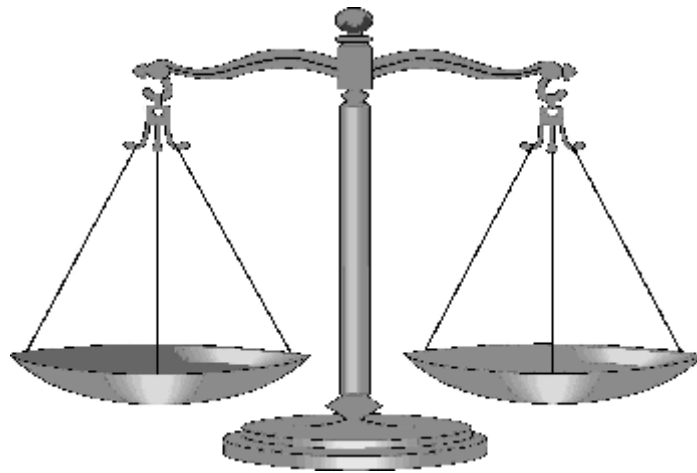


REPORT TO THE NEW JERSEY SUPREME COURT



Systemic Proportionality Review Project 2001 - 2002 Term

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I. INTRODUCTION

On August 2, 2000, our Supreme Court rendered its decision In re Proportionality Review, 165 N.J. 206 (2000), and adopted a multifaceted system to determine whether the administration of capital punishment in New Jersey is infected by racial discrimination. The 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 discrimination exists in death penalty sentencing. Thus, a defendant must relentlessly document the risk of racial disparity in order to establish systemic disproportionality. The test requires a substantial converging of outcomes produced by the application of the three different modes of analysis.

Our approach seeks to isolate and describe potential racial 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 outcomes at penalty trials, (2) death outcomes 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 analyses.

Sound statistical analysis requires that the cases examined 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 verdicts have been overturned and the defendants retried. We seek to avoid this problem by including the 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.

In last year's report, we found no statistically reliable evidence supporting the thesis that the race or ethnicity of the defendant affects whether or not his or her case advances to the penalty phase or whether or not a death sentence is returned. In a similar vein, the statistical evidence indicated that the race or ethnicity of the victim had no impact on whether or not the defendant was sentenced to death. However, we discovered unsettling statistical evidence indicating that cases involving killers of white

victims are more likely to progress to a penalty trial than cases involving killers of African-American victims. We, nevertheless, concluded that this finding was beclouded by confounding factors. Specifically, an important variable that is confounded with progression to penalty trial is the county where the charging decision and trial take place. A disproportionate number of minority victim cases are tried in counties with the lowest overall rates of progression to penalty trial.

This year's analysis strongly confirms these findings. Again, our analysis discloses no statistically reliable evidence that the race or ethnicity of the defendant affects whether or not the case proceeds to the penalty phase or whether or not the death sentence is imposed. Although bivariate analyses reveal that a greater proportion of White defendants than African-American defendants advance to the penalty phase and are sentenced to death, that conclusion is not supported by our regression studies and application of case sorting techniques. We also find no statistically reliable evidence that the race of the victim affects whether or not the death penalty is imposed.

Our findings respecting the effect of race or ethnicity of the victim on the progression of cases to the penalty phase to a large extent also mirror those made last year. There is some statistical evidence indicating that cases involving killers of white victims are more likely to progress to a penalty trial than cases involving killers of

African-American victims. Bivariate analysis and several regression studies trend toward that conclusion. However, we find strong evidence indicating that this conclusion is beclouded by county variability. Although we find a consistent and strong effect of race of victim in our regression studies utilizing relevant variables defined by experienced judges and set forth in our statutes, that finding essentially disappears when county variability is introduced. Specifically, an important variable that is confounded with progression to penalty trial is the county where the charging decision and trial take place. Our studies confirm the fact that a disproportionate number of minority victim cases are tried in counties with the lowest overall rates of progression to penalty trial. The fact that minority victim cases are concentrated in counties with low penalty trial rates has a strong impact on our regression and case sorting studies. Importantly, when county variability is accounted for in these analyses, the evidence does not suggest that the race of the victim plays an important role in determining which death-eligible cases advance to the penalty phase. In point of fact, our conclusion in that regard is stronger than that reached last year. When county variability is taken into account, the race-of-victim effect is not sustained in any of our regression or case-sorting studies. We are extremely confident that county variability explains why White victim cases seemingly progress to penalty trial at a higher rate than African-American victim cases. Stated somewhat differently, we find

no statistically reliable evidence indicating that White or African-American defendants who kill white victims are discriminated against overall within the State or within the counties studied.

We hasten to add that county variability may itself be a problem. It is arguable that the county in which a death-eligible crime takes place should not influence whether a case is capitally prosecuted or whether a case ultimately progresses to the penalty phase. We offer no opinion on the subject because the issue goes well beyond the contours of this report. We note that former Attorney General John Farmer impaneled a commission to explore the causes of county variability. The commission has not yet reported its findings. The point to be stressed here is that we have found no relentless documentation of the thesis that the administration of New Jersey's capital punishment laws is infected by racial or ethnic discrimination.

II. BIVARIATE ANALYSIS

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.

At the outset, we note 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" 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, 1646 (1999); see also Peter J. Bickel et al., Sex Bias in Graduate Admissions: Data from Berkeley, in Statistics and Public Policy 13 (William B. Fairley & Frederick Mosteller eds., 1977).¹ Nevertheless, raw numbers, percentages and fractions benefit from their transparency, and tell a tale

¹ In this piece, Professor Bickel described a well known study of sexual discrimination in the graduate programs of a leading university. I cited this study in my earlier report. Baime Report II at 34. I recount it again here because it so aptly illustrates the problems inherent in drawing conclusions from raw numbers. A large unadjusted statistical disparity indicated that the university admitted women at a much lower rate than men. This disparity led to a charge of sexual discrimination. On closer examination, however, it became apparent that the great bulk of women applied to departments with low admission rates, while men applied to departments with very high admission rates. The failure to control for the department to which the students applied fatally undercut the validity of the unadjusted disparity as a basis for inferring systemic gender discrimination.

that can easily be understood by laypersons. Moreover, they provide a basis for annual comparison. We thus consider bivariate analysis as an essential tool in our multifaceted system to detect the presence of racial or ethnic discrimination.

Certain prefatory comments are in order. In prior reports I questioned the need to exclude all but one disposition in cases where the defendant has been tried multiple times for the same murder. See, e.g., David S. Baime, Report to the New Jersey Supreme Court: Systemic Proportionality Review 18 (Dec. 1, 1999) (Baime Report I). In somewhat pungent language, I wrote that while the rule advocated by Professors David Weisburd and Joseph Naus "made sense in the arcane world of statistics, it seem[ed] . . . to defy common sense in a legal context." Id. at 18-19. Because of my uncertainty, I included all case dispositions in my sections dealing with bivariate analysis, but adopted the professors' recommendation in sections dealing with regression studies and case sorting techniques. After further study, I have now arrived at the conclusion that the professors were correct in their determination and that the "first case" and "last case samples" should be utilized across the board. More specifically, our studies rest on the assumption that there is no systematic relationship between measured characteristics of the case and unmeasured characteristics that influence death penalty sentencing. The basic statistical assumption is that each case is independent of others. This principle applies with equal force to bivariate analysis.

