Supreme Court of New Jersey.
STATE of New Jersey, Plaintiff-Respondent,
v.
Brian WAKEFIELD, Defendant-Appellant.
Argued Oct. 12, 2005.
Decided May 7, 2007.

Background: Defendant entered an unconditional guilty plea in the Superior Court, Law Division, Atlantic County, to two counts of capital murder and eleven other offenses. Following penalty phase of trial, defendant was sentenced to death. Defendant appealed.

Holdings: The Supreme Court, Rivera-Soto, J., held that:
(1) defendant's statements to police following his arrest were admissible during penalty phase;
(2) facts of defendant's underlying crimes of robbery, burglary, murder, and hindering apprehension all were directly relevant to his penalty phase trial;
(3) evidence of defendant's post-crime activities was admissible during penalty phase;
(4) prosecution's opening statement during penalty phase did not contain impermissible argument;
(5) State's summation during penalty phase did not jeopardize defendant's right to a fair trial and to individualized sentencing;
(6) reasonable doubt instruction given during penalty phase did not in any way lessen the State's burden of proof;
(7) defendant was not entitled to a sua sponte instruction on the presumption of life during penalty phase;
(8) trial court followed applicable guidelines in admitting victim impact statements;
(9) trial court properly exercised its discretion during penalty phase in denying defendant's motion to strike the jury panel; and
(10) defendant failed to establish that his death sentence was disproportionate.

Affirmed.

Albin, J., filed a separate concurring opinion.

Long, J., filed a dissenting opinion.

Wallace, J., filed a dissenting opinion in which Long, J., joined.

. . . .

USE OF VICTIM IMPACT STATEMENTS.

A.

[47] Defendant raises two separate but related complaints in respect of the State's use

of victim impact statements. First, defendant argues that "[t]he State presented victim impact evidence that far exceeded the bounds set by the Court for such evidence, in terms of length, content, and emotional and inflammatory nature." Second, defendant asserts that the State's victim impact evidence "was bolstered by a deliberate and improper demonstration by members of the victims' family group." In defendant's view, the aggregate of these failings require that defendant's death sentence be vacated and a new penalty trial held.

The State responds that the trial court "appropriately exercised its discretion when it made extensive revisions to the statements and determined that the final versions were admissible under *State v. Muhammad*, 145 *N.J.* 23, 678 *A.*2d 164 (1996)." The State also noted that "the trial court appropriately exercised its discretion when, at defense counsel's request, it issued a curative instruction and ameliorated any possible prejudice that could have resulted from the spectators' departure from the courtroom."

*482 B.

[48] The admissibility of victim impact statements in a capital case is of both constitutional and statutory dimension. *N.J. Const.* art. I, ¶ 22 ("Victim's Rights Amendment"); *N.J.S.A.* 2C:11-3c(6) (victim **1008 impact statement statute). *See also N.J.S.A.* 52:4B-34 to -49 ("Crime Victim's Bill of Rights"). Acknowledging, however, a potential for abuse, we have taken great care in defining the proper scope of admissible victim impact statements. *See generally State v. Muhammad, supra*, 145 *N.J.* at 47-48, 54-55, 678 *A.*2d 164 (explaining requirements for admissibility of victim impact statements, and setting procedural limitations for their use). *See also State v. Koskovich*, 168 *N.J.* 448, 497-99, 776 *A.*2d 144 (2001) (explaining application of Victim's Rights Amendment and victim impact statement statute).

The trial court scrupulously followed *Muhammad's* guidelines. Once defendant asserted reliance on the "catch-all" mitigating factor set forth in *N.J.S.A.* 2C:11-3c(5)(h) ("[a]ny other factor which is relevant to the defendant's character or record or to the circumstances of the offense."), but before the start of the penalty phase trial, the State notified defendant of the prosecution's intention to use victim impact statements. Defense counsel were provided the names of the victim impact witnesses the State intended to call so as to afford defendant the opportunity to interview the witnesses prior to their testimony. Further, only one survivor per victim was permitted to testify in respect of "each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness." The proposed victim impact statements were reduced to writings. The trial court then conducted a *Rule* 104 hearing and, after three separate efforts, the proposed victim impact statements were substantially redacted so that each was "factual, not emotional, and ... free of inflammatory comments or references[ ]" and "to ensure that its probative value is not substantially outweighed by the risk of undue prejudice or misleading*483 the jury." [FN19] As an additional prophylactic step, the trial court required that the victim impact

statements be read first outside the presence of the jury so the trial court could gauge both the content and the delivery of the statements. Also, the trial court provided the required limiting instructions to the victims' family. Finally, the trial court ruled that "any comments about the victim impact evidence in ... summation should be strictly limited to the previously approved testimony of the witness."

FN19. The victim impact statement in respect of Richard Hazard, prepared by Mr. Hazard's son, Michael, spoke of Mr. Hazard's childhood and adolescence; Mr. Hazard's career in the United States Navy; Michael's and his siblings upbringing in the Hazard home; family events and celebrations in the Hazard home; Mr. Hazard's interests, hobbies, education, career, and community volunteer work; Mr. Hazard's relationships with his wife, children, grandchildren, and family pets; and the effect of Mr. Hazard's murder on his family. The victim impact statement in respect of Shirley Hazard, prepared by Mrs. Hazard's daughter, Helen, spoke of Mrs. Hazard's childhood, marriage to and relationship with Mr. Hazard; how Mrs. Hazard raised her family on a tight budget while Mr. Hazard was stationed abroad with the Navy; Mrs. Hazard's dedication to her family; Mrs. Hazard's reputation and kindness; Mrs. Hazard's fight against breast cancer; and the impact of Mrs. Hazard's murder.

In light of the foregoing, we reject defendant's assertions on appeal and we hold that, in each instance, the trial court's admission of the victim impact evidence and the State's use of that victim impact evidence was proper.

C.

Defendant raises a related issue in respect of the victim impact evidence at the penalty phase trial. As noted earlier, *supra*, 190 *N.J.* at 453-55, 921 *A.*2d at 988-90, defendant contends that the State improperly interrupted defendant's presentation of mitigation evidence from **1009 defendant's cousin, a contention we have rejected. In the context of his cousin's direct testimony, defendant interposes an additional, separate objection based on the following. Immediately after her direct testimony was concluded, defense counsel noted on the record, albeit after the fact, that during the last portion of defendant's cousin's *484 testimony, several members of the victims' family rose from their seats and left the courtroom. Defense counsel, conceding that no restrictions had been placed on the comings and goings of members of the public, requested that the trial court instruct all present that they were to remain seated until the witness's testimony was completed or a recess was called by the trial court. Defense counsel also requested that the jury be instructed that the victims' family's exodus from the courtroom was inappropriate and that no regard should be given to that event.

The trial court agreed in both respects and immediately instructed the jury as follows:

Members of the jury, three persons just got up and walked out of the courtroom. I don't know whether you saw that or didn't see it, certainly I did and others did. Whatever their motive for getting up and walking out should play no role in your deliberation and should have no impact on your evaluation of this witness's testimony, if that was intended as

some form of nonverbal comment on the witness's testimony, that would be inappropriate nonverbal comment and should be disregarded.

The cross-examination of defendant's cousin commenced following that instruction. Once that cross-examination was completed and the jury had left the courtroom, the trial court addressed the persons in the audience and instructed them as follows:

Let me just say this to the persons who were spectators in the courtroom: an issue arose about a group of you getting up and leaving during the course of that witness's testimony. I haven't walked a mile in your shoes; I'm not, through God's grace, a family member of a victim, so I'm not sitting there in your shoes, but I have a job to do and the attorneys have a job to do. And my job is to see that things are fair to both sides. And any type of nonverbal comment, if that was intended as nonverbal comment, it is inappropriate during the course of any witness's testimony. So what I'm going to direct-obviously, it is a public courtroom, you have a right to be here and are welcomed to be here, but absent some kind of emergency, I'm going to direct that persons remain until a recess or until there is a break.

After that instruction was given to the public, the prosecutor spoke with members of the victims' family and later addressed the trial court:

[The Prosecutor]: I want to put something on the record, what was talked about right before [your Honor] went off the bench. In speaking with the family, they had been told by members of the office and myself that if something got too upsetting, instead of making a scene in court which we didn't want to do, taint the *485 jury, that they should probably leave. In the courtroom it probably wouldn't have been a problem, they could have slipped out the back door, but here where they are seated and went all the way through-

The Court: So it was an upsetment issue? Is that what you are saying after you discussed it?

[The Prosecutor]: Yes, Judge.

[Defense Counsel # 1]: Well, I can certainly be sympathetic to that. I would ask then that the prosecutor let the family know what it is that they can anticipate relating to testimony because **1010 I think the timing of that was really problematic. She had testified for the whole time and it was kind of our conclusion and our one opportunity to plead for [defendant's] life, and to have people walk out in the middle of it is problematic so....

The Court: Well, it is emotional for all concerned. It is emotional for the witness. It is emotional for the family who are here, so you have to have some understanding of that. So all I will do is direct that to the extent you are able to acquaint the family members with the anticipated testimony, and if they perceive there is [a] problem-

[The Prosecutor]: Judge, I wasn't aware that [defendant's cousin] was going to plead for

[defendant's] life.

The Court: Fair enough. All right.

Although defendant requested and received an immediate curative instruction to the jury and a separate instruction to the victims' family-and interposed no contemporaneous objection to either-defendant now claims that the fact that several members of the victims' family left the courtroom during defendant's cousin's testimony was a “deliberate and improper demonstration by members of the victims' family group” that “bolstered” the victim impact evidence adduced by the State. In response, the State notes that, for the first time on appeal, defendant seeks to causally relate the victim impact evidence with the instance of three members of the victims' family exiting the courtroom while defendant's cousin pleaded for defendant's life. The State notes that the event involving defendant's cousin's testimony occurred more than one week before the State presented its victim impact evidence, and that defendant did not so object when the State presented its victim impact evidence.

[49] [50] Central to the obligations of a trial court is the

responsibility to insure that the jury remain fair and impartial throughout the proceedings. *State v. Bey*, 112 *N.J.* 45, 75 [548 *A.*2d 846] (1988) (*Bey I*). The *486 jury's impartiality is significantly threatened by extraneous influences arising from contact with non-record facts. *Id.* at 74-76 [548 *A.*2d 846] (citation omitted). The determination of whether the appropriate response is a curative instruction, as well as the language and detail of the instruction, is within the discretion of the trial judge “who has the feel of the case and is best equipped to gauge the effect of a prejudicial comment on the jury in the overall setting.” *State v. Winter*, 96 *N.J.* 640, 647 [477 *A.*2d 323] (1984) (citations omitted).

[*State v. Loftin (I)*, 146 *N.J.* 295, 365-66, 680 *A.*2d 677 (1996).]

In *State v. Loftin (I)*, we rejected a claim that a spectator's outburst “amounted to victim impact evidence[.]” *Id.* at 366, 680 *A.*2d 677. Here, in contrast, there was no “outburst.” Instead, the record discloses only the fact of three members of the victims' family simply walking out of the courtroom during the testimony of a defense witness. Upon defendant's application, the trial court immediately cautioned both the jury and the spectators. The record explains that these events were not intended as a form of silent protest, but to avoid an outburst “if something got too upsetting[.]” In this context, defendant's claim that these events were intended to “bolster” the State's victim impact evidence via “a deliberate and improper demonstration” lacks any support in the record and, hence, we reject it.

IX.

ESCAPE DETECTION AGGRAVATING FACTOR-N.J.S.A. 2C:11c(4)(f).

[51] [52] Defendant next contends that the escape detection aggravating factor is **1011 unconstitutionally vague and further asserts that it was not supported in the evidence in this case. We reject both contentions.

N.J.S.A. 2C:11-3c(4)(f) provides that among the aggravating factors the jury can consider is whether "[t]he murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another[.]" We have twice considered-and rejected-the claim that this aggravating factor is either unconstitutionally vague or overbroad. *487 *State v. Papasavvas (I)*, 163 *N.J.* 565, 619, 751 *A.*2d 40 (2000); *State v. Harvey*, 151 *N.J.* 117, 226, 699 *A.*2d 596 (1997). No different result obtains here.

We also reject defendant's contention that the jury's unanimous finding of the escape detection factor was not supported by sufficient evidence. Specifically, among the aggravating factors alleged by the State were that the separate murder of each of Richard Hazard and Shirley Hazard was committed for the purpose of escaping detection, apprehension, trial, punishment, or confinement, for another offense committed by defendant. Once the State concluded its case-in-chief in respect of the aggravating factors, including the escape detection aggravating factor, defendant moved to dismiss them, alleging that the State had failed to present evidence sufficient to support them.

The trial court denied defendant's motion. Applying the long-observed standard concerning the sufficiency of the State's evidence, that is, "whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt[,]" *State v. Reyes*, 50 *N.J.* 454, 459, 236 *A.*2d 385 (1967) (citing *State v. Fiorello*, 36 *N.J.* 80, 90-91, 174 *A.*2d 900 (1961), *cert. denied*, 368 *U.S.* 967, 82 *S.Ct.* 439, 7 *L.Ed.*2d 396 (1962)), the trial court recounted several items of evidence adduced by the State and noted that "[u]nder the totality of the circumstances there is sufficient circumstantial evidence to allow a fact finder to resolve this issue." When defendant renewed his motion at the close of the State's rebuttal evidence, the trial court again denied that application, noting that

[t]here's been no material change, as I recall the proofs and the status of proofs between the time that that motion was originally made as the State's direct case has been presented and now, and as a consequence, the determination now is and will be the same and for the reasons which I've given at the time applying the *State versus Reyes* criteria a reasonable jury could conclude, beyond a reasonable doubt-

....

*488 Backing up to *State versus Reyes*, giving to the State the benefit of the doubt on all proofs and legitimate inferences that can be drawn therefrom, a reasonable jury could

conclude, beyond a reasonable doubt, that the Aggravating Factor has been proven.

So I deny the application.

Our independent review of the proofs adduced by the State in respect of the escape detection factor, whether direct, circumstantial or inferential, leads us to conclude that the rationale, analysis and conclusions of the trial court are unassailable: the State's evidence in its entirety, together with all reasonable inferences therefore, was more than sufficient for a reasonable jury to conclude, beyond a reasonable doubt, that defendant committed the murders of Richard and Shirley Hazard with "the purpose of escaping detection,**1012 apprehension, trial, punishment or confinement for another offense committed by the defendant[.]" *N.J.S.A.* 2C:11-3c(4)(f). We therefore reject defendant's challenges to the application of the escape detection aggravating factor to his death penalty phase trial.

X.

OBJECTIONS TO THE STATE'S REBUTTAL PROOFS.

A.

[53] Defendant next claims that the trial court erred in permitting the State's psychiatrist to testify in rebuttal as to certain statements defendant made to him in the course of a psychiatric evaluation. The specific statements defendant complains of are that, "in relating the details of the crime to him, the defendant had told [the State's rebuttal psychiatrist] both that [defendant] had kicked Mrs. Hazard twice *after* asking her where the money was, and that he did not know where the knife he had stabbed Mrs. Hazard with had come from." By way of contrast, defendant notes that, "[i]n his statements to the police, the defendant had not stated that he had kicked Mrs. Hazard to obtain an answer as to money from her, and had maintained that [his alleged accomplice] had given him the knife." The State responds that its psychiatrist's*489 testimony "was proper rebuttal to defendant's evidence regarding the purported existence of ... mitigating factors [c(5)(a) and c(5)(d) [FN20]], and the trial court appropriately issued two limiting instructions concerning the jury's use of that evidence." Thus, the State concludes, "[t]he trial court's evidentiary ruling was sound."

FN20. *N.J.S.A.* 2C:11-3c(5)(a) provides that, among "[t]he mitigating factors which may be found by the jury or the court [is that t]he defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution [.]" *N.J.S.A.* 2C:11-3c(5)(d) provides that, among "[t]he mitigating factors which may be found by the jury or the court [is 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[.]"

During the direct examination of the State's psychiatrist's rebuttal testimony, defendant objected to certain statements attributed to defendant in the psychiatrist's report. The trial court allowed the psychiatrist to testify to those statements, subject to two conditions: that the testimony be limited to defendant's "factual recitation of before the crime and after the crime" and that the jury be instructed that this testimony "is not being offered and cannot be considered by them as evidence on the existence of aggravating factors but only on whether a mitigating factor has been rebutted and to understand [the State's psychiatrist's] opinions and conclusions as to that issue." The trial court then issued the following cautionary instruction to the jury:

Members of the jury, to understand my instructions that I'm about to give you, you have to understand where we are in the case at this point in time. You heard the State's direct proofs, you've heard the defense's direct case with regard to proofs with regard to the mitigating factors and to the extent that there was, in your recollection as well, any challenge to the aggravating factors. So we've had, State direct, defense direct, we're now on State rebuttal and that is before you and is going to be before you for a very limited purpose.

This is not the opportunity for the State to reinforce claimed aggravating factors or establish new aggravating factors or to offer evidence on the existence **1013 of aggravating factors. It is not and cannot be used by you for that purpose. Rather, as [the State's psychiatrist] said at the beginning of his testimony, his purpose here was a limited one and that was to examine the defendant for a limited *490 purpose and offer an opinion on the issues of extreme ... let me get the exact words because I keep forgetting it ... but defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired as a result of mental disease or defect or intoxication, or that defendant was under the influence of extreme mental or emotional disturbance.

So it's before you not-can't be used by you on the issue of whether aggravating factors exist or not, but to, on the State's behalf, offer evidence in rebuttal for your consideration, determination and evaluation as to whether or not those mitigating factors exist. So it is only before you and can only be used by you on the issue of the existence of mitigating factors.

Defendant did not object to this cautionary instruction.

The next day, the trial court again addressed the State's rebuttal psychiatric testimony in its charge to the jury:

And you'll recall during the testimony of [the State's rebuttal psychiatrist] that an issue arose concerning aspects of his testimony and I'll remind you of the limitations upon the way you may use the testimony from [the State's rebuttal psychiatrist] regarding what was told to him in the course of his interview of [defendant]. As I told you then and as I'll

remind you now, rebuttal testimony was not the opportunity for the State to reinforce claimed aggravating factors or to offer evidence on the existence of aggravating factors. It cannot be used by you for that purpose. Rather, as [the State's rebuttal psychiatrist] said at the beginning of his testimony, he examined the defendant for a limited purpose: to offer an opinion on the issue of whether the defendant was under the influence of extreme mental or emotional disturbance or whether 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 a result of mental disease or defect or intoxication.

So thus this evidence is before you only on the issue or the existence of mitigating factors and for no other purpose[, and it is] specifically not usable in the establishment of any alleged aggravating factor.

Defendant also did not object to this charge.

B.

[54] [55] It is a central tenet of our jurisprudence that we "rel[y] upon the ability of jurors to faithfully follow a trial judge's instructions in deliberating on a defendant's guilt, and, in the capital context, the appropriate sentence." *State v. Muhammad*, 145 *N.J.* 23, 52, 678 *A.*2d 164 (1996). We acknowledge that "[w]hile there is no way to assure that a jury adheres scrupulously to the mandate of a limiting instruction, there is no reason to *491 believe that jurors will not act responsibly in performing their duty." *Ibid.* On the contrary, "[t]he entire structure of the penalty phase of capital cases is premised on the belief that jurors will use evidence only for its proper purpose." *Ibid.* In the context of instructions concerning the admissibility of evidence, we provide that "a trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion, i.e., there has been a clear error of judgment." *State v. Brown*, 170 *N.J.* 138, 147, 784 *A.*2d 1244 (2001) (citation and internal quotation marks omitted). Thus, "an appellate court should **1014 not substitute its own judgment for that of the trial court, unless the trial court's ruling was so wide of the mark that a manifest denial of justice resulted." *Ibid.* (citation and internal quotation marks omitted).

Applying those standards, we reject defendant's attack on the statements made by the State's rebuttal psychiatrist for several, interrelated reasons. First, the complained of statements were those of defendant himself, statements that were otherwise admissible hearsay pursuant to *N.J.R.E.* 803(b)(1). Second, defendant's statements to the State's rebuttal psychiatrist concerning defendant kicking one of the victims and the location from which defendant secured the knife he admittedly used to kill both victims certainly were relevant to defendant's claimed mitigating factors. *See* *N.J.R.E.* 401 (" 'Relevant evidence' means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action."). Finally, we note the diligence with which the trial court twice-once when the proofs were adduced and again in its final charge to the jury-cautioned the jury as to the appropriate use of that testimony,

instructions we must presume the jury strictly observed.

In light of the foregoing, the trial court's exercise of discretion to allow these statements was neither an abuse of discretion, nor a “clear error of judgment,” nor “so wide of the mark that a manifest denial of justice resulted.” We therefore reject defendant's challenge to the admission of his statements to the State's rebuttal psychiatrist.

*492 XI.

INTERFERENCE WITH JURY SELECTION.

A.

[56] Defendant also argues that he is entitled to either a new penalty phase trial or, at the least, a remand for a taint hearing because of a claimed interference with “defendant's right to a fair and impartial jury [.]” At its core, defendant argues that there was an informal, social contact between a secretary in the Prosecutor's Office and a member of the jury panel that resulted in that potential juror being excused, and that “due process and fundamental fairness were violated by such blatant and unethical conduct [.]” In response, the State notes that the potential juror was excused by consent after he explained that his judgment “might be [a] little steered differently” because the social interaction he had could impact his ability to judge the testimony of one of the prosecution witnesses. The State also notes that, once that potential juror was excused, there simply was no basis on which to strike the entire jury panel.

During jury selection, one of the prosecution witnesses, Det. Joseph McFadden, was shot in the face during an unrelated homicide investigation and was hospitalized in critical condition. Due to McFadden's unavailability as a witness, the State sought an adjournment. Although the trial court initially denied the State's application, it later granted an adjournment of three months. During that hiatus, one of the potential jurors continued to coach youth sports; among his charges was the son of a secretary employed by the Prosecutor's Office. The child missed a game the day McFadden was shot. Speaking to the mother on a later date, she explained to the potential juror that her son's absence was due to the fact that one of her friends-McFadden-had been shot and she was quite upset as a result. According to the potential juror, he did not relate the shooting to defendant's case because he did not realize that McFadden was a witness in defendant's case. During a later conversation with the mother, *493 the potential juror told her that he was among **1015 the jury pool in defendant's case and she told the juror that she had worked on defendant's case in the Prosecutor's Office.

