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# THE REIMPOSITION OF CAPITAL PUNISHMENT IN NEW JERSEY: FELONY MURDER CASES

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## INTRODUCTION

In 1982 the New Jersey State Legislature reinstated capital punishment,<sup>1</sup> a decade after all state death sentences were in effect declared unconstitutional by the United States Supreme Court in *Furman v. Georgia*<sup>2</sup> and almost two decades after the last execution in New Jersey.<sup>3</sup> Shortly after the 1982 statute went into effect, the New Jersey Department of the Public Advocate, a state agency that includes the state-wide Office of the Public Defender, began a study of all New Jersey homicide cases in which the homicide had taken place after August 6, 1982, the effective date of the capital punishment statute. After a final judgment was entered at the trial stage, interviews were conducted with defense attorneys, including private counsel, public defenders, and pool attorneys. Data were collected on more than 100 variables relating to the defendant and the victim, the circumstances of the offense, and the procedural history of the case.<sup>4</sup> This Article reports research findings from the analysis of felony murder cases, a subset of the database of 703 homicide cases that were reported and analyzed in an earlier study.<sup>5</sup>

The New Jersey Supreme Court has played a unique role in the structuring of this research. Reports from this study were submitted to the New Jersey Supreme Court as they became available, and the court cited this research in its first opinion interpreting the New Jersey capital punishment statute.<sup>6</sup> In the summer of 1988 the New

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<sup>1</sup> See Act of Aug. 6, 1982, ch. 111, 1982 N.J. Laws 555 (codified as amended at N.J. STAT. ANN. § 2C:11-3(c) (West Supp. 1990)). The relevant portions of this statute appear in Appendix A. For a discussion of the history of the New Jersey capital punishment statute, see Bienen, Weiner, Denno, Allison & Mills, *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 46-70 (1988) [hereinafter Bienen, *Prosecutorial Discretion*]; *infra* notes 21-33 and accompanying text.

<sup>2</sup> 408 U.S. 238 (1972) (per curiam).

<sup>3</sup> The last execution in New Jersey was that of Ralph Hudson on January 22, 1963. Bienen, *Prosecutorial Discretion*, *supra* note 1, at 63 n.129.

<sup>4</sup> See *id.* at 158-242 (publishing research findings to date). That article describes the data collection procedures and research methodology, reviews the legislative history of capital punishment in New Jersey, includes a discussion of relevant national research, presents a regression analysis of 404 death possible cases, describes the procedural requirements under the newly enacted statute, summarizes all reported opinions interpreting the statute up to August 1, 1988, and identifies those sentenced to death in the jurisdiction as of October 19, 1988.

<sup>5</sup> See Bienen, *Prosecutorial Discretion*, *supra* note 1, at 37, 158-286.

<sup>6</sup> See *State v. Ramseur*, 106 N.J. 123, 173, 524 A.2d 188, 212 (1987); see also *State v. Koedatich*, 112 N.J. 225, 253-58, 548 A.2d 939, 953-55 (1988) (discussing interim report by the Public Defender, *The Reimposition of Capital Punishment in New Jersey: Homicide Cases from 1982-1986*, that reported earlier research of this project), *cert. denied*, 488 U.S. 1017 (1989); *id.* at 377, 548 A.2d at 1018-19 (Handler, J., dissenting) (same). The research reports of this project are described in Bienen, *Prosecutorial Discretion*, *supra* note 1, at 36 n.3. Both the 1987 Preliminary Report and the 1988 Interim Report of this study are on file at the Law Library of the Rutgers (Newark) School of Law.

Jersey Supreme Court appointed Professor David Baldus as a Special Master for the purposes of conducting proportionality review.<sup>7</sup> The empirical research conducted by the Proportionality Review Project then incorporated data from the Public Defender Homicide Study. As the analysis in this Article indicates, proportionality review is especially important in felony murder cases, where there is great latitude in the selection of cases for capital prosecution.

Not all New Jersey murders are eligible for capital prosecution. Only eligible are those in which there is both a factual basis for one or more of the eight enumerated statutory aggravating factors and the defendant by his own conduct with specific intent to kill<sup>8</sup> either purposely or knowingly committed the homicidal act or paid another to do so.<sup>9</sup> Under the New Jersey capital punishment scheme the

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<sup>7</sup> Proportionality review "purports to inquire . . . whether the [death] penalty is nonetheless unacceptable in a particular case because [it is] disproportionate to the punishment imposed on others convicted of the same crime." *Ramseur*, 106 N.J. at 326, 524 A.2d at 292 (quoting *Pulley v. Harris*, 465 U.S. 37, 43 (1984)). It is "a means through which to monitor the imposition of death sentences and thereby to prevent any impermissible discrimination in imposing the death penalty." *Id.* at 327, 524 A.2d at 292.

For the special order issued by the New Jersey Supreme Court appointing Professor David C. Baldus of the State University of Iowa School of Law as a Special Master for the purpose of preparing a data base and issuing a report on the subject of proportionality review in capital cases, see Order, New Jersey Supreme Court (July 29, 1988), reprinted in Bienen, *Prosecutorial Discretion*, *supra* note 1, app. E, at 371-72; see also *id.* at 44-46 & n.27 (discussing the special order and the background of Professor Baldus). The Proportionality Review Project has issued two Interim Reports and is expected to issue its final report in 1991. Copies of these reports may be obtained by writing John P. McCarthy, Jr., Administrative Office of the Courts, CN037, Trenton, N.J. 08625. The authors also wish to thank Professor David C. Baldus of the University of Iowa Law School, and the attorneys and other staff associated with the N.J. Proportionality Review Project.

<sup>8</sup> An important interpretative issue is raised by the formulation of the intent requirement itself. The New Jersey Supreme Court held in *State v. Gerald*, 113 N.J. 40, 549 A.2d 792 (1988), that a conviction for capital murder could not be sustained unless the defendant had a specific intent to kill. A number of death sentences were reversed on the basis of this holding. All of the cases analyzed in this Article went to trial before *Gerald* was decided and were, therefore, unaffected by this question. *Gerald* was a case that involved the felony aggravating circumstance. See *id.* at 62, 549 A.2d at 803.

The specific intent requirement for the felony aggravating factor would also be a significant appellate issue in New York under the proposed New York formulation. See N.Y.S. 200, N.Y.A. 305, 214th Sess. sec. 3, § 125.27(1)(a)(vi) (1991) (making intent to kill a requirement of the proposed felony murder aggravating factor).

<sup>9</sup> See N.J. STAT. ANN. § 2C:11-3(c) (West Supp. 1990). The New Jersey capital punishment statute was drafted to comport with the federal constitutional requirements specified by the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976), and cases subsequent to *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). See *Ramseur*, 106 N.J. at 183-86, 524 A.2d at 217-19. Significant differences exist, however, between federal constitutional standards in capital cases and the standards imposed under the New Jersey State Constitution. New Jersey Supreme Court opinions interpreting the capital statute discuss these differences in detail, and the law on these issues continues to evolve. See *id.* at 182-97, 524 A.2d at 216-24 (holding

individual county prosecutor in each of the twenty-one separate county jurisdictions designates which cases will be subject to capital prosecution through a procedure called the serving of a notice of factors.<sup>10</sup> The notice of factors informs the defendant and the court that the prosecutor intends to allege at the penalty phase proceeding that there is a factual basis for one or more of the statutorily designated aggravating factors. As of February 25, 1991, a total of thirty-seven death sentences had been imposed since reenactment in 1982.<sup>11</sup> Of those thirty-seven death sentences, twenty-seven have been reversed by the New Jersey Supreme Court.<sup>12</sup> When the New Jersey Supreme Court upheld the death sentence of Robert O. Marshall on January

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N.J. STAT. ANN. § 2C:11-3 (West 1982 & Supp. 1990) constitutional under the New Jersey Constitution); see also Bienen, *Prosecutorial Discretion*, *supra* note 1, at 70-89 (discussing New Jersey Supreme Court cases on capital punishment decided between 1982 and 1988).

<sup>10</sup> See N.J. STAT. ANN. § 2C:11-3(c)(2)(e) (West Supp. 1990). The notice of aggravating factors must generally be served at the arraignment or at the bail hearing. N.J. CT. R. 3:26-1; see also *State v. Price*, 195 N.J. Super. 285, 309, 478 A.2d 1249, 1261 (Law Div. 1984) (A prosecutor must give the defendant notice of aggravating factors at the time of arraignment unless the prosecutor moves at that time for an enlargement of time and the motion is granted); Bienen, *Prosecutorial Discretion*, *supra* note 1, at 92 (discussing *Price*).

<sup>11</sup> This total includes the 33 death sentences enumerated in Bienen, *Prosecutorial Discretion*, *supra* note 1, app. C, at 363. To be added are Richard Biegenwald, who had an additional death sentence imposed in February of 1989, at the first penalty phase retrial in New Jersey, and Marko Bey, who was resentenced to death in Monmouth county on September 11, 1990. New death sentences were imposed upon Braynard Purnell in Camden county on February 21, 1990 and upon John Martini in Bergen county on December 12, 1990. As of February 25, 1991, there were eight persons in New Jersey with death sentences.

<sup>12</sup> The 27 reversals include two separate death sentences imposed upon Marko Bey. In addition the death sentence imposed upon Raymond Kise was set aside on April 15, 1987 by a superior court judge on his own motion and the death sentence imposed upon Benjamin Lodato was vacated on April 15, 1987 by order of the New Jersey Supreme Court. *State v. Lodato*, 107 N.J. 141, 526 A.2d 204 (1987) (citing *State v. Biegenwald*, 106 N.J. 13, 524 A.2d 130 (1987), as basis for the order). The opinions of the New Jersey Supreme Court in the following cases represent a substantial contribution to the jurisprudence on capital punishment: *State v. Moore*, 122 N.J. 420, 585 A.D.2d 864 (1991); *State v. Oglesby*, 122 N.J. 522, 585 A.D.2d 916 (1991); *State v. Harvey*, 121 N.J. 407, 581 A.D.2d 483 (1990), *cert. denied*, 111 S. Ct. 1336 (1991); *State v. Clausell*, 121 N.J. 298, 580 A.2d 221 (1990); *State v. Johnson*, 120 N.J. 263, 576 A.2d 834 (1990); *State v. Savage*, 120 N.J. 594, 577 A.2d 455 (1990); *State v. Hightower*, 120 N.J. 378, 577 A.2d 99 (1990); *State v. McDougald*, 120 N.J. 523, 577 A.2d 419 (1990); *State v. Long*, 119 N.J. 439, 575 A.2d 435 (1990); *State v. Pennington*, 119 N.J. 547, 575 A.2d 816 (1990); *State v. Coyle*, 119 N.J. 194, 574 A.2d 951 (1990); *State v. Jackson*, 118 N.J. 484, 572 A.2d 607 (1990) (*per curiam*); *State v. DiFrisco*, 118 N.J. 253, 571 A.2d 914 (1990); *State v. Davis*, 116 N.J. 341, 561 A.2d 1082 (1989); *State v. Pitts*, 116 N.J. 580, 562 A.2d 1320 (1989); *State v. Hunt*, 115 N.J. 330, 558 A.2d 1259, *reconsid. denied*, 117 N.J. 152, 564 A.2d 873 (1989); *State v. Williams*, 113 N.J. 393, 550 A.2d 1172 (1988); *State v. Moore*, 113 N.J. 239, 550 A.2d 117 (1988); *State v. Gerald*, 113 N.J. 40, 549 A.2d 792 (1988); *State v. Rose*, 112 N.J. 454, 548 A.2d 1058 (1988); *State v. Zola*, 112 N.J. 384, 548 A.2d 1022 (1988), *cert. denied*, 489 U.S. 1022 (1989); *State v. Koedatich*, 112 N.J. 225, 548 A.2d 939 (1988), *cert. denied*, 488 U.S. 1017 (1989); *State v. Bey (I)*, 112 N.J. 45, 548 A.2d 846 (1988); *State v. Bey (II)*, 112 N.J. 123, 548 A.2d 887 (1988); *State v. Biegenwald*, 106 N.J. 13, 524 A.2d 130 (1987); *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188 (1987).

24, 1991,<sup>13</sup> it was the first death sentence to be upheld on direct appeal since reenactment.

Under the reenacted New Jersey statute and the proposed New York bill<sup>14</sup> felony murder cases are an important subset of all potentially capital cases. The proposed New York statute includes a felony aggravating factor that is virtually identical to the felony aggravating factor analyzed in this Article.<sup>15</sup> The breadth and inclusiveness of the proposed New York felony aggravating factor would allow prosecutors the broad discretion in the selection of capital cases that is documented in this Article. If the proposed New York statute were to be enacted there would be many more potentially capital cases under the felony aggravating factor than could realistically be prosecuted as capital cases. Prosecutors would then be in the position of selecting among cases for capital prosecution on arguably arbitrary grounds that would differ widely from trial jurisdiction to trial jurisdiction.

This Article contends that the scope of prosecutorial discretion has currently resulted in the inclusion of legally irrelevant and arbitrary factors, such as the race of the victim and defendant, and the county of prosecution, in the decision to seek the death penalty in New Jersey felony murder cases. This Article shows in particular that racial and geographic differences have significant impacts on the risks that felony murder defendants will be exposed to a death sentence at two critical stages in the prosecution: the prosecutor's decision to go to trial or accept a guilty plea and the prosecutor's decision to serve a notice of factors. Sections V and VI statistically examine how these racial and geographic variables influence the risk of a defendant's progressing from one stage to the next in the capital case processing system,<sup>16</sup> as well as the overall risk of progressing to the next case

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<sup>13</sup> *State v. Marshall*, 123 N.J. 1, 586 A.2d 85 (1991). In *Marshall* the court upheld the death sentence on direct appeal, but reserved and called for briefs and argument on the issue of proportionality review. See *id.* at 170-71, 586 A.2d at 174-75; *infra* notes 225-27 and accompanying text.

<sup>14</sup> N.Y.S. 200, N.Y.A. 395, 214th Sess. (1991).

<sup>15</sup> The proposed New York felony aggravating circumstance reads:

[T]he victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of robbery, burglary, kidnapping, arson, rape, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, or in the course and furtherance of immediate flight after committing or attempting to commit any such crime.

*Id.* sec. 3, § 125.27(1)(a)(vi)). See N.J. STAT. ANN. § 2C:11-3(c)(4)(g) (West Supp. 1990) (referring to the offense rather than to the victim, and specifying only six predicate felonies for felony murder).

<sup>16</sup> This term, and other methodological definitions in this Article, are discussed *infra* note 34 and accompanying text; see also Figure 1 (providing a diagram of the capital case processing system in N.J.).

processing stage.<sup>17</sup> Before addressing the statistical analysis of felony murder cases, this Article discusses in Section II the legal background of the New Jersey felony murder statute in both its capital and non-capital versions<sup>18</sup> and in Section III examines those characteristics of felony murder cases that make them particularly important to analyze.<sup>19</sup> Section IV of the Article sets out the model of prosecutorial decision making which forms the basis of the statistical analysis.<sup>20</sup> Annotations of some of the felony murder cases discussed in this Article appear in Appendix D.<sup>21</sup>

## II. LEGAL BACKGROUND

In New Jersey the doctrine of felony murder has been recognized from the earliest colonial days, and felony murderers have been death eligible throughout the period in which capital punishment has been in effect.<sup>22</sup> Public support for capital punishment has fluctuated over time,<sup>23</sup> and there has been a great deal of variation in the extent to

<sup>17</sup> See *infra* notes 143-95 and accompanying text.

<sup>18</sup> See *infra* notes 22-103 and accompanying text.

<sup>19</sup> See *infra* notes 104-19 and accompanying text.

<sup>20</sup> See *infra* notes 120-42 and accompanying text.

<sup>21</sup> See App. D. Appendix A contains excerpts from the New Jersey murder statute pertaining to felony murder and capital prosecution. Appendix B reprints in their entirety the 1989 Prosecutor's Guidelines for Designation of Homicide Cases for Capital Prosecution, adopted by the New Jersey County Prosecutors Association and the New Jersey Attorney General. Appendix C presents case characteristics of the New Jersey felony murder cases analyzed in this Article.

<sup>22</sup> The first comprehensive crimes act in New Jersey was enacted in 1796. See Bienen, *Prosecutorial Discretion*, *supra* note 1, at 51 (citing Act of Mar. 18, 1796, 1821 REV. LAWS 244). The 1796 law drew no distinction between first and second degree murder, or between principals and aiders and abettors. Death sentences were given to all murderers. *Id.* The same statute classified as murderers persons who killed another while

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

Act of Mar. 18, 1796, 1821 REV. LAWS 262, *quoted in* Bienen, *Prosecutorial Discretion*, *supra* note 1, at 52 n.57. In 1898, this definition of felony murder was reincorporated as the standard and remained the effective statutory definition, including death eligible felony murder, until the Code of Criminal Justice was enacted in 1979. See Bienen, *Prosecutorial Discretion*, *supra* note 1, at 52; *see also* E. Feiertag, *Capital Punishment in New Jersey: 1664-1950, A Study of Change* 48-49 (1951) (unpublished master's thesis, Political Science Department, Columbia University, on file at *Albany Law Review*) (discussing nineteenth-century revisions of New Jersey's murder statute). In 1977 the New Jersey Supreme Court limited the application of the felony murder doctrine in cases in which a policeman or bystander committed the homicidal act. *State v. Canola*, 73 N.J. 206, 226, 374 A.2d 20, 30 (1977). The New Jersey Supreme Court's most recent discussion of the felony murder doctrine is in *State v. Martin*, 119 N.J. 2, 19-34, 573 A.2d 1358, 1368-76 (1990).

<sup>23</sup> The abolitionist movement was strong enough in the middle of the nineteenth century to



which executions have actually been carried out during the period when the death sentence was authorized.<sup>24</sup>

To date, there have been two published studies of homicide and capital punishment in New Jersey under pre-*Furman* capital statutes, both of which provide data on felony murder. The earliest was Emil Frankel's 1939 study analyzing data pertaining to one-thousand individuals committed for murder to the New Jersey State Prison from 1908-1936.<sup>25</sup> Nearly one-fifth of these prisoners were incarcerated for a murder committed during the course of a felony.<sup>26</sup> The second and more comprehensive study of capital punishment in New Jersey is Hugo Bedau's *Death Sentences in New Jersey, 1907-1960*, detailing all death sentences and executions during that period.<sup>27</sup> Data on

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get abolitionist bills through the New Jersey General Assembly on three separate occasions: around 1840, in 1845, and in 1908. In each case the abolitionist bill did not pass the New Jersey Senate. See E. Feiertag, *supra* note 22, at 58-60. In 1915 and 1921 abolitionist bills were introduced, debated, and failed to pass. See *id.* at 60-62. The 1915 bill was introduced in response to public outcry against the execution of a 16-year-old male, the youngest person on record to be executed in New Jersey. See Bedau, *Death Sentences in New Jersey, 1907-1960*, 19 RUTGERS L. REV. 1, 24 (1964). The bill passed the Senate, but was defeated in the Assembly. *Id.*

<sup>24</sup> See Bedau, *supra* note 23, at 9-11 (showing that the number of executions varied widely over time). For a general discussion, see C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 79-84 (2d ed. 1981). For a very useful annotated bibliography which covers both the discussion of legal issues and the social science literature, see M. RADELET & M. VANDIVER, CAPITAL PUNISHMENT IN AMERICA: AN ANNOTATED BIBLIOGRAPHY (1988).

<sup>25</sup> See Frankel, *One Thousand Murderers*, 29 J. CRIM. L. & CRIMINOLOGY 672 (1938-1939) (including a detailed analysis of legal procedures, defendant demographics and criminal circumstances). In this group, 14.4% had death sentences, 22.7% had life sentences and 62.9% had "time sentences of varying lengths." *Id.* at 679. From 1907 until June 30, 1937 there were 169 individuals with death sentences received into the state prison. *Id.* at 686. "Of this number, 119 (70.4 percent) [were] electrocuted; eight were retried and sentenced to life or time imprisonment; in 27 cases the death sentence was commuted to life or time imprisonment; seven cases had other dispositions; in 1939 eight individuals are awaiting execution." *Id.*

<sup>26</sup> *Id.* at 687. Frankel included county and city homicide rates, although his data did not distinguish between felony murder and other homicides. See *id.* at 675. Frankel reported wide county discrepancies with respect to homicide cases per 100,000 population. *Id.* He also reported data on death sentences by race of defendant, including a breakdown for "native born white" and "foreign born" defendants. Native born whites were most likely to be sentenced to death (19.7%), followed by foreign born whites (14.9%) and blacks (8.1%). *Id.* at 679.

<sup>27</sup> Bedau, *supra* note 23, at 1. A methodological appendix, Abstract of Analysis of Jury Sentencing in Capital Cases: New Jersey: 1937-1961, by Edwin D. Wolf analyzed data between 1937-1961 pertaining to the relationship between race of offender and sentence. *Id.* app. II, at 56. This study is discussed in detail in Bienen, *Prosecutorial Discretion*, *supra* note 1, at 109-12.

In addition to these two studies, a specialized and relatively limited study of persons incarcerated for a homicide offense was published in 1958. See Gibbens, *Sane and Insane Homicide*, 49 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 110 (1958-1959). Using data from Trenton State Prison and the criminal wing of the New Jersey State Hospital, this research compared the psychiatric history of 120 sane murderers convicted during the period 1947-1949 and sentenced to Trenton State Prison with a group of 115 persons who were found guilty of homicide prior

felony murder cases were reported separately, and showed felony murder defendants to have been 60.4% of all defendants sentenced for murder and 82.5% of those receiving a death sentence.<sup>28</sup>

The former New Jersey death penalty was declared unconstitutional in 1972.<sup>29</sup> The last execution in the state occurred in 1963. The new capital punishment statute, enacted in 1982, is radically different from previous capital punishment statutes.<sup>30</sup> This statute incorporates post-*Furman* developments in federal constitutional law and, like many statutes in effect in the other thirty-five capital punishment jurisdictions, is based upon a structure of aggravating and mitigating factors.<sup>31</sup> The New Jersey capital punishment statute sets out the criteria and procedures for imposing the sentence of death for capital murder.<sup>32</sup> Capital murder is not just any murder, but only a murder in which one or more of eight specially defined statutory aggravating factors is present *and* the defendant either committed the homicidal act with the requisite intent by his own conduct or paid another to do so.<sup>33</sup>

A "capital" case is a case that has been designated for capital prosecution by the county prosecutor by way of a pretrial procedure

to 1950 and admitted to the State Hospital. *Id.* at 110. Neither of these two groups included persons who had been sentenced to death. *See id.*

<sup>28</sup> See Bedau, *supra* note 23, table IV, at 60.

<sup>29</sup> See *State v. Funicello*, 60 N.J. 60, 67, 286 A.2d 55, 59 (1972) (per curiam), *on remand from Funicello v. New Jersey*, 403 U.S. 948 (1971) (mem.). The New Jersey Supreme Court declared the State's death penalty statute unconstitutional in *Funicello* after the United States Supreme Court's memorandum decision in *Funicello v. New Jersey*. *See id.* The New Jersey Supreme Court decided *Funicello* on January 17, 1972, six months before the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), decided June 29, 1972.

<sup>30</sup> For the complete text of the New Jersey homicide statute, which contains the current capital punishment provisions, see N.J. STAT. ANN. § 2C:11-3 (West Supp. 1990); *see also* Appendix A (excerpting the relevant capital punishment provisions).

<sup>31</sup> Besides New Jersey, the following states currently have death penalty statutes: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1989, at 4 (1990).

For examples of statutes from other jurisdictions that base the decision to impose a capital sentence upon a weighing of aggravating and mitigating factors, *see, e.g.*, ALA. CODE §§ 13A-5-40, -45 (1982 & Supp. 1990); FLA. STAT. ANN. §§ 782.04, 921.141 (West 1976 & Supp. 1990); ILL. ANN. STAT. ch. 38 para. 9-1(a), (d) (Smith-Hurd Supp. 1990); OR. REV. STAT. §§ 163.095, .150 (1989). For a complete list of statutes in this category, *see* Acker, *New York's Proposed Death Penalty Legislation: Constitutional and Policy Perspectives*, 54 ALB. L. REV. 515, 538 n.145 (1990).

<sup>32</sup> See N.J. STAT. ANN. § 2C:11-3(c)(1)-(5) (West Supp. 1990).

<sup>33</sup> See N.J. STAT. ANN. § 2C:11-3(c) (West Supp. 1990) (stating the by-his-own-conduct restriction and by payment criteria); *see also supra* note 8 and accompanying text (discussing the intent requirement). For the aggravating factors, *see* N.J. STAT. ANN. § 2C:11-3(c)(4)(a)-(h) (West Supp. 1990).

called the serving of a notice of factors. Only the county prosecutor in the jurisdiction where the case arises has the authority to designate a case as capital by deciding to prosecute that defendant for capital murder. Once a case is so designated, a capital case may or may not go to capital trial, to penalty phase, or result in the death sentence being imposed upon the defendant. The *capital case processing system* consists of the sequence of trial stages, beginning with the homicide charge and ending with the imposition of the sentence of death.<sup>34</sup> Cases can drop out of the capital case processing system at each successive stage. These stages are presented graphically in Figure 1, along with the numbers and probabilities of felony murder cases progressing to each stage.

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<sup>34</sup> The following terminology is used in this Article:

A case is "death eligible" if it has been designated for capital prosecution by the county prosecutor. The term "death eligible" is used to refer to capital cases, especially when discussing cases which have not resulted in a conviction for capital murder or the imposition of a death sentence. This Article's use of the term "death eligible" is broader than that employed by the New Jersey Supreme Court, which uses the term to refer to defendants who have been convicted of capital murder and are subject to the penalty phase weighing of aggravating and mitigating factors. See *State v. Ramseur*, 106 N.J. 123, 156, 524 A.2d 188, 203 (1987).

The term "death possible" refers to those potentially death eligible cases where there is a *factual basis* for serving a notice of factors, either because of the presence of a felony or the presence of facts or circumstances supporting some other statutory aggravating factor, irrespective of whether or not the case is ever designated capital by the county prosecutor. There are many "death possible" cases that are never prosecuted as capital cases and do not reach the capital trial phase. For examples, see the annotated cases presented in Appendix D.

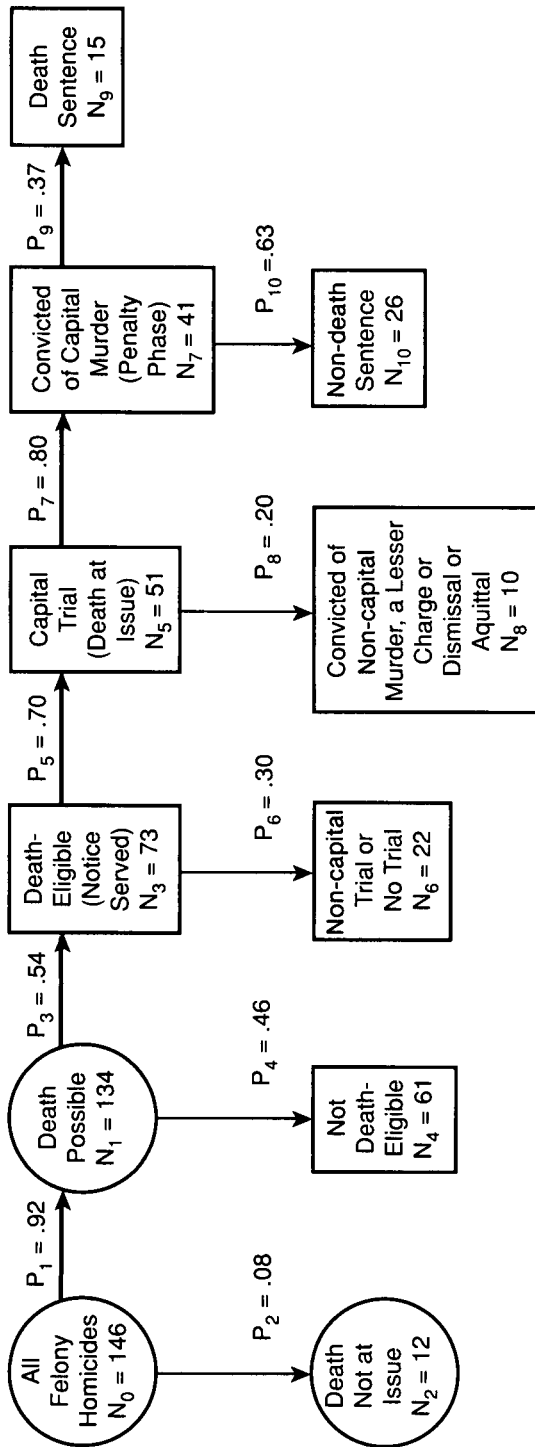
A "death possible" case becomes "death eligible" when the prosecutor serves a notice of factors. By definition a "death eligible" case will have been "death possible" (potentially death eligible) prior to the serving of a notice of factors.

A case ceases to be capital when the possibility of the imposition of a death sentence is no longer present. This will occur if the prosecutor withdraws the notice of factors, either unilaterally or as a result of court action, if the jury at the guilt phase of a capital trial does not return a verdict of guilty of capital murder, or if the capital jury at penalty phase does not return the death sentence.

The term "capital trial" refers to those cases that go to trial for capital murder before a death qualified jury, or a judge if a jury has been waived. In this Article, "capital trial" refers to the first phase of a capital trial, when a determination of guilt on the charge of capital murder is made. This first part of a capital trial is also called the guilt phase of the capital trial.

The term "penalty phase" refers to those cases that reach the second phase of a capital trial after a conviction for death eligible murder at the guilt phase. The penalty phase trial will, like the capital trial, take place before a death qualified jury, or a judge if the jury has been waived. The penalty phase jury makes a finding of statutory aggravating and mitigating factors and then weighs the aggravating factors against the mitigating factors. See *infra* notes 33-34 and accompanying text. The jury's duty is to decide whether to impose the death sentence or a penalty of life imprisonment. Capital cases that result in the death sentence being imposed will be referred to as "death sentences."

