

 KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Constitutional Amendment as Stated in
State v. Cruz, N.J., May 8, 2000

121 N.J. 407

Supreme Court of New Jersey.

STATE of New Jersey, Plaintiff–Respondent,

v.

Nathaniel HARVEY, Defendant–Appellant.

Argued March 27, 1990.

|

Decided Oct. 18, 1990.

Synopsis

Defendant was convicted in the Superior Court, Law Division, Middlesex County, of capital murder. Defendant appealed. The Supreme Court, Clifford, J., held that: (1) trial court was required to instruct jury to specify intentional murder or serious bodily injury murder; (2) any taint from alleged failure of police to scrupulously honor defendant's right to silence was sufficiently dissipated at time of confession approximately two days after invoking right to silence; and (3) defendant's request to talk to his father before telling police about the murder invoked his right to silence, and, thus, police were required to give fresh *Miranda* warnings before recommencing questioning and obtaining confession.

Reversed and remanded.

O'Hern, J., concurred in part, dissented in part, and filed opinion.

Stein, J., concurred in part, dissented in part, and filed opinion in which Garibaldi, J., joined.

Handler, J., concurred in part, dissented in part, and filed opinion.

West Headnotes (19)

[1] **Homicide**

 Form and requisites in general

203 Homicide

203XIII Verdict

203k1551 Form and requisites in general

(Formerly 203k312)

Evidence concerning blows to victim's head during burglary would have permitted jury to conclude that defendant intended only to cause serious bodily injury and, therefore, required instruction to specify intentional murder or serious bodily injury murder for which death penalty was not permitted; trial court had also instructed on felony-murder, aggravated manslaughter, and manslaughter. N.J.S.A. 2C:11–3, subd. a(1, 2).

7 Cases that cite this headnote

[2] **Criminal Law**

 Instructions on Particular Points

110 Criminal Law

110XXIV Review

110XXIV(Q) Harmless and Reversible Error

110k1173 Failure or Refusal to Give Instructions

110k1173.2 Instructions on Particular Points

110k1173.2(1) In general

(Formerly 203k341)

Erroneous failure to instruct jury to specify intentional murder or serious bodily injury murder required reversal of conviction for capital murder arising from blows to victim's head during burglary. N.J.S.A. 2C:11–3, subd. a(1, 2).

4 Cases that cite this headnote

[3] **Criminal Law**

 Reinitiating Interrogation

Criminal Law

 Other offenses

110 Criminal Law

110XVII Evidence

110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused

110XVII(M)16 Invocation of Rights

110k411.82 Effect of Invocation

110k411.86 Reinitiating Interrogation

110k411.86(1) In general

(Formerly 110k517(7))

110 Criminal Law

110XVII Evidence

110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused

110XVII(M)16 Invocation of Rights

110k411.82 Effect of Invocation

110k411.86 Reinitiating Interrogation

110k411.86(4) Other offenses

(Formerly 110k517.2(3))

Any taint from alleged failure of police to scrupulously honor defendant's right to silence was sufficiently dissipated at time of confession approximately two days after invoking right to silence; during intervening period defendant was arraigned twice and received *Miranda* warnings at least three times; and there was no evidence of police coercion or misconduct or extended interrogations to wear down defendant's will. U.S.C.A. Const.Amend. 5.

8 Cases that cite this headnote

[4] **Criminal Law**

🔑 Repetition

Criminal Law

🔑 Initiation by defendant

110 Criminal Law

110XVII Evidence

110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused

110XVII(M)10 Warnings

110k411.9 Repetition

(Formerly 110k412.2(3))

110 Criminal Law

110XVII Evidence

110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused

110XVII(M)16 Invocation of Rights

110k411.82 Effect of Invocation

110k411.86 Reinitiating Interrogation

110k411.86(6) Initiation by defendant

(Formerly 110k412.2(3))

Fresh *Miranda* warnings are not necessary if accused initiates conversation after invoking right to silence. U.S.C.A. Const.Amend. 5.

1 Cases that cite this headnote

[5] **Criminal Law**

🔑 Particular cases

Criminal Law

🔑 Reinitiating Interrogation

110 Criminal Law

110XVII Evidence

110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused

110XVII(M)16 Invocation of Rights

110k411.76 Right to Remain Silent

110k411.78 Particular cases

(Formerly 110k412.2(3))

110 Criminal Law

110XVII Evidence

110XVII(M) Statements, Confessions, and Admissions by or on Behalf of Accused

110XVII(M)16 Invocation of Rights

110k411.82 Effect of Invocation

110k411.86 Reinitiating Interrogation

110k411.86(1) In general

(Formerly 110k412.1(4))

Defendant's request to talk to his father before telling police about the murder invoked his right to silence, and, thus, police were required to give fresh *Miranda* warnings before recommencing questioning and obtaining confession. U.S.C.A. Const.Amend. 5.

10 Cases that cite this headnote

[6] **Courts**

🔑 In general;retroactive or prospective operation

106 Courts

106II Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k100 In General
106k100(1) In general;retroactive or prospective operation
 Supreme Court's *Hartley* decision that police must give fresh *Miranda* warnings before recommencing questioning after defendant seeks to terminate interrogation would be retroactive, even if it were new rule of law. U.S.C.A. Const.Amend. 5.

12 Cases that cite this headnote

[7] **Criminal Law**

🔑 For prosecution

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2067 Scope and Effect of Opening Statement
110k2069 For prosecution (Formerly 110k703)
 Prosecutor's opening statement improperly claimed that trial was important to family of homicide victim and that victim was recent widow; reference to widowhood was plainly designed to impassion jury.

6 Cases that cite this headnote

[8] **Criminal Law**

🔑 Nature, condition, relation, and identity of objects

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k449 Witnesses in General
110k459 Nature, condition, relation, and identity of objects
 Comparison between shoe print and shoe alleged to have made that print does not require expert testimony.

3 Cases that cite this headnote

[9] **Criminal Law**

🔑 Footprints

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k475.6 Footprints
 Proposition that shorter people tend to have smaller feet is not proper subject of expert testimony.

3 Cases that cite this headnote

[10] **Criminal Law**

🔑 Footprints

Criminal Law

🔑 Miscellaneous matters

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k475.6 Footprints
110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k476.6 Miscellaneous matters
 Size of shoe that made print on victim's pillow case and height of person that left print were beyond the ken of the average juror.

3 Cases that cite this headnote

[11] **Criminal Law**

🔑 Particular tests or experiments

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k388 Experiments and Tests; Scientific and Survey Evidence
110k388.2 Particular tests or experiments
 (Formerly 110k388(2))
 Biological anthropologist's methods for determining shoe size and height of person from shoe print were not shown to be scientifically reliable.