When jury selection recommenced, all prospective jurors were asked to complete a supplemental questionnaire. In response to that questionnaire, this potential juror indicated that someone “had spoken with [him] about the case since the date of [his] jury

interview;" that he had "heard [someone] discuss or [he had] discussed the case or the people involved in it ... since the date of [his] jury interview;" and that he knew or had heard something "about this case or any of the people involved in it, since the date of [his] jury interview[.]" The trial court then examined this potential juror and ascertained the contacts described above. The trial court also invited both counsel to examine the potential juror; only defense counsel elected to examine the potential juror.

Once the examination of the potential juror was completed, all parties agreed that he should be excused. Defendant then complained about the actions of the secretary, alleging that, after she was aware of the potential juror's status in respect of this case, she should not have told the potential juror that she had worked on this case. Claiming that this potential juror was one defendant specifically wished to retain on the jury, defendant sought to examine the secretary under oath, a request the trial court granted. Both the trial court and defense counsel questioned her. There were some differences between her recollection of the events and the potential juror's testimony; however, the trial court credited her recall.

Conceding that no juror tampering had occurred, defendant nonetheless moved to dismiss the entire jury panel. Defendant's focus was on the loss of that potential juror, a juror defendant insisted he wished to retain. The State resisted that application, arguing that defendant was entitled to fair, impartial and death-qualified jurors, precisely what had been empanelled. The State noted that defendant could have, but did not, request that the jury venire be expanded and that defendant's complaints about the *494 composition of the jury as empanelled were belied by the fact that defendant exercised only fifteen of his allotted twenty peremptory challenges.

The trial court denied defendant's motion. Its complete reasoning is informative and, for that reason, is set forth in full:

Before the Court is a motion to strike the panel and implicit[ ] in that application [is] to commence selection of the panel anew. For [the] reasons which follow, I deny the application. My reasons are these: While clearly the defense does not consent and had to deal with the situation as it unfolded, the Court did adjourn this case for an initial period and a short subsequent period and that arose out of the absence of Detective McFadden. McFadden was shot in the face while involved in another matter at times material to this case. Needless to say, that was not a plan or strategy of anyone involved.

The defense isn't arguing it, but I merely note [that] what we have is an unforeseen set of circumstances. The unforeseen set of circumstances is superimposed on another unforeseen set of circumstances which was the death by heart attack of Sergeant Henry Carr, one of the other participants in the initial two statements of the defendant.

A trial, all things being equal, is a search for [the] truth. And subject [to] counter-veiling considerations which may affect that, the Court[ ]-should be ... permitted to structure a matter so that the fact-finder can have the best available information from the respective**1016 sides as to what occurred[,] and that is the dynamic of the adjournment.

While things happen in the passage of time, and I'll get to the [potential juror] matter in a moment, but the mere inadvertent dynamics of the passage of time are not such as to require this Court to start anew with another panel.

Now, with respect to the [potential juror] issue. There are some differences between the testimony of what [the potential juror] said and what we just heard from [the Prosecutor's Office secretary]. Having said that, I am satisfied to find for the purpose of this hearing that the contact was inadvertent. It was not designed but rather, arose out of community activity, sports related with respect to their children involving both [the secretary] and [the potential juror]. It was not where someone set out to contact or set out to do something.

Now, with respect to the first aspect of the distinctions between [the potential juror] and [the secretary], there may or may not be a distinction in their testimony. I say that because it is clear and I accept the witness today was quite upset when she learned of what transpired with respect to McFadden and was talking about it to those who were at the sporting event which she described. Apparently [the potential juror] was one of those present there at the sporting event. From her perspective it was not directed specifically at [the potential juror] or even at [the potential juror], although he was probably there to either hear or learn of it secondhand.

Somewhat more problematic is the issue with respect to what occurred thereafter. It's his testimony that she was aware that he was a member of the panel. *495 She said she didn't know that. What one remembers and another may or may not [may be] material distinctions, but what occurred here again is through inadvertence as opposed to any type of effort to in any way influence the jury. Her testimony is necessarily totally contradictory to [the potential juror]. In any event, it is clear that when he became aware of her friendship, this was one with McFadden, this was one of the things that ... caused him to reflect on his ability to be fair and impartial. What we have I think is an inadvertent series of contacts and by reason of his excusal I think for the purposes of this it ends the issue, so I do deny the motion with respect to the panel.

B.

[57] [58] [59] [60] Because the trial court examined both the potential juror and the secretary, and thereafter made factual findings based on that testimony, our review of the trial court's findings is guided by

[c]ertain broad principles [that] are paramount and helpful in an appellate court's approach to this aspect of the decision-making process.... It must review the record in the light of the contention, but not initially from the point of view of how it would decide the matter if it were the court of first instance. It should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the

witnesses and to have the “feel” of the case, which a reviewing court cannot enjoy.

The aim ... is rather to determine whether the findings made could reasonably have been reached on sufficient credible evidence present in the record. This involves consideration of the proofs as a whole.... When the reviewing court is satisfied that the findings and result meet this criterion, its task is complete and it should not disturb the result, even though it has the feeling it **1017 might have reached a different conclusion were it the trial tribunal. ....

But if the appellate tribunal is thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction, then, and only then, it should appraise the record as if it were deciding the matter at inception and make its own findings and conclusions. While this feeling of “wrongness” is difficult to define, ... it can well be said that that which must exist in the reviewing mind is a definite conviction that the judge went so wide of the mark, a mistake must have been made. This sense of “wrongness” can arise in numerous ways-from manifest lack of inherently credible evidence to support the finding, obvious overlooking or under-evaluation of crucial evidence, a clearly unjust result, and many others. This, then, is when and how the permissive power of [*R.* 2:10-5] should be utilized by the first appellate tribunal and is what our prior cases mean no matter how they have expressed it.

[*State v. Johnson*, 42 *N.J.* 146, 161-62, 199 *A.*2d 809 (1964) (citations omitted).]

Accord *State v. Locurto*, 157 *N.J.* 463, 470-71, 724 *A.*2d 234 (1999); *Beck v. Beck*, 86 *N.J.* 480, 496, 432 *A.*2d 63 (1981). Because this *496 issue arises in the context of the jury selection process, the principles that govern the *voir dire* of the jury in a capital case further inform our analysis:

It is axiomatic that an impartial jury is a necessary condition to a fair trial. “This requirement of fairness-and particularly jury impartiality-is heightened in cases in which the defendant faces death.”

In order to insure the impartiality of the jury, we have emphasized the critical importance of the *voir dire* in exposing potential and latent bias. Under our single jury capital trial system, jury selection must serve double duty as a time to death qualify jurors and to enable counsel to exercise the valuable constitutional prerogative of selecting a fair and impartial jury. In that dual setting, *voir dire* acts as a discovery tool. It should be like a conversation in which, without manipulation or delay of trial, the parties are able to discern the source of attitudes that would substantially interfere with the jurors' ability to follow the law. In order for this discovery procedure to be effective, potential jurors must have a full comprehension of their legal duties.

[*State v. Papasavvas (I)*, 163 *N.J.* 565, 584, 751 *A.*2d 40 (2000) (citations omitted).]

Ultimately, we observe that “ *[v]oir dire* procedures and standards are traditionally

within the broad discretionary powers vested in the trial court [and] its exercise of discretion will ordinarily not be disturbed on appeal." *Id.* at 595, 751 *A.*2d 40 (citations and internal quotation marks omitted). *See also State v. Williams*, 113 *N.J.* 393, 410, 550 *A.*2d 1172 (1988) (same); *State v. Singletary*, 80 *N.J.* 55, 62, 402 *A.*2d 203 (1979) (same).

Gauged against these standards, there was no error in respect of either the procedure utilized by the trial court in dealing with what the trial court aptly termed "an inadvertent series of contacts" or the findings it reached. On the contrary, by immediately questioning the potential juror and determining whether there was a taint and, if so, whether it extended beyond that single potential juror, the trial court hewed to the procedure we explicitly endorsed in respect of mid-trial juror taint, *State v. R.D.*, 169 *N.J.* 551, 557-61, 781 *A.*2d 37 (2001), one we now extend to allegations of taint in the pre-trial jury selection process.

**1018 Under *R.D.*, the overarching relevant inquiry is not whether the trial court committed error, but whether it abused its discretion. *Id.* at 559, 781 *A.*2d 37 ("The abuse of discretion standard of review should pertain when reviewing such determinations of a *497 trial court."). That is so because "[a]pplication of that standard respects the trial court's unique perspective [and w]e traditionally have accorded trial courts deference in exercising control over matters pertaining to the jury." *Id.* at 559-60, 781 *A.*2d 37. When we apply the abuse of discretion standard to the trial court's actions, we are well satisfied that the trial court properly exercised its discretion in denying defendant's motion to strike the jury panel. For that reason, we reject defendant's challenge to the trial court's refusal to strike the jury panel.

XII.

CONSTITUTIONALITY OF THE DEATH PENALTY.

Defendant and *amicus curiae* the Association of Criminal Defense Lawyers of New Jersey argue that New Jersey's death penalty statute, *N.J.S.A.* 2C:11-3c, contravenes the Eighth Amendment to the United States Constitution, *U.S. Const.* amend. VIII, and Article I, Paragraphs 1 and 12 of the New Jersey Constitution, *N.J. Const.* art. I, ¶¶ 1, 12. We disagree.

We reaffirm the views we expressed in *State v. Josephs*, 174 *N.J.* 44, 138, 803 *A.*2d 1074 (2002) (citations omitted): "We have upheld the constitutionality of New Jersey's death penalty statute in each and every year since we last examined the issue in 1987 in *[State v.] Ramseur[*, 106 *N.J.* 123, 524 *A.*2d 188 (1987)]. Nothing submitted in this appeal warrants departure from that uninterrupted chain of decisional law." That said, we add only the following.

In light of what may be evolving community standards, however, the continued vitality of the death penalty in New Jersey has been questioned. During the pendency of this appeal, the Legislature adopted *P.L.* 2005, *c.* 321, §§ 1 to 5, effective January 12, 2006, which

established the New Jersey Death Penalty Study Commission. That commission was charged with the responsibility to "study all aspects of the death penalty as currently administered in the State of New Jersey[,] ... propose new legislation, if *498 appropriate[, and] report its findings and recommendations to the Governor and the Legislature, along with any legislation it desires to recommend for adoption by the Legislature[.]" *Id.* at §§ 2b, 2c, and 2k. The Act also imposed a moratorium on the execution of any death sentence until "60 days after the issuance of the commission's report and recommendations." *Id.* at § 3.

On January 2, 2007, the Commission filed its report with the Governor, the President of the State Senate and the Speaker of the State Assembly. *New Jersey Death Penalty Study Commission Report* (Jan. 2, 2007). It "recommend[ed] that the death penalty in New Jersey be abolished and replaced with life imprisonment without the possibility of parole, to be served in a maximum security facility." *Id.* at 2. That recommendation is both prospective and retroactive in its application. *Id.* at 75-76 (proposing, among several statutory amendments, that "[a]n inmate sentenced to death prior to the date of the passage of [the] bill [abolishing the death penalty], upon motion to the sentencing court and waiver of any further appeals related to sentencing, shall be resentenced to a term of life imprisonment during which the defendant shall not be eligible for parole"). Bills implementing that recommendation have been introduced in both the Senate and the Assembly. *See* S.B. 163, 212th Leg. (N.J.2007); Assemb. B. 1732, 212th Leg. (N.J.2007). Neither Bill has been adopted to date.

**1019 XIII.

PROPORTIONALITY REVIEW.

A.

According to defendant, his death sentence is disproportionate and, therefore, cannot be sustained. The State, on the other hand, asserts that "defendant cannot show that his death sentences are disproportionate" because "he was not singled out for capital prosecution and ... his death sentences are not a freakish aberration."

*499 B.

[61] [62] Our task in determining whether a death sentence is disproportionate is statutorily mandated:

Upon the request of the defendant, the Supreme Court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Proportionality review under this section shall be limited to a

comparison of similar cases in which a sentence of death has been imposed under subsection c. of this section.

[*N.J.S.A.* 2C:11-3e.]

We comply with that mandate by engaging in a progressive analysis. As a threshold matter, the statute requires that a death penalty defendant first request that we conduct a proportionality review of his death sentence. *Ibid.* Once a request for proportionality review has been made, we define our task as follows:

[W]e engage in proportionality review "to ensure that the death penalty is being administered in a rational, non-arbitrary, and evenhanded manner, fairly and with reasonable consistency." To that end, proportionality review focuses on whether a specific defendant's death sentence is inconsistent with the penalty imposed in comparable cases. The defendant must demonstrate that his or her death sentence is aberrant, arbitrary, or otherwise anomalous.

[*State v. Timmendequas (II)*, 168 *N.J.* 20, 34, 773 *A.*2d 18 (2001) (citations omitted).]

In our graduated review of the proportionality of a defendant's death sentence, we first define the cohort of cases against which we must compare defendant's death sentence. *Ibid.* ("In order to compare this case with similar death-eligible cases, we must first determine the 'universe' of cases from which we draw the comparison cases."). We cast a wide net, as we

consider all death-eligible cases, rather than only death-sentenced cases. We also consider death-eligible cases "whether or not they were capitally prosecuted," because the decision not to seek the death penalty "is not necessarily a reflection of [the] defendant's lack of deathworthiness." Thus, all cases in which the defendant was eligible for the death penalty comprise the universe under consideration.

[*Id.* at 35, 773 *A.*2d 18 (citations omitted).]

The process of determining the correct "universe" of cases for proportionality review is greatly aided by the database of all death-eligible cases maintained by the Administrative Office of the Courts (AOC). We have explained that

*500 [t]he AOC has subdivided the cases into thirteen distinct categories of comparison cases. The AOC assigns cases for comparison to the following categories: FN21

FN21. These categories track, although not sequentially, most of the statutory aggravating factors. *See N.J.S.A.* 2C:11-3c(4).

(A) Victim is a Public Servant;

**1020 (B) Prior Murder Conviction without A above;

(C) Contract Killing without A-B above;

(D) Sexual Assault without A-C above (subdivided into (1) aggravated and (2) other);

(E) Multiple Victims without A-D above (subdivided into (1) aggravated and (2) other);

(F) Robbery without A-E above (subdivided into (1) home, (2) business, and (3) other);

(G) Torture/Depravity without A-F above;

(H) Abduction without A-G above;

(I) Arson without A-H above;

(J) Escape Detection without A-I above;

(K) Burglary without A-J above;

(L) Grave Risk without A-K above;

(M) Victim Under 14 Years Old without A-L above.

[*Id.* at 35-36, 773 *A.*2d 18.]

[63] Once the relevant "universe" of cases has been defined, we "compare defendant's case to similar cases within the [appropriate] category." *Id.* at 37, 773 *A.*2d 18. We do so by "first conduct[ing] frequency analysis, and then we apply precedent-seeking review." *Ibid.* (citations omitted).

We have explained that frequency analysis "consists exclusively of the salient-factors test." *Ibid.* We have limited our frequency analysis to the salient-factors test because

[t]he salient-factors test allows us to measure the relative frequency of a defendant's sentence by comparing it to sentences in factually-similar cases. Its purpose is to help us determine whether the death sentence is imposed in a category of comparable cases often enough to create confidence in the existence of a societal consensus that death is the appropriate remedy.

*501 [*Id.* at 38, 773 *A.*2d 18 (quoting *State v. Martini (II)*, 139 *N.J.* 3, 33, 651 *A.*2d 949 (1994)).]

We have noted that

the objective is to determine whether the frequency of death sentences in similar cases involving defendants with similar culpability supports a determination that the death

penalty in the case before us is or is not aberrational. The process compares a defendant's culpability with that of other death-eligible defendants. We measure the relative frequency of a defendant's sentence by determining the rate at which factually-similar cases culminate in a death sentence. The salient-factors test, demystified, is largely deductive, involving a simple "if-then" method of reasoning. If, in similar cases, the ratio of death sentences to penalty-trial cases or the ratio of death sentences to death-eligible cases is high, then the Court may interpret the relatively high rate of death sentencing as "strong evidence of the reliability of [the] defendant's death sentence."

[*Ibid.* (citations omitted).]

[64] [65] [66] After the frequency analysis is performed, we turn to precedent-seeking review, where " 'we [have] examine[d] death-eligible cases similar to defendant's case to determine whether his death sentence is aberrant when compared to the sentences received by defendants in those other cases.' This is 'the traditional, case-by-case form of review in which we compare similar death-eligible cases.' " *Id.* at 40, 773 *A.*2d 18 (citations omitted). Our purpose in engaging in precedent-seeking review is to

determine whether a defendant's criminal culpability exceeds that of similar life-sentenced defendants and whether it is equal to or greater than that of other **1021 death sentenced defendants, such that the defendant's culpability justifies the capital sentence; or whether a defendant's culpability is more like that of similar life-sentenced defendants and less than that of death-sentenced defendants, such that the defendant's culpability requires a reduction of sentence to a life term. We note that statutory proportionality does not require identical verdicts even in closely-similar cases. It merely requires that the defendant was not singled out unfairly for capital punishment.

[*Ibid.* (quoting *State v. Martini (II), supra*, 139 *N.J.* at 47, 651 *A.*2d 949 (citations omitted)).]

We have described the process of precedent-seeking review as

one familiar to us as judges and is not vulnerable to the concerns about reliability that burden frequency analysis. We have consistently placed our reliance on this form of review because of the analytic difficulties we have encountered in applying frequency analysis. Precedent-seeking review is less empirical and more analytical than frequency analysis. The exercise is more inductive, less formulaic.

[*Ibid.* (citations and internal quotation marks omitted).]

*502 Precedent-seeking review requires that "we first examine the criminal culpability of the defendant." *Ibid.* We have divided that examination into "three components: the moral blameworthiness of the defendant, the degree of victimization, and the character of the defendant." *Ibid.* (citations omitted).

Addressing each of those components in turn, we have explained that "[b]lameworthiness requires consideration of motive, premeditation, justification or excuse, evidence of mental defect or disturbance, knowledge of helplessness of the victim, defendant's age or maturity level, and defendant's involvement in planning the murder." *Id.* at 41, 773 *A.*2d 18 (citations and internal quotation marks omitted). We have described the victimization component as "concern[ing] the relative violence and brutality of the murder [including any] injury to non-decedent victims." *Id.* at 42, 773 *A.*2d 18 (citations and internal quotation marks omitted). Finally, the last category "in determining overall culpability, defendant's character, is a catchall category that warrants consideration of defendants prior criminal history, unrelated acts of violence, cooperation with authorities, remorse and capacity for rehabilitation." *Id.* at 43, 773 *A.*2d 18 (citations and internal quotation marks omitted).

After the defendant's criminal culpability is examined, we have "review[ed] the comparison cases to determine if those similarly culpable to or more culpable than defendant generally receive life sentences rather than death sentences." *Id.* at 44, 773 *A.*2d 18 (citation omitted). That exercise was deemed necessary because "[s]uch a finding would support a claim of disproportionality, because it would provide evidence of a societal consensus that the death penalty is not imposed in cases similar to this one." *Ibid.* We engage in that exercise by

consider[ing] each comparison defendant's motive, premeditation, justification or excuse, evidence of mental disease, defect, or disturbance, knowledge of the victim's helplessness, knowledge of the effects on nondecedent victims, age, involvement in planning the murder, violence and brutality of the murder, injury to nondecedent victims, prior record, other unrelated acts of violence, cooperation with authorities, remorse, and capacity for rehabilitation. With regard to the actual mechanics, we analyze each case to determine if defendant is more or less deathworthy than the *503 comparison defendant. If defendant is less deathworthy than a life-sentenced **1022 defendant, that conclusion supports defendant's claim of disproportionality. If, however, defendant is more deathworthy than a life-sentenced defendant, that detracts from defendant's claim. After we compare defendant to all of the comparison cases, we determine if the results demonstrate that cases more deathworthy than defendant's generally receive life sentences, which would strongly indicate disproportionality.

[*Id.* at 44-45, 773 *A.*2d 18 (citation omitted).]

Throughout our system of proportionality review, we remain mindful that "[t]he results of proportionality review may not obtain with syllogistic precision." *Id.* at 56, 773 *A.*2d 18. We view this as an "evolving process," having concluded, "[f]or the present, [that our] principles of proportionality review reflect and preserve a capital jurisprudence that is fair and just to all parties." *Ibid.* With those principles firmly in mind, we turn to the application of proportionality review in respect of defendant's death sentence.

1. *Universe of Cases.*

The AOC assigned defendant to the “E1” cell, a category of cases that involve multiple homicide victims which are “aggravated” by the commission of an additional felony. Excepted from the E1 cell are intra-family and rage killings, as well as killings that involve some sort of drug transaction between the defendant and the victim. The Attorney General agrees with, and the Public Defender has no comment on, the AOC's assignment.

2. *Frequency Analysis-Salient Factor Test.*

[67] The following table reflects the outcome of the salient factors test of the E1/aggravated multiple-victims murders category; it includes the percentages for the E1 category both with and without defendant included.

Category	Death-sentencing rate, all eligible cases	Cases advancing to sentencing	Death-sentence rate after sentencing
E1	23% (7/30)	60% (18/30)	39% (7/18)
E1 without Wakefield	18% (5/28)	57% (16/28)	31% (5/16)

*504 In respect of the death sentencing rate for all eligible cases, the E1 category has a higher rate than all but the A (public servant), B (prior murder conviction), C (contract killing), and D1 (aggravated sexual assault) categories. We have observed that “the greater the frequency of death sentences in a class of cases, the more certain we are that a given death sentence is proportionate for any member of that class.” *State v. Martini(II), supra*, 139 *N.J.* at 30, 651 *A.*2d 949. The following table shows the death-sentencing rate among all death-eligible cases in the five categories (two of which, categories D and E, contain two subcategories each) with the highest rates.

Principal Salient Factor	Death-sentencing rate/all eligible cases [FN22]
A - Victim is a public servant	50% (5/10)
B - Prior murder	35% (14/40)

	conviction	
C	- Contract killing	19% (5/27)
D	- Sexual assault	16% (10/64)
D1	- Aggravated sexual assault	20% (10/51)
D2	- Other sexual assault	0% (0/13)
E	- Multiple victims	9% (7/76)
E1	- Aggravated multiple victims	18% (5/28)
E2	- Other multiple victims	4% (2/48)
All factors (including F-Q)		10% (57/570)

FN22. Defendant's case is not part of the case universe because the universe only contains cases from 1983-2003.

