SUPREME COURT OF NEW JERSEY

STATE OF NEW JERSEY,
Prosecution-Respondent,
v. Docket No.: 001/2024

PETER PAPASAVVAS,
Defendant-Appellant.

MAJORITY OPINION:

Last term, we affirmed Peter Papasavvas's conviction and death sentence for the murder of Mildred Place. We preserved his right to challenge the proportionality of his death sentence. We now conclude that Papasavvas was unfairly singled out for the ultimate sanction of death.

In reaching that conclusion, we remain keenly aware that Papasavvas committed a terrible crime that, standing alone, might legitimately be viewed as deathworthy. Such is not the inquiry on proportionality review, however. Proportionality review is a unique endeavor in our law:

> Unlike direct review, proportionality review does not question whether an individual death sentence is justified by the facts and circumstances of the case or whether, in the abstract, the sentence imposed on a defendant is deserved on a moral level. On the contrary, its role 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."

When that singular process is carried out, Peter Papasavvas cannot be condemned to death.

I. FACTS

Shortly before nine o'clock in the evening on April 25, 1996, police officers arrived at Papasavvas's home in Iselin, New Jersey to serve an arrest warrant on an unrelated matter. When Papasavvas saw the officers he fled from his house on foot, dressed only in his underwear.

Four blocks away, he broke into the basement of a house owned by Mildred Place, a sixty-four year-old woman who lived alone. There is no suggestion in the record that Papasavvas knew Mrs. Place personally or even knew about her. Mrs. Place returned home from a church function at approximately ten o'clock that

evening. Unaware that Papasavvas was hiding in her basement, she spoke with a friend on the phone until 10:30 p.m. Shortly after that conversation ended, Mrs. Place encountered Papasavvas.

Although what happened next is contested by the parties, we do know that Mrs. Place's body was discovered lying at the bottom of the basement stairs. An autopsy revealed that Mrs. Place had sustained multiple physical injuries, including fractured vertebrae and ribs, hemorrhages and abrasions to her back and right side, contusions and abrasions to the bridge of her nose and right cheek, buttocks, and thighs, and extensive bruising. Those injuries, according to the State's experts, were consistent with a fall down the cellar steps. The medical examiner also discovered spermal fluid on Mrs. Place's body. He did not find any evidence of penetration. Based on the foregoing evidence, the Attorney General and the Public Defender propose different accounts of Mrs. Place's murder.

According to the Attorney General, Papasavvas broke into Mrs. Place's house to obtain clothing. He stole money, credit cards, and a telephone calling card and then heard Mrs. Place return home. Papasavvas emerged from the basement and ambushed her. After knocking her to the floor, he dragged her across the room and asphyxiated her by tying a belt around her head and mouth, thereby impeding her breathing. He then proceeded to cut off her clothes piece by piece. The cuts were straight, indicating that Mrs. Place was motionless at the time. When he finished removing her clothes, Papasavvas sexually assaulted Mrs. Place. According to the State, after the sexual assault, Papasavvas strangled Mrs. Place and threw her down to the bottom of the basement stairs where she was found the following day. The State's medical examiner concluded that Mrs. Place died from asphyxiation as a result of the belt pushing her tongue to the side.

The Public Defender offers the following contrary account. Papasavvas broke into Mrs. Place's house to steal clothing and money. When he heard Mrs. Place return home, he decided to remain hidden in the basement until she went to sleep, at which time he planned to slip out of the house unnoticed. That plan went awry, however, when Mrs. Place opened the basement door and surprised Papasavvas, who was still dressed only in his underwear. To prevent her from screaming, Papasavvas placed her in a "sleeper hold." When she lost consciousness, he let her go and she accidentally fell down the basement stairs and broke her neck - an injury so severe that it may have caused her death. Mistakenly believing that Mrs. Place was feigning her death, Papasavvas threatened to sexually assault her so that she would stop pretending. When she did not respond, he proceeded to have sexual contact with her as evidenced by the semen found on Mrs. Place's body during the autopsy. After Mrs. Place's death, Papasavvas rummaged through her pocketbook and closets, stealing some clothing, two credit cards, and a telephone calling card.

There is little dispute over the remaining evidence. At 11:15 p.m., Papasavvas

used Mrs. Place's telephone to call his own house. Before dialing his phone number, Papasavvas dialed "*67" so that Mrs. Place's phone number would not appear on his call recognition (caller ID) box. The telephone call did, however, appear on Mrs. Place's bill. Papasavvas stole Mrs. Place's automobile and drove to New York City, where he spent the night with Rosa Talbert, a female acquaintance. The next day, Papasavvas and Talbert drove to a liquor store and purchased wine and champagne using Mrs. Place's credit card. Talbert signed the receipt at Papasavvas's request after he told her that the card belonged to his mother. That same day, Papasavvas had his hair cut at a barber shop located in the vicinity of Talbert's apartment. Papasavvas left Talbert's apartment two days later, leaving behind Mrs. Place's clothing. Nineteen days after the murder, Papasavvas turned himself in to the police.

During the guilt phase of the trial, Papasavvas introduced evidence of his life history. Born in Livingston, New Jersey in 1972, Papasavvas was one of four siblings. His childhood is most remarkable for the verbal and physical abuse he endured. Whenever Papasavvas's father, Chris Papasavvas, suspected that any of his sons was misbehaving, he would take all three children downstairs to the basement, strip them, tie them to a column, and beat them with a belt or stick. His father forced Papasavvas and his brothers to shower together, occasionally scalding them with hot water, and was known to squeeze his sons' toes with pliers. Papasavvas's mother and the family pets were also on the receiving end of his father's wrath.

While in junior high school, Papasavvas developed behavioral problems that led to truancy and erratic scholastic performance. Seeking social acceptance, Papasavvas was naturally drawn to other adolescents with similar behavioral problems. Around this time, Papasavvas began abusing alcohol and various drugs, including marijuana, cocaine, LSD, and mescaline.

To support his drug habit, Papasavvas stole car radios and radar detectors from unlocked vehicles. At age fifteen, he was arrested for the first time. Over the next several years, Papasavvas was repeatedly convicted for shoplifting, theft, and burglary. As the misbehavior increased, so did the abuse at home.

In 1989, Papasavvas dropped out of high school. That same year, he received court-ordered in-patient counseling at the Carrier Clinic for a twenty-day period. Because he suffered from insomnia, flashbacks, hallucinations, and suicidal thoughts, doctors diagnosed him with adolescent adjustment reaction.

