

ADMINISTRATIVE OFFICE OF THE COURTS  
STATE OF NEW JERSEY

PHILIP S. CARCHMAN, J.A.D.  
ACTING ADMINISTRATIVE DIRECTOR OF THE COURTS

JOHN P. McCARTHY, JR., ESQ.  
DIRECTOR, OFFICE OF TRIAL COURT SERVICES



JOSEPH J. BARRACO, ESQ.  
ASSISTANT DIRECTOR  
CRIMINAL PRACTICE DIVISION  
PO Box 982  
TRENTON, NEW JERSEY 08625-0982  
(609) 292-4638

July 10, 2006

Chief Justice and Associate Justices  
R.J. Hughes Justice Complex  
8<sup>th</sup> Floor, Jewel  
P.O. Box 023  
Trenton, New Jersey 08625

Dear Chief Justice and Associate Justices:

Enclosed please find the *Special Report to the Supreme Court on Reactions to the 2004-2005 Systemic Proportionality Review Project Report*. This report analyzes responses received from the Attorney General, Public Defender and New Jerseyans for Alternatives to the Death Penalty to our 2004-2005 Systemic Proportionality Report. The Special Report also provides the Court with some possible options on how to address the issue of county variability.

I want to express my appreciation to Joe Barraco, Vance Hagins and Marlaine Meskunas for their assistance. Neither floods nor budgetary problems deterred them from completing this report.

Very truly yours,

A handwritten signature in cursive script that reads "David S. Baime".

David S. Baime, Special Master

/jjb

Attachment

c: Philip S. Carchman, J.A.D.  
John P McCarthy, Jr., Esq.  
Joseph J. Barraco, Esq.  
Stephen W. Townsend, Clerk of the Supreme Court  
Vance D. Hagins, Esq.



**SPECIAL REPORT TO THE SUPREME COURT  
ON REACTIONS TO THE  
2004-2005 SYSTEMIC PROPORTIONALITY  
REVIEW PROJECT REPORT**

By: David S. Baime  
Special Master  
July 10, 2006

This memorandum concerns the status of our systemic proportionality review studies. On December 15, 2005, we submitted our latest report on the subject to the Supreme Court.<sup>1</sup> We found: (1) while White defendants advance to penalty trial and are sentenced to death at higher rates than African-American or Hispanic defendants, our multivariate regression analyses disclose no sound statistical evidence that the race of defendant plays an important role in the administration of our capital punishment laws; (2) there is no consistent, significant statistical evidence that the race of the victim is an important factor in determining which defendants are sentenced to death; (3) although some statistical evidence suggests that White victim cases proceed to penalty trial at a higher rate than African-American victim cases, the race of the victim is not a significant factor in determining which cases advance to the penalty stage, and (4) county variability, i.e., the disparity in the rates that death-eligible cases are capitally prosecuted in the various vicinages, is a key factor in determining whether a defendant faces a death penalty trial.<sup>2</sup> We concluded that New Jersey's capital punishment system is not infected with racial or ethnic prejudice, but that huge differences in the rates that individual county prosecutors institute capital prosecutions continue to be a vexing problem and raise significant questions of

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<sup>1</sup> David S. Baime, Report to the New Jersey Supreme Court: Systemic Proportionality Review Project 2004-2005 Term (December 15, 2005).

<sup>2</sup> Id. at 1-4.

fundamental fairness.<sup>3</sup> We suggested that centralization of the decision whether or not to capitally prosecute in the Attorney General's Office could ameliorate or resolve the problem of county variability.<sup>4</sup>

Pursuant to the Supreme Court's direction, we served the Attorney General and the Public Defender with copies of our report and invited comment. With respect to the Attorney General, we specifically referred to that part of our report dealing with county variability and requested that Office's response. The Supreme Court subsequently granted the motion of New Jerseyans for Alternatives to the Death Penalty (NJADP) to appear in the role of amicus curiae.

#### I. THE PARTIES RESPONSES

Neither the Attorney General nor the Public Defender commented on our findings pertaining to race or ethnicity. The Attorney General's reticence in that respect is understandable, because our conclusion comports with arguments previously advanced by that Office. However, the current Attorney General, Zulima Farber, is not an advocate of the death penalty, and her silence cannot reasonably be interpreted as official acquiescence in our findings that race or ethnicity of the defendant or victim does not play an important part in the administration of New Jersey's capital punishment laws. In a similar vein, the Public Defender's failure to address the issue of race or ethnicity does not mean

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<sup>3</sup> Id. at 54-56.

<sup>4</sup> Id. at 55-56

that she supports our finding. In the past, the Public Defender's Office has vigorously argued that White victim cases advance to the penalty stage at a higher rate than African-American or Hispanic victim cases, thus devaluing the lives of minority victims.

Unfortunately, the Attorney General's vague response to our findings pertaining to county variability is not particularly helpful. The Attorney General rejected our recommendation that the decision whether or not to capitally prosecute should be centralized to insure uniformity in capital sentencing. Although her response is somewhat equivocal, the Attorney General apparently asserts that our capital punishment system must be tolerant of disparities between the counties which merely reflect the state's diverse and heterogeneous population. The Attorney General observed that, given the various safeguards that already exist in New Jersey, including prosecutorial guidelines for capital cases and comparative proportionality review, a centralized system for capital charging decisions would be "superfluous and redundant" and would ultimately result in a greater number of death penalty prosecutions. Attorney General Farber was satisfied that county prosecutors were applying the death penalty laws "cautious[ly] and conscientious[ly]." She noted that the New Jersey County Prosecutor's Association voted unanimously against a centralized system of review for capital charging decisions.