**1023 Referencing the AOC report in respect of defendant's death sentence, defendant claims it is "noteworthy-in fact, striking-that every previous death sentence imposed in the E-1 category has been vacated and the defendant has received a sentence of life." Although reversed death sentences previously were not excluded from the statistical universe used in frequency analysis, *State v. Chew (II)*, 159 *N.J.* 183, 198, 731 *A.*2d 1070, *cert. denied*, 528 *U.S.* 1052, 120 *S.Ct.* 593, 145 *L.Ed.*2d 493 (1999), "a reversed death penalty is a less persuasive indicator of deathworthiness *505 than one that is affirmed." *State v. Bey (IV)*, 137 *N.J.* 334, 348, 645 *A.*2d 685 (1994). Defendant points out that he "is the only person currently assigned to the E-1 classification who *could* emerge from prosecution with an ultimate sentence of death." Moreover, defendant contends that because less than one-fifth of cases in the E1 subcategory resulted in death sentences, society has not indicated a consensus that death is the appropriate punishment in cases of this sort.

The State responds that the overall death rate for E1 murders is significantly greater than the overall death sentencing rate of ten percent. Because "a greater percentage of aggravated multiple victim murderers advanced to a capital sentencing phase, received the death sentence after the penalty phase, and received the death sentence overall, than did all death-eligible murderers ... the statistics belie defendant's contention that his death sentences are an aberration." The State contends that the statistics prove that both prosecutors and juries view aggravated multiple murderers as particularly deathworthy.

We concur with the State's analysis of the salient factors test. The death sentencing rate for defendants assigned the E1 category is nearly double that of the entire universe of cases. The rate is not a statistically significant amount less than the rate for defendants in the D1 category, concerning whom we have rejected claims of disproportionality. *See, e.g.*, *State v. Timmendequas (II)*, *supra*, 168 *N.J.* at 39, 773 *A.*2d 18; *State v. (Ambrose)*

Harris (II), 165 *N.J.* 303, 319-20, 757 *A.*2d 221 (2000). Because defendants in the E1 category advance to penalty trials and receive death sentences at a greater rate than all death-eligible defendants, defendant has failed to establish that his death sentences are disproportionate under the frequency analysis prong of proportionality review.

3. *Precedent-Seeking Review.*

[68] In precedent-seeking review, the less empirical, but arguably more critical half of proportionality review, we compare *506 defendant's case with those of similarly situated defendants selected from the category to which defendant was assigned for frequency analysis. Again, the focus of **1024 precedent-seeking review is on defendant's culpability, and the goal is to ensure that a "defendant's criminal culpability exceeds that of similar life-sentenced defendants and ... is equal to or greater than that of other death-sentenced defendants." *State v. Martini (II), supra*, 139 *N.J.* at 47, 651 *A.*2d 949. A defendant need not be equally culpable as the other death-sentenced defendants, or more culpable than all the life-sentenced defendants. Rather, we engage in precedent-seeking review only to eliminate the possibility that defendant's death sentence is irrational or aberrant in light of the sentences imposed in similar cases. *Id.* at 48, 651 *A.*2d 949.

[69] [70] The methodology employed in precedent-seeking review is to conduct a case-by-case evaluation of a defendant's case relative to statistically comparable cases. Those cases are selected from the same universe of cases used in frequency review, based on relevant statutory and non-statutory aggravating and mitigating factors that are "rooted in traditional sentencing guidelines." *State v. Marshall (II), supra*, 130 *N.J.* at 159, 613 *A.*2d 1059. When considering non-statutory factors, we may only consider factors that are objective, have been clearly submitted to the jury, and are likely to have influenced the jury's decision. *State v. Martini (II), supra*, 139 *N.J.* at 50, 651 *A.*2d 949; *State v. Bey (IV), supra*, 137 *N.J.* at 368, 645 *A.*2d 685. Therefore, even if a particular fact known to the trial court or to the jury because of improper admission of evidence makes a defendant more "deathworthy," that fact may not be invoked in precedent-seeking review because it could not have been used either in the process of finding or rejecting statutory factors or in the decision to impose the death penalty. *See* *State v. Martini (II), supra*, 139 *N.J.* at 50, 651 *A.*2d 949.

[71] [72] Evidence bearing on a defendant's culpability can only be considered to the benefit, not to the detriment of a defendant. We do not consider aggravating circumstances that were not *507 clearly presented to the jury and thus not included in its deliberative process. *See* *State v. Cooper (II)*, 159 *N.J.* 55, 88, 731 *A.*2d 1000 (1999). However, we may consider mitigating factors, such as age, that were rejected by the jury, *State v. Bey IV, supra*, 137 *N.J.* at 368, 645 *A.*2d 685, because even if a jury has rejected a specific mitigating factor, it may still have been influenced by the evidence in support

of that mitigating factor in finding the catch-all factor, *State v. Loftin (II)*, 157 *N.J.* 253, 336, 724 *A.*2d 129 (1999). When considering the catch-all mitigating factor, we have recognized that, although the defendant's jury may have rejected a given enumerated mitigating factor, it may nevertheless have been influenced by the evidence presented in support of that mitigating factor. *See id.*; *State v. DiFrisco (III)*, *supra*, 142 *N.J.* at 185, 662 *A.*2d 442; *State v. Bey (IV)*, *supra*, 137 *N.J.* at 368, 645 *A.*2d 685.

A defendant's culpability is measured according to factors falling under three general headings: moral blameworthiness, degree of victimization, and character. *See State v. Martini (II)*, *supra*, 139 *N.J.* at 48-49, 651 *A.*2d 949. In *State v. Papasavvas (II)*, 170 *N.J.* 462, 790 *A.*2d 798 (2002), we described culpability analysis in detail:

We divide criminal culpability into three categories: the defendant's moral blameworthiness, the degree of victimization, and the defendant's character. The components by which we measure a defendant's culpability are not disputed. In fact, they are catalogued in minute detail in our cases:

1. Defendant's moral blameworthiness

a. Motive

b. Premeditation

c. Justification or excuse

**1025 d. Evidence of mental disease, defect or disturbance

e. No Knowledge of victim's helplessness

f. No Knowledge of effects on nondecedent victims

g. Defendant's age

h. Defendant's involvement in planning the murder

2. Degree of victimization

a. Violence and brutality of the murder

b. Injury to nondecedent victim

*508 3. Character of defendant

a. Prior record

b. Other unrelated acts of violence

c. Cooperation with authorities

d. Remorse

e. Capacity for rehabilitation.

It would be fair to say that the foregoing list is a manifesto of the matters that are at the heart of a judgment regarding culpability-the assessment of good versus evil.

[*Id.* at 480-81, 790 *A.*2d 798 (citations omitted).]

Applying that framework, we analyze defendant's relative culpability as follows.

a. *Moral blameworthiness.*

[73]  "Blameworthiness requires consideration of 'motive, premeditation, justification or excuse, evidence of mental defect or disturbance, knowledge of helplessness of the victim, defendant's age or maturity level, and defendant's involvement in planning the murder." *State v. Timmendequas (II), supra*, 168 *N.J.* at 41, 773 *A.*2d 18 (quoting *State v. Loftin (II), supra*, 157 *N.J.* at 336, 724 *A.*2d 129). We address those factors in order.

(i) *Motive.*

Defendant concedes that the " 'escape detection' motivation has been termed 'highly blameworthy,' " *State v. Timmendequas (II), supra*, 168 *N.J.* at 41, 773 *A.*2d 18, but contends that it is less heinous than the desire to experience pleasure from killing-as in *State v. Ramseur, supra*, 106 *N.J.* at 209-11, 524 *A.*2d 188-or to obtain money by means of a contract killing-as in *State v. Marshall (II), supra*, 130 *N.J.* at 170, 613 *A.*2d 1059. Defendant also notes that "the contemporaneous killing of victims of an initial crime [ ] is in fact a common scenario, and entails a motivation qualitatively different from, and far less heinous than, the calculated killing of a witness who is not a victim of the crime, or returning to eliminate such a witness."

The State suggests that defendant's motive for robbery was greed, but stresses that the motive for killing-witness elimination*509 was unanimously found by the jury. The State suggests that the witness elimination element in this case was especially contemptible because both victims were totally incapacitated before defendant returned to the basement to kill them.

Although common logic would indicate that witness elimination is a relatively common motive for murder, it has nonetheless been found it to be "highly blameworthy." *State v. Morton*, 165 *N.J.* 235, 249-50, 757 *A.*2d 184 (2000). Thus, a defendant's "cold, calculating presence of mind" to attempt to "clean" the crime scene increases his

blameworthiness. *State v. Harvey (III)*, 159 *N.J.* 277, 313, 731 *A.*2d 1121 (1999). Defendant's blameworthiness is further heightened by the fact that he likely could have completed the robbery without committing the murder. *State v. Feaster (II)*, 165 *N.J.* 388, 404, 757 *A.*2d 266 (2000), *cert. denied*, 532 *U.S.* 932, 121 *S.Ct.* 1380, 149 *L.Ed.*2d 306 (2001). Although there may be more blameworthy motivations, they do not serve as an excuse. Defendant's conduct **1026 and motive substantially exacerbate his moral blameworthiness.

(ii) *Premeditation.*

Defendant suggests that while he may have premeditated the robbery, there is no evidence that he premeditated the murder. According to defendant, even the State's rebuttal psychiatrist could not say with certainty that the murder was not a robbery-gone-awry. Defendant contends that the relevant inquiry in respect of premeditation pertains to the murder and not to the underlying robbery.

In response, the State asserts that, despite discrepancies in defendant's statements owing to his attempts to blame an alleged accomplice, defendant admitted to planning the robbery at least ninety minutes prior to the time he actually committed the crimes. The State points out that defendant had sufficient time to consider his plan and retreat, but instead he chose to go forward. Finally, the State notes that, in at least one of defendant's statements, he *510 stated that he had brought the knife with him to the Hazards' home.

The evidence that defendant planned to rob the Hazards was overwhelming. He entered the Hazards' home-a home occupied by two elderly persons-armed with a knife. Shortly after gaining entry into the Hazards' home, defendant murdered Richard Hazard, a seventy-year-old man who represented no physical threat to him. Defendant then lay in wait until Shirley Hazard returned from her food shopping trip, and brutally murdered her. In the aggregate, these facts establish his premeditation, one that significantly increases defendant's moral blameworthiness.

(iii) *Justification or excuse.*

Defendant does not contend that his murders were justified, but “submits that a degree of ‘excuse’ is provided by his longstanding and severe mental problems.” He suggests that those mental problems, combined with his troubled childhood, “underlay [defendant's] apparent loss of control and inhibition that resulted in the instant murders.” The State, however, suggests that there is no evidence that the Hazards provoked defendant in any way so as to justify his killing them.

We need not abandon caution to conclude beyond any doubt that defendant had no justification whatsoever to kill the Hazards. If at all relevant, defendant's reference to his childhood and his mental problems is more appropriately considered as evidence of mental disease, defect or disturbance, not as a justification for his actions.

(iv) *Evidence of mental disease, defect or disturbance.*

Defendant submits that his "history of psychological problems, as probably caused, and certainly exacerbated, by his horrific childhood unquestionably explains, to the extent that they can be explained, [his] actions in this case." Defendant points out that three jurors found that he suffers from "neurologic dysfunction," and the State's rebuttal psychiatrist found that defendant suffered *511 from "Bipolar II disorder." Also, defendant points out that, in proportionality analysis, we "consider mitigating evidence 'even if the jury found it insufficient to establish a statutory mitigating factor.' " (citing *State v. Feaster(II), supra*, 165 *N.J.* at 403, 757 *A.*2d 266).

The State acknowledges that three jurors found that defendant suffered from a neurological dysfunction. However, the State emphasizes that the jury unanimously rejected the mitigating factors relating to emotional disturbance and mental disease or defect. Although the State agrees that defendant did present evidence of a troubled upbringing and that some jurors found that evidence mitigating, the State **1027 suggests that, as in *State v. Timmendequas (II), supra*, 168 *N.J.* at 42, 773 *A.*2d 18, "[d]espite this poor childhood and resulting debilitating effects on defendant, the evidence was not persuasive that defendant should be relieved of his culpability."

There indeed was some evidence that defendant suffered from an emotional disease or defect, and the jury heard a good deal of evidence recounting the questionable parenting techniques of defendant's parents. Although that evidence does not relieve defendant of culpability, it does tend to "reduce his moral blameworthiness." *State v. Timmendequas (II), supra*, 168 *N.J.* at 42, 773 *A.*2d 18. In the end, however, the evidence of mental defect was contested by the State, thereby reducing its impact on defendant's blameworthiness.

(v) *Knowledge of victim's helplessness.*

Defendant suggests that, while he knew that the male victim was old, he had no knowledge that he was disabled or enfeebled. Defendant therefore suggests that the factor "would appear to be at most average." The State points out that not only were the victims vulnerable because of their age, but defendant's method of attack made certain that they would be especially defenseless. By the time defendant delivered the fatal blows, both victims "had *512 been so severely assaulted that they were totally physically incapacitated, and utterly defenseless."

The particular vulnerability of elderly victims has been a matter of concern to us before. *State v. Papasavvas (II), supra*, 170 *N.J.* at 482, 485, 790 *A.*2d 798 (noting that victim was vulnerable due to advanced age and listing cases where victims were vulnerable because they were elderly). It cannot be disputed that victims of the ages of Richard and Shirley Hazard are less able to defend themselves than younger, adult victims. As a result, defendant's suggestion that this factor is "at most average" is contrary not only to the well-established principle that children and older victims are more vulnerable, but also contrary to plain common sense. Defendant knew Mr. and Mrs. Hazard were "old,"

yet he incapacitated both victims before he killed them. That adds to his moral blameworthiness.

(vi) *Knowledge of effects on nondecedent victims.*

Our case law is clear: we impute knowledge to a defendant that his murderous actions will "eliminate a unique person and destroy a web of familial relationships." *State v. Loftin (II)*, 157 *N.J.* 253, 337, 724 *A.*2d 129 (1999) (quoting *State v. Muhammad*, *supra*, 145 *N.J.* at 46, 678 *A.*2d 164). Defendant urges that we adopt the reasoning from Justice Long's dissent in *State v. Timmendequas (II)*, *supra*, 168 *N.J.* at 83, 773 *A.*2d 18, suggesting that the factor is "universal and thus cannot serve as a basis to distinguish between defendants." Using that logic, defendant argues that the victim impact statements concerning the effect of the loss on the Hazards' family should not carry substantial weight.

The State stresses that this Court has determined that the effect of the murders on the families of the victims is a proper consideration on proportionality review, even where defendant did not have specific knowledge of the surviving family members. In the State's view, because the Hazards' loved ones "must live each day with the ache of [their] absence and their awareness of the *513 terror [they] endured in the final moments of [their lives,]" defendant's blameworthiness is increased.

We reject defendant's invitation to adopt the reasoning of the dissent in *State v. Timmendequas (II).* We consider this factor although we acknowledge that its **1028 presence in all, or nearly all, of the comparison cases may reduce its significance. *Id.* at 42, 773 *A.*2d 18. Even on that reduced basis, however, defendant's moral blameworthiness is increased by the suffering of his victims' family members.

(vii) *Defendant's age.*

Defendant submits that, despite the jury's rejection of age as a mitigating factor, the fact that he was twenty-three years old at the time of the crime reduces his blameworthiness. He suggests that the value of the factor is increased by the fact that there is no evidence that he "lived as an adult with adult responsibilities." (citing *State v. Loftin (II)*, *supra*, 157 *N.J.* at 337, 724 *A.*2d 129). Defendant acknowledges that we effectively rejected "emotional deficits" and a "highly abusive childhood" as mitigating factors in respect of this element. *State v. Timmendequas (II)*, *supra*, 168 *N.J.* at 42, 773 *A.*2d 18. Defendant again advances the logic of the dissent in *State v. Timmendequas (II)* regarding the defendant's stunted emotional development. *Id.* at 82, 773 *A.*2d 18 (Long, J., dissenting) (citations omitted). Accordingly, defendant submits that, on the basis of chronological age alone, his blameworthiness on this factor is low, and it is lower still if defendant's maturity level is taken into account.

In opposition, the State argues that defendant's age and level of maturity do not reduce his moral blameworthiness. The State reasons that, at over twenty-three years old,

defendant was “a mature, full-grown man who was ‘old enough to know right from wrong.’ ” (quoting *State v. Timmendequas (II), supra*, 168 *N.J.* at 42, 773 *A.*2d 18). The State points out that we already have determined that a defendant's blame was not diminished by his age where he was twenty-five years old and the jury rejected the *514 age mitigating factor. *State v. Morton, supra*, 165 *N.J.* at 251, 757 *A.*2d 184.

[74] The jury's rejection of age as a mitigating factor does not preclude its consideration on proportionality review. *See State v. Bey (IV), supra*, 137 *N.J.* at 360-61, 645 *A.*2d 685 (despite jury's rejection of age as stand-alone mitigating factor, it may have considered age as part of “catch-all” mitigating factor). We attach no substantive difference to the fact that defendant was chronologically younger than the defendant in *State v. Morton.* Although there is little evidence of defendant's maturity, under current precedent, defendant's stunted emotional development does not decrease his culpability in respect of this factor. Moreover, even if defendant's moral blameworthiness is decreased by his age, he was not so young-or so emotionally underdeveloped-to make the decrease significant.

(viii) *Defendant's involvement in planning the murder.*

Defendant claims that he consistently maintained that he acted at his alleged accomplice's behest. He submits that, even if that contention is rejected, the robbery demonstrates so little planning that his culpability as to this factor is not above average. Defendant contrasts the haphazardness of his crime with other, meticulously-planned crimes. The State does not address this factor.

Even granting defendant's claim that his planning may have been minimal, the evidence that defendant acted alone is overwhelming, thus rendering defendant solely liable for his acts, however conceived. The police were able to establish an alibi for defendant's alleged accomplice, one that was confirmed by two testifying witnesses. To the extent that defendant likely acted alone, his moral blameworthiness ranks at least above average in respect of this factor.

**1029 In sum, while defendant is relatively young, his childhood was marred by abuse and neglect, and he was no more aware of the suffering by the families of his victims than other murderers, his degree of moral blameworthiness is quite high as a result of his *515 premeditation, his motive of witness elimination, his knowledge of the victims' vulnerability, and his lack of justification.

b. *Degree of victimization.*

We evaluate victimization by examining the “violence and brutality of the murder, and injury to nondecedent victims.” *State v. Chew (II), supra*, 159 *N.J.* at 211, 731 *A.*2d 1070. The “extent of mutilation of the victim” is relevant in considering the first component.

State v. Bey (IV), supra, 137 *N.J.* at 366, 645 *A.*2d 685.

(i) *Violence and brutality of the murder.*

Defendant correctly acknowledges that this factor carries a great deal of weight, but claims that evidence of intentional torture is absent and that the State did not charge the depravity aggravating factor. For that reason, defendant contends that "this factor has high, although not extreme, value in this case."

On the other hand, the State details the extreme level of physical brutality defendant inflicted on Richard and Shirley Hazard. The State points out that the victims suffered stab wounds, broken bones, and serious cuts. In addition, the State notes that Mr. Hazard must have suffered immense mental anguish knowing that his wife would either find him dead or be killed herself; and Mrs. Hazard saw her husband murdered and knew that a similar fate awaited her. The State points out that, to the victim, it does not matter whether a defendant's motive is torture; it was a defendant's extreme violence that caused severe pain and suffering.

It is unquestionable that the Hazards suffered a prolonged, brutal death characterized by intense physical and mental pain. Defendant's culpability in respect of this factor is very high.

(ii) *Injury to nondecedent victim.*

Defendant does not discuss this factor, while the State notes that the victims' family members delivered victim impact statements detailing how the murders harmed their family.

*516 We do not diminish the pain and anguish the Hazards' family has suffered by the tragic, brutal and senseless loss of their cherished ones. However, this factor does not contemplate that a victim's family members are to be considered nondecedent victims. This interpretation is consistent with other cases where there were families who suffered great losses, but where we made no mention of this factor in the victimization analysis. *See, e.g.*, *State v. Cooper (II)*, 159 *N.J.* 55, 91, 731 *A.*2d 1000 (1999); *State v. Timmendequas (II), supra*, 168 *N.J.* at 42-43, 773 *A.*2d 18. Thus, because there were no nondecedent victims, we cannot give this factor any weight.

In sum, while there were no nondecedent victims, the brutality of this crime renders the victimization very high in this case.

c. *Character of defendant.*

The third factor considered is the character of the defendant, which includes the defendant's prior criminal history, other acts of violence, cooperation with authorities,

remorse, and capacity for rehabilitation. *State v. Bey (IV), supra*, 137 *N.J.* at 366, 645 *A.*2d 685. We have designated these factors as a "catchall category." *State v. Timmendequas (II), supra*, 168 *N.J.* at 43, 773 *A.*2d 18.

**1030 (i) *Prior record.*

Defendant acknowledges his extensive juvenile and adult criminal history. He explains, however, that prior to these murders he had never been convicted of a crime of violence as an adult and that, while his juvenile record contains forty-four adjudications of delinquency, it does not refer to a single crime of violence. Defendant does not claim a capacity for rehabilitation, but suggests he cannot be classified as a predator or sociopath. Finally, defendant argues that his history of criminality is hardly surprising in light of his childhood, which included being taken by family members to grocery stores to steal food.

The State points out that defendant's record includes a large number of juvenile adjudications of delinquency, including burglary,*517 shoplifting, theft by unlawful taking, criminal mischief, escape, attempt, improper behavior (fighting), receiving stolen property, criminal trespass, possession of a weapon, robbery, and attempt to kill. As a twenty-three-year-old adult, he already had five adult convictions for offenses including receiving stolen property, unlawful possession of a weapon (handgun), and improper behavior. Also, at the time of his arrest, defendant had two additional criminal indictments pending: one for possession of cocaine, and the other for armed robbery and aggravated assault.

Defendant's criminal record is more expansive than many defendants for whom we have conducted comparative proportionality review. *See, e.g.*, *State v. Cooper (II), supra*, 159 *N.J.* at 91, 731 *A.*2d 1000; *State v. Feaster (II), supra*, 165 *N.J.* at 406-07, 757 *A.*2d 266. We acknowledge that defendant's record contains fewer crimes of violence than some defendants. *See, e.g.*, *State v. Harris (II)*, 165 *N.J.* 303, 325-26, 757 *A.*2d 221 (2000); *State v. Harvey (III), supra*, 159 *N.J.* at 314, 731 *A.*2d 1121. That said, defendant cannot claim that this is his first "brush with the law." Even without any prior convictions for crimes of violence, defendant's pending armed robbery and aggravated assault charges, coupled with the sheer breadth of his criminal record, make his culpability in respect of this factor significant.