The "capital punishment scheme" refers to the entire body of procedures, rules, and statutory law governing the imposition of the death sentence from the first charge to the final imposition of the penalty of death at the penalty phase. This Article does not take into account or discuss dispositions at the appellate or post-trial level.



**Figure 1**  
**New Jersey Capital Case Processing Stages from Indictment to Death Sentence\***

\* The figure represents the flow of felony homicide cases at four decision making and case processing points in New Jersey's judicial system. Each box represents a decision or processing option made for a case. The top set of horizontally aligned boxes indicates cases advancing sequentially further into the system based on judicial decisions and processing options. The vertical flow indicates decisions that remove a case from further advancement into the judicial system at each point in the system. The number (N) of cases at each stage is listed in the circle or box. Above or to the right of each case flow arrow is the probability (P) that the cases flow in the indicated direction. This depiction of the system provides a departure point for later analyses. Central to these analyses will be the identification of felony case characteristics that influence the flow of cases at each flow point.

Each separate statutory aggravating factor has its own character and each can independently trigger a prosecution for capital murder.<sup>35</sup> The presence of a factual basis for a statutory aggravating factor, however, is not enough for the imposition of the death penalty in New Jersey. After a determination of guilt, a penalty phase jury,<sup>36</sup> or the judge if a jury has been waived, must separately evaluate the existence of both the statutory aggravating and mitigating factors and then weigh the aggravating factors found against the mitigating factors found. The death sentence will be imposed only if the aggravating factors found to exist are not outweighed by all or any of the mitigating factors found.<sup>37</sup> For the purposes of this Article, it is important to remember that the death penalty is imposed only after a conviction for capital murder and after the special sentencing hearing, set out above, results in the jury first finding specific statutory aggravating factors and then weighing them against specific statutory mitigating factors. The decision to impose the sentence of death is the end result of the weighing process. It must be unanimous and at the evidentiary standard of beyond a reasonable doubt at the penalty phase.<sup>38</sup>

Each individual statutory aggravating factor operates essentially as a miniature capital punishment statute. Some factors are more precise than others, and some seem to have a greater likelihood of having notice served when they are factually present.<sup>39</sup> This Article is prin-

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<sup>35</sup> See N.J. STAT. ANN. § 2C:11-3(c)(4)(a)-(h) (West Supp. 1990) (delineating aggravating factors). These factors are discussed in Bienen, *Prosecutorial Discretion*, *supra* note 1, at 242-62.

<sup>36</sup> Ordinarily, the penalty phase jury will be the same jury that determined guilt. The statute allows for a different jury at the penalty phase "for good cause." See N.J. STAT. ANN. § 2C:11-3(c)(1) (West Supp. 1990); see also *Ramseur*, 106 N.J. at 252, 524 A.2d at 252 (stating that the statute "presupposes in most instances that there shall be the same jury that heard the guilt/innocence phase" at the penalty phase). As of February, 1991, no defendant had gone to a penalty phase trial before a second death qualified jury, although in at least one case the defense requested that option but did not exercise it. There have been cases of a defendant going to penalty phase before a death qualified jury after the guilt phase trial was conducted without a jury. See, e.g., *State v. Jackson*, 118 N.J. 484, 572 A.2d 607 (1990) (*per curiam*); *State v. Davis*, 116 N.J. 341, 561 A.2d 1082 (1989).

<sup>37</sup> For a more detailed discussion of how this weighing process is supposed to occur, see *Ramseur*, 106 N.J. at 156-60, 524 A.2d at 203-06.

<sup>38</sup> This is an area of law which continues to develop with each newly decided capital case. For a discussion of the New Jersey Supreme Court's interpretation of these provisions as of August, 1988, see Bienen, *Prosecutorial Discretion*, *supra* note 1, at 70-89.

<sup>39</sup> For statistics on the number of times each statutory aggravating factor was served and returned in the 703 cases originally studied by this project, see *id.* at 263-86 (giving tables showing the frequency with which each statutory aggravating factor was served or was present at a particular stage in the capital case processing system). For comparable information on the individual statutory aggravating and mitigating factors in the group of cases discussed in this Article, see *infra* note 143 & Tables 1-4 and accompanying text.

cipally concerned with statutory aggravating factor "g," the felony factor. Although the felony factor is just one of eight enumerated statutory aggravating factors, a substantial proportion of capital cases have the felony factor served.<sup>40</sup> This is partly because the felony aggravating factor incorporates six separate underlying felonies, each one of which can independently and separately serve as the factual basis for this aggravating factor.<sup>41</sup> The felony factor itself has six distinct components. The category of felony murder, then, encompasses several very different crimes. A murder during an arson, for example, has a different character than a murder committed during a robbery or a sexual assault. The felony aggravating factor also incorporates by reference the common law precedents surrounding each individual underlying felony. This is an additional source of distinction among felony murders.

To understand the legal foundation of this analysis, it is important to understand the difference between the crime of ordinary felony murder, which is not a capital offense, and the crime of death eligible felony murder, or capital felony murder, as defined both under traditional common law and now under New Jersey capital punishment jurisprudence.<sup>42</sup> The difference between the two crimes underscores

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<sup>40</sup> See Bienen, *Prosecutorial Discretion*, *supra* note 1, at 254-57, 263-65, 277-78. The felony factor is rarely served by itself, however. Felony cases that are prosecuted as capital cases and result in death sentences typically have the felony factor and at least one other statutory aggravating factor served. *Id.* at 256-57, 281.

<sup>41</sup> The felony factor is defined in New Jersey as follows:

(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping. . . .

N.J. STAT. ANN. § 2C:11-3(c)(4)(g) (West Supp. 1990). Some states define each separate felony as a separate aggravating factor. See, e.g., IND. CODE ANN. § 35-50-2-9 (Burns Supp. 1990); MONT. CODE ANN. § 46-18-303 (1989). In New Jersey a homicide during the course of any of the six enumerated felonies would be death eligible under the one all-encompassing felony aggravating factor. Murder was added to the list of predicate felonies in 1985. See Act of June 10, 1985, ch. 178, § 2, 1985 N.J. Laws 536, 541 (codified as amended at N.J. STAT. ANN. § 2C:11-3(c)(4)(g) (West Supp. 1990)); Bienen, *Prosecutorial Discretion*, *supra* note 1, at 66-69. None of the cases analyzed in this Article were affected by this amendment. Therefore, none of these cases have as a factual basis for the felony factor the fact that a murder occurred during the course of another murder. See Table C-3, at Appendix C. This amendment had the result of rendering potentially death eligible any murder case in which there were two or more victims.

For a recent discussion of the history of the felony murder doctrine in current New Jersey law, and the intent requirement for felony murder, see *State v. Martin*, 119 N.J. 2, 19-34, 573 A.2d 1359, 1368-76 (1990).

<sup>42</sup> See generally G. FLETCHER, *RETHINKING CRIMINAL LAW* § 4.1-.5, at 235-335 (1978) (discussing the law of homicide and felony murder generally); S. KADISH, S. SCHULHOFER & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 474-507 (4th ed. 1983) (presenting materials and commentary on the felony murder doctrine); J. MICHAEL & H. WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES AND COMMENTARIES* 25-289 (1940) (presenting materials and commentary on the law of homicide).

the distinction between non-capital and capital homicides generally and illustrates how ostensibly similar murders can be treated very differently in the criminal justice system. Appendix D provides specific examples of seemingly similar felony murders that were charged and processed very differently under the New Jersey capital punishment system.

### A. Ordinary Felony Murder

Under British common law,<sup>43</sup> the source of statutory criminal law in New Jersey and most other American jurisdictions, non-capital felony murder is any killing, intentional or not, including a killing by a codefendant, that takes place during the course of one of six enumerated felonies.<sup>44</sup> These common law felonies were regarded by many seventeenth- and eighteenth-century jurists and legislators as among the most serious of crimes.<sup>45</sup> The term "felony" itself is often

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<sup>43</sup> The felony murder doctrine was articulated in 1887 by the Honorable Justice Stephen as follows:

The definition of murder is unlawful homicide with malice aforethought; and the words malice aforethought are technical. You must not, therefore, construe them or suppose that they can be construed by ordinary rules of language. The words have to be construed according to a long series of decided cases, which have given them meanings different from those which might be supposed. One of those meanings is, the killing of another person by an act done with an intent to commit a felony. Another meaning is, an act done with the knowledge that the act will probably cause the death of some person.

*Regina v. Serné*, 16 Cox Crim. Cas. 311, 312 (Cent. Crim. Ct. 1887), reprinted in S. KADISH, S. SCHULHOFER & M. PAULSEN, *supra* note 42, at 475.

<sup>44</sup> The present definition of felony murder under New Jersey law is typical:

It [felony murder] is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault [rape], arson, burglary, kidnapping or criminal escape, and in the course of such crime or immediate flight therefrom, any person causes the death of a person other than one of the participants.

N.J. STAT. ANN. § 2C:11-3(a)(3) (West Supp. 1990). This statute was modeled after the American Law Institute's Model Penal Code. See MODEL PENAL CODE § 210.6(3)(e) (Proposed Official Draft 1962). The 1979 New Jersey Code also adopted the four part affirmative defense to felony murder from the New York Code. See N.Y. PENAL LAW § 125.25(3)(a)-(d) (McKinney Supp. 1991). See generally *State v. Martin*, 119 N.J. 2, 19-34, 573 A.2d 1359, 1368-76 (1990) (discussing the statutory definition of felony murder and the changes to the homicide law introduced by the 1979 Code); Bienen, *Prosecutorial Discretion*, *supra* note 1, at 63-65 (same).

<sup>45</sup> These felonies at common law included murder, rape, robbery, burglary, grand larceny, and arson. See M. HALE, *PLEAS OF THE CROWN* 43-76, 79-86 (1678 & photo. reprint 1982); Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources*, 50 U. CHI. L. REV. 1, 38-39 (1983). New Jersey does not use the term felony to characterize offenses, and discussions of felony murder are often confused by the fact that the term felony has very different meanings in different jurisdictions. For the history and derivation of the term "felony," see J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 426-27 (2d ed. 1979); 4 W. BLACKSTONE, *COMMENTARIES* \*95-98; 2 F. POLLOCK & F. MATTLAND, *THE HISTORY OF ENGLISH LAW* 464-70 (2d ed. 1898 & reprint 1968).

a source of confusion.<sup>46</sup> Under traditional British common law, death was the penalty for most felonies, and for many other crimes as well,<sup>47</sup> so that imposing the death penalty for a murder that occurred during the course of a felony was not unusually harsh. It should be borne in mind, however, that although death was the designated penalty for most felonies, the death sentence was not imposed uniformly or in a large proportion of the cases for which it was the stipulated penalty.<sup>48</sup> There has been no crime of felony murder under British law since 1957,<sup>49</sup> and the doctrine is now unique to American jurisprudence.<sup>50</sup>

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<sup>46</sup> In this Article the term "felony" will be used only to refer to those New Jersey crimes other than murder that can provide the factual basis for serving the felony aggravating factor: robbery, sexual assault [rape], arson, burglary and kidnapping. See N.J. STAT. ANN. 2C:11-3(c)(4)(g) (West Supp. 1990). At one time nearly all felonies were capital offenses, at least in theory. See J. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660-1800*, at 451 (1986); Langbein, *supra* note 45, at 36. Because the classification of what constitutes a felony in some jurisdictions has been broadened to include such offenses as aggravated assault, drug trafficking, or practicing medicine without a license, some courts have sought to limit the list of predicate offenses for felony murder to the most dangerous of traditional common law felonies. See, e.g., *People v. Burroughs*, 35 Cal. 3d 824, 828-33, 678 P.2d 894, 896-900, 201 Cal. Rptr. 319, 321-25 (1984) (applying the inherently dangerous felony limitation in a case involving the felony of unlicensed practice of medicine); see also Fletcher, *Reflections on Felony-Murder*, 12 SW. U.L. REV. 413, 418-22 (1981) (reviewing the disjunction between felony murder and principles of homicide liability in various jurisdictions).

<sup>47</sup> See J. BEATTIE, *supra* note 46, at 450-51; Baker, *Criminal Courts and Procedure at Common Law 1550-1800*, in *CRIME IN ENGLAND 1550-1800*, at 17, 42-43 (J. Cockburn ed. 1977).

<sup>48</sup> Recent research on the administration of the English criminal law shows that, relative to the potential severity of punishment, few convicted felons were actually hanged. See J. BEATTIE, *supra* note 46, at 454, 484-501, 513-19 (giving statistics on the imposition of capital sentences and executions between 1660 and 1800). Historians have identified three principal sources of mitigation at work in the seventeenth and eighteenth centuries. The legal fiction of benefit of clergy exempted convicted felons from a death sentence upon proof that they could read; by the early eighteenth century, the reading requirement had been dropped, the practice had been extended to women felons on an equal basis with men, and the availability of benefit of clergy was confined to first convictions largely for common law felonies against property. See *id.* at 141-48; Langbein, *supra* note 45, at 37-41. Juries continued to nullify death sentences for felonies by acquitting, even when the evidence clearly supported the accused's guilt, or by rendering partial verdicts (such as finding that stolen goods were worth less than one shilling, to convict the defendant of the non-capital offense of petty larceny). See T. GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800*, at 28-64, 118-52, 267-88 (1985); Langbein, *supra* note 45, at 52-55. Finally, transportation to a colony was increasingly used as a penal alternative to hanging in the century after 1660 and continued to be used as such, along with incarceration in a penitentiary, until Parliament abolished it in 1853. See J. BEATTIE, *supra* note 46, at 502-06, 592-601; M. IGNATIEFF, *A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750-1850*, at 19-20, 196, 200-01 (1978).

<sup>49</sup> See Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, § 1 (abolishing "constructive malice").

<sup>50</sup> For an interesting discussion of the evolution of the felony murder doctrine and its current justifications, see Fletcher, *supra* note 46, at 413; see also Roth & Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 444, 449-60 (1985) (criticizing the historical justifications for the rule).



The doctrine of felony murder ascribes malice, the highest form of criminal intent, to a killing that would otherwise not be classified as murder. The purpose of the felony murder doctrine is to create a category of murder called felony murder out of criminal behavior that might otherwise constitute a lesser grade of homicide, such as manslaughter, or the non-homicide offenses of robbery or burglary.<sup>51</sup> Moreover, under the felony murder doctrine, persons who did not actually commit murder, or any other form of homicide, can nevertheless be convicted of this form of murder. Under this doctrine, both the person who killed but did not actually have the intent to commit murder, and the person who did not kill but participated in a felony in which another killed, can be convicted of murder if a killing took place during the course of a designated felony.<sup>52</sup>

Absent capital punishment, the felony murder doctrine creates a mechanism for upgrading the punishment for any and all participants in a felony when a death occurs during the course of that felony. The felony murder doctrine provides the mechanism both for bypassing the elevated intent requirement for murder and dispenses with the requirement that the defendant commit the homicidal act.<sup>53</sup> The principal underlying theory of the felony murder doctrine is that the intent to commit the primary felony is the functional equivalent of "malice," the level of intent required for a murder conviction.<sup>54</sup> The justification for the doctrine is that a person who commits or participates in a common law felony resulting in death *ought* to be treated as severely as a person who had the intention to commit and did in fact commit murder.<sup>55</sup> Therefore, the felony murder indictment

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<sup>51</sup> See Fletcher, *supra* note 46, at 413-19.

<sup>52</sup> See, e.g., *Pizano v. Superior Court*, 21 Cal. 3d 128, 577 P.2d 659, 145 Cal. Rptr. 524 (1978); *People v. Fuller*, 86 Cal. App. 3d 618, 150 Cal. Rptr. 515 (1978); *People v. Stamp*, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1969), *cert. denied*, 400 U.S. 819 (1970); *People v. Podolski*, 332 Mich. 508, 52 N.W.2d 201, *cert. denied*, 344 U.S. 845 (1952); *Commonwealth v. Moyer*, 357 Pa. 181, 53 A.2d 736 (1947).

<sup>53</sup> See Fletcher, *supra* note 46, at 413, 418-19. Both of these requirements are imposed in New Jersey when capital felony murder is at issue. See *supra* notes 8 & 33 and accompanying text, and *infra* note 85 and accompanying text.

<sup>54</sup> See *Pizano*, 21 Cal. 3d at 134-41, 577 P.2d at 663-67, 145 Cal. Rptr. at 528-32 (applying this theory to hold that petitioner could be tried for felony murder for a killing arising out of a robbery in which the victim was shot by a bystander); Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 58-74 (1956) (discussing and criticizing the implied malice theory in the context of the liability of felons for deaths caused by accomplices and third parties); Roth & Sundby, *supra* note 50, at 453-57 (discussing and criticizing the transferred intent and constructive malice theory generally).

<sup>55</sup> See *Regina v. Serné*, 16 Cox Crim. Cas. 311, 313 (1887) (Stephen, J.), *reprinted in* S. KADISH, S. SCHULHOFER & M. PAULSEN, *supra* note 42, at 476. Justice Stephen explained that instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that *any act known to be dangerous to*

need not specify that the defendant committed the homicide, much less specify that he committed it by his own conduct and with a purposeful or knowing intent. Maximum culpability for the death that occurred, according to the theory of implied malice, should be and will be attributed to all co-felons because of their joint participation in furthering the underlying felony.<sup>56</sup> Under the circumstances of a felony murder, individual co-felons will not be excused on the grounds that they themselves did not intend to kill or did not in fact commit the homicidal act.<sup>57</sup> Thus, the doctrine has resulted in convictions for felony murder for a non-slayer felony participant when a bystander kills a hostage held as a shield by the defendant,<sup>58</sup> and when a vehicular manslaughter occurs during an escape from a police officer.<sup>59</sup>

Typically, felony murder is indicted by alleging that a death occurred during the course of a specifically enumerated felony, which itself may or may not be a separate count of the indictment.<sup>60</sup> The circumstances of a felony murder present the prosecutor with a number of different charging options. For example, a defendant who allegedly

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*life, and likely in itself to cause death done for the purpose of committing a felony which caused death, should be murder.* As an illustration of this, suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her, that would be murder. I think that every one would say in a case like that, that when a person began doing wicked acts for his own base purposes, he risked his own life as well as that of others. That kind of crime does not differ in any serious degree from one committed by using a deadly weapon, such as a bludgeon, a pistol, or a knife. *If a man once begins attacking the human body in such a way, he must take the consequences if he goes further than he intended when he began.* That I take to be the true meaning of the law in the subject.

*Id.* (emphasis added). See also *State v. Mathis*, 47 N.J. 455, 464, 221 A.2d 529, 533 (1966) (applying the implied malice theory in case in which the killing occurred during an attempted robbery).

<sup>56</sup> See G. FLETCHER, *supra* note 42, § 4.4, at 314-15; Fletcher, *supra* note 46, at 419.

<sup>57</sup> The four-part affirmative defense to felony murder for non-slayer participants that is incorporated in the New Jersey statutory definition to felony murder is a minor exception to the doctrine. See N.J. STAT. ANN. § 2C:11-3(a)(3)(a)-(d) (West Supp. 1990). Note that all four parts of the defense must be simultaneously present, and it is an exceedingly rare set of circumstances in which the affirmative defense could be proved. See Fletcher, *supra* note 46, at 419-20.

<sup>58</sup> See *Pizano*, 21 Cal. 3d at 131-33, 577 P.2d at 661-62, 145 Cal. Rptr. at 526-27.

<sup>59</sup> See *People v. Fuller*, 86 Cal. App. 3d 618, 621-28, 150 Cal. Rptr. 515, 516-20 (1978). Other examples are discussed in Fletcher, *supra* note 46, at 422-25.

<sup>60</sup> A typical felony murder indictment would read:

The Grand Jurors of [specified] county upon their oath present that the [defendant, name of individual] on the [designated date] at the [specified place] aforesaid and within the jurisdiction of this court did murder [the victim] in that while the said [defendant] was engaged in the commission of [the designated felony] and in the course of such crime the death of [the victim] was caused contrary to the provisions of N.J. STAT. ANN. § 2C:11-3(a)(3).

committed the homicidal act alone or with others may be indicted only for felony murder,<sup>61</sup> or the defendant could be indicted both for murder and for felony murder.<sup>62</sup> Or, the prosecutor could indict for purposeful or knowing murder, and indict for the underlying felony, but not indict for felony murder.<sup>63</sup> In addition, the presence of a homicide during the course of a felony has the potential to upgrade the underlying crime to felony murder for all participants despite their lack of actual participation in the homicidal act.<sup>64</sup> Such an increase in degree of liability is possible since the doctrine of felony murder attributes homicidal intent to a defendant who, by definition, did not actually have that intent.<sup>65</sup>

These aspects of the felony murder doctrine take on different dimensions when capital punishment is at issue. In New Jersey, only the person who committed the homicidal act or paid another to do so is eligible for capital prosecution.<sup>66</sup> The defendant must first be convicted of capital murder before the felony aggravating factor will be submitted to the penalty phase jury for the decision whether to impose the death sentence.<sup>67</sup> If the death sentence is not imposed at the penalty phase, the penalty for non-capital and for ordinary felony murder under present New Jersey law is the same: a mandatory minimum term of thirty years with a maximum term of life.<sup>68</sup>

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<sup>61</sup> See, e.g., case nos. 139, 140, 142 and 478 annotated in Bienen, *Prosecutorial Discretion*, *supra* note 1, at 313.

<sup>62</sup> See, e.g., App. D at 806 (case no. 007).

<sup>63</sup> See, e.g., App. D at 806 (case no. 016).

<sup>64</sup> See, e.g., App. D at 810 (cases nos. 371, 344, and 314).

<sup>65</sup> This inconsistency with modern concepts of criminal liability is discussed and criticized in G. FLETCHER, *supra* note 42, §§ 4.4-.4.1, at 274-85, §§ 4.4.4-.5, at 290-303; Roth & Sundby, *supra* note 50, at 450-60.

<sup>66</sup> N.J. STAT. ANN. § 2C:11-3(c) (West Supp. 1990).

<sup>67</sup> N.J. STAT. ANN. § 2C:11-3(c)(1) (West Supp. 1990). In some capital jurisdictions other than New Jersey, non-slayer participants can be sentenced to death for their role in a felony murder. See, e.g., *Pizano v. Superior Court*, 21 Cal. 3d 128, 577 P.2d 659, 145 Cal. Rptr. 524 (1978); see also G. FLETCHER, *supra* note 42, § 4.4.7, at 307-19 (tracing the expansion of the application of the capital felony murder doctrine to non-slayer participants); Fletcher, *supra* note 46, at 424-28 (criticizing the California Supreme Court's analysis in *Pizano*).

In some jurisdictions a defendant may be convicted of a non-capital felony murder if a police officer or a bystander kills an accomplice during the course of a designated felony. See, e.g., *State v. Wright*, 379 So. 2d 96, 96 (Fla. 1980); see also Morris, *supra* note 54, at 51-69 (discussing older cases and the conceptual properties raised by retaliatory liability). This is no longer the law in New Jersey. See *State v. Canola*, 73 N.J. 206, 226, 374 A.2d 20, 30 (1977) (limiting non-slayer felony murder to killings done by the defendant's accomplice during the felony).

<sup>68</sup> See Table C-6, at App. C, for an enumeration of the maximum penalties imposed for the homicide offense in the cases analyzed here. In New Jersey the sentence for felony murder at the time of this study was usually 30/30, that is, a maximum of 30 years and a minimum of 30 years. There were a few sentences of 40/30 or of other terms between 30 years and life. Most sentences were life/30. Cf. N.J. STAT. ANN. § 2C:11-3(b) (West Supp. 1990) (providing

### B. Capital Felony Murder

As with ordinary felony murder, capital felony murder is murder committed during the course of one of the enumerated common law felonies. Capital felony murder, however, must be separately charged under the special procedures of the capital statute, including the servicing of a notice of factors.<sup>69</sup> The majority of states with capital punishment statutes have some version of the felony aggravating factor as one of the criteria for the imposition of the death penalty.<sup>70</sup> In New Jersey, the presence of any one enumerated felony in section 2C:11-3(c)(4) is sufficient to make a case potentially death eligible for the defendant who committed the homicidal act or paid another to commit it.<sup>71</sup> A non-slayer cannot be eligible for capital prosecution, unless he paid another to commit the homicide.<sup>72</sup>

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the statutory limitations on sentences); Bienen, *Prosecutorial Discretion*, *supra* note 1, at 65 (describing the 1985 amendments to the penalty provisions applicable to the maximum term for non-capital murder and felony murder). In New Jersey, under present law, the minimum term is mandatory and is served without the application of commutation or other credits against sentence. Thus, a minimum term of 30 years, the ordinary term for felony and non-capital murder, means the defendant serves every day of 30 calendar years.

<sup>69</sup> See N.J. STAT. ANN. § 2C:11-3(c)(2)(e) (West Supp. 1990); *supra* notes 8-10 & 31 and accompanying text.

<sup>70</sup> See ALA. CODE § 13A-5-49(4) (Supp. 1990); CAL. PENAL CODE § 190.2(a)(17)(i-ix) (Deering Supp. 1991); COLO. REV. STAT. § 18-3-102(1)(b) (Supp. 1990); CONN. GEN. STAT. ANN. § 53a-46a(h)(1) (West 1985); DEL. CODE ANN. tit. 11, § 4209(e)(1)(j) (Supp. 1990); FLA. STAT. ANN. § 921.141(5)(d) (West Supp. 1991); GA. CODE ANN. § 17-10-30(b)(7) (1988); ILL. ANN. STAT. ch. 38, § 9-1(b)(6) (Smith-Hurd Supp. 1990); IND. CODE ANN. § 35-50-2-9(b)(1) (Burns Supp. 1990); KY. REV. STAT. ANN. § 532.025(2)(a)(2) (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art. 905.4(A)(1) (West Supp. 1991); MD. CRIM. LAW § 413(d)(10) (1988); MISS. CODE ANN. § 99-19-101(5)(d) (Supp. 1990); MO. ANN. STAT. § 565.032(2)(11) (Vernon Supp. 1991); MONT. CODE ANN. § 46-18-303(9) (1989); NEV. REV. STAT. ANN. § 200.033(4) (Michie Supp. 1990); N.M. STAT. ANN. § 31-20A-5(B) (1987); N.C. GEN. STAT. § 15A-2000(e)(5) (1988); OHIO REV. CODE ANN. § 2929.04(A)(7) (Anderson 1987); 42 PA. CONS. STAT. ANN. § 9711(d)(6) (Purdon 1982 & Supp. 1990); S.C. CODE ANN. § 16-3-20(C)(a)(1) (Law. Co-op. Supp. 1990); TENN. CODE ANN. § 39-13-204(i)(7) (Supp. 1990); UTAH CODE ANN. § 76-5-202(1)(d) (1990); WASH. REV. CODE ANN. § 10.95.020(9) (1990); WYO. STAT. § 6-2-102(h)(xii) (Supp. 1990).

<sup>71</sup> Under present New Jersey law if a murder is committed during the course of more than one felony, only one statutory aggravating factor will be served:

[U]nder N.J. [STAT. ANN. §] 2C:11-3(c)(4)(g) these facts [that the killing occurred during a robbery and a burglary] would be enumerated as a single aggravating factor with the jury instructed to consider both the robbery and burglary in the overall weighing process. The record under which an appeal is taken will then clearly reflect that the jury considered both the robbery and burglary pursuant to N.J. [STAT. ANN. §] 2C:11-3(c)(4)(g). Both are therefore subsumed under [§] 2C:11-3(c)(4)(g) and mentioned separately under the single aggravating factor. The weight assigned to the factor may, in the jury's view, be more because two underlying felonies are involved, although only one aggravating factor exists. *State v. Moore*, 207 N.J. Super. 561, 571-72, 504 A.2d 804, 809 (1985).

<sup>72</sup> See N.J. STAT. ANN. § 2C:11-3(c) (West Supp. 1990). Under federal constitutional standards non-slayer participants can be sentenced to death. The United States Supreme Court has held

Under the New Jersey capital punishment scheme, the presence of a felony can transform a felony murder case into a capital case only for the defendant who is alleged to have committed the homicide by his own conduct or paid another to commit the homicidal act.<sup>73</sup> The New Jersey Supreme Court has held that not only must the defendant be convicted of purposeful or knowing murder by his own conduct, but it must be proved that the defendant specifically intended to kill the victim, not that he merely intended to commit serious bodily injury.<sup>74</sup> Cases in which capital murder is charged because the de-

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that state statutes making nonslayer participants death eligible do not necessarily violate federal constitutional standards. See *Enmund v. Florida*, 458 U.S. 782 (1982). *Enmund* summarized the then existing state law in all jurisdictions and concluded that the imposition of the death penalty on a person who aids and abets a felon (*Enmund* drove the get-away car) in the course of which murder is committed by others but who does not himself kill, attempt to kill, or intend to kill, violates the eighth and fourteenth amendments. *Id.* at 789-801. At that time, Florida was one of only eight jurisdictions that authorized the death penalty "solely for participation in a robbery in which another robber takes life." *Id.* at 789 (footnote omitted).

The *Enmund* holding was explained in *Tison v. Arizona*, 481 U.S. 137, 146-52 (1987). *Tison* held that the death penalty for felony murder for persons who do not kill or intend to kill, but who have major personal involvement in the felony and show reckless indifference to human life, does not violate the eighth amendment. *Id.* at 158. The state must show more than a mere presence during the felony to justify the death sentence, but the federal presumption is no longer that the death penalty for non-slayer participants is disproportionate.

When an ordinary felony murder becomes a capital murder in a state that allows for the capital prosecution of non-slayer participants, the intent to commit the predicate felony can serve two purposes. It may ascribe to the defendant the malice necessary for a conviction for murder as well as be the factual basis for transforming ordinary felony murder into capital felony murder.

