

THE DEATH PENALTY IN NEW JERSEY: A DEFENSE LAWYER'S PERSPECTIVE†

*Joseph E. Krakora**

Attorneys defending capital cases today in New Jersey face the reality that the tide is turning. Society's demand that the punishment fit the crime combined with the increasing number of New Jersey Supreme Court decisions upholding death sentences have made the defense lawyer's job more difficult at both the trial and appellate levels. Recent changes in the law reflect public demand for enforcement of the capital punishment law. These changes have resulted in an expanded definition of capital murder, an expansion of the number of aggravating factors, and enactment of a victim impact rule. This article discusses these changes in the context of society's increasing demand that the law focus on the nature of the crime and not on the person of the defendant. An understanding of this trend is essential to an understanding of how we as a society decide who should be sentenced to death and of how we as defense lawyers can best represent people accused of capital murder.

In order to put the recent trend in context, these changes must be viewed in relation to a political climate that has demanded increasingly harsher sentences for convicted criminals. Underlying this trend has been the notion that the punishment should fit the crime, not the criminal. Judges have been given less discretion in sentencing. New Jersey, for example, has mandatory sentences for certain drug offenses, crimes with guns, and carjacking.¹ Moreover, judges must sentence persons convicted of murder, but not subject to the death penalty, to a mandatory minimum of 30 years

† This article was delivered by the author as part of the *Seton Hall Law Review's* Symposium on Capital Punishment, on November 2, 1995.

* Mr. Krakora received his B.A. from Princeton University and J.D. from Cornell University. Presently, he is First Assistant Deputy Public Defender with the Essex County Public Defender's Office. Prior to this appointment, he was a litigation associate with Schenck, Price, Smith & King. Mr. Krakora has earned praise for his ability to defend capital murder cases, including a *New Jersey Law Journal* article focusing on his successful defense of double-murder suspect, Jesus Suarez.

¹ See N.J. STAT. ANN. § 2C:35-7 (West 1995) (establishing mandatory minimum sentences for certain drug offenses committed within 1,000 feet of school property); N.J.S.A. § 2C:43-6(c) (establishing mandatory minimum sentences for certain offenses committed with firearms); N.J.S.A. § 2C:15-2 (establishing mandatory minimum sentences for the crime of carjacking).

in prison.² In other words, certain crimes require a specific punishment regardless of the circumstances of the offense or background of the accused.

For all its political appeal, however, mandatory sentencing cannot be applied to capital punishment. The United States Supreme Court requires that the sentencer be permitted to consider not only the circumstances of the crime, but also the background and life history of the defendant.³ Consequently, mitigating factors generally focus on the individual who committed the crime.⁴ This is where the real tension in death penalty jurisdiction has developed. It pits the increasingly popular view that the

² N.J.S.A. § 2C:11-3(b). This section provides that:

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

Id.

³ See, e.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

⁴ Under New Jersey's capital punishment statute, jurors are required to weigh aggravating and mitigating factors during the sentencing phase to determine the appropriate sentence. N.J.S.A. § 2C:11-3(c)(2)(a). Aggravating factors are, in essence, the legal reasons supporting death as the appropriate sentence. In contrast, mitigating factors represent legal reasons against imposing the death penalty. Unlike aggravating factors, which must be specifically delineated, mitigating factors can include any information about the defendant's background or life history that the defendant believes should be taken into consideration. Specifically, mitigating factors include:

- (a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution;
- (b) The victim solicited, participated in or consented to the conduct which resulted in his death;
- (c) The age of the defendant at the time of the murder;
- (d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as the result of mental disease or defect or intoxication, but not to a degree sufficient to constitute a defense to prosecution;
- (e) The defendant was under unusual and substantial duress insufficient to constitute a defense to prosecution;
- (f) The defendant has no significant history of prior criminal activity;
- (g) The defendant rendered substantial assistance to the State in the prosecution of another person for the crime of murder; or
- (h) Any other factor which is relevant to the defendant's character or record or to the circumstances of the offense.

N.J.S.A. § 2C:11-3(c)(5).

Importantly, N.J.S.A. § 2C:11-3(c)(5)(h) is commonly referred to as the "catch-all" mitigating factor because it allows a wide range of information to be presented in mitigation.

punishment fit the crime without regard to the person of the defendant against the historical view, with constitutional implications, that the punishment fit the person as well as the crime.