In 1993, Papasavvas suffered a serious head injury in a motorcycle accident. He was comatose for nearly three weeks, followed by at least three additional weeks of post-traumatic amnesia. A CT scan revealed that Papasavvas had bilateral frontal traumatic subdural hygromas, a diagnosis that indicates a fluid buildup in both frontal lobes, the area of the brain where high-level reasoning, judgment, and decision making take place. Tests performed in 1997 on Papasavvas's cognitive functioning

revealed that his I.Q. had returned to its pre-accident level but that his abstract thinking and judgment had not similarly recovered.

After the motorcycle accident, Papasavvas's personality changed. Although he had shown aggressive characteristics prior to the accident, he began acting violently after he injured himself. In July 1994, for example, he threatened his girlfriend with a knife. Papasavvas's alcohol abuse and criminal activity also escalated.

Not surprisingly, the Public Defender and the Attorney General reached conflicting conclusions regarding Papasavvas's psychiatric condition. Dr. Wilfred Van Gorp testified for the defense that Papasavvas had suffered a severe brain injury, which included permanent damage to the frontal lobes, temporal lobes, and subcortical structures. He said that the frontal lobe injury further impaired Papasavvas's pre-accident deficiencies in judgment and inhibiting responses. Stressful conditions magnify his cognitive deficits. Dr. Arnold Apolito, another defense expert, concluded that Papasavvas's motorcycle accident caused him to suffer a severe organic brain disorder, commonly known simply as brain damage. As a result, according to Dr. Apolito, Papasavvas has cognitive defects, including impaired judgment and an inability to handle unexpected events and stressful situations.

Experts testifying on behalf of the State acknowledged that Papasavvas suffered a moderate to severe head injury in the motorcycle accident, but they concluded that his cognitive functioning had returned to its pre-accident level. Dr. Michael Miller stated that Papasavvas's motorcycle accident did not affect his behavior on the night of the offense. Another expert testifying for the State, Dr. Stanley L. Portnow, diagnosed Papasavvas with antisocial personality disorder and a substance dependence problem, but opined that Papasavvas had recovered from any head injury by the time of the murder. In short, the State's experts testified that the head injury played no role in the murder and that Papasavvas's actions comprised part of a continuum of misbehavior that had begun in his childhood.

The jury convicted Papasavvas of knowing or purposeful murder by his own conduct, felony murder, burglary, robbery, auto theft, and credit-card theft. The jury acquitted Papasavvas of aggravated sexual assault but convicted him of aggravated sexual contact, a lesser-included offense involving touching.

In the penalty phase, the State sought to establish the c(4)(g) (felony murder) and the c(4)(f) (escape detection) aggravating factors. The State relied entirely on the evidence presented at the guilt phase to prove that Papasavvas killed Mrs. Place during the commission of a burglary or robbery in order to escape detection or apprehension.

Papasavvas relied on the psychiatric testimony offered at trial and introduced additional evidence of the abuse he had endured as a child.

The jury unanimously determined that the felony-murder aggravating factor outweighed the mitigating factors beyond a reasonable doubt. Accordingly, the court sentenced Papasavvas to death.

II. INDIVIDUAL PROPORTIONALITY REVIEW

The Court conducts proportionality review to ensure that a specific defendant's death sentence is not disproportionate when compared to similarly situated defendants. State v. DiFrisco, 142 N.J. 148, 160 (1995); N.J.S.A. 2C:11-3e. "A capital sentence is excessive and thus disproportionate if other defendants with characteristics similar to those of the defendant under review generally receive sentences other than death for committing factually-similar crimes in the same jurisdiction." State v. Martini, 139 N.J. 3, 20 (1994); State v. Morton, 165 N.J. 235, 243-44 (2000).

The first step in proportionality review is to determine the universe of cases against which the defendant's case will be compared. In this case, the Court relies on a universe of cases assembled by the Administrative Office of the Courts (AOC) in the Papasavvas Report. The proportionality universe currently includes a total of 455 death-eligible cases, 176 of which proceeded to a penalty trial. Of the 176 cases that reached the penalty phase, fifty-two, or 29.5%, resulted in a death sentence. The overall death-sentencing rate is 11.4% (52/455).

Proportionality review consists of two steps: frequency analysis and precedent-seeking review. Each must be addressed separately.

A. FREQUENCY ANALYSIS

In frequency analysis, the Court "seeks[s] to determine... whether there is a societal consensus that the defendant in the case before us is sufficiently culpable such that his sentence may be deemed not aberrational." State v. Chew, 159 N.J. 183, 201 (1999). The Court conducts frequency analysis by relying on the salient-factors test, a measurement of the relative frequency of death sentences in factually similar cases. Under the salient- factors test, every death-eligible case is assigned to one of thirteen categories based on the statutory aggravating factors. We then subdivide that group "according to circumstances that serve either to aggravate or to mitigate the blameworthiness of the defendants in those cases." State v. Loftin, 157 N.J. 253, 328 (1999). In the present case, the State and Papasavvas cannot agree on the appropriate category for salient-factors review. The State contends that this case should be assigned to the F-1 cell - murder committed during a residential robbery. Papasavvas, on the other hand, argues that this case belongs in the K cell - murder committed during a burglary. For the reasons that follow, we conclude that this case should be assigned to the F-1 cell.

As noted previously, the State submitted two aggravating factors to the jury: (1) Papasavvas murdered Mrs. Place to escape detection for burglary or robbery, and (2) Papasavvas murdered Mrs. Place during the commission of a burglary or a robbery. Only five of the twelve jurors found the "escape detection" aggravating factor, but the jury unanimously agreed that Papasavvas murdered Mrs. Place during a burglary *and* a robbery. Papasavvas nevertheless contends that this case should be assigned to the burglary cell because the robbery was a mere afterthought, and it was actually the burglary that led to Mrs. Place's death.

Clearly, a robbery occurred. Accordingly, the case is assigned to the most aggravated category. The main rationale in support of the principle of unique assignment is that juries generally are swayed by the most aggravating characteristic in a case. Consequently, we assign Papasavvas's case to the F-1 subcategory - murder committed during a robbery in a home.

However, after a careful review of the statistical information available for all F-1 cases, without burdening the record and setting forth the said data herein, the statistics do not demonstrate a societal consensus for or against the use of the death penalty in F-1 cases. Accordingly, we must rely on the process of precedent-seeking review." State v. Cooper, 159 N.J. 55, 88 (1999).

B. PRECEDENT-SEEKING REVIEW

The second step in conducting proportionality review consists of precedent-seeking review, wherein the Court "examine[s] 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." Chew, *supra*, at 209-10. The goal of precedent-seeking review is "to ensure that the defendant has not been 'singled out unfairly for capital punishment.'" Cooper, *supra*, at 88.