There is an interesting ambiguity in the present formulation of the proposed New York statute. It is unclear whether a non-slayer participant would be eligible for capital prosecution under the proposed bill. The language defining the intent requirement reads: "With intent to cause the death of another person, he *causes* the death of such person or of a third person; and . . . the victim was killed . . . [during the predicate felony.]" N.Y.S. 200, N.Y.A. 305, 214th Sess., sec. 3, § 125.27(a)(vi) (1991) (emphasis added). Whether non-slayer participants were death eligible under that formulation would presumably depend upon a court's interpretation of "cause." If two persons commit a robbery, and one shoots the victim or a bystander, did both "cause" the death? The specification that the defendant was "criminally liable for the present offense of murder *committed by another*" in the proposed mitigating factors specified for capital murder strongly implies that the legislative intent of this bill is that non-slayer participants may be eligible for capital prosecution. *Id.* sec. 8, § 400.27(8)(d) ("The defendant was criminally liable for the present offense of murder committed by another, but his participation in the offense was relatively minor although not so minor as to constitute a defense to prosecution."). The proposed New York statute does not include the New Jersey language limiting death eligibility to a defendant who commits the murder by his own conduct. See *infra* notes 67-69 and accompanying text. This omission provides additional support for the supposition that the proposed New York statute would allow non-slayer participants to be death eligible. The proposed New York formulation is far more problematic than the definition of intent adopted in New Jersey. See *id.*

<sup>73</sup> See N.J. STAT. ANN. § 2C:11-3(c) (West Supp. 1990).

<sup>74</sup> See *State v. Gerald*, 113 N.J. 40, 549 A.2d 792 (1988). *Gerald* involved a murder committed

fendant paid another to commit the murder are rare.<sup>75</sup> If the prosecutor is to charge capital murder and allege the presence of the felony aggravating factor, the defendant must be indicted for both the capital murder and the underlying felony.<sup>76</sup> The notice of factors must then specify the felony statutory aggravating factor.<sup>77</sup> The notice may allege other statutory aggravating factors as well. In addition, the defendant may be indicted for felony murder in the same indictment.<sup>78</sup>

While this describes the prosecutor's charging options prior to trial, the aggravating factors set forth in the statute, including the felony factor, are in theory only brought before the jury at the penalty phase of a capital trial after a conviction for death eligible murder.<sup>79</sup> While

during the course of a felony. The case set out important new doctrine regarding the requisite intent for capital felony murder. *See id.*; *supra* note 8.

<sup>75</sup> *See* *State v. Marshall*, 123 N.J. 1, 27, 586 A.2d 85, 97 (1991) (providing an example of a killing for payment, in the only death sentence affirmed to date in New Jersey under the 1982 statute). The by-his-own-conduct requirement does not mean that only one defendant in a codefendant case can be charged with capital or death eligible murder. This requirement is discussed in detail in *State v. Moore*, 113 N.J. 239, 297-303, 550 A.2d 117, 146-49 (1988). In *Moore*, the court reversed the death penalty imposed on the ground that the evidence was insufficient to show that the defendant committed the homicidal act by her own conduct. *Id.* at 302-03, 550 A.2d at 149. The majority opinion cited legislative history indicating that the Legislature clearly intended to preclude death eligibility:

where a defendant's murder conviction was based on a felony murder charge or a theory of accomplice liability, unless, as N.J.S.A. [§] 2C:11-3 expressly provides, defendant hired another to commit the murder. Other than that very narrow "murder for hire" exception, only the principal, *i.e.*, the "triggerman," shall be death-eligible.

*Id.* at 300, 550 A.2d at 148; *see also Gerald*, 113 N.J. at 89-90, 549 A.2d at 818 (discussing legislative history supporting a more restrictive application of the death penalty than in other states). There are a few cases in which the indictment rests upon the allegation that the defendant paid another to commit the murder. *But see, e.g., Marshall*, 123 N.J. 1, 586 A.2d 85 (1991) (upholding the sentence in a capital case in which the defendant was sentenced to death for paying two others to kill his wife). For the purposes of this Article we will refer to persons who commit the homicidal act by their own conduct as the class of persons who are potentially eligible for capital prosecution under the felony factor.

<sup>76</sup> *See* Bienen, *Prosecutorial Discretion*, *supra* note 1, at 242-43 (citing N.J. Ct. R. 3:7-3).

<sup>77</sup> A typical capital murder indictment would read: "The Grand Jurors . . . present that [the defendant] . . . did purposely or knowingly murder [the victim] by his own conduct contrary to the provisions of N.J.S.A. § 2C:11-3(a)(1)(2)." A separate count would indict the defendant for committing, attempting to commit, or flight after committing the underlying felony. A notice of factors would be served on the felony factor and perhaps other factors in a separate proceeding. The notice of factors is not part of the indictment, and there is no reference made to the notice of factors in the indictment. If a verdict of not guilty on the predicate felony were returned at the guilt phase, there would be no factual basis for the felony aggravating factor. Typically, the prosecutor simply introduces the guilt phase verdict for the felony as proof of the existence of the felony aggravating factor.

<sup>78</sup> *See, e.g., Bienen, Prosecutorial Discretion*, *supra* note 1, at 303 (annotated cases nos. 321 & 486); App. D (annotated case no. 276).

<sup>79</sup> Compare N.J. STAT. ANN. § 2C:11-3(c)(2)(a) (West Supp. 1990) (implying that aggravating factors are only formally presented to the jury at the penalty phase of the trial) with Bienen, *Prosecutorial Discretion*, *supra* note 1, at 244 (stating that prosecutors usually lay the factual

the facts supporting specific aggravating factors are not formally before the jury or judge until the penalty phase of a capital trial, the initial prosecutorial decision to charge a case as a capital case structures and defines all other procedural events and determines the trial strategy for both sides.<sup>80</sup> This is why the present study has focused upon the early stages of capital case processing and the prosecutor's decision to charge capital murder and serve a notice of factors.

The felony aggravating factor refers to an "offense" committed while the defendant was "engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit" any of the six enumerated felonies, of which murder is one.<sup>81</sup> This language is very broad. The threshold for establishing a factual basis for an attempt to commit or flight after committing a felony is low. Thus, even a minimal involvement in a felony has the potential of transforming a homicide into a capital murder for the person who committed the homicidal act under the New Jersey capital statute now in effect.

The five categories of the predicate felonies are the same in the proposed New York statute with one important difference. The proposed New York provision does not include murder as a predicate for a capital felony murder; the proposed New York statute is therefore virtually identical to the felony aggravating factor as it was in effect before *Gerald*, when the cases analyzed here were charged and tried.<sup>82</sup> Moreover, since the New York provision was drafted in 1978 and has not been amended since then, proposed the felony aggravating factor does not take into account recent amendments to the sex offense provisions in New York.<sup>83</sup>

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basis for aggravating factors at the guilt phase of the trial). The notice of factors must, of course, be served earlier, usually at arraignment. See authorities cited *supra* note 10.

<sup>80</sup> See Bienen, *Prosecutorial Discretion*, *supra* note 1, at 244.

<sup>81</sup> N.J. STAT. ANN. § 2C:11-3(c)(4)(g) (West Supp. 1990).

<sup>82</sup> See *supra* note 8. For discussion of the 1985 amendment adding murder to the list of statutory aggravating felonies, see *supra* note 38. Its effect was to make all two-victim homicides potentially death eligible.

<sup>83</sup> The proposed New York statute includes as predicate felonies the sex offenses of rape, sodomy in the first degree, and sexual abuse in the first degree. See N.Y.S. 200, N.Y.A. 305, 214th Sess., sec. 3, § 125.27(1)(a)(vi) (1990). Since 1978, the New York State Legislature has amended the definition of terms contained in each of these three offenses, thus rendering certain criminal conduct death eligible that was not death eligible when the language of the current death penalty bill was originally drafted. For example, the crimes of first degree rape, first degree sodomy, and first degree sexual abuse may each require proof of forcible compulsion. See N.Y. PENAL LAW § 130.35(1) (McKinney 1987) (rape in the first degree); *id.* § 130.50(1) (sodomy in the first degree); *id.* § 130.65(1) (sexual abuse in the first degree). Yet the Legislature in 1982 amended the statutory definition of "forcible compulsion" by dropping the requirement of "earnest resistance" on the part of the victim, against which compulsion was measured, and

*C. Differences Between Ordinary Felony Murder and Capital Felony Murder Under New Jersey Law*

The section of the homicide statute defining the crime of ordinary, or non-capital, felony murder uses language that is almost identical to that used in the definition of the felony aggravating factor.<sup>84</sup> The principal difference between ordinary felony murder and capital felony murder is that the felony aggravating factor can only be served against the defendant who actually committed the homicidal act, or paid another to do so.<sup>85</sup> This difference is a result of the general limitation restricting the application of the death sentence to persons who commit homicide by their own conduct.

A second important difference between the two forms of murder is that the felony aggravating factor includes murder as one of the predicate felonies, while the definition of ordinary felony murder does not include murder as a predicate felony for felony murder.<sup>86</sup> After the 1985 amendment to the felony aggravating factor,<sup>87</sup> a homicide involving more than one victim is potentially death eligible under the felony factor, although a homicide involving more than one victim would not automatically be indictable as felony murder under the definition of ordinary, non-capital felony murder.<sup>88</sup>

Issues concerning the overlapping definitions of ordinary felony murder and capital felony murder are further complicated in New Jersey by the statutory definition of sexual assault, a predicate for

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then in 1983 by dropping the requirement that physical force put the victim "in fear of immediate death or physical injury." See *id.* § 130.00(7), commentary at 569 (discussing the amendments to this subsection). Another example pertains to first degree sexual abuse, which requires proof of "sexual contact" between the defendant and the victim. See *id.* § 130.65. The statutory definition of "sexual contact" was broadened in 1984 to include "touching of the actor by the victim." See *id.* § 130.00(3), commentary at 567-68 (discussing the amendments to this section). Thus, forcibly compelling a victim to engage in sexual contact with the actor could be death eligible if the other proposed requirements of capital felony murder were met.

<sup>84</sup> Compare N.J. STAT. ANN. § 2C:11-3(a)(3) (West Supp. 1990) with *id.* § 2C:11-3(c)(4)(g) (West Supp. 1990).

<sup>85</sup> *Id.* § 2C:11-3(c) (West Supp. 1990).

<sup>86</sup> Compare *id.* (murder included) with *id.* § 2C:11-3(a)(3) (West Supp. 1990) (crimes listed are robbery, sexual assault, arson, burglary, kidnapping, or criminal escape).

<sup>87</sup> See *supra* note 41.

<sup>88</sup> A minor difference between the definition of ordinary felony murder and capital felony murder is the inclusion of "criminal escape" as a predicate crime for ordinary felony murder, where as the felony aggravating factor refers to "flight after committing" a felony. The crime of criminal escape applies to circumstances involving a defendant's escape from prison or police custody in the absence of another underlying felony. In the complete database of 703 cases on which this study is based, there was no case where the charge of criminal escape alone was alleged to be the factual basis for felony murder. The offense is typically charged any time a defendant does not surrender at the scene of the crime.



both capital murder and ordinary felony murder. The statutory definition of aggravated sexual assault includes the language that the act was "committed during the commission, or attempted commission, whether alone or with one or more other persons, of robbery, kidnapping, *homicide*, aggravated assault on another, burglary, arson or criminal escape."<sup>89</sup> Given this definition, circumstances involving sexual penetration associated with a killing could be charged in at least three different ways, and the characterization of the crime would result in very different penalties.<sup>90</sup>

*D. The Scope of Prosecutorial Discretion in Charging and in the Selection of Felony Murder Cases for Capital Prosecution*

In New Jersey, the county prosecutor has a great deal of discretion in deciding which felony murder defendants will be selected for capital case prosecution. To charge capital felony murder the prosecutor need only serve a notice of the felony aggravating factor and inform the defendant, at arraignment, that evidence concerning the defendant's participation in a particular predicate felony will be submitted to the penalty phase jury.<sup>91</sup> This submission, of course, will only occur if the defendant is convicted of death eligible murder at the guilt phase of a capital trial.

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<sup>89</sup> N.J. STAT. ANN. § 2C:14-2(a)(3) (West Supp. 1990) (emphasis added). The drafters of this provision modeled it upon the doctrine of felony murder, the theory being that any sexual act committed during a felony was by definition without the consent of the victim. The fact that the word homicide is used instead of murder, however, raises problems with regard to intent. A homicide includes manslaughter (requiring only a negligent or reckless intent) and aggravated manslaughter or death by automobile. See N.J. STAT. ANN. § 2C:11-4 (West Supp. 1990) (manslaughter); *id.* § 2C:11-5 (West Supp. 1990) (death by auto). For a history of the enactment of rape reform legislation in New Jersey, see Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. LAW REP. 170, 206-9 (1980).

<sup>90</sup> For example, the crime of homicide during the course of a sexual assault could be alternatively charged as follows: (1) aggravated sexual assault, with the homicide (irrespective of whether it was murder) serving as the predicate felony for the crime of felony-aggravated sexual assault; (2) non-capital felony murder, with sexual assault as the underlying felony; or (3) purposeful or knowing murder, by his own conduct, with specific intent to kill, which is capital murder, for the person who committed the homicidal act with sexual assault serving as the factual basis for the felony aggravating factor.

If convicted, for (1) the maximum penalty would be 20 years; for (2) the maximum penalty would be life with a 30-year mandatory minimum; and for (3) the penalty could be death. These penalties are for the crimes of aggravated sexual assault, felony murder, and capital murder respectively, without additional or enhanced penalties for contemporaneous offenses or habitual offender status. See N.J. STAT. ANN. § 2C:11-3(b) (West Supp. 1990) (penalty for non-capital felony murder); *id.* § 2C:11-3(c) (West Supp. 1990) (penalty for capital felony murder); *id.* § 2C:43-6(a)(1) (West Supp. 1990) (maximum penalty for crimes of the first degree).

<sup>91</sup> See N.J. STAT. ANN. § 2C:11-3(c)(2)(e) (West Supp. 1990); Bienen, *Prosecutorial Discretion*, *supra* note 1, at 243.

Given the overlapping character of the statutory criteria, it might be expected that individual county prosecutors would elect to charge the formulation of the offense that carried the longest and harshest possible sentence. In short, one might expect county prosecutors to charge capital felony murder at every available opportunity. In fact, county prosecutors do not charge a capital offense for every potentially capital felony murder.<sup>92</sup> Theoretically, for every crime of felony murder, there is at least one defendant who intentionally committed the homicidal act by his own conduct and who is therefore liable for capital prosecution on the basis of the felony aggravating factor. Yet, the actual number of capital felony prosecutions is a fraction of all potentially death eligible felony murder cases.<sup>93</sup>

The statute is silent as to which criteria the individual county prosecutors should use to select felony murder cases for capital prosecution. The New Jersey Supreme Court has recognized that the absence of any sort of legislative guidance on this issue raises serious constitutional problems.<sup>94</sup> In response to the court's recommendation, the County Prosecutor's Association in February of 1989 issued a document entitled "Prosecutorial Guidelines for the Designation of Homicide Cases for Capital Prosecution" (Guidelines).<sup>95</sup>

While both prosecutors and defense attorneys agree that the number of cases for which the death penalty could be sought (death possible cases)<sup>96</sup> is significantly greater than the number of cases for which

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<sup>92</sup> See Bienen, *Prosecutorial Discretion*, *supra* note 1, at 255-56 (discussing some of the strategic considerations in the decision to charge a capital felony murder).

<sup>93</sup> See App. D. The Guidelines were adopted after *State v. Gerald*, 113 N.J. 40, 549 A.2d 792 (1988).

<sup>94</sup> See *State v. Koedatich*, 112 N.J. 225, 548 A.2d 939 (1988), *cert. denied*, 488 U.S. 1017 (1989). The *Koedatich* court recognized "the need for greater guidance for prosecutors as they attempt to perform their constitutional duty of enforcing this statute" and "strongly" recommended that the attorney general and the county prosecutors adopt guidelines for the selection of capital cases in order "to promote uniformity in the administration of the death penalty." *Id.* at 258, 548 A.2d at 955.

<sup>95</sup> The Guidelines are reprinted in Appendix B. The county prosecutors and the attorney general suggest that the Guidelines do not represent new policies, but simply affirm policies that have always been followed. Of the seven Guidelines, none makes reference to felony murder cases. The Guidelines and their Preamble are formulated in very general terms. See, e.g., Guideline No. 4: "The prosecutor must be satisfied that there is proof beyond a reasonable doubt of the existence of at least one statutory aggravating factor." The Preamble to the Guidelines states:

The twenty-one County Prosecutors in the State of New Jersey reaffirm the fact that race, sex, social or economic religion [sic] and/or national origin of a defendant or victim has not in the past, nor will in the future be considered in any fashion to determine whether a case warrants capital prosecution.

See Appendix B, at 791. The Guidelines were adopted on March 3, 1989 and amended on January 23, 1990 to include a reference to victims in the preamble, which was a word omitted by oversight in the original version. See *id.* at [12].

<sup>96</sup> See *supra* note 34 (definition of a death possible case).

the death penalty is actually charged (death eligible cases),<sup>97</sup> there may be disagreement as to which cases belong in either category. A number of death possible cases which are not designated death eligible by the prosecutor are cases in which the felony factor could have been served against the principal in a felony murder.<sup>98</sup> The exercise of unilateral prosecutorial discretion in felony murder cases is central to capital case processing. A key research goal in the present project has been to identify the factors possibly influencing the prosecutor's decision to charge capital murder at this early stage.

Prosecutorial discretion is exercised in several different ways at the charging stage.<sup>99</sup> These crucial charging decisions are made prior to filing a formal notice of factors and prior to the designation of a case as death eligible. Indeed, they are often made prior to the formal indictment being returned. No prosecutor has yet indicated how such decisions are made in felony cases and what considerations influence this highly discretionary process. The Guidelines issued in 1989 simply assert that prosecutors designate cases as capital when they have a legally sufficient basis for doing so.<sup>100</sup> By the time the prosecutor serves a formal notice of factors, or decides not to designate a case as capital, the final disposition of the case (if it is a plea) may already have been determined. There will be no record or court disposition reflecting the dynamics of that decision making process.<sup>101</sup>

Information gathered about the cases identified in Appendix D suggests that felony murder cases are designated capital in a manner that is inconsistent from county to county and in an arbitrary manner when the cases are compared by jurisdiction and identified groups of defendants and victims.<sup>102</sup> It appears that there is no single or con-

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<sup>97</sup> *Id.* (definition of a death eligible case).

<sup>98</sup> *See, e.g.*, annotated cases in App. D (annotations of cases not prosecuted as capital cases).

<sup>99</sup> The initial decision concerning the form of the charge determines what evidence will be presented to the grand jury. The kind of evidence that is presented to the grand jury may preclude death eligibility. There is also the procedural decision to charge by accusation rather than indictment. This decision is another threshold decision on death eligibility that is made unilaterally by prosecutors, yet has never been subject to judicial review. *See Bienen, Prosecutorial Discretion, supra* note 1, at 299. If the homicide charge is in the form of an accusation, it may mean that a decision has been made to offer a plea. It may mean that the plea bargain has already been negotiated or agreed upon, or that a plea is being considered. It certainly means the case will not proceed as a capital case because a capital case must be charged by indictment.

<sup>100</sup> *See* App. B.

<sup>101</sup> *Cf. State v. Smith*, 202 N.J. Super. 578, 495 A.2d 507 (1985). In *Smith*, the court held that the defendant had demonstrated that his case had been singled out for capital prosecution by the service of notice of factors, while fifteen other recent homicide indictments of similar gravity were not capitally prosecuted. *Id.* at 591, 495 A.2d at 514. The court refused to quash a subpoena duces tecum to compel the Essex county prosecutor's office to reveal its guidelines for selection of capital cases. *Id.* at 591-92, 495 A.2d at 514.

<sup>102</sup> *See* App. D and *infra* notes 149-54 and accompanying text.

sistent legal standard being applied to select eligible felony murder cases for capital prosecution and that impermissible or arbitrary factors may be influencing the selection of felony cases for capital case processing.<sup>103</sup> These influences can result in a capital case processing system that is arbitrary or capricious.

### III. THE IMPORTANCE OF FELONY MURDER CASES

This study reports findings on the processing of 146 felony murder cases in New Jersey in which the defendant was identified as committing the homicide by his own conduct. These felony murders were selected for separate review and analysis for several reasons.

First, these 146 felony murders comprised a large segment (one fifth) of the 703 cases in the entire study, and these cases advanced farthest into the capital case processing system. Moreover, felony murders were a large proportion of those cases in which defendants were sentenced to death. Of the twenty-five defendants sentenced to death during the pertinent period, fifteen were served with the felony statutory aggravating factor and in only one instance was the felony factor not found at the penalty phase.<sup>104</sup>

To understand more clearly how far the felony murder cases advanced into the system, consider that the 146 by-his-own-conduct felony murders comprised one-fifth of all cases in the study, but the fifteen death sentences among the 146 by-his-own-conduct felony cases accounted for fully three-fifths of the twenty-five death sentences.<sup>105</sup> The large number of felony murderers sentenced to death, relative to all murderers sentenced to death, together with potential disparities in felony murder case processing, make these cases a critical group for analysis.

Second, because of the broad definition of the felony statutory aggravating factor in New Jersey, felony murder cases represented over half (fifty-six percent) of those cases that were declared capital by the county prosecutor.<sup>106</sup> They also made up approximately one-fifth (twenty-two percent) of those cases identified as having a factual

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<sup>103</sup> See *infra* notes 167-95 and accompanying text (statistical analysis of this hypothesis).

<sup>104</sup> See Bienen, *Prosecutorial Discretion*, *supra* note 1, table 45, at 278. Some of the figures reported in Section III are based on analyses not discussed in this Article. Details of these analyses will be provided by the authors upon request.

<sup>105</sup> See *id.*

<sup>106</sup> Compare Bienen, *Prosecutorial Discretion*, *supra* note 1, at 159 (stating that prosecutors served a notice of factors in 131 out of 703 murder cases studied in the project) and Table 6 (giving the number of death eligible felony murder cases in the subset of 146 cases as 73).

basis for serving a notice of factors, although no notice was served.<sup>107</sup> Prosecutors exercised considerable discretion in the decision to declare a case capital and in the decision to offer and accept a plea bargain. This exercise of discretion removed many potentially capital cases from the capital case processing system.

Third, some New Jersey counties have only a few felony murders each year, perhaps as few as one or two. Other counties have as many as twenty-five or more pending indictments for felony murder at any given time.<sup>108</sup> Felony murders in such diverse trial court jurisdictions, or even within a single high-volume county, can exhibit similar circumstances but have dramatically different judicial outcomes. Data on the individual cases in this study indicate that similar felony murders have been disposed of very differently by individually autonomous county prosecutors.<sup>109</sup> This disparity was another reason why felony murders were a key group of cases for determining how the New Jersey capital statute has been operating in practice.

Fourth, felony murders often have multiple aggravating factors present, placing them among the most serious cases. Three or more aggravating factors were present in nearly one-third (31%) of the felony murder cases in which the defendant committed the homicide by his own conduct. In contrast, less than one percent of the non-felony homicides had three or more statutory aggravating factors present.<sup>110</sup> In other words, felony murders were over thirty times more likely than non-felony homicides to have three or more aggravating factors present.

Paradoxically, felony murders may sometimes exhibit minimal levels of aggravation, such as when a murder occurs under circumstances that are technically a burglary or a robbery. The definition of the felony aggravating factor is so broad that it accommodates very different types of cases. In sum, while capital felony cases generally

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<sup>107</sup> Compare Bienen, *Prosecutorial Discretion*, *supra* note 1, table 1, at 169 (giving the total number of death possible cases as 404) and *infra* Table 6 (giving the total number of death possible felony murders as 134). Thus, prosecutors did not serve a notice of factors in 273 death possible homicide cases; the analogous figure for the felony murder subset is 61.

<sup>108</sup> Cf. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES—1988, at 94-98, 130 (1989) (giving 1988 statistics for murders and nonnegligent homicides for New Jersey cities and towns with populations of 10,000 and over, and for suburban counties). While the Uniform Crime Reports do not distinguish felony murders from other nonnegligent homicides, a comparable variation in the incidence of felony murders across counties can be seen in Table C-1, at App. C.

<sup>109</sup> See App. D (annotating death possible felony murder cases with discrepancies in outcome among counties); see also Bienen, *Prosecutorial Discretion*, *supra* note 1, at 299-17 (same).

<sup>110</sup> This percentage is derived from the data reported in Bienen, *Prosecutorial Discretion*, *supra* note 1, table 35, at 265.

exhibit more extreme aggravation in terms of the number of statutory aggravating factors present, they also exhibit great variability in this respect. A crucial question thus arises: What criteria do prosecutors use to decide which felony murder cases will be designated for capital prosecution?

Finally, enhanced racial disparities in the case processing of felony murders as compared to non-felony murders have been consistently reported in death penalty research in other jurisdictions. Empirical studies conducted since *Furman*<sup>111</sup> on the application of the death penalty generally have repeatedly found evidence of racial and geographical disparities in case outcomes across a wide spectrum of states.<sup>112</sup> Regional variations within states in charging decisions have also been documented in some studies, which have found that rural prosecutors were more likely to seek a death sentence against black defendants than were urban prosecutors.<sup>113</sup>

<sup>111</sup> 408 U.S. 238 (1972) (per curiam).

<sup>112</sup> A consistent finding of these studies has been the distinctly greater likelihood that a defendant would receive a death sentence if the victim were white. See, e.g., D. BALDUS, G. WOODWORTH & C. PULASKI, *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 149-60 (1990) (analyzing Georgia data); S. GROSS & R. MAURO, *DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING*, 44-45 (1989) (finding this disparity in Florida, Georgia, and Illinois, the three states with the largest number of death sentences between 1976 and 1980); Bowers, *The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, table 4, at 1084 (1983) (studying twenty Florida counties); Bowers & Pierce, *Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 593-97 (1980) (finding that black defendants and defendants who murdered whites were more likely to receive a death sentence in Florida, Georgia, Ohio, and Texas); Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437, 450-53 (1984) (studying prosecutorial requests for the death penalty in felony murder prosecutions in South Carolina) [hereinafter Paternoster, *Prosecutorial Discretion*]; Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 767-69 (1983) (studying initial charging decisions in South Carolina nonnegligent homicides, and finding that blacks who killed whites in murders having statutory aggravating factors were 4.5 times more likely to receive a death sentence than blacks who killed blacks) [hereinafter Paternoster, *Race of Victim*]; Paternoster & Kazyaka, *Racial Considerations in Capital Punishment: The Failure of Evenhanded Justice*, in CHALLENGING CAPITAL PUNISHMENT 113, 129-32 (K. Haas & J. Inciardi eds. 1988) (finding that the combined effects of defendants' and victims' race influenced prosecutorial decisions to seek the death penalty in felony murder cases); Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918, 921-22 (1981) (studying twenty Florida counties, and finding that defendants in white-victim cases have a higher probability of being indicted for first degree murder and of receiving a death sentence); Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 460-61 (1981) (finding that the ratio of death row murderers of whites to murderers of blacks was 31:1, and that black murderers of whites outnumbered white murderers of whites by a 2:1 ratio).

For a comprehensive critical review of the empirical studies on capital punishment, both pre- and post-*Furman*, see Bienen, *Prosecutorial Discretion*, *supra* note 1, at 100-58.

<sup>113</sup> See, e.g., D. BALDUS, G. WOODWORTH & C. PULASKI, *supra* note 112, at 179 & table 4,

These disparities have been observed at the several successive points in the capital case processing system, including the stages of charging, indictment, conviction, and sentencing.<sup>114</sup> For example, Bowers and Pierce investigated sequential case processing decisions relating to charging, indictment, conviction, and sentencing in twenty Florida counties for 1976-77.<sup>115</sup> The race of both the victim and the defendant affected the defendant's chances of advancing through the system, with the race of the victim having a greater effect at each stage.<sup>116</sup> These disparities have persisted even when the homicides have been partitioned into felony and non-felony murders.<sup>117</sup> Specifically among felony murders, the race of the victim has had a greater influence on case outcome than the defendant's race.<sup>118</sup> Killers of whites, especially blacks who have killed whites, have been at highest risk of being charged with capital murder and being sentenced to death.<sup>119</sup>

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at 180 (Georgia); Bowers, *supra* note 106, at 1084-86 (finding that death sentences more likely in the northern and central regions of Florida than in the south, for murders of equivalent culpability); Bowers & Pierce, *supra* note 112, at 601-07 (finding significant regional disparities among counties in Georgia and Florida); Paternoster, *Race of Victim*, *supra* note 112, at 780-83 (finding that, for South Carolina, prosecutors in rural areas were more likely to seek a death sentence in both white- and black-victim cases).

<sup>114</sup> See Bowers & Pierce, *supra* note 112, at 608-12.

<sup>115</sup> See *id.* at 608.

<sup>116</sup> *Id.* at 608-9. Blacks who killed whites were at the greatest risk of advancing at each stage. *Id.* table 7, at 609. When homicide cases were divided into felony murders and non-felony murders, racial disparities persisted at each stage for the former but not for the latter. *Id.* at 610-11. See also D. BALDUS, G. WOODWORTH & C. PULASKI, *supra* note 112, at 178-84 (comparing prosecutorial charging decisions and jury sentencing decisions for rural and urban Georgia); Paternoster & Kazyaka, *supra* note 112, at 124-28 (comparing prosecutorial charging decisions and the imposition of death sentences in South Carolina, and finding race a factor at both stages); Radelet, *supra* note 112, at 922 (finding the race of the victim to be a factor in indictments for first degree murder and in imposing death sentences).

<sup>117</sup> See S. GROSS & R. MAURO, *supra* note 112, at 45-46 (showing that race-of-victim disparities persisted when the felony status of the homicide was controlled, with defendants in white-victim cases more likely to receive a death sentence); Bowers & Pierce, *supra* note 112, at 598-600 (same); Paternoster, *Prosecutorial Discretion*, *supra* note 112, at 457-63 (same).

<sup>118</sup> See *supra* note 116.

<sup>119</sup> Gross and Mauro found that in the three states with the largest number of death sentences, Florida, Georgia, and Illinois, blacks who killed whites in felony homicides were substantially more likely to receive a death sentence than blacks who killed blacks. See S. GROSS & R. MAURO, *supra* note 112, at 45-47. Similar results have been noted in other studies. See, e.g., Bowers & Pierce, *supra* note 112, table 3, at 599 (examining data for Florida, Georgia and Texas); Paternoster, *Prosecutorial Discretion*, *supra* note 112, at 452-55 (finding a marked disparity in prosecutorial decisions to seek the death penalty between black- and white-victim felony homicides in South Carolina, but a less marked disparity based on race of the defendant); Zeisel, *supra* note 112, figure 2, at 461 (showing that of those defendants arrested for the murder of a white victim during a felony, 47% of blacks received death sentences as opposed to 24% of white defendants).

