

Supreme Court of New Jersey.
STATE of New Jersey, Plaintiff-Respondent and Cross-Appellant,
v.
Thomas J. KOSKOVICH, Defendant-Appellant and Cross-Respondent.
Argued Sept. 26, 2000.
Decided June 7, 2001.

Defendant was convicted in the Superior Court, Law Division, Sussex County, of multiple counts of first-degree murder and related non-capital offenses, and was sentenced to death. Defendant appealed. The Supreme Court, [Verniero, J.](#), held that: (1) writings found in defendant's bedroom were relevant and admissible; (2) prosecutor's statements in guilt phase closing argument were not misconduct; (3) defendant was not improperly deprived of possibility of own-conduct finding on death eligibility; (4) allowing victim's mother to testify at sentencing about her family's opposition to the death penalty was improper; and (5) combined effect of penalty phase instructional errors required reversal of death sentence.

Convictions affirmed; sentence of death reversed; remanded for new penalty proceeding.

[Zazzali, J.](#), filed separately concurring opinion in which [Long, J.](#), joined.

[Stein](#) and [Long, JJ.](#), concurred in part and dissented in part with separate opinions.

[Coleman, J.](#), concurred in part and dissented in part with separate opinion in which

[Poritz, C.J.](#), and [LaVecchia, J.](#), joined.

[LaVecchia, J.](#), concurred in part and dissented in part with separate opinion, in which

[Poritz, C.J.](#), and [Coleman, J.](#), joined.

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A. Admission of Victim-Impact Statement

Defendant argues that the victim-impact statement presented to the jury by Loretta Giordano, Jeremy's mother, was unduly prejudicial and violated guidelines established by this Court for such statements in [State v. Muhammad, 145 N.J. 23, 678 A.2d 164 \(1996\)](#). Specifically, defendant argues that the statement was too long, inflammatory, emotional, non-factual, and was not sufficiently restricted to the impact that Jeremy's death had on his immediate family. In response, the State contends that the statement complied with the guidelines set forth in *Muhammad*. The State maintains that both the content and length of the statement were proper and that it did not abridge defendant's constitutional rights.

At the conclusion of the penalty phase of the trial, the State proffered the victim-impact statement of Mrs. Giordano. Defendant objected to various portions of the statement and proposed editing the statement to approximately half its original length. *497 The trial court conducted a *Rule* 104 hearing to consider defendant's objections. Specifically, defendant objected to references to the Giordano family's religion, Jeremy's relationship

with his grandparents, references to the death of Jeremy's grandfather and the effect the grandfather's death had on Jeremy's sister, Mrs. Giordano's descriptions of Jeremy as an infant, and a poem that described Mrs. Giordano's feelings about Jeremy's death.

The trial court made minor changes to the statement and rephrased certain portions of it, but for the most part rejected defendant's arguments and left the statement intact. (The statement as delivered to the jury by Mrs. Giordano is reprinted as an appendix to this opinion.) The trial court, concluding that the statement did not violate the standards promulgated in *Muhammad*, explained:

There is nothing in the statement, with the minor additions-especially with the minor editing, changes that I have made in the course of our discussion thus far, which is grossly inflammatory. There's nothing that's unduly prejudicial. And there's nothing extremely likely to divert the jury from its focus on the aggravating and mitigating factors. There is nothing in it containing opinions about the defendant, about the crime, in terms **174 of the-you know, the nature of the crime, other than in terms of it's [a] hard thing that hit us. And there's nothing in it about the appropriate sentence. So the-the statement does not violate the-what I'll call the negative restrictions of the Supreme Court as reflected in the [*Muhammad*] case and in other cases.

Addressing the length of Mrs. Giordano's statement, the trial court observed:

Now, I don't think the statement is unduly long in terms of it being burdensome on us. After all, the trial has taken 20 plus days to get to this point. Everybody else has had days and days to present evidence. When I say everyone, the State has had a chance for days to present evidence and Defense has, for days, presented evidence. And there's been much presented. And I think if the family wants to give some of the details of the background and-we shouldn't sit here with a stop watch and with a-an editor's blue pencil and limit and edit in an unduly-in an unduly controlled environment. So I think there-this is the-this is the family statement, this is Mrs. Giordano's statement, and so long as she meets the requirements of the Supreme Court rulings and of the statute, I think she should be able to say it in her own way and in the kind of detail that she feels comfortable with.

We have recounted the history of the Victim's Rights Amendment in *498 [State v. Muhammad, supra, 145 N.J. at 32-35, 678 A.2d 164](#), and need not repeat that history here. Following the passage of that amendment, the Legislature enacted *N.J.S.A. 2C:11-3c(6)*, which provides: "When a defendant at a sentencing proceeding presents evidence of the defendant's character or record pursuant to subparagraph (h) of paragraph (5) of this subsection, the State may present evidence of the murder victim's character and background and of the impact of the murder on the victim's survivors."

In [State v. Muhammad, supra, 145 N.J. at 40, 678 A.2d 164](#), we concluded that the victim-impact statute was constitutional under both the Federal and State Constitutions. Examining the Legislature's intent, we noted that "the Legislature [has] determined that before a jury determines whether to sentence a defendant to death, the jurors should, in limited circumstances, be informed about the uniqueness of the victim as a human being

and the particular harm caused by the crime.” [Id. at 45, 678 A.2d 164.](#)

In addition to upholding the constitutionality of the statute, we provided guidance to lower courts in considering the admissibility of such evidence. We indicated that the victim-impact evidence had to be relevant and reliable and must satisfy the balancing test contained in [N.J.R.E. 403](#). [Id. at 47, 678 A.2d 164.](#) The Court suggested that, in evaluating the specific testimony under [N.J.R.E. 403](#), “there is a strong presumption that victim impact evidence that demonstrates that the victim was a unique human being is admissible.” [Id. at 55, 678 A.2d 164.](#) We noted that certain statements are impermissible, including “the victim's family members' characterizations and opinions about the defendant, the crime, or the appropriate sentence.” [Id. at 47, 678 A.2d 164.](#)