Our review is substantially fact-driven, however, the Attorney General and the Public Defender continue to dispute certain facts. To compare the facts of this case with others, the Court must determine the appropriate version of events to evaluate. In so doing, we accept as given all uncontroverted facts and, where facts are disputed, we extract from the jury's findings of guilt and innocence the version of events essential to the verdict.

The conviction for aggravated sexual contact and acquittal of aggravated sexual assault indicate that the jury found only some form of non-invasive sexual touching. It is also apparent from the jury's verdict that Papasavvas deliberately threw Mrs. Place down the stairs. Because the jury found only the felony-murder aggravating factor and rejected the escape-detection aggravating factor, it can be inferred that the jury found that the murder happened in the course of a robbery or burglary but not that the robbery or burglary occurred before the murder. Thus, it is

reasonable to infer that the jury believed Papasavvas to have taken Mrs. Place's property after the murder.

The only fact still disputed by the parties but not resolved by the jury's verdict is whether Papasavvas ambushed Mrs. Place or was surprised by her. If the reason we accept all of the facts that are essential to the jury's verdict is because we can be sure the State bore its burden of proving those facts beyond a reasonable doubt, it follows that where, as here, the verdict does not provide such assurance, the State's version should not prevail. Because the issue is contested and neither version of the facts is essential to the verdict, we must assume that Papasavvas was surprised by Mrs. Place while he hid in her basement.

The burden is cast upon the defendant in proportionality review. However, the unique situation confronting us is to determine the factual predicate for the proportionality review. The burden shifts to Papasavvas only after the facts have been established, at which point the proportionality review inquiry begins.

RELEVANT FACTORS

We divide criminal culpability into three categories: the defendant's moral blameworthiness, the degree of victimization, and the defendant's character. See Chew, *supra*, at 210. In considering Defendant's Moral Blameworthiness we are compelled to look at: Motive, Premeditation, Justification or excuse, Evidence of mental disease, defect or disturbance, Knowledge of victim's helplessness, Knowledge of effects on non-decedent victims, Defendant's age, and Defendant's involvement in planning the murder. In considering the Degree of Victimization, we look to: Violence and brutality of the murder and Injury to non-decedent victim(s). In considering the Character of Defendant, we look to: Prior record, other unrelated acts of violence, Cooperation with authorities, Remorse, and Capacity for rehabilitation. State v. Harvey, 159 N.J. 277, 309 (1999).

A. DEFENDANT'S MORAL BLAMEWORTHINESS

Papasavvas has been placed in the F-1 category - murder during the commission of a robbery. Among robbery cases, Papasavvas's motive for pecuniary gain is on the low end of the spectrum: his crime was not a contract killing, State v. Marshall, 123 N.J. 1, 28 (1991), it was not a murder resulting from a kidnaping for ransom, Martini, *supra*, at 74, nor was it an insurance killing, Chew, *supra*, at 226. Murders, that occur in the course of a felony, are strikingly common. At the very least then, because it is so widespread, cases that have only the 4(g) factor require particular scrutiny. In addition, we note that while the murder was not premeditated, the defense does not suggest any justification or excuse for Papasavvas's crime.

Papasavvas offered extensive evidence of brain damage and psychological impairments including a serious head injury sustained during a motorcycle accident. Although the jury unanimously rejected Papasavvas's claim of diminished capacity all twelve jurors found that Papasavvas suffered from a mental defect or other mental disorder. Papasavvas also presented considerable evidence of child abuse, and ten jurors found that Papasavvas was subject to cruelty as a child. All twelve jurors found that the school district in which Papasavvas was enrolled classified him as emotionally disturbed. Seven jurors found that his emotional disturbance was attributable in part to the abuse he suffered as a child.

Mrs. Place was vulnerable due to her advanced age and the fact that she lived alone. There is no evidence, however, that suggests Papasavvas was aware of those vulnerabilities when he broke into the basement.

Although Papasavvas was twenty-three years old at the time of the murder, the jury unanimously rejected his age as a mitigating factor. Nevertheless, we assign some mitigating weight to his age. Assessing all of those facts, we find Papasavvas's moral blameworthiness to be moderate.

B. DEGREE OF VICTIMIZATION

Papasavvas assaulted Mrs. Place. To prevent her from screaming, he tied a belt around her mouth, which made it difficult for her to breathe. After choking her, he threw her body down the stairs. Finally, he cut off her clothes piece by piece and had some sort of sexual contact with her. Because it is unknown at what point Mrs. Place died in the attack, we are unable to assess her level of suffering. However, even short periods of suffering are sufficient to increase the degree of victimization. Accordingly, the degree of victimization overall was high.

C. DEFENDANT'S CHARACTER

Papasavvas has both a juvenile record and an adult record. As an adult, he has nine convictions for such offenses as burglary, larceny, receiving stolen property, and unlawful possession of a weapon. As a juvenile, Papasavvas had two adjudications for delinquency, beginning at age fifteen, for burglary and thefts. His criminal history increases his culpability. However, that is offset by the absence of violent offenses prior to this offense.

Papasavvas did not immediately cooperate with the authorities. After three weeks had passed, he finally turned himself into the police. He confessed to his psychiatrists that he killed Mrs. Place, but he claimed that she accidentally fell down the basement stairs. That diminishes the weight to be accorded to his confession. Waiting until allocution to express remorse when facing the prospects of a death sentence diminishes the value of that remorse.

Although Papasavvas's capacity for reform is questionable, his criminal history, the lack of violence in his criminal record, his belated remorse, and his age indicate that he may well have the potential for rehabilitation.

D. CONCLUSION

Of the fifteen considerations that underlie this analysis, eleven clearly support Papasavvas. Accordingly, we find Papasavvas's overall culpability to be moderate based on the three-part model of criminal culpability.

PAPASAVVAS'S COMPARISON GROUP

We must now consider whether defendant's sentence is disproportionate in comparison with the culpability levels of other defendants committing similar offences. Loftin II, *supra*, at 339.