In this section, I have therefore adopted the professors' method for defining a single case for each defendant. While this approach makes it more difficult for the reader to compare this year's raw numbers with those contained in the bivariate analysis presented last year, I am convinced that adoption of the "single case" rule provides a truer form of analysis.

A. Race of Defendant and Death Outcomes at Penalty Trial

There is no statistically significant relationship between the race of the defendant and the return of death penalty verdicts in penalty trials.² In the "first case sample", thirty-five percent of White defendants were sentenced to death and approximately thirty-three percent of African-American defendants were sentenced to death. Only twelve percent of Hispanic defendants received the death penalty, but there were only seventeen Hispanic defendants in this analysis overall. See Technical Appendix, Table 1.1. The "last case sample" yielded essentially the same results. There is no appreciable difference between the death sentencing rates of White defendants and

² A finding is said to be statistically significant if chance, acting alone, probably would not have caused it. In many situations, the probability of the chance occurrence of a relationship or difference . . . of a particular magnitude can be calculated and expressed in terms of a p-value. In many research contexts, a relationship or difference will be considered statistically significant if $p < .05$; that is, if there is less than a one-in-twenty probability that a comparable finding would have emerged as a matter of chance alone. State v. Loftin, 157 N.J. 253, 301 (1999) (citing John M. Conley & David W. Peterson, The Science of Gatekeeping: The Federal Judicial Center's New Reference Manual on Scientific Evidence, 74 N.C. L. Rev. 1183, 1209 n.159 (1996)).

African-American defendants. See Technical Appendix, Table 1.2. Simply stated, the results do not achieve statistical significance.

B. Race of Victim and Death Outcomes at Penalty Trial

We find no statistically significant relationship between the race of the victim and the return of the death penalty in penalty trials. In the "first case sample", the jury sentenced the defendant to death in approximately thirty-one percent of the cases in which the victim was White, and in thirty-five percent of the cases in which the victim was African-American. Although twenty-five percent of the cases involving Hispanic victims resulted in the imposition of the death penalty, the sample is too small to arrive at any sound conclusion. See Technical Appendix, Table 5.1. The "last case sample" yielded essentially the same results. See Technical Appendix, Table 5.2. To recapitulate, there is no statistically significant difference in death sentencing rates comparing cases involving White victims and cases involving African-American victims in the penalty trial universe.

C. Race of Defendant and Death Outcomes for Death-Eligible Cases

There is a statistically significant relationship between the race of the defendant and death outcome in the "first case sample." Although it appears somewhat counterintuitive, the "first case sample" indicates that a greater percentage of White defendants are sentenced to death than African-American defendants. Approximately

fifteen percent of White defendants in death-eligible cases were sentenced to death. In comparison, only nine percent of African-American defendants in death-eligible cases and only four percent of Hispanic defendants in death-eligible cases were sentenced to death. See Technical Appendix, Table 9.1. White defendants are also sentenced to death at a higher rate than African-American defendants and Hispanic defendants in the "last case sample," but this result is not statistically significant at the five percent threshold. See Technical Appendix, Table 9.2.

D. Race of Victim and Death Outcomes for Death-Eligible Cases

In the "first case sample," approximately thirteen percent of White victim cases resulted in imposition of the death penalty. In comparison, approximately eight percent of African-American victim cases resulted in imposition of the death penalty, and approximately seven percent of Hispanic victim cases resulted in imposition of the death penalty. See Technical Appendix, Table 13.1. These results do not reach the .05 threshold statisticians normally apply in determining the significance of a particular finding. The significance level is low (.139). While a greater percentage of White victim cases than African-American victim cases result in imposition of the death penalty, there is no significant bivariate relationship between race of victim and death outcome. This observation applies with equal force to the "last case sample." See Technical Appendix, Table 13.2. It also applies whether victims are coded in three

categories – White, African-American and Hispanic – or two categories – White and African-American. See Technical Appendix, Tables 14.1 and 14.2.

E. Race of Defendant and Advancement to Penalty Trial

We find a consistent and significant bivariate relationship between race of defendant and progression to the penalty phase. Again, our findings are counterintuitive. Forty-two percent of White defendants advance to penalty trial in the "first case sample". In contrast, only twenty-seven percent of African-American defendants and only thirty-two percent of Hispanic defendants advance to penalty trial. See Technical Appendix, Table 17.1. The result is statistically significant at the .01 level. The results are similar in the "last case sample," and are statistically significant at the .005 level. See Technical Appendix, Table 17.2. The results reach the .001 significance threshold when we compare only African-American and White defendants both for the "first case" and "last case samples." See Technical Appendix, Tables 18.1 and 18.2. Thus, our bivariate analysis discloses that a greater percentage of White defendants than African-American or Hispanic defendants advance to penalty trial.

F. Race of Victim and Advancement to Penalty Trial

There is a strong and statistically significant relationship between race of victim and advancement to penalty trial. While approximately forty-two percent of White victim cases advanced to penalty trial, only twenty-two percent of African-American victim cases and only twenty-nine percent of Hispanic victim cases progressed to the penalty phase with respect to the "first case sample." See Technical Appendix, Table 21.1. This finding is statistically significant at the .001 threshold. The results are essentially the same with respect to the "last case sample." See Technical Appendix, Table 21.2. Moreover, the race-of-victim effect persists whether three categories – White, African-American and Hispanic – are considered, or two categories – White and African-American – are considered. See Technical Appendix, Tables 22.1 and 22.2.

The following tables reflect our findings:

I. RACE OF DEFENDANT - PENALTY TRIAL CASES

A. <u>(First Case Sample - 149 Cases)</u>		<u>Cases Resulting in Death (47 Cases)</u>
1. <u>White Defendants:</u>	60 (40.3%)	21 (44.7%)
2. <u>African-American Defendants:</u>	72 (48.3%)	24 (51.1%)
3. <u>Hispanic Defendants:</u>	17 (11.4%)	2 (4.3%)
<p>35% (21/60) of the White defendant cases resulted in the death penalty. 33.3% (24/72) 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.</p>		
B. <u>(Last Case Sample - 137 Cases)</u>		<u>Cases Resulting in Death (27 Cases)</u>
1. <u>White Defendants:</u>	56 (40.9%)	13 (48.2%)
2. <u>African-American Defendants:</u>	64 (46.7%)	13 (48.2%)
3. <u>Hispanic Defendants:</u>	17 (12.4%)	1 (3.7%)
<p>23.2% (13/56) of the White defendant cases resulted in the death penalty. 20.3% (13/64) of the African-American defendant cases resulted in the death penalty. 5.9% (1/17) of the Hispanic defendant cases resulted in the death penalty.</p>		
C. <u>(First Case Sample - 132 Cases)</u>		<u>Cases Resulting in Death (45 Cases)</u>
1. <u>White Defendants:</u>	60 (45.5%)	21 (46.7%)
2. <u>African-American Defendants:</u>	72 (54.6%)	24 (53.3%)
<p>35% (21/60) of the White defendant cases resulted in the death penalty. 33.3% (24/72) of the African-American defendant cases resulted in the death penalty.</p>		
D. <u>(Last Case Sample - 120 Cases)</u>		<u>Cases Resulting in Death (26 Cases)</u>
1. <u>White Defendants:</u>	56 (46.7%)	13 (50%)
2. <u>African-American Defendants:</u>	64 (53.3%)	13 (50%)

23.2% (13/56) of the White defendant cases resulted in the death penalty. **20.3% (13/64)** of the African-American defendant cases resulted in the death penalty.