#### IV. MODELING THE STATUTORY CRITERIA FOR DEATH ELIGIBILITY AND PROSECUTORIAL DECISION MAKING

##### *A. The Structure of Prosecutorial Decision Making at the Charging Stage*

Our analysis of prosecutorial decision making in felony murder cases focuses on the early stages of capital case processing because it is there that key determinative decisions are made. Seemingly technical or procedural pretrial decisions concerning charging may well determine a case's outcome and have other far-reaching consequences for the defendant and all other participants in the criminal justice system. For example, as a result of a prosecutor's early, unilateral decision not to charge capital felony murder, or a later decision to accept a plea to non-capital felony murder or another offense, the county will not have to incur the expense of a capital trial. There will be no jury trial, or any death qualified jury in the penalty phase. The case will therefore require far fewer resources and a minimum of court time.<sup>120</sup>

If the case is to proceed as a capital felony murder, however, trial preparation will take at least a year. The trial itself, including the selection of a capital jury, will be extremely cumbersome and lengthy. There may even be one or more trips up the appellate ladder on interlocutory appeals before the trial stage is completed.<sup>121</sup>

As a first step, it was necessary to identify analytically the legal criteria for death eligibility in felony murder cases, including the by-his-own-conduct restriction and the presence of at least one of the felonies included in the statutory definition of the felony aggravating factor. Although such criteria seem straightforward, previous research indicated that charging practices differed widely across counties, thus creating great variability in how cases were formally charged.<sup>122</sup> The

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<sup>120</sup> The Guidelines adopted by the county prosecutors state that the expense of a trial shall not influence the decision to declare a case death eligible. See App. B, at [9]. It is difficult to imagine, however, that resource allocation does not play some role in the decision making process, especially in the urban counties where fiscal crisis is endemic and there is a chronic shortage of prosecutors and court facilities.

<sup>121</sup> See, e.g., *State v. Bey*, 96 N.J. 625, 477 A.2d 315 (1984) (per curiam) (appeal of trial court rulings on motions before conclusion of trial); *State v. Bey*, 97 N.J. 666, 483 A.2d 185 (1984) (mem.) (clarifying previous ruling); *State v. Bey* [I], 112 N.J. 45, 548 A.2d 846 (1988) (appeal of conviction based on trial errors); *State v. Bey* [II], 112 N.J. 123, 548 A.2d 887 (1988) (appeal of death sentence).

<sup>122</sup> See Bienen, *Prosecutorial Discretion*, *supra* note 1, at 298-317 (annotating death possible felony murder cases); *id.* at 165-92 (discussing case progression by county and race); *id.* at 192-220 (discussing analysis of the plea/trial decision by county and race of defendant and victim); see also cases annotated in App. D (showing variability across counties).



twenty-one individual county prosecutors have great latitude in charging. In this process they unilaterally and independently interpret a broadly-worded statute.<sup>123</sup> The formal indictment brought by the individual county prosecutor could not, therefore, be the sole criterion for determining whether a case was potentially death eligible. Nor did we want to rely exclusively upon the defense attorney's characterization of the circumstances of the offense in deciding whether a case was death possible. Defense counsel might minimize the level of aggravation in a case in order to protect a client. Consequently, relying only upon defense counsel's characterizations of the circumstances of the offenses might not identify all death possible cases.<sup>124</sup>

The definition of a homicide as felony murder, for purposes of this study, incorporates both prosecutorial charging decisions and the defense attorney's characterization of the case. The definition utilizes three criteria: first, the prosecutor's homicide charge was accompanied by a formal charge against the same defendant for one of the six predicate felonies for the felony factor;<sup>125</sup> or second, the case was designated by the defense attorney as death possible on the felony factor; and third, the defense attorney identified the defendant as committing the homicide by his own conduct.<sup>126</sup> Given the almost identical language in the definition of non-capital felony murder and

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<sup>123</sup> See *supra* notes 91-103 and accompanying text.

<sup>124</sup> See generally Bienen, *Prosecutorial Discretion*, *supra* note 1, at 331-37 (describing the role of the interviewer and procedures for data verification for this project); *infra* note 138.

<sup>125</sup> See *supra* note 41 and accompanying text (discussing the six aggravating felonies of murder, robbery, sexual assault, arson, burglary, and kidnapping, leading to capital felony murder as set forth in N.J. STAT. ANN. § 2C:11-3(C)(4)(g) (West Supp. 1990)). Contemporaneous felony cases involve the contemporaneous charges of murder, aggravated sexual assault and sexual assault, robbery, burglary, kidnapping, and aggravated arson and arson (charge codes A31, A41, A42, C11, D21, D22, E11, F12, F13, or G23 on any one of variables 56, 60, 64, 68, 72, 76, 80, and 84) or a factual basis for a contemporaneous felony (variable 629, values 1-5) and a factual basis indicating that the homicide was the result of the defendant's own conduct (variables 433, 434, or 435; values 3 or 4). Because no cases in this data base involved the serving of a felony factor for homicide committed during the course of another murder, murder was not treated as one of the underlying predicate felonies used to identify felony murders. Analyses of felony murder cases after June 10, 1985, the effective date of the amendment to N.J. STAT. ANN. § 2C:11-3, will include murder as a predicate felony. See N.J. STAT. ANN. § 2C:11-3(c)(4)(g) (West Supp. 1990); see also Bienen, *Prosecutorial Discretion*, *supra* note 1, at 66, 68-9 (discussing the inclusion of murder as a predicate felony in the 1985 amendments to N.J. STAT. ANN. § 2C:11-3).

<sup>126</sup> In the spring of 1989, the New Jersey Legislature considered a bill that would have extended the felony aggravating factor to non-slayer participants. This bill, reintroduced in the 1990 session, would substantially increase the number of persons eligible to be charged with capital murder under the felony factor. See N.J.A. 2575, Sess. 1990 (introduced by Assemblyman Hardwick). "This bill would amend New Jersey's capital punishment statute to reflect the [Tison v. Arizona, 481 U.S. 137 (1987)] ruling and thus permit murderers convicted under the felony murder doctrine to be sentenced to death." Statement to N.J.A. 2575, Sess. 1990, at 5.

in the definition of the felony aggravating factor, the basic distinction between a felony murder which could be designated capital under the felony aggravating factor and ordinary felony murder is the overarching by-his-own-conduct restriction.<sup>127</sup> The separate identification of the defendant as committing the homicide by-his-own-conduct was therefore critical.

### *B. Plea Agreements: An Exit from the Capital Case Processing System*

The important, early role of plea bargaining in capital case processing is overlooked by analyses that focus only upon jury decision making at capital trial and penalty phase.<sup>128</sup> A plea agreement in New Jersey and elsewhere effectively removes a case from the capital case processing system.<sup>129</sup> Cases that are pled, whether to avoid the death penalty or for other reasons, never reach capital trial or penalty phase, although their circumstances may be as grave as those cases in which a defendant is sentenced to death.<sup>130</sup>

Different county policies regarding plea bargaining in potentially capital cases are a major source of discrepancies among counties in

<sup>127</sup> All of the cases analyzed in this Article were prosecuted before the New Jersey Supreme Court's decision in *State v. Gerald*, 113 N.J. 40, 549 A.2d 792 (1988), which requires proof of a specific intent to kill before the death penalty may be imposed. See *id.* at 76-90, 549 A.2d at 811-18; *supra* note 8.

<sup>128</sup> See, e.g., Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908 (1982); Krauss, *The Witherspoon Doctrine at Witt's End: Death-Qualification Reexamined*, 24 AM. CRIM. L. REV. 1 (1986); Comment, *Jury Coercion in Capital Cases: How Much Risk are We Willing to Take?*, 57 U. CIN. L. REV. 1073 (1989).

<sup>129</sup> See, e.g., Bienen, *Prosecutorial Discretion*, *supra* note 1, at 313 (cases nos. 252, 275, 283, 316 and 379—Ocean County):

A 23 year old black male and four black male co-defendants became involved in an altercation outside of a bar with the 30 year old black male victim . . . . The defendants stabbed and clubbed the victim to death. Four of the five defendants were jointly indicted for purposeful or knowing murder by their own conduct. The fifth defendant was indicted as an accomplice to murder. No notice of factors was served against any defendant. The homicide charge was dismissed in a plea bargain against the first defendant who was convicted of aiding and abetting aggravated assault. That defendant was sentenced to the 315 days he had already served in county jail. One co-defendant pled guilty to aggravated manslaughter on an accusation and was sentenced to 15 years with a four year minimum. Another co-defendant pled guilty to manslaughter and was sentenced to seven years. A third co-defendant pled guilty to aggravated assault and was sentenced to one year. The fourth co-defendant pled to a weapons offense and was sentenced to less than a year.

*Id.*

<sup>130</sup> A defendant can no longer plead guilty to capital murder, waive a jury, and be sentenced to death by a judge. See *State v. Di Frisco*, 118 N.J. 253, 269-83, 571 A.2d 914, 923-30 (1990). On pleas to capital murder to avoid a death sentence, see Bienen, *Prosecutorial Discretion*, *supra* note 1, at 78 n.236, 81 n.257. All pleas to capital murder prior to *Di Frisco* resulted in the imposition of a life term. Cf. *id.*

charging and disposition. Moreover, if a prosecutor anticipates that a case may be pled, the case may be charged in a manner that will facilitate plea negotiations.<sup>131</sup> During the period of this study, some New Jersey prosecutors were far more receptive than others to plea negotiations in potentially capital cases. Plea bargaining in potentially capital felony murder cases was a widespread practice during the period of this study. The data on disposition used in this study always indicate whether a sentence was imposed pursuant to a plea agreement.<sup>132</sup>

*C. Removing Codefendants Who Were Not Potentially Eligible  
for Capital Prosecution*

Codefendants who did not commit the homicidal act or pay another to do so are not eligible for capital prosecution.<sup>133</sup> Conversely, all codefendants who committed or participated in the homicidal act are eligible to have a notice of factors served against them by the county prosecutor. Proof of the by-his-own-conduct requirement in codefendant cases is typically submitted to the death qualified jury at the guilt phase of a capital trial.<sup>134</sup> There are instances where the county prosecutor served all codefendants with a death eligible indictment and a notice of factors, even though the circumstances of the case indicated that only one person committed the homicidal act.<sup>135</sup> In some cases, it is unclear prior to trial who committed the homicidal act. In that situation, the prosecutor could, and in some instances did, serve a notice of factors declaring a case death eligible against more than one defendant in a single case.<sup>136</sup> Also, in a very few cases, not only was the defendant death eligible because he had hired another person to commit the homicidal act, but the person who committed the homicidal act was potentially death eligible too. Multiple codefendants could also be potentially death eligible when more than one person committed the homicidal act by his own conduct, as for example

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<sup>131</sup> For illustrations of such charging decisions, see Bienen, *Prosecutorial Discretion*, *supra* note 1, at 317-26 (annotation of death possible cases with respect to pleas to manslaughter).

<sup>132</sup> In New Jersey, the fact of a disposition by plea agreement is recorded on the judgment sheet.

<sup>133</sup> See *supra* notes 73-75 and accompanying text.

<sup>134</sup> See *supra* note 79 and accompanying text.

<sup>135</sup> See, e.g., Bienen, *Prosecutorial Discretion*, *supra* note 1, at 315-16 (annotation of cases nos. 294 and 304, involving codefendants).

<sup>136</sup> E.g., the facts in *State v. Kise*, whose death sentence was set aside in an unreported order on April 15, 1987, involved several codefendants who jointly beat the victim and allowed him to drown.

when more than one defendant beat a victim to death.<sup>137</sup> Finally, in some cases, the attorney in the interview did not indicate that the defendant committed the homicidal act by his own conduct, even though the defendant was convicted of purposeful or knowing murder by his own conduct, and there were no codefendants.<sup>138</sup> The principal analytical problem, then, was how to capture all of the potentially death eligible cases without including cases of felony murder in which the defendant did not commit the homicidal act by his own conduct.

Under the circumstances of many felony murders, the by-his-own-conduct restriction alone would remove codefendants who were non-slayer participants from the group of death possible cases. The archetypal example is the four-person robbery of a grocery store in which only one person shoots and kills the proprietor or a bystander.<sup>139</sup> Only the shooter is potentially death eligible under the New Jersey statute.<sup>140</sup> All four codefendants could be indicted for death eligible murder if it is unknown who had the gun or committed the homicidal act by his own conduct. But once it is determined that a particular person pulled the trigger and committed the homicidal act by his own conduct, absent other facts, only the trigger person will be eligible for a death sentence, whether the determination of death eligibility is made at arraignment, prior to trial, or as part of the guilt phase of a capital trial. Thus, in the analysis of prosecutorial decision making in the decision whether to declare a case death eligible, it was important therefore to remove non-slayer codefendants who were not in fact death eligible.<sup>141</sup> Otherwise it would be impossible to

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<sup>137</sup> See, e.g., Bienen, *Prosecutorial Discretion*, *supra* note 1, at 313 (annotating case nos. 252, 275, 283, 316 and 379—Ocean county).

<sup>138</sup> This study adopted the procedure of coding for the defense attorney's responses, rather than substituting the interviewing attorney's judgment for that of the respondent defense attorney. See Bienen, *Prosecutorial Discretion*, *supra* note 1, at 335. We were sensitive to the possibility of respondent bias by the interviewed defense counsel. If the defendant never admitted that he committed the homicidal act, and the conviction was not premised upon a factual finding that this defendant committed the homicidal act, then the defense attorney might not indicate that his client committed the homicidal act. There seemed to be little actual respondent bias of this sort.

<sup>139</sup> See, e.g., Bienen, *Prosecutorial Discretion*, *supra* note 1, at 311 (annotating cases nos. 20, 78, 84, 108 and 110—Camden county).

<sup>140</sup> See *supra* notes 73-75 and accompanying text.

<sup>141</sup> Assume for the moment that codefendant cases were more likely than non-codefendant cases to involve both white victims and black defendants. Further assume that analysis of felony murders which included non-slayer participants showed that prosecutors served a notice of factors significantly more often in cases involving white victims and black defendants. That finding would be legitimately subject to the criticism that the white-victim effect was artificially bolstered by the presence of black codefendants in white-victim cases because some black codefendants were non-slayer participants who were not in fact eligible to be prosecuted for capital murder.

pinpoint the number of defendants actually eligible for capital prosecution given the special restrictions of the New Jersey statute.<sup>142</sup>

## V. RESEARCH FINDINGS

### *A. The Individual Statutory Aggravating and Mitigating Factors*

Overall, 134 of the 146 by-his-own-conduct felony murders (91.8%) had at least one statutory aggravating factor designated present by the defense counsel and, therefore, were death possible cases (Table 5).<sup>143</sup> However, only seventy-three cases of these 134 cases were death eligible (50.0% of the 146 felony murder cases), in that the county prosecutor formally served a notice of aggravating factors to the defense making the case a capital case (Table 5). Not surprisingly the most often served aggravating factor in this group of cases was the felony factor "g" (43.8%) (Table 1). The next most often served factor was the heinous factor "c," which was served in fifty-six of the 146 cases (38.4%). The remaining six aggravating factors were served between a negligible percent (factors "e" and "h") and 11.6% of the time (factor "f").

Table 2 presents for each individual statutory aggravating factor the number of times that factor was served; the number of cases that went to capital trial with that factor served; and the number of cases in which that factor was served but the case did not go to capital trial. The rows indicate the individual statutory aggravating factors "a" through "h," and the columns show whether that factor was served, present at capital trial or not present at capital trial.

Two factors, the heinous factor "c" and the felony factor "g," were served much more frequently than the remaining six factors. The felony factor "g" was served sixty-four times in this group of 146 felony cases. Of these sixty-four cases, forty-four went to capital trial with this factor served and twenty cases did not. The next most frequently served factor was the heinous factor "c," which was served fifty-six times. Of these fifty-six cases, thirty-nine reached capital

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<sup>142</sup> Initially 252 cases were identified as felony murders. When the by-his-own-conduct restriction was applied, the number of potentially death eligible felony murders dropped to 146. The 146 cases analyzed here, therefore, do not include cases where the defendant was death eligible because he paid another to commit the homicidal act, nor do they include potentially death eligible cases in which the defendant was not identified by the defense attorney as committing the homicidal act by his own conduct.

<sup>143</sup> Frequency tables for the principal variables in this data set are contained in App. C.

trial with the "c" factor served and seventeen did not. The "g" and "c" factors had about the same chance of being present at capital trial once served (68.8% and 69.6%, respectively). There were some cases that reached capital trial with both of these factors served.

Among the 146 cases, forty-one cases reached penalty phase (Table 5). Tables 3 and 4 report on individual statutory aggravating and mitigating factors, respectively, for those forty-one cases that reached penalty phase.

The individual statutory aggravating factors are designated by their statutory letter "a" through "h" across the column headings in Table 3. The row entries indicate whether that individual statutory aggravating factor was served, submitted, or found. "Served" here means that the prosecutor served a notice of factors on that particular statutory aggravating factor. "Submitted" means that the individual statutory aggravating factor served was actually submitted at the penalty phase of a capital trial after a defendant had been convicted of capital murder. "Found" means that the penalty phase factfinder returned, or found, that individual statutory aggravating factor. A statutory aggravating factor may be served but not submitted if the prosecutor served a notice of that factor, but the case never reached penalty phase for any of a number of reasons, including an acquittal of capital murder at guilt phase of the capital trial or the dismissal of the notice of factors as part of a plea agreement prior to trial.<sup>144</sup>

When a factor is submitted to the penalty phase judge or jury, the factfinder will either find the factor present or not present.<sup>145</sup> The only exception is if the jury is unable to reach a unanimous verdict at penalty phase. A jury that is not unanimous at the penalty phase is dismissed and a life sentence is imposed.<sup>146</sup> By definition a penalty phase jury that could not reach a verdict did not find either statutory aggravating factors or statutory mitigating factors.

There are three major row headings in Table 3: "all penalty phase cases," "non-death verdict," and "death verdict." "All penalty phase cases" are all forty-one cases in the group of 146 that reached the penalty phase of a capital trial. "Non-death verdict" includes the subset of all penalty phase cases that did not result in a death verdict (twenty-six cases). Conversely, "death verdict" refers to the remaining subset of all penalty phase cases that resulted in a verdict of death (fifteen cases).

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<sup>144</sup> See, e.g., Bienen, *Prosecutorial Discretion*, *supra* note 1, at 312 (annotating cases nos. 103, 132 and 256—Cumberland county).

<sup>145</sup> See N.J. STAT. ANN. § 2C:11-3(c)(3) (West Supp. 1990).

<sup>146</sup> *Id.* § 2C:11-3(c)(3)(c).

**Table 1**  
**Individual Statutory Aggravating Factors (v. 624-630) (N = 146)**

	<i>Death Possible</i>					
	<i>Factor Present and Served: Death-Eligible</i>		<i>Factor Present but Not Served</i>		<i>Factor Not Present</i>	
	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>
(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal; (v. 624)*	5	3.4	0	0.0	141	96.6
(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim; (v. 625)	15	10.3	16	10.9	115	78.8
(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim; (v. 626)**	56	38.4	31	21.2	59	40.4
(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value; (v. 627)	2	1.4	6	4.1	138	94.5
(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value; (v. 627a)	0	0.0	0	0.0	146	100.0

Table 1 (*continued*)

	<i>Death Possible</i>					
	<i>Factor Present and Served: Death-Eligible</i>		<i>Factor Present but Not Served</i>		<i>Factor Not Present</i>	
	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>	<i>N</i>	<i>%</i>
(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another; (v. 628)	17	11.6	15	10.3	114	78.1
(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping; (v. 629)***	64	43.8	59	40.4	23	15.8
(h) The defendant murdered a public servant, as defined in N.J.S. 2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant. (v. 630)	1	0.7	0	0.0	145	99.3

\* Prior to the 1985 amendment, this section read: The defendant has previously been convicted of murder. Amended by Act of June 10, 1985, ch. 178, 1985 N.J. Laws 536. No case in this database was affected by this amendment.

\*\* Prior to the 1985 amendment, this section read: The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Amended by Act of June 10, 1985, ch. 178, 1985 N.J. Laws 536.

\*\*\* The 1985 amendment added murder to the list of crimes. Amended by Act of June 10, 1985, ch. 178, § 2, 1985 N.J. Laws 536.



**Table 2**  
**Individual Statutory Aggravating Factors: Factor Served, Capital Trial, and Case Not a Capital Trial**

	<i>Factor Served (N=73)*</i>	<i>Factor Served, Capital Trial (N=51)</i>	<i>Case Not a Capital Trial** (N=22)</i>
(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal:***	5	4	1
(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;	15	13	2
(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;	56	39	17
(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;	2	0	2
(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value:	0	0	0
(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;	17	14	3
(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping:***	64	44	20
(h) The defendant murdered a public servant, as defined in N.J.S. 2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.	<u>1</u>	<u>1</u>	<u>0</u>
Total Number of Individual Factors Served	160	115	45

\* The N in parentheses refers to the number of defendants whose cases reach that stage.

\*\* A factor may not reach capital trial because the factor was dismissed or withdrawn, either unilaterally or after a plea bargain, or as a result of an order from a trial or appellate court.

\*\*\* Incorporates language of 1985 Amendment, Act of June 10, 1985, ch. 178, 1985 N.J. Laws 536.

**Table 3**  
**Individual Statutory Aggravating Factors, Submitted and Found, for**  
**Penalty Phase Cases and by Death Verdict (N = 146)**

	Statutory Aggravating Factors							
	"a"	"b"	"c"	"d"	"e"	"f"	"g"	"h"
All Penalty Phase Cases (N = 41)								
Factor Not Served	37	31	8	41	41	27	6	40
Served But Not Submitted*	0	2	4	0	0	0	1	0
Found	4	2	20	0	0	8	30	0
Not Found	<u>0</u>	<u>6</u>	<u>8</u>	<u>0</u>	<u>0</u>	<u>4</u>	<u>4</u>	<u>1</u>
Total Submitted	4	8	28	0	0	12	34	1
Non-death Verdict (N = 26)								
Found	2	2	7	0	0	3	17	0
Not Found	<u>0</u>	<u>5</u>	<u>7</u>	<u>0</u>	<u>0</u>	<u>2</u>	<u>3</u>	<u>1</u>
Total Submitted	2	7	14	0	0	5	20	1
Death Verdict (N = 15)								
Found	2	0	13	0	0	5	13	0
Not Found	<u>0</u>	<u>1</u>	<u>1</u>	<u>0</u>	<u>0</u>	<u>2</u>	<u>1</u>	<u>0</u>
Total Submitted	2	1	14	0	0	7	14	0

\* An aggravating factor may have been served but dismissed pretrial or during the guilt phase of a capital trial.

**Table 4**  
**Individual Statutory Mitigating Factors, Submitted and Found, for Penalty**  
**Phase Cases and by Death Verdict (N = 146)**

	<i>Statutory Mitigating Factors</i>							
	"a"	"b"	"c"	"d"	"e"	"f"	"g"	"h"
All Penalty Phase Cases (N = 41)								
Found	13	0	15	15	2	16	1	29
Not Found	<u>12</u>	<u>2</u>	<u>14</u>	<u>12</u>	<u>2</u>	<u>7</u>	<u>0</u>	<u>5</u>
Total Submitted	25	2	29	27	4	23	1	34
Non-death Verdict (N = 26)								
Found	9	0	13	11	2	13	1	16
Not Found	<u>6</u>	<u>0</u>	<u>7</u>	<u>6</u>	<u>1</u>	<u>2</u>	<u>0</u>	<u>4</u>
Total Submitted	15	0	20	17	3	15	1	20
Death Verdict (N = 15)								
Found	4	0	2	4	0	3	0	13
Not Found	<u>6</u>	<u>0</u>	<u>7</u>	<u>6</u>	<u>1</u>	<u>5</u>	<u>0</u>	<u>1</u>
Total Submitted	10	0	9	10	1	8	0	14

**Table 5**  
**Felony Homicides ("By His Own Conduct"): Probability of Receiving Death**  
**Sentence by Case Processing Stage**

<i>Case Processing Stage</i>	<i>Probability of Receiving Death Sentence</i>
All Homicides	.10 (15/146)
Death-Possible	.11 (15/134)
Death-Eligible (Notice Served)	.21 (15/73)
Capital Trial	.29 (15/51)
Penalty Phase	.37 (15/41)

The felony factor "g" in the next to last column of Table 3 was served in all but six of the forty-one cases that reached the penalty phase. There was one case in which the felony factor "g" was served but not submitted to the penalty phase jury, because the case did not reach penalty phase. Of the thirty-four cases in which the felony factor was submitted at penalty phase, the felony factor "g" was found or returned by the penalty phase factfinder in thirty cases and not found in four cases. For those cases not resulting in a death verdict, the felony factor "g" was found seventeen times and not found three times. For those that did result in a death verdict, the felony factor "g" was found thirteen out of the fourteen times in which it was submitted. The cases that resulted in a death sentence were more likely to have that factor found (92.9% for death verdict cases, versus 85.0% for non-death verdict cases).

Table 4 reports the analogous data for the statutory mitigating factors. The individual statutory mitigating factors are listed by their statutory letter designations "a" through "h" as column headings. The rows indicate whether the individual statutory mitigating factor was submitted, found or not found at penalty phase. The terms submitted and found have meanings similar to those for the statutory aggravating factors discussed previously. There is no equivalent term for served because the individual statutory mitigating factors are not served by the prosecutor. The individual statutory mitigating factors are only submitted by the defense when the case reaches penalty phase after a conviction for capital murder.<sup>147</sup>

Cases are divided into those resulting in a non-death verdict of life imprisonment and those resulting in a death verdict. The burden of proof for finding or returning a statutory mitigating factor is different from that for finding a statutory aggravating factor.<sup>148</sup> The finding of a statutory mitigating factor does not need to be unanimous or beyond a reasonable doubt. Thus, the term found or returned has a different meaning for statutory mitigating factors than it does for statutory aggravating factors.

Of the specific statutory mitigating factors, the "c" and "d" factors were submitted most frequently (twenty-nine times and twenty-seven

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<sup>147</sup> *Id.* § 2C:11-3(c)(2)(a).

<sup>148</sup> Compare *id.* § 2C:11-3(c)(2)(a) ("[T]he State shall have the burden of establishing beyond a reasonable doubt the existing of any aggravating factors . . . .") with *id.* § 2C:11-3(c)(2)(b) (The defendant has the burden of producing reliable evidence of mitigating factors, and may do so "without regard to the rules governing the admission of evidence at criminal trials.").

times, respectively).<sup>149</sup> Each of these statutory mitigating factors was found fifteen times. The "d" factor was found slightly more often than the "c" factor (55.6% as opposed to 51.7%). With the exception of the broadly defined, "any other" factor "h," cases in which the verdict was not death uniformly had a higher proportion of statutory mitigating factors found from among those that were submitted than did death verdict cases.

These tables begin a disaggregated analysis of the eight statutory aggravating factors and statutory mitigating factors. It is clear even from this preliminary examination that the eight individual statutory aggravating factors function differently in the capital case processing system and are regarded differently by prosecutors, judges, and jurors. These statutory aggravating and mitigating factors will be looked at closely later in the multivariate statistical analysis.

### *B. Case Progression by Defendant Race and Victim Race and by County*

Fifteen of the 146 New Jersey felony murder defendants advanced through all five capital case processing stages and eventually received death sentences. Table 5 displays the sequence of nearly uniformly rising probabilities as these defendants penetrated further into the system: from .10 (one chance in ten relative to the initial set of all felony homicides), to .11 (also about one chance in ten among death-possible cases), to .21 (more than one chance in five with respect to death eligible cases), to .29 (more than one chance in four among cases at capital trial), and, finally, to .37 (verging on two chances in five among cases reaching penalty phase).

These statistics, providing the successive risks of receiving a death sentence, are retrospectively constructed in that we know the outcome in each case: that fifteen felony murder defendants were sentenced to death. The fundamental challenge confronting this death penalty research thus involves determining which characteristics of defendants, victims, and the homicidal incident explain why only these fifteen felony murder defendants advanced to the final trial stage of the capital case processing system.

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<sup>149</sup> The "c" mitigating factor pertains to the defendant's age at the time of the murder. See *id.* § 2C:11-3(c)(5)(c) (West Supp. 1990). The "d" mitigating factor specifies that "[t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution." *Id.* § 2C:11-3(c)(5)(d) (West Supp. 1990).

We will first consider the racial distributions at each case processing stage in order to assess how the race characteristic influences decision making in the New Jersey capital case processing system. Two decisions will be examined: first, the decision to serve a notice of factors, and second, the decision to go to trial. Both decisions depend heavily on prosecutorial initiatives and discretion. The outcomes at the later processing stages—capital trial and penalty phase—depend upon decisions by the death qualified jury or judge as well as the prosecutor.

The top portion of Table 6 displays the percentage distributions of the defendant's race at the successive points in the capital case processing system. Blacks accounted for approximately three-fifths of all defendants regardless of the processing stage. The percentage of whites was much lower than that of blacks at each stage, about one-half the black percentage overall, edging upward from nearly one in three at the initial stage (30.1%) to two in five at the point of death sentence (40.0%). Among all defendants, Hispanics appeared least often and successively accounted for lower proportions of cases relative to whites and blacks. Indeed, whereas slightly more than one in ten defendants (11.0%) were Hispanics among all felony homicides, no Hispanic defendant received the death sentence in the cases analyzed here.

Percentage distributions of the victim's race at the six capital-case processing stages is presented in the bottom portion of Table 6. Overall, there were fewer black victims at each stage than black defendants, more white victims than white defendants and, except for a moderate difference at the "all homicides" point, roughly equal proportions of Hispanic defendants and victims. The representation of black victims declined moderately across the first and final progression points; the representation of whites increased moderately across these same two points; and, mirroring the Hispanic-defendant pattern, Hispanic-victim cases declined dramatically across these two points.