The Attorney General also alluded to the political context in which she made her decision. More specifically, she stated that her decision was “informed by the reality that these statistical analyses and claims of disparity come at a time when, for all practical purposes, New Jersey’s death penalty law is at a standstill.” The Attorney General noted that “there have been no executions in [New Jersey] since enactment of the current law in 1982,” that the decline in capital prosecutions and death verdicts has accelerated in recent years, that the Appellate Division has stayed implementation of lethal injection regulations pending reconsideration by the Department of Corrections, see, In the Matter of Readoption with Amendments of Death Penalty Regulations N.J.A.C. 10A:23 by the Department of Corrections, 367 N.J. Super. 61 (App. Div. 2004), certif. denied, 182 NJ 149 (2004), and that the Legislature has imposed a moratorium on executions pending the work of the New Jersey Death Penalty Study Commission, see L. 2005, c. 321 (eff. January 12, 2006). The Attorney General concluded by noting her intent to “revisit issues relating to the administration of our death penalty law” following completion of the Commission’s report.

The Public Defender supported our finding that county variability was an important factor in determining which death-eligible cases advance to penalty trial. Citing current client caseloads, the Public Defender noted that eighty clients were charged with murder in Essex County and “not a single case had been designated

as a capital prosecution." In contrast, seventeen clients were charged with murder in Cumberland County and six of these clients "were facing the death penalty." The Public Defender added that at one point last year, twenty-one of her clients faced capital prosecution, and of these cases eleven emanated from the Cumberland and Morris-Sussex vicinages.

The Public Defender did not specifically comment on our recommendation concerning centralization of the capital charging decision in the Attorney General's Office. However, she cogently expressed her opinion on the subject by observing that "capital punishment in New Jersey has failed" because "there is not - and never will be - a fair system in place to determine who does and who does not deserve the ultimate punishment."

The NJADP submitted its brief on June 14, 2006. Unlike the Attorney General and Public Defender, the NJADP retained statisticians who reviewed our statistical analysis and performed independent studies utilizing the same dataset. As an aside, we note that Claudia Van Wyk, a veteran, expert lawyer in the field of individual and systemic proportionality, prepared the NJADP's brief, and Dr. Paul Allison, a Professor at the University of Pennsylvania and Chair of its Department of Sociology, supervised the NJADP's statistical analysis. We have had substantial experience with these individuals. While recognizing that they appear

as advocates for their client, we hold them in high regard for their fairness and integrity.<sup>5</sup>

We briefly discuss the arguments advanced by the NJADP. The NJADP argues that New Jersey's capital punishment laws, as administered, are infected by racial bias because White victim cases advance to penalty trial at a higher rate than African-American victim cases. In support of this argument, it points to an error in one of the statistical tables that appears in our report. In our case sorting analysis, after adjusting for other variables, we did not find a statistically significant White victim effect. The resulting p-values in our report were .080 in Table 38, .095 in Table 39, and .34 in Table 40.<sup>6</sup> See Report to the New Jersey Supreme Court: Systemic Proportionality Review Project 2004-2005 Term, Technical Appendix, 156-60. As to Table 38, we erroneously believed that all six Warren County cases involved White victims where, in truth, one did not. Correcting that error reduced the p-value to .062. We emphasize, and Dr. Allison concedes, that correction of the error does not make the White victim effect a statistically significant variable. Succinctly stated, correction of the error does not affect our conclusion that White victim is not a statistically significant variable in determining which death-eligible

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<sup>5</sup> Ms. Van Wyk is a former Deputy Public Defender. Dr. Allison was previously retained by the Public Defender's Office in earlier proportionality litigation.

<sup>6</sup> The p-value 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 and David Petersen, *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-value, the less likely that the effect of an observation has emerged by reason of random chance. The threshold of statistical significance is conventionally set at .05.

cases advance to the penalty stage. To reiterate, while it is unfortunate that this error crept into our study it does not alter the conclusion we reached.

The NJADP next argues that our study was defective because we excluded all cases that involved the 4H aggravating factor (N.J.S.A. 2C: 11-3c(4)(h)), the killing of a law enforcement officer in the performance of his duty. It is thus contended that our findings "rested on a questionable methodological judgment." When Dr. Allison added the 4H cases to Table 38, "the cumulative race-of-victim differences in capital prosecution rates across the [twenty-one] counties were statistically significant," and "[t]he results were the same when he added those cases to Table 39."

We reject this analysis. We believe that we are correct in excluding the 4H cases from consideration. The issue must be considered in its proper context. In our database, there were seven cases that involved the killing of a public official. Six of these cases, eighty-six percent, advanced to penalty trial. In five of the seven cases the victim was White. Excluding these cases resulted in a finding that White victim was not a significant variable in determining which death-eligible cases advance to the penalty stage. Including these cases results in a finding that White victim is a significant factor in determining which cases proceed to a penalty trial.

We excluded these cases because the killing of a police officer almost always results in a capital prosecution, a penalty trial and a death verdict. Since the very beginnings of our proportionality studies, the 4H cases have always constituted the salient factor category with the highest rate of capital prosecutions, death penalty trials and death outcomes. This is true not only in New Jersey, but elsewhere. These cases have long been regarded as particularly heinous, as criminal justice professionals have often noted. To ignore this fact is to ignore reality.

