates of death verdicts, but the number of cases examined is small. In the last case sample, eighteen percent of both White and African-American victim cases resulted in the death penalty. Thirteen percent of Hispanic victim cases resulted in death verdicts. These differences are not statistically significant.

C. DEATH-ELIGIBLE UNIVERSE – RACE OF DEFENDANT

In our 2002 and 2003 reports,⁶ we found a statistically significant relationship between the race of the defendant and imposition of the death sentence. A greater percentage of White defendants received the death sentence

⁶ We did not prepare a full and complete report for the year 2004. Adopting our recommendation, the Supreme Court directed that interim reports be prepared every other year because the number of death penalty prosecutions and death sentences had declined. In our 2004 interim report, we examined the then current data utilizing the regression models and case-sorting categories established the year before. We note that our findings in 2004 reflected conclusions drawn in prior reports. We did not find significant statistical evidence of racial or ethnic bias in the administration of New Jersey's capital punishment laws.

than African-American or Hispanic defendants in the first case sample. That finding is repeated this year. In the first case sample, fourteen percent of White defendants were sentenced to death. About eight percent of African-American defendants received the death sentence. Three percent of Hispanic defendants were sentenced to death.

In 2002 and 2003, we found a statistically significant relationship between the race of the defendant and the death penalty in the last case sample. In contrast, our bivariate analysis this year does not disclose a statistically significant relationship between the race of the defendant and imposition of the death sentence in the last case sample. Eight percent of the White defendant cases resulted in the death penalty. Four percent of the African-American defendant cases resulted in the death penalty. No Hispanic defendant case resulted in the death penalty.⁷ These differences are not statistically significant.

In the case of the race of the defendant and advancement to penalty trial, we find consistent and significant bivariate relationships. In the first case sample, forty percent of White defendants advanced to penalty trial. Twenty-three percent of African-American defendants advanced to penalty trial. Twenty-five percent of Hispanic defendants proceeded to the penalty stage. The White defendant effect is

⁷ In our 2003 Report, we observed that one Hispanic in the last case sample had been sentenced to death. The Supreme Court vacated that sentence, State v. Mejia, 141 N.J. (1995), and the defendant was later sentenced to life imprisonment.

significant at the .001 level.⁸ These observations apply with equal force to the last case sample. White defendants were far more likely to face a penalty trial than African-American defendants. The results are statistically significant at the .001 level, and are sustained whether we examine the three main racial groups or only Whites and African-Americans.

D. DEATH-ELIGIBLE UNIVERSE-RACE OF VICTIM

We find no statistically significant bivariate relationship between race of victim and the return of death verdicts. This observation is true whether we examine first or last case samples, and whether we consider the three main groups - Whites, African-Americans and Hispanics - or two racial groups - Whites and African-Americans. We note, however, that several of the first case samples approach statistical significance, White victim cases being more likely to result in a death verdict. Twelve percent of White victim cases resulted in a death verdict, while seven percent of African-American victim cases and six percent of Hispanic victim cases resulted in a death verdict. In the last case sample, six percent of White victim cases resulted in a death sentence. Three percent of African-American victim cases resulted in a death verdict, and a slightly lower percent of

⁸ The P level of statistical significance refers to the degree a variable appearing to have an effect on another variable has emerged by reason of random chance. See John M. Conley & Dave Peterson, The Science of Gate Keeping: The Federal Judicial Center's New Reference Manual on Scientific Evidence, 74 N.C. L. Rev. 1183, 1209 (1996). The lower the P level, the less the possibility that the effect of an observation has emerged by reason of random chance.

Hispanic victim cases resulted in a death verdict. We do not find solid evidence that African-American victim cases and Hispanic victim cases are treated differently from White victim cases.

We now turn to the question of whether race of victim affects the progression of a death-eligible case to the penalty phase. Our findings this year are the same as those described in prior reports. As in our 2001, 2002, and 2003 analyses, the bivariate distribution between race of victim and advancement to penalty trial suggests strong and statistically significant relationships. Without extended discussion, the following percentages illustrate this point. In the first case sample, approximately thirty-nine percent of White victim cases advanced to penalty trial. In contrast, only twenty percent of African-American victim cases, and only twenty-three percent of Hispanic victim cases progressed to the penalty stage. The result is statistically significant at the .001 level. The last case sample yields similar findings. These observations are sustained whether we compare White, African-American and Hispanic victim cases or only White and African-American victim cases.

We note here the similarity in statistical findings between White defendant cases advancing to the penalty phase and White victim cases advancing to the penalty phase. We will probe this relationship later in this report. We observe here, however, that White defendants generally kill White victims. In fact, since

the reenactment of the death penalty, we have found only three death-eligible cases in which White defendants killed African-American victims. African-American defendants were most likely to have killed African-American victims, but they also killed White victims. The question of confounding will be explored in our regression and our case-sorting sections of this report, but we observe here that White defendants almost exclusively killed White victims and White defendant cases progressed to the penalty stage at a far greater rate than African-American defendant cases.

The following synopsis details our bivariate findings.

I. RACE OF DEFENDANT - PENALTY TRIAL CASES

| | | | |
|-----------|---|---|------------|
| A. | <u>(First Case Sample - 156 Cases)</u> | <u>Cases Resulting in Death (49 Cases)</u> | |
| | 1. <u>White Defendants:</u> | 64 (41.0%) | 22 (44.9%) |
| | 2. <u>African-American Defendants:</u> | 75 (48.1%) | 25 (51.0%) |
| | 3. <u>Hispanic Defendants:</u> | 17 (10.9%) | 2 (4.1%) |

34.4% (22/64) of the White defendant cases resulted in the death penalty. 33.3% (25/75) of the African-American defendant cases resulted in the death penalty. 11.8% (2/17) of the Hispanic defendant cases resulted in the death penalty.

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|-----------|---|---|------------|
| B. | <u>(Last Case Sample - 141 Cases)</u> | <u>Cases Resulting in Death (24 Cases)</u> | |
| | 1. <u>White Defendants:</u> | 59 (41.8%) | 12 (50.0%) |
| | 2. <u>African-American Defendants:</u> | 66 (46.8%) | 12 (50.0%) |
| | 3. <u>Hispanic Defendants:</u> | 16 (11.4%) | 0 (0.0%) |

20.3% (12/59) of the White defendant cases resulted in the death penalty. 18.2% (12/66) of the African-American defendant cases resulted in the death penalty. 0.0% (0/16) of the Hispanic defendant cases resulted in the death penalty.

| | | | |
|-----------|---|---|------------|
| C. | <u>(First Case Sample - 139 Cases)</u> | <u>Cases Resulting in Death (47 Cases)</u> | |
| | 1. <u>White Defendants:</u> | 64 (46.0%) | 22 (46.8%) |
| | 2. <u>African-American Defendants:</u> | 75 (54.0%) | 25 (53.2%) |

34.4% (22/64) of the White defendant cases resulted in the death penalty. 33.3% (25/75) of the African-American defendant cases resulted in the death penalty.

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|-----------|---|---|------------|
| D. | <u>(Last Case Sample - 125 Cases)</u> | <u>Cases Resulting in Death (24 Cases)</u> | |
| | 1. <u>White Defendants:</u> | 59 (47.2%) | 12 (50.0%) |
| | 2. <u>African-American Defendants:</u> | 66 (52.8%) | 12 (50.0%) |

20.3% (12/59) of the White defendant cases resulted in the death penalty. 18.2% (12/66) of the African-American defendant cases resulted in the death penalty.

II. RACE OF VICTIM - PENALTY TRIAL CASES

| | | | |
|-----------|---|---|------------|
| A. | <u>(First Case Sample - 153 Cases)</u> | <u>Cases Resulting in Death (48 Cases)</u> | |
| | 1. <u>White Victims:</u> | 93 (60.8%) | 29 (60.4%) |
| | 2. <u>African-American Victims:</u> | 44 (28.8%) | 15 (31.3%) |
| | 3. <u>Hispanic Victims:</u> | 16 (10.5%) | 4 (8.3%) |

31.2% (29/93) of the White victim cases resulted in the death penalty. 34.1% (15/44) of the African-American victim cases resulted in the death penalty. 25% (4/16) of the Hispanic victim cases resulted in the death penalty.