I. THE EXPANDING DEFINITION OF CAPITAL MURDER

To understand the recent expansion of the definition of capital murder, a little background is necessary. Under New Jersey's homicide statute, a person is guilty of murder if he purposely or knowingly causes death *or* if he purposely or knowingly causes serious bodily injury resulting in death.⁵ In other words, a specific intent to kill is not necessary for a murder conviction; it is enough that the defendant intended to cause serious bodily injury that results in an unintended death. The statute does not distinguish between the two types of murder in terms of eligibility for the death penalty.

In *State v. Gerald*, however, the New Jersey Supreme Court limited death eligibility to those defendants who intended to cause death.⁶ The court based this ruling on the view that it would be a violation of the New Jersey State Constitution to impose the death penalty on a defendant who did not purposely or knowingly cause death, but merely intended to cause serious bodily harm that later resulted in death.⁷ In the process, the court overturned a number of death sentences and directed that jurors be required to make a specific finding that the defendant acted with intent to kill.⁸ As a result, until the recent constitutional amendment, jurors had the option of finding the defendant guilty of non-capital murder with the knowledge that the defendant would still receive the thirty-year minimum mandatory sentence for murder. Needless to say, this resulted in fewer capital murder verdicts and therefore fewer cases that even reached the sentencing phase.

Death penalty proponents characterized this as a "loophole" in the law and sought to expand the definition of capital murder. Voters closed this loophole by approving a constitutional amend-

⁵ N.J.S.A. § 2C:11-3(a).

⁶ 113 N.J. 40, 69, 549 A.2d 792, 807 (1988).

⁷ *Id.* ("We hold, on state constitutional grounds, that a defendant who is convicted of purposely or knowingly causing 'serious bodily injury resulting in death' under N.J.S.A. § 2C:11-3(a)(1) and (2), or either of them—as opposed to one who is convicted of purposely or knowingly causing death under those same provisions—may not be subjected to the death penalty.")

⁸ See, e.g., *State v. Harvey*, 121 N.J. 407, 581 A.2d 483 (1990); *State v. Clausell*, 121 N.J. 298, 580 A.2d 221 (1990); *State v. Pennington*, 119 N.J. 547, 575 A.2d 816 (1990); *State v. Long*, 119 N.J. 439, 575 A.2d 435 (1990); *State v. Coyle*, 119 N.J. 194, 574 A.2d 951 (1990).

ment in 1992.⁹ Accordingly, the homicide statute was amended in 1993.¹⁰ These changes have effectively overruled the *Gerald* decision. Thus, the State need not prove that the defendant purposely or knowingly caused death, but must only prove that the defendant purposely or knowingly caused the serious bodily injury that resulted in death.

Obviously, the definition of capital murder has been expanded by eliminating the requirement that the defendant intended to cause death. This change is an effort to expose more defendants to the possibility of capital punishment. It reflects the public's view that the capital punishment law will be enforced more often if additional types of murders are made death eligible.

Ironically, in the long run, this change in the law may simply create new legal issues. The New Jersey Supreme Court, in reaction to these changes, has already suggested that federal constitutional law may impose some limitation on the extent to which a defendant who did not intend to kill may be sentenced to death. Specifically, in *State v. Harris*, the court referred to the United States Supreme Court's holding in *Tison v. Arizona* that a participant in a murder who did not kill or intend to kill could still be sentenced to death as long as he is shown to have acted with reck-

⁹ The New Jersey State Constitution was amended on December 3, 1992, to provide specifically that it would not be cruel and unusual punishment to impose a death penalty on a defendant whose intent had been merely to cause serious bodily injury. See Assembly Bill No. 2113, L. 1993, c.111 (describing the constitutional amendment and the reasons supporting the amendment). The Assembly Committee on the Judiciary, Law and Public Safety noted that:

As a result of a vote of the people of the State of New Jersey, effective December 3, 1992, Article I, paragraph 12 of the New Jersey Constitution is amended to provide, "It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing serious bodily injury resulting in death who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value." The amendment responds to the New Jersey Supreme Court's decision in *State v. Gerald*. . . .

Therefore, in order to clarify legislative intent and thereby avoid additional judicial construction that might narrow the scope of the law to comport with the court's view of the legislative intent, this bill would amend New Jersey's death penalty statute to clearly state that the term "homicidal act" means conduct that causes "death or serious bodily injury resulting in death."