One other cogent factor should be mentioned. In one of the two African-American 4H victim cases that did not result in a penalty trial, the police arrested the wrong suspect and then physically assaulted him. The suspect was not released from jail despite clear evidence that he was not the perpetrator. The case received a great deal of publicity. The police and prosecutor were censured by the media. In short, the reasons for not capitally prosecuting the case are apparent, and it is quite clear that they had nothing to do with the race of the victim.

We are unpersuaded by Dr. Allison's reference to "multicollinearity" in attacking our analysis. Multicollinearity means that two factors (race of victim and the 4H factor) are so strongly related that it is difficult to distinguish their effects. Dr. Allison "acknowledge[s] such difficulty," but asserts that "excluding the 4H

cases arbitrarily prejudices the effect to be with the 4H factor rather than the race of the victim.”

We find no merit in Dr. Allison’s argument. For many years, social scientists stood on the sidelines of the law. Only in the last few decades has social science become a substantial factor in the courts, and even then its acceptance has been grudging and resistant. Having said this, we have enthusiastically accepted the idea that the social sciences have much to contribute in developing concepts designed to guide the proportionality review process. This acceptance does not, however, require us to shed our knowledge and experience. Nor does it require us slavishly to sacrifice common sense in favor of methodological rigor. We believe we are correct in excluding 4H cases because these crimes are considered especially heinous and the perpetrators particularly deserving of punishment regardless of race.

The NJADP does not address the relationship between the rate that White defendant cases proceed to a penalty trial and the rate that White victim cases advance to the penalty stage. That relationship is discussed in our report.<sup>7</sup> Briefly, White defendant cases advance to penalty trial at a higher rate than minority defendant cases. Our database reveals that White defendants almost always kill

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<sup>7</sup> See Baime, Systemic Proportionality Review Project 2004-2005 Term, 15-16

White victims,<sup>8</sup> thus partially explaining why White victim cases advance to penalty trial at a higher rate than African-American victim cases.

The NJADP created a model specifically designed to measure county variability. In all earlier studies, including our own, the regression model was designed to determine whether there is a race effect in the administration of our death penalty statutes. The NJADP's study constitutes an important and beneficial development. We need not describe in detail the arcane statistical strategies employed by Dr. Allison. Suffice it to say, the methodology utilized and its specific focus on the question of county variability provide additional indicia of reliability to the process.<sup>9</sup> The results of the study confirm our finding that county variability is a key factor in determining whether a case is capitally prosecuted and whether a defendant faces a penalty trial.

## II. OPTIONS

Neither the Public Defender nor the NJADP has presented sufficient evidence that the administration of New Jersey's capital punishment statutes is infected by racial or ethnic bias. Indeed, the Public Defender has not even raised the point. While the NJADP contends that White victim cases advance to penalty trial at a higher rate than minority victim cases, it has not seriously challenged our

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<sup>8</sup> Our database discloses only three cases in which White defendants killed African-American victims.

<sup>9</sup> We note in passing that in May 2004 our experts recommended development of new models designed specifically to deal with the question of county variability. At that time, however, the issue of county variability had not been raised by any party. This Court rejected the recommendation of Professor's Weisburd and Naus on this basis.

finding that county variability, and not race or ethnicity, is the real culprit in causing this disparity.

We have suggested that "a defendant must relentlessly document the risks of racial or ethnic disparity in order to establish systemic disproportionality."<sup>10</sup> "The test requires a substantial converging of outcomes produced by the three different modes of analysis" - bivariate studies, regression runs and case-sorting techniques.<sup>11</sup> The NJADP has failed to make the required robust showing.

The question of county variability raises different considerations. Every study we and our predecessors have performed has shown a marked disparity in the rates that the counties have instituted capital prosecutions and the rates that death-eligible cases have proceeded to penalty trial. As we noted in our latest report, the point was first raised by Professor Baldus.<sup>12</sup> Every study since has disclosed a "wide variability in rates at which cases advance to penalty trial in the individual counties."<sup>13</sup> We think that the time has come for review of the issue in an adversarial setting. We thus suggest the following options.

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<sup>10</sup> Id. at 4.

<sup>11</sup> Ibid.

<sup>12</sup> Id. at 31; see David C. Baldus, Death Penalty Proportionality Review Project: Final Report to the New Jersey Supreme Court, 22-23 (September 24, 1991)

<sup>13</sup> Ibid. We note that our database does not differentiate between the prosecutorial charging decision and cases advancing to penalty trial. Stated differently, we have no specific record in our database disclosing those cases in which prosecutors have commenced capital prosecutions but juries have not, for one reason or another, returned a verdict of capital murder. I am told by the Administrative Office of the Courts that it is impossible to retrieve this information. Our experience, however, discloses that by far the greatest cause of county variability is the decisions of individual prosecutors to pursue or not to pursue the death penalty. We are confident that uniformity in charging decisions would largely ameliorate the problem of county variability.

**A. Call for Briefs on the Question of County Variability**

The first option is the most straight-forward. The issue should be fully briefed and the matter scheduled for oral argument. The parties should be ordered to address the following issues: (1) is county variability a basis for judicial abolition of the death penalty? (2) If so, has a sufficient showing of county variability been made? (3) If so, what should be the remedy?