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|-----------|--|---|------------|
| B. | <u>(Last Case Sample - 138 Cases)</u> | <u>Cases Resulting in Death (24 Cases)</u> | |
| | 1. <u>White Victims:</u> | 85 (61.6%) | 15 (62.5%) |
| | 2. <u>African-American Victims:</u> | 38 (27.5%) | 7 (29.2%) |
| | 3. <u>Hispanic Victims:</u> | 15 (10.9%) | 2 (8.3%) |

17.7% (15/85) of the White victim cases resulted in the death penalty. 18.4% (7/38) of the African-American victim cases resulted in the death penalty. 13.3% (2/15) of the Hispanic victim cases resulted in the death penalty.

| | | | |
|-----------|---|---|------------|
| C. | <u>(First Case Sample - 137 Cases)</u> | <u>Cases Resulting in Death (44 Cases)</u> | |
| | 1. <u>White Victims:</u> | 93 (67.9%) | 29 (65.9%) |
| | 2. <u>African-American Victims:</u> | 44 (32.1%) | 15 (34.1%) |

31.2% (29/93) of the White victim cases resulted in the death penalty. 34.1% (15/44) of the African-American victim cases resulted in the death penalty.

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| D. | <u>(Last Case Sample - 123 Cases)</u> | <u>Cases Resulting in Death (22 Cases)</u> | |
| | 1. <u>White Victims:</u> | 85 (69.1%) | 15 (68.2%) |
| | 2. <u>African-American Victims:</u> | 38 (30.9%) | 7 (31.8%) |

17.7% (15/85) of the White victim cases resulted in the death penalty. 18.4% (7/38) of the African-American victim cases resulted in the death penalty.

III. RACE OF DEFENDANT - DEATH-ELIGIBLE CASES

| | | | |
|-----------|---|---|------------|
| A. | <u>(First Case Sample - 550 Cases)</u> | <u>Cases Resulting in Death (49 Cases)</u> | |
| | 1. <u>White Defendants:</u> | 159 (28.9%) | 22 (44.9%) |
| | 2. <u>African-American Defendants:</u> | 322 (58.6%) | 25 (51.0%) |
| | 3. <u>Hispanic Defendants:</u> | 69 (12.6%) | 2 (4.1%) |

13.8% (22/159) of the White defendant cases resulted in the death penalty. 7.8% (25/322) of the African-American defendant cases resulted in the death penalty. 2.9% (2/69) of the Hispanic defendant cases resulted in the death penalty.

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|-----------|---|---|------------|
| B. | <u>(Last Case Sample - 550 Cases)</u> | <u>Cases Resulting in Death (24 Cases)</u> | |
| | 1. <u>White Defendants:</u> | 159 (28.9%) | 12 (50.0%) |
| | 2. <u>African-American Defendants:</u> | 322 (58.6%) | 12 (50.0%) |
| | 3. <u>Hispanic Defendants:</u> | 69 (12.6%) | 0 (0.0%) |

7.6% (12/159) of the White defendant cases resulted in the death penalty. 3.7% (12/322) of the African-American defendant cases resulted in the death penalty. 0.0% (0/69) of the Hispanic defendant cases resulted in the death penalty.

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|-----------|---|---|------------|
| C. | <u>(First Case Sample - 481 Cases)</u> | <u>Cases Resulting in Death (47 Cases)</u> | |
| | 1. <u>White Defendants:</u> | 159 (33.1%) | 22 (46.8%) |
| | 2. <u>African-American Defendants:</u> | 322 (66.9%) | 25 (53.2%) |

13.8% (22/159) of the White defendant cases resulted in the death penalty. 7.8% (25/322) of the African-American defendant cases resulted in the death penalty.

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|-----------|---|---|------------|
| D. | <u>(Last Case Sample - 481 Cases)</u> | <u>Cases Resulting in Death (24 Cases)</u> | |
| | 1. <u>White Defendants:</u> | 159 (33.1%) | 12 (50.0%) |
| | 2. <u>African-American Defendants:</u> | 322 (66.9%) | 12 (50.0%) |

7.6% (12/159) of the White defendant cases resulted in the death penalty. 3.7% (12/322) of the African-American defendant cases resulted in the death penalty.

IV. RACE OF VICTIM - DEATH-ELIGIBLE CASES

| | | | |
|-----------|---|---|------------|
| A. | <u>(First Case Sample - 533 Cases)</u> | <u>Cases Resulting in Death (48 Cases)</u> | |
| | 1. <u>White Victims:</u> | 240 (45.0%) | 29 (60.4%) |
| | 2. <u>African-American Victims:</u> | 223 (41.8%) | 15 (31.3%) |
| | 3. <u>Hispanic Victims:</u> | 70 (13.1%) | 4 (8.3%) |

12.1% (29/240) of the White victim cases resulted in the death penalty. 6.7% (15/223) of the African-American victim cases resulted in the death penalty. 5.7% (4/70) of the Hispanic victim cases resulted in the death penalty.

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|-----------|--|---|------------|
| B. | <u>(Last Case Sample - 533 Cases)</u> | <u>Cases Resulting in Death (24 Cases)</u> | |
| | 1. <u>White Victims:</u> | 240 (45.0%) | 15 (62.5%) |
| | 2. <u>African-American Victims:</u> | 223 (41.8%) | 7 (29.2%) |
| | 3. <u>Hispanic Victims:</u> | 70 (13.1%) | 2 (8.3%) |

6.3% (15/240) of the White victim cases resulted in the death penalty. 3.1% (7/223) of the African-American victim cases resulted in the death penalty. 2.9% (2/70) of the Hispanic victim cases resulted in the death penalty.

| | | | |
|-----------|---|---|------------|
| C. | <u>(First Case Sample - 463 Cases)</u> | <u>Cases Resulting in Death (44 Cases)</u> | |
| | 1. <u>White Victims:</u> | 240 (51.8%) | 29 (65.9%) |
| | 2. <u>African-American Victims:</u> | 223 (48.2%) | 15 (34.1%) |

12.1% (29/240) of the White victim cases resulted in the death penalty. 6.7% (15/223) of the African-American victim cases resulted in the death penalty.

| | | | |
|-----------|--|---|------------|
| D. | <u>(Last Case Sample - 463 Cases)</u> | <u>Cases Resulting in Death (22 Cases)</u> | |
| | 1. <u>White Victims:</u> | 240 (51.8%) | 15 (68.2%) |
| | 2. <u>African-American Victims:</u> | 223 (48.2%) | 7 (31.8%) |

6.3% (15/240) of the White victim cases resulted in the death penalty. 3.1% (7/223) of the African-American victim cases resulted in the death penalty.

V. RACE OF DEFENDANT - ADVANCEMENT TO PENALTY TRIAL

| | | | |
|-----------|---|---|------------|
| A. | <u>(First Case Sample - 550 Cases)</u> | <u>Cases Resulting in Pen. Trial (156 Cases)</u> | |
| | 1. <u>White Defendants:</u> | 159 (28.9%) | 64 (41.0%) |
| | 2. <u>African-American Defendants:</u> | 322 (58.6%) | 75 (48.1%) |
| | 3. <u>Hispanic Defendants:</u> | 69 (12.6%) | 17 (10.9%) |

40.3% (64/159) of the White defendant cases advanced to penalty trial. 23.3% (75/322) of the African-American defendant cases advanced to penalty trial. 24.6% (17/69) of the Hispanic defendant cases advanced to penalty trial.

| | | | |
|-----------|---|---|------------|
| B. | <u>(Last Case Sample - 550 Cases)</u> | <u>Cases Resulting in Pen. Trial (141 Cases)</u> | |
| | 1. <u>White Defendants:</u> | 159 (28.9%) | 59 (41.8%) |
| | 2. <u>African-American Defendants:</u> | 322 (58.6%) | 66 (46.8%) |
| | 3. <u>Hispanic Defendants:</u> | 69 (12.6%) | 16 (11.4%) |

37.1% (59/159) of the White defendant cases advanced to penalty trial. 20.5% (66/322) of the African-American defendant cases advanced to penalty trial. 23.2% (16/69) of the Hispanic defendant cases advanced to penalty trial.

| | | |
|-----------|---|---|
| C. | <u>(First Case Sample - 481 Cases)</u> | <u>Cases Resulting in Pen. Trial (139 Cases)</u> |
| | 1. <u>White Defendants:</u> | 159 (33.1%) 64 (46.0%) |
| | 2. <u>African-American Defendants:</u> | 322 (66.9%) 75 (54.0%) |

40.3% (64/159) of the White defendant cases advanced to penalty trial. **23.3% (75/322)** of the African-American defendant cases advanced to penalty trial.

| | | |
|-----------|---|---|
| D. | <u>(Last Case Sample - 481 Cases)</u> | <u>Cases Resulting in Pen. Trial (125 Cases)</u> |
| | 1. <u>White Defendants:</u> | 159 (33.1%) 59 (47.2%) |
| | 2. <u>African-American Defendants:</u> | 322 (66.9%) 66 (52.8%) |

37.1% (59/159) of the White defendant cases advanced to penalty trial. **20.5% (66/322)** of the African-American defendant cases advanced to penalty trial.