4 Cases that cite this headnote**[12] Criminal Law** Knowledge, Experience, and Skill110 Criminal Law110XVII Evidence110XVII(R) Opinion Evidence110k477 Competency of Experts110k478 Knowledge, Experience, and Skill110k478(1) In general

Trial court could conclude that forensic chemist was qualified to testify as expert on analysis of hair in prosecution for capital murder, even though chemist was unaware of alleged requirement that there must be 15 to 20 similar characteristics before opinion could be deemed reliable; chemist took courses in microscopy of human hair at FBI academy and examined hair samples in over 1,200 cases.

1 Cases that cite this headnote**[13] Criminal Law** Matters not within issues110 Criminal Law110XXXI Counsel110XXXI(F) Arguments and Statements by Counsel110k2087 Matters not within issues
(Formerly 110k718)

Fact that alleged hair of defendant at crime scene was pubic hair was not relevant in capital murder prosecution, and, thus, prosecutor could not refer to hair as pubic hair.

Cases that cite this headnote**[14] Criminal Law** Experiments and results thereof110 Criminal Law110XVII Evidence110XVII(R) Opinion Evidence110k482 Examination of Experts110k488 Experiments and results thereof

State's in-house study that 17.5% of black population of New Jersey have enzyme CAII in blood was insufficient ground for forensic serologist to testify about that figure in capital murder prosecution. Rules of Evid., N.J.S.A. 2A:84A, Rule 56(2).

1 Cases that cite this headnote**[15] Criminal Law** Experiments and Tests;Scientific and Survey Evidence110 Criminal Law110XVII Evidence110XVII(I) Competency in General110k388 Experiments and Tests; Scientific and Survey Evidence110k388.1 In general

(Formerly 110k388(1))

Jury's consideration of statistical evidence did not usurp its function of weighing the evidence.

Cases that cite this headnote**[16] Criminal Law** Examination of Experts110 Criminal Law110XVII Evidence110XVII(R) Opinion Evidence110k482 Examination of Experts110k483 In general

Expert testimony as to possibility that victim's skull injury was two wounds was inadmissible in capital murder prosecution; testimony should have been couched in terms of reasonable medical certainty or probability.

6 Cases that cite this headnote**[17] Witnesses** Time of prior conviction; remoteness410 Witnesses410IV Credibility and Impeachment

410IV(B) Character and Conduct of Witness
410k334 Witnesses Who May Be Impeached as to Character
410k337 Accused as Witness in Criminal Prosecution
410k337(5) Former Accusation or Conviction of Crime
410k337(28) Time of prior conviction; remoteness
 Seven-year-old rape conviction could be used to impeach defendant in capital murder prosecution.

1 Cases that cite this headnote

[18] **Criminal Law**

🔑 Sufficiency

110 Criminal Law
110XVII Evidence
110XVII(F) Other Misconduct by Accused
110XVII(F)13 Proof and Effect
110k374.15 Preliminary Evidence
110k374.20 Proof of Defendant's Commission of or Connection with Other Misconduct
110k374.20(3) Sufficiency
 (Formerly 110k369.15)

Discovery of camera and film in trunk of defendant's car and defendant's confession to having stolen "hammer-like" object shortly before victim's death were clear and convincing evidence of defendant's theft of those items, and, thus, evidence of those other crimes was admissible on issue of identification in capital murder prosecution. Rules of Evid., N.J.S.A. 2A:84A, Rule 55.

6 Cases that cite this headnote

[19] **Sentencing and Punishment**

🔑 Other offenses, charges, or misconduct

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence

350Hk1755 Admissibility
350Hk1762 Other offenses, charges, or misconduct

(Formerly 203k358(1))

Defendant's alleged theft of hatchet was not relevant in penalty phase of capital murder prosecution on issue whether defendant used hatchet to inflict pain and suffering on victim. N.J.S.A. 2C:11-3, subd. c(4)(c).

3 Cases that cite this headnote

Attorneys and Law Firms

****484 *410** Edward A. Kopelson and Robert D. Westreich, Designated Counsel, argued the cause for defendant-appellant (Thomas S. Smith, Jr., Acting Public Defender, attorney).

***411** Lisa Sarnoff Gochman, Deputy Atty. Gen., argued the cause for plaintiff-respondent (Robert J. Del Tufo, Atty. Gen., attorney).

Opinion

The opinion of the Court was delivered by

CLIFFORD, J.

Defendant, Nathaniel Harvey, appeals from a capital-murder conviction and death sentence. Because the trial court's jury instructions at the guilt phase did not comply with our later holding in *State v. Gerald*, 113 N.J. 40, 549 A.2d 792 (1988), we reverse the conviction and remand for a new trial.

****485 I**

—A—

After Irene Schnaps failed to appear for work on June 17, 1985, a colleague went to her apartment at the Hunter's Glen complex in Plainsboro. When no one answered, he entered through the unlocked door and found Schnaps dead on the bedroom

floor. She had suffered severe head and facial wounds.

The police found an empty box for a Seiko LaSalle watch on the dressing table in the bedroom. An empty camera box was in the closet, and an open purse sat atop the vanity in the bathroom. A pillowcase had a bloody sneaker print bearing a chevron design and the letters “PON.” There were no signs of forced entry; the sliding glass door was closed but unlocked.

Dr. Martin Shuster performed an autopsy. He concluded that Schnaps had suffered numerous skull fractures, a fractured jaw, and a deep laceration on her skull. Dr. Shuster believed that she had been struck at least fifteen times with a blunt object. Pressure applied to her neck for an hour had caused contusions. In Dr. Shuster's opinion, a brief interval separated the first blow and death. He could not determine *412 which blows had been fatal and which had been inflicted after the victim's death.

—B—

On October 28, 1985, the police arrested defendant on suspicion of kidnapping and burglary. Following several interrogations over the next three days, defendant admitted that he had killed Irene Schnaps. He said that on June 16 he had gone to the Hunter's Glen apartment complex. Entering Schnaps' apartment through an unlocked patio door, he went into the bedroom, where he took a watch and some jewelry from the dresser. Schnaps, who had been sleeping, woke up and punched him in the nose, causing it to bleed. Defendant then struck her in the head with a “hammer-like” object, knocking her to the ground. Afraid that the blood from his nose had stained the sheets, he replaced them with clean ones from the closet. He then retrieved a towel from the bathroom and wiped the blood off of Schnaps' body. After collecting the bed sheets, the towel, the watch, a camera, and other pieces of jewelry, he left the apartment.

A jury convicted defendant of the knowing and purposeful murder of Irene Schnaps, felony

murder, first-degree robbery, and second-degree burglary. Following a penalty-phase proceeding on the capital-murder conviction, the trial court sentenced defendant to death.