**1. County Variability As a Ground for Judicial Intervention**

We have found no reported decision holding that geographic or regional disparity constitutes a constitutional violation. See, eg., People v. Ayala, 1 P.3d 3, 51 (Cal. 2000), cert. denied, 532 U.S. 908, 121 S.Ct. 1235, 149 L.Ed.2d 143 (2001) (rejecting defendant's claim that the discretion conferred on the district attorney of each county to seek the death penalty results in a county-by-county disparity in capital prosecutions); Thomas v. State, 421 So.2d 160, 163 (Fla. 1982), cert. denied, 475 U.S. 1031, 106 S.Ct. 1241, 89 L.Ed. 2d 349 (1986) (rejecting petitioner's claims of geographic and economic discrimination); State v. Hairston, 988 P. 2d 1170 (Idaho 1999), cert. denied, 529 U.S. 1134, 120 S.Ct. 2014, 146 L.Ed.2d 963 (2000) (discrepancy in county capital prosecution rates does not implicate constitutional concerns, because financial resources play a role in a prosecutor's decision to seek the death penalty); People v. Casillas, 749 N.E. 2d

864, 886 (Ill. 2000), cert. denied, 534 U.S. 1043, 122 S.Ct. 621, 151 L.Ed. 2d 543 (2001) (rejecting claim that county variability results in arbitrary and capricious enforcement of capital punishment laws); Baker v. Maryland, 883 A.2d 916 (Md. Ct. App. 2005) (geographic disparity does not demonstrate that the death sentence in this case was illegal on its face); Richardson v. State, 598 A.2d 1, 13 (Md. Ct. Spec. App. 1991) (rejecting equal protection claims "that the Baltimore County prosecutor is more likely to seek the death penalty in a robbery-murder or first degree murder case than is a prosecutor in another county in Maryland" because defendant did not show any discriminatory purpose or imposition of an unjustifiable standard on the part of Baltimore County State's Attorney in its application of the death penalty); Pennsylvania v. Cook, 30 Phila. 1 (Pa. C.P. 1995), aff'd, 720 A.2d 79, 120 (Pa. 1998) (rejecting claim that death penalty is unconstitutional because of alleged geographic disparity); Allen v. State, 108 S.W.3d 281, 285-87 (Tex. Crim. App. 2003), cert. denied, 540 U.S. 1185, 124 S.Ct. 1405, 158 L.Ed.2d 90 (2004) (the fact that Harris County, a large county with a large budget, sentences more offenders to death than any other county in Texas, does not in and of itself establish disparate treatment among similarly situated defendants). See also United States v. Bin Laden, 126 F. Supp. 2d 256, 263 (D.N.Y. 2000) (rejecting defendants' Eighth Amendment claim of geographic disparity).

Decisions rejecting claims of disparity are difficult to categorize. They generally rest upon a broad tolerance for prosecutorial discretion, defects in statistical studies purporting to show disparity, and the failure of challengers to establish non-germane, improper reasons for the variability shown. The cases cited here are not all-inclusive. However, they tend to be representative of the general skepticism courts have expressed in reviewing these claims. See, e.g. Simpson v. State, 6 S.W.3d 104, 107 (Ark. 1999) (the choice of which charges to file, including the decision to seek the death penalty against an accused, is a matter entirely within the prosecutor's discretion and this discretion does not render Arkansas's death-penalty statutes arbitrary and capricious); State v. White, 982 P.2d 819 (Ariz. 1999), cert denied, 529 U.S. 1005, 120 S.Ct. 1272, 146 L.Ed.2d 221 (2000) (inappropriate for court to encroach on reasonable prosecutorial discretion, absent a clear indication of misconduct); In Re Seaton, 95 P.3d 896 (Cal. 2004) (no statute or constitutional provision requires a district attorney to have guidelines on when to seek the death penalty); State v. Webb, 680 A.2d 147 (Conn. 1996) (decision to "seek the death penalty...is ultimately a discretionary prosecutorial decision."); State v. Bloom, 497 So.2d 2, 3 (Fla. 1986) (circuit judge has no authority to interfere with the prosecutor's discretion in proceeding with this cause as a death penalty case); Brannan v. State, 561 S.E.2d 414 (Ga. 2002) (claim that the State has too much discretion in choosing to seek the death penalty

or to offer a plea bargain is without merit); Lowery v. State, 640 N.E.2d 1031, 1038 (Ind. 1994), cert. denied, 516 U.S. 992, 116 S.Ct. 525, 133 L.Ed.2d 432 (1995) (prosecutorial discretion to bring capital and recidivist charges does not violate any constitutional right); People v. Kirchner, 743 N.E.2d 94, 124 (Ill. 2000) (death penalty statute is not unconstitutional on the basis that it gives prosecutors unrestricted discretion to seek capital punishment); State v. Barnett, 980 S.W.2d 297, 309 (Mo. 1998), cert. denied, 525 U.S. 1161, 119 S.Ct. 1074, 143 L.Ed.2d 77 (1999) (rejecting claim that the death penalty scheme is arbitrary because prosecutors have unfettered discretion to seek imposition of the death penalty); Johnson v. Pataki, 691 N.E.2d 1002 (N.Y. 1997) (in crafting the new death penalty provisions, the Legislature chose to bestow upon each one of the 62 District Attorneys of the State absolute discretion to seek either the penalty of death against a defendant accused of committing first-degree murder or life imprisonment without parole); State v. Brown, 528 N.E.2d 5 (Ohio 1988) (rejecting claim that the Ohio capital punishment statute unconstitutionally permits arbitrary prosecution by the State); Bryson v. State, 876 P.2d 240, 263 (Okla. Crim. App. 1994) (claim that the State of Oklahoma has insufficient guidelines concerning when the death penalty should be sought lacks merit); State v. Walton, 809 P.2d 81 (Oregon 1991) (rejecting defendant's arguments that Oregon's statutory criminal homicide scheme allows for the unbridled exercise of prosecutorial discretion); State v.