VI. RACE OF VICTIM - ADVANCEMENT TO PENALTY TRIAL

| | | |
|-----------|---|---|
| A. | <u>(First Case Sample - 533 Cases)</u> | <u>Cases Resulting in Pen. Trial (153 Cases)</u> |
| | 1. <u>White Victims:</u> | 240 (45.0%) 93 (60.8%) |
| | 2. <u>African-American Victims:</u> | 223 (41.8%) 44 (28.8%) |
| | 3. <u>Hispanic Victims:</u> | 70 (13.1%) 16 (10.5%) |

38.8% (93/240) of the White victim cases advanced to penalty trial. **19.7% (44/223)** of the African-American victim cases advanced to penalty trial. **22.9% (16/70)** of the Hispanic victim cases advanced to penalty trial.

| | | |
|-----------|--|---|
| B. | <u>(Last Case Sample - 533 Cases)</u> | <u>Cases Resulting in Pen. Trial (138 Cases)</u> |
| | 1. <u>White Victims:</u> | 240 (45.0%) 85 (61.6%) |
| | 2. <u>African-American Victims:</u> | 223 (41.8%) 38 (27.5%) |
| | 3. <u>Hispanic Victims:</u> | 70 (13.1%) 15 (10.9%) |

35.4% (85/240) of the White victim cases advanced to penalty trial. **17.0% (38/223)** of the African-American victim cases advanced to penalty trial. **21.4% (15/70)** of the Hispanic victim cases advanced to penalty trial.

| | | |
|-----------|---|---|
| C. | <u>(First Case Sample - 463 Cases)</u> | <u>Cases Resulting in Pen. Trial (137 Cases)</u> |
| | 1. <u>White Victims:</u> | 240 (51.8%) 93 (67.9%) |
| | 2. <u>African-American Victims:</u> | 223 (48.2%) 44 (32.1%) |

38.8% (93/240) of the White victim cases advanced to penalty trial. **19.7% (44/223)** of the African-American victim cases advanced to penalty trial.

| D. <u>(Last Case Sample - 463 Cases)</u> | <u>Cases Resulting in Pen. Trial (123 Cases)</u> | |
|---|---|------------|
| 1. <u>White Victims:</u> | 240 (51.8%) | 85 (69.1%) |
| 2. <u>African-American Victims:</u> | 223 (48.2%) | 38 (30.9%) |

35.4% (85/240) of the White victim cases advanced to penalty trial. **17.0% (38/223)** of the African-American victim cases advanced to penalty trial.

IV. MULTIVARIATE REGRESSION

In earlier reports, we discussed at length the problems pertaining to the regression models originally developed by Professor Baldus. We noted that these regression models were created for the purpose of individual proportionality review, *i.e.*, the index of outcomes test. They were not intended to detect the presence or absence of racial discrimination. Because the professor's models were designed to measure culpability levels and compare a particular defendant's case with others, all relevant predictors had to be included in the regression models. However, multivariate regression requires variability in the measures examined "in order to disentangle the effects in a model."⁹ As the relevant descriptive, independent variables increase, the variability or split of scores in the dependent variable is divided up into smaller and smaller pieces. It becomes increasingly difficult to determine the relationship between the independent and dependent variables.

In earlier reports, we explained that although there is no hard and fast rule defining the number of independent variables that may be included, "models should be reviewed for instability when there are fewer than ten cases in the infrequent category (progression of a death-eligible case to penalty trial or death

⁹ David Weisburd, Good For What Purpose? Social Science, Race and Proportionality in New Jersey in Social Science, Social Police and the Law 268 (Patricia Eurick et. als. ed. 1999).

sentence verdict) for each of the independent variables.”¹⁰ The eminent statistician, Dr. John Tukey, suggested a rule of thumb “that requires at least five, and more conservatively ten, of the less frequent outcomes per independent variable.”¹¹ This is the principle of parsimony referred to by former Special Master Richard Cohen in his Report to the New Jersey Supreme Court 27 (1997).

Because New Jersey’s database is relatively small (relatively few cases have advanced to penalty trial and relatively few cases have resulted in imposition of the death penalty), the number of independent variables that may be included in a regression model is limited. Professor Baldus was thus faced with an unsolvable problem. Since his regression models were designed to predict progression of a death-eligible case to penalty trial or return of a death verdict, the number of relevant variables (variables describing the offender and the circumstances of the offense) could not be reduced. However, New Jersey’s small database required elimination of independent variables in order to meet the demands of parsimony.

We sought to alleviate the tension between these competing demands by more sharply focusing on the question to be answered. The basic premise upon which our methodology rests is that in assessing race effect, as contrasted to defining culpability levels for individual proportionality review, we do not have to account for all factors that influence death penalty sentencing. Rather, we need

¹⁰ Id.

¹¹ Dr. John Tukey, Report to the Special Master 5 (1997).

only to include in our models those factors that are related to the outcome variable (either advancement to a penalty trial or imposition of a death sentence) and the race or ethnicity variable examined. This is so because our effort is not to develop a reliable estimate of culpability level on the outcome measure, but only to control for potential confounding of the race or ethnicity variable.

Our thesis is that we need only identify and control such confounders in order to isolate and measure any race or ethnicity effect that may exist. Thus, where race or ethnicity is distributed equally, or in statistical terms where all else is equivalent, there is no need to take account of that variable in the model. But where there is variability in a parameter, i.e., where race or ethnicity is unevenly distributed, that variable should be considered for its inclusion in the model.

The difference between the goal of gaining a reliable prediction of the outcome measure and that of controlling for confounding provides an opportunity to develop more parsimonious models than those that have been used in assessing death penalty sentencing in terms of individual proportionality. Variables must be theoretically related to the outcome measure examined (progression to penalty trial or imposition of the death penalty) and empirically related to the race or ethnicity variable being evaluated. This permits us to define a much smaller set of variables for inclusion in the regression model.

We described our methodology in earlier reports. We repeat that description here for two reasons. First, the composition of our Supreme Court has changed over the years, and a summary might be helpful to newly appointed Justices.

Second, other jurisdictions, most notably Maryland, have adopted many of our procedures in conducting their multivariate regression studies. To the extent that other jurisdictions have used our methodology but have deviated from our approach in various particulars, we believe it wise to repeat our description of the steps we have taken. Our methodology consists of the following steps:

(1) Define a base set of variables thought to have an effect on the outcome measured. These variables were identified in a survey of judges having significant experience in trying capital punishment cases. Ninety-four variables taken from our database were presented to the judges. The judges selected twenty-two variables said to affect death trial verdicts. In addition, all statutory factors were included in the base set of variables.

(2) Examine the bivariate relationship between the race variables and each of the variables included in the base set. The objective here is to determine which of the base set of variables are possible confounders.

(3) Exclude from the analysis any variable that does not reach a set threshold of statistical significance. Different thresholds of significance are to be used depending on the outcome measure examined, because the size of the sample is an important component of statistical significance. All else being equal, larger samples will produce more significant findings. In dealing with questions relating to the larger death-eligible universe, a .05 significance threshold is to

be applied. In dealing with questions relating to the smaller penalty trial universe, a less stringent criterion of .10 is to be applied.