Likewise, the Court noted that “statements that are grossly inflammatory, unduly prejudicial, or extremely likely to divert the jury from its focus on the aggravating and mitigating factors should be excluded.” [Ibid.](#) We reasoned that evidence admitted under the victim-impact statute should be restricted “to statements designed to show the impact of the crime on the victim's family and **175 to statements that demonstrate that the victim was not a faceless stranger, but was a unique individual human being. *499 There is no place in a capital case for unduly inflammatory commentary.” [Id. at 48, 678 A.2d 164.](#)




The Court also cautioned against extensive use of victim-impact evidence and required strict adherence to the legislative provisions. [Id. at 52-53, 678 A.2d 164.](#) Specifically, we noted that “[v]ictim impact testimony may not be used as a general aggravating factor or as a means of weighing the worth of the defendant against the worth of the victim.” [Id. at 53, 678 A.2d 164.](#) Rather, we emphasized that the statute required “that such evidence can be introduced for only one purpose, namely, to assist the jury in determining the appropriate weight to give the catch-all mitigating factor.” [Ibid.](#)

Importantly, we observed that victim-impact evidence may not be introduced in such a manner that would foster the arbitrary and unconstitutional imposition of a death sentence. [Ibid.](#) To protect the rights of capital defendants from that possibility, the Court outlined certain procedural safeguards. [Id. at 54, 678 A.2d 164.](#) For example, we determined that absent special circumstances, only one survivor would be allowed “to provide the jury with a glimpse 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.” [Ibid.](#) Especially significant to the present case, the Court also emphasized that

[t]he testimony can provide a general factual profile of the victim, including information about the victim's family, employment, education, and interests. The testimony can describe generally the impact of the victim's death on his or her immediate family. The testimony should be factual, not emotional, and should be free of inflammatory comments or references.

[[Id. at 54-55, 678 A.2d 164.](#)]

 [24] With those tenets in mind, we address defendant's arguments. Defendant first claims that the statement was too long and otherwise not appropriate in its tenor and content. As support, defendant points to [State v. Timmendequas, supra, 161 N.J. 515, 737 A.2d 55](#), in which the victim-impact statement encompassed only six pages. In contrast, Mrs. Giordano's statement comprised approximately fifteen pages. We reject defendant's *500 argument. We find nothing in our capital jurisprudence that would require us to impose an artificial limit on victim-impact testimony. As the Court observed in [State v. Muhammad, supra, 145 N.J. at 47, 678 A.2d 164](#), “the decision to admit specific victim impact statements will typically be in the discretion of the trial court[.]” We should not restrict that discretion by requiring a trial court to measure a victim-impact statement with stop-watch precision.

 [25]  [26]  [27] We do not retreat, however, from our reasoning in *Muhammad* that victim-impact evidence should provide only a glimpse of the murder victim's life and background, and the impact that his or her death has had on immediate family members. Within those parameters, trial courts retain wide discretion concerning the length of victim-impact testimony. In short, victim-impact evidence must be considered on a case-by-case basis, as no two witnesses will be affected by crime precisely in the same manner. The varying factual circumstances presented in capital cases counsel against our establishing a rigid limit on the time or length of such evidence. The trial court did not abuse its discretion in the present case.

Defendant next claims that the victim's mother's use of poetry in her testimony **176 was improper. Mrs. Giordano included the following poem in her statement to the jury:

As time passes by and you're not here

The days are long and the nights too much to bear

I think most of those loving times, your great big smiles and your silly rhymes

Oh how I wish you were here for a while

I miss your hug and joking ways

And I wish you were here to stay

I know God's love is holding you tight



I know God holds us in his sight


So as time passes by and by I know you hear my awful sigh.

Remember always that I care.

And Mommy and all of us love you, oh, my Jer.

Defendant contends that the poem was too emotional. Moreover, according to defendant, any statement containing poetry, not *501 prose, violates *Muhammad*. In response, the State emphasizes the brevity of the poem and contends that the poem was not overly emotional.



[28]  [29]  We decline to establish a *per se* prohibition against the inclusion of poetry in victim-impact testimony. Although we do not read *Muhammad* as requiring such a *per se* rule, we do share defendant's concern about the emotional nature of poetry and similar forms of expression. The Court is reluctant to infringe on the ability of victims to express themselves as they see fit, yet we are mindful that such unfettered expressions may be unduly prejudicial to defendants. As in so many other areas of the law, the Court must consider competing concerns in determining the propriety of victim-impact testimony. In considering those concerns here, we uphold the inclusion of the poetry in the present case but caution trial courts to be particularly vigilant in future cases in ensuring that such forms of expression do not breach the parameters established in *Muhammad*.


[30]  In its cross-appeal, the State argues that allowing a family member of a murder victim to testify about the family's opposition to the death penalty violates the guideline established in *Muhammad, supra, 145 N.J. 23, 678 A.2d 164*, which prohibits victim-impact witnesses from expressing their opinions about the appropriate sentence to be imposed. In response, defendant contends that victim-impact witnesses who do not support the imposition of the death penalty should be allowed to share that opinion with the jury because most jurors assume that the victim's family prefers the death penalty.

On cross-examination, defense counsel, over the State's objections, questioned Mrs. Giordano about whether she and her family supported the imposition of the death penalty for defendant. Mrs. Giordano testified that she and her family, “coming from a family of faith and Christians,” wanted defendant to “commit himself to Christ.” As previously noted, Mrs. Giordano stated that “[w]e are not in favor of the death penalty. I would like the jury to evaluate everything according to what they feel is their job to do according *502 to the laws of the State of New Jersey, according to how they feel that they have to answer to their God.” Immediately thereafter, the court explained that it allowed that testimony because it was “useful” for the jury to know. The court, however, cautioned the jurors that “even though Mrs. Giordano and her family may not be supporters of the death penalty, as many people in our society are not, her views aren't controlling.”

We agree with the State's position. In *Muhammad, supra, 145 N.J. at 55, 678 A.2d 164*, we barred victim-impact testimony “concerning the victim's family members” **177

characterizations and opinions about the defendant, the crime, or the appropriate sentence.” The Court imposed that restriction to help ensure that victim-impact evidence did not inflame the jury or prevent it from deciding the appropriate punishment based solely on relevant factors. Although primarily motivated by a concern that family members would testify in support of the death penalty and thereby unduly prejudice the defendant, the Court's directive in *Muhammad* applies equally to testimony concerning a family's opposition to the death penalty.