Hines, 919 S.W.2d 573, 582 (Tenn. 1995), cert. denied, 519 U.S. 847, 117 S.Ct. 133, 136 L.Ed.2d 82 (1996) (unlimited discretion is vested in the prosecutor to seek or not to seek the death penalty); State v. Lafferty, 20 P.3d 342 (Utah 2001), cert. denied, 534 U.S. 1018, 122 S.Ct. 542, 151 L.Ed.2d 420 (2001) (upholding the constitutionality of the death penalty scheme in Utah because it allows neither too much prosecutorial discretion nor unguided prosecutorial discretion in determining to seek the death penalty); State v. Hoffman, 804 P.2d 577 (Wash 1991) (prosecutorial discretion in deciding whether or not to seek the death penalty does not violate equal protection principles); Osborn v. State, 672 P.2d 777, 793 (Wyo. 1983); cert. denied, 465 U.S. 1051, 104 S.Ct. 1331, 79 L.Ed.2d 726 (1984) (leniency in one case does not invalidate the death penalty in others).

We need not fall in lock-step with these jurisdictions. Putting aside questions of equal protection and selective prosecution, our Supreme Court has given strong emphasis to the concept of uniformity of sentencing. See, e.g., State v. Brimage, 153 N.J. 1 (1998), State v. Vasquez 129 N.J. 189 (1992); State v. Lagares, 127 N.J. 20 (1992); cf. State v. Leonardis, 73 N.J. 360 (1977). In State v. Vasquez, for example, the Court held that the transfer of sentencing power to the prosecutor under section 12 of the Comprehensive Drug Reform Act (N.J.S.A. 2C:35-1 to 36A-1) was subject to judicial oversight to protect against “arbitrary and capricious prosecutorial decisions.” 129 N.J. at 196. The Court directed the

Attorney General to promulgate uniform guidelines to protect against disparate treatment. Ibid. More recently, the Court abrogated several of the guidelines that permitted each county to adopt its own standard plea offers and policies, observing that the guidelines then in force did not “serve as the universal, equitable prototype that the Vasquez line of cases had in mind.” 153 N.J. at 23. See also, State v. Gerns, 145 N.J. 216, 231 (1996) (“[t]he indications of grave sentencing disparities are sufficient to engender a concern over the potential for sentencing disparity” inherent in the guidelines). In a similar vein, in State v. Lagares, the Court held that, to pass constitutional scrutiny, prosecutorial decisions to invoke the extended term provisions of the Code of Criminal Justice, N.J.S.A. 2C:43-6f, were subject to judicial review for arbitrariness and that “guidelines [should] be adopted to assist prosecutorial decision-making.” 127 N.J. at 32.

These decisions rest in part on the articulated objective of the Code of Criminal Justice “to safeguard offenders against excessive, disproportionate or arbitrary punishment” on conviction of an offense. N.J.S.A. 2C:1-2. Consistent with that statutory mandate, the Court has repeatedly acknowledged the “dominance, if not paramountcy, of uniformity” in sentencing. State v. Pillot, 115 N.J. 558, 571-72 (1989) (citing State v. Roach; 146 N.J. 208, 231-32 (1996) cert. denied, 519, U.S. 1021, 117 S.Ct. 540, 136 L.Ed. 2d 424 (1996); State v. Jarbath, 114 N.J. 394, 400 (1989); State v. Hartye, 105 N.J. 411, 417 (1987); State v.

Hodge, 95 N.J. 369, 379 (1984). That goal has particular efficacy in the context of capital punishment where life is literally at stake.

These decisions also give weight to the separation of powers doctrine and the historic role of the judiciary in sentencing criminal offenders. To be sure, the charging decision in criminal cases is often considered to be within the prosecutor's domain. However, the grand jury, the ultimate arbiter, is under the general supervision of the judiciary. In the context of capital punishment litigation, our Constitution, and more specifically the separation of powers doctrine, cannot be construed as calling for three hermetically sealed, watertight compartments.

Against this backdrop we are of the view that county variability should not be judicially countenanced. In these cases, we deal with the worst of the worst, the dregs of society. It is difficult to sympathize with a cold-blooded killer. But it makes no sense that a murderer in one county is subject to the death penalty when an identical crime would be treated in an entirely different way if it were committed in another county. Whether viewed as a constitutional imperative, a requirement of statutory policy or simply a matter of fundamental fairness, we submit that county variability is a basis for judicial intervention.

## 2. Sufficient Showing of County Variability

As noted earlier, we take the position that a defendant must “relentlessly” document county variability. We are entirely satisfied that our studies disclose a gross disparity in the manner in which individual county prosecutors have treated death-eligible crimes.

A question that remains unaddressed, however, is whether disparate treatment, by itself, is a basis for attacking our system of capital punishment. It is arguable that a defendant should be required to show that the disparity is the result of a non-germane causative factor. In Brimage, for example, the Court stated that “differences in available county resources as well as varying backlog and caseload situations are legitimate factors that prosecutors may consider in deciding whether or not to waive a mandatory minimum under N.J.S.A. 2C:35-12.” 153 N.J. at 24. The Court also alluded to the need for prosecutorial discretion “in setting enforcement priorities and prosecution policies to reflect local concerns and enforcement opportunities.” Ibid. Are these and other factors appropriate circumstances to be considered in the exercise of prosecutorial discretion in capital charging decisions? In other contexts, the Court has recognized the “need for some flexibility among different counties and some accommodation of local concerns and differences.” Ibid. (quoting State v. Press, 278 N.J. Super. 589, 593-94 (App. Div. 1995) (Stern, J., dissenting), certif. denied, 140 N.J. 329 (1995)).