The recent case of State v. Timmendequas, 168 N.J. 20 (2001) is instructive. There, the Court compared defendant to, among other cases, those in which the victims were vulnerable because they were elderly. Those cases, that are factually similar to this case, include: (1) Kevin Conley, who broke into the home of his eighty-seven year-old victim and beat, raped, stabbed, and fatally strangled her; (2) Frank Masini, who first went to his eighty-five year-old aunt's home, stabbed her in the neck, and vaginally and anally raped her, and two weeks later did the same thing to another eighty year-old relative from whom he then stole a ring; (3) Samuel Mincey, who broke into the home of his seventy-three year-old victim, beat her severely, raped her, and strangled her, and then stole two oriental dolls and a television; (4) Rafael Rivera, who beat and strangled his seventy-eight year-old next door neighbor when she unexpectedly returned to her apartment and found him looking around for money; and (5) Otis James, who, after assaulting one woman, proceeded to rape and smother her eighty-two year-old upstairs neighbor. Not a single one of those plainly more culpable defendants had mitigating evidence nearly as compelling as that of Papasavvas. Yet not one of them received the death penalty. We find Papasavvas's sentence aberrant when compared to the sentences of those individuals.

Other similar cases received sentences of either a term of years or life. They include Robert Bolinger who stalked his victim, entered her apartment through the window, hid in the closet until he was observed and then stabbed the victim, bound her and sexually assaulted her. Bolinger claimed as mitigation an alcohol and drug abuse problem. He pled guilty to felony murder and aggravated sexual assault and received a life term. Fouincill Brockington entered the home of his victim, sexually assaulted and strangled her, and struck her on the head with a pointed object. His mitigation was cocaine use and no prior record. He pled guilty to aggravated manslaughter and was sentenced to twenty-five years with eight years of parole

ineligibility. Jerry Spraggins broke into his sixty-eight year-old victim's home and sexually assaulted her. To silence her, he put a pillow over her face and smothered her. He then took his victim's purse and a gold chain and left through the window. He had a long criminal record and little mitigating evidence. He was convicted of burglary, aggravated sexual assault, and felony murder, and received a life term with a thirty year parole disqualifier for murder, with consecutive terms on the other offenses.

If those are the comparison cases, Papasavvas's death sentence is clearly disproportionate.

In addition to the cases outlined above, the parties agreed to ten additional cases to consider. The defense offered an additional five cases, four of which we find substantially similar and worthy of consideration. In addition, the State offered an additional eight cases, of which we excluded three due to factual differences and accept the remaining five for consideration. In total, the court is considering an additional 19 cases.

COMPARISON OF AGREED-ON CASES

Of those defendants in the agreed-on group, only one, Nathaniel Harvey, received a death sentence, and he is far more culpable than Papasavvas. Harvey was sentenced to death based upon a finding of torture and/or depravity). The facts reveal that his crime was much more brutal then the instant case. He inflicted sixteen wounds on his victim, whose teeth and jaw were broken and whose skull was split open by a hammer or lead pipe. Harvey's break-in of his victim's apartment was "not an impulsive act" and that he "previously had committed numerous burglaries." Harvey's prior record is extensive and involves convictions for serious, violent crimes dating back over 20 years, including rape, kidnapping, attacking a girl with an ax and murder. Suffice it to say, Nathaniel Harvey is a very dangerous man who has kidnaped, raped, robbed and killed.

By contrast, Papasavvas' break-in of Mrs. Place's home appears to have been impulsive, and he killed her after she surprised him as he was hiding in her basement. Moreover, Harvey was significantly older than Papasavvas, did not suffer from a mental disease or defect, and was not abused as a child. Finally, unlike Papasavvas, Harvey did not express remorse for his crime. We conclude that this supports Papasavvas's disproportionality contention.

Considering the remaining agreed upon cases involved life sentences as opposed to a death penalty, with some supporting Papasavvas' claim of disproportionality and some not. Alvin Adams selected his victim, not by chance, but because he knew she was an elderly woman, however there was no sexual contact and Adams was mentally retarded. Alphonso Brunson has a substantially similar

history of abuse to the defendant here, but although his assault/murder was more violent, there was no sexual assault. Timothy Lee stabbed his victim one time causing her death, but there were no other mitigating factors supporting or challenging whether the death penalty would be appropriate. In addition there was no sexual assault component in the Lee case. These cases do not support Papasavvas' claim of disproportionate sentencing.

Other cases, including Jerry Britton (stabbing his victim 16 times, before sexually assaulting her); Jesus DeJesus (although he did not sexual assault the victim, he stabbed his victim, set her apartment on fire and denied any mitigating factors such as child abuse, brain damage or alcohol dependency); Franklin Flowers Hudson (murdered one victim and tied up another, leaving him to die after bludgeoning his victims with a baseball bat – and found to be comparably similar in culpability to Papasavvas); Gerald Williams (robbery of a third floor apartment and threw the victim out of the window to his death, while the victim's 8 year old daughter watched him commit the crime); and Thomas Wolfe (slashed the throat of his victim in such a way that the victim bled to death in a long and drawn out manner) are all equally or more culpable or deathworthy that Papasavvas, yet all received life sentences as opposed to the death penalty. Accordingly, these cases all support Papasavvas' claim of disproportionate sentencing.

PUBLIC DEFENDER'S PROPOSED COMPARISON CASES

Cases submitted by the defense all tend to suggest that more deathworthy or culpable defendants that received life sentences support his claim that his sentence was disproportionate. These include Larry Durden (similar facts to the instant case, adding that he sold the stolen items to the victim's neighbor and threatened her not to say anything); Albert Fain (who planned the murder and waited to get his victim alone after the home health aide left and then murdered the wheelchair-bound, elderly victim); and Charles Ploppert (beat his blind victim unconscious and then set the house on fire while the victim was still alive) all received sentences of life imprisonment, this supporting Papasavvas' claim of disproportionality

ATTORNEY GENERAL'S PROPOSED COMPARISON CASES

The cases submitted by the State are all distinguishable from the Papasavvas case. In each such case, we have found that the defendant was either more deathworthy that Papasavvas (Wayne Busby who planned his attack; George Schaffer also planned his attack before he beat his victim with a brass lamp and strangled her with his hands, a chain, and finally the lamp cord), equally deathworthy or culpable (Aaron Huff who the jury found suffered from mental disease or defect; Thomas Reigle who also suffered from emotional and psychiatric problems), or less culpable (Samuel Rodriguez who was somewhat younger that Papasavvas,

suffered from a neurologic impairment, and did not sexually abuse his victim). Accordingly, the life sentence for Schaffer does not help the State's case, although the death sentences for the other equally or less culpable defendants does.

CONCLUSION OF CASE COMPARISONS

Our precedent-seeking review establishes that Papasavvas's death sentence is disproportionate. Although we continue to adhere to the basic proposition that a defendant need not be equally culpable to the other death-sentenced defendants, or more culpable than all the life-sentenced defendants, we conclude that Papasavvas has demonstrated that he has been "singled out unfairly" for the death penalty. Martini, *supra*, at 47.