[31]  [32]  Just as victim-impact testimony supportive of the death penalty could inflame the jury and distract it from relevant evidence, so too could testimony in opposition to the death penalty. Moreover, in [*Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 \(1991\)](#), the United States Supreme Court left undisturbed the holding in [*Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 \(1987\)](#), that “the admission of a victim's family members' characterizations *and opinions* about the crime, the defendant, and the appropriate sentence violated the Eighth Amendment [of the United States Constitution].” [*Payne, supra*, 501 U.S. at 830 n. 2, 111 S.Ct. at 2611 n. 2, 115 L.Ed.2d at 739 n. 2](#) (emphasis added). We thus clarify that *Muhammad's* prohibition on victim-impact testimony concerning the appropriate penalty is intended to apply to testimony either in support of, or in opposition to, the death penalty. We are mindful of the possibility that some jurors will assume that a victim-impact witness prefers the *503 death penalty when otherwise silent on that question. To guard against that possibility, trial courts should instruct the jury that a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

[33]  In sum, viewing Mrs. Giordano's statement in its entirety, we cannot conclude that the court abused its discretion in admitting it. Nothing contained in that statement had the capacity to affect the jury to such an extent that it would have acted arbitrarily in imposing the death sentence. Mrs. Giordano's opinion that she and her family were opposed to the death penalty, although inappropriate, did not prejudice defendant and actually may have been of some minor benefit to him. (Nor did Mrs. Giordano's opinion prejudice the State in view of the jury's disposition.) Aside from that aspect of Mrs. Giordano's testimony, the victim-impact evidence did not transgress the parameters established in *Muhammad*, and, therefore, we will not disturb the trial court's discretionary rulings.

B. Jury Instructions Relating to the Victim-Impact Statement

Defendant argues that the trial court erred in instructing the jury in respect of how to evaluate the victim-impact evidence and how it was to be utilized during deliberations. Specifically, defendant contends that the court's instructions improperly permitted the jury to weigh or “balance” the worth of Jeremy Giordano against the worth of defendant, to consider sympathy for the victim's family, and to consider the victim-impact evidence

in relation to evidence other than the catch-all mitigating factors. The State asserts that the trial judge's charge, when viewed in its entirety, properly instructed the jury on how to evaluate and utilize the victim-impact evidence.

Because those asserted errors in the charge form a major basis of defendant's overall challenge, we recite the charge at length. *504 After instructing the jury about **178 aggravating factors, the court turned to mitigating factors, informing the jury:

[I]n the area of mitigating factors we-we see another sense in which there is a kind of preference in the law to a sentence of imprisonment. And that is that there are some listed statutory factors. The law dealing with mitigating factors and capital punishment list[s] a number of potential mitigating factors which may be present in a case. And if the defense thinks those are present, they can try to prove them. And so far that's the same thing as the law for aggravating factors. The law with respect to aggravating factors lists the aggravating factors. The difference, however, is that the [S]tate cannot go beyond the aggravating factors listed in the statute, nor can the jury. But when mitigating factors, in addition to a number of mitigating factors that are listed, there is a catch-all factor that is made extraordinarily broad. And the catch-all factor is any other factor relevant to the defendant's character or record or to his circumstances of the offense. So that is a very broad factor. And it-it allows, under that heading, many potential mitigating factors to come in. So the Legislature has deliberately created not just a list of mitigating factors, but an opportunity for the defendant to argue that there are other mitigating factors in his particular case.

....

Now, you only get to the mitigating factors if you first found that at least one aggravating factor exists. The defendant does not have the burden of establishing a mitigating factor by some standard of proof. He has the burden, if he wants you-if he wants you to consider mitigating factors, he has the burden of producing evidence of the mitigating factor. And of course the defense has spent some time trying to do that. But the defense does not have the burden of proving ... the existence of mitigating factor[s]. In other words, the defense doesn't have to prove that a mitigating factor exists by a preponderance of the evidence or by the greater weight of the evidence or by reasonable doubt. All the defense has to do is introduce reliable evidence that the mitigating factor exists. And then if there is evidence proffered, each individual juror has to make a qualitative judgment as to whether the evidence really establishes, in the mind of that juror, that there is that mitigating factor. The same evidence could be used to establish a number of different mitigating factors. So one piece of evidence might considerably give rise to support for more than one mitigating factor.

....

If there is evidence of [a] mitigating factor, ... you must, each individual juror, who thinks that evidence is reliable, must give that evidence such weight as it deems-he or she deems

appropriate. And balance it against the aggravating factor.

Now, keep in mind that the offering of mitigating factors is not given by way of justifying or excusing the defendant's conduct. He's been found guilty of murder. And that's extremely serious, and no matter what else happens, he's going to be punished at least very severely for that. And there's-it's not-it's not excused. And it's not justified. But there may be-these mitigating factors are offered to *505 present facts about the defendant's life or character or circumstances surrounding the murder which would lead you to impose a sentence less than death.

And mitigating factor[s] may be used to weaken the [S]tate's proof concerning **179 the existence of [the] aggravating factor[s] or the weight of [the] aggravating factors. It may also be used, mitigating evidence, to establish the existence of mitigating factors and to bolster their weight and to push you in the direction of a-of a favorable answer to the defendant in the issue of the balancing of aggravating and mitigating factors. In considering any mitigating factor you can take into account the normal sympathy that such a mitigating factor might inspire or justify.

....

Now, ... you [do not] have to find that these mitigating factors exist, by any means. You have to consider the evidence, yourselves, and each juror has to figure out whether he or she thinks these mitigating factors exist.

After describing the statutory mitigating factors, the court then began its description of the catch-all mitigating factor:

The next mitigating factor[s][are] number 6 though [sic] 14, are not listed in the statute, except that they come under the catch-all of any factor-mitigating factor relevant to the defendant's character or record or the circumstances of the offense. And the-the-the defense has presented evidence about these. And-and you may-you should consider that evidence and see whether you think that the claimed mitigating factor exists.