(ii) *Other unrelated acts of violence.*

Neither party mentions, nor does our search of the record indicate, any other unrelated acts of violence.

(iii) *Cooperation with authorities.*

Defendant submits that he cooperated with authorities. Although he did not turn himself in, he disingenuously suggests that "any possibility of his doing so was essentially

foreclosed by his arrest early in the morning following the crime." He also contends that, once in custody, he virtually immediately gave a statement in which he admitted participation in the crimes, albeit disguising the extent of his participation. By way of explanation, *518 he argues that "it is hardly unique that a defendant would admit the depth of his involvement in a particularly severe crime in stages." As to defendant's statements implicating an alleged accomplice, defendant maintains that it has remained his position throughout that his alleged accomplice was involved.

The State stresses that "[s]ince the moment defendant was [arrested], he has continuously attempted to minimize his responsibility and thwart the investigation." It suggests that it was the overwhelming evidence against him, " 'rather than any pang of conscience,' [that] prompted defendant's incomplete admissions." (quoting *State v. Timmendequas (II), supra*, 168 *N.J.* at 44, 773 *A.*2d 18).

Although we credit defendant with the statements he provided to the police, his request that his mother cooperate with the authorities, and his unconditional plea to **1031 all of the crimes for which he stood charged, the degree to which that credit affects the calculation of his character is slight because each such form of cooperation was designed to better his own plight, and not out of any sense of correctness.

(iv) *Remorse.*

Defendant suggests that his sentencing allocution, while brief, demonstrated his remorse. Defendant contrasts his statement in allocution with that delivered by Ambrose Harris, where he "blame[d] society and the victim's family for being prosecuted." (quoting *State v. Harris (II), supra*, 165 *N.J.* at 326, 757 *A.*2d 221). Defendant further submits that much of the evidence submitted to rebut the mitigating factor of remorse was improperly admitted in the State's direct case, and that the pertinent time for considering remorse is not the immediate aftermath of the crime, but after the defendant has had time for reflection.

The State points out that the first time defendant delivered an apology for the murders was just before the jury retired to deliberate on his fate. It notes that, when the police asked defendant at the end of each of his statements whether he wanted *519 to add anything, he never availed himself of that opportunity to express any remorse for his actions. The State also suggests that defendant's post-crime casual meal at the fast-food restaurant, his leisurely shopping spree, and the party that he hosted, complete with drugs, alcohol, and sex, further evidence of his lack of remorse.

Defendant's evidence of remorse is weak at best. Even if we ignore defendant's post-crime activities, defendant presents precious little evidence of remorse. We do not place much credit in defendant's apology during his sentencing allocution. We have viewed other late apologies as simply a last minute fear of punishment. Evidence of remorse is diminished when a defendant waits until the last possible moment-the sentencing phase-to express it. *See State v. Bey (IV), supra*, 137 *N.J.* at 385, 645 *A.*2d 685 (noting that belated apology at sentencing phase does not distinguish defendant's character from that

of other defendants).

(v) *Capacity for rehabilitation.*

The parties agree that defendant has presented no evidence evincing a capacity for rehabilitation.

In sum, defendant's lengthy and serious, albeit mostly non-violent, criminal record and his lack of capacity for rehabilitation outweigh his lukewarm cooperation with authorities and his belated expressions of remorse.

d. *Precedent-seeking review-Overall culpability.*

Defendant's moral blameworthiness is quite high, the victimization in the case was severe, and his character, while not uniformly bad, does not weigh in his favor. On the basis of the foregoing discussion, defendant's criminal culpability does not render this death sentence irrational or aberrant. *State v. Martini (II), supra*, 139 *N.J.* at 47, 651 *A.*2d 949. Nor does it indicate that defendant was singled out unfairly for capital punishment. *Ibid.* None of the considerations that underlie this analysis "clearly support" defendant. *See* *520 *State v. Papasavvas (II), supra*, 170 *N.J.* at 484, 790 *A.*2d 798. He is slightly less culpable under some considerations than others, but none of the considerations clearly offend the proportionality of a death sentence for this defendant and his crime.

e. *Precedent-seeking review-Case comparisons.*

[75] The final component of precedent-seeking review compares defendant's case **1032 to those of other people convicted of capital murder in his salient factor group. Our search is not for identical outcomes in all the comparison cases; to the contrary, we "expect that juries may decide similar cases differently. Disparity alone does not demonstrate disproportionality." *State v. Bey (IV), supra*, 137 *N.J.* at 386, 645 *A.*2d 685. As we explained in *State v. Marshall (II), supra*, 130 *N.J.* at 181, 613 *A.*2d 1059, "[o]ur search should be for some impermissible or invidious factor or pattern that has been broken. That the [other defendants] were spared their lives does not establish a pattern of life-sentencing for such killings." We select comparison cases from the same salient-factor group used in the salient-factors comparison, *State v. Harris (II), supra*, 165 *N.J.* at 326, 757 *A.*2d 221, to "ensure[ ] that the two analyses are complementary and can confirm each other." *State v. Chew (II), supra*, 159 *N.J.* at 214, 731 *A.*2d 1070.

Which cases should be included in the case comparisons is a matter in dispute. Defendant suggests a group of twenty-one comparison cases, drawn primarily, but not exclusively from the statistically limited E1/aggravated multiple-victims murders category. He submits that his case is "appropriately compared to cases in which multiple homicides occurred in conjunction with other crimes, and force beyond that necessary to cause death

was used." The State counters that eighteen cases are appropriate for comparison, based on the following characteristics:

1) the victims were killed in their home; 2) defendant used multiple means of attack and extreme brutality; 3) the victims were particularly vulnerable because of their ages; 4) defendant desecrated the victims' bodies post-mortem; 5) defendant committed the murders to escape detection or apprehension within the meaning of aggravating favor (4)(f); 6) defendant committed the murders within *521 the course of committing multiple felonies of a non-sexual nature within the meaning of aggravating factor (4)(g); and 7) a stranger upon stranger crime.

Although the State's proposed criteria are broader than those suggested by defendant, we do not require that a case satisfy all of the above characteristics to be considered for inclusion. That, of course, would provide far too limited a universe.

[76] The parties recommend cases for comparison purposes. The ultimate decision concerning which cases will be considered for comparison, however, rests squarely with this Court. *In Re Proportionality Review Project (I)*, 161 *N.J.* 71, 91, 735 *A.*2d 528 (1999). Cases within the E1 subcategory are presumptively included in defendant's comparison group; conversely, cases outside the E1 subcategory are presumptively excluded. *State v. Timmendequas (II), supra*, 168 *N.J.* at 52, 773 *A.*2d 18 (citing *State v. Morton (II)*, 165 *N.J.* at 256-57, 757 *A.*2d 184).

The relevant cases are categorized as follows: FN23 (1) cases agreed to by the parties [Bobby Lee Brown (T1, V1), Bobby Lee Brown (T1, V2), Bobby Lee Brown (T2, V1, V2), Louis Crumpton, Felix Díaz, Walter Johnson (T1, V1), Walter Johnson (T1, V2), Walter Johnson (T2, V2), Frank Masini FN24 (M2), Ronald Mazique, Anthony McDougald (T1, V1), Anthony McDougald (T1, V2), Anthony McDougald (T2, V1), Peter Regan, and Roy Watson]; (2) cases **1033 proposed only by defendant [William Menter, Clarence Reeves, George Booker (V1) [B1) George Booker (V2)[B1], and Josh Pompey [D1]]; (3) cases proposed only by the State [Thomas Koskovich (T1), and Thomas Koskovich (T2)]; and (4) cases withdrawn by both parties [David Cullen FN25 [E2]]. In addition, the *522 AOC lists several other cases that, although suggested by the parties, ultimately were not relied on by them. These are: Richard Farrow, Gerald Klatzkin, Angel Melendez, Maria Montalvo (V1), Maria Montalvo (V2), Thomas Patterson, Reginald Scott III, Adonis Thomas, Joseph Harris (M2, V1)[B1], Joseph Harris (M2, V2)[B1], Joseph Harris (M2, V3)[B1], Joseph Harris (M2, V4) [B1], Daron Josephs (T1, V1)[B1], Daron Josephs (T1, V2)[B1], Daron Josephs (T2, V1 and V2)[B1], John Lee Allen [E2], David Hester [E2], James Lawrence Lopez [E2], Donald Naples [E2], and Darryl Pitts [E2]. We, therefore, do not include them for comparison purposes.

FN23. Victims are indicated with a "V", the distinct murders with an "M", and the trials or pleas with a "T." All cases fall within the E1 subcategory, unless otherwise noted in brackets.

FN24. The State does not include Masini on either its own list or on its list of cases about which the parties disagree. The State nonetheless discusses that case.

FN25. The State originally included Cullen in its list of comparable cases, but later withdrew that submission. The State suggests that Cullen does not share "several defining characteristics" with defendant's case. Defendant concurs.

There remain, then, seven cases on which the parties do not agree: Booker (V1), Booker (V2), Koskovich (T1), Koskovich (T2), Menter, Pompey, and Reaves. Of those, only Koskovich, Menter, and Reeves were categorized as E1, and are thus presumptively comparable to defendant. Each one, however, is marked by characteristics that may substantially differentiate it from defendant. Neither Menter nor Reeves was a stranger-upon-stranger killing; in both cases, the killings were spurred by defendants' rejection by a woman. Although both cases involved brutal multiple murders, neither shares "several defining characteristics" with defendant's case and, therefore, both are excluded from the case-comparison portion of precedent seeking review.

Koskovich (T1 and T2) was a stranger-on-stranger robbery/murder. However, his crimes also had so many unique characteristics that his case defies comparison with defendant's case. Koskovich was only guilty of "own-conduct" murder as to one of the two victims. As such, although Koskovich's cases are coded in the E1 subcategory, they differ, at their core, from many multiple-victim murders. More importantly, Koskovich's case appears to be a "thrill-killing," which was its essential characteristic. While admittedly a very close question, Koskovich's cases are not included for comparison with defendant's case.

Booker and Pompey were both coded outside the E1 subcategory, and are therefore presumptively not comparable to defendant. *523 Pompey, like Menter and Reeves, was a case of unrequited love gone horribly wrong: Pompey killed his victims because one of them refused to reconcile with him. Pompey does not share enough essential characteristics with defendant to overcome the presumption that it is not comparable. *See State v. Morton (II), supra*, 165 *N.J.* at 256-57, 757 *A.*2d 184.

George Booker, who had a prior murder conviction, raped and killed two women as part of a crime-spree. The crime-spree, sexual assault, and prior murder all make this case sufficiently distinct from defendant's and, thus, is excluded from comparison.

In sum, we have determined to engage in case comparisons only in respect of the agreed upon cases: an aggregate of sixteen cases involving nine unique defendants. A very brief summary of each, followed by a comparison analysis, follows.

**1034 (i) *Bobby Lee Brown.*

Summary: Brown, who has been honorably discharged from the armed forces, and his girlfriend followed through on a plan to rob her eighty-two-year-old great aunt and her sixty-four-year-old great uncle. The great aunt was shot to death and the great uncle was shot and stabbed over ten times with a pair of scissors.

The jury found aggravating factors 4(f), escape detection, (as to the female victim) and 4(g), robbery murder, (as to both victims). The jury also found mitigating factors 5(c), defendant's age, and 5(h), the catch-all factor. The jury sentenced Brown to death for the murder of the great aunt and, because the jury could not unanimously agree on a sentence for the killing of the great uncle, Brown also received a life sentence. On appeal of the death sentence, we reversed for flaws in the instruction on the option of a non-unanimous vote on "own conduct." The conviction was affirmed, but would be vacated if the State again sought the death penalty. *State v. Brown*, 138 *N.J.* 481, 651 *A.*2d 19 (1994). The State opted not to seek the death penalty a second time. Brown received two life sentences, with a sixty-year period of parole ineligibility.

*524 *Comparison:* Defendant acknowledges that the victimization in his case was greater than that of the great aunt and likely greater than that of the great uncle. But, defendant suggests that the differences are vitiated by the planning apparent in Brown's crime and Brown's lack of psychiatric history, lack of suggestion of drug influence, and maturity, as evidenced by his successful military service. Defendant also points out that, although originally sentenced to death, Brown ultimately received a life sentence.

The State suggests that Brown and defendant are equally blameworthy, insofar as both selected elderly defendants whom they knew to be vulnerable. The State stresses that the jury in defendant's case rejected any psychological mitigating factors. Also, the State sees Brown's military service as evidence of his rehabilitative potential. The State also points to the increased victimization in defendant's case.

Although defendant's case in mitigation may have been slightly more compelling than Brown's, the difference is not meaningful enough to suggest that defendant's death sentence is disproportional, particularly in light of the increased victimization in defendant's case. We conclude that defendant's criminal culpability is equal to or greater than Brown's.

(ii) *Louis Crumpton.*

Summary: Crumpton, a thirty-six year old man living with AIDS, broke into a home to steal items. He was surprised by the victims, aged eighty-six and eighty-one. He beat the victims over the face, most likely with a blunt object. One victim was found dead and the other died four months later. After the State served its notice of aggravating factors, he pled guilty to two counts of felony murder and was sentenced to two consecutive life terms, with more than sixty-three years of parole ineligibility on each count.

Comparison: Defendant suggests that Crumpton's life sentences indicate that defendant's sentence is disproportionately harsh. Defendant points out that the victims in Crumpton's case *525 were older, and therefore more vulnerable. Defendant further suggests that there was no indication that Crumpton, while ill with AIDS, suffered any psychiatric disease. The State points out that Crumpton did not know his victims would be home, and that Crumpton suffered from AIDS and drug addiction.

Defendant's entry into the Hazards' home knowing someone was home increases his moral blameworthiness sufficiently **1035 to justify the difference in result between Crumpton and defendant, a distinction further highlighted by the fact that Crumpton suffered from AIDS and drug addiction.

(iii) *Felix Díaz.*

Summary: Díaz and his co-defendant went to the home of the co-defendant's ex-lover seeking money for drugs. Díaz and the co-defendant beat, shot, and stabbed two members of the ex-lover's family, including his eight-year-old niece. The defendants then waited for the ex-lover to return home and also killed him. That victim's body was burned and a pet dog also was killed.

The jury found the escape detection and felony murder aggravating factors. The jury also found Díaz's age (twenty-seven), lack of significant prior criminal history, and assistance to the State, in addition to the catch-all factor, to be mitigating. Díaz received consecutive life sentences; after the non-capital charges were added, his total term of parole ineligibility was more than one hundred years.

Comparison: Defendant suggests that Díaz's case is simply a more aggravated version of his, save that Díaz received a life sentence. Defendant points out that the victimization in Díaz's case was about the same as in his own, except Díaz killed three people and, as to the last victim, Díaz lay in wait. Defendant concedes that Díaz was "mildly retarded," but notes that defendant scored an eighty-one on a full-scale IQ test. Unlike Díaz, defendant suffered from bipolar disorder and had an abusive childhood. Defendant suggests that Díaz's case presents more criminal culpability than his, but in no event presents sufficiently *526 less to justify Díaz's life sentence as opposed to defendant's death sentence. In contrast, the State points out that Díaz's jury found four mitigating factors: his age, his lack of significant criminal history, his assistance to the State, and the "catch-all" factor.

This comparison is closely poised. Díaz's crime, with its additional victim and the fact that they waited for the final victim to return home, is more blameworthy than defendant's, but Díaz's character shows fewer indicia of culpability. The similarities in the cases are not dispositive of the issue of proportionality. We "expect that juries may decide similar cases differently. Disparity alone does not demonstrate disproportionality." *State v. Bey (IV), supra*, 137 *N.J.* at 386, 645 *A.*2d 685. Here, while there are disparate results in potentially similar cases, those differences, standing alone, are insufficient to suggest that defendant was unfairly singled-out for death.

(iv) *Walter Johnson.*

Summary: Johnson had done some carpentry work for a married couple. He went to their home and asked to use the phone. After the female victim caught Johnson stealing

jewelry, he shot the male victim and beat the female victim to death with a poker.

The jury found the murder involved extreme suffering, was committed to escape detection, and occurred contemporaneous to other felonies. As to the male victim the jury found only the catch-all mitigating factor; as to the female victim the jury found that Johnson was under extreme mental or emotional disturbance. Although Johnson received a death sentence for the killing of the female victim, the jury determined that the aggravating factors did not outweigh the mitigating factor for the male victim. We reversed Johnson's convictions after determining that his confession had been illegally obtained. *State v. Johnson*, 120 *N.J.* 263, 576 *A.*2d 834 (1990). He ultimately pled guilty to **1036 two counts of non-capital murder and was sentenced to consecutive life terms.

Comparison: Defendant concedes that his case may present slightly more culpability than Johnson, but contends that any *527 difference is sufficient to justify the fact that Johnson, after a reversed death sentence, ultimately received a life sentence. The State points out that a jury determined that Johnson, unlike defendant, was affected by mental defect or disturbance.

Johnson's initial death sentence, despite the jury's determination that he suffered from a mental defect or disturbance, is an indicator that defendant's death sentence is not disproportionate to Johnson's sentence. Other than that finding, these cases have similar degrees of moral blameworthiness, victimization, and character.

(v) *Frank Masini.*

Summary: Masini killed an elderly couple that employed him as a handyman. He stabbed the male victim in the neck with a letter opener. When the female victim responded to the commotion, Masini also stabbed her to death. Both victims had defensive wounds on their hands. The female victim was nude from the waist down. Masini was also linked to the murder of his elderly aunt and another woman, both of whom were stabbed in the neck and found partially nude. Masini claimed to have had “detachments from reality” in the months leading up to the other murders.

He pled guilty to the four murders and was sentenced to two consecutive terms of life imprisonment and a concurrent term of life imprisonment, with a thirty-year parole bar.

Comparison: Defendant points out that, while there may have been slightly less victimization in Masini's cases, his victims were older and more numerous, and there may have been sexual assaults involved. According to defendant, although Masini claimed to have experienced a detachment from reality, there was no evidence that he ever sought treatment, and, while he may have been drinking heavily that night, there was no evidence of a sustained substance abuse problem. The State suggests that Masini's culpability is reduced by his intoxication on the night of the murders.

*528 This comparison, again, poses a close question. There are aspects of Masini's case that make it more aggravated than defendant's-most importantly, that he killed four

people in three separate incidents-and aspects that make it less so, that is, the fact that he was drinking heavily. Both defendant and Masini exhibited a high level of blameworthiness, a large amount of victimization, and their characters are not universally mitigating.

(vi) *Ronald Mazique.*

Summary: Mazique went to the forty-one-year old female victim's house to obtain money; purportedly he intended to steal her income tax refund. He killed the victim and her six-year-old grandson by striking them over thirty times each with a hammer. In an effort to cover up the crime, Mazique turned on the gas in an attempt to explode the apartment. Mazique was also a suspect in a double homicide in his home-state of South Carolina.

Mazique was convicted of a number of crimes, including capital murder. The jury found that the murder involved an aggravated assault of the victim, was committed to escape detection, and was committed in the course of a robbery. The jury also determined that eight of the ten catch-all mitigating factors presented by Mazique were present, including factors related to childhood abuse. The jury could not reach a unanimous decision on sentencing. As a result, Mazique received consecutive life sentences for the murders and **1037 additional terms of imprisonment for other crimes.

Comparison: Defendant suggests that his case and Mazique's case "present roughly equal degrees of culpability." Defendant points out that although Mazique suffered sexual abuse as a child, he had no documented psychiatric history. Defendant also notes that Mazique was a suspect in two South Carolina homicides. The State, however, asserts that the level of brutality of defendant's crime exceeded that of Mazique. The State further differentiates between these cases by noting that Mazique was a drug and *529 alcohol addict, who had been physically and sexually abused by his father.

Whether Mazique was suspected of other killings does not enter into our calculus. For example, in *State v. Martini (II), supra*, 139 *N.J.* at 75-76, 651 *A.*2d 949, the defendant had pleaded guilty to a double homicide in Arizona, was awaiting trial for murder in Pennsylvania, and was a suspect in four other killings. Nonetheless, we did not consider that information in assessing the defendant's character because the jury had heard "neither of his prior record nor evidence of unrelated acts of violence." *Id.* at 76, 651 *A.*2d 949. Here, too, we consider only that evidence heard by the jury in comparing the cases.

The jury in Mazique's case accepted eight catch-all mitigating factors related to his traumatic upbringing. Although defendant, too, suffered a troubled childhood, the jury did not credit that evidence to any appreciable extent. Although the cases are quite similar, that distinction likely and rationally explains the difference between defendant's death sentence and Mazique's life sentence.

(vii) *Anthony McDougald.*

Summary: McDougald and a thirteen-year-old accomplice killed the parents of another thirteen-year-old, with whom he had been having sex. He attacked the parents in their bedroom, cutting the man's throat, stabbing him, and hitting him with a baseball bat. When the co-defendant proved unable to kill the woman quickly enough, McDougald hit the woman with a cinderblock, hit her with the bat, and then cut her throat. He then pulled off her underpants and violated her with the bat.

For each victim, the jury found aggravating factors 4(c), [intent to cause suffering], 4(f), [escape detection (to cover up his statutory rape of their daughter)], and 4(g) [murder within the course of burglary]. The jury also found that McDougald acted under extreme mental or emotional disturbance and the catch-all mitigating factor. Because the jury determined that the aggravating *530 factors outweighed the mitigating factors, he was sentenced to death. We overturned the death sentences because the instruction on the 4(c) "intent to cause suffering" aggravating factor was flawed. *State v. McDougald*, 120 *N.J.* 523, 577 *A.*2d 419 (1990).

In the penalty phase re-trial, the jury found that, as to the male victim, the murder was committed to escape detection; and, as to the female victim, that the murder was committed to escape detection and that the murder involved an aggravated battery and depravity of mind. The jury also found that McDougald was under extreme mental or emotional disturbance, suffered from mental disease, defect or intoxication, and had established some catch-all mitigating factors. The jury also found that while in the Marines, McDougald spent time in a Japanese prison and that he had sought help before the offense. The jury could not decide whether the aggravating factors outweighed the mitigating factors. Accordingly, McDougald was sentenced to consecutive life terms, with sixty years of parole ineligibility, to **1038 run consecutive to his sentences on the non-capital crimes.