II. RACE OF VICTIM - PENALTY TRIAL CASES

A. (First Case Sample - 146 Cases)		Cases Resulting in Death (46 Cases)
1. <u>White Victims</u>:	90 (61.6%)	28 (60.9%)
2. <u>African-American Victims</u>:	40 (27.4%)	14 (30.4%)
3. <u>Hispanic Victims</u>:	16 (11%)	4 (8.7%)
<p>31.1% (28/90) of the White victim cases resulted in the death penalty. 35% (14/40) of the African-American victim cases resulted in the death penalty. 25% (4/16) of the Hispanic victim cases resulted in the death penalty.</p>		
B. (Last Case Sample - 134 Cases)		Cases Resulting in Death (27 Cases)
1. <u>White Victims</u>:	83 (61.9%)	17 (63%)
2. <u>African-American Victims</u>:	35 (26.1%)	7 (25.9%)
3. <u>Hispanic Victims</u>:	16 (11.9%)	3 (11.1%)
<p>20.5% (17/83) of the White victim cases resulted in the death penalty. 20% (7/35) of the African-American victim cases resulted in the death penalty. 18.8% (3/16) of the Hispanic victim cases resulted in the death penalty.</p>		
C. (First Case Sample - 130 Cases)		Cases Resulting in Death (42 Cases)
1. <u>White Victims</u>:	90 (69.2%)	28 (66.7%)
2. <u>African-American Victims</u>:	40 (30.8%)	14 (33.3%)
<p>31.1% (28/90) of the White victim cases resulted in the death penalty. 35% (14/40) of the African-American victim cases resulted in the death penalty.</p>		
D. (Last Case Sample - 118 Cases)		Cases Resulting in Death (24 Cases)
1. <u>White Victims</u>:	83 (70.3%)	17 (70.8%)
2. <u>African-American Victims</u>:	35 (29.7%)	7 (29.2%)

20.5% (17/83) of the White victim cases resulted in the death penalty. **20% (7/35)** of the African-American victim cases resulted in the death penalty.

III. RACE OF DEFENDANT - DEATH-ELIGIBLE CASES

A. (First Case Sample - 465 Cases)	Cases Resulting in Death (47 Cases)
1. White Defendants: 142 (30.5%)	21 (44.7%)
2. African-American Defendants: 270 (58.1%)	24 (51.1%)
3. Hispanic Defendants: 53 (11.4%)	2 (4.3%)
<p>14.8% (21/142) of the White defendant cases resulted in the death penalty. 8.9% (24/270) of the African-American defendant cases resulted in the death penalty. 3.8% (2/53) of the Hispanic defendant cases resulted in the death penalty.</p>	
B. (Last Case Sample - 465 Cases)	Cases Resulting in Death (27 Cases)
1. White Defendants: 142 (30.5%)	13 (48.2%)
2. African-American Defendants: 270 (58.1%)	13 (48.2%)
3. Hispanic Defendants: 53 (11.4%)	1 (3.7%)
<p>9.2% (13/142) of the White defendant cases resulted in the death penalty. 4.8% (13/270) of the African-American defendant cases resulted in the death penalty. 1.9% (1/53) of the Hispanic defendant cases resulted in the death penalty.</p>	
C. (First Case Sample - 412 Cases)	Cases Resulting in Death (45 Cases)
1. White Defendants: 142 (34.5%)	21 (46.7%)
2. African-American Defendants: 270 (65.5%)	24 (53.3%)
<p>14.8% (21/142) of the White defendant cases resulted in the death penalty. 8.9% (24/270) of the African-American defendant cases resulted in the death penalty.</p>	
D. (Last Case Sample - 412 Cases)	Cases Resulting in Death (26 Cases)
1. White Defendants: 142 (34.5%)	13 (50%)
2. African-American Defendants: 270 (65.5%)	13 (50%)
<p>9.2% (13/142) of the White defendant cases resulted in the death penalty. 4.8% (13/270) of the African-American defendant cases resulted in the death penalty.</p>	

IV. RACE OF VICTIM - DEATH-ELIGIBLE CASES

A. (First Case Sample - 453 Cases)		Cases Resulting in Death (46 Cases)
1. <u>White Victims:</u>	213 (47%)	28 (60.9%)
2. <u>African-American Victims:</u>	185 (40.8%)	14 (30.4%)
3. <u>Hispanic Victims:</u>	55 (12.1%)	4 (8.7%)
<p>13.2% (28/213) of the White victim cases resulted in the death penalty. 7.6% (14/185) of the African-American victim cases resulted in the death penalty. 7.3% (4/55) of the Hispanic victim cases resulted in the death penalty.</p>		
B. (Last Case Sample - 453 Cases)		Cases Resulting in Death (27 Cases)
1. <u>White Victims:</u>	213 (47%)	17 (63%)
2. <u>African-American Victims:</u>	185 (40.8%)	7 (25.9%)
3. <u>Hispanic Victims:</u>	55 (12.1%)	3 (11.1%)
<p>8% (17/213) of the White victim cases resulted in the death penalty. 3.8% (7/185) of the African-American victim cases resulted in the death penalty. 5.5% (3/55) of the Hispanic victim cases resulted in the death penalty.</p>		
C. (First Case Sample - 398 Cases)		Cases Resulting in Death (42 Cases)
1. <u>White Victims:</u>	213 (53.5%)	28 (66.7%)
2. <u>African-American Victims:</u>	185 (46.5%)	14 (33.3%)
<p>13.2% (28/213) of the White victim cases resulted in the death penalty. 7.6% (14/185) of the African-American victim cases resulted in the death penalty.</p>		
D. (Last Case Sample - 398 Cases)		Cases Resulting in Death (24 Cases)
1. <u>White Victims:</u>	213 (53.5%)	17 (70.8%)
2. <u>African-American Victims:</u>	185 (46.5%)	7 (29.2%)
<p>8% (17/213) of the White victim cases resulted in the death penalty. 3.8% (7/185) of the African-American victim cases resulted in the death penalty.</p>		