The percentage of black, white, and Hispanic defendants and victims at each case processing stage depends upon the probability that each defendant and victim race category advanced from one stage to the next. For this reason, we now track case progression through the sequential stages in the capital-case processing system based on selected characteristics of the victim, defendant, and the incident.

Table 7 presents the sequential probabilities that felony murderers would traverse the New Jersey capital case processing system by the race of the defendant (left panel) and victim (right panel). Overall, more than nine in ten felony murderers (.92) were death possible, and more than half of these (.54) became death eligible through the

prosecutor's serving of a notice of aggravating factors. Seven in ten (.70) of the death possible cases advanced to capital trial. Four in five (.80) of the capital trial cases progressed to penalty phase. And finally, almost two in five (.37) of those who reached penalty phase received a death sentence.

Regardless of the defendant's race, the probability was uniformly high that a felony murder case was death possible (.93 for whites, .93 for blacks, and .81 Hispanics). The risk of progressing to death eligible status, however, appeared to differ by race: white defendants exhibited the highest risk (.61), followed by blacks (.54) and Hispanics (.38). Movement from death possible to capital trial was highest for black defendants (.74), followed closely by whites (.68) and, distantly, by Hispanics (.40). The risk of advancing to the penalty phase was comparatively high regardless of the defendant's race. Among those race categories with more than ten defendants at the capital trial stage, white defendants had the highest probability of progressing to penalty phase (.82), followed closely by blacks (.78). The final progression to death sentence resulted in markedly lower advancement risks for all defendant races: .43 for whites, .36 for blacks and, strikingly, .00 for Hispanics. Overall, white defendants either led or were among the highest in case advancement.

The right panel of Table 7 represents analogous progression probabilities based on the race of the victim. Consistent with the defendant race pattern, regardless of the victim's race, the probability that a felony murder was death possible was uniformly high, at about nine chances in ten (.94 for whites, .91 for Hispanics, and .90 for blacks). The risk of having a notice of aggravating factors served was highest in white victim cases (.60), followed by Hispanic and black victim cases (.50 and .46 respectively). Capital trial progression probabilities were nearly the same for white (.72) and black (.71) victim cases but lower for Hispanic (.50) cases. White victim cases progressed at the highest rate to penalty phase (.87), followed by black victim and Hispanic victim cases (.71 and .67, respectively). Cases involving black victims advanced at the highest rate from penalty phase to death sentence (.42). White victim cases sustained a death sentence at a moderately lower rate (.37) and, again most noteworthy, Hispanic victim cases uniformly avoided sustaining death sentences.

Advancement through the capital case processing system has been shown by prior research to depend in part not only on the independent influences of the defendant's and victim's race but also upon their joint impact, such that the level of impact of the defendant's race

Table 6  
Felony Homicides ("By His Own Conduct"): Race of Defendant and Race of Victim by Capital Case Processing Stage

	All Homicides		Death-Possible		Death-Eligible (Notice Served)		Capital Trial		Penalty Phase		Death Sentence	
	%	N	%	N	%	N	%	N	%	N	%	N
Defendant's Race												
Black	58.9	86	59.7	80	58.9	43	62.7	32	61.0	25	60.0	9
White	30.1	44	30.6	41	34.2	25	33.3	17	34.1	14	40.0	6
Hispanic	11.0	16	9.7	13	6.8	5	3.9	2	4.9	2	0.0	0
Total	100.0	146	100.0	134	100.0	73	100.0	51	100.0	41	100.0	15
Victim's Race*												
Black	39.7	58	38.8	52	32.9	24	33.3	17	29.3	12	33.3	5
White	52.7	77	53.7	72	58.9	43	60.8	31	65.9	27	66.7	10
Hispanic	7.5	11	7.5	10	8.2	6	5.9	3	4.9	2	0.0	0
Total	100.0	146	100.0	134	100.0	73	100.0	51	100.0	41	100.0	15

\* Victim's race was defined as the race of the first decedent on the interview questionnaire (v. 292).





depends upon the level of impact of the victim's race.<sup>150</sup> Probabilities of felony murder case progression were calculated for the nine combinations of defendant and victim race, which appear in Table 8.

Felony murders involving all four racial combinations with ten or more cases<sup>151</sup> exhibited high risks of being death possible, at more than nine chances in ten. Two of the three racial combinations involving white victims advanced to the death eligible stage at the highest rates, at about three chances in five (white/white, .64; black/white, .60). These advancement risks were about one and one-fifth times greater than for black/black cases (.49) and one and one-half times greater than for Hispanic/white cases (.40). The racial combinations of black/black, white/white, and black/white advanced to capital trial at a substantial rate of more than seven in ten. By comparison, Hispanic/white cases made this progression at a rate of .50. Among racial combinations with the largest numbers of cases, Hispanic/white, white/white, and black/white cases reached penalty phase at the highest rates (1.00, .87, and .86, respectively), followed by black/black (.71). White/white cases resulted in the death sentence at the highest rate (.46) followed closely by black/black cases (.42) and, further behind, by black/white cases (.33).

In addition to differences in case processing due to the race of the defendant and victim, research has identified geographical jurisdiction as a factor influencing capital case processing.<sup>152</sup> The units of analysis of case processing differences by jurisdiction in this study are the twenty-one autonomous New Jersey counties. Table 9 represents the advancement probabilities for eight individual counties and a residual county group that includes those counties with too few felony homicides to permit separate analysis. Among the eight high volume counties, only Essex, Hudson, Camden, and Monmouth had a sufficient number of cases for reliable individual analysis.<sup>153</sup> Even for these four

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<sup>150</sup> See, e.g., Bowers & Pierce, *supra* note 112, at 608-10; Paternoster, *Race of Victim*, *supra* note 112, at 766-68.

<sup>151</sup> Because of the sparse numbers of cases for several of the racial combinations, discussion is limited to the four more substantial defendant/victim combinations with ten or more cases: black/black, white/white, black/white, and Hispanic/white. Even among these racial combinations, the numbers of cases that reached the final progression points were often quite limited.

<sup>152</sup> See authorities cited *supra* note 113.

<sup>153</sup> Three of these four counties may be characterized as relatively densely settled and urban, with higher crime rates compared to New Jersey counties generally. See BUREAU OF CENSUS, U.S. DEP'T COMMERCE, COUNTY AND CITY DATABOOK 1988, at 341, 344 (1988) (providing 1986 population totals, densities, and 1985 crime rates for all New Jersey counties). Thus, Essex and Hudson counties, in northeastern New Jersey, contain the cities of Newark and Jersey City respectively, while Camden county in the southern part of the state contains the city of Camden. Monmouth county, also in northeastern New Jersey, in contrast, has a population density and crime rate more associated with suburban, and even rural, counties. See *id.*

counties, discussion of the later progression points must be qualified because of the few cases reaching those points.

All four counties displayed high and nearly equal proportions of death possible cases: about nine in ten in each county. There was, however, substantial variability across counties in the risk of a notice of aggravating factors being served. Of these four counties, Monmouth and Hudson counties fell at the upper end of the risk spectrum (.85 and .69, respectively) and Camden and Essex counties fell at the lower end of the spectrum (.44 and .29, respectively). A notice of factors was, therefore, served nearly three times more often in Monmouth county than in Essex county. Cases also progressed to capital trial at the highest rate in Monmouth county (1.00), followed by Hudson (.67), Essex (.56) and, far behind, Camden (.43) counties. The highest proportion of cases also reached penalty phase in Monmouth county (.82), followed in a close cluster by Hudson, Camden, and Essex counties (.67, .67, and .60, respectively). The proportion of cases resulting in a death sentence ranged between one-half, in Camden county, and one-third, in both Monmouth and Essex counties.

*C. The Plea/Trial Decision by Race of Defendant and Race of Victim and by County*

Table 10 presents the distributions of pleas and trials for all felony murder cases distinguished by the race of the defendant (panel A), the race of the victim (panel B), and the combination of the defendant's and victim's race (panel C). Overall, more than three-fifths (62.3%) of the felony murder defendants went to trial. White and black defendants went to trial in nearly equal and higher percentages than did Hispanic defendants (panel A).

The same overall pattern appeared with respect to victim race (panel B). Among those defendant-race/victim-race combinations with eight or more cases, black/white cases went to trial at the highest rate (75.0%), followed by white/white, black/black, and Hispanic/white cases (65.7%, 61.2%, and 60.0%, respectively) (panel C).

Substantial differences appeared across counties in the percentages of cases that went to trial (Table 11). Monmouth, Essex, Mercer, and Union counties clustered at the high end of the continuum, with between seven in ten cases (Union) and nine in ten cases (Monmouth) proceeding to trial. Camden county fell at the low end of the continuum, with less than one in four cases going to trial.

Preliminary evidence points, then, to the presence of racial and county differences in the capital case processing of felony murder cases in New Jersey. Characteristics other than the race of the defendant and the victim or county jurisdiction, however, could have

Table 8  
Felony Homicides ("By His Own Conduct"): Probability of Progressing to Next Capital Case Processing Stage\* by Race of Defendant and Race of Victim Combined

Processing Stage	Defendant's Race/Victim's Race**										Total
	Black/ Black	White/ White	Hispanic/ Hispanic	Black/ White	Hispanic/ White	Black/ Hispanic	White/ Black	Hispanic/ Black	White/ Hispanic		
All Homicides	1.00 (49)	1.00 (35)	1.00 (3)	1.00 (32)	1.00 (10)	1.00 (5)	1.00 (6)	1.00 (3)	1.00 (3)	1.00 (146)	
Death-Possible	.92 (45/49)	.94 (33/35)	.67 (2/3)	.94 (30/32)	.90 (9/10)	1.00 (5/5)	.83 (5/6)	.67 (2/3)	1.00 (3/3)	.92 (134/146)	
Death-Eligible (Notice Served)	.49 (22/45)	.64 (21/33)	0.00 (0/2)	.60 (18/30)	.40 (4/9)	.60 (3/5)	.20 (1/5)	.50 (1/2)	1.00 (3/3)	.54 (73/134)	
Capital Trial	.77 (17/22)	.71 (15/21)	---	.78 (14/18)	.50 (2/4)	.33 (1/3)	0.00 (0/1)	0.00 (0/1)	.67 (2/3)	.70 (51/73)	
Penalty Phase	.71 (12/17)	.87 (13/15)	---	.86 (12/14)	1.00 (2/2)	1.00 (1/1)	---	---	.50 (1/2)	.80 (41/51)	
Death Sentence	.42 (5/12)	.46 (6/13)	---	.33 (4/12)	0.00 (0/2)	0.00 (0/1)	---	---	0.00 (0/1)	.37 (15/41)	

\* The death flow probabilities are computed by dividing the number of cases at the designated processing stage by the number of cases at the immediately prior processing stage.

\*\* Victim's race was defined as the race of the first decedent on the interview questionnaire (v. 292).

**Table 9**  
**Felony Homicides ("By His Own Conduct"): Probability of Progressing to Next Capital Case Processing Stage\* by County**

Processing Stage	County								Total
	Essex	Hudson	Camden	Passaic	Union	Mercer	Atlantic	Monmouth	Other I**
All Homicides	1.00 (35)	1.00 (14)	1.00 (17)	1.00 (9)	1.00 (10)	1.00 (8)	1.00 (10)	1.00 (15)	1.00 (28) (146)
Death-Possible	.89 (31/35)	.93 (13/14)	.94 (16/17)	.78 (7/9)	1.00 (10/10)	.88 (7/8)	.90 (9/10)	.87 (13/17)	1.00 (28/28) (134/146)
Death-Eligible (Notice Served)	.29 (9/31)	.69 (9/13)	.44 (7/16)	.71 (5/7)	.40 (4/10)	.57 (4/7)	.89 (8/9)	.85 (11/13)	.57 (16/28) (73/134)
Capital Trial	.56 (5/9)	.67 (6/9)	.43 (3/7)	.60 (3/5)	.75 (3/4)	1.00 (4/4)	.75 (6/8)	1.00 (11/11)	.63 (10/16) (51/73)
Penalty Phase	.60 (3/5)	.67 (4/6)	.67 (2/3)	1.00 (3/3)	1.00 (3/3)	.50 (2/4)	1.00 (6/6)	.82 (9/11)	.90 (9/10) (41/51)
Death Sentence	.33 (1/3)	0.00 (0/4)	.50 (1/2)	0.00 (0/3)	0.00 (0/3)	1.00 (2/2)	.50 (3/6)	.33 (3/9)	.56 (5/9) (15/41)

\* The death flow probabilities are computed by dividing the number of cases at the designated processing stage by the number of cases at the immediately prior processing stage.

\*\* The definition of this county grouping is in Table C-1.

Table 10  
**Felony Homicides ("By His Own Conduct"): Plea Versus Trial by Race of Defendant and Race of Victim**

<i>A. Plea Versus Trial by Race of Defendant</i>			
	<i>White % (N)</i>	<i>Black % (N)</i>	<i>Hispanic % (N)</i>
Plea	36.4 (16)	34.9 (30)	56.3 (9)
Trial	63.6 (28)	65.1 (56)	43.8 (7)
Total	100.0 (44)	100.0 (86)	100.0 (16)
<i>B. Plea Versus Trial by Race of Victim</i>			
	<i>White % (N)</i>	<i>Black % (N)</i>	<i>Hispanic % (N)</i>
Plea	31.2 (24)	43.1 (25)	54.5 (6)
Trial	68.8 (53)	56.9 (33)	45.5 (5)
Total	100.0 (77)	100.0 (58)	100.0 (11)

Table 10 (continued)

## C. Plea Versus Trial by Race of Defendant and Race of Victim

	Black/ Black* %	White/ White %	Hispanic/ Hispanic %	Black/ White %	Hispanic/ White %	White/ Black %	Black/ Hispanic %	Hispanic/ Black %	White/ Hispanic %	Total %
	(N)	(N)	(N)	(N)	(N)	(N)	(N)	(N)	(N)	(N)
Plea	38.8 (19)	34.3 (12)	66.7 (2)	25.0 (8)	40.0 (4)	50.0 (3)	60.0 (3)	100.0 (3)	33.3 (1)	37.7 (55)
Trial	61.2 (30)	65.7 (23)	33.3 (1)	75.0 (24)	60.0 (6)	50.0 (3)	40.0 (2)	0.0 (0)	66.7 (2)	62.3 (91)
Total	100.0 (49)	100.0 (35)	100.0 (3)	100.0 (32)	100.0 (10)	100.0 (6)	100.0 (5)	100.0 (3)	100.0 (3)	100.0 (146)

\* The defendant's race is listed first, the victim's race second.

Table 11  
Felony Homicides ("By His Own Conduct"): Plea Versus Trial By County

	Essex %	Hudson %	Camden %	Passaic %	Union %	Mercer %	Atlantic %	Monmouth %	Other I* %	Total %
	(N)	(N)	(N)	(N)	(N)	(N)	(N)	(N)	(N)	(N)
Plea	20.0 (7)	50.0 (7)	76.5 (13)	44.4 (4)	30.0 (3)	25.0 (2)	50.0 (5)	13.3 (2)	42.9 (12)	37.7 (55)
Trial	80.0 (28)	50.0 (7)	23.5 (4)	55.6 (5)	70.0 (7)	75.0 (6)	50.0 (5)	86.7 (13)	57.1 (16)	62.3 (91)
Total	100.0 (35)	100.0 (14)	100.0 (17)	100.0 (9)	100.0 (10)	100.0 (8)	100.0 (10)	100.0 (15)	100.0 (28)	100.0 (146)

\* The definition of this county grouping is in Table C-1.

influenced the flow of cases through the New Jersey legal system. For example, white victim cases, which appear to have advanced farthest into the case processing system, may generally have been more aggravated than either the black-victim or Hispanic-victim cases, thereby accounting for the extent of their progression. Similarly, it is possible that cases in Monmouth and Essex counties were more aggravated than those in Camden county, resulting in the far higher rates of cases that went to trial. Another possibility is that characteristics of the felony murder incident and of the victims and defendants influenced decision making jointly with respect to case processing, resulting in the apparently disparate case processing patterns observed here. The logistic regression analysis presented in the next section attempts to unravel some of these complex issues.

## VI. LOGISTIC REGRESSION ANALYSIS

Preliminary descriptive analysis of these data suggests the presence of race and county disparities at two key case processing stages. The first stage is the prosecutor's decision to offer a felony murder defendant a plea bargain and, in turn, the defendant's decision to accept that offer, thereby derailing the defendant from the death sentence track.<sup>154</sup> The second stage is the prosecutor's decision to serve a notice of aggravating factors, thereby making the felony murder defendant death eligible and vulnerable to a death sentence.<sup>155</sup> These two decisions were analyzed separately because, although closely related, they represent separable and distinct decision making points in the capital case processing system. For example, a plea bargain almost always means a notice of factors will not be served or has not yet been served because the plea bargain usually hinges on the prosecutor's agreement to forego capital prosecution.<sup>156</sup> In contrast, however, failure to grant and accept a plea does not typically or uniformly result in the serving of a notice of factors. Many cases in which there is no plea go to trial without a notice of factors ever being served.<sup>157</sup>

In the previous section, selected case characteristics were discussed that might have partly accounted for the observed differences in decision making.<sup>158</sup> These characteristics included features of the felony murder that are legally relevant to decision making, such as

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<sup>154</sup> See Tables 10 & 11 and accompanying text.

<sup>155</sup> See *supra* notes 150-53 and accompanying text (discussing Tables 8 & 9).

<sup>156</sup> See *supra* notes 128-32 and accompanying text.

<sup>157</sup> *Id.*

<sup>158</sup> See *supra* notes 143-53 and accompanying text.

the presence of statutory aggravating factors, as well as features that are legally irrelevant and potentially impermissible, such as the race of the defendant or victim and county jurisdiction. It is unclear, however, and a matter of much judicial and scholarly debate, whether legal factors significantly and predominantly influence capital case processing or whether extra-legal factors, and especially legally impermissible factors, also play an influential role.<sup>159</sup>

To sort out these complex multiple relationships, a logistic regression analysis was chosen to examine the effects of case characteristics on these two decision making points.<sup>160</sup> The logistic regression technique can pinpoint independent (explanatory or risk) variables that are significantly related to a dependent (outcome) variable which is, in the present study, either the plea/trial outcome or the serving of a notice of aggravating factors.<sup>161</sup>

<sup>159</sup> See *supra* notes 110-19 and accompanying text.

<sup>160</sup> Logistic regression was used rather than a regression procedure that corrects for sample selection bias. Sample selection bias occurs when the researcher attempts to model a causal process that characterizes a population but does so using a nonrepresentative sample of that population.

Although we considered using regression models that correct for sample selection bias, we decided not to pursue them because published criticisms render their utility suspect. See, e.g., Little, *A Note About Models for Selectivity Bias*, 53 *ECONOMETRICA* 1469 (1985); Stolzenberg & Relles, *Theory Testing in a World of Constrained Research Design: The Significance of Heckman's Censored Sampling Bias Correction for Nonexperimental Research*, 18 *SOC. METHODS & RES.* 395 (1990).

<sup>161</sup> Logistic regression was selected over other multivariate regression techniques for several reasons. First, each of the dependent variables of interest in this study is dichotomous (meaning that the case was either pled or went to trial; a notice of aggravating factors was either served or not served). Logistic regression is tailored for use with just such dependent variables. Second, logistic regression accommodates dichotomous and interval-level independent variables, both of which are used in the analyses. Third, logistic regression relaxes the stringent assumption that each independent variable must be normally distributed. Finally, logistic regression coefficients are easily interpreted.

For a more detailed discussion of these aspects of logistic regression, see Bienen, *Prosecutorial Discretion*, *supra* note 1, at 220-42; see also J. ALDRICH & F. NELSON, *LINEAR PROBABILITY, LOGIT, AND PROBIT MODELS*, 48-66 (1984) (providing a more detailed discussion of logistic regression and related statistical procedures); E. HANUSHEK & J. JACKSON, *STATISTICAL METHODS FOR SOCIAL SCIENTISTS* 179-216 (1977) (same); G. MADDALA, *LIMITED-DEPENDENT AND QUALITATIVE VARIABLE IN ECONOMETRICS* 13-57 (1983) (same); Halperin, Blackwelder & Verter, *Estimation of the Multivariate Logistic Risk Function: A Comparison of the Discriminant Function and Maximum Likelihood Approaches*, 24 *J. CHRONIC DISEASES* 125 (1971) (same).

The logistic regression equation is

$$\log \left( \frac{P_i}{1-P_i} \right) = \underline{B'}\underline{X}_i$$

where,

$P_i$ : the probability that person  $i$  advances to the next capital case processing stage;

$\underline{X}_i$ : a vector of risk variables for person  $i$ ; and

$\underline{B'}$ : a vector of coefficients.



This multivariate analysis, used to identify significant variables among the more than one hundred candidate variables, involved two stages.<sup>162</sup> The first stage screened explanatory variables for their potential significance using a regression procedure known as backward selection; the second stage examined variables that formed sets.<sup>163</sup> This strategy was dictated by the large number of variables analyzed.

The following regression analysis attempts to identify disparities in capital case processing that are related to the extra-legal case characteristics of race and county jurisdiction. With this objective in mind, all independent variables other than race and county jurisdiction can be viewed as control variables, permitting one to see whether race and county jurisdiction remain influential once the effects of other significant variables are statistically removed and, thereby, controlled.<sup>164</sup>

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<sup>162</sup> A complete list of these variables and their frequency distributions is contained in L. Bienen, N. Weiner, D. Denno, P. Allison & D. Mills, *The Reimposition of Capital Punishment in New Jersey: Interim Report*, pt. II, app. C\* (1988) (unpublished) (on file at Rutgers-Newark School of Law Library), cited in Bienen, *Prosecutorial Discretion*, *supra* note 1, at 36 n.3, 223 n.694. The data file includes detailed information on the characteristics of the defendant and victim, the circumstances of the offense, and procedural case processing.

<sup>163</sup> More than 100 independent variables were available for study. Consequently, using all of them simultaneously in a single logistic regression model, even with this large dataset, would have created technical problems such as multicollinearity and estimation nonconvergence, and introduced estimation imprecision. In the first stage, therefore, a subset of the independent variables was analyzed using the backward selection, logistic regression procedure, which sequentially removed nonsignificant variables ( $p\text{-val.} > .05$ ) from the larger set of candidate variables, creating a more manageable subset of potentially significant variables that was subjected to further analysis. For documentation of the backward selection technique, see Harrell, *The Logist Procedure*, in SUGI SUPPLEMENTAL LIBRARY USER'S GUIDE, VERSION 5, at 269 (1986).

The second stage examined two types of independent variables: First, those that must be evaluated as sets, and second, selected legal and extra-legal variables that were included in the final regression model because of their centrality in death penalty research and jurisprudence. Neither of these two types of independent variables were included in the first-stage backward selection procedure because we wanted to calculate explicitly the numerical effects of each variable in the set on capital case processing, and because the backward selection procedure could have deleted one or more members of a variable set from the final regression model. Thus, in order to ensure that the appropriate regression calculations were performed, these variables were forced into the estimated regression models. Variables forced into the regression model at the second stage were evaluated for statistical significance along with those variables that had been significant at the first stage. Significant variables ( $p\text{-val.} < .05$ ) were then included in the final logistic regression equation.

Because of their legal and research importance, six variables were always entered into the final logistic regression model in order to guarantee their explicit review: The defendant's and victim's race, county jurisdiction, type of prior conviction record, all statutory mitigating factors, and those statutory aggravating factors that were present often enough to sustain a reliable analysis. The strategy was to determine which of these six variables could achieve statistical significance when confronted by the explanatory challenge of the most statistically potent of the other variables in the data set.

<sup>164</sup> In nontechnical terms, one looks to see whether disparities across races and counties are

*A. Extra-Legal Case Characteristics and  
the Decision to Go to Trial*

In New Jersey, a murder defendant can be sentenced to death only after a bifurcated trial before either a judge or a death qualified jury.<sup>165</sup> The decision to accept a plea agreement effectively removes a case from the capital case processing flow.<sup>166</sup> The decision to go to trial is critical and, therefore, is examined separately in our analysis of the New Jersey capital case processing system.<sup>167</sup>

Table 12 presents the logistic regression results with respect to the prosecutor's decision to proceed to trial for the 146 felony murder defendants in the data set. The outcome measure is going to trial rather than the disposition resulting from a plea agreement. Column 1 lists those independent variables that were significantly related ( $p$ -val.  $< .10$ ) to the prosecutorial decision to go to trial. The coefficient appearing in column 2 represents a numerical effect and is adjusted for the impacts of the other independent variables in the table. This numerical effect communicates two important pieces of information. First, the coefficient indicates the direction of the independent variable's effect on the odds of going to trial. A positive coefficient means that the variable increased the odds of going to trial. A negative coefficient indicates the opposite effect, that the odds of going to trial decreased. Second, the coefficient communicates the degree of that effect. It represents a numerical weight for the variable's influence on the odds of a trial outcome.

Column 3 displays the chi-square test statistic, which indicates the statistical significance of the relationship between the designated independent variable and the prosecutor's decision to go to trial. The greater the statistical significance the greater the likelihood that the variable influences the trial outcome. From one to four asterisks appear next to some of the chi-square values, representing the level of statistical significance.<sup>168</sup>

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present, all other things being equal by virtue of statistical adjustments. For example, the effect of the defendant's race on the prosecutor's plea/trial decision can be determined when all other significant independent variables are statistically set equal, that is, the cases differ only with respect to the race of the defendant.

<sup>165</sup> See *supra* notes 30-33 and accompanying text.

<sup>166</sup> See *supra* notes 122-26 and accompanying text.

<sup>167</sup> Whether a conviction is obtained by a plea agreement or by going to trial is always unambiguously stated on the official record of the judgment of conviction. There is no ambiguity about whether or not a case went to trial.

<sup>168</sup> The significance level indicates the statistical probability of having calculated an association between the independent and dependent variables at the listed chi-square value even if no association actually exists between them. For example, under the variable "County Jurisdiction"

**Table 12**  
**Felony Homicides ("By His Own Conduct"): Plea Versus Trial,**  
**Logistic Regression"**

(1) <i>Independent Variable</i>	(2) <i>Coefficient</i>	(3) <i>Chi-Square</i>	(4) <i>Odds Multiplier</i>
<u>County Jurisdiction</u>			
Essex	3.31	6.13**	27.39
Hudson	-1.83	1.46	---
Other Counties, 1 <sup>b</sup>	.79	.33	---
Other Counties, 2 <sup>b</sup>	1.78	2.17	---
Camden <i>OMITTED</i>	---	---	---
<u>Defendant's Race</u>			
White	- .42	.27	---
Hispanic	- .38	.15	---
Black <i>OMITTED</i>	---	---	---
<u>Victim's Race</u>			
White	2.05	6.25*	7.77
Hispanic	- .24	.04	---
Black <i>OMITTED</i>	---	---	---
<u>Statutory Aggravating Factors</u>			
"b": Grave Risk of Death	1.95	5.99**	7.03
"c": Outrageously or Wantonly Vile	1.29	3.07*	3.63
"d": In Expectation of Pecuniary Value	- .57	.14	---
"f": Escape Detection	.98	1.34	---
"g": Felony	.09	.01	---

Table 12 (*continued*)

(1) <i>Independent Variable</i>	(2) <i>Coefficient</i>	(3) <i>Chi-Square</i>	(4) <i>Odds Multiplier</i>
<u>Statutory Mitigating Factors</u>			
"a": Extreme Mental Disturbance	-1.44	3.09*	.24
"b": Victim Participated in Conduct	.72	.65	---
"c": Age of Defendant	-.79	1.44	---
"d": Capacity to Appreciate Wrongfulness Impaired	-1.52	4.07**	.22
"e": Duress	-1.15	1.15	---
"f": No Significant History of Prior Criminal Activity	-.34	.14	---
"g": Substantial Assistance to the State	-4.67	8.60***	.01
"h": Any Other	-2.00	3.21*	.14
<u>Defendant's Type of Prior Conviction Record</u>			
Homicide or Other Felony	.28	.16	---
Non-felony	-.30	.18	---
No Prior Conviction <i>OMITTED</i>	---	---	---
<u>Accomplice Present</u>	-2.18	7.79***	.11
<u>Total Denial or Denial of Involvement</u>	2.76	14.05****	15.80
Intercept	.68	.16	---
R <sup>2</sup>	.26		
-2 Loglikelihood	93.04		

\* P-val. < .10 \*\* P-val. < .05 \*\*\* P-val. < .01 \*\*\*\* P-val. < .001

a. These results are based on the 146 contemporaneous felony cases in which the defendant committed the homicide by his own conduct. Contemporaneous felony cases involve the contemporaneous charges of murder, aggravated sexual assault and sexual assault, robbery, burglary, kidnapping, and aggravated arson and arson (charge codes A31, A41, A42, C11, D21, D22, E11, F12, F13, or G23 on any one of variables 56, 60, 64, 68, 72, 76, 80, and 84) or a factual basis for a contemporaneous felony (variable 629, values 1-5) and a factual basis indicating that the homicide was the result of the defendant's own conduct (variable 433; values 3 or 4).

The dependent variable, "PLEATRIA," was coded "0" if the defendant pled and "1" if the defendant went to trial. Two cases which resulted in a total dismissal of all charges without a plea or trial were coded as trials.

b. The definition of this country grouping is in Table C-1.

c. See *infra* note 170 (explaining the OMITTED category).

Column 4, labeled odds multiplier, presents a useful interpretation of the coefficient in column 2. Consider under "County Jurisdiction" the independent variable Essex county. When the coefficient value of +3.31 in column 2 is converted into an odds multiplier, the value 27.39 is obtained.<sup>169</sup> This number means that the odds are, on the average, more than 27 times greater that a defendant in a felony murder case in Essex county will go to trial, as opposed to being granted a plea, than a similarly situated defendant in Camden county, the omitted contrast county, after controlling for other significant variables listed in the table.<sup>170</sup> Consider as another example, the variable "Accomplice Present." Converting -2.18 into an odds multiplier, .11 is obtained. This means that a felony murder defendant whose case had an accomplice present sustained approximately one-tenth the odds of going to trial compared to a defendant who had no accomplice present. The magnitude of this effect is represented by the numerical value of .11. The presence of an accomplice reduced the odds of going to trial by approximately ten times. The reduction in the odds is indicated by the negative sign on the coefficient in column 2.