Comparison: Defendant contends that McDougald's case, although characterized by rage and lacking robbery as a motive, is similar to his case, except with more victimization. According to defendant, there is no rational reason McDougald ultimately received a life sentence while defendant remains on death row. The State freely acknowledges that the brutality in McDougald's case was equal to that of defendant's. However, the State argues that defendant is more blameworthy for having intentionally selected older-and, hence, more vulnerable-victims. The State also argues that because McDougald's murders were "essentially motivated by rage, jealousy, and passion[,]" he is less blameworthy, although the jury's finding that McDougald committed the murders to escape detection belies the State's claim in this regard. The State further points out that the jury found two mitigating factors in McDougald's case that were not found in defendant's case: extreme mental or emotional disturbance and mental disease, defect, or intoxication.

*531 McDougald's crime was horrifying. But, because McDougald was initially sentenced to death and because the jury found the existence of two important mitigating factors that defendant's jury rejected, it cannot be said that McDougald's ultimate life

sentence indicates that defendant was unfairly singled out for capital punishment.

(viii) *Peter Regan.*

Summary: Regan left his girlfriend at a bar and went to her house to rob it. When a fifteen-year-old girl entered the home, Regan hit her five times with an aluminum baseball bat, killing her. When his girlfriend's twelve-year-old daughter entered the apartment, Regan hit her six times in the head and face with the bat, also killing her. Regan then removed the second victim's clothing so the incident would appear to be a rape. Regan had a prior record of assaults and a robbery, along with a history of drug and alcohol abuse.

Regan pleaded guilty to two counts of purposeful, knowing murder and one count of robbery. He was sentenced to two concurrent life terms, with thirty years of parole ineligibility for the murder and a twenty-year term with a ten-year parole bar for the robbery.

Comparison: Defendant concedes that Regan may be slightly less culpable than defendant, but suggests the difference is insufficient to justify Regan being allowed to plead guilty and avoid a penalty trial. In defendant's view, there was no evidence that Regan suffered abuse or had any mental impairment. Defendant also concedes that the victimization in Regan's case, though exacerbated by the undressing of one victim, was somewhat less than in his case, and that Regan may not have expected the house to be occupied.

The State argues that the victimization in Regan's case was less than in defendant's case. The State further notes that Regan's moral blameworthiness is diminished because he did not know the victims would be there. Finally, the State argues that Regan had *532 drug and alcohol problems, and was drinking on the night of the crime.

The central differences between Regan and defendant are that defendant decided to commit his crime in a home he knew would be occupied by elderly victims, and that Regan's attack was not as prolonged as defendant's. In comparison, this reduces the victimization in Regan's case. As a result, Regan's case does not suggest that defendant's death sentence was disproportionate.

**1039 (ix) *Roy Watson.*

Summary: Armed with a pipe, Watson broke into the home of an elderly couple. He went into their bedroom and severely beat them both. He then drank scotch while they died. He stole jewelry, furs, and money. He had an extensive, violent criminal record. He had been admitted to a mental hospital after his acquittal of the scalding death of his sister. At the time of the murder, he was a fugitive from a New York assault charge. Watson was addicted to barbiturates and crack cocaine.

After convicting him, a jury found that the murder was committed within the course of a burglary. The jury also found his age (he was forty-four and his attorneys argued that his age meant he would likely never leave prison) and his impaired capacity were mitigating factors. Because the jury deadlocked on whether to impose death, Watson received consecutive life sentences.

Comparison: Defendant concedes that the victimization in Watson's case, while severe, may have been less than in his case. But, defendant notes, Watson presented "no personal mitigation whatsoever." Defendant contends that Watson had no "indication of addiction, as opposed to use, of substances[.]" The State, on the other hand, notes that the degree of victimization in defendant's case was greater than Watson's. The State also suggests that Watson was surprised by his victims in the midst of his crimes. Finally, the State argues that Watson's culpability is diminished by the fact that he "was a severe and chronic drug abuser who was addicted to barbiturates and crack cocaine, and he was using *533 drugs and alcohol at the time of the crimes." This conclusion is supported by the jury's finding that Watson suffered from mental disease, defect, or intoxication.

Both parties include information about Watson that is unsupported in the AOC summary. Contrary to defendant's claim, Watson was a drug addict. Likewise, contrary to the State's assertion, there is no support in the summary for the idea that Watson was surprised by his victims: he entered the house armed and went directly to their bedroom, where he killed them. Nevertheless, Watson's addiction and intoxication may account for the disparate sentences he and defendant received.

f. *Proportionality Review-Conclusion.*

[77] Given Defendant's high degree of culpability, as determined by the procedure explained in *State v. Papasavvas (II), supra*, 170 *N.J.* at 480-81, 790 *A.*2d 798, as well as the results of the frequency analysis, we hold that defendant has failed to establish that his death sentence is disproportionate. We do so recognizing that no other member of defendant's statistical cohort-Category E1-is presently on death row. However, our task in proportionality review is not to slavishly adhere to blind statistical analyses. We are mindful that defendant has been placed in Category E1 (Aggravated multiple victims) largely by default: although defendant murdered multiple victims, none of his victims was a public servant (Category A), defendant did not have a prior murder conviction (Category B), defendant's murders were not contract killings (Category C), and the murders did not involve sexual assaults (Category D). In short, when confronted with so limited a sample, the scope of our proportionality review cannot be bounded solely by a mechanical comparison of sentences ultimately imposed within any given statistical category.

In the final analysis, we complete our proportionality review by engaging in a more detailed comparison between defendant and the remaining nine murderers within his E1 statistical cohort. As points **1040 of comparison, we distinguish between defendant and *534 Crumpton, Johnson, Masini and Regan because their life sentences were the result

of negotiated plea agreements, whereas defendant chose instead to place his fate in the hands of a jury. We also differentiate between defendant and Díaz, Mazique, McDougald and Watson because the juries in each of those latter cases either found that the aggravating factors did not outweigh the mitigating factors or they deadlocked on that issue, automatically resulting in the imposition of a life sentence. Thus, of the Category E1 group, only Brown remains as a meaningful point of comparison.

Like defendant, Brown murdered two elderly victims. Also like defendant, the jury found that the aggravating factors outweighed the mitigating factors and sentenced Brown to death. At present, however, Brown is serving a life sentence for reasons unrelated to his culpability: on appeal, we affirmed his conviction but reversed his death sentence because of an erroneous jury instruction. That affirmance came with a catch: if the State on retrial sought the death penalty, the conviction would have been vacated and the State would have been required to retry both the guilt and penalty phases of Brown's trial. Given that stark choice, the State bargained for, and Brown accepted, two consecutive life terms. In that latter respect, then, even Brown is dissimilar to defendant and is closer to the negotiated plea cases.

Taking into account the nature of defendant's crimes, the jury's finding that the aggravating factors outweighed the mitigating factors, and the fact that defendant's circumstances are different from, and more blameworthy than, those of the other members of Category E1, we conclude that defendant's death sentence is not disproportionate.[FN26]

FN26. We reject our dissenting colleague's view that, because no one else in the E1 Category has been sentenced to death, defendant's death sentence must, by definition, be disproportionate. Post, 190 *N.J.* at 553-68, 921 *A.*2d at 1051-60 (2007). We do not believe that the discharge of our responsibilities in respect of proportionality review requires a slavish adherence to statistical abstracts when, as here, they lead to absurd results: if the view advanced by the dissent were correct, single-victim murderers-those who may be eligible for the death penalty in a category other than the limited E1/aggravated multiple-victim murder-can remove all doubt by murdering yet another victim so as to qualify for inclusion in Category E1, thus avoiding the death penalty. No rational system of justice can reward a multiple murderer with immunity from the death penalty, while exposing a single-victim murderer to the ultimate penalty. Neither our procedures for proportionality review nor our system of jurisprudence as a whole countenance such a result.

*535 XIV.

EFFECT OF RACE ON THE IMPOSITION OF THE DEATH PENALTY.

A.

Defendant, an African-American, claims that his death sentence is unconstitutional because of the "the pernicious effect race has on capital cases." The State, on the other hand, points to *In Re Proportionality Review Project II*, 165 *N.J.* 206, 226, 757 *A.*2d 168 (2000), where we accepted Special Master David Baime's conclusion that there was no reliable evidence of race of victim or race of defendant discrimination in New Jersey's capital sentencing scheme. The State adds that the same conclusion was subsequently reached by the Special Master in *Report to the New Jersey Supreme Court: Systematic Proportionality Review Project, 2002-2003 Term,* at 54-55, and again in the *Interim **1041 Report to Special Master David Baime: Applying the 2003 Race Monitoring System to May 2004 Proportionality Review Date,* at 2 (*"Interim Report 2004"*). The State submits that, in the aggregate, there simply is no evidence to conclude that the race of either the defendant or his victims resulted in or caused discrimination in respect of the imposition of death sentences in New Jersey.

B.

Without fail, we have required that a defendant "relentlessly document[ ] the risk of racial disparity in the imposition of the *536 death penalty." *State v. Loftin (II)*, 157 *N.J.* 253, 315, 724 *A.*2d 129 (1999) (internal quotation marks omitted). We have made that requirement stringent because such a showing would invalidate an otherwise valid death sentence. *State v. Marshall (II)*, 130 *N.J.* 109, 213, 613 *A.*2d 1059 (1992). Whether based on the race of the victim or of the defendant, racial disparity is patently unacceptable:

We have no doubt that the people of New Jersey would not tolerate a system that condones disparate treatment for black and white defendants or a system that would debase the value of a black victim's life. Whether in the exercise of statutory proportionality review or our constitutional duty to assure the equal protection and due process of law, we cannot escape the responsibility to review any effects of race in capital sentencing.

[*Id.* at 214, 613 *A.*2d 1059.]

We have not yet been presented with persuasive evidence of such disparity. *See, e.g.*, *State v. Papasavvas (II), supra*, 170 *N.J.* at 534, 790 *A.*2d 798 (Coleman, J., dissenting) (rejecting defendant's claims of racial bias and geographic disparity); *State v. Morton*, 165 *N.J.* 235, 267-68, 757 *A.*2d 184 (2000), *cert. denied*, 532 *U.S.* 931, 121 *S.Ct.* 1380, 149 *L.Ed.*2d 306 (2001) (same); *In Re Proportionality Review Project II, supra*, 165 *N.J.* at 226, 757 *A.*2d 168 (concluding that evidence presently available did not support finding of racial bias or discrimination in administration of death penalty).

Special Master Baime's latest report on the impact of race on capital sentencing discerns no solid evidence that the race or ethnicity of defendants affects whether the cases progress to the penalty phase or whether the death penalty is imposed. *Interim Report 2004* at 1. The Special Master noted that, although two-variable analysis might indicate some disproportionality, that effect was not sustained when multi-variable analysis was

utilized. *Ibid.* Likewise, the Special Master found no statistically significant relationship between race of victim and imposition of the death penalty. *Ibid.* Some evidence exists that White-victim cases are more likely to advance to a penalty trial than African-American-victim cases; however, when county variability was taken into account, the discrepancy largely disappears. *Id.* at 2.

*537 The Special Master is confident that the administration of capital punishment in New Jersey is not infected with racial or ethnic bias. *Ibid.* He concludes that "we do not find consistent, statistically significant evidence of racial or ethnic prejudice in the administration of our death penalty statutes." *Id.* at 3. In the absence of any persuasive evidence from defendant to the contrary-and we underscore that, other than policy statements, defendant has tendered no evidence at all in support of this claim-we reject defendant's assertion that his death sentence is unconstitutionally tainted as a result of racial discrimination.

XV.

CUMMULATIVE ERROR.

We address defendant's final point: that the aggregate of his complaints suffices to **1042 vitiate his death sentence. The State, in response, claims that we "should reject defendant's request because no error occurred below and defendant received a fair trial."

[78] The standard for review of a trial is neither as stringent nor as unforgiving as defendant asserts. We repeatedly have made clear that

[t]he proper and rational standard [for the review of claimed trial errors] is not perfection; as devised and administered by imperfect humans, no trial can ever be entirely free of even the smallest defect. Our goal, nonetheless, must always be fairness. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak v. United States*, 344 *U.S.* 604, 619, 73 *S.Ct.* 481, 97 *L.Ed.* 593 (1953); *accord*, *State v. Marshall*, 123 *N.J.* 1, 169-70, 586 *A.*2d 85 (1991), *cert. denied*, 507 *U.S.* 929, 113 *S.Ct.* 1306, 122 *L.Ed.*2d 694 (1993).

[*State v. R.B.*, 183 *N.J.* 308, 333-34, 873 *A.*2d 511 (2005).]

That principle applies equally in death penalty cases. *See State v. Koskovich*, 168 *N.J.* 448, 540, 776 *A.*2d 144 (2001) ("[W]e still adhere to the general principle that a defendant is entitled to a fair trial but not a perfect one." (quoting *State v. Feaster*, 156 *N.J.* 1, 84, 716 *A.*2d 395 (1998) (internal quotation and editing marks omitted)); *State v. Timmendequas (I)*, 161 *N.J.* 515, 639, 737 *A.*2d 55 (1999), *cert. denied*, 534 *U.S.* 858, 122 *S.Ct.* 136, 151 *L.Ed.*2d 89 (2001) (same, explaining that "[t]his is true even in capital cases, *538 where we subject the record to intense scrutiny, recognizing that a defendant's very life is at stake." (citations and internal quotation marks omitted)). Thus, although it is a fundamental tenet of our system of justice that where "legal errors ... in

their aggregate have rendered the trial unfair, our fundamental constitutional concepts dictate the granting of a new trial before an impartial jury[,]" *State v. Orecchio*, 16 *N.J.* 125, 129, 106 *A.*2d 541 (1954), the predicate for relief for cumulative error must be that the probable effect of the cumulative error was to render the underlying trial unfair.

Defendant has made repeated assertions of trial error. However, our close scrutiny of defendant's penalty phase trial discloses that, in all material respects, no appreciable error was present. More fundamentally, it was fair. Therefore, we reject defendant's claim of cumulative error.

XVI.

CONCLUSION.

Our review of defendant's penalty phase trial, a review conducted under the stringent guidelines we apply in capital cases, leads us to the firm conclusions that the proceedings were fair, that defendant's death sentence was properly imposed, and that his death sentence is not disproportionate.

The judgment of conviction and sentence, including defendant's death sentence, are affirmed.

Justice ALBIN, concurring.

Defendant received a fair, not a flawless, penalty hearing. Unlike the majority, however, I would not downplay or excuse the errors made by the prosecutor, particularly those made in his opening remarks. Prosecutors must be reminded of the high standards expected of them in capital cases. Nevertheless, even by the exacting standards that we apply to capital proceedings, we do not reverse unless a prosecutorial error had the capacity to *539 alter the outcome. Because I do not believe that the errors committed here would have affected the jury's judgment, I cannot join the dissent.

Next, this is my first opportunity to speak to this Court's proportionality jurisprudence.**1043 I believe that our proportionality review has become a macabre and overly complex social science exercise that artificially classifies into distinct categories savage murders, many of which are hardly distinguishable from one another in their unspeakable cruelty and gruesomeness. Public confidence cannot be sustained in a system that people of ordinary intelligence cannot comprehend. The purpose of proportionality review is not to ensure uniformity in capital sentencing-an impossible goal given the myriad variables that lead to the imposition of life sentences in most death-eligible cases-but rather to ensure that the few death sentences meted out are not aberrational. Under this Court's proportionality jurisprudence, I cannot find that defendant's death sentence is aberrational when comparing his case to similar cases of defendants sitting on death row. For those reasons, I am compelled to affirm defendant's

sentence.

I.

I do not believe that we should mince words when a prosecutor's remarks exceed the bounds of propriety, even if those remarks do not warrant the reversal of a conviction or sentence. Here, perhaps innocently, the prosecutor in his opening statement placed an irrelevant factor not in the record before the jury-the claimed good faith of the State in pursuing a capital prosecution. The prosecutor stated that "[t]he State does not seek the death penalty on a routine basis. It is not something that we do lightly. The State seeks the death penalty when the State believes the facts call for it."

Whether the State seeks the death penalty routinely or not, lightly or not, or only so when "the facts call for it," were not relevant considerations for the jury. The jury had only one purpose-to determine whether the State proved beyond a reasonable*540 doubt an aggravating factor or factors and, if so, whether any such factor or factors outweighed beyond a reasonable doubt any mitigating factors found by any juror. Not only was there nothing in the record to support his statements, but the prosecutor in essence improperly vouched for the credibility of the State's case. The prosecutor suggested that his case was more worthy of belief because the State only sought the death penalty when a defendant really deserved it. By insinuating that the State reserved death penalty prosecutions only for special cases, the prosecutor, in effect, stated that he and "the State" believed that defendant's case was deserving of the death penalty. It makes no difference that the jury may have been able to deduce as much on the basis that the State was pursuing a death verdict.

Although the prosecutor's brief comments were clearly improper and offensive, I cannot conclude that the trial court abused its discretion in denying defendant's motion for a mistrial. Significantly, the court immediately gave a curative instruction, advising the jury to disregard any "personal opinion or personal belief" expressed by counsel. In light of the court's prompt corrective action, I do not believe that the prosecutor's limited comments had the capacity to lead to an unjust sentence. Moreover, I do not find the other issues raised by defendant "have substantially prejudiced defendant's fundamental right to have a" fair penalty hearing. *See* *State v. Timmendequas*, 161 *N.J.* 515, 575, 589, 737 *A.*2d 55 (1999) (*Timmendequas I)* , *cert. denied,* 534 *U.S.* 858, 122 *S.Ct.* 136, 151 *L.Ed.*2d 89 (2001).

II.

I also do not find that Wakefield's death sentence violates principles of proportionality set forth in our capital jurisprudence. Our current system of proportionality review has become an overly complex and **1044 inscrutable social science project that defies easy understanding and allows honorable jurists reading the same statistics and cases to reach diametrically opposite results. Our proportionality review must return to first principles.

*541 The “primary objective” of proportionality review is to “ ‘detect [ ] and prevent[ ] ... aberrational sentences' ”-not to “ ‘insure symmetry, or even a high degree of correlation, in the sentences imposed on comparable defendants.’ ” [FN1] *State v. Feaster*, 165 *N.J.* 388, 418, 757 *A.*2d 266 (2000) (*Feaster II*) (quoting *State v. Cooper*, 159 *N.J.* 55, 107, 731 *A.*2d 1000 (1999) (*Cooper II*), *cert. denied*, 532 *U.S.* 932, 121 *S.Ct.* 1380, 149 *L.Ed.*2d 306 (2001)). Thus, if a particular death sentence falls so far out of the heartland of comparable cases that it stands as an isolated quirk among the sentences of similar death-eligible defendants, it cannot survive proportionality review. Uniformity, therefore, is not the aim of proportionality review and, indeed, is not even possible in our current capital punishment system.

FN1. Although not required by the Federal Constitution, our capital system provides that a death-sentenced defendant is entitled to a “proportionality review” to “determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” *N.J.S.A.* 2C:11-3e; *see also Pulley v. Harris*, 465 *U.S.* 37, 50-51, 104 *S.Ct.* 871, 879, 79 *L.Ed.*2d 29, 40-41 (1984) (holding that proportionality review not constitutionally required in state capital-sentencing scheme).

When this Court compares a death-sentenced defendant to a non-death sentenced defendant, we attempt to compare their levels of culpability: moral blameworthiness, degree of victimization, and defendant's character. *State v. Timmendequas*, 168 *N.J.* 20, 40, 773 *A.*2d 18 (2001) (*Timmendequas II*). However, whether a capital murder defendant is tried, convicted, and sentenced to death depends on a number of vagaries in the process. *See Feaster II, supra*, 165 *N.J.* at 455, 757 *A.*2d 266 (Long, J., dissenting) (noting that “it is much more likely that a host of factors other than culpability, moral blameworthiness and character are determinative of who is sentenced to life and who is sentenced to death”). One such variable is whether a particular county prosecutor will proceed with or forgo a capital prosecution. That decision may be conditioned on such factors as the prosecutor's philosophical leanings, the relative strength of the case, or *542 the likelihood of obtaining a conviction in a county where the jurors may or may not be disposed to return a death verdict.

Inter-county disparity may be “one of the most significant variables in terms of death sentencing.” David S. Baime, *Report to the New Jersey Supreme Court: Systemic Proportionality Review Project 2004-2005 Term* 54 (Dec. 15, 2005). For example, in October 2005 in Cumberland County (population 150,000) the Public Defender's Office had seventeen defendants charged with murder and six defendants facing the death penalty, whereas in Essex County (population 800,000) it had eighty defendants charged with murder and none facing a capital prosecution. As of December 2005, only sixteen percent of death-eligible cases in Essex and Union Counties advanced to penalty trials, whereas fifty-seven percent of death eligible cases in Monmouth County and fifty-four percent in Middlesex County progressed to the penalty stage. *Id.* at 41-42.[FN2]

FN2. This Court has heard oral arguments on the issue of inter-county disparity in capital sentencing and eventually will have to decide to what degree it is present and whether any significant disparity is constitutionally tolerable.

**1045 Imposition of the death penalty also depends on whether the grand jury returns a capital indictment, *State v. Fortin*, 178 *N.J.* 540, 646, 843 *A.*2d 974 (2004) (*Fortin II*), and whether the prosecutor offers and the defendant accepts a plea bargain that will spare him the potential of a death sentence. Of course, we also recognize that consistency between different juries, even if they heard the same case, cannot be expected.

We must be mindful as well that jurors bring to the courtroom their own moral codes through which the evidence will be filtered as they proceed to decide, subjectively, the strength of the State's case. In the penalty phase, if a single juror determines that the State has failed to prove the existence of an aggravating factor, the defendant cannot be sentenced to death. *See N.J.S.A.* 2C:11-3c(3). Even when the jury unanimously agrees that the proofs establish the presence of one or more aggravating factors, if a *543 single juror does not find that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt, a sentence of life rather than death must be imposed. *Ibid.* Thus, because a single juror has the power to nullify the imposition of a death sentence, it is difficult to conclude that the jury's failure to return such a sentence necessarily reflects a community consensus of the appropriate punishment.