V. RACE OF DEFENDANT - ADVANCEMENT TO PENALTY TRIAL

A. (First Case Sample - 465 Cases)		<u>Cases Resulting in Pen. Trial (149 Cases)</u>
1. White Defendants:	142 (30.5%)	60 (40.3%)
2. African-American Defendants:	270 (58.1%)	72 (48.3%)
3. Hispanic Defendants:	53 (11.4%)	17 (11.4%)
<p>42.3% (60/142) of the White defendant cases advanced to penalty trial. 26.7% (72/270) of the African-American defendant cases advanced to penalty trial. 32.1% (17/53) of the Hispanic defendant cases advanced to penalty trial.</p>		
B. (Last Case Sample - 465 Cases)		<u>Cases Resulting in Pen. Trial (137 Cases)</u>
1. White Defendants:	142 (30.5%)	56 (40.9%)
2. African-American Defendants:	270 (58.1%)	64 (46.7%)
3. Hispanic Defendants:	53 (11.4%)	17 (12.4%)
<p>39.4% (56/142) of the White defendant cases advanced to penalty trial. 23.7% (64/270) of the African-American defendant cases advanced to penalty trial. 32.1% (17/53) of the Hispanic defendant cases advanced to penalty trial.</p>		
C. (First Case Sample - 412 Cases)		<u>Cases Resulting in Pen. Trial (132 Cases)</u>
1. White Defendants:	142 (34.5%)	60 (45.5%)
2. African-American Defendants:	270 (65.5%)	72 (54.6%)
<p>42.3% (60/142) of the White defendant cases advanced to penalty trial. 26.7% (72/270) of the African-American defendant cases advanced to penalty trial.</p>		
D. (Last Case Sample - 412 Cases)		<u>Cases Resulting in Pen. Trial (120 Cases)</u>
1. White Defendants:	142 (34.5%)	56 (46.7%)
2. African-American Defendants:	270 (65.5%)	64 (53.3%)
<p>39.4% (56/142) of the White defendant cases advanced to penalty trial. 23.7% (64/270) of the African-American defendant cases advanced to penalty trial.</p>		

VI. RACE OF VICTIM - ADVANCEMENT TO PENALTY TRIAL		
A. (First Case Sample - 453 Cases)		Cases Resulting in Pen. Trial (146 Cases)
1. White Victims:	213 (47%)	90 (61.6%)
2. African-American Victims:	185 (40.8%)	40 (27.4%)
3. Hispanic Victims:	55 (12.1%)	16 (11%)
<p>42.3% (90/213) of the White victim cases advanced to penalty trial. 21.6% (40/185) of the African-American victim cases advanced to penalty trial. 29.1% (16/55) of the Hispanic victim cases advanced to penalty trial.</p>		
B. (Last Case Sample - 453 Cases)		Cases Resulting in Pen. Trial (134 Cases)
1. White Victims:	213 (47%)	83 (61.9%)
2. African-American Victims:	185 (40.8%)	35 (26.1%)
3. Hispanic Victims:	55 (12.1%)	16 (11.9%)
<p>39% (83/213) of the White victim cases advanced to penalty trial. 18.9% (35/185) of the African-American victim cases advanced to penalty trial. 29.1% (16/55) of the Hispanic victim cases advanced to penalty trial.</p>		
C. (First Case Sample - 398 Cases)		Cases Resulting in Pen. Trial (130 Cases)
1. White Victims:	213 (53.5%)	90 (69.2%)
2. African-American Victims:	185 (46.5%)	40 (30.8%)
<p>42.3% (90/213) of the White victim cases advanced to penalty trial. 21.6% (40/185) of the African-American victim cases advanced to penalty trial.</p>		
D. (Last Case Sample - 398 Cases)		Cases Resulting in Pen. Trial (118 Cases)
1. White Victims:	213 (53.5%)	83 (70.3%)
2. African-American Victims:	185 (46.5%)	35 (29.7%)
<p>39% (83/213) of the White victim cases advanced to penalty trial. 18.9% (35/185) of the African-American victim cases advanced to penalty trial.</p>		

III. THE REGRESSION METHOD

The basic premise upon which our analysis rests is that in assessing a race or ethnicity effect, as contrasted against defining culpability levels, we do not have to account for all factors that influence death penalty sentencing. Instead, we need only to include in our model those factors that are related to the outcome variable (either advancement to penalty trial or 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. We thus seek to isolate and ultimately control for possible confounders. Where race or ethnicity is distributed equally, or in statistical terms, where all else is equivalent, there is no need to take into account that variable. But where there is variability in a parameter, *i.e.*, where race or ethnicity is unevenly distributed, that variable is considered for inclusion in the regression model. Our method excludes variables that are not possible confounders but includes others that are.

The difference between the goal of gaining a reliable prediction of the outcome measure and that of controlling for confounding allows us to alleviate the tension between New Jersey's relatively small database and the guidelines of parsimony recommended by the venerable Professor John Tukey. Those guidelines require at

least five cases in the infrequent outcome category (progression to penalty trial or imposition of the death penalty) for each of the independent variables. See John Tukey, Report to Special Master 5 (January 27, 1997); see also Richard Cohen, Report to the New Jersey Supreme Court 27 (January 27, 1997).

We need not describe at length the statistical strategies we have developed to meet the demands of parsimony. These methods are discussed in great detail in our prior reports. See David S. Baime, Report to the New Jersey Supreme Court: Systemic Proportionality Review 15-18 (June 1, 2001) (Baime Report II); Baime Report I at 41-42. Suffice it to say, we have applied these strategies in our reports for the last two years, and we are extremely confident that the results we have reached are reliable and comport with sound statistical practice.

As in the past, we examine the effect of the race or ethnicity of the defendant and the race or ethnicity of the victim to each of the critical decision points in the administration of our capital punishment laws: (1) death outcomes at penalty trials, (2) death outcomes among all death-eligible cases, and (3) advancement to penalty trial.

We examine the impact of race or ethnicity of defendant and race or ethnicity of victim separately in each category. We conduct four separate regression analyses within each of these categories. Specifically, we conduct regression studies including the three racial categories (White, African-American and Hispanic) and one including

only two racial categories (White and African-American). We conduct regression studies utilizing two data samples ("first case sample" and "last case sample"). Although the studies we perform rest on several alternative assumptions, it is noteworthy that the results yielded by our analyses are remarkably consistent.

A. Race of Defendant and Death Outcomes at Penalty Trial

We first consider the three racial categories (White, African-American and Hispanic). African-American and Hispanic defendants do not differ significantly from White defendants in terms of death outcomes. This is true both with respect to the "first case sample" and the "last case sample." See Technical Appendix, Tables 3.1 and 3.2.

Turning to our analysis comparing only two of the racial categories studied (White and African-American), the results are similar. The race of the defendant is not a statistically significant factor in terms of death outcomes. See Technical Appendix, Tables 4.1 and 4.2.

Our analyses provide no evidence of a statistically significant effect of race or ethnicity of the defendant on the return of death penalty verdicts.