The location of the crime would seem to be a fortuitous and non-germane factor in determining whether the perpetrator should be capitally prosecuted. The fact that the county in which the crime occurred has adequate resources for commencing a capital prosecution, thus subjecting the defendant to a potential death sentence, would appear to be a matter of chance. In the mind's eye of the perpetrator, application of the death penalty would seem fortuitous and, perhaps, undeserved, i.e., like being struck by lightning.

Perhaps for this reason the statewide guidelines currently in force specifically provide neither "resource restraints" nor "individual attitudes" should "play any role whatsoever in the charging decision." Prosecutor's Guidelines for Designation of Homicide Cases for Capital Prosecution, (1989). Instead, the Guidelines require that each prosecutor must establish a local capital review committee and that, before seeking a death penalty, a prosecutor must be satisfied that the State can prove (1) a death-eligible form of murder occurred, (2) an aggravating factor is present, and (3) the aggravating factor or factors outweigh the mitigating circumstance or circumstances known to exist. What is contemplated is a fair assessment of the likelihood of a successful prosecution without concern for resources and backlog. That standard is consistent with the Supreme Court's repeated expressions concerning the need for reliability and consistency in the

imposition of capital punishment. See State v. Koedatich, 112 N.J. 225, 258 (1988)<sup>14</sup>; State v. Ramseur, 106 N.J. 123, 190 (1987).

In any event, we cannot fairly decide at this time what factor or factors may properly be considered by a prosecutor in deciding whether or not to seek the death penalty.<sup>15</sup> We merely note here that there are a myriad of factors beyond the merits and strength of the case that arguably may be weighed by a prosecutor in determining whether or not to bring a capital case. At this point, the best that can be said is that the causative factor for the disparity in capital prosecutions should be germane to legitimate criminal justice goals and law enforcement objectives in order to satisfy constitutional and statutory requirements.

### 3. Remedy For Improper County Disparity

If county variability is a basis for judicial intervention and should a defendant relentlessly establish improper county disparity in capital prosecution rates, the next question concerns the judicial remedy to be invoked. We recommend limited judicial intervention in the form of a remand ordering the

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<sup>14</sup> Paradoxically, the Court in Koedatich observed that there could be a "myriad of reasons" for differences in prosecutorial charging decisions, including the strength of the evidence and availability of witnesses, a defendant's willingness to plead guilty, the relative weights of the aggravating and mitigating factors, and the resources of the county prosecutor's office. 112 N.J. 253-54, 256. It is unclear whether the Court's reference to "county resources" was intended as an expression of its approval of this factor as a circumstance that may legitimately be considered in deciding whether a capital prosecution should be pursued.

<sup>15</sup> Also beyond the scope of this memorandum are questions relating to the burden of proof and burden of production. As noted above, a defendant must relentlessly document county variability in an attack upon the statute as applied. However, we have also suggested that legitimate factors consonant with criminal justice goals and law enforcement objectives may result in county disparity in capital prosecution rates. Perhaps once a defendant establishes county disparity the burden of production to show that legitimate factors caused the variability should be imposed on the prosecutor.

Attorney General to centralize the capital charging decision within her office with the assistance of the county prosecutors. We also recommend that a death-eligible universe should be utilized by the Attorney General in determining which cases are so heinous as to warrant capital prosecution. We do not suggest that centralization of the charging decision will cure the problem of county variability. However, we believe that adoption of appropriate procedures would ameliorate the extent of the problem and enhance the fairness of our capital punishment system.<sup>16</sup> In our view, the Brimage line of cases compels this solution and provides the basis for a reasonable accommodation of competing values.

We recognize the dangers inherent in the course we recommend. The Attorney General might refuse to obey such a mandate. Moreover, prosecutors are good politicians, generally protective of their turf and prerogatives. Extension of Brimage in the manner we have suggested may precipitate a constitutional crisis. However, in Ramseur this Court declared that “there can be no justice without uniformity,” and that “uniformity is the paramount goal of sentencing.” 106 N.J. 330-31. New Jersey is one of the few states that has adopted individual and systemic proportionality as important criminal justice goals. This Court has taken expansive steps to insure fairness and justice in capital sentencing. We should not

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<sup>16</sup> There is some sentiment within the Administrative Office of the Courts for ordering the Attorney General to provide more precise guidelines. We do not view this as a potential solution. We believe that it is the large number of prosecutors and assistants who participate in making the charging decision that produces disparity in the rates of capital prosecution. Each individual harbors different views on the subject of the death penalty and has different experience within the criminal justice community.

retreat from this laudable goal. And to those who argue that the judiciary has taken too expansive a view of its role, we should not apologize for New Jersey's conscientious exercise of conscience.

**B. Judicial Deference to the Legislative Process**

At the other end of the spectrum is the option of awaiting the report of the Commission. As a general proposition, we find it distasteful to do nothing on the vague hope that the Legislature will ultimately resolve problems pertaining to capital punishment. The vagaries of the legislative process and the uncertainty of the outcome militate in favor of judicial resolution of these difficult issues.

Nonetheless, we would be remiss were we to ignore the attractiveness of a legislative solution. Surely, a legislative cure would result in less damage to the system. Because of the moratorium on executions, awaiting a legislative response would cause little pain.

Moreover, we could keep our options open by continuing and refining our study of county variability. The Court could direct our experts to develop models designed specifically to measure county disparity in capital prosecution rates. It could direct the Standing Master to investigate the feasibility of developing models designed to determine the causes of county variability while we await the outcome

of the legislative process.<sup>17</sup> As we noted earlier,<sup>18</sup> our experts previously suggested development of models designed to examine the issue of county variability and its causes. In their most recent report on this subject they continue to make the same recommendations.