CONCLUSION

Peter Papasavvas has met his burden of establishing that his death sentence is disproportionate. His culpability is less than that of the only death-sentenced defendant in the F-1 category and equal to or less than most of the seventeen life-sentenced F-1 defendants. When Papasavvas's crime is re-categorized and compared with murders involving a sexual offense against a vulnerable victim, the disproportionality of his death sentence becomes even more stark.

Accordingly, we vacate Papasavvas's death sentence and remand for sentencing consistent with this opinion.

DISSENTING OPINION:

Today, for the first time, the Court finds a defendant's death sentence disproportionate. In the past, the Court has vacated thirty-six of fifty-one death penalties imposed since 1982 because of trial errors but never because of disproportionality. Significantly, in all of those cases the State was entitled to seek the death penalty in a retrial. The Court's decision today is very different in that the State is forever barred from seeking a sentence of death for the grotesque murder of Mrs. Place. I do not find defendant's death sentence to be disproportionate based on either the undisputed facts or a combination of the undisputed and disputed facts. I respectfully disagree with the Court's holding and therefore dissent.

I.

"Under our system of capital punishment, a jury of men and women forms the essential link between society and the defendant before the court. Each capital jury expresses the collective voice of society in making the individualized determination

that a defendant shall live or die." State v. Zola, 112 N.J. 384, 429 (1988). My careful examination of the record in this case leads me to conclude that the death sentence was not "wantonly and . . . freakishly imposed" by the jury. Furman v. Georgia, 408 U.S. 238, 310, 92 S. Ct. 2726, 2762, 33 L. Ed.2d 346, 390 (1972) (Stewart, J., concurring). Notwithstanding the substantial evidentiary basis to support the jury's individualized determination to impose the death sentence, the Court has concluded that, based on facts in other cases that the jury was completely unaware of, defendant's death sentence should be vacated because of comparative disproportionality.

My substantial point of departure from the opinion of the Court is the determination of the standard to be used in individual proportionality review to resolve disputed factual issues in respect of the capital murder that were not resolved by the jury's verdict and the utilization of the undisputed and disputed facts in this proportionality review. I adopt the majority's recitation of facts and assessment of the frequency analysis stage of this proportionality review. I write separately, in dissent, with respect to the remaining sections of the majority decision.

II.

I agree with the majority that, when conducting individual proportionality review, "both precedent-seeking review and frequency analysis, especially the relevant factors component, are fact-driven." I agree that presents a "unique challenge" in this case because the Attorney General and the Public Defender continue to dispute the facts surrounding Mrs. Place's murder. The Attorney General contends that defendant ambushed Mrs. Place and gagged her with a belt after he knocked her to the floor. Defendant then cut off Mrs. Place's clothing piece by piece before sexually attacking her. According to the Attorney General, defendant concluded the assault by strangling Mrs. Place and throwing her down the basement stairs.

The Public Defender, on the other hand, argues that Mrs. Place opened the basement door and surprised defendant, who was hiding in the basement. According to the Public Defender, defendant applied a "sleeper hold" to Mrs. Place to prevent her from screaming, but she accidentally fell down the basement stairs, broke her neck, and died. Mistakenly believing that Mrs. Place was feigning her death, defendant removed her clothes and sexually molested her in an attempt to stop her from pretending to be dead.

In order to convict defendant of the various crimes with which he was charged, the jury was required to resolve certain factual disputes. For example, the Public Defender and the Attorney General contested at trial whether defendant suffered from "diminished capacity." By convicting defendant of capital murder, the jury must have concluded that defendant's diminished capacity did not prevent him from

forming the mental culpability required for a knowing or purposeful murder. State v. Oglesby, 122 N.J. 522, 528 (1991) (observing that "if there is any evidence that defendant suffered from a mental disease or defect that might affect his ability to form an intent to kill, the State must prove beyond a reasonable doubt that such disease or defect did not prevent defendant from acting with the requisite mental state"). Other facts, however, remain in dispute because the jury did not need to resolve them in order to convict defendant of the various offenses. For example, the jury was not required to decide whether defendant ambushed Mrs. Place, or whether Mrs. Place opened the basement door and surprised defendant. In order to conduct precedent-seeking review, however, the Court must decide which facts to use.

Thus, the critical legal issue raised in this case is what standard should be used in individual proportionality review to resolve disputed factual issues surrounding the capital murder that were not clearly resolved by the jury's verdict. The Court adopts the following standard:

> We do not attempt to replicate the jury's deliberate process, an activity that is plainly beyond our purview. Rather, we accept as given all uncontroverted facts and, where facts are disputed, we extract from the jury's findings of guilt and innocence the version of events essential to the verdict. The reason we do that is because we can be sure that the State proved those facts beyond a reasonable doubt.

Under the Court's standard, it can simply ignore those facts that were not critical to guilt or innocence but were nonetheless highly persuasive in the jury's determination of whether the aggravating factor outweighed any mitigating factors. Those facts are extremely relevant when deciding whether one case is comparable to another when conducting precedent-seeking review. That death-worthiness determination is made independently of the jury's finding that the defendant committed a knowing or purposeful murder by the defendant's own conduct. Therefore, the standard adopted by the majority converts the Court "from the Court of last resort, see N.J. Const. 1947, art. VI, to some sort of super rescue-mission." Whitefield v. Blackwood, 101 N.J. 500, 501 (1986). To avoid having the Court act as a "super rescue-mission," prosecutors in all likelihood will request that special interrogatories be submitted to the penalty jury for a determination of disputed death-worthiness facts that are extremely relevant to precedent-seeking review.

A sentence of death is unique both in terms of finality and severity. State v. Ramseur, 106 N.J. 123, 326-27 (1987). In order to ensure that it is applied in a fair, just, and rational manner, many precautions have been taken. We catalogued some of those precautions in State v. Marshall, 130 N.J. 109 (1992). In Ramseur, we undertook to "narrow imprecise [c(4)(c)] statutory language in order to render it constitutional." In Gerald, we interpreted the Act to limit the sentence

of death to those who intended to kill, not just injure. In Bey, we rejected any idea of a mechanical or numerical balancing of factors in the death-sentencing process. We made it clear that jurors must be instructed that it is they who must make the qualitative judgment about who shall live or who shall die. In Zola, we recognized the request that defendants be permitted to plead for life at the hands of a jury. In State v. Davis, we allowed any relevant evidence bearing on the defendant's potential for rehabilitation to be presented to a jury in a capital-sentencing phase. Marshall, *supra*, 130 N.J. at 192.