Table 12 shows that certain county jurisdiction and victim race variables were significantly related to a trial outcome for the 146 felony murder defendants (county: chi-square = 20.25, df = 4, p-val. < .001; victim race: chi-square = 8.38, df = 2, p-val. < .02).<sup>171</sup>

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appears "Essex," after which appears the chi-square value of 6.13 followed by two asterisks. The two asterisks represent a p-val. < .05, which implies that one might observe the indicated level of association between Essex County and going to trial fewer than five times in 100 even if no statistical association actually exists. Thus, at higher significance levels, indicated by more asterisks, the probability that the observed association is merely chance is smaller, and the inference of influence is more likely to be real.

<sup>169</sup> See footnote "b" of Table 12 for details about the computation of the odds multiplier.

<sup>170</sup> Whenever a variable belongs to a set of related variables, such as the five county variables, one variable from the set is suppressed from the table to enable a clear comparison of each variable in the set with the omitted contrast category. This omitted contrast category is the baseline, or zero magnitude, category against which the effects of each of the related variables in the set are compared. For each set of related independent variables, the compared category appears as the last variable in the set and is indicated by "OMITTED."

An odds can be converted into a probability by dividing the odds by one plus that odds. The probability corresponding to a 3-to-1 odds is equal to 3 divided by 1 plus 3, which produces a probability of .75 ( $3/[1+3] = 3/4$ ). The probability corresponding to the even odds of 1-to-1 is equal to 1 divided by 1 plus 1, which produces a probability of .50 ( $1/[1+1] = 1/2$ , which is a "50-50" chance, or even odds).

A probability is converted into an odds by dividing the probability by 1 minus that probability. For instance, a probability of .75 is converted into 3-to-1 odds by dividing .75 by .25 ( $.75/[1.00-.75] = .75/.25$ , which is a 3-to-1 odds or ratio).

<sup>171</sup> These results were derived from information in Table 12. These analyses and similar ones discussed later were conducted as follows. To assess the impact of the race of the victim on

Defendants in felony murder cases in Essex county were at a substantially higher risk of going to trial than defendants in felony murder cases in either Camden or Hudson counties. The odds that a felony murder case in Essex county went to trial were more than twenty-seven times higher than in Camden county and more than 170 times higher than in Hudson county.<sup>172</sup> These results support the presence of the hypothesized county disparities, which were only suspected in the descriptive analyses reported earlier.<sup>173</sup> Whereas the previous analyses failed to control statistically for other potentially influential case characteristics, the regression procedure does precisely that.

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the plea/trial outcome, the victim race variables were deleted from the plea/trial regression equation. The equation was then reestimated. If the presence of victim race variables significantly improves the ability to explain the plea versus trial decision, then the difference between the statistical criterion of the "loglikelihoods" of the two equations will be large, yielding a statistically significant result. One determines whether the two equations are statistically dissimilar in their comparative abilities to explain the outcome variable by, first, calculating minus 2 times the loglikelihood of each logistic equation; second, subtracting these two figures; and third, determining whether this difference, which is distributed approximately chi-square, is significant at a preset level, such as  $p\text{-val.} < .05.$ , the criterion used in this study. The degrees of freedom corresponding to this significance test is equal to the difference between the degrees of freedom of the two equations, which is equal to the difference in the number of independent variables in the two equations. In this study, this procedure yielded a finding of significant victim race effects, which is discussed in the text. Defendant race effects were not observed to be significant.

A potential drawback of the backward selection regression procedure is that it may capitalize on chance associations. To assess the extent to which this might be so in this analysis, an additional logistic regression model was run. We formulated a theoretical baseline model including only those key variables that may impermissibly (race, county jurisdiction) and permissibly (statutory aggravating factors, statutory mitigating factors, and prior felony conviction) influence capital case processing. If the results are robust, and chance associations have not been found by the backward selection regression procedure, then the findings based on the backward selection procedure should be consistent with this limited key variable model. Any inconsistency between significant variables in the key variable model and the backward selection regression model would call into question the original findings based on the backward selection procedure. That is, if findings pertaining to race and county jurisdiction are nonsignificant in the backward selection model but are significant in the key variable model, then this would support the conclusion of nonsignificant findings. This approach is conservative because we only assert the presence of significant findings when *both* models are consistent in this regard.

In this study, the key variable regression model and the backward selection regression model were consistent with respect to the plea/trial outcome. The same race and individual county jurisdiction variables were significant in both regression models, reinforcing our confidence in the validity of these findings.

<sup>172</sup> The odds of a felony case in Essex county going to trial were more than 170 times higher than in Hudson county. This odds was calculated as follows: The difference between the coefficients in Essex and Hudson counties appearing in column 2 of Table 12 was calculated. This resulted in a value of 5.14, which when exponentiated produced the odds of 170.72. The comparative odds reported elsewhere in this section between any two independent variables other than the omitted variable were calculated by the same method.

<sup>173</sup> See Tables 9 & 11.

The impact of the victim's race was also substantial, although the disparities in the odds of going to trial were not as pronounced as those involving counties. Felony murders involving white victims displayed higher odds of going to trial by a factor of nearly eight compared to cases involving black victims, and almost ten times the odds of cases involving Hispanic victims.<sup>174</sup>

In order to determine whether the impact of the victim's race on going to trial depended upon the defendant's race and, conversely, whether the impact of the defendant's race depended on the victim's race (these are known as "interaction effects"), race combination variables were constructed and introduced into the final logistic regression model reported in Table 12. Significant race interactions were observed (chi-square = 17.26, df = 4, p-val. < .01).<sup>175</sup> Unfortunately, the equation for the race interaction model failed to converge (i.e., the coefficients could not be reliably calculated). Comparisons of loglikelihoods for a convergent and a nonconvergent model can be made to determine whether explanatory variables are significant. The individual coefficients, however, cannot be directly interpreted in the nonconvergent model. For this reason results have been reported in Table 12 only for the convergent regression model that does not include race interactions.

In an attempt to isolate those race combinations that contributed most to the race interaction effects, the regression was estimated for the subset of felony murders that involved only white and black defendants and victims, which were the bulk of the felony murder cases (122 cases among the 146 cases, or 83.6%). If interactions were not observed for these white and black cases, then the hypothesis that Hispanic cases substantially contributed to interaction effects would be tentatively supported. On the other hand, if interactions were observed, then the hypothesis that at least some of the interaction effects were introduced by the black and white cases would be tentatively supported.<sup>176</sup>

The regression estimation revealed modest evidence of the presence of race interactions among the 122 white and black felony murder cases. When the race interaction variables were introduced, the explanatory power of the model increased, but only so with marginal significance (chi-square = 3.16; df = 1; p-val. < .10).<sup>177</sup> Relative to

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<sup>174</sup> See *supra* note 172 (describing the manner by which this odds was calculated).

<sup>175</sup> See *supra* note 171 (describing the manner by which these figures were calculated).

<sup>176</sup> Additional interaction effects might be introduced by the Hispanic cases, but we cannot determine this from these data.

<sup>177</sup> See *supra* note 171 (describing the method by which these figures were calculated).

those felony murders involving black defendants and black victims, cases involving white victims, regardless of the defendant's race, were more than six and one-half times likely to go to trial (white-defendant/white-victim, 6.9 times; black-defendant/white-victim, 6.6 times).<sup>178</sup> At the other extreme, white-defendant/black-victim cases had one-fiftieth the odds of going to trial relative to the black-defendant/black-victim cases.<sup>179</sup>

The results for the subset of 122 cases, therefore, leaves unresolved the issue of which race combinations were mainly responsible for the race interaction effects in the parent group of 146 felony murders, although cases involving black and white defendants and victims appear to account for some of the effect.

### *B. Extra-Legal Case Characteristics and the Decision to Serve a Notice of Aggravating Factors*

In New Jersey a defendant cannot be sentenced to death unless the county prosecutor serves a notice of aggravating factors.<sup>180</sup> Determining which variables influence this decision is therefore a critical concern. Table 13 summarizes the logistic regression findings with respect to the prosecutor's decision to serve a notice of factors.<sup>181</sup> Table 13 indicates that, among the felony murder cases, race differences were limited to those of the race of the victim: Incidents involving Hispanic victims sustained more than nine times the odds of having a notice of factors served than cases involving black victims.<sup>182</sup> Although the single contrast between Hispanic victims and black victims was significant, the overall effect of the victims' race variables failed to achieve significance (chi-square = 4.10, df = 2, p-val. > .10).<sup>183</sup>

There is evidence of significant overall county disparities in the decision to serve a notice of aggravating factors (chi-square = 26.15,

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<sup>178</sup> These calculations are based on additional analyses, not appearing in this Article, of the 122 felony murder cases only involving black and white defendants and victims.

<sup>179</sup> See *supra* note 178.

<sup>180</sup> See *supra* notes 33-35 and accompanying text.

<sup>181</sup> A key variable regression model was also run to assess the robustness of results as compared to the backward selection regression model. See *supra* note 171 (discussing the key variables model). The same race variable was significant in both regression models, reinforcing our confidence in the validity of these findings concerning the serving of a notice of factors.

<sup>182</sup> Cases involving white victims and Hispanic victims did not have significantly different odds of being designated capital by the prosecutor serving a notice of aggravating factors (chi-square = 1.53, df = 1, p-val. > .10). See *supra* note 171 (describing the method by which these figures were calculated).

<sup>183</sup> See *supra* note 171 (describing the method by which these figures were calculated).



**Table 13**  
**Felony Homicides ("By His Own Conduct"): Notice of Factors Served,**  
**Logistic Regression<sup>a</sup>**

(1) <i>Independent Variable</i>	(2) <i>Coefficient</i>	(3) <i>Chi-Square</i>	(4) <i>Odds Multiplier</i>
<u>County Jurisdiction</u>			
Essex	-1.82	2.51	---
Hudson	1.59	1.51	---
Other Counties, 1 <sup>b</sup>	-.32	.09	---
Other Counties, 2 <sup>b</sup>	2.87	6.39**	17.64
Camden <i>OMITTED</i> <sup>c</sup>	---	---	---
<u>Defendant's Race</u>			
White	-.21	.08	---
Hispanic	.04	< .01	---
Black <i>OMITTED</i> <sup>c</sup>	---	---	---
<u>Victim's Race</u>			
White	.91	1.38	---
Hispanic	2.21	3.69*	9.12
Black <i>OMITTED</i> <sup>c</sup>	---	---	---
<u>Statutory Aggravating Factors</u>			
"b": Grave Risk of Death	.62	.61	---
"c": Outrageously or Wantonly Vile	3.18	14.50****	24.05
"d": In Expectation of Pecuniary Value	-6.68	10.18***	< .01
"f": Escape Detection	1.78	4.50**	5.93
"g": Felony	2.15	3.86**	8.58
<u>Statutory Mitigating Factors</u>			
"a": Extreme Mental Disturbance	.08	.01	---
"b": Victim Participated in Conduct	-.07	.01	---
"c": Age of Defendant	1.59	5.28**	4.90
"d": Capacity to Appreciate Wrongfulness Impaired	1.42	3.94**	4.14
"e": Duress	.25	.08	---
"f": No Significant History of Prior Criminal Activity	-1.19	2.04	---
"g": Substantial Assistance to the State	-1.24	.85	---
"h": Any Other	-.41	.24	---

Table 13 (continued)

(1) <i>Independent Variable</i>	(2) <i>Coefficient</i>	(3) <i>Chi-Square</i>	(4) <i>Odds Multiplier</i>
<u>Defendant's Type of Prior Conviction Record</u>			
Homicide or Other Felony	-.65	.61	---
Non-felony	-1.51	2.10	---
No Prior Conviction <i>OMITTED</i> <sup>c</sup>	---	---	---
<u>Defendant's Prior Conviction Status</u>			
Juvenile	.11	.02	---
Adult	3.11	7.48***	22.42
No Prior Contact <i>OMITTED</i> <sup>c</sup>	---	---	---
<u>Weapon Used to Kill Victim</u>			
Firearm	4.93	12.34****	> 100.00
Knife	3.66	8.72***	38.86
Other	2.76	7.16***	15.80
Beating <i>OMITTED</i> <sup>c</sup>	---	---	---
<u>Defendant's Addiction at Time of Offense</u>			
Drugs	-2.54	7.47**	.08
Alcohol	-.23	.08	---
Not Addict <i>OMITTED</i> <sup>c</sup>	---	---	---
<u>Victim's Employment Status</u>			
Employed	-.58	.41	---
Other	2.85	7.57***	17.29
Unknown	-1.00	.84	---
Unemployed <i>OMITTED</i> <sup>c</sup>	---	---	---
Intercept	-9.78	16.48****	---
R <sup>2</sup>	.17		
-2 Loglikelihood	102.26		

\* P-val. < .10 \*\* P-val. < .05 \*\*\* P-val. < .01 \*\*\*\* P-val. < .001

a. See footnote a in Table 12. The dependent variable, "DEATHFAC," was coded "0" if no notice of factors was served and "1" if a notice of factors was served.

b. The definition of this country grouping is in Table C-1.

c. See *supra* note 170 (explaining the OMITTED category).

df = 4, p-val. < .001) (Table 2).<sup>184</sup> Among the individual counties, Hudson county prosecutors were over thirty times more likely than Essex county prosecutors to serve a notice of aggravating factors (chi-square = 6.53, df = 1, p-val. < .02).<sup>185</sup> Also, defendants in one of the two residual county groupings appear to have had significantly higher odds (more than seventeen times) of having a notice of aggravating factors served on them than defendants in Camden county.

*C. Disparities Across Case Processing Stages: Advancement  
Risks, Race, and County Jurisdiction*

This study shows that county jurisdiction, and perhaps race of the victim, influenced the prosecutor's decision to serve a notice of statutory aggravating factors. It might, however, be argued that disparities in case processing introduced early in the system, for example, at the death possible to death eligible progression stage, were corrected by countervailing decisions by the judge or jury at later case processing stages of the system. For example, if cases involving felony murders of Hispanic victims had a higher risk of having a notice of aggravating factors served than cases involving felony murders of black victims, juries might nevertheless fail to return a death verdict in many of the former cases for other reasons, thereby neutralizing the heightened liabilities introduced earlier in the system.

Prior studies of capital case processing have either calculated separate conditional probabilities or estimated separate regression equations for each case processing stage in order to assess the comparative risks of advancing at the different stages.<sup>186</sup> This study, however, took an alternative approach: Each of the sequential decision making points in the capital case processing system was represented in a single equation. Each decision making point was expressed as a separate independent variable, what we have called an advancement risk variable. The coefficients of the advancement risk variables can be compared to one another with respect to the relative odds that defendants face at each case processing stage of advancing at least one step further into the system.

To examine the probability of advancement at different case processing stages, we adopted the procedure described by Feinberg and

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<sup>184</sup> See *id.* (describing the method by which these figures were calculated).

<sup>185</sup> See *id.* (describing the method by which these figures were calculated).

<sup>186</sup> See, e.g., Bowers, *supra* note 112, at 1072-74, 1083-86; Foley & Powell, *The Discretion of Prosecutors, Judges, and Juries in Capital Cases*, 7 CRIM. JUST. REV. 16, 18-19 (Fall 1982). See generally Bienen, *Prosecutorial Discretion*, *supra* note 1, at 122-56 (reviewing these studies).

Mason.<sup>187</sup> Under this procedure, the sequence of successive advancements from one case processing stage to the next, which may place the defendant in ever-increasing jeopardy of advancing yet further into the capital case processing system, can be expressed in the form of a "continuation odds" logistic regression model.<sup>188</sup>

To understand this procedure, consider the following example from education. All other things being equal, the chance of progressing from one school grade to the next, for example from the ninth grade to the tenth grade, can be compared to the chances of progressing from some other school grade to the next school grade. One can compare the chances of progressing from eighth grade to ninth grade with the chances of progressing from eleventh grade to twelfth grade, and express the comparison as an odds. It may be that the higher the school grade completed, the higher the odds of continuing to the next grade. Thus, for a variety of reasons, the odds of advancing from the eleventh grade to the twelfth grade may be 1.5 times as high as that of advancing from the ninth grade to the tenth grade. The comparative chances of advancement across two decision making

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<sup>187</sup> Feinberg & Mason, *Identification and Estimation of Age-Period-Cohort Models in the Analysis of Discrete Archival Data*, in *SOCIOLOGICAL METHODOLOGY* 1979, at 1-67 (K. Schuessler ed. 1978). We also attempted to examine case advancement in another way. It seemed reasonable to expect that disparities might not appear across adjacent case processing stages but might have to accumulate gradually across several processing stages before becoming sufficiently large to show up. Consequently, we conducted a "stage jumping" analysis, which involved estimating logistic regression models traversing case processing stages that were made successively "longer." For example, we investigated the impact of the victim's race on case advancement from: First, death possible to death eligible; second, death possible to death trial (jumping across the intervening death eligible stage); third, death possible to death penalty (jumping across the intervening death eligible and death trial stages); and fourth, death possible to death sentence (jumping across the intervening death eligible, death trial, and death penalty stages). If victim-race disparities accumulated gradually, one would expect to find increasingly significant differences as the number of jumped stages increased. Unfortunately, we are unable to report this analysis because the regression models failed to converge for the longer stage-jumping traversals. This problem occurred because too few cases reached the final processing stages. With a sufficient number of cases, however, this strategy might yield additional insights into case advancement progressions.

<sup>188</sup> The continuation odds regression equation is

$$\log \left( \frac{P_{ij}}{1-P_{ij}} \right) = \Theta_j + \underline{B}'_j \underline{X}_{ij} \quad \text{for } j = 1, J - 1$$

where,

$P_{ij}$ : the probability that person  $i$  advances to capital case processing stage  $j+1$ , given that the person has reached capital case processing stage  $j$ ;

$J$ : the number of capital case processing stages;

$\underline{X}_{ij}$ : a vector of risk variables for person  $i$ ;

$\underline{B}'_j$ : a vector of coefficients (typically, one constrains  $\underline{B}'_j = \underline{B}'$  for all  $j$ ); and

$\Theta_j$ : capital case processing stage  $j$ .

points in a system is termed a "continuation odds" or, as we have termed it, an advancement risk.

One can extend the continuation odds procedure and include other independent variables in the regression model. Doing so permits one to calculate the continuation odds while controlling for the effects of other influential variables. In the present context, the continuation odds analysis permits us to evaluate the independent effects, among others, of the case processing stage, race, and county jurisdiction on the progression of capital cases through the judicial system.

Each case processing stage is represented separately by a dichotomous variable indicating either advancement to the next adjacent stage or the failure to advance to that stage.<sup>189</sup> The advancement risk variables can be viewed as expressing the independent decision making influences that operate at each case processing stage and, hence, can reasonably be used as independent variables. These advancement risk variables enable one to isolate the risk of advancing, for example, from the death eligible to capital trial stage relative to the risk of advancing from capital trial to the penalty stage, while controlling for the influences of other significant variables. The advancement risk variables are handled in the same manner as the other independent variables in the logistic regression analysis.<sup>190</sup>

One attractive feature of the advancement risk approach is that it permits the analysis of interactions between advancement risk variables and race, and advancement risk variables and county jurisdiction. The finding of an interaction effect between race and an advancement risk variable would indicate that race operates at different levels across case processing stages. Thus, hypothetically, the odds that blacks accused of killing whites would advance to the next stage might be greater in the earlier stages of the capital processing system. A similar finding for county jurisdiction would indicate that county

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<sup>189</sup> Failure to advance is coded "0"; advancement is coded "1". By independently characterizing the discrete stages in the capital case processing system, the continuation odds approach pools observations across successive stages. Each time a defendant is at risk to proceed to the next capital case processing stage, that defendant contributes one observation to the analysis.

Each defendant contributes at least one observation by virtue of having been involved in a felony murder. Each defendant who is designated death eligible then contributes one more observation. This procedure is repeated for each successive stage in the system through which a defendant traverses. Although pooling multiple observations for individual defendants may seem to violate assumptions of independence, it is merely a convenient computational method of obtaining true maximum likelihood estimates for the continuation odds model. See generally Allison, *Discrete-Time Methods for the Analysis of Event Histories*, in *SOCIOLOGICAL METHODOLOGY* 1982, at 61 (S. Leinhardt ed. 1982) (explaining this technique in more detail); Feinberg & Mason, *supra* note 181, at 37-62 (same).

<sup>190</sup> See *supra* note 171 (discussing the method by which these figures were calculated).

effects shift in their level of impact across case processing stages. Conversely, if these case processing stage interactions are not observed, yet *independent* race, county jurisdiction, and advancement risk effects do appear, then it would seem that the capital case processing system is disparate in outcome for race and county, but at the same levels at each case processing stage, controlling for the influence of the case processing stage.

Table 14 reports the advancement risk logistic regression model for the 146 defendants who committed the homicide by their own conduct.<sup>191</sup> Significance tests were conducted for interactions between race and advancement risk variables and county jurisdiction and advancement risk variables. In neither instance was an interaction effect observed.<sup>192</sup> For this reason, these interaction variables were dropped from Table 14. Should the case processing stages be found to influence capital case decision making, they appear to do so independently of race and county jurisdiction.

Neither race nor county jurisdiction was related to overall advancement risks. Race interactions were first examined to disclose any interdependency between the victim's and the defendant's race in influencing advancement risk. No significant interactions were observed (chi-square = 4.39, df = 4, p-val. > .10) and therefore were not included in Table 14. Next, the main effects of the defendant's and victim's race were examined. Neither variable significantly influenced overall case progression (defendant's race: chi-square = 2.06, df = 2, p-val. > .10; victim's race: chi-square = 1.87, df = 2, p-val.

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<sup>191</sup> The advancement risk variables were forced into the equation from the outset of model building and not permitted to exit. In all other respects, model building proceeded as outlined earlier. See *supra* note 171. The "all homicides to death possible" advancement risk was not included because there were only 27 cases that were not death possible. In effect, the initial case processing stage is from "all homicides to death eligible," disregarding the death possible progression.

A key variable regression model was also run to assess the robustness of results in comparison to the backward selection regression model. The key variable model and the backward selection model were inconsistent. In the backward selection model, neither individual county jurisdiction nor race variables were observed to have a significant impact on the risk of case advancement. In the key variable model, however, a grouped county variable was significant as were the Hispanic-defendant and white-victim variables. The conservative logic of our assessment of robustness leads to the conclusion that the nonsignificant results in the backward selection model are correct; nonsignificant results in the former model and significant results in the latter model support the assertion that the effects of county and race on case advancement are nonsignificant. See *id.* for further discussion.

<sup>192</sup> Following are the results of the hypothesis tests for race and county interaction effects for Table 14: First, advancement risk by defendant race (chi-square = 3.57, df = 6, p-val. > .05); second, advancement risk by victim race (chi-square = 3.53, df = 6, p-val. > .05); and third, advancement risk by county (chi-square = 9.20, df = 12, p-val. > .05). See *supra* note 171 (describing the method by which these figures were calculated).

**Table 14**  
**Felony Cases ("By His Own Conduct"): Logistic Regression,**  
**Advancement Risk<sup>a</sup>**

(1) <i>Independent Variable</i>	(2) <i>Coefficient</i>	(3) <i>Chi-Square</i>	(4) <i>Odds Multiplier</i>
<u>Capital-Case Processing Stage:</u>			
Advancement Risk			
All Homicides to Death-Eligible	.04	.01	---
Capital Trial to Penalty Phase	— .01	<.01	---
Penalty Phase to Death Sentence	-2.86	26.76****	.06
Death-Eligible to Capital Trial <i>OMITTED<sup>c</sup></i>	---	---	---
<u>County Jurisdiction</u>			
Essex	— .24	.13	---
Hudson	.70	.80	---
Other Counties, 1 <sup>b</sup>	.48	.46	---
Other Counties, 2 <sup>b</sup>	.94	2.30	---
Camden <i>OMITTED<sup>c</sup></i>	---	---	---
<u>Defendant's Race</u>			
White	— .49	1.07	---
Hispanic	— .82	1.55	---
Black <i>OMITTED<sup>c</sup></i>	---	---	---
<u>Victim's Race</u>			
White	.63	1.84	---
Hispanic	.54	.49	---
Black <i>OMITTED<sup>c</sup></i>	---	---	---
<u>Statutory Aggravating Factors</u>			
"b": Grave Risk of Death	.31	.52	---
"c": Outrageously or Wantonly Vile	.71	2.47	---
"d": In Expectation of Pecuniary Value	-3.83	7.15***	.02
"f": Escape Detection	1.09	5.46**	2.97
"g": Felony	.39	.49	---
<u>Statutory Mitigating Factors</u>			
"a": Extreme Mental Disturbance	.78	2.58	---
"b": Victim Participated in Conduct	— .71	1.43	---
"c": Age of Defendant	.80	3.79*	2.23
"d": Capacity to Appreciate Wrongfulness Impaired	.51	1.28	---
"e": Duress	.23	.14	---
"f": No Significant History of Prior Criminal Activity	.08	.04	---
"g": Substantial Assistance to the State	.02	< .01	---
"h": Any Other	— .12	.07	---

Table 14(continued)

(1) Independent Variable	(2) Coefficient	(3) Chi-Square	(4) Odds Multiplier
<u>Defendant's Type of Prior Conviction Record</u>			
Homicide or Other Felony	.24	.29	---
Non-felony	-1.01	2.86*	.36
No Prior Conviction <i>OMITTED</i> <sup>c</sup>	---	---	---
<u>Defendant's Prior Conviction Status</u>			
Juvenile	-.57	1.37	---
Adult	1.87	9.15***	6.49
No Prior Contact <i>OMITTED</i> <sup>c</sup>	---	---	---
<u>Victim/Defendant Relationship</u>			
Nonstranger	1.56	5.80**	4.76
Stranger	2.29	11.85****	9.87
Relative <i>OMITTED</i> <sup>c</sup>	---	---	---
<u>Defendant's Addiction at Time of Homicide</u>			
Drugs	-.64	1.23	---
Alcohol	-1.14	2.73*	.32
Drugs and Alcohol	2.20	4.53**	9.03
Not Addict <i>OMITTED</i> <sup>c</sup>	---	---	---
<u>Victim Female</u>	1.33	9.03***	3.78
<u>Victim's Physical Disability</u>	-1.94	9.33***	.14
<u>Defense Counsel Representation</u>			
Pool Attorney	-.65	1.56	---
Private Attorney	1.20	5.10**	3.32
Public Defender <i>OMITTED</i> <sup>c</sup>	---	---	---
Intercept	-4.52	12.86****	---
R <sup>2</sup>	.17		
-2 Loglikelihood	277.75		

\* P-val. < .10 \*\* P-val. < .05 \*\*\* P-val. < .01 \*\*\*\* P-val. < .001

a. See footnote a of Table 12. The dependent variable, "CONT," was coded "0" if the case did not advance to the next capital-case processing stage and was coded "1" if the case did advance.

b. The definition of this county grouping is in Table C-1.

c. See *supra* note 170 (explaining the OMITTED category).



> .10).<sup>193</sup> Finally, county jurisdiction failed to be significant (chi-square = 5.95, df = 4, p-val. > .10).<sup>194</sup>

In contrast, the case processing stage was related to the risk of further advancement (chi-square = 42.46, df = 3, p-val. < .001).<sup>195</sup> The odds of advancing from penalty phase to death sentence were nearly one-twentieth the odds of advancing from death eligible to capital trial and were similarly well below the odds of advancing to the death eligible status (odds multiplier = .06, regression coefficient = -2.86). Given this substantial effect, it appears that decision making processes at the final risk stage place a brake on capital case advancement.

## VII. SUMMARY AND CONCLUSIONS

### A. *Summary of Research Findings*

This study of the capital case processing of felony murderers attempted to determine which of more than one-hundred variables describing the defendant, victim, and homicidal incident were related to specific decisions by prosecutors and others: first, the decision to go to trial, second, the decision to serve a notice of aggravating factors, and third, the decision to advance a defendant from one stage to the next stage of the capital case processing system. The study concentrated on identifying case processing variables that resulted in divergent risks of case advancement for similarly situated defendants in felony murder cases, most notably the extra-legal variables of race and county jurisdiction. Other potential influences on case advancement were treated as control variables. The study also examined whether differences in case advancement were related to the advancement stages themselves, independent of race and county jurisdiction, or whether differences in overall case advancement were related to the advancement stages in interaction with race and county jurisdiction.

Significant county jurisdiction and race disparities were observed with respect to the decision to go to trial.<sup>196</sup> Felony murder defendants processed in Essex county experienced substantially higher odds of going to trial than defendants processed in Camden and Hudson

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<sup>193</sup> See *supra* note 171 (describing the method by which these figures were calculated).

<sup>194</sup> See *id.* (describing the method by which these figures were calculated).

<sup>195</sup> See *id.* (describing the method by which these figures were calculated).

<sup>196</sup> See *supra* note 171 and accompanying text.

counties.<sup>197</sup> White-victim cases had significantly greater odds of going to trial than both Hispanic- and black-victim cases.<sup>198</sup> Race interactions appeared to be present, but this analysis was impeded because of technical difficulties in model estimation.<sup>199</sup>

County jurisdiction and perhaps victim-race disparities were also found with respect to prosecutor's decisions to serve a notice of aggravating factors. Defendants in Hudson county had a higher risk of having a notice of factors served than defendants in Essex county.<sup>200</sup> Defendants who murdered Hispanics had a higher odds of having a notice of factors served than defendants who murdered blacks.<sup>201</sup>

The advancement risks at the successive case processing stages did not depend upon (interact with) either the victim's or defendant's races or upon the county jurisdiction.<sup>202</sup> Moreover, neither the defendant's race, nor the victim's race, nor the county jurisdiction independently influenced the overall advancement risks of the felony murder defendants.<sup>203</sup>

The odds of advancing from penalty phase to death sentence were substantially less than the odds of advancing from system entry to death eligible status or from death eligible status to capital trial.<sup>204</sup> To put it another way: at each case processing stage *prior* to the penalty phase, the odds for a felony murder defendant of progressing to the next stage were considerably greater than the odds of progressing from penalty phase to a death sentence. The penalty phase, therefore, acted as a firm brake on the advancement of felony murder cases.<sup>205</sup>

In sum, the analyses revealed significant race, county jurisdiction, and advancement risk effects, but these effects were not the same for each type of decision making outcome. For example, with respect to going to trial, white-victim cases had substantially higher risks than black-victim cases. With respect to serving a notice of aggravating factors, it was the Hispanic-victim cases that had substantially higher risks relative to black victim cases. With regard to county jurisdiction, the risk of a trial was greater in Essex county than in Hudson county. The relationship between these two counties was reversed, however,

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<sup>197</sup> See Table 12; notes 171-72 and accompanying text.