Id.

¹⁰ N.J.S.A. § 2C:11-3(i) (providing that "[f]or purposes of this section the term 'homicidal act' shall mean conduct that causes death or serious bodily injury resulting in death").

less indifference to whether death would result from his conduct.¹¹ The New Jersey Supreme Court suggested that this requirement would apply in a New Jersey case where the State seeks to impose a death penalty on a defendant whose intent was merely to cause serious bodily injury which resulted in death. Otherwise, a death sentence in such a case would violate the federal constitution.

The New Jersey Supreme Court is therefore suggesting an additional element for the definition of capital murder, despite the amendment to New Jersey's Constitution. This additional element would be the reckless indifference to the risk of death described in the *Tison* case. Interestingly, the *Tison* defendants were accomplices, not principals, but were nevertheless sentenced to death.¹² Even with New Jersey's expanded definition of capital murder, accomplices, with only two exceptions, are not subject to the death penalty.¹³ Indeed, New Jersey still requires that the defendant commit the murder by his own conduct whether he intends either to cause death or merely serious bodily injury resulting in death. This creates the anomaly that, in New Jersey, an accomplice with intent to kill is not subject to the death penalty, but a principal intending only to cause serious bodily injury is subject to the death penalty.

II. ADDITIONAL AGGRAVATING FACTORS

Recently, New Jersey law further expanded the number of murder cases likely to be treated as capital cases by adding three new aggravating factors. These new aggravating factors, designed to result in more capital verdicts, include: murder ordered or committed as part of a drug operation (drug kingpin); murder committed as part of a terrorist act; and, murder of a child under age fourteen.¹⁴ They establish three new categories of cases potentially

¹¹ 141 N.J. 525, 548, 662 A.2d 333, 344 (1995) (citing *Tison v. Arizona*, 481 U.S. 137 (1987)).

¹² See *Tison v. Arizona*, 481 U.S. 137, 137 (1987).

¹³ N.J.S.A. § 2C:11-3(c) (establishing the requirement that the defendant be shown to have committed the murder "by his own conduct" before facing a possible death sentence). The two exceptions are for those who hire the actual killer and for those who, as drug kingpins, order the murder or solicit it by threat or promise. *Id.*

¹⁴ N.J.S.A. § 2C:11-3(c)(4)(i)-(k). The remaining aggravating factors are:

(a) The defendant has been convicted, at any time, of another murder.

For purposes of this section, a conviction shall be deemed final when sentence is imposed and may be used as an aggravating factor regardless of whether it is on appeal;

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

subject to the death penalty. There are now eleven aggravating factors in New Jersey's death penalty statute.¹⁵ Significantly, ten of the eleven focus on the type of murder committed and not on the background or prior history of the accused. The only aggravating factor which looks specifically to the history of the accused is the one that exposes a previously convicted murderer to the death penalty.¹⁶ The remaining aggravating factors make certain types of murders capital offenses regardless of the background or prior history of the defendant.

The three new aggravating factors reflect a political response to particular events. The drug kingpin factor provides an obvious response to the high number of drug-related killings. The terrorist act factor provides a clear response to cases like the World Trade Center and Oklahoma City bombings. Finally, the child murder factor is a clear response to recent cases involving the abduction and killing of young children.

Perhaps the most important consequence of these new factors in the trial of capital cases will be a practical one for the attorneys involved. That consequence will not be so much on the number of capital cases brought, but on the number of aggravating factors charged against a particular defendant. For example, a defendant accused of bombing a building and thereby committing a murder or murders would previously have been exposed to the death penalty because he had created a grave risk of death to another person in addition to the victim.¹⁷ Now, he would also likely have to face

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

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

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

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

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

(h) The defendant murdered a public servant . . . while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.

N.J.S.A. § 2C:11-3(c)(4)(a)-(h).

¹⁵ *See id.*

¹⁶ N.J.S.A. § 2C:11-3(c)(4)(a).

¹⁷ N.J. S.A. § 2C:11-3(c)(4)(b).

the additional aggravating factor of having committed the murder as part of a terrorist act. Child-killing cases often involve charges of sexual assault and kidnapping and, thus, were already appropriately treated as capital offenses.¹⁸ In these cases, the new aggravating factor simply gives jurors an additional reason for imposing a death verdict in cases in which capital prosecution was already likely.