It is ultimately the jury, however, that must decide whether a specific defendant deserves to die for the murder. The statistics demonstrate that New Jersey juries impose the death penalty sparingly. Thus, once a jury decides to impose the death sentence, our role, as a reviewing court, is a limited one. As we explained in Martini, *supra*, proportionality review is not intended to "validate" the death sentence, but is instead "a vehicle to ensure that the penalty-phase jury's decision is not insupportable." Martini, *supra*, 139 N.J. at 22.

That purpose stems from the mandate of the statutory language itself: "the Supreme Court * * * shall determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant". Thus, our search is not for proportionality, but rather one in which our goal is to determine whether the jury's decision to sentence a defendant to death is comparable to decisions reached in the appropriate capital cases in our universe of cases. The question is whether other defendants with similar characteristics generally receive sentences other than death.

The dissent finds "a palpable bias in favor of the proportionality of a death sentence." That bias, if present, does not stem from what our colleague describes as a "selective and convenient rationalization." Rather, our imposing on the defendant the burden of showing disproportionality stems from the statutory language itself, discussed above. It is settled law. We held as much in Bey, *supra*, 137 N.J. at 343, 349. The dissent unearths nothing new or "treacherous," here. On the contrary, it simply attempts to rewrite established proportionality jurisprudence. Therefore, the statement that the "Court is determined to put the burden of proof on the defendant," although accurate, is hardly a damning accusation. Martini, *supra*, 139 N.J. at 22-23.

Once the jury imposes the death penalty, the burden shifts to the defendant to prove that his sentence is disproportionate. Morton, *supra*, 165 N.J. at 244; Chew, *supra*, 159 N.J. at 195; State v. Bey, 137 N.J. 334, 352 (1994). In other words, a presumption is triggered that the defendant's death sentence is not aberrational.

A claim of individual disproportionality is, in effect, a motion by the defendant to set aside the penalty-phase jury's verdict of death on the ground that it is an

aberration. Such a claim requires us to replicate the jury's deliberative process as much as is humanly possible in respect of its role as factfinder. In the absence of special interrogatories, I believe that the best way to accomplish that objective is to conclude that where disputed facts have not been resolved by the jury's guilty or not guilty verdicts, a reasonable inference arises that the jury relied on those facts that are most consistent with its imposition of the death sentence. That standard is largely guided by the Court's assignment of cases to the single most aggravated cell for salient-factor review based on the recognition that juries are often swayed by the most aggravating characteristics in a case.

Stated differently, I believe that the standard that should be applied to decide which of the conflicting versions of the evidence should be accepted when deciding defendant's aberrational claim is analytically similar to the one established for Rule 3:18-2 and its counterpart for civil cases. Under that standard, and here, defendant's application to the Court is to enter judgment for the defendant notwithstanding the verdict, in whole or in part, based on insufficiency of the evidence when compared with similar death-worthy defendants. The standard applied under Rule 3:18-2 is the same as that applied in determining a motion for acquittal made either at the end of the State's case or at the end of the entire case. State v. Kluber, 130 N.J. Super. 336, 341 (App. Div. 1974). Under both Rules 3:18-1 and -2, the court "is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the State." Kluber, *supra*, 130 N.J. Super. at 342. Our standard for Rule 3:18-2 motions is similar to that approved by the United States Supreme Court. In Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979), the Court explained the appellate standard for reviewing the sufficiency of evidence to support a criminal conviction. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Jackson, at 319, 99 S. Ct. at 2789, 61 L. Ed. 2d at 573.

A claim of disproportionality is essentially a motion by the defendant to vacate the jury's verdict of a sentence of death. As with a motion for judgment notwithstanding the verdict (jnov), "'the court must accept as true all the evidence which supports the position of the party defending against the motion and must accord him [or her] the benefit of all legitimate inferences which can be deduced therefrom.'" Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 535 (1995). Another way to articulate the same standard is to "treat plaintiff's [or the State's] proofs as uncontradicted." Evers v. Dollinger, 95 N.J. 399, 402 (1984).

To summarize, under the standard I would adopt, I conclude that where disputed facts have not been resolved by the jury's guilty or not guilty verdicts, a

reasonable inference arises that the jury relied on those facts that are most consistent with its imposition of the death sentence. That generally means accepting the State's version of the facts. That is not the case, however, with respect to evidence presented solely to establish an element of an offense for which the defendant was acquitted.

In addition to applying such an inference in the present case, there are legal reasons under the New Jersey Criminal Code for rejecting some of defendant's factual-legal assertions. For example, under the Code, a person need not intend the death of his victim in order to be death eligible. It suffices in a purposeful serious bodily injury (SBI) capital murder case if it was "the defendant's conscious object to cause serious bodily injury that then resulted in the victim's death, [when the defendant] knew that the injury created a substantial risk of death and that it was highly probable that death would result." State v. Cruz, 163 N.J. 403, 417-18 (2000).

Therefore, in order for defendant to have been sentenced to death in the present case, based on the instructions given to the jury, the jury must have found that defendant by his own conduct purposely or knowingly caused the death of Mrs. Place or intended serious bodily injury knowing that it was highly probable that death would result from the injury. Defendant contends that he only intended to induce Mrs. Place to become unconscious by placing her in a "sleeper hold," but that she died when she accidentally fell down the basement stairs. The prosecutor, on the other hand, argued to the jury that defendant assaulted Mrs. Place, strangled her with his hands and her belt, and threw her down the stairs. It is apparent from the jury's verdict that it rejected defendant's version. If it had believed defendant's version, it could not have found him to be death eligible. There is a substantial amount of evidence in the record to support that finding.

Furthermore, the few facts that are disputed do not support defendant's version of how the victim died. For example, defendant presented a diminished capacity defense at trial that was rejected by the jury. He also proposed the diminished capacity mitigating factor at the penalty phase, but it was unanimously rejected. Moreover, defendant's conduct following the murder is not consistent with a diminished capacity defense. Immediately after the murder, defendant placed a call from Mrs. Place's home. He had the presence of mind, however, to first dial *67 so that Mrs. Place's telephone number would not appear on the caller identification box at his house.

The question of whether defendant raped Mrs. Place is easily resolved because the jury made specific findings on this issue. At the guilt phase the jury acquitted defendant of aggravated sexual assault but convicted him of aggravated sexual contact, a lesser-included offense. Thus the jury found there was no aggravated sexual assault. The aggravated sexual contact found by the jury, however, was bizarre and repulsive in that Mrs. Place's private parts were left exposed and there was evidence that defendant ejaculated upon her.