After describing each of the mitigating factors, the court proceeded to instruct the jurors about use of the victim-impact evidence:

I-you-you, of course, heard some testimony from Mrs. Giordano, the mother of Jeremy Giordano, indicating the-the impact that the death of her son had on her and-and on the rest of the family. And I want to point out to you that that kind of evidence is admitted for a limited purpose, and it's-it's only meant to be used for a limited purpose and not for any other purpose. That evidence is to be used by you in determining the appropriate weight to be given to certain mitigating factors. And those are the kind of catch-all mitigating factors. And they are, in terms of our verdict list, they are mitigating factors 6, 7, 8, 9, 10, 11, 12 and 13. So from 6 on those are-those are mitigating factors not specifically listed in the statute, which I submitted to you for your consideration, because they-they do-there was evidence about them. They do relate to the defendant's background and his

makeup and to the circumstances of the offense.

And-and this-and there may be some others that you will find. There's a space in the verdict list for you to find other mitigating factors that none of us have thought of. But-and if you find them it would apply to that, too. *But this impact statement is-is meant to relate to that. So it kind of balances the victim's background and circumstances against the defendant's background. Balance them. But it's a-it's a sort of a parallel opportunity.* And it's-it's-it's to be considered in relation to those-those mitigating factors, 6 through 14, and any others that you may find. And it's not to be considered in terms of boosting an *506 aggravating factor. And it's not-not to be used by you in deciding whether there is an aggravating factor or in terms of adding any weight to an aggravating factor. It's only meant to [a]ffect your determination of the weight of those certain mitigating factors.

There's one thing, too, that-that we do want to point out to you. A crime against a-a very nice, decent person is really no worse than a murder-a murder of a nice decent person is, in a certain sense, **180 under our law, no-no worse than the murder of somebody who isn't so attractive. So happens that the young man in this case, Jeremy Giordano, seems to have been a very fine, nice, nice young man. But even if he were not, even if you-even if the local-even if some local reprobate that nobody liked was killed, that would still be a crime, and the aggravating factors and guilt or innocence would be measured in terms of that. So the law-it's not, by admitting these impact factors, meaning to make any inappropriate distinctions about the fundamental blameworthiness of all-of all murders. So you-you are meant to use that fact-that statement that Mrs. Giordano made for the purpose of helping you to weigh the impact of some of the mitigating factors dealing with the defendant's history and his record and circumstances of the offense.

[(emphasis added).]

Before the trial court, defense counsel objected to that part of the charge pertaining to the use of the victim-impact statement and recommended that the charge be modified. The court disagreed, noting that “the charge was appropriate as given.” After the jury returned the death sentence, defendant again objected to the court's instruction and the court again rejected defendant's argument, explaining:

The Defense also urges that I made an error in neglecting to say-to use in instructing the Jury the specific language in the model charge, which reads: “You must decide the case on the evidence without reference to conjecture and without any sympathy except such sympathy as a mitigating factor may inspire and you must decide the case without any bias or prejudice.”

I did not use that specific language, but the instructions were clear on how sympathy could be used. It could be used in terms of enhancing or in terms of evaluating a mitigating factor.

The Jury was also told how it could-how it was to use the victim impact statement made

by Mrs. Giordano. And the instructions were adequate in my judgment.

The Jury was also given an opportunity, I might say, to emphasize-to employ sympathy for the Defendant in a way that I believe was never before given to a jury in this case under the special circumstances of this case, which I thought it appropriate for the Jury to be instructed, to be allowed to know that Mrs. Giordano and the family did not think that the death penalty should be imposed on this Defendant.

*507 I did that because I thought in the absence of such a clear affirmative manifestation the Jury might by silent inference draw the conclusion that the Giordano Family was in favor of the death penalty when it was not.

So I allowed that testimony to be given.

And that I think was a factor that weighed very heavily in favor of the Defendant and very heavily in favor of a non-capital penalty.

Now the Jury ended up ultimately not accepting that, but it wasn't because of any runaway sympathy for Mrs. Giordano's statement. It was not that at all.

The Jury did have the right to-and I instructed them that they had the right not to be controlled by the wishes of the family with respect to the non-imposition of the death penalty, but the Jury certainly, certainly was not exposed to a misuse of Mrs. Giordano's statement in a way prejudicial to the Defendant. Exactly the opposite is true in this case.

We have repeatedly stressed that "clear and correct jury instructions are essential for a fair trial." **181 [State v. Brown, supra, 138 N.J. at 522, 651 A.2d 19](#). See also [State v. Martini, 131 N.J. 176, 271, 619 A.2d 1208 \(1993\)](#) ("An appropriate charge is essential for a fair trial."), *cert. denied*, [516 U.S. 875, 116 S.Ct. 203, 133 L.Ed.2d 137 \(1995\)](#); [State v. Concepcion, 111 N.J. 373, 379, 545 A.2d 119 \(1988\)](#) ("Accurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial."); [State v. Green, 86 N.J. 281, 287, 430 A.2d 914 \(1981\)](#) ("Appropriate and proper charges to a jury are essential for a fair trial.").

Accordingly, "[t]he trial court has an absolute duty to instruct the jury on the law governing the facts of the case." [State v. Concepcion, supra, 111 N.J. at 379, 545 A.2d 119](#). See also [State v. Green, supra, 86 N.J. at 287-88, 430 A.2d 914](#) ("[T]he trial court should explain to the jury in an understandable fashion its function in relation to the legal issues involved.... [The charge must provide] a comprehensive explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find."); [State v. Butler, 27 N.J. 560, 595, 143 A.2d 530 \(1958\)](#) ("[A] mandatory duty exists on the part of the trial judge to instruct the jury as to the fundamental principles of law which control the case.").