Next, capital convictions are subjected to an exacting scrutiny by this Court to ensure the fairness of the guilt and penalty-phase proceedings and the correctness of the sentence. Because of the high stakes in a capital prosecution, we have accorded capital defendants heightened procedural protections to minimize the potential for the wrongful imposition of a death sentence. *See State v. Feaster*, 184 *N.J.* 235, 250, 877 *A.*2d 229 (2005) (*Feaster III*). The result has been the reversal of most death penalty convictions and sentences. Thereafter, the State's decision to decline a capital re-prosecution may reflect less the so-called “death-worthiness” of the defendant than the availability of witnesses or desire to conserve financial resources. *State v. Martini*, 139 *N.J.* 3, 27, 651 *A.*2d 949 (1994) (*Martini II*), *cert. denied*, 516 *U.S.* 875, 116 *S.Ct.* 203, 133 *L.Ed.*2d 137 (1995).

Due to the host of variables that allow the channeling of discretion toward a life sentence, it should be no wonder that there are few inmates on death row today. Since 1982, when our current death penalty statute was enacted, there have been 455 death-eligible defendants. N.J. Death Penalty Study Comm'n, *New Jersey Death Penalty Study Commission Report* 24 (Jan.2007). Of those, 228 were tried capitally and, although sixty death sentences have been returned, through the reversal of convictions and sentences only nine persons are presently on death row. *Ibid.*

By surveying the multiple variables that determine whether death is imposed, I do not suggest that more death sentences would make the system a better one. The structure of our capital laws apparently represents a societal judgment that it is better to *544 err on the side of life, better to let a hundred death-worthy persons receive life sentences than wrongly impose a death sentence on even one person. That being said, such a system will never allow for uniformity in sentencing.

Our task here, therefore, is not vainly to look for consistency, but to determine whether Wakefield's death sentence is aberrational. This Court's proportionality analysis involves

two approaches, frequency review and precedent-seeking review, *see* *Cooper II, supra,* 159 *N.J.* at 70, 731 *A.*2d 1000, which are discussed at length in both Justice Rivera-Soto's and Justice Long's opinions. Central to proportionality review is setting the relevant universe **1046 of cases to which defendant's sentence is compared. Since this Court's first proportionality review, we have compared a defendant's case to that of all death-eligible homicides, even if a death sentence was not imposed or the prosecutor decided not to seek the death penalty. *See* *State v. Marshall,* 130 *N.J.* 109, 137, 613 *A.*2d 1059 (1992) (*Marshall II*), *cert. denied,* 507 *U.S.* 929, 113 *S.Ct.* 1306, 122 *L.Ed.*2d 694 (1993).

The Administrative Office of the Courts (AOC) has divided the universe of death-eligible cases into thirteen major categories and assigns each defendant to one of those categories. *Timmendequas II, supra,* 168 *N.J.* at 35, 773 *A.*2d 18; *Cooper II, supra,* 159 *N.J.* at 71, 731 *A.*2d 1000.[FN3] In conducting proportionality review, we *generally* limit our analysis to other cases that are in the same category as defendant. *See* *545 *State v. Harris,* 165 *N.J.* 303, 326, 757 *A.*2d 221 (2000) (*Harris III*), *cert. denied,* 532 *U.S.* 1057, 121 *S.Ct.* 2204, 149 *L.Ed.*2d 1034 (2001). The thirteen categories, however, are not air-tight compartments, and cross-over comparisons are permitted. The characteristics of a defendant's crime may fit into more than one category, and even if not, the crime nevertheless may be similar to crimes assigned to other categories.

FN3. The AOC assigns cases for comparison to the following categories, which track, although not sequentially, most of the statutory aggravating factors. *See N.J.S.A.* 2C:11-3c(4). Those categories are: (A) Victim is a Public Servant; (B) Prior Murder Conviction without A above; (C) Contract Killing without A-B above; (D) Sexual Assault without A-C above (subdivided into (1) aggravated and (2) other); (E) Multiple Victims without A-D above (subdivided into (1) aggravated and (2) other); (F) Robbery without A-E above (subdivided into (1) home, (2) business, and (3) other); (G) Torture/Depravity without A-F above; (H) Abduction without A-G above; (I) Arson without A-H above; (J) Escape Detection without A-I above; (K) Burglary without A-J above; (L) Grave Risk without A-K above; (M) Victim Under 14 Years Old without A-L above. *State v. Timmendequas,* 168 *N.J.* 20, 35-36, 773 *A.*2d 18 (2001) (*Timmendequas II*).

In the past, we have "maintain[ed] a certain tolerance and openness to cross-category comparisons." *State v. Morton,* 165 *N.J.* 235, 256, 757 *A.*2d 184 (2000) (*Morton II*), *cert. denied,* 532 *U.S.* 931, 121 *S.Ct.* 1380, 149 *L.Ed.*2d 306 (2001). In *Morton II,* we commented that we would compare a defendant's case to one that falls outside of his classification if the cases shared "several defining characteristics." *Ibid.* For example, we have expressed a willingness to compare two gas-station-robbery-murders even though one has been placed into cell B (prior murder conviction) and the other placed into cell F-2 (business-robbery). *Id.* at 256-57, 757 *A.*2d 184; *see also* *Feaster II, supra,* 165 *N.J.* at 408, 757 *A.*2d 266 (comparing defendant who committed murder in course of robbery of business to defendants in prior murder conviction and other-robbery categories); *Martini II, supra,* 139 *N.J.* at 51, 651 *A.*2d 949 (comparing defendant whose murders spanned several different categories to defendants assigned to several different cells).

With those proportionality principles in mind, I now evaluate whether Wakefield's death

sentence is aberrational. Defendant was assigned to the E-1 cell, a category of cases that involve the murder of multiple victims in the course of an additional felony. In preparation for defendant's proportionality review, the AOC identified twenty-eight other cases in the E-1 cell, comprised of nineteen individual defendants.[FN4] Six of those defendants pled guilty to non-capital murder or a lesser charge; two went to trial *546 after the prosecutor **1047 declined to capitally charge them; two entered into plea agreements after the State served a notice of aggravating factors; and seven proceeded to trial but the jury declined to impose the death penalty. Of the nineteen, four defendants were convicted of capital murder and received death sentences. In all four cases, this Court reversed either the conviction or the sentence. In the aftermath, Walter Johnson pled guilty to non-capital murder. Thomas Koskovich and Anthony McDougald received new penalty trials, but in both cases their juries were deadlocked and therefore life sentences were imposed. Last, Bobby Lee Brown received a life sentence because the State elected not to seek the death penalty again. [FN5]

FN4. A defendant may count as more than one case if he or she underwent a penalty trial for more than one victim, or if his or her death sentence was reversed and then tried again.

FN5. Johnson and Brown received life sentences for the murder of one of their victims and death sentences for the other. Therefore, the number of life and death decisions is twenty-one, rather than nineteen.

Given the many variables favoring a life sentence and the small number of defendants in the E-1 cell, it is not completely surprising that Wakefield is the only remaining death-sentenced individual in his category. For the majority and the dissent the battleground is the E-1 cell, with the majority arguing that Wakefield's crime and moral culpability are not truly comparable to his cohort class and the dissent claiming just the opposite.

Ultimately, the majority's considerable efforts to distinguish Wakefield from his cohorts are not convincing. For example, the majority contends that Wakefield is more deserving of death than thirty-six year old Louis Crumpton who savagely beat to death two women, aged eighty-six and eighty-one, during a home invasion that began as a garden-variety burglary. Crumpton pled guilty to non-capital murder. Unlike Wakefield, Crumpton suffered from AIDS and apparently was surprised by the presence of his victims, and, based on those factors, the majority concludes Wakefield's “moral blameworthiness” was sufficiently different to justify his death sentence and Crumpton's life sentence. *See ante* at 524-25, 921 *A*.2d at 1034-35.

*547 The majority also strains to find that Wakefield is more deserving of death than Ronald Mazique. At the time that he broke into the home of a forty-one-year old woman to steal her income tax return, Mazique was twenty-one years old. Mazique killed the woman and her six-year old grandson, striking each victim at least thirty times with a hammer. To conceal the crime, Mazique attempted to blow-up the apartment by turning on the gas jets in an oven. A penalty-phase jury could not return a unanimous death verdict and therefore Mazique was sentenced to consecutive life terms. Although both Mazique and Wakefield had troubled childhoods, the majority hypothesizes that

Wakefield's jury did not "credit [his] evidence to any appreciable extent." *Ante* at 529, 921 *A.*2d at 1037. The majority concedes that both "cases are quite similar," but it nevertheless speculates that the differing ways that separate juries viewed the traumatic upbringings of the two defendants "likely and rationally explains the difference between defendant's death sentence and Mazique's life sentence." *Ibid.*

Without engaging in hairsplitting distinctions, it is difficult to conclude that Wakefield is more death-worthy than Crumpton or Mazique or many of the other defendants in the E-1 category. The divergent outcomes cannot rationally be explained by distinguishing the heinousness of the murders they committed, their psychological impairments, or their dysfunctional childhoods. The system's vagaries, more than the relative moral blameworthiness of the defendants in the **1048 relatively small E-1 class, go much further toward explaining why Wakefield stands apart from the other defendants. Therefore, I cannot affirm Wakefield's death sentence based on the proportionality review conducted by the majority.

Nor do I agree with the approach taken by Justice Long in her dissent. Justice Long quite reasonably finds Wakefield's crime and moral blameworthiness characteristics indistinguishable from those of other members of the E-1 class, who are serving prison terms. *Post* at 565-67, 921 *A.*2d at 1058-59. From that premise, *548 she finds that Wakefield's death sentence cannot be upheld because, viewing the relevant factors, he is "no better or worse than the members of his band," and therefore he too should receive a life sentence. *See post* at 568, 921 *A.*2d at 1060. Justice Long's logic might be irrefutable if there were a statistically larger number of defendants in the E-1 group and if no cross-group comparisons were permitted.

If this Court were to hold that the death sentence in this case-where defendant assaulted and killed an elderly couple in their own home, set fire to their bodies, and went on a shopping spree with the money he stole-is disproportionate, it is unlikely that any multiple homicide death sentence would ever survive proportionality review. Indeed, the Wakefield case would become the impossible standard to meet in all future multiple-homicide proportionality review cases and the E-1 group would be shut forever. In short, the paradigm suggested by the dissent would render our proportionality review scheme a farce.

We must remember that the AOC categories are artificial constructs-not statutory mandates-and that the overall object of proportionality review is comparison to similar cases, in whatever categories those cases may be designated. *See N.J.S.A.* 2C:11-3e. The AOC categories were created to facilitate, not to thwart review. As an alternative to the analysis employed by the majority and the dissent, I would compare defendant's culpability to factually similar cases outside the E-1 group. Rigid comparison within a specific category is not required by *N.J.S.A.* 2C:11-3e or our case law. *See* *Morton II, supra*, 165 *N.J.* at 256-57, 757 *A.*2d 184. There is no point to strictly confining a defendant to one category when the facts and circumstances of a defendant's crime transcend multiple categories. Wakefield's crime is not only a "multiple victim" homicide (category E), but also a homicide in the course of committing a robbery (category F).

Accordingly, I will compare Wakefield's case to single-murder robbery (category F) cases in which this Court has upheld death sentences on proportionality review. Surely, Wakefield should not *549 be better situated because he murdered more than one person. The case of Nathaniel Harvey, who now sits on death row for a robbery-murder, provides a useful point of comparison.

Late at night or early in the morning, Harvey broke into the apartment of a woman he did not know and, while armed with a hammer and another blunt-force object, struck his victim fifteen times in the head, fracturing her skull. *State v. Harvey*, 159 *N.J.* 277, 309-10, 731 *A.*2d 1121 (1999) (*Harvey III*). After the brutal murder, Harvey, then age forty-four, washed the blood off the victim's body, changed the sheets, and then left her naked on the floor. *Id.* at 297, 310, 731 *A.*2d 1121.

As in the Wakefield case, the jury found that Harvey committed the murder while engaged in the commission of a burglary and a robbery, and that he did so to escape detection and apprehension. *Id.* at 288, 731 *A.*2d 1121. As in the Wakefield case, various jurors found as mitigating factors **1049 that Harvey endured a traumatic and abusive childhood. *See id.* at 312, 731 *A.*2d 1121. Neither Wakefield nor Harvey posited any justification for the murder. *See id.* at 313, 731 *A.*2d 1121.

This Court found that Harvey was moderately culpable with respect to the degree of victimization. *Id.* at 315, 731 *A.*2d 1121. In comparison, Wakefield's murder is notable not only because of the brutality inflicted on his elderly victims, but also because of the mental anguish suffered both by Mr. Hazard, who probably knew his wife would find him dead or be killed herself, and by Mrs. Hazard, who probably saw the body of her murdered husband. *See ante* at 515, 921 *A.*2d at 1029. Last, Harvey's character is distinguished by his extensive prior record, which included convictions for violent crimes, and by the lack of any remorse expressed in his allocution statement. *Harvey III, supra*, 159 *N.J.* at 314, 731 *A.*2d 1121. Defendant also has an extensive, though nonviolent, criminal record, and while he did apologize during his sentencing allocution, his post-crime shopping and partying spree evidenced a callous indifference to the horrors he had perpetrated. In short, I cannot conclude that Wakefield who *550 killed two elderly people in their home is less morally culpable than Harvey, who killed only one. Because this Court determined that Harvey's death sentence was not disproportionate, *id.* at 320, 731 *A.*2d 1121, then, it follows, as a matter of inexorable logic, that defendant's sentence should stand too.

That conclusion is bolstered by looking at the universe of comparable murder-robberies cases and, in particular, the case of Richard Feaster. In that case, Feaster was convicted of the robbery-murder of a gas station attendant from whom he stole $191.32, and sentenced to death. *Feaster II, supra*, 165 *N.J.* at 393-98, 757 *A.*2d 266. This Court upheld his death sentence after conducting proportionality review. *Id.* at 420, 757 *A.*2d 266. The victimization caused by Feaster's crime-a single gunshot wound-was significantly lower than Wakefield's. *See id.* at 406, 757 *A.*2d 266. Moreover, Feaster was raised by an emotionally and physically abusive father and his intellectual capacity placed him in the

borderline mentally retarded category. *Id.* at 405, 757 *A.*2d 266. Feaster had a fairly minor criminal history, compared to Wakefield's lengthier one. *See id.* at 406-07, 757 *A.*2d 266. It seems impossible to find that Wakefield's culpability is not at least equal to that of Feaster.

Therefore, when comparing Wakefield's death sentence to other "similar cases" in which the death sentences passed this Court's proportionality review, I necessarily conclude that Wakefield's sentence is neither aberrational nor disproportionate.[FN6]

FN6. In comparing defendant's case to similar cases where death has been imposed, we are simply following what is required by the statute. *See N.J.S.A.* 2C:11-3e ("Proportionality review under this section shall be limited to a comparison of similar cases in which a sentence of death has been imposed....").

III.

Last, I want to respond to Justice Long's suggestion that this Court should revisit *State v. Ramseur,* in which this Court upheld *551 the constitutionality of the death penalty. 106 *N.J.* 123, 170-73, 524 *A.*2d 188 (1987). In *Ramseur,* the Court specifically determined that the death penalty did not violate Article I, Paragraph 12, of our Constitution, which prohibits cruel and unusual punishment. *Ibid.* In doing so, the Court applied the "contemporary standards of decency" standard found in federal jurisprudence, *Trop v. Dulles,* 356 *U.S.* 86, 101, 78 *S.Ct.* 590, 598, 2 *L.Ed.*2d 630, 642 (1958). The Court determined in *Ramseur, supra,* decided in 1987, that the **1050 death penalty conformed to those standards under our State Constitution. 106 *N.J.* at 174, 524 *A.*2d 188.

Justice Long notes that attitudes have changed in twenty years and that "evolving standards of decency," as reflected in opinion polls and studies, indicate that the citizens of New Jersey are no longer enamored with the death penalty and would be happy to be rid of it. *Post* at 568, 921 *A.*2d at 1060. On that basis, Justice Long would consider declaring our death penalty unconstitutional. *Ibid.* I cannot subscribe to that approach because I do not believe that this Court has the constitutional authority to strike down the death penalty in its entirety under the "evolving standards of decency" test. [FN7] That is so because in 1992, the voters of New Jersey approved a constitutional amendment providing that the death penalty was not cruel and unusual punishment when imposed on a person who purposely and knowingly caused death or serious bodily injury resulting in death, if he committed the act himself or paid another to do it. *See N.J. Const.* Art. 1, ¶ 12. Applying "contemporary standards of decency" may have been *552 appropriate in 1987 when *Ramseur* was decided because then Article I, Paragraph 12 made no reference to the death penalty. Now, however, our State Constitution proclaims that the death penalty is not cruel and unusual punishment.

FN7. We may, however, as the United States Supreme Court has done, apply the "evolving standards of decency" standard in determining the constitutionality of the death penalty when applied to certain classes of defendants, such as juvenile offenders or the mentally retarded, and certain classes of crimes. *See, e.g., Roper v. Simmons,* 543 *U.S.*

551, 560-61, 578, 125 *S.Ct.* 1183, 1190, 1200, 161 *L.Ed.*2d 1, 16, 28 (2005); *Atkins v. Virginia*, 536 *U.S.* 304, 321, 122 *S.Ct.* 2242, 2252, 153 *L.Ed.*2d 335, 350 (2002). This Court also may insist that the death penalty comply with other constitutional provisions, such as the guarantees of due process and equal protection under Article I, Paragraph 1 of our State Constitution, and the fundamental fairness doctrine rooted in our common law. *See Doe v. Poritz*, 142 *N.J.* 1, 94, 99, 108-09, 662 *A.*2d 367 (1995).

There is no firmer expression of public opinion than a constitutional amendment. Although opinion polls may suggest that an increasing number of New Jersey residents are opposed to the death penalty, *see post* at 568, 921 *A.*2d at 1060, the only poll that will truly count in our representative democracy is if the popularly elected members of our Legislature vote to repeal the death penalty. In short, our Court cannot declare the death penalty to be cruel and unusual punishment when our Constitution states otherwise.

Last, I have a few observations about the current state of our capital punishment system. Although the few defendants currently on death row may fairly be described as the "worst-of-the-worst," sadly they are no worse than many of those who have been spared death sentences. Since the recent advent of modern capital punishment in 1982, hundreds of death-eligible defendants have entered the system, but only nine currently await execution. We must come to grips with the fact that the fates of the few death-slated inmates, however morally culpable they are for their crimes, are the product of what may appear to be a random selection. How else to explain that that so many depraved defendants who have committed heinous murders are serving ordinary prison sentences while only nine bide their time on death row. I am not suggesting that the machinery of our capital system is churning out too few death sentences, but given the perfect vision of a quarter-century of hindsight, the few death sentences meted out might appear arbitrary when compared to the life sentences imposed on so many other seemingly death-worthy defendants.**1051 The strange irony of our capital jurisprudence is that it runs counter to one of the primary purposes of the Code of Criminal Justice-uniformity in sentencing. *See State v. Natale*, 184 *N.J.* 458, 485, 878 *A.*2d 724 (2005) (identifying uniformity*553 in sentencing as " '[t]he dominant, if not paramount, goal of the Code' ") (quoting *State v. Kromphold*, 162 *N.J.* 345, 352-53, 744 *A.*2d 640 (2000)). But that is so not because of some evil design, but because of the multitude of procedural safeguards that favor the imposition of sentences other than death.

The people have the right to choose laws that reserve the ultimate punishment for the worst offenders. However, the people ultimately will have to decide whether a capital system that yields such widely disparate outcomes serves a legitimate penological purpose, whether it is any longer worth the financial expense and cost in lost expectations, and whether it is more harmful than healing to the innocent families who have lost loved ones.

Justice LONG, dissenting.

For proportionality review purposes, Brian Wakefield's cohort is made up of a motley crew of life-sentenced multiple murderers, who laid in wait for their victims and bludgeoned, shot, stabbed, and scissored to death men, women, and children of all ages.

Wakefield's crimes, execrable as they were, were in fact not “worse” than those of his comparators and the personal stories of those in his group were not “better” than his. Yet alone among his cohort, Wakefield awaits lethal injection while every other defendant will live out his days in prison. Advancing inconsequential and unprecedented distinctions, or no distinctions at all, the majority declares Wakefield's sentence of death to be proportional. Such a result cannot be countenanced in a system of laws.

I.

Because we believe that “death is different,” *Gregg v. Georgia*, 428 *U.S.* 153, 188, 96 *S.Ct.* 2909, 2932, 49 *L.Ed.*2d 859, 883 (1976), we have developed a proportionality review methodology that provides a “more expansive source of protections against the arbitrary and nonindividualized imposition of the death penalty” than does the United States Constitution. *State v. Ramseur*, 106 *N.J.* 123, 190, 524 *A.*2d 188 (1987).

*554 Proportionality review is unique in that it is not a “just deserts” analysis of one defendant's deathworthiness. Indeed, we presume that “the death sentence is not disproportionate to the crime in the traditional sense.” *Pulley v. Harris*, 465 *U.S.* 37, 43, 104 *S.Ct.* 871, 876, 79 *L.Ed.*2d 29, 36 (1984). We “inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime.” *Ramseur, supra*, 106 *N.J.* at 326, 524 *A.*2d 188 (quoting *Pulley, supra*, 465 *U.S.* at 43, 104 *S.Ct.* at 876, 79 *L.Ed.*2d at 36). The role of proportionality review “is to place the sentence imposed for one terrible murder on a continuum of sentences imposed for other terrible murders to ensure that the defendant ‘has not been singled out unfairly for capital punishment.’ ” *State v. Timmendequas*, 168 *N.J.* 20, 76, 773 *A.*2d 18 (2001) (Long, J., dissenting) (internal quotations omitted) (citations omitted).

Proportionality review is not a numbers game. Rather, it is the difficult substantive measurement of one defendant's character and crime against those of similarly-situated defendants. Indeed, even if every defendant in a cohort has been spared, a death sentence will not be disproportionate if the details of the subject defendant's crime or of his character warrant different treatment than the life-sentenced group. The polestar in each case is whether a defendant's culpability is greater than that **1052 of similarly-situated, life-sentenced defendants and whether “it equals or exceeds that of other death-sentenced defendants.” *State v. Loftin*, 157 *N.J.* 253, 335, 724 *A.*2d 129 (1999) (*Loftin II*) (quoting *State v. DiFrisco*, 142 *N.J.* 148, 184, 662 *A.*2d 442 (1995) (*DiFrisco III)* , *cert. denied*, 516 *U.S.* 1129, 116 *S.Ct.* 949, 133 *L.Ed.*2d 873 (1996)).