B. Race of Victim and Death Outcomes at Penalty Trial

Considering the three racial categories (White, African-American and Hispanic), we find no statistically significant relationship between race of victim and imposition

of the death penalty. Neither White victim cases nor Hispanic victim cases differ appreciably from African-American victim cases in terms of death penalty verdicts. The race of victim is not statistically significant whether we examine the "first case sample" or the "last case sample." See Technical Appendix, Tables 7.1 and 7.2.

The results are similar when comparing only African-American victim cases and White victim cases. In the context of either the "first case sample" or the "last case sample," race of the victim is not a statistically significant factor in terms of death outcome. See Technical Appendix, Tables 8.1 and 8.2.

These analyses provide no evidence of a statistically significant effect of race or ethnicity of the victim on the return of death penalty verdicts.

C. Race of Defendant and Death Outcomes for Death-Eligible Cases

We first consider the three racial categories (White, African-American and Hispanic). The overall effect of the race of the defendant is not statistically significant. Neither African-American defendant cases nor Hispanic defendant cases differ materially from White defendant cases in terms of death penalty verdicts. This is true both with respect to the "first case sample" and the "last case sample." The race of defendant is not a statistically significant factor in terms of death outcome. See Technical Appendix, Tables 11.1 and 11.2.

The same results are reflected in our studies comparing only White defendant

cases with African-American defendant cases. The effect of the race of the defendant is minuscule and is not statistically significant. This finding applies equally with respect to the "first case sample" and the "last case sample." See Technical Appendix, Tables 12.1 and 12.2.

We do not find evidence supporting a statistically significant race-of- defendant effect on death penalty verdicts in the context of the death-eligible universe. While our bivariate analyses disclosed that White defendants are more likely to receive the death penalty than African-American or Hispanic defendants in the "first case sample," that effect was not sustained in multivariate analyses.

D. Race of Victim and Death Outcomes for Death-Eligible Cases

Comparing the three racial categories (White, African-American and Hispanic), we find no statistically significant effect of race-of-victim and death penalty verdicts. The same finding applies in the context of both the "first case sample" and the "last case sample." There is no statistically significant relationship between the race of the victim and death outcome. See Technical Appendix, Tables 15.1 and 15.2.

This finding is confirmed when we compare only White victim cases with African-American victim cases. Once again, our analysis does not show that the race of the victim is a statistically significant factor in terms of death outcome. This finding is further confirmed when examining either the "first case sample" or the "last case

sample." See Technical Appendix, Tables 16.1 and 16.2. Overall, we find no sound evidence that the race of the victim affects the jury's verdict with respect to imposition of the death penalty.

We find no evidence of a statistically significant race-of-victim effect on death penalty verdicts in death-eligible cases.

E. Race of Defendant and Advancement to Penalty Trial

It will be recalled that we found a strong statistical relationship between race of defendant and progression to penalty trial in our bivariate analysis. Specifically, a much greater percentage of White defendants was found to advance to the penalty phase than African-American or Hispanic defendants. This finding was not sustained in our regression studies.

Comparing the three racial categories (White, African-American and Hispanic), the race-of-defendant effect is small and is not statistically significant. This is true whether we compare African-American defendants or Hispanic defendants with White defendants or we examine the overall significance of the three category race-of-defendant measure. Our finding applies to both the "first case sample" and the "last case sample." See Technical Appendix, Tables 19.1 and 19.2. Race of defendant is not a statistically significant factor in terms of progression of a case to the penalty phase.

Our findings are confirmed when comparing only African-American defendants with White defendants. Race of defendant is not a statistically significant factor in predicting advancement to the penalty phase. This finding applies with respect to both the "first case sample" and the "last case sample." See Technical Appendix, Tables 20.1 and 20.2.

We do not find sustained evidence of a race-of-defendant effect on advancement to penalty trial.

F. Race of Victim and Advancement to Penalty Trial

We first examine the three racial categories (White, African-American and Hispanic). In both the "first case sample" and the "last case sample," we find a strong and statistically significant race effect. White victim cases are found to differ significantly from African-American victim cases. White victim cases are more likely to progress to a penalty trial than African-American victim cases. The overall race effect is significant at the .01 level. See Technical Appendix, Table 23.1. Hispanic victim cases are not found to differ significantly from African-American victim cases. Examining the "last case sample," the results are essentially the same. White victim cases are again found to be significantly different from African-American victim cases in terms of progression to a penalty trial. White victim cases progress to a penalty trial at a higher rate than African-American victim cases. Hispanic victim cases are not

significantly different from African-American victim cases in terms of progression of a case to the penalty phase. See Technical Appendix, Table 23.2.

These findings are stronger when only White victim cases are compared with African-American victim cases. In the first case sample, White victim cases are approximately three times as likely to progress to penalty trial than African-American victim cases. This result is statistically significant at greater than a .005 level. See Technical Appendix, Table 24.1. The "last case sample" yields similar results. The White victim effect is statistically significant at the .01 level. See Technical Appendix, Table 24.2.

G. Race of Victim - the Confounding Influence of County Variability

We have long suspected substantial county variability in the progression of cases to penalty trial. The point was first raised by Professor Baldus. See David C. Baldus, Death Penalty Proportionality Review Project: Final Report to the New Jersey Supreme Court, 22-23 (September 24, 1991). At a relatively early stage, the professor found that the penalty trial rates in several counties were much higher than those in other counties. Id. at 24. 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." Ibid. Professor Baldus also found "higher penalty trial rates in the non-urban

counties." Id. at 23.

We, too, noticed that penalty trial cases were unevenly distributed among the counties. A simple review of the cross-tabulation of advancement to penalty trial suggested a wide variability in rates at which cases advance to penalty trial in the individual counties. See Technical Appendix, Tables 25.1 and 25.2. 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. Last year we decided to test the thesis that county variability may serve as a 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.

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 there is a White victim effect in determining which death-eligible cases progress to the penalty phase. "[I]ncluding county variability controls in the regression studies pertaining to the three main categories (White, African-American and Hispanic), the White victim effect disappear[ed]." Baime Report II at

36. This was true both with respect to the "first case sample" and the "last case sample." Ibid. Comparing White victim cases with African-American victim cases, our findings were more equivocal. For the "first case sample," the race-of-victim effect continued to maintain statistical significance at the .05 level. Ibid. For the "last case sample," the race-of-victim effect approached, but did not reach, the .05 threshold of statistical significance. Ibid. "Thus, controlling for county variability, three of the four regression studies [did] not provide significant statistical evidence of a White victim effect in terms of cases advancing to a penalty trial." Ibid.

We have repeated these studies. With one important exception, our findings essentially echo those reached last year. Comparing the three racial categories, neither White victim cases nor Hispanic victim cases are significantly different (at the .05 threshold) from African-American victim cases. The overall race measure is also not statistically significant. This applies with equal force to the "first case sample" and the "last case sample." See Technical Appendix, Tables 26.1, 26.1.1, 26.2 and 26.2.1. Neither White victim cases nor Hispanic victim cases are significantly different from African-American victim cases, and the overall relationship between race of victim and progression to penalty trial is not statistically significant.