II

[1] We first consider defendant's contention that the trial court's failure to instruct the jury separately for the crimes of knowingly or purposely causing death (intentional murder) and of knowingly or purposely causing serious bodily injury resulting in death (serious-bodily-injury murder) requires reversal of his conviction. In *State v. Gerald, supra*, 113 N.J. at 69, 549 A.2d 792, we held that a person who is convicted of serious-bodily-injury murder under N.J.S.A. 2C:11-3(a)(1) or (2) may not be *413 sentenced to death. If the evidence provides a rational basis for a jury to convict a defendant of either intentional or serious-bodily-injury murder, the trial court “must instruct the jury to specify which, if [either], of those findings forms the basis for a conviction.” *State v. Coyle*, 119 N.J. 194, 209, 574 A.2d 951 (1990).

In arguing that there was no rational basis for a finding of serious-bodily-injury murder, the State points to the medical evidence suggesting that the victim had been hit fifteen times in the head with a blunt instrument and that her neck had been squeezed for an hour. The victim's jaw was broken. Defendant confessed that he had hit her with a “hammer-like object.”

Of course, such repeated blows can support a jury finding of intentional murder. However, the issue here, as in other pre-*Gerald* capital cases, is whether that *was* the jury's determination. The jury was not asked to distinguish between intentional murder and serious-bodily-injury murder. Its verdict did not indicate which of the two **486 it found to apply to this case. Although it might seem probable that the jury had intentional murder in mind, the question is whether there is a rational basis in the evidence on which the jury, if instructed to distinguish between the two, might return a verdict of serious-bodily-injury murder. If there is, then the

jury, as the finder of fact, must decide the matter. An appellate court cannot.

The State conceded that defendant's initial intent was to commit burglary, not murder. Defendant confessed that he had struck the victim only once, in response to being hit in the nose. That evidence suggests that defendant may have intended only to injure the victim, not to kill her. We note too that while arguing for purposes of the *Gerald* issue that the number of blows inflicted unquestionably establishes an intention to kill, the State claims for penalty-phase purposes that the first blows were intended to injure and inflict pain before death rather than to kill. See *infra* at 434, 581 A.2d at 496 (discussion of c(4)(c) aggravating factor).

***414** The jury was free to reject the pathologist's testimony and accept the other evidence that indicated a lack of murderous intent. See *State v. Crisantos (Arriagas)*, 102 N.J. 265, 273, 508 A.2d 167 (1986) (a jury has "the power to disregard even overwhelming proof"). This was not merely a one-issue case requiring the jury to determine only whether defendant had in fact been the one who had inflicted the intentionally-fatal blows. The mental state of the perpetrator was also clearly in issue here. The trial court instructed the jury not just on capital murder, but also on felony-murder, aggravated manslaughter, and manslaughter. Obviously, then, the trial court believed the evidence would allow the jury rationally to convict on one of those counts while acquitting defendant on capital murder. A rational jury could have concluded that defendant inflicted the fatal blows but had not intended to kill. The determination of whether defendant had the *mens rea* necessary to permit the State to put him to death is quintessentially one that our system of law entrusts to juries. All mental states related to the law of homicide were developed over a long period of history for the purpose of distinguishing capital murders from others. Wechsler & Michael, "A Rationale of the Law of Homicide I," 37 *Colum.L.Rev.* 701 (1937). Determining a defendant's mental state is the special function of the jury, not of this Court.

[2] The record provided "a rational basis for the jury to find that the defendant intended to cause only serious bodily injury." *State v. Coyle, supra*, 119 N.J. at 209, 574 A.2d 951. Because the trial court understandably failed to anticipate *Gerald* and did not instruct the jury to distinguish that offense from intentional murder, we reverse defendant's capital-murder conviction.

III

We turn now to those alleged errors that might arise again at retrial.

***415 —A—**

Defendant argues that the trial court should have suppressed his confession. He claims that on five occasions he asserted his right to remain silent, but that the police did not "scrupulously honor" his invocations. See *Michigan v. Mosley*, 423 U.S. 96, 103–04, 96 S.Ct. 321, 326, 46 L.Ed.2d 313, 321 (1975). Defendant contends that the police violated the bright-line test adopted in *State v. Hartley*, 103 N.J. 252, 511 A.2d 80 (1986), by not re-informing him of his *Miranda* rights after each invocation of his right. He also alleges that his confession was not voluntary.

—1—

The police arrested defendant at about 7:30 a.m. on October 28, 1985. When they reached the station an hour later, the police read the *Miranda* warnings to defendant, who then signed a rights form. The police did not question him that morning.

At 3:37 that afternoon, Sergeant Hibbs and Detective Swanhart began interrogating defendant. They again gave *Miranda* warnings to defendant, who signed another ****487** rights form. After eliciting personal information from defendant, the police started asking him about other crimes. At about 4:10 p.m. they questioned him about the Schnaps murder. Defendant denied responsibility, began to cry, and "asked for time to think, he

wanted time by himself * * *.” The questioning ceased and the police returned defendant to his cell. Forty minutes later the police brought defendant back to the interrogation room. On the way an officer “reminded” him of his rights but did not issue the formal *Miranda* warnings. When the police asked defendant about the Schnaps murder, he again began crying and said: “[B]efore I talk or say anything else I want to talk to my mother-in-law Pearl Thomas.”

Thomas arrived at the station an hour later and spoke with defendant for five minutes in his cell. At 7:30 p.m. the police took defendant back into the interrogation room. They gave *416 him no *Miranda* warnings or reminders. When the police broached the Schnaps murder at 8:00 p.m., defendant again began to cry and said that he “just didn't do anything.” According to one of the officers, the questioning then ended, “not at his request or our request, it was a mutual thing.” Defendant was returned to his cell.

Fifteen minutes later defendant asked to speak with Detective Swanhart alone. Swanhart “reminded” defendant of his rights and talked to him for an hour and a half. Defendant did not admit killing Irene Schnaps but he did confess to other crimes.

Around midnight a detective from the prosecutor's office spoke to defendant about the murder. He orally advised defendant of his *Miranda* rights. The interview lasted only a couple of minutes, and defendant did not give a statement.

The next morning, October 29, two officers took defendant for a one-hour car ride to the scenes of the crimes he had admitted the night before. No *Miranda* warnings were given.

At defendant's arraignment that day for offenses unrelated to the Schnaps murder, the municipal court did not ask him if he had or desired an attorney. That afternoon defendant was read his *Miranda* rights and signed a rights form. During the interrogation he consented to searches of his room and car. The search of the car turned up a Seiko LaSalle watch, later identified as having belonged to Schnaps' deceased husband.