<sup>198</sup> See Table 12; note 174 and accompanying text.

<sup>199</sup> See *supra* notes 177-79 and accompanying text.

<sup>200</sup> See Table 13; notes 184-85 and accompanying text.

<sup>201</sup> See Table 13; note 182 and accompanying text.

<sup>202</sup> See Table 14; note 192 and accompanying text.

<sup>203</sup> See Table 14; notes 193-94 and accompanying text.

<sup>204</sup> See Table 14; note 195 and accompanying text.

<sup>205</sup> *Id.*

when considering the chances that a notice of factors would be served. These divergent findings remain to be explained in terms of case decision making dynamics.

We separately examined the individual statutory aggravating factors because we knew from our earlier study that each statutory aggravating factor can function as a miniature capital punishment statute.<sup>206</sup> The present study can be viewed as an intensive analysis of the operation of one of the eight statutory aggravating factors, the felony factor. Separate studies could be constructed of other statutory aggravating factors which have been frequently served, such as the heinous factor, which is served more often than the felony factor.<sup>207</sup> A comparison of those cases in which the heinous factor is served and those cases in which the felony factor is served might pinpoint how each of these statutory aggravating factors functions. And, of course, there would be a number of cases where they were both served together.

The individual statutory aggravating factors have very different definitions and characters. The wording of the heinous factor, when it is read to the jury, presents them with a different kind of decision than what is necessary for a jury finding that the felony aggravating factor is present.<sup>208</sup> A jury finding that a murder involved "depravity of mind" is a very different judgment from a jury determination that "the offense was committed . . . after committing burglary."<sup>209</sup> A conviction at guilt phase for the underlying felony is usually sufficient for a finding that the felony aggravating factor is factually present. The jury's deliberations on that factor are relatively straightforward. Consistent with the earlier study,<sup>210</sup> the present study shows that the individual factors were served, submitted and found at widely varying rates, reflecting differences in their rates of occurrence, definitional clarity, and the way in which they are interpreted by prosecutors, judges and jurors.

The overwhelming majority (211/252 or 83.7%) of all felony murders were death possible because of the factual presence of the felony statutory aggravating factor.<sup>211</sup> Yet in only 37.4% (79/211) of those death possible cases in which the felony factor was factually present did the prosecutor designate the case as capital by serving a notice of factors on the felony factor. For the subset of felony murder cases

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<sup>206</sup> See Bienen, *Prosecutorial Discretion*, *supra* note 1, at 246-62.

<sup>207</sup> See *id.* at 250 & table 34, at 263.

<sup>208</sup> See App. A (providing the text for each statutory aggravating factor).

<sup>209</sup> N.J. STAT. ANN. § 2C:11-3(c)(4)(c), § 2C:11-3(c)(4)(g) (West Supp. 1990).

<sup>210</sup> See Bienen, *Prosecutorial Discretion*, *supra* note 1, at 242-62.

<sup>211</sup> See *supra* note 142 (explaining the source for the figure of 252 felony murders).

examined in this study, those in which the defendant committed the homicide by his own conduct, the vast majority (123/146 or 84.2%) were also death possible on the felony aggravating factor.<sup>212</sup> Yet, only 52.0% (64/123) of these death possible cases were designated death eligible on the felony aggravating factor. Pinpointing differences, and the reasons for these differences, between the rates at which individual statutory aggravating factors are served, submitted and found must remain a high research priority in order to explain observed capital case processing disparities.

### *B. Comparison of Research Findings Across Studies*

Results from this study are consistent in several respects with our earlier analysis that examined all death possible cases (n=404) in the dataset.<sup>213</sup> Significant county disparities were observed with respect to the plea/trial decision among both the 404 death possible cases and among the 146 by-his-own-conduct felony murder cases.<sup>214</sup> With respect to the serving of a notice of statutory aggravating factors, however, significant county disparities were not observed among the 404 cases but were observed among the 146 by-his-own-conduct felony murder cases.<sup>215</sup>

Significant disparities by race appeared with respect to the plea/trial decision among both the 404 death possible cases and the 146 by-his-own-conduct felony murder defendants.<sup>216</sup> Among the 404 cases, the victim's race influenced the odds that a case would go to trial. In addition, among the 146 own-conduct felony murder defendants, there was evidence that the effects of the defendant's race on the plea/trial decision was related to the victim's race and vice versa. Thus, there appear to be interaction effects within this subset.<sup>217</sup> With

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<sup>212</sup> All of the cases analyzed here were prosecuted prior to *State v. Gerald*, in which the New Jersey Supreme Court held that an intent to commit serious bodily injury was insufficient to sustain a conviction for capital murder. See 113 N.J. 40, 549 A.2d 792 (1988); *supra* note 8. For the cases in this study, it was presumed that a purposeful or knowing intent to commit murder was sufficient to sustain a conviction for capital murder. The capital murder indictment may be modified to account for the *Gerald* decision.

<sup>213</sup> See Bienen, *Prosecutorial Discretion*, *supra* note 1, at 163.

<sup>214</sup> Compare *id.* at 226-229 (plea versus trial for all 404 death possible cases) and Table 12; notes 161-68 and accompanying text (plea versus trial for 146 felony murder subset).

<sup>215</sup> Compare Bienen, *Prosecutorial Discretion*, *supra* note 1, at 235-239 (notice of factors served for all 404 death possible cases) and Table 13; notes 181-85 and accompanying text (notice of factors served in 146 felony murder subset).

<sup>216</sup> See authorities cited *supra* note 214.

<sup>217</sup> See *supra* note 175 and accompanying text. Technical difficulties in estimation, however, impeded our being more specific.

respect to the serving of a notice of aggravating factors, significant race interaction effects were observed among the 404 cases; but neither significant overall main effects nor interaction effects for race were observed among the 146 own conduct felony murder cases.<sup>218</sup>

Unfortunately, direct comparisons like those above cannot be made between this study and studies conducted in other jurisdictions. For example, we do not know of any study which has examined the plea/trial decision or advancement risks across successive stages in the capital case processing system. Some studies have looked at the prosecutor's decision to charge a defendant with capital murder<sup>219</sup> which, under the New Jersey capital punishment scheme, is the decision to serve a notice of aggravating factors. Studies in other jurisdictions have focused on the final stage of the decision to impose the death sentence,<sup>220</sup> which was analyzed here only in the advancement risk analysis.

Also, prior studies have examined race effects only for blacks and whites.<sup>221</sup> To the best of our knowledge, this is the first study to have looked at the effect of Hispanic ethnic status on case processing outcomes. The relatively large number of Hispanic defendants and victims in this study's data set merited their inclusion as a separate ethnic category. Although direct comparisons are difficult between this study and those conducted in other jurisdictions, some overall points of convergence are nevertheless noteworthy.

Analysis indicated that the plea/trial decision depends upon the interaction between the defendant's and the victim's races. Because of technical difficulties in model estimation, however, we are unable to pinpoint unambiguously which race combinations are mainly responsible for this result.<sup>222</sup> Other studies have generally reported that blacks who killed whites sustained the highest risks of advancing in the capital case processing system, regardless of the case processing stage.<sup>223</sup> Although we are currently unable to make direct comparisons between our race results and those reported by other researchers,

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<sup>218</sup> See *supra* notes 182-83 and accompanying text.

<sup>219</sup> See, e.g., Bowers & Pierce, *supra* note 112, at 608-12; Paternoster, *Prosecutorial Discretion*, *supra* note 112, at 445-47.

<sup>220</sup> See, e.g., D. BALDUS, G. WOODWORTH & C. PULASKI, *supra* note 112, at 160-97; S. GROSS & R. MAURO, *supra* note 112, at 43-94; Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913, 917-26 (1983).

<sup>221</sup> See, e.g., authorities cited *supra* note 112.

<sup>222</sup> See *supra* notes 175-79 and accompanying text.

<sup>223</sup> See, e.g., S. GROSS & R. MAURO, *supra* note 112, table 4.2, at 45; Bowers & Pierce, *supra* note 112, at 608-16; Paternoster, *Prosecutorial Discretion*, *supra* note 112, at 452-53; Zeisel, *supra* note 112, figure 2, at 461.

unambiguous disparities across race combinations may be found in the future as death penalty research begins to describe in more detail the racial and ethnic compositions in diverse capital case processing systems and at each decision making point in these systems.

Our observation of disparities across county jurisdictions for the plea/trial decision and with respect to the serving of a notice of factors add to mounting findings along these lines. Jurisdictional differences are ubiquitous in the research literature, although these differences have been found with respect to other outcome measures, such as the decision to prosecute a case capitally or the decision to return a death sentence.<sup>224</sup> The present study expands the contexts in which jurisdictional disparities have been observed within an entire capital case processing system.

This study also found significantly different advancement risks at different processing stages: Felony murder defendants were less likely to advance from penalty phase to death sentence than to advance from any earlier decision making point to the next adjacent point. This finding must stand alone until other research explores this issue.

Across the entire capital case processing system, neither county jurisdiction nor race were discerned to significantly effect case advancement. Because no other study has conducted an advancement risk analysis, we are unable to draw comparative conclusions at this time.

### *C. Policy Implications and Considerations*

Race and county jurisdiction appear to operate somewhat differently in New Jersey with respect to the two outcomes of interest: the plea versus trial decision and the serving of a notice of aggravating factors. The differences at these two crucial decision making points in the capital case processing system, and potentially between subgroups of defendants, underscore the conclusion that strategies to eliminate disparate treatment in capital case processing must pinpoint the decision making outcomes, types of disparities, and particular defendant subgroups. Strategies ignoring these factors may be limited in their effectiveness.

Race and county jurisdiction did not appear to affect overall capital case advancement in the New Jersey judicial system. Despite their absence over the entire case processing system, however, these dis-

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<sup>224</sup> See, e.g., D. BALDUS, G. WOODWORTH & C. PULASKI, *supra* note 112, at 178-81; S. GROSS & R. MAURO, *supra* note 112, at 43-94; Bowers & Pierce, *supra* note 112, at 616-25; Paternoster, *Race of Victim*, *supra* note 112, at 778-83.

parities were nevertheless present at the initial case processing stages pertaining to the prosecutor's decision to accept a plea or serve a notice of aggravating factors. Resources might, therefore, be optimally targeted at these initial decision making stages to counteract the disparate case processing outcomes which occur there.

Advancement risks diverged across the capital case processing system: They were higher at the earlier case processing stages than at the final case processing stage. When considered together with the race and county results associated with the early prosecutorial decision to serve a notice of aggravating factors, the following conclusion emerges: Attention must focus more closely on the disparities originating at the earliest procedural decision making stages so that these disparities may be rectified.

The New Jersey Supreme Court recently decided *State v. Marshall*.<sup>225</sup> In *Marshall* the court affirmed a death sentence on direct appeal for the first time since reenactment. The court reserved, however, on the issue of comparative proportionality review and asked the Special Master and the parties to submit additional briefs on that question.<sup>226</sup> On March 20, 1991 the Special Master presented to the court its Second Interim Report.<sup>227</sup> This report included a preliminary proportionality analysis of the *Marshall* death sentence, comparing that sentence to similar cases in the jurisdiction. At the time this Article went to press, attorneys for the defense and the State were preparing their briefs for the New Jersey Supreme Court on the broad legal issues raised by proportionality review. Although the *Marshall* case does not involve the felony aggravating factor, the opinion eventually handed down will set the parameters for proportionality review in all future capital cases. Irrespective of the final result in *Marshall*, the data and research findings presented in this Article make clear that disproportionality in capital case processing will continue to be a major issue in felony murder cases.

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<sup>225</sup> 123 N.J. 1, 586 A.2d 85 (1991).

<sup>226</sup> *Id.* at 170-71, 536 A.2d at 174-75.

<sup>227</sup> D. Baldus, Second Interim Report to the New Jersey Supreme Court (March 20, 1991).

## APPENDIX A

### N.J. CAPITAL PUNISHMENT STATUTE:

N.J. STAT. ANN. § 2C:11-3<sup>1</sup>

#### 2C:11-3. Murder

a. Except as provided in section 2C:11-4 criminal homicide constitutes murder when:

(1) The actor purposely causes death or serious bodily injury resulting in death; or

(2) The actor knowingly causes death or serious bodily injury resulting in death; or

(3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping or criminal escape, and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants; except that in any prosecution under this subsection, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

. . . . .

b. Murder is a crime of the first degree but a person convicted of murder shall be sentenced, except as provided in subsection c. of this section, by the court to a term of 30 years, during which the person shall not be eligible for parole or to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

c. Any person convicted under subsection a. (1) or (2) who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value shall be sentenced as provided hereinafter:

(1) The court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or pursuant to the provisions of subsection b. of this section.

Where the defendant has been tried by a jury, the proceeding shall be conducted by the judge who presided at the trial and before the jury which determined the defendant's guilt, except that, for good

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<sup>1</sup> N.J. STAT. ANN. § 2C:11-3 (West Supp. 1991).



cause, the court may discharge that jury and conduct the proceeding before a jury empaneled for the purpose of the proceeding. Where the defendant has entered a plea of guilty or has been tried without a jury, the proceeding shall be conducted by the judge who accepted the defendant's plea or who determined the defendant's guilt and before a jury empaneled for the purpose of the proceeding. On motion of the defendant and with consent of the prosecuting attorney the court may conduct a proceeding without a jury. Nothing in this subsection shall be construed to prevent the participation of an alternate juror in the sentencing proceeding if one of the jurors who rendered the guilty verdict becomes ill or is otherwise unable to proceed before or during the sentencing proceeding.

(2)(a) At the proceeding, the State shall have the burden of establishing beyond a reasonable doubt the existence of any aggravating factors set forth in paragraph (4) of this subsection. The defendant shall have the burden of producing evidence of the existence of any mitigating factors set forth in paragraph (5) of this subsection but shall not have a burden with regard to the establishment of a mitigating factor.

....  
(d) The State and the defendant shall be permitted to rebut any evidence presented by the other party at the sentencing proceeding and to present argument as to the adequacy of the evidence to establish the existence of any aggravating or mitigating factor.

(e) Prior to the commencement of the sentencing proceeding, or at such time as he has knowledge of the existence of an aggravating factor, the prosecuting attorney shall give notice to the defendant of the aggravating factors which he intends to prove in the proceeding.

(f) Evidence offered by the State with regard to the establishment of a prior homicide conviction pursuant to paragraph (4)(a) of this subsection may include the identity and age of the victim, the manner of death and the relationship, if any, of the victim to the defendant.

(3) The jury or, if there is no jury, the court shall return a special verdict setting forth in writing the existence or nonexistence of each of the aggravating and mitigating factors set forth in paragraphs (4) and (5) of this subsection. If any aggravating factor is found to exist, the verdict shall also state whether it outweighs beyond a reasonable doubt any one or more mitigating factors.

(a) If the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death.

(b) If the jury or the court finds that no aggravating factors exist, or that all of the aggravating factors which exist do not outweigh all of the mitigating factors, the court shall sentence the defendant pursuant to subsection b.

(c) If the jury is unable to reach a unanimous verdict, the court shall sentence the defendant pursuant to subsection b.

(4) The aggravating factors which may be found by the jury or the court are:

(a) The defendant has been convicted, at any time, of another murder. For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;

(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value;

(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit murder, robbery, sexual assault, arson, burglary or kidnapping; or

(h) The defendant murdered a public servant, as defined in N.J.S. 2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.

(5) The mitigating factors which may be found by the jury or the court are:

(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution;

(b) The victim solicited, participated in or consented to the conduct which resulted in his death;

(c) The age of the defendant at the time of the murder;

(d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law

was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution;

(e) The defendant was under unusual and substantial duress insufficient to constitute a defense to prosecution;

(f) The defendant has no significant history of prior criminal activity;

(g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or

(h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.

. . . .

## APPENDIX B

PROSECUTOR'S GUIDELINES FOR DESIGNATION OF  
HOMICIDE CASES FOR CAPITAL PROSECUTION<sup>2</sup>

## PREAMBLE

The legislature has determined that some homicide cases are so egregious that a term of imprisonment is insufficient to properly address societal concerns. These cases have been designated as "Capital" cases.

The decision to file a statutory notice of aggravating factor(s) and thereby commence a capital punishment prosecution is one of the most important charging functions to be performed by a County Prosecutor. It is through this decision making process that a prosecutor commits the entire resources of the criminal justice system.

Because of the significance of the concerns of the legislature for the victims of these egregious crimes and also as to the penalty involved, the prosecutor must establish guidelines which ensure a rational procedure for the designation of a capital case. Because there are twenty-one county prosecutors, each must screen the homicide cases occurring within his respective jurisdiction and decide whether or not the statutory notice of aggravating factor(s) should be filed in a particular case. It is through this charging process that each prosecutor implements the intent of the legislature and ultimately that of the people of the State. It is neither desirable nor acceptable to have a capital charging standard dependent upon individual attitudes.

All homicide cases and all defendants are different. Therefore, no set of guidelines can possibly anticipate every circumstance. The decision as to whether or not a case will be designated a capital prosecution shall be made by each County Prosecutor by applying these guidelines in a realistic and reasonable fashion to each case.

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<sup>2</sup> Adopted by the New Jersey County Prosecutors Association and the New Jersey Attorney General, submitted to Professor David Baldus, special master, and the Chief Justice of the New Jersey Supreme Court on March 3, 1989.

The words "or victim" were inadvertently omitted from the draft of the Preamble dated March 3, 1989. The Guidelines were formally amended on January 23, 1990 by the County Prosecutors Association to correct this oversight. Letter from Boris Moczula, Deputy Attorney General of the State of New Jersey, to Stephen W. Townsend, Clerk of the New Jersey Supreme Court (Feb. 2, 1990).

The twenty-one County Prosecutors in the State of New Jersey reaffirm the fact that race, sex, social or economic religion and/or national origin of a defendant or victim has not in the past, nor will in the future be considered in any fashion to determine whether or not a case warrants capital prosecution.

In addition, it has been and continues to be the position of all prosecutors that economic or other resource constraints of their respective offices shall not be a factor in determining whether or not the case warrants capital prosecution nor shall it in any specific case play any role whatsoever in the capital designation decision making process.

These guidelines are not intended to, do not, and may not be relied upon to create any substantive or procedural rights, enforceable at law by any party in any matter, civil or criminal. The guidelines do not place any limitation upon the otherwise lawful prosecutorial prerogatives of the Office of the County Prosecutor.

## GUIDELINES FOR THE DESIGNATION FOR CAPITAL PROSECUTIONS

### *Guideline No. 1*

Each County prosecutor shall establish within his office a committee to review every homicide case pursuant to the statute and guidelines, to assist the prosecutor in the prosecutor's determination as to death eligibility.

### *Guideline No. 2*

The prosecutor, in determining whether or not a case is death eligible, must be satisfied that there is proof beyond a reasonable doubt that the defendant, by his own conduct, actively and directly participated in causing the death of the victim, or procured the commission of the homicide by payment or promise of payment of anything of pecuniary value.

### *Guideline No. 3*

The prosecutor, in determining whether or not a case is death eligible, must be satisfied that there is proof beyond a reasonable doubt that the defendant acted purposely in that it was his conscious

object, or knowingly in that he was aware it was practically certain that his conduct would cause the death of the victim.

*Guideline No. 4*

The prosecutor must be satisfied that there is proof beyond a reasonable doubt of the existence of at least one statutory aggravating factor.

*Guideline No. 5*

The prosecutor shall consider all known information tending to establish mitigating factors in the case in determining whether or not a case warrants death penalty prosecution.

*Guideline No. 6*

If after such review the Prosecutor is satisfied that the State will be able to prove beyond a reasonable doubt that the aggravating factor(s) outweigh the mitigating factor(s) then the case shall be designated a Capital Case.

*Guideline No. 7*

After a case has been designated a Capital Case, nothing contained herein shall prevent the prosecutor, prior to conviction, from reconsidering his initial decision to file the statutory notice of aggravating factors based upon a subsequent change in the factual or legal circumstances of the case. If there is a change in factual or legal circumstances of the case, the prosecutor may move to withdraw the Statutory Notice. Any reconsideration by the prosecutor of his initial charging decision shall be made in accordance with these Guidelines.

## APPENDIX C

CASE CHARACTERISTICS OF NEW JERSEY  
FELONY MURDERS

The greatest proportion of the 146 New Jersey felony murders that were by the defendant's own conduct occurred in 1983 and 1984 (more than 32.0% in each year), followed by 1982 (18.5%), and 1985 (12.3%) (Table C-3). Indictments and accusations for these felony murders were mainly served between 1983 and 1985 (Table C-3).

These murders were concentrated in four of the state's twenty-one counties: Essex, Camden, Monmouth, and Hudson, in decreasing order of concentration (Table C-1). Essex alone accounted for nearly one-quarter of the total cases. Camden, Monmouth, and Hudson counties together registered roughly one-third of all felony murders. The other eighteen counties individually contributed between 6.8% (Atlantic and Union) and a negligible percent (Salem and Sussex) of the cases.

The overwhelming majority (95.9%) of defendants were males (Table C-7). Almost three-fifths of the felony murderers were black (58.9%), nearly one-third were white (30.1%), and more than one-tenth (11.0%) were Hispanic (Table C-8). Almost one-half (47.9%) were young adults age 18-25; and one-fifth (20.6%) were ages 26-29 (Table C-9). Juveniles below age 18 and adults over 45 accounted for comparatively small fractions of the defendants (7.5% and .7%, respectively).

Nearly two-thirds (64.4%) of the victims were males (Table C-10). More than one-half (52.7%) of the victims were white, almost two-fifths were black (39.7%), and less than one-tenth (7.5%) were Hispanic (Table C-11). Three-fifths (60.9%) of the victims were between the ages of 18 and 50 (Table C-12). The modal age group was 18-25 (25.3%). Comparatively small proportions of the victims were juveniles or elderly—8.3% were age 17 or younger and 14.4% were age 66 or older.

In contrast to whites, blacks and Hispanics were more likely to be defendants than victims: nearly one and one-half times as many blacks and Hispanics were defendants than victims, whereas three-fifths as many whites were defendants than victims (Tables C-8, C-11). Victims were more than eight and one-half times as likely to be females than males (35.6% versus 4.1%) (Tables C-7, C-10). Defendants were often younger than their victims. For example, almost one-half of the defendants were between the ages of 18-25 (47.9%) but only one-quarter (25.3%) of the victims fell between these ages (Tables C-9, C-12).

More than nine out of ten felony-murder defendants (95.9%) were charged with an indictment rather than an accusation (Table C-4). For the analysis of case processing stages, seven types of homicide charges were distinguished: capital murder (murder with death an issue, notice served); murder (no notice of factors served); felony murder; aggravated manslaughter and other. The majority of accusations and indictments (88.3%) were initially charged as capital murder or murder.

Of the 146 felony murder cases, 134 cases (91.8%) involved a factual basis for asserting the presence of an aggravating factor (death possible cases), of which 73 cases (54.5%) resulted in the prosecutor serving a notice of factors (death eligible cases). Of those cases in which a notice of factors was served, 51 cases (69.9%) went to trial as capital cases before a judge or death qualified jury (i.e., the factor was neither dismissed by the judge nor withdrawn by the prosecutor prior to trial). Of these 51 cases, 41 cases (80.4%) resulted in a capital conviction for death eligible murder and went to a penalty phase trial before a judge or a death qualified jury. Finally, of the 41 cases, 15 cases (36.6%) resulted in a death sentence imposed by a death qualified jury after a penalty phase trial.

Tables C-2 and C-5 report the procedural disposition of cases, but in different ways. Table C-2 describes the way the whole case was disposed of, whether by trial or plea, and details four different kinds of pleas. More than three-fifths of the cases (61.0%) were disposed of by trial; the other single largest category was pleas to manslaughter (17.8%). The category plea to capital murder (4.1%) includes both those cases where the defendant pled guilty to capital murder, and the penalty phase was decided by a penalty phase jury, and those cases where the judge sat as the fact finder at the penalty phase. Plea to non-capital murder (14.4%) includes both pleas to murder and felony murder. The category other plea (1.4%) refers to pleas to nonhomicide offenses, such as robbery.

Table C-5 reports the disposition or result on the homicide charge alone. More than three-fifths of the charges (62.4%) were disposed of by trial. In 2.8% of the cases, the homicide charge was dismissed, although the defendant may have pled guilty or been found guilty on other charges. Among all cases, relatively few (5.5%) resulted in a not guilty verdict on the homicide charge. The largest group resulted in a verdict of guilty on the homicide charge (45.9%). When combined with those who were found guilty of a lesser included offense (11.0%), the total proportion of all cases which resulted in a guilty verdict at trial was nearly three-fifths (56.9%). There were no cases in which the defendant was acquitted on the basis of the insanity defense. In



the category of pleas, the largest group was, not surprisingly, pleas to downgraded offenses (21.9%). Pleas of guilty to accusation (5.5%) refers to a special procedure which bypasses indictment. A small number of cases were disposed of by a plea of guilty to the indictment (7.5%).

One in ten of the felony murder defendants (10.3%) received the death sentence as the maximum sentence on the homicide charge, and nearly two-fifths received life imprisonment (38.3%) (Table C-6). About one-tenth (8.9%) received no prison sentence.

Almost one-half of the defendants and victims were strangers (47.3), more than one-third were friends or acquaintances (34.9%), and more than one-sixth of the victims and defendants were intimates or relatives (16.4%) (Table C-13). The largest proportion of the murders took place in a residence (50.7%), followed by public places or institutions (34.9%), and business establishments (12.3%) (Table C-15). The principal motive for the commission of the homicide was money (46.6%) and, at much lower and comparable percentages, sexual reasons (12.3%), the commission of another crime (11.0%), rage or irrational outbursts (10.9%), and hatred or revenge (9.6%) (Table C-16). Almost two-fifths of the victims were killed with firearms (37.0%), followed, at a distance, by a knife or other sharp instrument (19.9%), or beating (15.7%) (Table C-14).

## APPENDIX C TABLES

FREQUENCY DISTRIBUTIONS OF SELECTED  
STUDY VARIABLES\*Table C-1  
County (v. 2)\*\*

	N	%
Atlantic	10	6.8
Bergen	6	4.1
Burlington	4	2.7
Camden	17	11.6
Cape May	1	0.7
Cumberland	5	3.4
Essex	35	24.0
Gloucester	1	0.7
Hudson	14	9.6
Hunterdon	2	1.4
Mercer	8	5.5
Middlesex	1	0.7
Monmouth	15	10.3
Morris	3	2.1
Ocean	3	2.1
Passaic	9	6.2
Salem	--	--
Somerset	2	0.7
Sussex	--	--
Union	10	6.8
Warren	1	0.7

\* All tables are based on 146 felony murder cases in which the defendant was identified as committing the homicide by his own conduct. This is a subset of the 703 cases reported in 41 *Rutgers L. Rev.* 27 (1988).

\*\* Refers to the labels used to identify the variables in the interview schedule (see appendix A in Bienen, Weiner, Denno, Allison, and Mills, "The Reimposition of Capital Punishment in New Jersey: Interim Report (1988)," cited in n.3, 41 *Rutgers L. Rev.* at 36.

Because of too few cases in several counties to permit their separate analysis, the following 13 counties were grouped in our earlier study into a variable designated "OTHERCO": Bergen, Burlington, Cape May, Cumberland, Gloucester, Hunterdon, Middlesex, Morris, Ocean, Salem, Somerset, Sussex, and Warren. Because of the fewer number of cases in the felony murder analysis, several of the counties which initially had been analyzed separately had to be grouped together. To keep these counties distinct from the earlier county grouping, another county group variable was created, "OTHERCO1," comprising the following 5 counties: Atlantic, Mercer, Monmouth, Passaic, and Union. By using these two groupings we were able to preserve continuity with our earlier analysis and, further, to determine whether the new county group differed from the earlier one.

**Table C-2**  
**Plea or Trial (v. 3)**

	<i>N</i>	%
Trial	89	61.0
Plea to Manslaughter	26	17.8
Plea to Capital Murder	6	4.1
Plea to Non-Capital Murder	21	14.4
Other Plea	2	1.4
Dismissal of All Charges, No Plea/No Trial	2	1.4

**Table C-3**  
**Year of Homicide and of Homicide Indictment or Accusation (v. 6)**

	Year of Homicide (v. 6)		Year of Homicide Indictment or Accusation (v. 15)	
	<i>N</i>	%	<i>N</i>	%
1982	27	18.5	7	4.8
1983	48	32.9	52	35.6
1984	51	34.9	50	34.2
1985	18	12.3	32	21.9
1986	2	1.4	5	3.4

**Table C-4**  
**Procedural History**

	Charge on Indictment or Accusation* (v. 38)		Charge at Disposition, Plea, or Trial (v. 39)		Charge at Sentencing Stage (v. 40)	
	<i>N</i>	%	<i>N</i>	%	<i>N</i>	%
Murder with Death an Issue, Notice Served	73	50.0	51	34.9	41	28.1
Murder Non-Death	56	38.4	42	28.8	28	19.2
Felony Murder	16	11.0	21	14.4	28	19.2
Aggravated Manslaughter	--	--	25	17.1	33	22.6
Manslaughter	1	0.7	3	2.1	4	2.7
Other	--	--	2	1.4	3	2.1
Dismissal	--	--	2	1.4	9	6.2
Not Applicable	6	4.1	--	--	--	--

\* Six cases were charged as murder non-death on an accusation (v. 37). No other cases were processed by accusation.