III. THE VICTIM IMPACT RULE

The third change—enactment of the victim impact evidence rule—is perhaps the most important one and the one most likely to increase the number of capital verdicts in New Jersey. The rule allows the prosecutor to present evidence about the victim's character and the impact of the murder on the victim's survivors whenever the defendant presents evidence of his own character in mitigation.¹⁹ It specifically allows jurors to give lesser weight to a defendant's mitigating factors where those factors involve the defendant's character or background.

Again, some historical background is needed to put this change in context. In *Booth v. Maryland*,²⁰ the United States Supreme Court held that the presentation of such evidence at a capital murder trial was unconstitutional as a matter of federal law. In 1991, however, the Court reversed itself in *Payne v. Tennessee*,²¹ thus opening the door for individual states to consider the admission of victim-impact evidence. With the passage of this amendment to the death penalty statute, New Jersey's legislature has done just that.

¹⁸ N.J.S.A. § 2C:11-3(c)(4)(g).

¹⁹ N.J.S.A. § 2C:11-3(c)(6). The victim impact rule provides that:

When a defendant at a sentencing proceeding presents evidence of the defendant's character or record pursuant to [N.J.S.A. § 2C:11-3(c)(5)(h)], the provision allowing the defendant to present any mitigating factor relevant to the defendant's character or record or the circumstances surrounding the offense], 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. If the jury finds that the State has proven at least one aggravating factor beyond a reasonable doubt and the jury finds the existence of a mitigating factor pursuant to [N.J.S.A. § 2C:11-3(c)(5)(h)], the jury may consider the victim and the survivor evidence presented by the State pursuant to this paragraph in determining the appropriate weight to give mitigating evidence presented pursuant to [N.J.S.A. § 2C:11-3(c)(5)(h)].

Id.

²⁰ 482 U.S. 496 (1987).

²¹ 501 U.S. 808 (1991).

Needless to say, this rule raises numerous constitutional, policy, and philosophical issues.²² Assuming, however, that victim impact evidence is ultimately allowed in some form, the law must determine how the factfinder should use the evidence in making its sentencing decision. As currently fashioned, New Jersey's rule allows the jury to consider the evidence only after it finds the existence of specific mitigating factors, and only then as a basis for giving less weight to those mitigating factors. It does not set up impact on the victim's survivors as an additional aggravating factor. This is revealing. Although several United States Supreme Court decisions require that the sentencer be permitted to consider in mitigation facts about the background, character, and condition of the defendant, there is no requirement that the sentencer give any particular weight to those facts. In fact, having considered the defendant's evidence in mitigation, the sentencer presumably can disregard it entirely in the weighing process. The victim impact rule will act as an encouragement to jurors to do just that because it allows them to use the new evidence as a reason to give less weight to the mitigating factors. It will shift the sentencer's attention away from the defendant and back to the crime and its effects, clearly the intended purpose. In this sense, the victim impact rule represents the clearest example of the way in which the law is evolving. It is specifically designed to put the jury's focus on the nature of the crime.

CONCLUSION

Recognizing the rationales behind these changes is essential for defense lawyers, particularly at the trial level. It is crucial insofar as jury selection and penalty phase presentations are concerned. Prospective jurors must be assessed carefully by defense lawyers to gauge their willingness to look beyond the crime itself in determining the appropriate punishment. In making decisions about the kinds of evidence to present in mitigation, defense attorneys must keep in mind the public's increasing hostility to what many view as mere excuses for the commission of violent crimes. This will be especially difficult in cases where the client's conduct can only be explained by looking at his upbringing and problems

²² In fact, the constitutionality of the new victim impact rule is currently before the New Jersey Supreme Court. The State has appealed a ruling by the Hon. Donald S. Coburn, J.S.C., sitting in Essex County, finding the statute unconstitutional on due process grounds. A decision by the New Jersey Supreme Court is expected during the summer because capital cases around the State are on hold pending resolution of the appeal. **Decided - State v. Muhammad** update

he encountered in childhood. In their efforts to convince jurors that the death penalty should not be imposed, defense attorneys will have to be increasingly creative and thoughtful in the presentation of penalty phase evidence. It will be a challenge not easily met.