(4) Estimate the regression model including only those variables that have reached the thresholds described, plus the race and ethnicity variables. This assumes that the number of variables is small enough to allow for the reliable estimation of regression equations. Using the guidelines on parsimony we have previously described, which require at least five cases in the infrequent category (progression to a penalty trial or imposition of the death penalty) for each of the independent variables, we arrive at a model containing a relatively small number of variables. Under our original proposal, we suggested that the significance criteria be raised if too many variables were identified as possible confounders. We altered our course in that respect. Because many of the variables defined as theoretically relevant to death penalty sentencing by the judges did not have a high correlation with death outcome, we decided that a fairer approach was to examine the relationship between the selected variables and the outcome measure examined. Preference in this situation is given to variables that are both significantly related to the examined racial or ethnic criterion and

to the outcome assessed.¹² This option conformed with the approach suggested by the Public Defender.

A. PENALTY TRIAL UNIVERSE – RACE OF DEFENDANT

Examining both the first case and last case samples, we find that neither African-American defendants nor Hispanic defendants differ significantly (at the .05 threshold) from White defendants in terms of death sentencing. Nor is race of defendant overall a significant factor in terms of imposition of a death sentence. The same results are found whether we compare Whites, African-American and Hispanic defendants or only White and African-American defendants.

In short, our analyses reveal no statistically significant race of a defendant effect in terms of death sentencing within the penalty trial universe.

B. PENALTY TRIAL UNIVERSE – RACE OF VICTIM

Examining both the first case and last case samples, there is no statistically significant evidence that the race of the victim impacts upon the return of a death verdict. Neither White victim nor Hispanic victim cases are significantly different from African-American victim cases. The results are essentially the same whether we compare White, African-American and Hispanic victim cases or only White and African-American victim cases.

¹² In such cases, where race was not significantly related to outcome, it was still included in the regression models if the rule of parsimony allowed. Our decision was based on the centrality of race in our monitoring procedure and the very strong confounding between race of victim and race of defendant in these analyses. However, variables that were significantly related to race and outcome were given preference in the scenario in which the rule of parsimony did not allow for the inclusion of additional measures.

Our regression studies do not disclose statistically significant evidence that White victim cases are treated differently than African-American and Hispanic victim cases in terms of death sentencing within the penalty trial universe.

C. DEATH-ELIGIBLE UNIVERSE – RACE OF DEFENDANT

It will be recalled that in our bivariate analyses, White defendants were more likely to progress to penalty trial and to be sentenced to death than African-American or Hispanic defendants. This race of defendant effect was not sustained in our regression studies.

Examining both the first case and last case samples, race of defendant was not found to be related to death sentencing. There is no statistically significant evidence that the race of defendant affects death sentencing within the death-eligible universe. This is true whether we compare White, African-American and Hispanic defendants or only White and African-American defendants.¹³

We next consider whether the race or ethnicity of the defendant affects progression of cases to the penalty phase. Examining the first and last case sample we do not find evidence of a statistically significant relationship between the race of the defendant and progression to the penalty phase. This is true whether we compare White, African-American and Hispanic defendants or only White and African-American defendants.

¹³ We add, however, that comparison of White and Hispanic defendants almost reaches the .05 threshold ($p=.0509$), White defendants being more likely to be sentenced to death.

D. DEATH-ELIGIBLE UNIVERSE – RACE OF VICTIM

We find no evidence of a statistically significant race of victim effect on death sentencing within the death-eligible universe. This is true both with respect to the first and last case samples. Essentially the same findings apply whether we compare White, African-American and Hispanic victim cases or only White and African-American victim cases.

In contrast, examining the first case sample we find that White victim cases differ significantly from African-American victim cases in terms of advancement to penalty trial. Hispanic victim cases are not found to differ significantly from African-American victim cases. White victim cases are more likely to progress to the penalty phase than African-American and Hispanic victim cases. This is true whether we compare White, African-American and Hispanic victim cases or only White and African-American victim cases. Although our findings with respect to the last case sample are more equivocal, the statistical evidence again points to the conclusion that White victim cases are more likely than African-American and Hispanic victim cases to advance to a penalty trial.

E. DEATH-ELIGIBLE UNIVERSE – WHITE VICTIM EFFECT AND COUNTY DISPARITY

We have long suspected substantial county disparity in the progression of cases to penalty trial. The point was first raised by Professor Baldus.¹⁴ At a relatively early stage, the professor found that the penalty trial rates in several counties were much higher than those in other counties.¹⁵ The professor's studies disclosed a "sixty-eight percentage point spread, from the low county with a penalty trial rate of .32 (plus three others in the .30 range) to two counties in which all death-eligible cases advanced to a penalty trial."¹⁶ Professor Baldus also found "higher penalty trial rates in the non-urban counties."¹⁷

We, too, noticed that penalty trial cases were unevenly distributed among the counties. A simple review of the cross-tabulations suggested a wide variability in rates at which cases advance to penalty trial in the individual counties. We thought it significant that counties having the lowest rates of cases progressing to the penalty phase had substantial minority populations, and counties having the highest rates of cases progressing to the penalty phase had substantial White populations. This issue is explored further in the section dealing with case-sorting techniques. In earlier reports, we tested the thesis that county variability may serve as a

¹⁴ Baldus, Final Report at 22-23.

¹⁵ Id. at 24.

¹⁶ Id.

¹⁷ Id. at 23.

confounder in assessing race effects in terms of cases progressing to a penalty trial. We thus constructed additional regression models to control for county variability.

As we pointed out in earlier reports, this proved to be a complex task. We need not describe in detail the statistical strategies we used to consider the question of county variability. It suffices to note that including county variability controls in the regression models had a substantial impact on our finding that White victim cases are more likely than minority victim cases to progress to the penalty stage. In our reports, we observed that the White victim effect on advancement to penalty trial was not sustained when the confounding factor of county variability was taken into account.

Our findings this year are essentially the same as those described in earlier reports. Taking into account county variability in regression analyses of advancement to penalty trial, we find that the White victim effect is not sustained. This is true applying the alternative assumptions we have traditionally used. Whether considering the first or last case samples, and whether we compare the three main racial groups or only two racial groups, the White victim effect fails to achieve statistical significance. This important finding has added support because we conducted additional studies this year that corrected potential bias in controlling for county variability. We are satisfied that there is no meaningful White victim effect on progression to penalty trial once county variability in capital prosecution rates is considered. As we will note later in this report, this finding is confirmed when we apply case-sorting methods.

V. THE CASE-SORTING APPROACH

Our third approach to monitoring race or ethnicity effect is described as the case-sorting technique. We rely upon simple cross-tabulations of the data, examining sentencing rates by race or ethnicity, and breaking down the data by various combinations of statutory aggravating and mitigating factors. Various exploratory techniques are used to select the combinations that are examined. The analyst identifies factors that have a strong and statistically significant impact on the outcome measure (death sentence or advancement to penalty trial), and then measures how race or ethnicity is distributed within those categories.

The strength of this approach is that the numbers within the categories selected are clear and easy to understand. This approach thus has the benefit of "transparency." Moreover, the combinations provide categories which permit the analyst to engage in a type of precedent-seeking review. For example, where a race effect is found in a particular category, the cases within that category can be examined to determine whether there is any explanation other than race that produced the disparity. The major weakness inherent in case-sorting techniques is that the relationships examined take into account only a few factors and do not control for other variables. Further, it is very difficult to look at all potential combinations. As the analyst sorts the data into smaller and smaller pieces, it becomes increasingly difficult to arrive at solid conclusions.

The method we use relies on four steps. First, we divide the data into different groups of cases recognizing the complex nature of the samples that are examined. Second, we examine the overall relationship between race factors and the outcomes examined. Third, we identify statutory and non-statutory factors that are significantly related to the outcomes examined and that have enough data to allow for adequate sorting of the cases. Fourth, we examine how race or ethnicity factors are related to the different factors we have identified. In this approach, we look at different potential combinations in order to examine more carefully potential interactions in these data.

As we pointed out earlier, statistical analysis rests on the assumption that each case is independent. The overall data set consists of death-eligible cases. Within this data set, there is a group of defendants who have multiple dispositions, either because of retrials of cases involving a single victim or multiple killings. We have found that the outcomes of multiple cases involving the same defendant are related in complex ways. Some of these complexities are due to variables associated with a particular defendant or to aspects of the process. For example, it is reasonable to assume that a prosecutor's decision whether or not to seek the death penalty in a particular case may be affected by a prior reversal of the defendant's conviction. Earlier dispositions may impact on the plea bargaining positions of the State and the defense attorney. In a similar vein, in a case

involving multiple killings in a single incident, many variables pertaining to the defendant and the criminal event are the same.