That night the police interviewed defendant in a holding room at the jail. After reading defendant his *Miranda* rights, the police told him that they had found the watch in his car. Defendant “responded as if talkin' to himself, he said, oh, not in the car, he said no, no, not in the car.” Defendant again denied involvement in the Schnaps murder.

The next day, October 30, defendant was arraigned in Superior Court for the murder of Schnaps. At about 10:00 that morning, after reissuing defendant his *Miranda* rights, the police started questioning him about the Schnaps murder. *417 Shortly after 11:00 a.m., defendant informed the officers that “he would tell [them] about the murder but he first wanted to speak to his father.” Questioning ceased, and arrangements were made to transport defendant's father to the jail. Defendant had lunch and talked to the officers about “things in general.” At 2:15 p.m. defendant went to the prosecutor's office, where he spoke with his father for fifteen minutes before returning to jail.

At 2:30 p.m. the interrogation resumed without new *Miranda* warnings or reminders. Defendant confessed having killed Schnaps. The police took him back to the prosecutor's office for a formal statement. When they read him his *Miranda* rights, defendant demanded an attorney. Questioning ceased.

—2—

[3] Defendant claims that he asserted his right to silence four times on October 28, two days before his confession: at the 3:30 p.m. interrogation when he asked for “time to think * * * by himself”; at the 5:00 p.m. interrogation when he asked to speak to his mother-in-law; at 7:00 p.m. when he “asked for more time”; and at the 7:30 p.m. interrogation when he began to **488 cry and said that he “just didn't do anything.”

The only statement that defendant seeks to suppress is his confession of October 30. Because of the intervening events between the alleged invocations on October 28 and the confession, we need not

decide whether defendant actually invoked his right to remain silent and whether the police scrupulously honored those alleged requests. Even if the police did not scrupulously honor defendant's alleged invocations of his right to silence, the confession was "sufficiently independent to dissipate the taint of their illegal conduct." *State v. Johnson*, 118 N.J. 639, 653, 573 A.2d 909 (1990).

The determination of whether a confession was the "fruit" of prior illegal police conduct involves three factors:

- *418 (1) the temporal proximity between the illegal conduct and the challenged evidence; (2) the presence of intervening circumstances; and (3) the flagrancy and purpose of the police misconduct. [*Ibid.*]

None of those factors helps defendant. First, his confession was not "temporally proximate" to the alleged violations—it occurred two days later—nor did it follow a prolonged illegal detention. See *id.* at 654–55, 573 A.2d 909 (repeated constitutional violations during illegal ten-hour detention preceded defendant's escape).

[4] Second, a number of intervening circumstances separated the alleged violations of October 28 from the confession. At 8:15 p.m. on October 28, after the fourth alleged invocation, defendant asked to speak with Detective Swanhart alone. Fresh *Miranda* warnings are not necessary if the accused initiates conversation after invoking the right to silence. *State v. Fuller*, 118 N.J. 75, 570 A.2d 429 (1990). Moreover, defendant was reminded of his rights at that time as well as later that evening. The next day he was arraigned before a municipal court judge. After receiving new *Miranda* warnings that afternoon, he signed a rights form. That evening he was read his rights again. The following day, October 30, he was arraigned a second time and received the *Miranda* warnings again.

Finally, there is no evidence of police coercion or misconduct. There were no extended interrogations designed to wear down defendant's will. Even if defendant had invoked his right to remain silent on October 28, any possible taint from the

police's alleged failure scrupulously to honor his invocations was sufficiently dissipated.

[5] The fifth time defendant allegedly invoked his right to remain silent was on October 30 when he asked to talk to his father. Although defendant indicated that he would talk about the Schnaps murder when questioning resumed, there was a significant break in the interrogation. Approximately three-and-one-half hours passed before the police resumed the interrogation. *419 But what makes the interruption significant is not its length so much as its nature. The request here was qualitatively different from the one in *State v. Bey*, 112 N.J. 123, 139, 548 A.2d 887 (1988) (*Bey II*), in which the defendant "requested permission to lay down and to think about what happened." The Court likened that situation to one in which a defendant asks for "something to eat or drink, the use of toilet facilities, [or] the opportunity to stand and stretch * * *." *Ibid.* Defendant's request here was not for a brief respite to satisfy physical needs. Instead he was asking, after three days in custody, for the chance to consult with a close family member.

Defendant's request is similar to the one in *State v. Hartley*, *supra*, 103 N.J. at 258, 511 A.2d 80, in which the defendant told the police, "I don't believe I want to make a statement at this time." In both cases the defendant suggested that he would talk to the police later. "[A] request to terminate an interrogation must be honored 'however ambiguous.' " *State v. Bey*, 112 N.J. 45, 64, 548 A.2d 846 (1988) (*Bey I*) (quoting *State v. Kennedy*, 97 N.J. 278, 288, 478 A.2d 723 (1984)). Certainly the request here was no more equivocal than the one in *Bey I* in which, according to the police, the defendant had "indicated he did not want to talk * * * about it * * *." *Ibid.* Defendant's conduct during three days of interrogation **489 and his refusal to answer questions about the Schnaps murder likewise indicated that he did not want "to talk about it."

This case also resembles *Law v. State*, 21 Md.App. 13, 318 A.2d 859 (1974), in which the police were questioning the wounded defendant as he lay handcuffed to his hospital bed. The defendant told

the police that “he didn't want to talk any more until he was further treated.” *Id.* at 36, 318 A.2d at 872 (emphasis deleted). Despite his request, the police continued to question him. The court held that the defendant's ensuing statement was inadmissible. Although the obvious difference from this case is that here defendant was not wounded, the court's decision in *Law* rested on the defendant's words, not on the surrounding circumstances. In both this case and *Law*, the *420 defendants indicated that they would talk, but only after a subsequent condition had been met. In *Law* the condition was further treatment. Here the condition was a meeting with defendant's father. The implied intent to talk later does not change the fact, as the court found in *Law* and as we find here, that defendant sought to terminate the interrogation.

The importance of the police's failure to reissue *Miranda* warnings after defendant had met his father is clearly shown by what happened when the police finally did give him the warnings. After defendant had confessed orally, the authorities gave him new *Miranda* warnings before seeking to take a formal statement. Defendant immediately demanded an attorney before any statement could be reduced to writing. It is no stretch to imagine that defendant would have requested an attorney had the police given him warnings when they first interrogated him after he had met with his father.