Finally, the fact that the jury did not find the c(4)(f) aggravating factor based on an attempt to avoid detection or prosecution for robbery or burglary is not determinative of whether defendant stole the victim's property before or after he murdered her. It is undisputed that defendant burglarized the victim's home before he murdered her. Nonetheless, the jury did not find that the purpose of the murder was to escape detection or prosecution for that burglary. That does not mean, however, that the gravity of the burglary should be minimized. Indeed, defendant has argued to this Court that it was the burglary and not the robbery that led to Mrs. Place's death. As stated previously, I view this case as one in which both the burglary and the robbery contributed to the murder regardless of whether the property was stolen before or after the murder. Loftin, *supra*, 157 N.J. at 338.

DEFENDANT'S CHARACTER

I agree with the majority that defendant's capacity for rehabilitation is indeed "questionable" given his extensive criminal history. However, I do not accept the majority's view that Papasavvas has a "potential for rehabilitation" especially because I consider his expression of remorse at the time of allocution to have little weight.

CONCLUSION

Defendant's overall culpability is moderate to high. Although his moral blameworthiness is above average, the high degree of victimization contributes significantly to his culpability. Ultimately, I find that the aggravating aspects of his character outweigh the mitigating aspects. Accordingly, I find defendant's overall culpability to be relatively high based on the three-part model of criminal culpability.

DEFENDANT'S COMPARISON GROUP

COMPARISON OF AGREED-UPON CASES

Alvin Adams case does not support defendant's claim of disproportionality. Adams's victim suffered far less than Mrs. Place. Most notably, Adams did not sexually abuse his victim. Further, Adams was diagnosed as mentally retarded.

Jerry Britton was unexpectedly confronted by his victim during a burglary. Although the police found Britton's victim naked from the waist down, there is no direct evidence that Britton sexually abused her. Britton was addicted to heroin at the time of the murder. Overall, Britton's life sentence does not support defendant's claim of disproportionality.

There are substantial similarities between Alphonso Brunson and defendant.

Both men endured child abuse and displayed signs of emotional and psychological disturbance. In addition, both men were in their early twenties when they committed their respective murders and had prior criminal records. However, Brunson murdered his victim in a far less brutal manner and there was no evidence of sexual abuse. In my view, Brunson's life sentence does not strongly support defendant's disproportionality claim.

The degree of victimization in Jesus DeJesus' case is similar to that in defendant's case. Although DeJesus did not sexually abuse his victim, he stabbed her and set her apartment on fire before leaving with some of her jewelry. Like defendant, DeJesus had a prior criminal record, but DeJesus was considerably older than defendant. DeJesus had little mitigating evidence. In addition, there was no evidence of child abuse, brain damage, or emotional disturbance. DeJesus' life sentence supports defendant's claim of disproportionality.

Nathaniel Harvey was more culpable than defendant because he was significantly older and did not suffer from a mental disease or defect. Harvey also had an extensive prior criminal record that included convictions for rape and kidnapping. Unlike defendant, Harvey did not express remorse for the murder. Although there was no evidence that Harvey was abused as a child, he was emotionally scarred by a childhood episode in which he accidentally set his sister on fire while trying to light a stove. Harvey was given the death sentence on two occasions. Accordingly, this case is not probative on the issue presented here.

Franklin Flowers Hudson's moral blameworthiness is similar to defendant's moral blameworthiness. Both individuals acted out of a pecuniary motive and were approximately the same age at the time of their respective crimes. Although Hudson did not have a history of mental disease, he was under the influence of cocaine and alcohol when he attacked his victim. With respect to degree of victimization, Hudson stabbed his victim and struck him over the head with a baseball bat. Hudson also tied up and gagged another individual during the robbery, but there was no evidence that he injured her. As for character, Hudson cooperated with authorities by admitting to everything except stealing the homeowner's jewelry. By comparison, defendant continues to contend that Mrs. Place's death was an accident. Hudson and defendant both have criminal records. In short, Hudson and defendant are roughly equally culpable. Thus, Hudson's life sentence supports defendant's claim of disproportionality.

Timothy Paul Lee had no history of mental disease, but was addicted to heroin when he committed his murder. In contrast to defendant, the degree of victimization was low in Lee's case. The victim died from a single stab wound to the chest. Like defendant, Lee had a prior criminal record. Due primarily to the degree of victimization, Lee's sentence does not support defendant's claim of disproportionality.

The degree of victimization in Gerald Williams's case was lower than in defendant's because Williams's victim presumably died instantaneously upon impact after he was thrown from a window. Williams was also drinking on the night of the murder, and so the AOC coded the c(5)(d) (mental disease, defect, or intoxication) factor as being present. On the other hand, Williams never confessed to the murder, was in his mid-thirties at the time of the offense, and had no history of child abuse or mental illness. In addition, Williams allowed the victim's eight-year old daughter to watch as he killed the victim. Due to the lower level of victimization, however, I find that Williams's life sentence does not support defendant's claim of disproportionality.

Thomas Wolfe and defendant have comparable levels of moral blameworthiness. Wolfe and defendant both murdered elderly females for pecuniary gain. However, Wolfe's crime involved a somewhat lesser degree of victimization. Although Wolfe slashed his victim's throat several times in addition to inflicting multiple puncture wounds in her back, he did not sexually abuse his elderly victim. Approximately the same age as defendant, Wolfe exhibited a more positive character than defendant. He engaged in a number of good Samaritan-type acts prior to his crime which, taken in connection with the absence of a prior criminal record, exhibits an increased potential for rehabilitation. In conclusion, defendant is more culpable than Wolfe. Therefore, Wolfe's life sentence does not lend credence to defendant's claim of disproportionality.

PUBLIC DEFENDER'S PROPOSED COMPARISON CASES

I agree with the majority that other than the fact that Larry Durden was honorably discharged from the U.S. Navy, there is little mitigating evidence in Durden's case. He did not suffer from mental disturbances, drug addiction, or child abuse. Durden was also almost ten years older than defendant at the time of their respective crimes. I also note that Durden gave false information to the police. I believe, however, that defendant's case involves greater aggravating evidence. Durden's victim died from a single stab wound to the chest, whereas defendant assaulted, gagged, and threw Mrs. Place down the stairs. Unlike defendant, Durden did not sexually abuse his victim. In view of the additional aggravating evidence in defendant's case, I am unable to conclude that Durden's life sentence supports defendant's claim of disproportionality.

I agree with the majority's evaluation of Albert Fain, Harold Perry and Charles Ploppert. In respect of Fain and Perry, their culpability "is similar," whereas Ploppert's life sentence does not support defendant's claim of disproportionality.