Because of the complexities of human nature and the enormously different details of individual crimes, the task of proportionality review is a difficult and, sometimes, macabre one. However, as Justice Brennan noted in *Pulley*,

although clearly no panacea, such review often serves to identify the most extreme examples of disproportionality among similarly situated defendants. At least to *555 this extent, this form of appellate review serves to eliminate some of the irrationality that

currently surrounds imposition of a death sentence.

[*Supra*, 465 *U.S.* at 71, 104 *S.Ct.* at 890, 79 *L.Ed.*2d at 53 (Brennan, J., dissenting).]

II.

Many of the deficiencies in our proportionality review scheme have been detailed previously. *See* *In re Proportionality Review Project*, 161 *N.J.* 71, 99-106, 735 *A.*2d 528 (1999) (*Proportionality Review I*) (Handler, J., concurring in part and dissenting in part) (criticizing Court's standard for assessing disproportionality); *DiFrisco III*, *supra*, 142 *N.J.* at 224-31, 662 *A.*2d 442 (Handler, J., dissenting) (criticizing principle of unique assignment); *State v. Martini*, 139 *N.J.* 3, 90-91, 651 *A.*2d 949 (1994) (*Martini II*) (Handler, J., dissenting) (discussing lack of statistical standard to measure disproportionality under frequency review); *State v. Marshall*, 130 *N.J.* 109, 249-50, 263-65, 613 *A.*2d 1059 (1992) (*Marshall II*) (Handler, J., dissenting) (criticizing coding of reversed death sentences as death sentences; inconsistency and inherent subjectivity of proportionality tests; inclusion of the defendant's own case in frequency analysis; and abandonment of generally-imposed standard for proportionality), *cert. denied*, 507 *U.S.* 929, 113 *S.Ct.* 1306, 122 *L.Ed.*2d 694 (1993).

Indeed,

the permeable boundaries of the process; its flaccidity; the constant change in standards from case to case; the utterly subjective way in which even legitimate standards are applied; and the consistent practice of the Court to focus only on the aggravating aspects of the case under review while underscoring the mitigating factors of the comparison cases allows the Court to conclude that virtually any death sentence is proportional.

[*Timmendequas*, *supra*, 168 *N.J.* at 78, 773 *A.*2d 18 (Long, J., dissenting).]

This case is emblematic of those problems.

III.

Frequency Analysis

In frequency analysis, a statistical modality, we attempt to determine the relative proportionality of a death sentence by *556 comparing it numerically with the universe of cases to which it is factually similar. *State v. Morton*, 165 *N.J.* 235, 245, 757 *A.*2d 184 (2000) (*Morton II)* , *cert. denied*, 532 *U.S.* 931, 121 *S.Ct.* 1380, 149 *L.Ed.*2d 306 (2001). Here, Wakefield has been assigned to the E-1 cell, which consists of cases that involve multiple homicide victims killed during the commission of an additional felony. In rejecting Wakefield's frequency-based claim of disproportionality, the majority points out that in the E-1 aggravated multiple victim category, without Wakefield,[FN1] 5/28, or 18%,

**1053 of the defendants were sentenced to death. *Ante* at 503, 921 *A*.2d at 1022. According to the majority, that augers poorly for Wakefield because it reflects a societal consensus that death is appropriate for E-1 offenders. *Ante* at 504-505, 921 *A*.2d at 1023.

FN1. Obviously, a defendant cannot be included in the salient factors statistics against which his sentence is to be compared. Otherwise his sentence would "confirm its own propriety." *Morton II, supra*, 165 *N.J.* at 289, 757 A.2d 184 (Long, J., dissenting) (quoting *Marshall II, supra*, 130 *N.J.* at 263, 613 *A*.2d 1059 (Handler, J., dissenting)).

Nothing could be further from the truth. The actual percentage is zero. Indeed, all five death sentences that constitute the numerator in the majority's fraction were reversed because of errors that rendered the trials in which they were imposed unfair. The four defendants comprising the five death sentences (Bobby Lee Brown (T1, V2), Walter Johnson (T1, V2), Anthony McDougald (T1, V1), (T1, V2), and Thomas Koskovich (T1)) have since been resentenced to life. To suggest that death sentences that were imposed in wrongful proceedings should somehow count against Wakefield in a societal consensus analysis is chilling. "The unfathomable irony of the Court's holding today is that although the Court found the reversed verdicts too untrustworthy for use in sentencing the individual defendants subject to them, it now finds them sufficiently trustworthy for use in sentencing other defendants who were not subject to them." *Marshall II, supra*, 130 *N.J.* at 254, 613 *A*.2d 1059 (Handler, J., dissenting).

*557 In short, a real calculation of death sentencing frequency demonstrates no societal consensus that death is an appropriate penalty for defendants in the E-1 category. On that backdrop, precedent-seeking review is of particular importance.

[T]he higher the frequency of life sentences in the pool of similar cases, the more searching will be the inquiry to test whether comparison with the life-sentenced cases (or more culpable death-sentenced cases) suggests that [a defendant's death] sentence was disproportionate in the sense of his having been singled out unfairly for capital punishment.

[*Id.* at 159, 613 *A*.2d 1059.]

IV.

Precedent-Seeking Review

A. Moral Blameworthiness

This case is a textbook example of the Court changing its standards on a case-by-case basis in order to achieve a foreordained outcome. For example, although Wakefield admitted to planning the robbery of the Hazards, no evidence was presented to prove that the murder itself was premeditated. In *State v. Papasavvas*, where the defendant broke

into a home in order to steal possessions therein and eventually murdered the owner, we noted that "the murder was not premeditated, at least not in advance of [defendant's] entry into the [victims'] home." 170 *N.J.* 462, 481-82, 790 *A.*2d 798 (2002). Based at least in part on that factor, we found "Papasavvas's moral blameworthiness to be moderate," and determined that his death sentence was disproportionate. *Id.* at 482, 495, 790 *A.*2d 798. Similar consideration was not given to Wakefield.

Further, the majority does not find Wakefield's age (twenty-three at the time the crime was committed) to reduce his blameworthiness. *Ante* at 513, 921 *A.*2d at 1028. Yet, in assessing Papasavvas, who was also twenty-three years old when he committed murder, we assigned "some mitigating weight to his age." *Papasavvas, supra,* 170 *N.J.* at 482, 790 *A.*2d 798.

*558 The other side of that coin is that in upholding death sentences on proportionality review, we have found defendants more **1054 deathworthy than those in their cohort, in part because those in the comparison group were *only* twenty-two or twenty-three years old when they committed murder. *See, e.g.*, *State v. Harvey* 159 *N.J.* 277, 298, 731 *A.*2d 1121 (1999) (*Harvey III*) ("Age was a mitigating factor for Dollard, Wolfe and Hart who were all twenty-two years or younger when they committed the murders for which they were charged."), *cert. denied,* 528 *U.S.* 1085, 120 *S.Ct.* 811, 145 *L. Ed.*2d 683 (2000); *State v. Harris,* 165 *N.J.* 303, 341, 757 *A.*2d 221 (2000) (*Harris II*) ("Unlike Harris, Marrero was relatively young when he committed murder, twenty-three years old."), *cert. denied,* 532 *U.S.* 1057, 121 *S.Ct.* 2204, 149 *L.Ed.*2d 1034 (2001); *Loftin II, supra,* 157 *N.J.* at 341, 724 *A.*2d 129 ("Feaster ... was only twenty-two years old at the time of his offense"). Yet, Wakefield's age plays little part in the majority's evaluation.

Further, although Wakefield has an extensive prior record, it is significant that he has never been convicted of a crime of violence. That is yet another characteristic that he shares with Papasavvas, whose death sentence we overturned on proportionality review. *Papasavvas, supra,* 170 *N.J.* at 495, 790 *A.*2d 798. As we said in *Papasavvas,* "[h]is criminal history increases his culpability. However, that is offset by the absence of violent offenses prior to this offense." *Id.* at 483, 790 *A.*2d 798. If we found Papasavvas's culpability diminished based on his lack of premeditation, his age, and his non-violent prior record, it is inconsistent that we not do the same when evaluating Wakefield's character.

The majority opinion is also paradigmatic of the Court's consistent practice of focusing our attention on a single feature of the case under review without recognizing its ubiquity. For example, Wakefield's motive to escape detection and the fact that he "likely could have completed the robbery without committing the murder" are declared by the majority "to substantially exacerbate his moral blameworthiness." *Ante* at 509, 921 *A.*2d at 1025. Those *559 factors, however, are nearly universally present in the comparison cases and yet are never considered in assessing the culpability of those defendants. Moreover, to the extent that a consideration is universal, it cannot be used to differentiate the culpability of one defendant from others.

Likewise, the majority concludes that the vulnerability of the Hazards adds to Wakefield's moral blameworthiness. *Ante* at 511-12, 921 *A*.2d at 1027. Again, vulnerable victims are a hallmark of the cases in Wakefield's cell. Ronald Mazique killed a six year old; Felix Díaz an eight year old; Peter Regan two adolescents. Brown, Masini, and Crumpton killed very elderly people, some older than the Hazards, one stroke-ridden. Thus vulnerability, as a universal characteristic, cannot be used to ratchet up Wakefield's culpability but not that of the others.

For the same reason, the majority's inclusion of the notion of family victimization in this analysis, *ante* at 512-13, 921 *A*.2d at 1027-28, is analytically unsound,

not because it is not terribly real, but because it is universal and thus cannot serve as a basis to distinguish between defendants. *Morton II, supra*, 165 *N.J.* at 293 [757 *A*.2d 184] (Long, J., dissenting) (criticizing Court's application of "non-decedent victim factor" to "every case in which the victim was a 'unique person' with a 'web of familial relations'- in other words, to every single murder case") (citation omitted).

[*Timmendequas, supra*, 168 *N.J.* at 83, 773 *A*.2d 18 (Long, J., dissenting).]

**1055 B. Victimization

I agree that the victimization in this case was high and that the Hazards suffered intense physical and mental pain. Where I part from the majority is in its concomitant suggestion that Wakefield's victimization of the Hazards exceeded that of the other criminal comparators. *See ante* at 515-16, 921 *A* .2d at 1029 . The horrific details of the comparison crimes, laid bare in Part V., *infra,* plainly underscore the wrongness of that conclusion. In the E-1 category, all victims suffered unimaginable deaths including beatings, stabbings, burnings, shootings, and bludgeonings. Victims had their skulls fractured , their dentures split, or their throats slit. *560 Some were murdered while attempting to crawl away. One lived on in a chronic vegetative state long after the assault. Several victims were older than the Hazards. Several were children, one as young as six. Some defendants actually laid in wait to murder their victims. One victim was stroke-impaired. Several defendants performed sexual acts on their victims post-mortem. Some defendants killed three or four victims. In the face of those facts, there is no rational basis from which to conclude that Wakefield's victimization of the Hazards exceeded that of his compatriots in crime . That is very important because the majority bases most of its justifications regarding Wakefield's sentence on that flawed sentiment. *E.g., ante,* at 524, 531-32, 921 *A*.2d at 1034, 1038-39.

C. Character

In terms of Wakefield's character, I find extraordinary the majority's conclusion that, although there was "evidence that Wakefield suffered from emotional disease or defect" and a troubled upbringing, (conditions we have always recognized as mitigating, *e.g.*, *Marshall II, supra*, 130 *N.J.* at 155, 613 *A*.2d 1059; *Papasavvas, supra*, 170 *N.J.* at 482,

790 *A.*2d 798), it "was contested by the State, thereby reducing its impact on defendant's blameworthiness." *Ante* at 512, 921 *A.*2d at 1027. This is the first time that mere State opposition is viewed as somehow affecting the quality of a mitigator.

Further, with respect to cooperation with the authorities, the majority recognizes defendant's statements to the police, his request that his mother cooperate, and his unconditional plea to all the crimes for which he stood charged. *Ante* at 518, 921 *A.*2d at 1030-31. That kind of cooperation has always been considered important mitigation in proportionality review cases. *See, e.g.*, *Papasavvas, supra*, 170 *N.J.* at 491, 790 *A.*2d 798 (distinguishing Papasavvas from life-sentenced defendant based on latter's confession to "everything except stealing the homeowner's jewelry"); *Harris II, supra*, 165 *N.J.* at 339, 757 *A.*2d 221 (noting life-sentenced defendant's willingness to plead guilty as mitigating *561 factor); *State v. Cooper*, 159 *N.J.* 55, 104, 731 *A.*2d 1000 (1999) (*Cooper II*) (distinguishing Cooper's death sentence from similarly-situated, life-sentenced defendant who, while initially denying involvement in murder, ultimately confessed), *cert. denied*, 528 *U.S.* 1084, 120 *S.Ct.* 809, 145 *L.Ed.*2d 681 (2000); *State v. Chew* 159 *N.J.* 183, 217, 731 *A.*2d 1070 (1999) (*Chew II*) (crediting another defendant with cooperation with authorities because, while sporadic, he confessed to killing the victim and implicated principal in murder-for-hire scheme), *cert. denied*, 528 *U.S.* 1052, 120 *S.Ct.* 593, 145 *L.Ed.*2d 493 (1999); *DiFrisco III, supra*, 142 *N.J.* at 207-08, 662 *A.*2d 442 (distinguishing defendant from similarly-situated, life-sentenced defendant who offered unconditional confession and voluntarily turned State's evidence). Yet, Wakefield receives no benefit because the majority concludes his cooperation was "designed to better his own plight, and not out of any sense of correctness." *Ante* at 518, 921 *A.*2d at 1031. Other than adopting**1056 the State's view, the majority's wholly subjective conclusion has no basis whatsoever. Moreover, even if it were true, we do not dice a defendant's cooperation so finely in assessing its bearing on culpability.

Again, with its failure to adhere to standards by which we have lived in prior cases, the majority effectively cuts the heart out of our proportionality review process.

V.

Comparison Cases [FN2]

FN2. I accept the majority's determination to engage in comparisons of the cases agreed upon by the parties. *Ante* at 521-23, 921 *A.*2d at 1032-33. Those include: Bobby Lee Brown (T1, V1), Bobby Lee Brown (T1, V2), Bobby Lee Brown (T2, V1, V2), Louis Crumpton, Felix Díaz, Walter Johnson (T1, V1), Walter Johnson (T1, V2), Walter Johnson (T2, V2), Frank Masini (M2), Ronald Mazique, Anthony McDougald (T1, V1), Anthony McDougald (T1, V2), Anthony McDougald (T2, V1), Peter Regan, and Roy Watson.

Because all E-1 offenders ultimately received life sentences, in order for the Court to uphold Wakefield's death sentence it must *562 conclude that Wakefield is worse than,

not merely as culpable as, his cohorts. Who are those comparison defendants that the majority concludes deserve to live while Wakefield awaits death?

Felix Díaz and a co-defendant broke into Díaz's ex-lover's house, awakening a male family member. They beat him and an eight year-old niece. Then they cut the man's throat and bludgeoned the eight year old to death before setting their bodies on fire. Díaz and his co-defendant then laid in wait for several hours for the ex-lover, rigging a light switch "so that the [victim] would be in a specific position for the murder." Hon. David S. Baime, *Report of the Special Master on Proportionality Review: State v. Brian Wakefield* B-12 (Oct. 21, 2004) [hereinafter *Wakefield Report*]. When the victim, a sixty-three year-old man, arrived home, Díaz shot him repeatedly and set his body on fire. A pet dog was also killed. Díaz's culpability is actually greater than Wakefield's. The majority recognizes the similarity between Díaz and Wakefield, and acknowledges the sentences are "disparate." *Ante* at 526, 921 *A.*2d at 1035.

Frank Masini murdered four people, including an elderly couple for whom he had worked as a handyman. He repeatedly stabbed the couple in the neck with a letter opener. When found, both were covered in blood, and the woman's girdle and underpants had been cut off. The victims had a number of defensive wounds on their hands. While investigating those murders, the police discovered similarities with the earlier murders of two elderly women (one Masini's eighty-five year-old aunt), each of whom had been stabbed repeatedly and found partially nude. Masini's culpability, as a middle-aged man with no psychological, alcohol, or drug abuse problems, who killed four people, is plainly greater than Wakefield's. Grudgingly, the majority characterizes them as equal. *Ante* at 528, 921 *A.*2d at 1036.

Walter Johnson, a twenty-four year old with a record of burglaries, shot a man and bludgeoned the man's wife to death with a poker as she attempted to escape after the gun misfired. The majority recognizes that Johnson's character, degree of blameworthiness,*563 and the victimization were "similar" to Wakefield's. *Ante* at 527, 921 *A.*2d at 1036.

Roy Watson, a forty-four year-old man with a long criminal history, beat an elderly couple to death, drinking scotch while watching them die and later stealing their belongings. His life sentence is recognized by the majority as "disparate." *Ante* at 532, 921 *A.*2d at 1039. However, **1057 his drug addiction is declared as a mitigating factor, whereas Wakefield's neurological impairment is not. *See ante* at 532-33, 921 *A.*2d at 1039. The majority also apparently does not consider the post-murder scotch drinking conduct as evidence of a lack of remorse although it concludes otherwise with respect to Wakefield's consumption of fast food after the commission of his crime. *See ante* at 532-33, 921 *A.*2d at 1039.

Ronald Mazique killed a woman and her six year-old grandson by striking them over thirty times each with a hammer, and then attempted to blow up their apartment by turning on the gas. Although recognizing his case as "quite similar" to Wakefield's, the majority simply distinguishes them on the ground of Mazique's "traumatic upbringing,"

while discounting the jury's findings of emotional and physical neglect and domestic violence by Wakefield's family. *Ante* at 529, 921 *A.*2d at 1037.

Peter Regan, a twenty-eight year old with a history of robbery and assault, was burglarizing his girlfriend's house when a fifteen year old entered the residence. He picked up an aluminum baseball bat and hit her in the head. When she started screaming and tried to get up from the floor, he continued to hit her in the head until she died. When his girlfriend's twelve year-old daughter entered the home, Regan killed her by hitting her six times in the head with the aluminum bat. He then removed the victims' clothing from the waist down to make it look as if a rape had occurred. How the majority can conclude that the victimization in this case is less than Wakefield's is unfathomable. *Ante* at 531-32, 921 *A.*2d at 1038.

*564 Anthony McDougald was twenty-seven years old when he enlisted the help of a thirteen year-old girl, with whom he was romantically involved, in murdering the parents of another thirteen year-old girl, with whom he had had a sexual relationship. McDougald first slit the father's throat and stabbed him in the chest multiple times. When the victim began crawling away, McDougald hit him on the head with a bat, crushing his left ear and fracturing his skull on both sides. The Medical Examiner estimated that the father continued to survive for approximately ten to fifteen minutes. McDougald then entered the bedroom and hit the mother on the head with a cinder block and the bat before cutting her throat. He also pulled down her underpants and inserted the bat three inches into her vagina. McDougald came from a deprived, abusive background and was involved with drugs when he committed murder. Nevertheless, the sheer brutality of his crime, along with the fact that he persuaded a thirteen year-old girl to be his accomplice, renders him more culpable than Wakefield. Yet, despite its assessment that McDougald's crimes were "horrifying," the majority concludes, without discussing Wakefield's own mitigators, that because McDougald had two mitigators that Wakefield did not (extreme mental disturbance and intoxication), Wakefield's death sentence is not disproportionate. *Ante* at 530, 921 *A.*2d at 1038.

Louis Crumpton's case, especially, suggests the disproportionality of Wakefield's sentence, because of the similarity of the facts. Crumpton, like Wakefield, brutally killed two elderly people in the course of a burglary. In Crumpton's case, one of his victims, an eighty-six year-old woman, was discovered with severe trauma to her head and face, blackened eyes, and dentures split in two. The other victim, an eighty-one year-old woman was found sitting upright against a couch, covered in blood and with severe trauma to her face. She did not die immediately but lived in a vegetative state for several months. Crumpton, **1058 a thirty-six year-old man, had perpetrated numerous burglaries in the area. The majority justifies Wakefield's death sentence on the ground that he entered the Hazard's home knowing it was occupied. *Ante* at 525, 921 *565 *A.*2d at 1034. How could that be the difference between life and death given the extraordinary violence of Crumpton's crimes against elderly victims and the absence of standard psychological mitigators in his case?

Bobby Brown, a twenty-three year old, killed his paramour's eighty-two year-old, stroke-

impaired aunt and sixty-four year-old uncle. The uncle was stabbed ten times with scissors and was "hard to kill" according to Brown. Baime, *supra*, *Wakefield Report*, at B-6. The aunt was shot. Brown had no psychiatric history or drug influence. The majority recognizes Wakefield's mitigation as greater than Brown's but justifies Wakefield's death sentence based solely on "increased victimization." *Ante* at 524, 921 *A*.2d at 1034.

The details of those comparison cases underscore that there is no real distinction between Wakefield and the others that justifies his death over their lives.

VI.

Perhaps recognizing that the subjective distinctions in its comparisons do not justify a lethal injection for Wakefield and a life sentence for everyone else, the majority adopts a new scheme of comparisons,

by engaging in a more detailed comparison between defendant and the remaining nine murderers within his E1 statistical cohort. As points of comparison, we *distinguish between defendant and* Crumpton, Johnson, Masini and Regan because their life sentences were the result of negotiated plea agreements, whereas defendant chose instead to place his fate in the hands of a jury. We also *differentiate between defendant and* Díaz, Mazique, McDougald and Watson because the juries in each of those latter cases either found that the aggravating factors did not outweigh the mitigating factors or they deadlocked on the issue, automatically resulting in the imposition of a life sentence. Thus, of the Category E1 group, only Brown remains as a meaningful point of comparison.

[*Ante* at 533-34, 921 *A*.2d at 1039-40.]

The problems with that approach are legion. First, we have never made the distinctions in death penalty cases that the majority here adopts. For example, it distinguishes Crumpton, Johnson, Masini, and Regan from Wakefield, on the basis of the former having been *566 subject to plea agreements. *Ante* at 533-34, 921 *A*.2d at 1039-40. Defendant thus stands as the only individual in the history of this Court's proportionality review to be deprived of the benefit of comparison to defendants who have pled guilty, thereby avoiding capital prosecution.[FN3] As prior **1059 cases make clear, the Court has never before used a plea bargain, in itself, as a distinguishing characteristic among death-eligible cases.