The mandate of *State v. Hartley*, *supra*, 103 N.J. 252, 511 A.2d 80, is clear. When a defendant seeks to terminate an interrogation, the police must at a minimum give fresh *Miranda* warnings before recommencing questioning. *Id.* at 256, 511 A.2d 80. Any statement made prior to the new warnings must be suppressed. We pause to observe that although our dissenting colleague Justice Stein readily acknowledges that “defendant asserted his right to cut off questioning,” *post* at 444, 581 A.2d at 501, nevertheless he concludes—contrary to the unmistakable language of *Hartley*’s “bright line” rule, see 103 N.J. at 267, 511 A.2d 80—that “the resumption of interrogation [thereafter] did not constitute a failure by the police to ‘scrupulously honor’ defendant's right to remain silent.” *Post* at 444, 581 A.2d at 501. Either defendant exercised his right (as we and Justice Stein conclude), or

he did not (as Justice O'Hern concludes). If he did, then without question *Hartley* requires the readministering of *Miranda* warnings before the resumption of interrogation.

*421 We apply the *Hartley* rule even though that rule was announced after the interrogation in this case had occurred. Retroactivity is not a consideration here. “The threshold question in any retroactivity decision is whether a new rule of law has actually been announced.” *State v. Burstein*, 85 N.J. 394, 403, 427 A.2d 525 (1981). The issue of retroactivity “never arises absent a new rule of law * * *.” *State v. Lark*, 117 N.J. 331, 344, 567 A.2d 197 (1989) (Clifford, J., concurring in judgment).

Hartley did not announce a new rule of law. It was “not a clear break with the past, but a simple extension of the principle of cases * * * holding that the State must honor ‘a defendant's request—however ambiguous—to terminate interrogation.’” *Bey II*, *supra*, 112 N.J. at 213, 548 A.2d 887 (Handler, J., dissenting) (quoting *State v. Kennedy*, 97 N.J. 278, 288, 478 A.2d 723 (1984)). We said that our rule in *Hartley* was “sound as a matter of New Jersey common law [and] consistent with the spirit of the Supreme Court's decisions * * *.” *State v. Hartley*, *supra*, 103 N.J. at 268, 511 A.2d 80. The foundation of our decision was *Michigan v. Mosley*, *supra*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313, in which the Supreme Court held that the police had “scrupulously honored” the defendant's decision to remain silent because they did not approach him for two hours, they gave him fresh *Miranda* warnings, a **490 different officer questioned him, and the questioning concerned a different offense from the one for which he was in custody. Although the Supreme Court did not indicate which of those elements are essential for a finding that the police “scrupulously honored” a suspect's rights, we held that the furnishing of fresh *Miranda* warnings is “indispensable.” *State v. Hartley*, *supra*, 103 N.J. at 267, 511 A.2d 80.

In reaching that conclusion, we relied on the decisions of other courts as well as academic literature. See, e.g., *Wilson v. United States*, 444 A.2d 25, 31 (D.C.1982) (all *Mosley* factors are required to validate reinterrogation); *People*

v. Young, 115 Ill.App.3d 455, 71 Ill.Dec. 259, 450 N.E.2d 947 (1983) (recess *422 and fresh *Miranda* warnings are a minimum prerequisite to reinterrogation); Kamisar, "The *Edwards* and *Bradshaw* Cases: The Court Giveth and the Court Taketh Away," 5 *The Supreme Court: Trends and Developments 1982-83* 153 (1984) (fresh *Miranda* warnings are necessary for renewing questioning after suspect has indicated desire to remain silent).

Because *Hartley* did not announce a new rule of law, retroactivity is not an issue. Any defendant who had not exhausted direct appeals when *Hartley* was decided could have asserted a claim based on that opinion. Because the police did not give defendant fresh *Miranda* warnings after he had indicated his desire to remain silent, *Hartley* requires that the ensuing confession be suppressed.

[6] Moreover, even if *Hartley* did create a new rule of law, it would still apply here under either the Supreme Court's old analysis of retroactivity of new criminal procedure rules or its more recent pronouncement on retroactivity in *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Under its former analysis, the Supreme Court held that *Miranda* itself applies to interrogations that took place before that rule was announced if the trial did not commence until after the *Miranda* decision (precisely the sequence in this case), see *Michigan v. Tucker*, 417 U.S. 433, 447, 94 S.Ct. 2357, 2365, 41 L.Ed.2d 182, 195 (1974), but not if the case was tried before that decision, *Johnson v. New Jersey*, 384 U.S. 719, 733, 86 S.Ct. 1772, 1781, 16 L.Ed.2d 882, 892 (1966). The obvious similarity between the nature and effect of *Miranda* and *Hartley* suggests that the application of *Hartley* should be no less broad.

Turning to the Supreme Court's most recent retroactivity pronouncements, we note first that Justice Stein correctly points out, *post* at 439, 581 A.2d at 499, that "[t]o the extent that retroactivity issues arise in the context of criminal-procedure decisions implicating rights guaranteed under the federal constitution, United States Supreme Court precedents control *423 the scope of retroactivity," (citing *State v. Lark*, *supra*, 117 N.J. at 335, 567 A.2d 197 (1989)), and that under *Griffith v.*

Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." 479 U.S. at 328, 107 S.Ct. at 716, 93 L.Ed.2d at 661; see *State v. Stever*, 107 N.J. 543, 548-53, 527 A.2d 408 (1987) (discussing Supreme Court's development of retroactivity principles). Clearly, then, *Griffith* mandates adherence to a *Hartley* analysis in this case. Justice Stein would avoid application of *Griffith*'s sound principle, however, on the ground that *Hartley* was not based "primarily" on federal-constitutional law, *post* at 425, 581 A.2d 491. Whatever "primarily" means in the foregoing context, our distinguished colleague is quite wrong.

First, it is abundantly clear that *Hartley* was grounded at least as much on the fifth amendment to the United States Constitution as it was on New Jersey's common-law privilege, codified in our Evidence Rules. No fewer than sixteen times does the opinion refer specifically to its "constitutional" basis. For example, we emphasized at the outset of *Hartley* that our decision was founded not only on state law but "on our understanding of the United States Supreme **491 Court precedents in this area." *State v. Hartley*, *supra*, 103 N.J. at 256, 511 A.2d 80. And: "[T]he failure to readminister *Miranda* warnings was a violation of the obligation scrupulously to honor *Hartley*'s asserted right to silence, and therefore amounted to a violation of defendant's fifth-amendment and state common-law right not to be compelled to be a witness against himself." *Id.* at 278, 511 A.2d 80. And: any statement obtained in violation of *Hartley*'s "bright-line" rule is "unconstitutionally compelled, and hence inadmissible, as having been obtained in violation of the fifth amendment and of the state common-law right against self-incrimination." *Id.* at 279, 511 A.2d 80. And finally: "[T]he failure scrupulously to honor *Hartley*'s previously-invoked *424 right to silence was a violation of constitutional magnitude * * *." *Id.* at 283, 511 A.2d 80.