We have also explained that "[a] charge is a road map to guide the jury, and without an appropriate charge a jury can take a wrong turn in its deliberations." *508 [State v. Martin,](#)

[119 N.J. 2, 15, 573 A.2d 1359 \(1990\)](#). Because of the importance of jury instructions, “[w]e have consistently held that incorrect charges on substantive elements of a crime constitute reversible error.” [State v. Rhett, 127 N.J. 3, 7, 601 A.2d 689 \(1992\)](#); [State v. Martin, supra, 119 N.J. at 15, 573 A.2d 1359](#) (“So critical is the need for accuracy that erroneous instructions on material points are presumed to be reversible error.”); [State v. Grunow, 102 N.J. 133, 148, 506 A.2d 708 \(1986\)](#) (“Erroneous instructions on matters or issues material to the jurors' deliberations are presumed to be reversible error.”).



[34] Further, in [State v. Muhammad, supra, 145 N.J. at 51-52, 678 A.2d 164](#), we recognized that instructions in capital cases are more complex than in non-capital cases, and highlighted the importance of limiting instructions concerning victim-impact evidence. We have also noted that “[a]llowing victim impact information to be placed before the jury without proper limiting instructions has the clear capacity to taint the integrity of the jury's decision on whether to impose death.” [State v. Hightower, 146 N.J. 239, 264-65, 680 A.2d 649 \(1996\)](#). Therefore, a trial court should specifically instruct the jury on how to use victim-impact evidence. [Id. at 266, 680 A.2d 649](#). Particularly significant to the present case, we emphasized in *Muhammad*:

[*v*]ictim impact testimony may not be used as a general aggravating factor or as a means of weighing the worth of the defendant against the worth of the victim. ... The victim impact statute mandates that such evidence can be introduced for only one purpose, namely, to assist the jury in determining the appropriate weight to give the catch-all mitigating factor.

[[Muhammad, supra, 145 N.J. at 53, 678 A.2d 164](#) (emphasis added).]



[35] Applying those tenets, we first address defendant's argument that the trial court impermissibly instructed the jury to “balance” defendant's background against that of the victim, Jeremy Giordano. Specifically, defendant objects to the following language contained in the court's charge: “But this impact statement ... kind of balances the victim's background and circumstances against the defendant's background.**182 Balance them. But it's a-it's a sort of a parallel opportunity.”

*509 We agree with defendant. Although the court did not instruct the jury to “weigh the worth” of defendant against that of the victim, the court's directive to jurors that they balance the victim's background against that of defendant was akin to asking the jury to compare the worth of each person. As such, it violated *Muhammad*.

The State argues to the contrary, relying on our approval of the trial court's instruction about the use of victim-impact evidence in *State v. Timmendeguas*. That reliance is misplaced. In [State v. Timmendeguas, supra, 161 N.J. at 632, 737 A.2d 55](#), the trial court instructed the jury:


[I]f you as a juror have not found to be present mitigating factor (h) or mitigating factors

in addition to those listed, meaning if you haven't found affirmatively as to factors number 3 through 25, if no one found any of those, you then must not give any consideration to this evidence regarding the victim's character or the impact of the murder on survivors. And that is so, because it only may be used in terms of balancing or in terms of assessing the weight to be given to the evidence concerning the defendant's character or the circumstances of the offense.

In considering whether that charge comported with *Muhammad*, we referred to the prosecutor's summation, in which she stated to the jurors that “ ‘[i]f you gave credit to any of the defendant's character evidence ... we refer to that as Factor H mitigation, you are then to weigh it against whatever weight you determine is appropriate for victim impact.’ ” *Id.* at 633, [737 A.2d 55](#). We concluded that, viewing the charge in its entirety, in conjunction with the prosecutor's comments, “defendant [could not] demonstrate that the jury instruction regarding victim-impact evidence constituted plain error.” *Id.* at 634, [737 A.2d 55](#). See also [State v. Robinson, 165 N.J. 32, 47, 754 A.2d 1153 \(2000\)](#) (recognizing that arguments of counsel “can mitigate prejudice resulting from a less-than-perfect charge”).


Because the instruction in *Timmendequas* informed the jury that the victim-impact evidence may be used “in terms of balancing” certain mitigating evidence, the State contends that the charge in the present case was also proper. However, the instruction in *Timmendequas* clearly informed the jurors that the victim-impact evidence was to be used only in assessing the proper *510 weight to be given to the catch-all factor. The court in that case did not invite the jury to balance the defendant's background against that of the victim as the court did explicitly in this case.


In *Muhammad*, we expressed our concern that weighing the worth of the victim against that of the defendant might prompt jurors to impose the death penalty arbitrarily. [Muhammad, supra, 145 N.J. at 53, 678 A.2d 164](#). Common experience informs us that comparing convicted murderers with their victims is inherently prejudicial because defendants in that setting invariably will appear more reprehensible in the eyes of jurors. That contrast is particularly stark in the present case: Jeremy Giordano was a hard-working, religious, law-abiding young man, whereas defendant was a convicted murderer. We are convinced that the court's instruction infringed on the integrity of the penalty phase and impermissibly increased the risk that the death sentence would be arbitrarily imposed. That error, in combination with the other errors identified below, warrants reversal of defendant's death sentence.

 [36] Next, we consider defendant's argument that the trial court erred in not **183 warning the jury against considering sympathy for the victim's family in its deliberations. Defendant theorizes that the court's erroneous instruction to the jury to balance the victim's background against that of defendant was compounded by the fact that the court told the jury that it could consider sympathy for defendant, but not for the victim's family. Defendant contends that because the jury was told to balance the backgrounds of the victim and defendant, and because the court instructed the jury to take into account

sympathy for defendant, the jury also must have improperly considered sympathy for the victim's family. Defendant thus suggests that the trial court was obligated to advise the jury explicitly not to feel sympathy for the victims.

The State counters that victim-impact evidence and the limited emotion it engenders does not violate constitutional principles. The State acknowledges that emotions should not be allowed to *511 unduly inflame jurors to the point of compromising their deliberations, but stresses that victim-impact evidence inherently conveys certain emotions, like pity, compassion, mercy, and sympathy, to the jury.