**Table C-5**  
**Result on Homicide Charge (v. 47)\***

	<i>N</i>	<i>%</i>
General Categories		
Trials	91	62.4
Pleas	51	34.8
Dismissals	4	2.8
Specific Categories		
TRIALS		
Trial, Not Guilty	8	5.5
Trial, Guilty to Homicide Charge	67	45.9
Trial, Guilty to Lesser Included Offense	16	11.0
Trial, Defendant Not Guilty by Reason of Insanity	--	--
PLEAS		
Plea of Guilty to Indictment	11	7.5
Pleas of Guilty to Downgraded Indictable Offense	32	21.9
Pleas of Guilty to Accusation	8	5.5
DISMISSALS	4	2.8

\* For those cases in which there was more than one decedent victim, the result reported is for the first homicide victim.

**Table C-6**  
**Maximum Sentence on Homicide Charge**

	<i>Maximum Sentence</i> <i>(v. 49)</i>	
	<i>N</i>	<i>%</i>
Death	15	10.3
Life	56	38.3
≥ 31*	7	4.8
30	21	14.4
20	19	13.0
11-19	10	6.8
10	2	1.4
1-9	3	2.1
No Prison Sentence	13	8.9

\* Numbers denote sentence in years.

**Table C-7**  
**Defendant's Gender (v. 97)**

	<i>N</i>	%
Male	140	95.9
Female	6	4.1

**Table C-8**  
**Defendant's Race (v. 98)**

	<i>N</i>	%
White	44	30.1
Black	86	58.9
Hispanic	16	11.0

**Table C-9**  
**Defendant's Age (v. 94-96)**

	<i>N</i>	%
13-17	11	7.5
18-25	70	47.9
26-29	30	20.6
30-35	17	11.6
36-40	9	6.2
41-45	8	5.5
> 45	1	0.7

**Table C-10**  
**Victim's Gender (v. 286)\***

	<i>N</i>	%
Male	94	64.4
Female	52	35.6

\* This table and the following tables, which report data on characteristics or behaviors of victims (i.e., variables 286-438 and 448-53), are based on the first decedent victim in cases where there was more than one decedent victim.

**Table C-11**  
**Victim's Race (v. 292)**

	<i>N</i>	%
White	77	52.7
Black	58	39.7
Hispanic	11	7.5

**Table C-12**  
**Victim's Age (v. 298)\***

	<i>N</i>	%
0-12	7	4.8
13-15	3	2.1
16-17	2	1.4
18-25	37	25.3
26-30	10	6.8
31-35	11	7.5
36-40	13	8.9
41-45	9	6.2
46-50	9	6.2
51-55	6	4.1
56-60	7	4.8
61-65	11	7.5
> 65	21	14.4

\* One victim of unknown age was assigned the mean value of 36.

**Table C-13**  
**Victim/Defendant Relationship (v. 322)**

	<i>N</i>	%
Intimate or Relative	24	16.4
Friend or Acquaintance	51	34.9
Stranger	69	47.3
Missing	2	1.4

**Table C-14**  
**Method of Killing (v. 370)**

	<i>N</i>	%
Firearm	54	37.0
Knife or Other Sharp Instrument	29	19.9
Beating	23	15.7
Strangulation	13	8.9
Other	27	18.5

**Table C-15**  
**Location of Homicide (v. 406)**

	<i>N</i>	%
Residence	74	50.7
Business	18	12.3
Public Place or Public Institution	51	34.9
Other	3	2.1
Unknown	--	--

**Table C-16**  
**Defendant's Motive (v. 448)\***

	<i>N</i>	%
Hatred or Revenge	14	9.6
Money	68	46.6
Rage or Irrational	16	10.9
Sexual	18	12.3
Racial	3	2.0
Other Crime	16	11.0
Other	10	6.8
Unknown	1	0.7

\* This is the prosecutor's theory of the defendant's motive in the case as reported by the defense counsel.

## APPENDIX D

ANNOTATION OF DEATH POSSIBLE  
FELONY MURDER CASES

This appendix identifies specific cases where the county prosecutor had a factual basis for serving a notice of factors on the felony factor and a discretionary decision was made not to serve a notice of factors.<sup>3</sup> Of the 146 felony murder cases, 134 were designated death possible, that is, there was a factual basis for serving a notice of factors. There were 70 cases which were death eligible: that is, a notice of factors was actually served by the county prosecutor. There were 64 cases identified as death possible which were not designated capital by the county prosecutor. In other words, in almost half of the death possible cases, (44.8%) the defendant was identified as committing the homicide by his own conduct and there was a concomitant felony, but the prosecutor did not serve a notice of factors.<sup>4</sup> In a great many of these cases the prosecutor accepted a plea agreement to an offense less than murder. These are concrete examples of county by county discrepancies in the disposition of potentially capital cases.

Consider the following examples where a notice of factors was served on the felony factor, declaring the case capital.

## CASES DESIGNATED FOR CAPITAL PROSECUTION

*Case No. 13—Camden County*

A 24-year-old black male strangled his 23-year-old white girlfriend. The defendant was a dishwasher with no prior criminal record. He had been drinking prior to the offense. There was no record of prior institutionalization or mental illness. The prosecutor charged murder with no contemporaneous offenses and served a notice of factors on the outrageous or wantonly vile factor and the felony factor. The factual basis for the felony factor was allegedly sexual assault. The

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<sup>3</sup> Case numbers refer to the original case numbers for the 703 cases for which data were reported in Bienen, Weiner, Denno, Allison & Mills, *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27 (1988).

<sup>4</sup> Every one but a few of these cases were charged prior to the New Jersey Supreme Court's decision in *State v. Gerald*, 113 N.J. 40, 549 A.2d 792 (1988). See Table C-3. Ambiguities concerning the interpretation of *Gerald* were not relevant to the charging decisions in these cases.



defendant pled to aggravated manslaughter and was sentenced to 20 years with a mandatory minimum of 10 years.

*Case No. 30—Essex County*

A 21-year-old black male with no prior record and three codefendants were involved in the robbery and murder of a 50-year-old black male. The crime occurred on the street. The victim was shot twice. The prosecutor charged murder and served a notice of factors on the outrageously or wantonly vile factor and the felony factor. Robbery and two weapons counts were charged as contemporaneous offenses. The case went to trial as a capital case. At capital trial the defendant was found guilty on all counts. At penalty phase the jury found the felony factor and did not find the outrageously or wantonly vile factor. The jury also found several mitigating factors. The jury did not return the death penalty.

*Case No. 199—Monmouth County*

A 25-year-old black male with no prior record was charged with killing a 25-year-old black male and wounding a 30-year-old black female. The two victims were lovers. The defendant was the former boyfriend. The defendant came to the victims' residence and shot and killed the man and shot the woman in the legs. The prosecutor charged murder, burglary, aggravated assault upon the non decedent victim, and a weapons charge. A notice of factors was served on the outrageously or wantonly vile factor and the felony factor. The case went to trial as a capital case. The defendant was acquitted of capital murder and found guilty of aggravated manslaughter.

*Case No. 225—Mercer County*

A 21-year-old black male was charged with killing, at her place of work, a 22-year-old black female, who was sexually assaulted and stabbed 32 times. The prosecutor charged murder, robbery, aggravated sexual assault, and burglary. A notice of factors was served on the outrageously or wantonly vile factor and the felony factor. At capital trial the defendant was found guilty of capital murder and the contemporaneous offenses. At penalty phase the jury found both aggravating factors and the catchall mitigating factor. The defendant was sentenced to death.

*Case No. 272—Essex County*

A 30-year-old white male killed a 76-year-old black female during the course of a robbery. The defendant was robbing the victim's house, and the victim surprised the defendant during the robbery. The defendant strangled the victim. The prosecutor indicted for capital murder and a notice of factors was served on three aggravating factors: the outrageously or wantonly vile factor, the purpose of escaping detection factor and the felony factor. The prosecutor also indicted for robbery and burglary. The defendant pled guilty to felony murder, and the case never went to capital trial.

*Case No. 260—Monmouth County*

This case involved a juvenile who was tried as an adult. A 17-year-old black male was charged with the aggravated sexual assault and murder of a 19-year-old black female. The victim was strangled, sexually assaulted, and then beaten to death. The prosecutor served a notice of factors on the outrageously or wantonly vile factor and the felony factor. The defendant was also indicted for aggravated assault and for aggravated sexual assault. At the guilt phase of the trial the defendant was found guilty of capital murder. At the penalty phase the jury found both aggravating factors and three mitigating factors. The defendant was sentenced to death.

*Case No. 276—Monmouth County*

A 21-year-old white male was at a party in an apartment over a bank in a building with three apartments. He and some others were asked to leave the party. The defendant had been drinking. About ten minutes later a fire accelerated by kerosene broke out on the stairs to the hall. The victim was an 18-year-old white female who was sleeping off her intoxication on the floor when the fire broke out. The whole building, including 20 people, had to be evacuated. Repeated attempts to bring out the victim failed. The defendant was indicted for murder, felony murder, aggravated arson and arson. The prosecutor served a notice of factors on the felony factor and the grave-risk-of-death-to-another factor. At capital trial the defendant was found guilty on all counts. At penalty phase the jury found both aggravating factors and mitigating factors. The jury did not return the death sentence.

## CASES THAT WERE NOT PROSECUTED AS CAPITAL CASES

The following annotations summarize some of the cases in which the defendant committed the homicide by his own conduct and the case was identified as having a factual basis for a notice of factors being served on the felony factor, but the case was not designated capital by the county prosecutor. In many of these cases the county prosecutor made a discretionary decision to accept a plea agreement. The results for codefendants are indicated where available. These specific examples illustrate the range of prosecutorial discretion in potentially death eligible felony cases. Can any meaningful distinction be made between those cases which were declared capital and the following cases which were not prosecuted as capital cases? Is there any relationship between the level of aggravation associated with the homicide and the sentence which has been imposed upon the defendant?

### *Case No. 007—Bergen County*

An 18-year-old white female with no prior record or history of mental illness set fire to her own house by pouring gasoline on it and setting it alight at three in the morning. The fire killed her 9-year-old brother and injured her mother, father, and another brother. The fire was allegedly set after an argument with her parents over a boyfriend. The prosecutor charged purposeful and knowing murder by his own conduct and felony murder in a single count and aggravated arson. No notice of factors was served. The defendant pled to manslaughter in the second degree with a noncustodial disposition, on the condition that she live in a restricted environment in a religious institution. On the manslaughter conviction she was sentenced to a five year maximum term, which was suspended, and to five years probation. The count for aggravated arson was dismissed.

The case was identified as death possible on the grave-risk-of-death-to-another factor and the felony factor.

### *Case No. 016—Camden County*

A 22-year-old black male killed his girlfriend's mother, a 45-year-old black woman, by beating her with a baseball bat, stabbing her, and drowning her. The prosecutor indicted for purposeful or knowing murder, aggravated sexual assault, robbery, burglary, a weapons charge, and two counts of hindering apprehension. No notice of factors was

served. The defendant had no prior record and no history of prior institutionalization for mental illness. The defendant pled guilty to murder and was sentenced to life with a mandatory minimum of 30 years and to a consecutive term of 20 years with a 10-year mandatory minimum term. His total sentence was life with a mandatory minimum of 40 years.

The case was identified as death possible on the outrageously or wantonly vile factor, the for gain factor, and the felony factor.

*Case Nos. 20, 78, 84, 108 & 110—Camden County*

Five black males shot a 47-year-old white male during the course of a robbery at a furniture store. The victim was the proprietor of the furniture store, and he was shot in the face. The prosecutor indicted the defendant for purposeful or knowing murder by his own conduct and indicted the other four codefendants for knowing murder without the by his own conduct language. All five codefendants were also indicted for two counts of robbery, two count of burglary, conspiracy to commit burglary or robbery, for weapons offenses, and for hindering apprehension. No notice of factors factors was served. All five codefendants accepted a plea bargain. One codefendant pled guilty to aggravated manslaughter and was sentenced to 20 years with a 10-year minimum with a consecutive 16-year term for robbery. The remaining codefendants pled guilty to a non-homicide offense.

A factual basis existed for serving a notice of factors against at least one defendant on the felony factor and on the purpose-of-escaping-detection factor.

*Case No. 66—Hudson County*

A 32-year-old black male stabbed to death his 73-year-old black grandmother. The defendant asked her for money and wanted to stay with her. There were three stab wounds. The victim was killed in her own home and then stuffed in a closet. The prosecutor charged murder on the complaint. No notice of factors was served. The defendant pled to a one count accusation for felony murder. He was sentenced to 30 years with a 30-year minimum term.

The case was identified as death possible on the heinous factor, the for gain factor, and the felony factor.

*Case Nos. 77, 88, 89 & 154—Camden County*

A 25-year-old black male, a 22-year-old black male, a 19-year-old black male, and a 23-year-old black male, robbed and murdered a

61-year-old black male, who was allegedly a numbers runner. The prosecutor indicted the defendant separately for purposeful and knowing murder by his own conduct and additionally indicted all four codefendants for knowing murder. All four defendants were also indicted for robbery and conspiracy to commit robbery, and additional counts included weapons charges and hindering apprehension. No notice of factors was served against any defendant. All four defendants were offered and accepted pleas to non-homicide offenses. The longest sentence imposed was a 30-year sentence for robbery and other offenses with a minimum of 15 years.

All four cases were identified as death possible on the felony factor. The defendant in Case No. 89 was identified as committing the murder by his own conduct.

*Case No. 102—Cumberland County*

A 16-year-old white male killed his 86-year-old greatgrandmother. She had tissues stuffed up her nostrils and in her mouth. She had been strangled, beaten, and sexually assaulted. Her empty wallet was found on the bed. A complaint charged murder, robbery, and sexual assault. No indictment was filed. No notice of factors was served. The defendant pled to an accusation for aggravated manslaughter and robbery and was sentenced to 30 years with a 15-year minimum.

The offense occurred at a time when other juvenile defendants were being charged with death eligible murder.

The case was identified as death possible on the felony factor and the heinous factor.

*Case No. 193—Hunterdon County*

A 37-year-old white male was charged with killing a 37-year-old white female. The victim was taken in her own car to an abandoned field and shot twice. The prosecutor charged purposeful and knowing murder by his own conduct on an accusation. The accusation also charged burglary and theft. The burglary and theft charges were for an earlier incident. The defendant pled guilty to murder and was sentenced to life with a 30-year minimum.

The case was identified as death possible on the felony factor and the heinous factor.

*Case Nos. 208 & 209—Essex County*

An 18-year-old black male and a 15-year-old black male and two codefendants, who were charged as juveniles, were charged with killing

an 84-year-old white female. The victim was tied to her bed, gagged, robbed, and hit on the head with a hammer or monkey wrench. The prosecutor indicted for felony murder, robbery, and conspiracy to commit robbery. The defendant was offered and accepted a plea to aggravated manslaughter and was sentenced to 20 years with a minimum of 10 years. The robbery count was dismissed, and the defendant was sentenced to a concurrent 7-year term for conspiracy to commit robbery. All three codefendants pled to aggravated manslaughter or manslaughter.

Both cases were identified as death possible on the felony factor and the outrageously or wantonly vile factor. At the time of this offense other juveniles in Essex County were being charged with capital offenses.

The defendant in Case No. 209 was identified as committing the homicide by his own conduct.

*Case No. 246—Monmouth County*

A 23-year-old black female started a fire in a closet because she was angry at her boyfriend. The homicide victim was a 23-year-old black male who lived in the house with the defendant and her boyfriend. The prosecutor indicted for felony murder, aggravated manslaughter, arson, and aggravated arson. No notice of factors was served. The defendant was offered and accepted a plea to aggravated manslaughter. She was sentenced to 15 years with no minimum.

The case was identified as death possible on the felony factor.

*Case Nos. 308, 404, 436 & 493—Essex County*

Four black males aged 16-, 21-, 21-years-old and another of unknown age, were charged with murder and other counts in connection with two homicides which occurred during the same evening. In the first homicide a 42-year-old black cabdriver was shot and killed in a robbery attempt. The defendants then stole a car. The second homicide occurred when the car's owner spotted the defendants driving his car and confronted them. All four defendants were charged with at least one count of murder and robbery and other counts. All were offered and accepted pleas. One defendant pled to murder and aggravated manslaughter and was sentenced to life with a concurrent 10-year term. The remaining defendants pled to non-homicide charges.

There was a factual basis for serving a notice of factors on the felony factor for each of these homicides. The defendant in Case No. 308 was identified as committing the homicide by his own conduct.

*Case Nos. 342 & 573—Essex County*

Two Hispanic males were accused of killing a 45-year-old white male. The victim, who ran a plumbing and appliance store, was tied up with a wire or cord around his neck and feet and placed upside down in a walk-in refrigerator. The defendants took items from the store and sold them. Later the defendants came back and placed the defendant's body in a large metal drum, which was left on the street. One defendant was indicted for murder, felony murder, robbery, and a weapons charge. The second defendant was charged with felony murder, robbery, and a weapons count. No notice of factors was served. At trial one defendant was convicted of felony murder and the other was convicted of aggravated manslaughter.

The case was identified as having a factual basis for serving a notice of factors on the felony factor and on the outrageous factor. The defendant in Case No. 342 was identified as committing the homicide by his own conduct.

*Case No. 360—Hudson County*

A 24-year-old black male stabbed to death a 28-year-old white female at her workplace. The defendant worked for the victim's father, and the victim was a bookkeeper at the same place of business. The victim was stabbed 28 times. The prosecutor charged purposeful or knowing murder by his own conduct, felony murder, robbery, and a weapons count. No notice of factors was served. The defendant was offered and accepted a plea to felony murder.

The case was identified as having a factual basis for serving a notice of factors on the felony factor and on the outrageous factor.

*Case Nos. 314, 344 & 371—Essex County*

A 28-year-old and a 29-year-old Hispanic male and a 28-year-old white male broke into the apartment of a 52-year-old white male. The decedent victim was tied to his bed and beaten with a phone receiver. He died of the injuries two days later. The victim's roommate was also beaten and died subsequently of unrelated causes. All three defendants were jointly indicted for felony murder, robbery, burglary, and aggravated assault. No notice of factors was served. One defendant pled guilty to robbery, and the homicide charge was dismissed. Another defendant was convicted of robbery at trial. The third defendant was found guilty at trial of felony murder and burglary and robbery and sentenced to 30 years with a 30-year minimum.

All three cases were identified as death possible on the felony factor. Two cases were also identified as death possible on the outrageously or wantonly vile factor, and one case additionally identified the purpose-of-escaping-detection factor as being present. The defendant in Case No. 371 was identified as committing the homicide by his own conduct.

*Case No. 392—Essex County*

A 16-year-old white male and two codefendants allegedly forced their way into the apartment of the decedent victim, a 77-year-old black male, and his wife, a 72-year-old black female. The decedent victim was beaten and died of a heart attack. His wife was pistol whipped but survived. This defendant was a juvenile who was tried as an adult. The prosecutor indicted this defendant for purposeful or knowing murder by his own conduct, felony murder, burglary, robbery, aggravated assault against the non-decedent victim, and two weapons charges. No notice of factors was served. At trial this defendant was acquitted of all charges.

The case was identified as death possible on the grave-risk-of-death-to-another factor, the outrageously or wantonly vile factor, and the felony factor. At this time other juveniles in Essex county were being charged with capital murder.

*Case Nos. 422, 447 & 454—Hudson County*

Three black males, aged 19-, 19- and 27-years-old broke into the apartment of a 54-year-old black male who was dying of cancer. The victim was tied up, gagged, and beaten to death with a baseball bat. The defendant in Case No. 442 was charged with purposeful or knowing murder by his own conduct. All three defendants were charged with two counts of felony murder, two counts of burglary (one count was for the burglary of another apartment in the same building on the same evening) and robbery. No notice of factors was served against any defendant. The defendant in Case No. 442 pled to felony murder. The second defendant pled to robbery, and the felony murder count and burglary counts were dismissed. The third defendant pled guilty to kidnapping on an accusation, and the indictment was dismissed.

The case was identified as having a factual basis for the felony factor and on the outrageous factor. The defendant in Case No. 422 was identified as committing the homicide by his own conduct.



*Case Nos. 431 & 458—Essex County*

An 18-year-old black male and a 21-year-old black male codefendant went to the apartment of their neighbor, an 87-year-old white woman, to commit a burglary. Both the defendant and the codefendant beat the victim, who died in the hospital two days later. The prosecutor indicted both defendants jointly for felony murder and burglary. No notice of factors was served. The case went to trial and both defendants were found guilty at trial of felony murder and of burglary. Both were sentenced to life with a minimum of 30 years.

Both cases were identified as death possible on the outrageously or wantonly vile factor and the felony factor. The defendant in Case No. 458 was identified as committing the homicide by his own conduct.

*Case No. 466—Atlantic County.*

A 39-year-old black male with no prior record went into an apartment building and set fire to an apartment. Three people died, a 65-year-old white male, a 65-year-old white female, and an 80-year-old white male. The victims were alcoholics who used the vacant apartment as a drinking place. The defendant confessed to the crime the next day, and an accomplice also confessed and was not charged. The defendant was seeking revenge against the landlord who had thrown him out of the building the previous day. The prosecutor indicted this defendant for three counts of felony murder, one count of burglary, one count of arson, and one count of aggravated arson. No notice of factors was served. At trial the defendant was found guilty on all counts. He was sentenced to three concurrent life terms with three concurrent minimum terms of 30 years. The counts for the contemporaneous offenses merged.

The case was not identified as death possible on the felony factor. It was included in the group of felony murders because the defendant was indicted and found guilty of contemporaneous felonies at the time of the homicide.

*Case No. 469—Camden County*

A 26-year-old black male entered the apartment of his neighbor, a 56-year-old black male. The victim, who was crippled, was tied to his wheelchair, bludgeoned over the head 14 times with a blunt instrument, and then stabbed. The prosecutor charged murder, robbery, and weapons counts. No notice of factors was served. At trial

the defendant was found guilty of murder and robbery and a weapons count. He was sentenced to life.

The case was identified as having a factual basis for the felony factor and the outrageous factor.

*Case No. 483—Mercer County*

An 18-year-old white male attacked the victim, a 32-year-old white female, as she left the jewelry store she owned. The defendant hit the victim over the head with a two by four and stabbed her seven times. He then robbed her. The defendant was indicted for purposeful or knowing murder, felony murder, armed robbery, and a weapons charge. No notice of factors was served. At trial the defendant was found guilty of felony murder, armed robbery, and the weapons count and was sentenced to life.

The case was identified as having a factual basis for the felony factor, the purpose of escaping detection factor, and the outrageous factor.

*Case No. 488—Passaic County*

A 44-year-old white male with no prior record, who was a part-time worker at a hotel, set fire to the third floor of the hotel after a dispute with the hotel management. The fire raged throughout the hotel. Sixteen people were killed and fifty people were injured. The prosecutor indicted for 14 counts of felony murder, one count of arson, and one count of aggravated assault. The injuries to 45 non-decedent victims were included in the single count of aggravated assault. No notice of factors were served. The case went to trial as a non-capital case and resulted in a hung jury. The defendant then pled to an accusation specifying one count of aggravated manslaughter and to the one count of arson. He was sentenced to 20 years with a minimum of 10 for the aggravated manslaughter and to a concurrent term of 20 years with a minimum of 10 years for the arson. The aggravated assault charge was dismissed. The counts for felony murder were dismissed.

The case was not identified as death possible on the felony factor. It was identified as death possible on the grave risk of death to another factor. It is included here because of the concomitant charge for arson.

*Case Nos. 536 & 570—Essex County*

Two black males and a codefendant went to the apartment of a 27-year-old black male, who was allegedly a drug dealer, and killed

him. The prosecutor indicted both defendants for felony murder. The third codefendant was also indicted for felony murder. Both defendants were also indicted for robbery. No notice of factors was served against either defendant. The first defendant pled guilty to murder and robbery. While in jail he was charged with killing another inmate. He pled to aggravated manslaughter for that charge and was sentenced simultaneously on both charges. Charges against the two codefendants were dismissed.

The case was identified as having a factual basis for serving a notice of factors on the felony factor. The simultaneous sentencing on the second homicide precluded the possible application of the prior murder factor on the second homicide.

*Case No. 539—Ocean County*

A 32-year-old white male and a friend picked up the victim, a 40-year-old white female, who was hitchhiking. The three of them had all been drinking at the same bar. The victim was beaten to death with a two by four, allegedly after refusing the defendant's sexual advances. The prosecutor indicted for one count of murder purposely and knowingly. No notice of factors was served. The defendant was convicted of that count of murder at trial.

The case was identified as having a factual basis for serving a notice of factors on the felony factor.

*Case No. 545—Camden County*

An 18-year-old black male killed a 32-year-old Hispanic female. The defendant went to the victim's house. She let him into the house and rejected his sexual advances. He then beat her and stabbed her to death. There were 10 stab wounds. After the killing, the victim's daughter came home from school with another child, a 10-year-old Hispanic girl. The defendant put the daughter upstairs in a room, took the second child down to the basement where he strangled her until she lost consciousness. The prosecutor indicted for purposeful and knowing murder by his own conduct, felony murder, attempted aggravated sexual assault, hindering apprehension, aggravated assault, kidnapping, and weapons charges. No notice of factors was served. The defendant was offered and accepted a plea to murder and was sentenced to life with a minimum of 35 years.

The case was identified as having a factual basis for serving a notice of factors on the felony aggravating factor, the grave risk of death to another factor, and the outrageous factor.

*Case No. 579—Essex County*

A 35-year-old black male, his 8-year-old daughter, and a co-defendant broke into the apartment of a 51-year-old black man. The victim woke up during the course of the burglary, was hit over the head with a television set and thrown out of the window. The blow to the head was the cause of death. The defendants then took money and the television set. Both defendants were indicted for felony murder. No notice of factors was served. This defendant was found guilty of felony murder and robbery and burglary and sentenced to life.

The case was identified as having a factual basis for serving a notice of factors on the felony factor.

*Case No. 601—Essex County*

A 23-year-old black male was charged with killing a 41-year-old black male during the course of a robbery and a burglary. Two others were involved in the offense, a juvenile who testified for the prosecution at trial, and a second person who was not apprehended. Two men forced themselves into the victim's apartment with a gun, robbed the victim and three additional non-decedent victims who were at the apartment. One of the robbery victims was the homicide victim's son. The homicide victim was shot in the chest when he woke up during the course of the robbery. The prosecutor indicted this defendant for purposeful or knowing murder by his own conduct, felony murder with both burglary and robbery as the underlying felony, second degree burglary, first degree robbery, and two weapons counts. No notice of factors was served. The case went to trial and the jury found the defendant guilty of purposeful and knowing murder by his own conduct and of all other counts. He was sentenced to 30 years with a 30-year minimum for the murder, to a consecutive term of 15 years with a 7.5-year minimum for robbery, and to a concurrent 4-year term for unlawful possession of a weapon, and to a concurrent 7-year term for possession of a weapon for an unlawful purpose. His total sentence was 45 years with a minimum of 37.5 years.

The case was identified as having a factual basis for the felony factor.

*Case No. 660—Union County*

A 19-year-old Hispanic male was charged with killing a 68-year-old white male. The victim and the defendant had allegedly been involved in a sporadic homosexual relationship for payment for over

two years. The victim and the defendant got into a fight in the victim's apartment which culminated in the defendant strangling the victim with a lamp cord. The defendant then took the victim's car. The prosecutor indicted for purposeful or knowing murder and third degree theft for the taking of the automobile. No notice of factors was served. The case went to trial. The defendant was found guilty of manslaughter, as a lesser included offense, and of unlawful taking, a disorderly persons offense. He was sentenced to 10 years with minimum of 5 years for manslaughter with a consecutive 6-month term for the disorderly persons offense.

The case was identified as death possible on the purpose of escaping detection factor and the felony factor.

*Case Nos. 670, 672 & 678—Bergen County*

A 30-year-old Hispanic male, a 26-year-old white female, and a 28-year-old Hispanic male were charged with killing a 60-year-old white male. The victim and the defendants had been staying in the same house. The victim had agreed to drive the defendants to New York in his car. The victim was shot three times in the head in the car. The car with the body in it was left in a parking lot. It was alleged that the defendants also robbed the victim of money he had just received from cashing his unemployment checks. The defendant in Case No. 670 was indicted for purposeful or knowing murder, felony murder, armed robbery, possession of a weapon, hindering apprehension, and unlawful possession of a weapon. The defendant in Case No. 672 was indicted for murder, felony murder, robbery, two weapons counts, and three counts for possession of drugs. The defendant in Case No. 678 was indicted for purposeful or knowing murder, felony murder, robbery, two weapons counts, and two counts for possession of drugs.

No notice of factors was served against any of these defendants. All three defendants accepted plea bargains. The defendant in Case No. 670 pled guilty to one count of aggravated manslaughter, and all other counts were dismissed. He was sentenced to 15 years with a minimum of 7.5 years. The defendant in Case No. 672 pled guilty to one count of possession of narcotics and was sentenced to 360 days in the county jail. All other counts against her were dismissed. The defendant in Case No. 678 pled guilty to aggravated manslaughter. All other counts against him were dismissed. He was sentenced to 40 years with a 20-year mandatory minimum term for aggravated manslaughter as an extended term.

Case No. 670 and Case No. 672 were identified as death possible on the basis of the felony factor, the for gain factor, and the outrageously or wantonly vile factor. Case No. 678 was identified as death possible on the heinous factor, the gain factor, and the felony factor. The defendant in Case No. 678 was not identified as committing the homicide by his own conduct.

*Case No. 709—Cape May*

A 39-year-old black male with no prior record was charged with killing a 14-year-old Vietnamese girl during the course of an aggravated sexual assault. The victim lived and worked at the same hotel where the defendant lived. The defendant was acquainted with the victim and her family. The victim was found in her room strangled and with a pillow over her face. Her body was also covered with bruises. The defendant was indicted for murder, aggravated sexual assault, and burglary. No notice of factors was served. The case went to trial before a jury. The defendant was found guilty of murder and guilty of aggravated sexual assault, and not guilty of burglary. He was sentenced to life with a minimum of 30 years for murder and to a concurrent term of 15 years for aggravated sexual assault.

The case was identified as death possible on the outrageously or wantonly vile factor, the purpose of escaping detection factor, and the felony factor.