Second, one need look no further than Justice Stein's own opinion for the Court in *Bey I*, supra, 112 N.J. 45, 548 A.2d 846, for confirmation of the federal-constitutional basis of *Hartley*: "As in *Hartley* * * * we base our analysis [of whether the police had scrupulously honored Bey's right to cut off questioning] on both federal constitutional law and our State common-law privilege against self-incrimination." *Id.* at 63, 548 A.2d 846 (citing *Hartley*, supra, 103 N.J. at 284, 511 A.2d 80). And: "*Hartley* held that where the failure scrupulously to honor a suspect's right to cut off questioning results from the absence of fresh *Miranda* warnings before resuming questioning, the illegality renders the suspect's subsequent inculpatory statement *unconstitutionally* compelled as a matter of law." *Id.* at 71, 548 A.2d 846 (emphasis added).

Note too that in *Bey* the interrogation occurred in May 1983 and the trial court heard the motion to suppress Bey's confession late in that same year. This Court decided *Hartley* in July 1986 and *Bey I* more than two years later, in August 1988. In *Bey I* we simply applied *Hartley* to a case that had been on direct appeal when *Hartley* was decided. See *id.* at 58–74, 548 A.2d 846. Likewise, in *Bey II*, supra, 112 N.J. 123, 548 A.2d 887, this Court engaged in a full discussion of the *Hartley* principle, see *id.* at 134–43, 548 A.2d 887, prompting two dissents on the issue of the admissibility of the defendant's confession under a *Hartley* analysis, see *id.* at 184–88, 548 A.2d 887. There was no necessity to discuss or rule on any question of *Hartley*'s retroactivity, because the Court assumed, again correctly, its applicability. No more was it an issue there than it is here. And if *Hartley* applied in the *Bey* cases, on appeal when *Hartley* was decided, *a fortiori* it applies when, as here, the trial began after the *Hartley* opinion had been published.

*425 Finally, Justice Stein overestimates *Hartley*'s impact ("a multitude of post-conviction-relief applications," *post* at 442, 581 A.2d 500), on cases such as this, which were tried after *Hartley* had been decided. *Griffith* would limit retroactive application to cases "in the pipeline"—those on appeal when *Hartley* was decided, in which the *Hartley* point had been raised—and would not affect cases that had gone to final decision before *Hartley*. We suspect

the number is minimal; and in any event the burden is not more than the criminal-justice system should be asked to bear.

We hold that the *Hartley* rule bars the introduction of defendant's confession at retrial. We need not consider defendant's claim that his confession was involuntary.

—B—

[7] Defendant objects to two statements made by the prosecutor during his opening. After describing the murder of Schnaps, the prosecutor told the jury:

So, as you can see, this is a very important trial. It's important for Nathaniel Harvey. It's important for the family of the victim, and it's important to each and every citizen.

Later the prosecutor observed that Schnaps "was a recent widow, her husband having died six weeks * * * previously."

**492 The prosecutor's comments were improper. They drew attention not to issues relevant to the crime charged but to the status of the victim and her family. His reference to her recent widowhood was "plainly designed to impassion the jury" and "contain[ed] nothing that would aid the jury in determining the defendant's guilt or innocence." " *State v. Hightower*, 120 N.J. 378, 411, 577 A.2d 99 (1990) (quoting *State v. Williams*, 113 N.J. 393, 452, 550 A.2d 1172 (1988)). On retrial the prosecutor must refrain from making such comments.

—C—

Defendant makes several objections to the testimony of four of the State's expert witnesses.

*426 —1—

First, defendant argues that the trial court should not have qualified Dr. Claude Owen Lovejoy as an expert to testify about the bloody sneaker print found on the pillowcase. Dr. Lovejoy, a professor at Kent State University, received a doctorate in biological anthropology, which according to him is “the study of human form and function, evolution of the human species, human variation involving anatomy, genetics, essentially the normal biology of man.” His specialty is “the form and function and biomechanics of the lower limb.” He claims to be able to estimate the stature of a person from the size of his or her shoes.

In October 1985 the police sent Dr. Lovejoy four photographs of the pillowcase containing a sneaker print. After having examined the pictures, Dr. Lovejoy concluded that the bloody print had been left by either a male of “short stature” or a female of “average to medium tall stature.” The police then sent Dr. Lovejoy the actual pillowcase and three pairs of Pony hightop sneakers, marked in evidence as S-58, S-59, and S-60, two of which they said belonged to defendant's son. The professor immediately decided that neither S-59 nor S-60 had left the print, but he was unsure about S-58. He then made a print with S-58 on a pillowcase stuffed with a pillow. Comparing that print to the one on Schnaps' pillowcase, Dr. Lovejoy concluded that it was “improbable” that S-58 had left the print.

The Pony Sneaker Company sent Dr. Lovejoy thirty-one pairs of sneakers from the same manufacturing run as S-58. The sneakers ranged in size from 7 to 11; none was 6, 6 ½, or 7 ½. The doctor took three measurements of the sole of each sneaker and plugged them into his “digitizer” to determine the size of the shoe that had left the print:

Okay, what we did was we took * * * each of the individual shoes in the Pony sample, measured each of the dimensions that I've just talked about, put those into a data base, into a computer, along with shoe size and determined the relationship between those using a variety of statistical techniques.

*427 The simplest of those is called linear correlation and if one puts a set of dimensions, two sets of dimensions from the same object

into the computer it will determine the degree of relationship between them, it will give you for example, the ability of one metric to predict the other with certain limits of reliability and that's what we mean by correlation and the strength of that physical relationship is expressed as varying from minus one through zero to plus one plus one being a perfect positive relationship, minus one being a perfect negative relationship.

Based on that analysis, Dr. Lovejoy concluded that the sneaker that had made the print was either a man's size 6 ½, plus or minus one-half size, or a woman's size 8 to 8 ½. The confidence limit of that conclusion was 95%, *i.e.*, the conclusion would be accurate within a one-half size 95% of the time. Deciding that hightop and lowtop sneakers have decorative stripes on different portions of the outer sole, he concluded that the sneaker was a hightop.

[8] [9] [10] There are three requirements for the admission of expert testimony:

(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently **493 reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.

[*State v. Kelly*, 97 N.J. 178, 208, 478 A.2d 364 (1984).]

Comparison between a shoe print and the shoe alleged to have made that print does not require expert testimony. *State v. Johnson*, 120 N.J. 263, 293-94, 576 A.2d 834 (1990). Nor is the proposition that shorter people tend to have smaller feet the stuff of expert testimony. It would be improper to use Dr. Lovejoy's professed expertise to bolster such testimony. However, to the extent that Dr. Lovejoy sought to establish with scientific reliability the size of the shoe and the height of the person that left the print, expert testimony was proper.