To avoid these problems, we focus primarily on the "first case sample," which is composed of 555 death-eligible cases. We do not analyze the "last case sample" because it includes too few death outcomes. In examining the "first case sample," we focus on various subsets of cases. For example, in studying the outcome of penalty trials, we examine the 157 penalty phase verdicts within the 555 case data set.

Because of the myriad of combinations examined in our study, we report on only the most salient. The reader is referred to the Technical Appendix for further information. Our principal findings are: (1) the race or ethnicity of the defendant overall is not an important factor in determining whether the death penalty is imposed, (2) nevertheless, a greater percentage of White defendants than African-American defendants in the death-eligible universe advance to penalty trial and are sentenced to death. White and African-American defendants in the penalty trial universe are sentenced to death at essentially the same rate, (3) the race of the victim is not a statistically significant factor in predicting whether the death penalty is to be imposed and (4) a greater percentage of White victim cases than African-American victim cases advance to penalty trial, but this effect is confounded by county variability.

We emphasize that this year's findings essentially reflect those made in earlier reports. This is to be expected because few cases have been added to the first case penalty trial sample since our 2003 report was submitted to the Supreme Court, and only one death sentence was returned during the interim period.

A. RACE OF DEFENDANT

In terms of net impact, a smaller fraction of minority defendants are sentenced to death than White defendants. A smaller fraction of minority defendants advance to penalty trial than White defendants, and a slightly smaller fraction of minority defendants who progress to penalty trial are sentenced to death than White defendants. From this essentially bivariate analysis, it appears that a greater percentage of White defendants advance to penalty trial, and a greater percentage of White defendants receive a death verdict than African-American or Hispanic defendants. Table 1 illustrates this point.

Table 1

| <u>Defendant's Race</u> | <u>White</u> | <u>African-American</u> | <u>Hispanic</u> | <u>Other</u> | <u>TOTAL</u> |
|---|----------------|-------------------------|-----------------|--------------|-----------------|
| number of cases | (159) | (322) | (69) | (5) | (555) |
| fraction of cases that went to penalty trial | 64/159 0.40 | 75/322 0.23 | 17/69 0.25 | 1/5 0.20 | 157/555 0.28 |
| fraction of cases that received death sentence | 22/159 0.14 | 25/322 0.08 | 2/69 0.03 | 0/5 0 | 49/555 0.09 |
| fraction of penalty trial cases that received death sentence | 22/64 0.34 | 22/75 0.33 | 2/17 0.12 | 0/1 0 | 49/157 0.31 |

In our earlier reports, we considered various combinations of aggravating and mitigating factors that have historically had a strong association with death

sentencing. Our thesis was that there would not be a substantial difference between the rates White, African-American and Hispanic defendants advanced to a penalty trial and were sentenced to death when these combinations were present. We were accurate in that assumption. White and African-American defendants advanced to the penalty stage and were sentenced to death at essentially the same rates. There were too few Hispanic defendant cases falling within these combinations to draw reliable conclusions. We repeated these analyses this year, and the results were essentially the same.

The point to be stressed is that our cross-tabulations provide no consistent, solid evidence of nongermane racial or ethnic bias in the administration of our capital punishment laws. While White defendants advance to the penalty stage and are sentenced to death at a higher rate than minority defendants, that phenomenon tends to disappear when other factors are taken into account.

B. RACE OF VICTIM

We begin this section by noting the two methods of coding the race or ethnicity of the victim. The first approach, that adopted by Professor Baldus, defines as a White victim case any case in which a White victim was killed by the offender, regardless of the race of other victims murdered by the offender in the same incident. For example, a case would be coded as a White victim case under this approach even if nine of the ten persons murdered by the offender in a single incident were African-American and one was White. A second approach, the

“primary victim” approach, defines a case as a White victim case if the first person killed in a single incident was White. Here, the approach focuses upon the chronology of the killings. In our bivariate and our regression studies, we coded a case as a White victim case if any of the victims was White. In our case-sorting section, we use the approaches alternatively, apprising the reader on each occasion of the coding methodology employed.

Table 2 presents an overall breakdown of the 555 death-eligible cases by the race of the victim, utilizing the Baldus method of coding.

Table 2

| <u>Victim's Race</u> | <u>White</u> | <u>African-American</u> | <u>Hispanic</u> | <u>Other</u> | <u>TOTAL</u> |
|--|----------------|-------------------------|-----------------|--------------|-----------------|
| Number of Cases | 240 | 223 | 70 | 22 | 555 |
| Fraction Of Cases That Went To Penalty Trial | 93/240 0.39 | 44/223 0.20 | 16/70 0.23 | 4/22 0.18 | 157/555 0.28 |
| Fraction Of Cases That Received Death Sentence | 29/240 0.12 | 15/223 0.07 | 4/70 0.06 | 1/22 0.05 | 49/555 0.09 |
| Fraction Of Penalty Trial Cases That Received Death Sentence | 29/93 0.31 | 15/44 0.34 | 4/16 0.25 | 1/4 0.25 | 49/157 0.31 |

Of the 240 White victim cases, twenty-nine defendants were sentenced to death, approximately twelve percent. Of the 223 African-American victim cases, fifteen defendants were sentenced to death, approximately seven percent. Of the seventy Hispanic victim cases, four defendants were sentenced to death, approximately six percent. The difference in death sentencing rates is not statistically significant.

Table 2 shows that of the ninety-three White victim cases that advanced to penalty trial, twenty-nine defendants were sentenced to death, approximately thirty-one percent. Of the forty-four African-American victim cases that advanced to penalty trial, fifteen defendants were sentenced to death, approximately thirty-four percent. Of the sixteen Hispanic victim cases that advanced to penalty trial, four defendants were sentenced to death, or twenty-five percent. This difference is not statistically significant.

Table 2 also shows the fractions of death-eligible cases that progressed to penalty trial. Thirty-nine percent of White victim cases advanced to the penalty stage. Twenty percent of African-American victim cases advanced to penalty trial. Twenty-three percent of Hispanic victim cases advanced to penalty trial. This difference is large and statistically significant. White victim cases progressed to the penalty phase at a higher rate than minority victim cases.

If no other variables are taken into account, the difference in the rate that White and African-American victim cases advance to penalty trial would be of greater concern. However, when other relevant variables are considered, the difference in rates is not statistically significant. For example, part of the disparity is explained by the fact that White victim cases tend to be concentrated in categories with high rates of progression to penalty trial. In five of the seven cases involving the killing of a law enforcement officer, for example, the victim was White. This category of cases has historically been considered particularly heinous

in the eyes of prosecutors and juries. It is the salient factor category having the highest progression to penalty trial and death sentencing rates.

As illustrated by our regression studies, an important variable that is confounded with penalty trial rates and race of victim is county disparity. This confounding factor is confirmed in our case-sorting analyses. Different counties have varying proportions of White, African-American and Hispanic victims in death-eligible cases. In a similar vein, several counties have much higher capital prosecution rates than others.

Table 3 shows that White victim cases are concentrated in counties with historically high rates of cases progressing to the penalty stage, and that African-American victim cases are concentrated in counties with historically low rates of cases progressing to the penalty stage.

Table 3

| County | Number of Cases | Percent Going To Penalty Trial | Percent of White Victim Cases |
|-----------------|------------------------|---------------------------------------|--------------------------------------|
| 1. Atlantic | 38 | 29% | 53% |
| 2. Bergen | 27 | 37% | 48% |
| 3. Burlington | 14 | 43% | 93% |
| 4. Camden | 64 | 25% | 28% |
| 5. Cape May | 12 | 25% | 83% |
| 6. Cumberland | 11 | 9% | 55% |
| 7. Essex | 122 | 16% | 20% |
| 8. Gloucester | 16 | 44% | 81% |
| 9. Hudson | 38 | 21% | 42% |
| 10. Hunterdon | 2 | 50% | 100% |
| 11. Mercer | 28 | 39% | 39% |
| 12. Middlesex | 24 | 54% | 54% |
| 13. Monmouth | 30 | 57% | 70% |
| 14. Morris | 17 | 53% | 76% |
| 15. Ocean | 15 | 40% | 80% |
| 16. Passaic | 30 | 20% | 17% |
| 17. Salem | 3 | 33% | 100% |
| 18. Somerset | 4 | 0% | 75% |
| 19. Sussex | 9 | 22% | 100% |
| 20. Union | 45 | 16% | 22% |
| 21. Warren | 6 | 50% | 83% |
| COMBINED | 555 | 28% | 43% |

For example, only sixteen percent of death-eligible cases in Essex County advanced to penalty trial. The same is true of Union County. In contrast, fifty-four percent of death-eligible cases progressed to the penalty stage in Middlesex County. Fifty-seven percent of death-eligible cases progressed to the penalty stage

in Monmouth County. Fifty-three percent of death-eligible cases progressed to the penalty stage in Morris County.