 [37] We agree with the State. That jurors are able to divest themselves of ordinary human emotions and disregard all feelings they may have for the victim's family is unlikely. That said, trial courts must work to ensure that “fatal emotionalism” is not injected into the jury's deliberations. [State v. Zola, 112 N.J. 384, 431, 548 A.2d 1022 \(1988\), cert. denied, 489 U.S. 1022, 109 S.Ct. 1146, 103 L.Ed.2d 205 \(1989\)](#). We would have preferred the court to deliver an explicit charge to better guard against that possibility. On this record, however, we cannot conclude that the court's omission deprived defendant of fair deliberations. See [Muhammad, supra, 145 N.J. at 45, 678 A.2d 164](#) (observing generally that brief statement from victim's family is “unlikely to inflame the jury”).

 [38] Finally, we consider defendant's argument that the court's instruction allowed the jury to consider the victim-impact evidence in relation to the statutory mitigating factors and not solely in respect of the catch-all factors. Defendant focuses on this one phrase of the court's instruction in making that argument: “[the victim impact evidence is] to be considered in relation to those—those mitigating factors, 6 through 14, *and any others that you may find.*” (emphasis added). Defendant contends that the highlighted language authorized the jury to consider the victim-impact evidence in relation to the statutory mitigating factors. In response, the State argues that that phrase simply referred to any other catch-all factors that the jury may have found beyond those listed by the court. The State stresses that when the charge is examined in its entirety, the disputed phrase refers exclusively to any catch-all mitigating factor beyond those proffered by defendant.

After reviewing the charge in its entirety, we are persuaded by the State's argument. The court stressed the limited manner in *512 which the victim-impact evidence could be used. The court specifically informed the jury that it could find mitigating factors beyond those proffered by defendant, and that there was a space on the verdict list for that very purpose. We are satisfied that when reviewed in context, the disputed language did not invite jurors to consider the victim-impact testimony outside of the permissible setting of the catch-all mitigating factors.

In sum, we agree with defendant that the trial court erred in its charge to the jury to the extent that it suggested or invited jurors to balance the worth of defendant against the worth of his victims. **184 That error, when combined with the other errors discussed

below, warrants reversal of defendant's death sentence. Defendant's other two claims of error-that the trial court failed to advise the jury not to feel sympathy for family members of the victim and that it allegedly authorized the jury to consider Mrs. Giordano's testimony outside of the limited context of the catch-all mitigating factors-are without merit for the reasons already stated.

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APPENDIX

STATE V. KOSKOVICH

VICTIM-IMPACT STATEMENT OF LORETTA K. GIORDANO

My name is Loretta K. Giordano. I am the mother of Jeremy Joseph Giordano. I reside in Hamburg, New Jersey. And I've been asked to give a statement to the Court to express the impact that this crime has had on my family and myself.

My husband's name is Joseph R. Giordano. He is the father of Theresa Katherine Giordano Navarro, Jeremy Joseph Giordano and Valerie Renee Giordano.

In a nutshell, the immediate impact this matter-murder has had on my family and me is that going on this trial every day has been like going to Jeremy's funeral over and over and over again.

This crime has had a tremendous impact on our family. I'll first tell you about my husband, Joe. At the time of the murder of our only son, Jeremy, my husband was just starting a woodworking business in which Jeremy was also becoming interested. Jeremy always encouraged his family members, as well as strangers. Jeremy not only helped with his words, he physically helped his father load the raw lumber in and out of the woodworking shop. He would stop by frequently, pop his head in to see if his father needed anything, to say hello and to make sure his father was all right, or perhaps to see if he needed help lifting larger lumber. Jeremy helped his father financially in purchasing some of the equipment that was needed for his business. Many times Jeremy would bring Joe lunch and visit for awhile. Those were male bonding times that a dad and son would have.

I remember Jeremy offering up ideas for my husband. Jeremy was very good at computers. He and his dad worked on getting *543 my husband's first computerized **205 woodworking cutting machine working. There were very successful at their task. It looked as though there were many nights that were left to perfect it. Their constant arguing has become so precious to me now. Joe's drive to be successful in his

woodworking business not only stemmed from his pride in creating and working for himself, but also from the desire to have something he could share with his son. Jeremy and his dad were finally at the time in their lives that they could respect each other's rights and were getting along very well together. It could be said that the bond of father and son was complete. So, when my son was killed, my husband not only lost his son, but also a good buddy.

There were always projects going on in our house to keep us busy. In one of those projects, Jeremy carefully planned and laid out all the bricks on the side patio. He made a little fountain in the backyard. Jeremy would talk about making the barbecue and a gazebo on the upper plateau of our yard. When he was younger, he and his buddies had the upper plateau for their forts and camping expeditions. Joe always believed in giving Jeremy controlled constructive opportunities within a supervised environment.

Since the murder, my husband has given up his woodworking business for a living and has returned to outside employment.

Now instead of traveling only a few miles down the road, Joe has a long drive five days a week to Carlstadt, New Jersey. He runs the risk of accidents while traveling on major highways like Route 80. When Joe can't sleep well at night, I'm concerned about his travel to and from work. Since my husband has lost his son and his business, he has changed. The future of sharing anything with our son has been permanently destroyed forever. Many nights are spent trying to make some sense out of this tragedy and sorting out personal feelings. The grieving process has been a long one, and it's not yet over.

*544 Jeremy's death also had a major impact on our eldest daughter, Theresa, who's now age 26. She has been married to Jose Navarro for almost three years. Being the oldest child, Theresa always felt responsible for her brother. This is the way we raised our children. They were all taught to take care of and be friends to each other, with the guidance of my husband and myself. From the first news of the murder, she had to deal with the feelings like I should have been there for Jeremy.

Theresa is a professional chef. She lost a year of employment due to this tragedy. Theresa, as well as the rest of the family, regard Jeremy as a friend. Jeremy would lend financial aid to his sister when she needed it. I remember a time her car insurance was due. Jeremy lent her the money. Jeremy was very proud of his sister. He would tell everyone that she was a professional chef. Knowing how much Jeremy respected her, Theresa had a hard time getting herself together to go back into the industry. Theresa loved her brother very much.

Jeremy was always a good listener for Theresa. They would talk about the future, opening a restaurant together. I remember times when Theresa and Jose would come up and Jeremy would come bouncing through the door after work and get us to go all out to the diner. He had a way about him that made you feel good, no matter how bad you felt.

These are just some of the things that have been taken from Theresa.