ATTORNEY GENERAL'S PROPOSED COMPARISON CASES

Defendant is more deathworthy than Wayne Busby. In contrast to defendant, Busby's jury found mitigating factors c(5)(a) (emotional disturbance) and c(5)(d)

(mental disease, defect, or intoxication). There was some evidence that Busby planned the burglary, but it appears that he was surprised by the homeowner. Like defendant, Busby assaulted and strangled his victim. However, Busby did not sexually abuse his victim and he did not throw her down a flight of stairs. In his favor, Busby was a high school graduate and was employed at the time of his offense. Like defendant, Busby had a history of drug abuse and child abuse, although he did not suffer from brain damage or mental illness.

I also agree with the majority's evaluation of Aaron Huff and consider that Huff and defendant are similarly culpable.

I disagree with the majority's view of Thomas Reigle. In many respects, Reigle and defendant are similar. Reigle murdered his uncle to obtain more money for drugs; defendant murdered Mrs. Place to facilitate the commission of a robbery and burglary. In both cases, there was an absence of justification or excuse. Reigle and defendant were approximately the same age when they committed their respective crimes. With respect to degree of victimization, defendant's murder was more brutal, but Reigle injured a non-decedent victim. With respect to character, Reigle had no history of mental disturbance, but he was high on drugs at the time of the murder. Yet, Reigle's jury found three mitigating factors: mental disease, defect, or intoxication; no significant criminal history; and the catch-all. Defendant's jury, on the other hand, found a single mitigating factor unanimously, the catch-all factor; another factor, c(5)(a), was found by only three jurors. Thus, Reigle is less deathworthy.

I agree with the majority that "Samuel Rodriguez is less culpable than Papasavvas." Rodriguez was only eighteen years old and under the influence of drugs when he murdered his victim. In addition, Rodriguez suffered from a neurological impairment. Rodriguez beat his victim around the head and strangled her, but he did not sexually abuse her or needlessly prolong her suffering.

George Shaffer is not as deathworthy as defendant because there is stronger mitigation present in Shaffer's case. The AOC coded the mitigating factor for diminished capacity, presumably because Shaffer was intoxicated when he murdered his landlord. By comparison, defendant's jury unanimously rejected the diminished capacity factor. Another difference between Shaffer and defendant is that Shaffer had no prior criminal record. Thus, Shaffer shows a greater potential for rehabilitation. Shaffer also was diagnosed as a manic depressive. Although defendant presented a great deal of evidence relating to brain damage, only three jurors found the extreme emotional disturbance factor. Finally, although there was evidence Shaffer planned his crime and had prior knowledge of his victim's age, he gave a full confession to the police, thereby showing a greater willingness to cooperate with law enforcement. Although defendant confessed, he did so to his psychiatrists

and he continued to insist that Mrs. Place died accidentally when she fell down the stairs.

The majority has included eight cases in its precedent- seeking review analysis that admittedly fall outside the F-1 cell and that neither the AOC, Public Defender, nor the State sought to have considered: Kevin Conley, Frank Masini, Samuel Mincey, Rafael Rivera, Otis James, Robert Bolinger, Foucill Brockington, and Jerry Spraggins. Including those cases is not only contrary to our law since it cannot be argued that they are similar to cases falling into the F-1 cell, but doing so imposes a risk of prejudice to defendant and the State as well. The improper use of those eight cases is corroborative of the majority's willingness to overreach to support its unsound and unwarranted conclusion that defendant's sentence of death is disproportionate.

CONCLUSION

It is my opinion that precedent-seeking review does not establish that defendant's death sentence is disproportionate. I find that defendant is more culpable than Adams, Britton, Brunson, Busby, Durden, Ploppert, Lee, Reigle, Rodriguez, Shaffer, Williams, and Wolfe. Those twelve less culpable individuals did not receive death sentences. Consequently, they do not support defendant's claim of disproportionality. The proportionality of defendant's death sentence is further supported by the fact that defendant is as culpable as Harvey, who twice received the death penalty. Defendant is also as culpable as DeJesus, Fains, Hudson, Huff, and Perry, all of whom received life sentences. Although those five cases lend some credence to defendant's claim of disproportionality, "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." Martini, *supra*, at 47. It should be noted that none of the comparison cases involved sexual abuse, which is a particularly aggravating factor that adds a great deal to the degree of victimization. Additionally, in contrast to Huff, who knew his victim, defendant was not acquainted with Mrs. Place. Consequently, Huff's case lacks the specter of randomness inherent in defendant's murder. In sum, when the facts of defendant's case are compared to the other cases, I cannot conclude that he was singled out unfairly. The brutality of his crime, the degree of victimization, and the increased level of premeditation sets his crime apart from the comparison cases.

OTHER ARGUMENTS

ALLEGED SYSTEMIC DISPROPORTIONALITY

Defendant argues that racial discrimination in the administration of the death penalty in New Jersey violated his right to equal protection of the laws and subjected him to cruel and unusual punishment. Specifically, defendant contends that cases

like his, in which the victim is white, are subject to disproportionate capital prosecution.

In, In re Proportionality Review Project (II), 165 N.J. 206 (2000), we determined, on the basis of the evidence presently available, that we could not conclude that racial bias or discrimination affects the manner in which the death penalty is applied in New Jersey. Defendant presents no new evidence. Consequently, that argument is rejected. I note further that the majority did not consider this argument.

UNCONSTITUTIONALLY LOW RATE OF IMPOSITION

Defendant contends that because the death-sentencing rate in New Jersey continues to fall and executions are seldomly upheld, the death penalty statute violates the Eighth Amendment's prohibition against cruel and unusual punishment. We have consistently rejected that argument, Harvey, *supra*, at 319-20; Chew, *supra*, at 220-21; Cooper, *supra*, at 115-16; Loftin, *supra*, at 345; DiFrisco, *supra*, at 210; Martini, *supra*, at 79-80; Bey, *supra*, at 396; Marshall, *supra*, at 188-95, and do so again today. As we first remarked in Marshall, *supra*, at 194, the low rate at which the death sentence is imposed in New Jersey reveals that juries are "fulfilling the Legislature's wish" that the death penalty be reserved for a small segment of the death-eligible cases. I note that the majority has not considered this argument, either.

CONCLUSION

Defendant does not meet his burden of establishing that his death sentence is disproportionate under either the standard used by the majority or by me. The undisputed facts support proportionality. Nor has defendant met his burden of proving that racial bias operates as an impermissible factor in New Jersey's death sentencing system. Furthermore, because the majority agrees that based on our current statistical data, "juries view F-1 cases [murder committed during a residential robbery] as average in terms of deathworthiness", I believe the Court has fallen into serious error in finding defendant's sentence of death to be disproportionate.

Accordingly, I would affirm defendant's death sentence.