Table 3 shows that the major proportion of death-eligible cases in Middlesex, Monmouth and Morris counties involved White victims. Fifty-four percent of death-eligible Middlesex County cases involved a White victim. Seventy percent of death-eligible Monmouth County cases involved a White victim. Seventy-six percent of death-eligible Morris County cases involved a White victim. Against these figures, we note that only twenty percent of death-eligible Essex County cases involved a White victim, and only twenty-two percent of Union County cases involved a White victim.

We now turn to Table 4. We previously observed the declining rate that death-eligible cases are capitally prosecuted. Table 4 starkly reveals this decline:

Table 4

| County | Number of Eligible Cases | | Before 1988 | After 1988 |
|-----------------|--------------------------|------------|-----------------------------|-----------------------------|
| | Before 88 | After 88 | Percent To Penalty Trial | Percent To Penalty Trial |
| 1. Atlantic | 9 | 29 | 44% | 24% |
| 2. Bergen | 6 | 21 | 67% | 29% |
| 3. Burlington | 3 | 11 | 67% | 36% |
| 4. Camden | 18 | 46 | 39% | 20% |
| 5. Cape May | 3 | 9 | 33% | 22% |
| 6. Cumberland | 0 | 11 | -- | 9% |
| 7. Essex | 27 | 95 | 48% | 6% |
| 8. Gloucester | 5 | 11 | 80% | 27% |
| 9. Hudson | 11 | 27 | 45% | 11% |
| 10. Hunterdon | 1 | 1 | 100% | 0% |
| 11. Mercer | 4 | 24 | 75% | 33% |
| 12. Middlesex | 2 | 22 | 100% | 50% |
| 13. Monmouth | 11 | 19 | 73% | 47% |
| 14. Morris | 4 | 13 | 75% | 46% |
| 15. Ocean | 5 | 10 | 100% | 10% |
| 16. Passaic | 10 | 20 | 60% | 0% |
| 17. Salem | 0 | 3 | -- | 33% |
| 18. Somerset | 1 | 3 | 0% | 0% |
| 19. Sussex | 0 | 9 | -- | 22% |
| 20. Union | 9 | 36 | 56% | 6% |
| 21. Warren | 1 | 5 | 100% | 40% |
| Combined | 130 | 425 | 57% | 20% |

Overall, fifty-seven percent of death-eligible cases before 1988 advanced to penalty trial. After 1988, only twenty percent of death-eligible cases advanced to penalty trial. Every county experienced a marked decline in death-eligible cases advancing to penalty trial after 1988. However, the decline was particularly severe in those counties having large proportions of African-American victim cases. For example, Essex County's penalty trial rate went from forty-eight percent before 1988 to six percent after 1988. Union County's penalty trial rate went from fifty-six percent before 1988 to six percent after 1988. The decline in penalty trial rates of Middlesex, Monmouth and Morris counties was less severe.

Returning to table 3, that chart provides greater detail in our analysis of the distribution of cases by race of primary victim broken down by counties. Specifically, that table again shows that a disproportionate number of African-American and Hispanic victim cases is concentrated in counties with the lowest rates of cases progressing to the penalty stage. The three counties with the largest number of death-eligible cases - - Essex, Camden and Union - - have among the lowest rates of cases advancing to penalty trial. Essex County has 122 death-eligible cases, of which sixteen percent progressed to the penalty stage. Camden County has sixty-four death-eligible cases, of which twenty-five percent progressed to the penalty stage. Union County has forty-five death-eligible cases, of which twenty-two percent progressed to the penalty stage. Relatively few of the cases in those counties involved White victims. Only twenty-eight percent of the death-eligible cases in Camden County involved a White victim. Only twenty

percent of the death-eligible cases in Essex County involved a White victim, and only twenty-two percent of the death-eligible cases in Union County involved a White victim. These three counties account for a disproportionately small fraction of White victim cases.

Table 5 shows that Essex, Camden and Union counties – counties with very low penalty trial rates -- account for a disproportionately small fraction of White victim cases.

Table 5

| County | | White | African-American | Hispanic | Asian | Other | TOTAL |
|-------------------|--------|-------|------------------|----------|-------|-------|-------|
| ATLANTIC | Count | 19 | 17 | 1 | 1 | 0 | 38 |
| | Row % | 50 | 45 | 3 | 3 | 0 | |
| | Col. % | 8 | 8 | 1 | 8 | 0 | |
| BERGEN | Count | 12 | 4 | 4 | 4 | 3 | 27 |
| | Row % | 44 | 15 | 15 | 15 | 11 | |
| | Col. % | 5 | 2 | 5 | 33 | 27 | |
| BURLINGTON | Count | 13 | 1 | 0 | 0 | 0 | 14 |
| | Row % | 93 | 7 | 0 | 0 | 0 | |
| | Col. % | 6 | 0 | 0 | 0 | 0 | |
| CAMDEN | Count | 17 | 31 | 14 | 1 | 1 | 64 |
| | Row % | 27 | 48 | 22 | 2 | 2 | |
| | Col. % | 7 | 14 | 19 | 8 | 9 | |
| CAPE MAY | Count | 10 | 1 | 0 | 1 | 0 | 12 |
| | Row % | 83 | 8 | 0 | 8 | 0 | |
| | Col. % | 4 | 0 | 0 | 8 | 0 | |
| CUMBERLAND | Count | 6 | 2 | 3 | 0 | 0 | 11 |
| | Row % | 55 | 18 | 27 | 0 | 0 | |
| | Col. % | 3 | 1 | 4 | 0 | 0 | |
| ESSEX | Count | 22 | 86 | 13 | 0 | 1 | 122 |
| | Row % | 18 | 70 | 11 | 0 | 1 | |
| | Col. % | 9 | 38 | 18 | 0 | 9 | |
| GLOUCESTER | Count | 13 | 1 | 2 | 0 | 0 | 16 |
| | Row % | 81 | 6 | 13 | 0 | 0 | |
| | Col. % | 6 | 0 | 3 | 0 | 0 | |
| HUDSON | Count | 16 | 10 | 9 | 2 | 1 | 38 |
| | Row % | 42 | 26 | 24 | 5 | 3 | |
| | Col. % | 7 | 4 | 12 | 17 | 9 | |
| HUNTERDON | Count | 2 | 0 | 0 | 0 | 0 | 2 |
| | Row % | 100 | 0 | 0 | 0 | 0 | |
| | Col. % | 1 | 0 | 0 | 0 | 0 | |
| MERCER | Count | 10 | 17 | 1 | 0 | 0 | 28 |
| | Row % | 36 | 61 | 4 | 0 | 0 | |
| | Col. % | 4 | 8 | 1 | 0 | 0 | |
| MIDDLESEX | Count | 12 | 7 | 5 | 0 | 0 | 24 |
| | Row % | 50 | 29 | 21 | 0 | 0 | |
| | Col. % | 5 | 3 | 7 | 0 | 0 | |
| MONMOUTH | Count | 21 | 5 | 3 | 0 | 1 | 30 |
| | Row % | 70 | 17 | 10 | 0 | 3 | |
| | Col. % | 9 | 2 | 4 | 0 | 9 | |
| MORRIS | Count | 13 | 1 | 1 | 1 | 1 | 17 |
| | Row % | 76 | 6 | 6 | 6 | 6 | |
| | Col. % | 6 | 0 | 1 | 8 | 9 | |