I remember a time the kids decided they were going to go on vacation by themselves. **206 It was a journey into adulthood. Theresa was 22 and Jeremy was 20. It was a time for bonding for them that's now gone forever.

When Theresa visited they would enjoy midnight trips to the bagel shop together. And Jeremy's favorite bagel was one with everything on it, and he liked cream cheese with salmon.

*545 The kids had many every day normal things that they would do, like just talking or taking a ride. And these times are lost forever.

We thank God we have good memories to hold onto. In my oldest daughter's words, Jeremy wasn't just a brother, he was a living, breathing human being that she misses unconditionally.

Theresa feels that this not only impacted her life, but also the lives of her husband, sister, mother, father, grandparents, uncles and aunts. I think you get the picture. In the beginning when all this chaos took place, it ripped a hole in her that to this day still has not been able to mend. Though she tried many things, what it all comes back to be is that Jeremy is gone forever, and she wants to know why.

Theresa has suffered in many ways after the murder of her brother. She struggled financially and sometimes felt like she was losing her sanity. But more importantly to her, her family and her marriage suffered the most. When this chaos started, we were starting to make progress as an adult family. After Jeremy's death our family members were separated emotionally. Each of us not knowing how to feel or what to say to one another. It made us so emotionally raw that we couldn't be around each other, separating us physically as well. It has gotten better in the past months, but when one of us starts getting hurt again, it literally rubs off on the others, causing more pain, friction, hurt and finally, separation. So you see, we not only lost a huge chunk of our lives with Jeremy's death, at times we are losing our own lives in a separation because of the pain, and not knowing how to deal with it.

In April 1997 Theresa had been married for only about seven months. Theresa and Jose struggled through what any young married couple would. Little did they know something more severe than daily struggles was just coming down the pike. When Theresa got the call about Jeremy's death at 6:00 that morning, it was something that she knew was going to change her life and her *546 marriage forever. Jose and Theresa, who talked about everything, didn't say one word to each other on their trip up to Hamburg. Since then their marriage has been up and down, kind of like a yo-yo. Anger and outrage pours out of Theresa at times. Her hurt and sadness pours out of her every day, affecting their marriage all the time. Jose tries to support her and cheer her up. Just-just what someone who loves you would do. But her pain and sorrow is so imbedded and deep that she feels hopeless at times. But then, at times she remembers a greater purpose, that she wanted something to live on in Jeremy's memory. Theresa has opened up her own business, a

restaurant and catering business called Jeremiah's. It's our family business that Theresa knows Jeremy would have loved to be a part of. He is the biggest part of it, because to Theresa, Jeremy is her inspiration, her friend and always her brother.

Now there will be no new memories to create with her brother, so she holds tight to the ones she has.

In regard to our youngest daughter, Valerie, who's now 20, she explains that the death of any kind is hard to go through. But when family informs you that your only brother was murdered in a **207 small, quiet town, it's even more devastating.

At the time of the murder she was living in Dallas, Texas. She felt a responsibility and guilt of not being able to help her brother that night. She thought, "It should have been me" and "Why did he have to go?" and "Why couldn't I help him?" Being so far from home when it happened made her feel like her hands were tied behind her back.

When she arrived back in New Jersey she found that the crime had captured many people's attention. It was feeding time with the media, and all the parties involved with this were the bait. Our grieving was not personal. There's not a time she can remember during the two weeks she remained in New Jersey for her brother's funeral that a reporter or someone of the like wasn't calling or showing up at the doorstep wanting to know answers *547 that we didn't have. She can understand the media has the right to know and relay information back to the public, but what happened was a shock to our family. We didn't need the media to pour more salt into an open wound.

She can, however, recall three reporters that have covered this trial since the beginning of this never ending nightmare that have always been gracious enough to allow our family to grieve. They were the only ones that allowed us to grieve personally without sticking news cameras in our faces or writing down every little detail and recounting it back to us, asking us for a comment.

Valerie can remember a time while she was grocery shopping with me one evening, perhaps a month or so after the murders. A girl maybe no more than maybe 11 or 12 years old looked over at Valerie. She then said to her mother, "Mom, look. That's the girl whose brother was murdered. You know, the one delivering the pizzas." Valerie didn't know how to react to what the girl said, but it shocked her, and she had to leave the store before anyone else could see the tears just streaming down her face.

A year after losing Jeremy, Valerie's grandfather, my Dad, passed away. She tried to remain strong for the benefit of me and Joe when her brother died. But when her grandfather died she could not be strong any more. She overloaded herself with part-time work and 18 credit semesters at college to keep her mind off of losing her brother. When her grandfather passed away the same feelings returned as when Jeremy passed away, "I should have been there. Why can't I help him?" She could no longer be strong and started breaking down. First it was panic attacks, only she didn't know what one was, and it was devastating to her. Her body began to get more and more numb. Soon she could no longer

feel her arms, legs or face. Her chest would tighten and she would cry, telling me she loved me and her Dad, and that she was going to die. The first panic attack lasted for close to an hour and a half. The ones that followed for the next five months were unbearable. She couldn't finish her semester at *548 school, and had to drop out. She was terrified to move an inch for fear she would die. She would look over her shoulders a hundred times a day to make sure someone wasn't after her, too. As she was getting closer to the age that Jeremy was when he died, she became scared that she, too, would die at 22.

When they were young adults Jeremy and Valerie would go out late at night to play pool or go bowling or gather up a group of friends and play basketball. As children they would build the tree forts and the bike ramps. Wherever Jeremy **208 went, Valerie was sure to follow. There was hardly a time that he would jokingly say, "Why do you always have to follow me?" But as they grew up, they respected one another's decisions and their friendships. Jeremy was protector and mentor to his little sister. Looking at her in high school with the friends, and making sure that the siblings-excuse me-looking at her high school friends who got along badly with their siblings, she felt lucky to have been graced with his love, understanding and compassion. Jeremy would often see her in the hallways at school and yell to her, "Hey! What's up? How's it going? Isn't lunch nasty today? Do you need money for lunch?" Jeremy tried to guard Valerie from the bad crowd at school and wanted to protect his baby sister from trouble. He was always willing to help her out with any problems, be it financial or personal. He gave her advice, even when she didn't want it, and in the end it was always his advice that helped her get through the hard times.