[11] Concerning the second requirement for the admission of Dr. Lovejoy's expert testimony, there are three ways, in a relatively new field of research,

to prove the evidence's "general acceptance and thereby its reliability":

(1) by expert testimony as to the general acceptance, among those in the profession, of the premises on which the proffered expert witness based his or her analysis; (2) by authoritative scientific and legal writings indicating that the *428 scientific community accepts the premises underlying the proffered testimony; and (3) by judicial opinions that indicate the expert's premises have gained general acceptance. [*State v. Kelly, supra*, 97 N.J. at 210, 478 A.2d 364.]

The State did not satisfy either the first or second alternative. It did not provide evidence that anyone in the scientific community other than Dr. Lovejoy himself vouches for his methods.

Nor do judicial opinions indicate that Dr. Lovejoy's methods have gained general acceptance. In *State v. Prudden*, 212 N.J.Super. 608, 515 A.2d 1260 (App.Div.1986), the same trial court that presided over these proceedings had qualified Dr. Lovejoy as an expert to testify about a sock print. Reversing on other grounds, the Appellate Division expressed reservations about the reliability of Dr. Lovejoy's methods. *Id.* at 617–18, 515 A.2d 1260. Dr. Lovejoy also testified in *United States v. Ferri*, 778 F.2d 985 (3d Cir.1985), *cert. denied*, 476 U.S. 1172, 106 S.Ct. 2896, 90 L.Ed.2d 983 (1986), to rebut the testimony of the government's footprint expert, who had compared one defendant's footprints with impressions inside shoes found at the crime scene and inside shoes seized from the defendants' residences. Notwithstanding *Prudden* and *Ferri*, we are unaware of any cases in which an expert's testimony involved the scientific comparison of sneaker prints with stature.

We also note several glaring weaknesses that cast doubt on the reliability of Dr. Lovejoy's conclusions. He admitted that he knew nothing about sneaker manufacturing or about the extent of variations from manufacturer to manufacturer or plant to plant. According to defendant, a Pony representative reported that the sneaker print had not even been made by a Pony. In conducting his analysis, Dr. Lovejoy used sneakers only from the same production series as that of S-58. Yet he had already determined that S-58 had not made the print. Nor was there any showing that the thirty-one pairs he measured were representative of the production run. Moreover, although he concluded within a 95% confidence limit that the shoe that *429 had left the print was size 6 ½, every shoe he examined from that production run was at least a size 7.

Because Dr. Lovejoy's methodology was not of sufficient scientific reliability, we need not consider the third requirement of whether he had sufficient expertise in the field. On retrial Dr. Lovejoy may not testify as an expert.

—2—

[12] Theodore Mozer, a forensic chemist, testified as an expert on hair comparison. Mozer has worked for the New Jersey State Police for over fifteen years as a principal forensic chemist specializing in the analysis of human hairs in assault and homicide cases. He received a B.S. in biology and took graduate courses in chemistry. Mozer also took courses in the microscopy **494 of human hair at the F.B.I. Academy in Virginia. A member of the International Committee on Hair Comparison, Mozer has examined hair samples in over 1,000 criminal cases and has testified as an expert in hair comparison between fifty and one-hundred times.

After analyzing seventy-five hairs found at the murder scene, Mozer determined that one of them was a black person's pubic hair that did not match Schnaps' hair. Comparing a hair sample from defendant, Mozer concluded that the hair had come either from defendant or from "[a]nother individual who had [the] same microscopic characteristics."

According to defendant, Mozer was not qualified on that subject because he was unfamiliar with a purported standard in the science of hair comparison that an expert must find fifteen to twenty similar characteristics before an opinion can be deemed reliable. See, e.g., *People v. Allweiss*, 48 N.Y.2d 40, 49, 421 N.Y.S.2d 341, 346, 396 N.E.2d 735, 740 (1979), and *People v. Watkins*, 78 Mich.App. 89, 93–96, 259 N.W.2d 381, 384–85 (1977). At the Rule 8 hearing, Mozer admitted that he was unaware of such a standard but explained that the technique he used included analyzing “hundreds of different characteristics of these two hairs side by side and seeing whether or not they *430 compare.” Given Mozer's extensive experience in hair comparison, as established at the Rule 8 hearing, the trial court did not abuse its discretion in admitting him as an expert.

[13] Defendant also claims that the State should not have been allowed to refer to the hair as a “pubic hair” because it conjures images of a sexual assault. We agree that the fact that the hair is a pubic hair is not relevant in this case. The important fact is that the hair might have come from defendant. Whether it might have come from his head, his chest, or his pubis is irrelevant in the absence of allegations of a sexual encounter. On retrial the prosecution should refrain from referring to the hair as a “pubic hair.”

—3—

[14] Defendant challenges the trial court's ruling that Philip Beesley was qualified to render an opinion regarding the percentage of blacks with a certain genetic marker in their blood. Beesley, an expert in forensic serology, analyzed four blood stains from Schnaps' apartment that did not match the victim's blood but did match defendant's. He found that the four stains and a sample of defendant's blood all contained enzyme CAII, which is present only in blacks. Beesley testified that only 17.5% of the black population have CAII.

Defendant contends that Beesley was unqualified to testify about the percentage of the population that has CAII. In reaching that figure, Beesley relied in

part on a State study of 337 blood samples taken from blacks. The study concluded that 17.5% of the black population in New Jersey have CAII. Beesley had not participated in that study and did not know how it had been conducted. Nor has that study ever been published and subjected to scientific scrutiny. His only basis for vouching for the study's reliability was that “[t]he person who did perform all that analysis and all that data knows a lot about statistics * * *.” The in-house study was an insufficient ground for Beesley to testify about the 17.5% figure.

*431 Beesley, however, also relied on the *Source Book of Forensic Serology*, which states that CAII exists in 17.5% of blacks. If on retrial the State can show that that book and figure are considered authoritative in the forensic-serology community, it can introduce the figure through Beesley. See *Evid.R.* 56(2); *Mauro v. Owens—Corning Fiberglas*, 225 N.J.Super. 196, 206, 542 A.2d 16 (App.Div.1988) (expert could testify about statistical data “‘of a type reasonably relied upon by experts’ in the field of pulmonary disorder”), *aff'd sub nom. Mauro v. Raymark Indus.*, 116 N.J. 126, 561 A.2d 257 (1989).

[15] Defendant also claims that the jury's consideration of statistical evidence quantified reasonable doubt and usurped its function of weighing the evidence. The argument is without merit. See **495 *State v. King*, 215 N.J.Super. 504, 520, 522 A.2d 455 (App.Div.1987) (“[s]imply because [a] figure is rather high is no reason to exclude it if the test procedure is a valid one”).