The Court should carefully consider this option in lieu of the more expansive solutions we have urged.

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<sup>17</sup> Although there is some support within the Administrative Office for engaging in new studies designed to determine the causes of county disparity, we question the feasibility of such a study. However, we have asked our experts for their views on the subject. We will supplement this memorandum following their written responses.

<sup>18</sup> See n. 9.



## **ATTACHMENT 4**

**Comments on NJADP letter brief by  
Joe Naus and David Weisburd**

**Comments on the statistical analysis in NJDAP's letter brief of June 14, 2006, to the NJ Supreme Court. (We specifically address the Allison et. al summary on pages 136a through 139a).**

BY: Joe Naus and David Weisburd; June 28, 2006

**Race of Victim Analysis**

It is useful to begin our comment by noting that we recommended to the court a multiple method approach for assessing the impacts of race on death penalty sentencing in New Jersey. Our reasoning was based in good part on the inherent statistical problems in coming to a persuasive conclusion regarding race effects using the AOC data. Those statistical problems are outlined in detail in our earlier reports. However, our approach is based on the assumption that any single analysis could not be fully relied upon given the inherent instabilities caused by the relatively small amount of data for analysis, and the complexity of the problem examined. We continue to believe that this is the case. Accordingly, we think that focus on a single table or analysis under a specific set of assumptions cannot be seen as persuasive evidence of a race effect.

In our 2005 and earlier reports we analyzed two sets of death eligible cases, to see if there was statistically significant evidence of a racial effect in progression of death eligible cases. We carried out multiple comparisons to investigate whether there was either a race of defendant effect, or a race of victim effect, in progression of a death eligible case to penalty trial, or progression from penalty trial to death sentence, or progression of a death eligible case to death sentence. There were thus six separate hypotheses being tested (race of defendant at each of three progressions, and race of victim at each of three progressions). After adjusting for other variables, we did not find persuasive evidence of either a race of defendant effect or race of victim effect in any of the three progressions. It is still our judgment that this is the case.

In the Allison et al comments they focus on our case sorting analysis of race of victim effect on progression to penalty trial, as summarized in our Tables 38, 39, and 40. In our analysis, after adjusting for other variables we did not find a statistically significant race of victim effect. The resulting p-values in our report were .080 in Table 38; .095 in Table 39; and .34 in Table 40. All of these values were larger than .05, and not statistically significant. The calculation in Table 38 had left out Warren County, because we mistakenly believed all 6 cases were white victim cases, when one was not. On March 30, 2006 we sent a corrected Table 38 to AOC, and noted that the resulting p-value in Table 38 went from .080 to .062, which was still not statistically significant. None of the conclusions of our 2005 report were changed.

The Allison report concurs with the 0.06 non-significant result in Table 38, but objects to our analysis in Table 38 and 39 based on our way of controlling for the 7 statutory 4H (killing a public official) cases. Our analysis controls for the 4H cases by separating them from the 555 cases, and seeing if there is a race of victim effect in the remaining 548 cases. Their analysis combines the 4H cases with the other cases, and

does not make any adjustment for the special nature of these cases. Their conclusion of a significant race of victim effect depends critically on this approach.

In our case-sorting analyses we took into account variables that may be seriously confounded with the effect we are analyzing. When we test for a relationship between race of victim and going to penalty trial, we seek to statistically control for factors such as killing a police officer, or murdering multiple victims, that are related both to race of victim and to the likelihood of advancing to penalty trials. For example, if murdering a police officer is related to advancement to a penalty trial, and murdered police officers are generally white, then these two factors are confounded. The purpose of our statistical models in this case is to disentangle the effects of "murdering a policeman" and "a victim being white" on advancement to a penalty trial.

In our data: there were seven cases out of the 555 death eligible cases that involved killing a public official (statutory factor 4H). Six of the seven cases (86%) went to penalty trial, and the case that did not, had exceptional circumstances as discussed in our reports. Five of the seven murdered public officials were white victims. Factor 4H is one of the most highly related variables to progression to penalty trial, and it is confounded with white victim effect. In Tables 38, 39, and 40 we removed the seven cases of killing a public official, and adjusted for county and time effects, so that we could test whether there is an impermissible discriminatory race of victim effect. The result of those analyses was that there was no statistically significant evidence of such an effect. We also noted that the analysis based on Table 40 was more appropriate than the analyses based on Tables 38 or 39.

Allison et al note our reasoning, and comment as follows: "Their [Weisburd and Naus'] rationale was that 6 of these 7 [4H] cases progressed to penalty trial, and in 5 of the 7 cases the victim was white. In effect, what we have here is a problem that is known in the statistical literature as 'multicollinearity/' which simply means that two factors (race of victim and the 4H factor) are so strongly related that it is difficult to distinguish their effects. While acknowledging such difficulty, we believe that simply excluding the 4H cases arbitrarily prejudices the effect to lie with the 4H factor rather than with the race of the victim." [our underlinings]

Based on our discussion with criminal justice professionals, we think it is reasonable (not arbitrary) to judge that the reason a 4H case goes to penalty trial is precisely because it is a 4H case, rather than because of the race of victim. Killing a policeman or judge or political official, strikes at the heart of the criminal justice system. Police investigators and prosecutors are particularly concerned with such cases, and make every possible effort to see those cases go to penalty trial.