In the weeks before Val moved to Dallas, Jeremy spoke with her about how great an opportunity it was for her to see a part of the country she had never been to. They grew closer with every passing day. And as they hugged and said their good-byes at a crowded New York-Newark Airport, she knew she's missed him-she would miss him a lot, but she didn't admit it to him. Now she wishes she did tell him how much she loved him and appreciated all he did for her.

*549 Losing someone so close to you alters your life in many ways. That goes without saying. But adapting to live again after the loss of someone is what is hard to do. Not a day goes by for Valerie without waking up with a memory of Jeremy or driving down a road or being reminded of their innocent childhood years together. She clings to the memories of her brother, because they are the only things that no one can take away from her. Valerie lost a friendship and a bond with her brother that her-that are only memories now. She lost a sense of security and sense of herself when her brother died. He was her shield, her protector, and her hero.

Lastly, I'd like to tell you about the personal impact this crime has had on me. Jeremy was my middle child. The day he was born he cried in the delivery room and I looked over at him and said, "Jeremy, stop crying. Mommie is here with you." We knew before he was born that his name was to be Jeremy. My husband had a dream. He told me that we should name our baby Jeremy. Joe knew that we were going to have a boy, even without any tests.

From the start, Jeremy had a bond with Mommie and Daddy. Joe was happy to have a son, a boy, to pass on the family name, a son whom he could teach and raise to become a man.

Jeremy was 22 when his life was taken from him. It seemed the rough times of raising him were in the past. Jeremy was a kind and gentle spirit. And he would help people without prodding. That was my son. My husband and I raised all our children to be giving, helping and polite. Jeremy certainly lived those teachings. We were blessed with good teachers in schools-in our school systems that reinforced the standards that we had taught our children.

One time in fifth grade Jeremy came home in a huff complaining about his teacher. The usual complaint. "The teacher doesn't understand me. He's not fair. I want you to go down to that school and tell him off." We asked Jeremy about the problem. *550 He explained. "The teacher wants me to clean out my desk. If I don't, he's going to dump it out." We **209 asked, "Well, Jeremy, what do you think we should do?" Jeremy responded, "Go down there and tell him he's wrong." The response we gave him wasn't what he expected. The reply was, "Jer, just go clean out the desk." The story ended with the desk getting turned over and Jeremy having to clean it up. He didn't get far with the "woe is me" routine.

As most young boys grow, they go through the stages of learning to be responsible for their own actions. This episode was only one of many learning experiences for Jer.

As he developed into manhood, our relationship changed. He was no longer the little boy who needed to be taught responsibilities. His life was one of sharing, of companionship, of being a friend, and good listener.

I saw Jeremy put into actions the lessons that he had been taught as he was growing up. Our son was a financial helper to our family. I needed a dishwasher, and Jeremy bought it. I needed a washer, and Jeremy went across the street to Western Auto and bought me a washer and made me a laundry room. He joked with me and said this was his insurance that he would have clean clothes.

When I needed money for groceries, he would give me money. When I needed money for gas to go to work, Jeremy wouldn't even think twice. His reply was, "Is 20 enough or do you need more?" He wasn't stingy with his money. The year before Jeremy died he shared his car with me so I could go to work.

There were times he went to New York State to visit his grandparents. He was concerned about them because of their age. He knew their time left on Earth was coming to a close, and wanted them to feel secure in knowing that they were loved. Little did he know that his time was short. Jeremy had a lot of love to give, and he gave it freely. He visited his grandparents at *551 least five times a year out of respect and love. I remember his visiting his uncles and aunts.

We had many conversations about God and the Bible. Jeremy's favorite book was Revelations. He was very interested in the seven seals and the future Christ holds for all. I remember a day in May of 1995 when he gave himself to Christ. After this I saw the changes in him. He became even more understanding of his family, and he attended church when he could. I remember waking him up for church many Sundays. He loved to challenge me about Bible verses. Jeremy always showed the fruit of the spirit with his giving smile and love. He showed his Christianity by his good deeds.

One of the most precious reminders of Jeremy's faith is the poem he wrote entitled "The Gift." I found this poem ten days after the murders in one of Jeremy's little testimony books. The book had fallen out on the floor of his Nova, and I picked it up and put it in my purse. On April 29th my oldest daughter and I were at the site of the killings. A man from the media was asking us questions. He wanted to know about Jeremy. I remembered the little book. I gave it to the man, and he found the poem "The Gift." That was the first time I knew the poem was there. I remember feeling very close to my son and was so thankful for the poem. All that has come—all of this has come to an abrupt end. No more poems. No more sharing.

Jeremy's faith and salvation has had the greatest impact on all of us because we know he is resting in heaven. We know his soul is safe with God and that when we leave this world we will all be together.

The last service we attended together was Easter morning at the First Baptist **210 Church of Sussex, where Jeremy attended and belonged. He grew up in that church and attended Sunday school there. Many good memories come to mind. He and Valerie were in Christmas plays together. He especially liked the Jesus birthday cake at the end of the service. And Jeremy knew the art of *552 forgiveness and repentance; and he was a very good witness to me.

So, as for myself, I've lost a son, a friend, someone that encouraged me, my church-going child, my helper, my buddy. My husband lost a business. I was out of work for five months and couldn't get myself together. I've had to endure the bad snowstorms without Jeremy shoveling the snow and helping with the spring clean-up. The company I work for requested that I use all my vacation, personal and sick time for this trial. I can't even begin to express to you the personal pain that each one of us has endured and are still enduring. Words cannot easily express the deep hurt our souls have suffered from this crime.

How this trial has changed my life and impacted me I think is best described by a poem I wrote.

As time passes by and you're not here

The days are long and the nights too much to bear

I think most of those loving times, your great big smiles and your silly rhymes

Oh how I wish you were here for a while

I miss your hug and joking ways

And I wish you were here to stay

I know God's love is holding you tight

I know God holds us in his sight.

So as time passes by and by I know you hear my awful sigh.

Remember always that I care

And Mommy and all of us love you, oh, my Jer.

I just want to thank you all for listening to me.