FN3. *See Papasavvas, supra*, 170 *N.J.* at 496-510, 790 *A*.2d 798 (comparing the defendant's sentence to life-sentences of defendants who pled guilty); *Timmendequas, supra*, 168 *N.J.* at 57-68, 773 *A*.2d 18 (same); *State v. Feaster*, 165 *N.J.* 388, 433-41, 757 *A*.2d 266 (2000) (*Feaster II*) (same), *cert. denied*, 532 *U.S.* 932, 121 *S.Ct.* 1380, 149 *L.Ed.*2d 306 (2001); *Harris II, supra*, 165 *N.J.* at 331-33, 757 *A*.2d 221 (same); *Morton II, supra*, 165 *N.J.* at 270-87, 757 *A*.2d 184 (same); *Harvey III, supra*, 159 *N.J.* at 320-43, 731 *A*.2d 1121 (same); *Chew II, supra*, 159 *N.J.* at 226-49, 731 *A*.2d 1070 (same); *Cooper II, supra*, 159 *N.J.* at 97-107, 731 *A*.2d 1000 (same); *Loftin II, supra*, 157 *N.J.* at

348-71, 724 *A.*2d 129 (same); *DiFrisco III, supra*, 142 *N.J.* at 187-203, 662 *A.*2d 442 (same); *Martini II, supra*, 139 *N.J.* at 54-74, 651 *A.*2d 949 (same); *State v. Bey*, 137 *N.J.* 334, 369-82, 645 *A.*2d 685 (1994) (*Bey IV*) (same), *cert. denied*, 513 *U.S.* 1164, 115 *S.Ct.* 1131, 130 *L.Ed.*2d 1093 (1995); *Marshall II, supra*, 130 *N.J.* at 175-88, 613 *A.*2d 1059 (same).

The majority's error in distinguishing cases where a jury "either found that the aggravating factors did not outweigh the mitigating factors or they deadlocked on that issue," is even graver. *Ante* at 534, 921 *A.*2d at 1040. A jury verdict that the aggravating factors do not outweigh the mitigating factors is a *unanimous* determination that the defendant is not deathworthy under *N.J.S.A.* 2C:11-3c(3)(b). Further, where a jury is deadlocked on the ultimate balance of the aggravating and mitigating factors, this Court has, without fail, treated such cases as life sentences for the purposes of proportionality review comparisons.[FN4]

FN4. *See Papasavvas, supra*, 170 *N.J.* at 496-510, 790 *A.*2d 798 (comparing the defendant's sentence with life-sentences of defendants whose juries were nonunanimous); *Timmendequas, supra*, 168 *N.J.* at 57-68, 773 *A.*2d 18 (same); *Feaster II, supra*, 165 *N.J.* at 420-33, 757 *A.*2d 266 (same); *Harris II, supra*, 165 *N.J.* at 334-41, 757 *A.*2d 221 (same); *Morton II, supra*, 165 *N.J.* at 270-87, 757 *A.*2d 184 (same); *Chew II, supra*, 159 *N.J.* at 226-49, 731 *A.*2d 1070 (same); *Cooper II, supra*, 159 *N.J.* at 116-32, 731 *A.*2d 1000 (same); *Loftin II, supra*, 157 *N.J.* at 348-71, 724 *A.*2d 129 (same); *DiFrisco III, supra*, 142 *N.J.* at 187-203, 662 *A.*2d 442 (same); *Martini II, supra*, 139 *N.J.* at 54-74, 651 *A.*2d 949 (same); *Bey IV, supra*, 137 *N.J.* at 369-82, 645 *A.*2d 685 (same); *Marshall II, supra*, 130 *N.J.* at 175-88, 613 *A.*2d 1059 (same).

*567 In treating a plea, a verdict, and a jury's inability to decide whether a defendant is deathworthy as characteristics distinguishing between cases, the Court essentially creates distinctions where there should be none. *Ante* at 533-34, 921 *A.*2d at 1039-40. Those invalid distinctions reduce the universe of cases to a point where proportionality review is no longer meaningful. To be sure, the majority is free to jettison our scheme or to retool it for future cases. What it is not free to do is to rely on distinctions that confound our prior jurisprudence to justify Wakefield's death. Wakefield is no better or worse than the members of his band. Yet, he alone awaits death and they have been spared. That outcome cannot stand.

VII.

One final note. The death penalty was declared constitutional over twenty years ago in *Ramseur, supra*, 106 *N.J.* at 154, 524 *A.*2d 188, and we have continued perfunctorily to give that declaration lip service. *See, e.g.*, *State v. Josephs*, 174 *N.J.* 44, 138-40, 803 *A.*2d 1074 (2002). Nevertheless, it is time to revisit the issue because *Ramseur, supra*, relied on "evolving standards of decency" to uphold that ultimate sanction. 106 *N.J.* at 171, 524 *A.*2d 188 (quoting *Trop v. Dulles*, 356 *U.S.* 86, 101, 78 *S.Ct.* 590, 598, 2 *L.Ed.*2d 630, 642 (1958)). If those standards applied then-they apply now. I have previously detailed some changes that have taken place since *Ramseur* was decided.

Indeed, ... a recent survey by the highly respected Eagleton Center for Public Interest Polling, a project of the Institute of Politics of Rutgers University, provides compelling evidence that community consensus against the death penalty is continuing to evolve. Eagleton Institute of Politics, New Jerseyans' Opinions on a Death Penalty Moratorium (May 2002) [hereinafter Eagleton Survey].

The study, based on interviews conducted with 803 New Jersey residents in May 2002, evinces a significant decrease in support for the death penalty. It shows that *568 60 percent of New Jersey residents support the death penalty as punishment for murder. *Id.* at 1. Sixty-three percent supported it when the issue**1060 was studied in 1999. *Id.* at 2. When we last considered the constitutionality of the death penalty, the then most recent surveys, conducted in 1977 and 1981 by the Eagleton Poll, showed public support for this State's death penalty at 72 percent.

When presented with the alternative of life in prison without parole, the public's support for the death penalty dropped to 36 percent, down from 44 percent in 1999. Eagleton Survey at 3. Moreover, as in prior years, New Jersey residents are less likely than other Americans to prefer the death penalty over life in prison without parole. *Ibid.* In addition, 66 percent of New Jersey residents-including 60 percent of those who favor the death penalty overall-favor a temporary halt to executions while a study is conducted to ascertain whether the death penalty is being administered accurately, fairly, and economically. *Id.* at 4.

The majority's reliance on our legislature's inaction regarding the death penalty as “the best and most reliable indicator” of contemporary values is mysterious in light of its citation to the recent United States Supreme Court decision in *Atkins v. Virginia*, 536 *U.S.* 304, 122 *S.Ct.* 2242, 153 *L.Ed.*2d 335 (2002), which held, among other things, that a national consensus has developed in the last thirteen years against the execution of mentally retarded persons. Despite that national consensus, our capital legislation still authorizes the execution of the mentally retarded, indicating that, at least as far as the United States Supreme Court is concerned, our legislature is out of synchronicity with “evolving standards of decency.” *Id.* at 311, 122 *S.Ct.* at 2247, 153 *L.Ed.*2d at 344.

[*Josephs, supra*, 174 *N.J.* at 162-64, 803 *A.*2d 1074 (Long, J., concurring in part and dissenting in part) (citations omitted).]

The majority's citation to the *New Jersey Death Penalty Study Commission Report* that reinforces my view of the changing moral climate, renders more curious its adamant refusal even to consider the issue. *Ante* at 498, 921 *A.*2d at 1018. I remain, as I was in *Josephs:*

[M]ystified by the Court's resistance to revisiting a fifteen [now twenty] year-old opinion that, by its very terms, was rooted in conclusions about the public's appetite for the death penalty that appear to have changed. The suggestion that the Court's past perfunctory rejection of equally perfunctory challenges to *Ramseur* over the years gives currency to

that opinion is neither jurisprudentially sustainable nor an appropriate response to a case involving the ultimate sanction of death.

[*Id.* at 164-65, 524 *A.*2d 188 (Long, J., concurring in part and dissenting in part).]

For those reasons, as well as the reasons expressed by Justice Wallace in his dissenting opinion on the merits, I dissent.

*569 Justice WALLACE, JR., dissenting.
When life hangs in the balance, error has no place. Indeed, "the nature of the death penalty, which leaves no room for the error tolerable in other cases, requires 'a level of error-free process that is commensurate with the criminal sanction of death.' " *State v. Papasavvas*, 163 *N.J.* 565, 636, 751 *A.*2d 40 (2000) (Long, J., dissenting) (quoting *State v. Bey*, 112 *N.J.* 45, 119, 548 *A.*2d 846 (1988) (Handler, J., concurring)), *remanded by* 170 *N.J.* 462, 790 *A.*2d 798 (2002).

In defendant's penalty phase trial, the process was far from error-free. In fact, there were numerous errors which, when considered cumulatively, served to deprive **1061 defendant of the right to a fair trial. Because I cannot place confidence in the death sentence imposed under such circumstances, I must dissent.

I.

This Court has previously recognized that it must exercise particular vigilance in reviewing prosecutorial misconduct claims in capital cases, dismayed as it was "by the frequency of prosecutor's comments that lay 'beyond the bounds of propriety.' " *Papasavvas, supra*, 163 *N.J.* at 622, 751 *A.*2d 40 (citation omitted). Moreover, this Court has expressed a willingness to find prejudice resulting from prosecutorial misconduct in a capital case more readily than in other criminal matters "[b]ecause death is a uniquely harsh sanction." *State v. Ramseur*, 106 *N.J.* 123, 324, 524 *A.*2d 188 (1987).

To be sure, prosecutors have a special duty to seek justice. *See, e.g.*, *State v. Reddish*, 181 *N.J.* 553, 641, 859 *A.*2d 1173 (2004) (noting that "prosecutors are charged not simply with the task of securing victory for the State but, more fundamentally, with seeing that justice is served"). "Prosecutors may fight hard, but they must also fight fair." *State v. Pennington*, 119 *N.J.* 547, 577, 575 *A.*2d 816 (1990), *overruled on other grounds by State v. Brunson*, 132 *N.J.* 377, 625 *A.*2d 1085 (1993), *and superseded by* *570 *statute*, *N.J.S.A.* 2C:11-3i, *as recognized in State v. Cruz*, 163 *N.J.* 403, 412, 749 *A.*2d 832 (2000).

In my view, the prosecutor overstepped the bounds of fairness on several occasions, beginning with the invocation of the authority of the State in the opening statement and later in casting unjustified aspersions on defense counsel and witnesses during the trial.

A.

Where a prosecutor has invoked the authority of the State, courts have not hesitated to find a deprivation of a defendant's right to a fair sentencing hearing. The United States Court of Appeals for the Eleventh Circuit explained that "[s]uch arguments are objectionable because their effect is to assure the jurors that someone with greater experience has already made the decision that the law imposes on them." *Tucker v. Zant*, 724 *F.*2d 882, 889 (11th Cir.1984), *vacated and remanded sub nom. Tucker v. Kemp*, 474 *U.S.* 1001, 106 *S.Ct.* 517, 88 *L.Ed.*2d 452 (1985).

In his opening statement, the prosecutor clearly invoked the authority of the State when he told the jury, "[t]he State does not seek the death penalty on a routine basis. It is not something that we do lightly. The State seeks the death penalty when the State believes the facts call for it." In response to defense counsel's motion for a mistrial, which was denied, the trial court issued the following instruction to the jury:

If during the course of either opening any counsel referred to their personal opinion or personal belief, that is not a proper aspect of presentation and counsel's belief or counsel's opinion is not evidence and is indeed not proper argument either. So to the extent there was any such argument or presentation made, it should be disregarded by you and you should allow that to play no role in any determination which you make.

That instruction fell short of curing any prejudice stemming from the prosecutor's statements. Indeed, the instruction was conditional, and thus diluted. By referring to the expression of a personal opinion, the instruction did not directly address the true problem of the prosecutor's invocation of the experience of the *571 State. As this Court explained in a similar context, "only **1062 a clear and precise instruction referring specifically to the improprieties and disapproving them could possibly have eliminated the harm already done to the defendant's rights." *State v. Farrell*, 61 *N.J.* 99, 107, 293 *A.*2d 176 (1972). The failure to give a clear and precise instruction to disregard the prosecutor's references to the State not seeking the death penalty on a routine basis, and the like, was error.

B.

Additionally, the prosecutor overstepped the bounds of propriety on several other occasions throughout the penalty phase trial. It is well-established that prosecutors may not cast "unjustified aspersions on the defense or defense counsel." *State v. Nelson*, 173 *N.J.* 417, 461, 803 *A.*2d 1 (2002) (citing *State v. Smith*, 167 *N.J.* 158, 177, 770 *A.*2d 255 (2001)). Here, when the prosecutor implied that defense counsel was not forthcoming in providing discovery materials and asking questions of defense experts that went beyond the proper scope of cross-examination, the prosecutor violated that fundamental maxim.

Further, the prosecutor's unwarranted comments and questions that impugned the integrity of various defense witnesses were not appropriate. This Court in *Nelson* set aside the defendant's death sentence because of the improper comments by the prosecutor, which included implications that defense witnesses were not credible because

they were part of the "defense team." *Id.* at 461-63, 803 *A.*2d 1. Here, the prosecutor's comments similarly gave the impression that defense experts were biased, if not worse. The prosecutor asked a defense medical expert, "[y]ou were hired for court purposes. And once you are done here, your work is done with Mr. Wakefield, correct?" He then asked that expert, "[a]s a physician, your job and your oath requires you to help and treat patients, correct?" That series of questions was meant to imply that the doctor was merely a mercenary who violated his oath by evaluating defendant strictly for the purposes of trial.

*572 When the defense social worker who was presenting defendant's social history testified on cross-examination, she told the prosecutor, in response to his comment that a specific quote did not appear in a report, "I don't feel comfortable relying on what you're saying." The prosecutor responded, "[w]ell, the feeling is mutual, ma'am." Such a personal attack on the witness's veracity was completely improper and undermined the witness's testimony. Because the social worker was a critical witness for defendant, the prosecutor's comment served to violate defendant's right to a fair trial.

Along with the instances discussed above, the prosecutor engaged in other improper behavior throughout the trial, such as, in his summation, likening defendant to a wolf, a tactic that this Court has criticized. *See* *State v. Williams*, 113 *N.J.* 393, 455-56, 550 *A.*2d 1172 (1988).

C.

Under the rules of professional responsibility, the prosecutor must "exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extra judicial statement that the prosecutor would be prohibited from making." *RPC* 3.8(f).

At trial, prospective juror, Paul Trinkle, who was selected to serve during the initial voir dire process, was later excused when he revealed after a three month adjournment before the trial began that he and a secretary in the prosecutor's office had talked about a witness in the case. When questioned by the trial court, Trinkle stated that what the secretary told him **1063 about the witness could impact his ability to fairly judge that witness's testimony.

Defense counsel wanted Trinkle as a juror on the panel, but the conduct of the prosecutor's employee deprived counsel of the opportunity to do so. That deprivation, caused by the actions of the prosecutor's secretary, can be attributed to the prosecutor under basic agency principles. *See* *573 *State v. Baker*, 310 *N.J.Super.* 128, 133, 708 *A.*2d 429 (App.Div.1998) (attributing knowledge to State where head of prosecutor's office, rather than prosecutor on case, invaded secrecy of jury deliberation process). In failing to ensure that its employees did not taint the jury pool, the State denied defendant a juror who might have provided the single vote that could have made the difference between life and death-for in a capital case, if even one juror finds the aggravating factors

do not outweigh the mitigating ones, death cannot be imposed.

D.

As this Court has stated, "[i]n the highly emotional setting of the penalty phase of a capital murder case, we cannot conclude that multiple violations of prevailing standards of prosecutorial conduct had no impact on th[e] jury's deliberations." *State v. Rose*, 112 *N.J.* 454, 523-24, 548 *A.*2d 1058 (1988). In my view, the cumulative effect of the prosecutor's errors committed throughout defendant's penalty phase proceeding deprived him of his constitutional right to a fair trial. Therefore, I cannot support the majority's decision to affirm defendant's conviction and death sentence.

II.

The trial court further denied defendant's right to a fair trial by failing to heed this Court's instruction that, in the penalty phase of a capital proceeding, "doubts must be resolved in favor of admission when evidence of a mitigating factor is offered by the defendant." *State v. Davis*, 96 *N.J.* 611, 620, 477 *A.*2d 308 (1984) (footnote omitted), *superseded by statute, N.J.S.A.* 2C:11-3i, *as recognized in Cruz, supra*, 163 *N.J.* at 412, 749 *A.*2d 832.

Defendant sought to introduce two photographs-one of his mother and one of the man who raised him and may be his father-which had been sent to him while he was in jail awaiting his capital murder trial. In the photograph of his mother, she is smoking something and written on the back is the following: "Fla/Got/Smokin to/ do. It ain't/ nothing nice / Love/ mommy." *574 The other photograph depicts the man smoking what appears to be a cigar and written on it is: "The Real Puff Daddy/ Fla Style." The trial court refused to admit the pictures, ruling that they were ambiguous as to the substance being smoked, prejudicial, largely irrelevant as post-homicidal, and cumulative.

In seeking to offer the pictures, defendant wished to demonstrate his parents' indifference to his situation. In my view, the photographs could have supported three of defendant's proffered mitigating factors: (1) that he was raised in an environment where domestic violence, criminal activity, and substance abuse were pervasive (found by seven jurors); (2) that he was raised in a home without structure, boundaries, or positive role models (found by six jurors); and (3) that he suffered physical and emotional neglect from his family (found by three jurors).

In *Lockett v. Ohio*, the United States Supreme Court held that a sentencer may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 *U.S.* 586, 604, 98 *S.Ct.* 2954, 2964-65, 57 *L.Ed.*2d 973, 990 (1978). The Legislature codified that proposition under *N.J.S.A.* 2C:11-3c(2)(b), **1064 which allows a defendant at a capital penalty phase trial to "offer, without regard for the rules governing the admission of evidence at criminal trials, reliable evidence relevant to any of the mitigating factors."

Given the guidance from both the United States Supreme Court and this Court, as well as the statutory framework, the trial court should have admitted the photographs into evidence. This is especially so because the prosecutor contested the fact that the photographs would have helped to prove that defendant had a horrendous upbringing. When discussing the evidence defendant offered regarding his mother, the prosecutor argued that "things were exaggerated." Although the jurors might have disbelieved the social worker who presented defendant's background, it would have been more difficult for them to ignore physical evidence such as the photographs. Thus, had the photographs been offered, it is *575 possible that more than three jurors might have found that defendant suffered neglect from his family and more than six jurors might have found that he was raised in a home without positive role models. In the context of a capital penalty phase trial, where a necessarily subtle and subjective weighing process might lead one juror to vote for life, thus removing the death penalty as an appropriate sentence, I conclude that such an error is substantial.

This Court has "acknowledged that in the sentencing phase of a capital proceeding-a life or death contest-a defendant is entitled to the use of all reliable, helpful information." *Davis, supra*, 96 *N.J.* at 619, 477 *A.*2d 308. Because the trial court did not adhere to that standard, defendant's case was unfairly hampered. It is impossible for me to conclude with confidence that not one juror would have weighed the aggravating and mitigating factors differently and voted to spare defendant's life if the jury had been presented with photographs showing such blatant and disturbing indifference on the part of defendant's parents to the fate of their son.

III.

One other factor might not, independently, warrant granting defendant a new penalty phase trial, but when considered in combination with the other errors discussed above, I believe contributed to the denial of his right to a fair trial.

The trial court's instruction to the jury on reasonable doubt failed to follow the instruction set forth by this Court in *State v. Medina*, 147 *N.J.* 43, 685 *A.*2d 1242 (1996), *cert. denied*, 520 *U.S.* 1190, 117 *S.Ct.* 1476, 137 *L.Ed.*2d 688 (1997). In particular, the trial court omitted the last two sentences from the *Medina* charge:

If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give the defendant the benefit of the doubt and find him not guilty.

[*Id.* at 61, 685 *A.*2d 1242.]

*576 Because a capital penalty phase jury must find that aggravating factors outweigh mitigating factors beyond a reasonable doubt, the omitted language could have been adapted to this setting, with the last sentence reading: "If, on the other hand, you are not

firmly convinced that the aggravating factors outweigh the mitigating factors, you must give the defendant the benefit of the doubt and return a life sentence."

While this error might, at first blush, seem inconsequential, the omission of the "benefit of the doubt" language represented a significant harm to defendant as the **1065 jury was not reminded of the essential presumption for life. The simple, straightforward quality of the "benefit of the doubt" language cannot be discounted, for a layperson on the jury can much better understand the nature of the balancing required when presented with such language. Without it, the State's burden was unfairly lessened.

IV.

Defendant contends that he was further denied his right to a fair trial because the trial court did not charge the jury that he was entitled to a presumption of life. Although I agree with the majority that the court's failure to issue such an instruction *sua sponte* was not error, I part company with the majority when it states that a presumption of life charge is never required.

In *Rose, supra,* we held that a defendant is not entitled to a presumption against the death penalty charge. 112 *N.J.* at 545, 548 *A.*2d 1058. However, at the time *Rose* was decided, aggravating factors were not treated as the functional equivalent of elements of a crime. Because they now are, *State v. Fortin,* 178 *N.J.* 540, 646, 843 *A.*2d 974 (2004), the legal landscape has changed sufficiently that the presumption of life charge must be reconsidered.

"The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams,* 425 *U.S.* 501, 503, 96 *S.Ct.* 1691, 1692, 48 *L.Ed.*2d 126, 130 (1976). The presumption *577 operates as a safeguard against the dilution of the State's burden to prove all elements of a crime beyond a reasonable doubt. *Taylor v. Kentucky,* 436 *U.S.* 478, 485-86, 98 *S.Ct.* 1930, 1935, 56 *L.Ed.*2d 468, 475 (1978). Thus, the presumption is inextricably linked to the State's burden to prove the elements.

Because, after *Fortin,* the aggravating factors necessary to make a defendant eligible for the death penalty are treated like elements of a crime and must therefore be proven beyond a reasonable doubt, I conclude that a presumption of life instruction should be given.

V.

In sum, defendant received a death sentence based on a proceeding that was not fair. The majority is convinced that the jury would have returned a verdict of death even if none of those errors occurred. I am not. Because I cannot place such confidence in the outcome of an unfair proceeding, I would vacate defendant's death sentence and remand for imposition of a sentence of life imprisonment.

For affirmance-Justices LaVECCHIA, ZAZZALI, ALBIN and RIVERA-SOTO-4.

For reversal-Justices LONG and WALLACE-2.