| County | | White | African-American | Hispanic | Asian | Other | TOTAL |
|--------------|--------|------------|------------------|-----------|-----------|-----------|------------|
| OCEAN | Count | 12 | 1 | 1 | 0 | 1 | 15 |
| | Row % | 80 | 7 | 7 | 0 | 7 | |
| | Col. % | 5 | 0 | 1 | 0 | 9 | |
| PASSAIC | Count | 5 | 12 | 12 | 1 | 0 | 30 |
| | Row % | 17 | 40 | 40 | 3 | 0 | |
| | Col. % | 2 | 5 | 16 | 8 | 0 | |
| SALEM | Count | 3 | 0 | 0 | 0 | 0 | 3 |
| | Row % | 100 | 0 | 0 | 0 | 0 | |
| | Col. % | 1 | 0 | 0 | 0 | 0 | |
| SOMERSET | Count | 3 | 1 | 0 | 0 | 0 | 4 |
| | Row % | 75 | 25 | 0 | 0 | 0 | |
| | Col. % | 1 | 0 | 0 | 0 | 0 | |
| SUSSEX | Count | 9 | 0 | 0 | 0 | 0 | 9 |
| | Row % | 100 | 0 | 0 | 0 | 0 | |
| | Col. % | 4 | 0 | 0 | 0 | 0 | |
| UNION | Count | 10 | 28 | 4 | 1 | 2 | 45 |
| | Row % | 22 | 62 | 9 | 2 | 4 | |
| | Col. % | 4 | 12 | 5 | 8 | 18 | |
| WARREN | Count | 5 | 1 | 0 | 0 | 0 | 6 |
| | Row % | 83 | 17 | 0 | 0 | 0 | |
| | Col. % | 2 | 0 | 0 | 0 | 0 | |
| TOTAL | | 233 | 226 | 73 | 12 | 11 | 555 |

These three counties, all of which have low penalty trial rates, contain sixty-four percent of death-eligible African-American victim cases and forty-two percent of Hispanic victim cases, but only twenty percent of the death-eligible White victim cases. In contrast, three counties with the highest penalty trial rates -- Gloucester with forty-four percent of its death-eligible cases advancing to penalty trial, Middlesex with fifty-four percent of its death-eligible cases advancing to penalty trial, and Monmouth with fifty-seven percent of its death-eligible cases advancing to penalty trial, have small percentages of African-American and Hispanic victim cases, and much larger percentages of White victim cases.

We add one additional complicating factor. In most cases the race of defendant and race of victim were the same. The plain implication is that the lower rate at which African-American victim cases advance to penalty trial is confounded with the lower rate at which African-American defendant cases advance to penalty trial. Table 6 shows this relationship between race of defendant and primary victim.

Table 6

| Defendant's Race | | | | | | |
|-------------------------|--------------|-------------------------|-----------------|--------------|--------------|--------------|
| Victim's Race | White | African-American | Hispanic | Asian | Other | TOTAL |
| White | 141 | 73 | 19 | 0 | 0 | 233 |
| African-American | 3 | 217 | 6 | 0 | 0 | 226 |
| Hispanic | 11 | 21 | 40 | 0 | 1 | 73 |
| Asian | 1 | 6 | 2 | 2 | 1 | 12 |
| Other | 3 | 5 | 2 | 0 | 1 | 11 |
| TOTAL | 159 | 322 | 69 | 2 | 3 | 555 |

Table 6 illustrates the phenomenon we described earlier. White defendants generally kill White victims, and, to a lesser extent, African-American defendants usually kill African-American victims. Among 159 White defendants, 141 cases involved White victims. Only three White defendant cases involved African-American victims. Stated another way, of the 226 cases involving an African-American victim, the defendant was also African-American in 217 of them.

This type of strong confounding leads to the question of whether African-American defendants who kill a White victim are more likely to advance to penalty

trial than African-American defendants who kill African-American victims. Table 7 describes the relationship between race of defendant and race of victim. This table pertains only to African-American defendants.

Table 7

| Race of Primary Victim | | | |
|---|---------------------|--------------------------------|---------------------|
| | <u>White</u> | <u>African-American</u> | <u>TOTAL</u> |
| Number of Cases | 73 | 217 | 290 |
| Fraction of Cases going to Penalty Trial | 29/73 | 43/217 | 72/290 |
| Percent | 40% | 20% | 25% |
| Fraction of Cases that received death sentence | 10/73 | 15/217 | 25/290 |
| Percent | 14% | 7% | 9% |

Of the 555 death-eligible cases, 290 involved an African-American defendant and a White or African-American victim. Of the seventy-three death-eligible cases that involved an African-American defendant and a White victim, forty percent advanced to penalty trial. Of the 217 death-eligible cases involving an African-American defendant and an African-American victim, twenty percent proceeded to the penalty stage when African-American defendant was held fixed. However, this strong White victim effect disappears when confounding factors are taken into account.

We now focus on these confounding factors. Table 8 shows the distribution of African-American defendant cases among the counties. Specifically, this table

displays the fraction of death-eligible African-American defendant cases that progress to penalty trial.

Table 8

| COUNTY | White (WHITVIC) | African-American (Not WHITVIC) |
|---------------|-----------------|--------------------------------|
| 1. Atlantic | 3/8 *(3/9) | 3/17 (3/16) |
| 2. Bergen | 2/4 | 2/4 |
| 3. Burlington | 3/5 | 1/1 |
| 4. Camden | 0/2 | 8/28 |
| 5. Cape May | 2/2 | 0/1 |
| 6. Cumberland | 0/2 | 0/2 |
| 7. Essex | 3/13 *(3/14) | 10/84 (10/83) |
| 8. Gloucester | 2/3 | 0/1 |
| 9. Hudson | 0/4 | 1/10 |
| 10. Hunterdon | -- | -- |
| 11. Mercer | 3/4 *(3/5) | 6/17 (6/16) |
| 12. Middlesex | 3/6 | 1/6 |
| 13. Monmouth | 4/6 | 3/5 |
| 14. Morris | 1/1 | 1/1 |
| 15. Ocean | 1/3 | 0/1 |
| 16. Passaic | 1/2 | 3/10 |
| 17. Salem | 0/1 | -- |
| 18. Somerset | -- | 0/1 |
| 19. Sussex | -- | -- |
| 20. Union | 0/5 | 4/28 |
| 21. Warren | 1/2 | -- |

Both methods of coding the race or ethnicity of the victim are depicted.¹⁸

The table indicates the fraction of cases proceeding to penalty phase for each county. Several of the counties have White victim cases with smaller or equal

¹⁸ The fractions denoted by asterisks and enclosed in parentheses follow the approach devised by Professor Baldus, in which a White victim case is defined as any case in which a White victim was killed by the offender, regardless of the race of any other victims killed during the same incident.

fractions than African-American victim cases. Others have observations for only White or African-American victims. In a few, a shift of one observation would change inequality to equality. The raw numbers are relatively small. Few, if any, reliable conclusions can be drawn from these small samples.

We thus pool or combine the intra-county differences using the Cochran-Mantel-Haenszel Test. This method is commonly used by statisticians to determine statistical significance. Table 9 reflects the simple, bivariate results with one added measure designed to eradicate potential confounding. Specifically, 4H cases, those involving the killing of a police officer, are removed. As we noted earlier, 4H cases are highly related to progression to penalty trial and death verdict rates, and are highly confounded with the White victim variable. Combining the intra-county differences together with the time effect and applying the Cochran-Mantel-Haenszel test results in a White victim effect that is not at all statistically significant. The observed significance level is .27, far below the conventional .05 threshold.¹⁹

¹⁹ Candor requires us to note that tables 39 and 40 in the Technical Appendix indicate a statistically significant relationship between race of victim and progression to penalty trial even when county variability is taken into account. The P value for Table 38 went from 0.051 (almost significant) in 2003, to 0.035 in 2004, and to 0.17 in 2005. As explained by Professor Naus, however, three of the forty-four minority victim cases added to the death-eligible universe during this period advanced to the penalty phase, while one of the twenty-one White victim cases added during this period advanced to the penalty phase, a smaller fraction. In a similar vein, the P value for Table 39 went from 0.095 (not significant) in 2003, to 0.36 in 2004, and to 0.020 in 2005. Paradoxically, between 2003 and 2005, there was only one additional case in Table 39 that advanced to penalty trial and that case involved a minority victim. Stated somewhat differently, one of forty-four minority victim cases proceeded to the penalty stage while zero of the twenty-one additional White victim cases proceeded to the penalty stage. One might reasonably think that these changes would make the P value less in 2005 than in 2003 with respect to both tables. That inference does not, however, take into account the “time effect,” *i.e.*, the sharp reduction in the fraction of cases that advance to penalty trial that we have repeatedly

Table 9

| RACE OF VICTIM | | | |
|-----------------------|--------------------|----------------|--------------|
| Penalty Trial | Not WHITVIC | WHITVIC | TOTAL |
| No | 170 80% | 47 64% | 217 |
| Yes | 43 20% | 27 36% | 70 |
| Total | 213 | 74 | 287 |

Cochran-Mantel-Haenszel Tests
Stratified by county (counties 17, 18, 21 with only 1 race of victim, and counties 6,14 with all cases having same PT result. removed from data. This left 277 cases).

| | | | |
|-----------------------|------------|----|------------|
| CMH Test | Chi-Square | DF | Prob>Chisq |
| Correlation of Scores | 1.2295 | 1 | 0.27 |

Note: A case's race of victim is WHITVIC if at least one victim is white; and is Not WHITVIC, if there is no white victim. For this table, Not WHITVIC implies that there is at least one African-American victim and no white victim.