Unlike last year, this essential finding also applies when only White victim and African-American victim cases are considered. Taking into account county variability,

the race effect is not sustained at the .05 threshold. See Technical Appendix, Tables 27.1, 27.1.1, 27.2 and 27.2.1. Race of victim does not achieve statistical significance in any of our regression studies.

IV. 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 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. Its major weakness 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 about the

relationships observed.

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 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 on the "first case sample," which is composed of 469 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 150 penalty phase verdicts within the 469 case data set.

Because of the myriad of combinations examined in our study, I report on only the most salient. The reader is referred to the Technical Appendix for further information. Our principal findings are: (1) the race of the defendant is not an important factor in determining whether the death penalty is imposed, (2) a greater percentage of White defendants than African-American defendants advance to penalty trial, although this effect is confounded by county variability, (3) the race of the victim is not an important 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 (like finding 2) is confounded by county variability.

We stress that this year's findings essentially mirror the results reached in last year's report. This is to be expected because only twenty-four cases have been added

to the "first case sample," only four additional cases advanced to penalty trial, and only one case resulted in a death sentence.³ In short, few cases have been added to the data set studied. This comports with the general trend described in earlier reports in which, over time, a smaller proportion of death-eligible cases are capitally prosecuted, a smaller proportion proceed to the penalty phase, and fewer death sentence verdicts are returned by juries.

A. Race of Defendant

Examining the 469 cases contained in the "first case sample," we find that a smaller proportion of African-American defendants and Hispanic defendants advance to penalty trial than White defendants. Sixty of the 142 White defendant cases proceeded to penalty trial, approximately forty-two percent. Only seventy-two of the 270 African-American defendant cases proceeded to the penalty phase, approximately twenty-seven percent. Only seventeen of the fifty-three Hispanic defendant cases advanced to penalty trial, approximately thirty-two percent. See Technical Appendix, Table 28.

Similarly, a greater percentage of White defendants received the death sentence than either African-American defendants or Hispanic defendants. Of the 142 White

³ The death penalty was returned in two cases in the past year. However, one pertained to a retrial of a defendant previously convicted of murder and sentenced to death. Thus, only one death penalty case was added to the "first case sample."

defendant cases in the "first case sample," twenty-one resulted in death penalty verdicts, approximately fifteen percent. Of the 270 African-American defendant cases, twenty-four resulted in death penalty verdicts, approximately nine percent. Of the 53 Hispanic defendant cases, only two resulted in death penalty verdicts, approximately four percent. Ibid. Examining the penalty phase universe within the "first case sample," however, White and African-American defendants received the death sentence at approximately the same rate. A smaller proportion of Hispanic defendants received the death sentence. Ibid.

There is no evidence suggesting that African-American defendants or Hispanic defendants are discriminated against in the context of this data set. The following table reflects the results of our study:

<u>Defendant's Race</u>	<u>White</u>	<u>African-American</u>	<u>Hispanic</u>	<u>Other</u>	<u>TOTAL</u>
number of cases	(142)	(270)	(53)	(4)	(469)
fraction of cases that proceed to penalty trial	60/142 0.42	72/270 0.27	17/53 0.32	1/4 0.25	150/469 0.32
fraction of cases that resulted in death sentence	21/142 0.15	24/270 0.09	2/53 0.04	0/4 0	47/469 0.10
fraction of penalty trial cases that resulted in death sentence	21/60 0.35	24/72 0.33	2/17 0.12	0/1 0	47/150 0.31

These findings are confirmed by our analysis of the "first case sample,"

considering various combinations of aggravating and mitigating factors. For all the combinations studied, there is no statistically significant evidence that African-American defendants or Hispanic defendants advance to the penalty phase at a greater rate than White defendants. The following table reflects the results of our study:

<u>Defendant's Race</u>		<u>White</u>	<u>African-American</u>	<u>Hispanic</u>	<u>Other</u>	<u>TOTAL</u>
number of defendants		(142)	(270)	(53)	(4)	(469)
fraction to penalty trial		60/142 0.42	71/270 0.27	17/53 0.32	1/4 0.25	150/469 0.32
Among first cases with race and combination listed of factors 4C and 5D, the fraction that went to penalty trial						
<u>Combination</u>		<u>White</u>	<u>African-American</u>	<u>Hispanic</u>	<u>Other</u>	<u>TOTAL</u>
<u>4C</u>	<u>5D</u>					
absent	present	18/58 0.31	21/90 0.23	2/17 0.12	0/0 -	41/165 0.25
absent	absent	23/50 0.46	28/133 0.21	9/27 0.33	1/3 0.33	61/213 0.29
present	absent	11/15 0.73	15/28 0.54	2/4 0.50	0/1 0	28/48 0.58
present	present	8/19 0.42	8/19 0.42	4/5 0.80	0/0 -	20/43 0.47

Similarly, for all combinations studied, we found no statistically significant evidence suggesting that a greater fraction of African-American defendants are sentenced to death than White defendants. The following table reflects the results of

our study:

<u>Defendant's Race</u>		<u>White</u>	<u>African-American</u>	<u>Hispanic</u>	<u>Other</u>	<u>TOTAL</u>
number of cases		(142)	(270)	(53)	(4)	(469)
Among defendants with race and combination listed of factors 4C and 5D, the fraction that got at least one death sentence.						
<u>Combination</u>		<u>White</u>	<u>African-American</u>	<u>Hispanic</u>	<u>Other</u>	<u>TOTAL</u>
<u>4C</u>	<u>5D</u>					
absent	present	2/58 0.03	0/90 0	0/17 0	- -	2/165 0.01
absent	absent	12/50 0.24	11/133 0.08	1/27 0.04	0/3 0	24/213 0.11
present	absent	5/15 0.33	10/28 0.36	0/4 0	0/1 0	15/48 0.31
present	present	2/19 0.11	3/19 0.16	1/5 0.20	- -	6/43 0.14

In sum, our studies do not indicate that minority defendants proceed to penalty trial at a greater rate than White defendants or are sentenced to death at a greater rate than White defendants.

B. Race of Victim

Examining the 469 cases contained in the "first case sample," we find statistically significant evidence of a White victim effect on advancement to penalty trial. Of the 206 White victim cases, eighty-nine proceeded to the penalty phase,

approximately forty-three percent. Of the 188 African-American victim cases, only forty advanced to penalty trial, approximately twenty-one percent. Approximately twenty-nine percent of the fifty-eight Hispanic victim cases advanced to the penalty phase. As we will note, this finding of disparate treatment is not confirmed when county variability is taken into consideration. See Technical Appendix, Table 31.