The Allison et al approach to Tables 38 and 39 is to combine the 7 4H cases with the rest of the data, and not to adjust in any way for the fact that they are 4H cases. Allison's report notes: "When we included the Warren County cases, our new version of Table 38 yielded a p-value of .06, only slightly above the .05 level. Furthermore, when we included the 4H cases, the p-value dropped to .026 which would be deemed to be

statistically significant by conventional standards. The same pattern occurred in our modified version of Table 39 which had a p-value of .039 when 4H cases were included....”

The bottom line is that in Tables 38 and 39, if the 7 4H cases are separated out, as we feel they should be, then there is no significant race of victim effect. If the 7 4H cases are combined with the other 548 cases, then there is a significant effect. But in our view it is very likely not a race of victim effect—but rather a confounded effect of 4H and race of victim. It is not reasonable given the confounding between race of victim and murdering a public official to allow these 7 cases to be included in the analysis without some type of statistical attempt to control that confounding. Given the small amount of data and the extent of the relationship between these factors, we do not think that such analysis is possible and that is why we excluded those cases. Our view is that the appropriate analysis is to separate these 7 cases involving murdering a public official from the rest of the data. Given this approach we do not find a statistically significant effect of race of victim.

In reference to Allison et al comment that the p-value of .06 in Table 38 (when 4H is excluded) “is only slightly above the .05 level,” we note that the p-value in Table 39 is .095, and in Table 40 is .34. Further, we pointed out in our previous reports that when multiple tests are carried out (see paragraph one above which describes six comparisons tested) it is not unusual purely by chance to find at least one test labeled as “significant.” To control for this “experiment-wide” error-rate, researchers sometimes require more highly significant results (p-values much smaller than .05) on individual tests, or use standardized test adjustments for multiple tests. We have not required this level of stringency to find a significant effect. At the same time, we feel that the standard cut-off of .05 is a reasonable criterion, and accordingly a p-value of .062 should not be seen as evidence of a statistically significant effect.

#### **Testing For County Effect on progression to Penalty Trial**

Allison et al carry out a preliminary but direct analysis to see if there is a County effect on progression to penalty trial after adjusting for other variables. This is an interesting topic to study given the large variability between counties in progression to penalty trial rates and we have in past reports recommended that a study of county variability be conducted.

There are about 100 pages of Tables in the materials provided to us, but there is only a short summary conclusion that does not connect in detail to the individual tables. We would find it helpful if there was more commentary on the tables and more detail regarding the analysis conducted.

Allison et al. follow our general approach for isolating a specific factor (in this case county) relying upon a screening approach to reduce the number of relevant variables in the model. However, it is important to note that they depart from our method

of choosing between a "single screen" and "double screen" model. They include both screening approaches for each model estimated. This was not our approach.

Our screening approach developed because of the statistical problems that resulted from including too many independent variables in the models estimated by Special Master Baldus. We followed Professor John Tukey's recommendation regarding a maximum number of variables that could be included based on the split of the dependent variable examined. Because the theoretical variables defined for these models exceeded this criterion for the models examined, we decided upon a statistical procedure for screening the theoretically relevant variables for measures that could be reasonably excluded from the analysis.

The single screen approach examines the relationship between each of the theoretically relevant variables and the relevant factor (race in our report, and county in this case). This is the preferred approach in our reports, since it involves a minimal amount of statistical intervention in the selection of variables. At the same time, in a number of models this screening approach did not limit the number of independent variables sufficiently to meet Tukey's rule of parsimony. In those cases we developed a second screen -- that the independent variable be significantly related to the outcome measure examined. Importantly, the second screen was used only when the first screen was not sufficient in limiting the number of independent variables in the model.

Accordingly, we agree with Allison et al. that the single screen model is to be preferred. Our preliminary review of the models estimated in this memorandum is that using the first stage criterion they do not violate Tukey's rule. Allison et al. carry out 8 regression models in which county effect is significant in 5 of the models and not significant in 3 of the models. The 3 models where county models were not significant involved a double-screening approach. We think it important to note that analyses were not conducted on the "last case" sample.

The analyses here do provide interesting evidence for the importance of county variability. We are not surprised by this result, and indeed we have recommended to the Special Master in past reports that the issue of county variability be examined more carefully. We are still of this belief, and think that the analyses presented here provide a start to this approach, but not sufficient evidence of strength and stability of a county variability as an explanatory factor.

For example, we would recommend that the case-sorting approach be used here as with race effects, and that the models be estimated for the last case sample. And we would advise that the methodology in a regression approach and the choice of variables be examined carefully to make sure that it is sufficient for analyzing county variable effects. For example, time may be a particularly important factor in analyzing county variability. That is not examined in present models. The examination of county variability might also lead to the use of methods that are better suited for examining the hierarchical nature of these data, especially the fact that the cases are "nested" within the counties that we examine.

Moreover, if a county effect is established it may be relevant to the Court to try to understand the underlying explanations for those effects. Are there variables in the case records that can reflect varying county difficulty in investigating and prosecuting cases. There is also some evidence in the time sequence of results of cases that indicates that there may be difficulty in prosecuting penalty trial cases in some counties. For example, for some counties there is evidence that negative (from the prosecutor's point of view) outcomes in a series of penalty trials is followed by a sharp drop in the number of cases going to penalty trial.

The Allison et al analysis is a first step in analyzing county variability in progression to penalty trial. Additional analysis would be needed to demonstrate the level of "relentness" conclusion required by the Court to document that alternative reasonable analyses lead to similar conclusions, and to provide an understanding of the underlying nature of any County effect.