Carrying out the County-Time analysis as in Tables 38 and 39 did not change the conclusion.

Cochran-Mantel-Haenszel Tests Stratified by County and Time
Stratified by county ((counties 17,18,21 with only 1 race of victim, and counties 6,14 with all cases having same PT result removed from data. This left 277 cases. Then took additional cases for 2004 and 2005 and put into separate stratum. This left County 15 with 3 cases with same race of victim. Removing these left 274 cases.)

| | | | |
|-----------------------|------------|----|------------|
| CMH Test | Chi-Square | DF | Prob>Chisq |
| Correlation of Scores | 0.91 | 1 | 0.34 |

In short, the White victim effect on progression to penalty trial, where African-American defendant is fixed, does not approach statistical significance.²⁰

noted in this report. When this reduction in capitally prosecuted cases is taken into account, the White victim effect is not statistically significant.

²⁰ For the sake of completeness, we have analyzed whether there is a White victim effect on the return of death sentences when African-American defendant is fixed. A bivariate analysis yields a statistical significance level of .94. Utilizing the Cochran-Mantel-Haenszel test, the statistical significance level is .80. The relationship between African-American defendant and White victim is not statistically significant.

In conclusion, our case-sorting analyses show that there is not a statistically significant race of victim effect on progression to penalty trial once other factors such as county variability are considered. Although a higher percentage of White victim cases proceed to the penalty stage, this is explained by county variability and other confounding factors.

VI. COUNTY VARIABILITY

We have previously emphasized the importance of county variability in the administration of our capital punishment laws. The county in which the murder occurs and the prosecution is initiated continues to be one of the most significant variables in terms of death sentencing. Although New Jersey is one of the most densely populated states in the union, its population is diverse and heterogeneous. Perhaps recognizing this diversity, counties differ significantly in the rates that cases advance to penalty trial. Different county prosecutors undoubtedly harbor individual views concerning the appropriate disposition of murder cases. The composition of each county prosecutor's office undoubtedly reflects these differences. Law enforcement priorities and policies mirror them as well.

It is arguable that the county in which a death-eligible murder takes place should not influence whether or not a case is capitally prosecuted or whether a defendant must confront the possibility of being sentenced to death. We offer no opinion on the subject. Geographic disparity in the prosecution of death-eligible cases has been reported in California,²¹ Maryland²² and Pennsylvania.²³ We are obliged to make these observations. No one currently disputes the fact that the

²¹ Glenn L. Pierce and Michael L. Radelet, The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99 (November 2005).

²² Raymond Paternoster, An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction (January 7, 2003).

²³ Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System (March 4, 2003).

county prosecutor is the chief law enforcement officer in his or her jurisdiction and is thus vested with substantial discretion in allocating resources, developing policies and establishing priorities. The fact remains, however, that the Attorney General, as “chief law enforcement officer of the State,” under the Criminal Justice Act of 1970 (N.J.S.A. 52:17B-98), is statutorily obliged to “maintain a general supervision over...county prosecutors with a view to obtaining effective and uniform enforcement of the criminal laws.” In a plethora of areas, the Attorney General has performed this obligation admirably and consistently. For example, the Attorney General has issued guidelines in order to enhance uniformity in sentencing under the Comprehensive Drug Reform Act.²⁴ In a similar vein, the Attorney General has provided guidelines, adopting essentially a matrix approach, in an effort to assure uniformity in assigning tiers for sex offenders under Megan’s Law.²⁵

A similar approach could be taken to ameliorate the problem of county disparity. The most simple would require the county prosecutor to inform the Attorney General, or his or her designate, of a decision to capitally prosecute. The Attorney General would be required to approve or disapprove of every county prosecutor decision to bring capital charges. The problem with this model is that the Attorney General would not be advised of death-eligible cases in which the

²⁴ Attorney General’s Directive to Enhance Uniformity in Sentencing Under The Comprehensive Drug Reform Act (January 15, 1998).

²⁵ Attorney General’s Registrant Risk Assessment Scale Manual (October 3, 1995).

county prosecutor's decision was not to capitally prosecute. Consider, for example, a county prosecutor's decision to capitally prosecute a felony murder case. Without knowing the circumstances of cases in which county prosecutors have decided to forego capital prosecutions in similar instances, the Attorney General would be hard pressed to assure that like cases are treated in a like manner.

Perhaps a more viable approach would embrace a screening of all death-eligible cases.²⁶ These number approximately twenty to twenty-five cases per year. The Attorney General or his designate could feasibly examine these cases and make decisions concerning whether a particular case warrants a capital prosecution.

Prosecutors cannot be expected to march in lock-stop with respect to their decision whether or not to pursue a capital prosecution. But uniformity in making these decisions is desirable and perhaps a constitutional imperative. Scarce prosecutorial resources can be pooled and law enforcement assets can be marshaled with the assistance of the Attorney General's Office. We commend the matter to the Attorney General for his consideration.

²⁶ The United State's Attorney General's Office has adopted a variation of this approach. See United State's Attorneys' Manual (USAM) § 9-10.000 et. seq. (2001); U.S. Department of Justice, Criminal Resource Manual §§ 70, 73 (1997).

VII. SUMMARY OF FINDINGS

Our findings can be summarized as follows:

(1) Overall, the statistical evidence does not support the thesis that the race of the defendant affects the likelihood that he or she will be sentenced to death. The available statistical evidence discloses that minority defendants who commit death-eligible crimes are not more likely than White defendants to be sentenced to death.

Our bivariate studies disclose a racial disparity in terms of White and African-American defendants proceeding to a penalty trial and receiving a death sentence. A greater percentage of White defendants advance to penalty trial than African-American defendants. A greater percentage of White defendants are sentenced to death than African-American defendants. However, this finding is not sustained in our regression analyses or in several of our case-sorting studies. Overall, we are satisfied that the race of the defendant does not affect which cases progress to the penalty stage or which cases result in the return of a death verdict.

(2) The statistical evidence does not support the thesis that the race of the victim affects the likelihood that the defendant will receive the death penalty.

(3) Although some of the statistical evidence suggests that defendants who kill White victims are more likely to advance to a penalty trial than defendants who kill African-American victims, this inference is rebutted by confounding factors - primarily county variability in the rate that cases progress to the penalty stage. The counties in which a large number of African-American victim cases are concentrated have low rates of cases advancing to a penalty trial. Less urban counties with a high concentration of White victim cases have higher rates of capital prosecutions. This observation applies with equal force to cross-racial killings. While some of the statistical evidence suggests that African-American defendants who kill White victims are more likely to advance to penalty trial than African-American defendants who kill African-American victims, this inference is rebutted by the confounding factor of county variability.

(4) County variability continues to be a vexing problem in the administration of New Jersey's capital punishment laws. It is arguable that the county in which a murder takes place and a prosecution ensues should not be a factor in determining whether capital charges are brought and the death penalty is ultimately imposed. From the inception of the sentencing scheme, however, the difference in the rates that death-eligible cases are capitally

prosecuted in the various vicinages has had a major impact on the manner in which the laws have been applied.

(5) There has been a marked decline in capital prosecutions in New Jersey. Although the reduction in capital prosecutions has been greater in some counties than in others, the trend is statewide in scope.

Our findings this year are essentially the same as those made in earlier reports. We remain confident that the administration of New Jersey's capital punishment laws is not infected by racial or ethnic bias.