Our findings respecting whether White victim cases are more likely to result in the death penalty are mixed. Twenty-eight of the 206 death-eligible White victim cases resulted in a death sentence, approximately fourteen percent. Fourteen of the 188 death-eligible African-American victim cases resulted in a death sentence, approximately seven percent. Four of the fifty-eight death-eligible Hispanic victim cases resulted in a death sentence, approximately seven percent.⁴ Ibid. If we compare the three racial categories, the difference between White victim cases and African-

⁴ The reader will note slight differences in the numbers and percentages of White victims, African-American victims and Hispanic victims in this section from those that appear in the section dealing with bivariate analysis. This appears to be an historical artifact. Dating back to the original Baldus recommendations on coding, two alternative methods of coding have been used in cases of simultaneous killings. The first Baldus method coded cases according to the chronological order in which victims were killed. The race of the first victim controls. Thus, if two individuals are murdered, the first White and the second African-American, the case is coded White victim. The second Baldus method accords primacy of White victims over other racial categories. Under this method, if a case includes an African-American victim and a White victim, the case is coded White victim. Historically, the first Baldus method has been used in bivariate analyses and case sorting, but the second method has been used in regression studies. The reader is to assume we have used the first method of coding in this section unless the contrary is specifically noted. In my view, this inconsistency should be reconciled. However, the question is currently a subject of debate. Because use of the alternative approaches does not impact on the results of this study, I have decided not to delay the filing of this report.

American victim cases is not statistically significant at the .05 threshold. But, if we compare only White victim and African-American victim cases, the difference is statistically significant. Again, we will examine this finding more systematically later in this report.

We add that there is no statistically significant difference in the context of penalty trial verdicts. In twenty-eight of eighty-nine White victim cases, the death penalty was imposed, approximately thirty-one percent. In fourteen of the forty African-American victim cases, the death penalty was imposed, approximately thirty-five percent. The sample of Hispanic victim cases is small. In four of seventeen Hispanic victim cases, the death penalty was imposed, approximately twenty-four percent. *Ibid.* In the penalty trial universe, there is thus no statistically significant evidence that the race of the victim affects death outcome. The following table reflects the results of our studies:

<u>Victim's Race</u>	<u>White</u>	<u>African-American</u>	<u>Hispanic</u>	<u>Other</u>	<u>TOTAL</u>
number of cases	206	188	58	17	469
fraction of cases that went to penalty trial	89/206 0.43	40/188 0.21	17/58 0.29	4/17 0.24	150/469 0.32
fraction of cases that received death sentence	28/206 0.14	14/188 0.07	4/58 0.07	1/17 0.06	47/469 0.10

fraction of penalty trial cases that received death sentence	28/89 0.31	14/40 0.35	4/17 0.24	1/4 0.25	47/150 0.31
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We considered the question of cross-racial killings. As we will note later in this report, there are very few cases in which White defendants have killed African-American or Hispanic victims. The numbers are too small to enable us to reach any conclusions when White defendant is held constant. Although African-American defendants generally kill African-American victims, the sample of cross-racial killings is large enough to allow us to study the question. Of sixty-two cases in which the primary victim was White, the African-American defendant was sentenced to death in ten cases, approximately sixteen percent. Of 181 cases in which the primary victim was African-American, the African-American defendant was sentenced to death in fourteen cases, approximately eight percent. See Technical Appendix, Table 36. This difference is not statistically significant.

C. White Victim Effect: Confounding Factors

Overall, we have found no sustained statistically significant evidence that the race of the defendant or the race of the victim affects the likelihood that the death sentence will be imposed. The evidence abounds the other way. However, the statistical evidence trends toward the conclusion that a greater percentage of White

victim cases than African-American victim cases progress to the penalty phase. As we noted earlier, our regression studies indicate that county variability tends to explain the difference between White victim and African-American victim cases in terms of progression to penalty trial. Our case-sorting approach also suggests that our finding of a White victim effect is confounded by county variability.

Examining the twenty-one counties, we see that a disproportionate number of African-American victim cases is concentrated in counties with extremely low rates of cases progressing to penalty trial. Conversely, White victim cases are concentrated in counties with extremely high rates of progression to penalty trial.

The three counties with the largest number of cases have among the lowest rates of cases progressing to the penalty phase. Camden County has fifty-three death-eligible cases. Twenty-five percent of these cases advanced to penalty trial. Essex County has ninety-nine cases. Nineteen percent of these cases advanced to penalty trial. Union County has forty-one cases. Seventeen percent of these cases went to penalty trial. Adding the percentages for these counties, we see that these three low penalty rate jurisdictions contain sixty-five percent of all African-American victim cases, fifty percent of all Hispanic victim cases, but only eighteen percent of all White victim cases. In contrast, three of the highest penalty rate counties, Gloucester County, Middlesex County and Monmouth County, have respectively fifty-four

percent, sixty percent and sixty-eight percent of cases proceeding to penalty trial. Significantly, these counties have a higher concentration of White victims. The following tables best illustrate the effect of county variability on racial disparities in terms of cases advancing to penalty trial.

County	Number of Cases	Percent Going To Penalty Trial	Percent of White Victim Cases
1. Atlantic	31	26%	55%
2. Bergen	21	48%	52%
3. Burlington	13	46%	92%
4. Camden	53	25%	23%
5. Cape May	12	25%	83%
6. Cumberland	11	9%	55%
7. Essex	99	19%	17%
8. Gloucester	13	54%	77%
9. Hudson	33	24%	48%
10. Hunterdon	2	50%	100%
11. Mercer	23	48%	35%
12. Middlesex	20	60%	60%
13. Monmouth	25	68%	80%
14. Morris	15	60%	80%
15. Ocean	13	46%	85%
16. Passaic	25	24%	20%
17. Salem	2	50%	100%

18. Somerset	4	0%	75%
19. Sussex	8	25%	100%
20. Union	41	17%	20%
21. Warren	5	60%	80%
Combined	469	32%	

County		White	African-American	Hispanic	Asian	Other	TOTAL
ATLANTIC	Count	17	13	0	1	0	31
	Row %	54.84	41.94	0.00	3.23	0.00	
	Col. %	8.25	6.91	0.00	12.50	0.00	
BERGEN	Count	11	4	2	2	2	21
	Row %	52.38	19.05	9.52	9.52	9.52	
	Col. %	5.34	2.13	3.45	25.00	22.22	
BURLINGTON	Count	12	1	0	0	0	13
	Row %	92.31	7.69	0.00	0.00	0.00	
	Col. %	5.83	0.53	0.00	0.00	0.00	
CAMDEN	Count	12	27	13	0	1	53
	Row %	22.64	50.94	24.53	0.00	1.89	
	Col. %	5.83	14.36	22.41	0.00	11.11	
CAPE MAY	Count	10	1	0	1	0	12
	Row %	83.33	8.33	0.00	8.33	0.00	
	Col. %	4.85	0.53	0.00	12.50	0.00	
CUMBERLAND	Count	6	2	3	0	0	11
	Row %	54.55	18.18	27.27	0.00	0.00	
	Col. %	2.91	1.06	5.17	0.00	0.00	
ESSEX	Count	17	69	12	0	1	99
	Row %	17.17	69.70	12.12	0.00	1.01	
	Col. %	8.25	36.70	20.69	0.00	11.11	
GLOUCESTER	Count	10	1	2	0	0	13
	Row %	76.92	7.69	15.38	0.00	0.00	
	Col. %	4.85	0.53	3.45	0.00	0.00	
HUDSON	Count	16	8	8	1	0	33
	Row %	48.48	24.24	24.24	3.03	0.00	
	Col. %	7.77	4.26	13.79	12.50	0.00	
HUNTERDON	Count	2	0	0	0	0	2
	Row %	100.00	0.00	0.00	0.00	0.00	
	Col. %	0.97	0.00	0.00	0.00	0.00	

County		White	African-American	Hispanic	Asian	Other	TOTAL
MERCER	Count	8	15	0	0	0	23
	Row %	34.78	65.22	0.00	0.00	0.00	
	Col. %	3.88	7.98	0.00	0.00	0.00	
MIDDLESEX	Count	12	4	4	0	0	20
	Row %	60.00	20.00	20.00	0.00	0.00	
	Col. %	5.83	2.13	6.90	0.00	0.00	
MONMOUTH	Count	20	3	1	0	1	25
	Row %	80.00	12.00	4.00	0.00	4.00	
	Col. %	9.71	1.60	1.72	0.00	11.11	
MORRIS	Count	12	1	0	1	1	15
	Row %	80.00	6.67	0.00	6.67	6.67	
	Col. %	5.83	0.53	0.00	12.50	11.11	
OCEAN	Count	11	0	1	0	1	13
	Row %	84.62	0.00	7.69	0.00	7.69	
	Col. %	5.34	0.00	1.72	0.00	11.11	
PASSAIC	Count	5	11	8	1	0	25
	Row %	20.00	44.00	32.00	4.00	0.00	
	Col. %	2.43	5.85	13.79	12.50	0.00	
SALEM	Count	2	0	0	0	0	2
	Row %	100.00	0.00	0.00	0.00	0.00	
	Col. %	0.97	0.00	0.00	0.00	0.00	
SOMERSET	Count	3	1	0	0	0	4
	Row %	75.00	25.00	0.00	0.00	0.00	
	Col. %	1.46	0.53	0.00	0.00	0.00	
SUSSEX	Count	8	0	0	0	0	8
	Row %	100.00	0.00	0.00	0.00	0.00	
	Col. %	3.88	0.00	0.00	0.00	0.00	
UNION	Count	8	26	4	1	2	41
	Row %	19.51	63.41	9.76	2.44	4.88	
	Col. %	3.88	13.83	6.90	12.50	22.22	

County		White	African-American	Hispanic	Asian	Other	TOTAL
WARREN	Count	4	1	0	0	0	5
	Row %	80.00	20.00	0.00	0.00	0.00	
	Col. %	1.94	0.53	0.00	0.00	0.00	
TOTAL		206	188	58	8	9	469

In most cases, the race of defendant and race of victim were the same. This fact supports the implication that the lower rate at which African-American victim cases proceeded to penalty trial is confounded with the lower rate that African-American defendant cases proceeded to penalty trial. The following table illustrates this relation between race of victim and race of defendant:

Defendant's Race						
Victim's Race	White	African-American	Hispanic	Asian	Other	TOTAL
White	129	62	15	0	0	206
African-American	2	181	5	0	0	188
Hispanic	8	19	30	0	1	58
Asian	1	4	1	1	1	8
Other	2	4	2	0	1	9
TOTAL	142	270	53	1	3	469

Among the White defendant cases, 129 involved a White victim. Only two involved African-American victims. From a different vantage point, there are 188 cases in which the victim was African-American. One hundred eighty-one of those cases involved an African-American perpetrator.

This type of strong confounding leads to the question whether African-Americans who kill White victims are more likely to proceed to penalty trial than African-Americans who kill African-American victims. The following table provides a possible answer:

Race of Primary Victim for African-American Defendants			
	<u>White</u>	<u>African-American</u>	<u>TOTAL</u>
Number of Cases	62	181	243
Fraction of Cases Proceeding to Penalty Trial	29/62	40/181	69/243
Percent	47%	22%	28%

This table breaks down the race of victim and the rate of proceeding to penalty trial of African-American defendants. There are 243 cases in which the defendant is African-American. Of those 243 cases, sixty-two involved a White victim. Forty-seven percent of the White victim cases advanced to penalty trial. Of the 243 cases, there were 181 African-American victims. Twenty-two percent of the African-American victim cases proceeded to penalty trial. But our prior studies showed that even for comparisons within African-American defendant cases, one must still take the county variability effect into consideration. White victim cases were concentrated in counties with high rates of cases progressing to penalty trial. This essential finding is confirmed by this year's study. African-American victim cases were concentrated in counties with low rates of progression of cases to penalty trial. This suggests that a county effect must be taken into account even when we hold the race of the defendant fixed.

We performed other studies aimed at determining whether there was intra-county discrimination in the selection of cases that advanced to the penalty phase. For example, we considered the impact of aggravating factors that tend to propel juries to return the death penalty on cases proceeding to the penalty phase. To generalize, we found other far more plausible considerations than the race of the victim in explaining why some cases advanced to penalty trial and others did not. We utilized other methods to determine or detect a race-of-victim effect in specific counties. We found no statistically significant intra-county disparities in the rate that White and African-American victim cases advanced to penalty trial in the counties with a sufficient number of cases to permit reliable analysis. In some counties, the numbers were too small to enable us to draw reliable conclusions. In such cases, we attempted to cumulate the cases in order to provide an adequate sample. We did not find a White victim effect.

V. SUMMARY

Four questions are presented: (1) whether minority defendant cases are more likely than White defendant cases to advance to penalty trial; (2) whether minority defendant cases are more likely than White defendant cases to result in imposition of the death penalty; (3) whether White victim cases are more likely than minority victim cases to advance to penalty trial; and (4) whether White victim cases are more likely than minority victim cases to result in imposition of the death penalty.

We have attempted to provide reliable answers to these questions by utilizing a multifaceted approach consisting of bivariate analysis, multivariate regression and case sorting. In our attempt to be fair and impartial, we have examined the data based on numerous alternative statistical assumptions. Our answers to the questions posed are thus necessarily "messy" in the sense that occasionally different assumptions have led to slightly different results. This will undoubtedly concern those who demand absolute certainty. But statistics are not the answer. They, instead, provide only evidence of the answer. All evidence, even the most reliable, is fallible. We consider a result compelling when there is a substantial converging of findings utilizing the three modes of analysis. In other words, relentless documentation of racial or ethnic disparity requires a converging of findings.

With those prefatory comments in mind, we state our conclusions: (1) there is no sustained, statistically significant evidence that the race of the defendant affects which cases advance to penalty trial; (2) there is no sustained, statistically significant evidence that the race of the defendant affects which cases result in imposition of the death penalty; (3) there is statistically significant evidence that White victim cases are more likely than African-American victim cases to advance to penalty trial, but that finding is eradicated when county variability is taken into account; and (4) there is no sustained, statistically significant evidence that White victim cases are more likely than minority victim cases to result in imposition of the death penalty.