—4—

[16] Defendant contends that Dr. Shuster, who had conducted the autopsy of the victim, improperly testified about opinions that were not based on a reasonable degree of medical certainty or probability. For example, Dr. Shuster testified that the skull injury was “possibly” two wounds or “possibly not.” We need not delve into each part of Dr. Shuster's testimony. We merely instruct the trial court that on remand Dr. Shuster's ultimate “[m]edical expert testimony ‘must be

couched in terms of reasonable medical certainty or probability; opinions as to possibility are inadmissible.’ ” *State v. Freeman*, 223 N.J. Super. 92, 116, 538 A.2d 371 (App.Div.1988) (quoting *Johnesee v. Stop & Shop Co.*, 174 N.J. Super. 426, 431, 416 A.2d 956 (App.Div.1980)).

—D—

[17] The trial court conducted a hearing to determine whether the State could impeach defendant's credibility with a prior ***432** conviction. The hearing centered on defendant's 1979 four-count conviction arising from a rape. Defendant was sentenced to a prison term of fifteen to twenty years. The record does not indicate when he was released. The trial court allowed the State to use the conviction for impeachment.

“The well-established rule in this jurisdiction is that admission of a prior conviction ‘into evidence against a criminal defendant rests within the sound discretion of the trial judge.’ ” *State v. Pennington*, 119 N.J. 547, 586, 575 A.2d 816 (1990) (quoting *State v. Sands*, 76 N.J. 127, 144, 386 A.2d 378 (1978)). The defendant has the burden of showing that the conviction should be excluded. *Ibid.* “The key to exclusion is remoteness.” *State v. Sands*, *supra*, 76 N.J. at 144, 386 A.2d 378.

The trial court here did not abuse its discretion in permitting the use of defendant's conviction for impeachment purposes. The conviction was only seven years old. Moreover, because defendant had been sentenced to a prison term of fifteen to twenty years, at the time of trial he must have been out of prison for less than seven years. Given the seriousness of his prior offenses, we see no reason to second-guess the trial court.

—E—

Defendant contends that the trial court improperly admitted sixty color photographs of the murder scene and of the victim's body. We do not rule on that challenge here but alert the trial court on remand to the standards set forth in *State v.*

Thompson, 59 N.J. 396, 283 A.2d 513 (1971), and discussed in *State v. Johnson*, *supra*, 120 N.J. at 296–299, 576 A.2d 834, *State v. Moore*, 113 N.J. 239, 295–97, 550 A.2d 117 (1988), *State v. Rose*, 112 N.J. 454, 533–36, 548 A.2d 1058 (1988), and *Bey II*, *supra*, 112 N.J. at 181–83, 548 A.2d 846.

—F—

[18] Peggy Stevens testified that someone had stolen perfume and a camera from her house about a week before the ***433** murder of Schnaps. Several months later she had reported that a hatchet had been stolen. Because her family had used the hatchet only during the fall and winter, she did not know how long it had been missing. When the police searched defendant's car, they found the camera and undeveloped photographs of Stevens' family.

At a *Rule 8* hearing the State argued that Stevens' testimony established defendant's identity, showed his intent, and corroborated his confession, in which he had admitted having stolen a “hammer-like” instrument from someone's garage a week before the murder. Defendant countered that Stevens' testimony was inadmissible “other crimes” evidence because she could not state when she had last seen the hatchet and because her testimony did not prove that defendant had stolen it.

Evidence of “other crimes” is not admissible to prove a person's disposition to commit ****496** crime but is admissible “to prove some other fact in issue including motive, intent, plan, knowledge, identity, or absence of mistake or accident.” *Evid. R.* 55. The State bears the burden of proving other crimes by clear and convincing evidence. *State v. Stevens*, 222 N.J. Super. 602, 614, 537 A.2d 774 (App.Div.1988), *aff'd*, 115 N.J. 289, 558 A.2d 833 (1989).

Although the trial court admitted the evidence at first for “the issues of identification, state of mind, purposefully or knowingly, type of instrument used, presence of the defendant at the scene, [and] corroboration of [defendant's] confession,” its jury instructions limited consideration of the evidence to the issue of identification.

Defendant argues that the testimony was inadmissible at the guilt phase because the State did not prove by clear and convincing evidence that defendant had stolen the items. The State, however, did provide substantial evidence of that allegation. The Stevens family had reported their camera as stolen about a week before the murder. The police had found the camera and film in the trunk of defendant's car. Defendant *434 had confessed to having stolen a "hammer-like" object from a garage shortly before Schnaps' death. The trial court did not abuse its discretion in allowing Stevens' testimony. However, because we have determined that defendant's confession must be suppressed, the trial court should reconsider the issue in light of the remaining evidence.

The State contends that the trial court should have allowed the jury to consider Stevens' testimony not only for identification but also as evidence of defendant's purposeful intent. We see no basis for finding that the trial court abused its discretion in limiting admissibility to the issue of identification.

[19] Defendant also argues that even if Stevens' testimony is admissible at the guilt phase, it should not be admitted at the penalty phase. In the penalty phase the State "is restricted to proving the statutory aggravating factors and rebutting proof of mitigating factors." *State v. Rose, supra*, 112 N.J. at 503, 548 A.2d 1058. The State asserts that Stevens' testimony is relevant to aggravating factor c(4)(c) as showing that "defendant armed himself with a weapon capable of inflicting pain and suffering in addition to death." The testimony is not admissible at the penalty phase for that purpose. The fact that defendant may have stolen a hatchet from the Stevenses is not relevant to c(4)(c). What matters is whether he used that weapon to inflict pain and suffering on the victim. Stevens' testimony is not relevant to that question. However, her testimony might be relevant to the issue of intent under c(4)(c). If the State proposes to show that defendant stole the hatchet for the purpose of inflicting pain and suffering on a future murder victim, Stevens' testimony might be admissible. Otherwise, if defendant is convicted of capital

murder on remand, the trial court should not admit her testimony at the penalty phase.

—G—

Defendant alleges a number of penalty-phase errors involving jury instructions that did not conform to our holdings in *435 subsequent capital cases. We need not consider those claims now. If there is a new penalty phase on remand, the trial court should heed those opinions in formulating its instructions.

Defendant also contends that the evidence does not support a finding of aggravating circumstance c(4)(c), that the murder was wantonly vile, horrible, or inhumane. The State argues that the murder of Schnaps falls into the category of c(4)(c) murders in which the perpetrator "intended to cause, and did in fact cause, severe physical or psychological pain or suffering to the victim prior to the victim's death." *State v. Ramseur*, 106 N.J. 123, 211, 524 A.2d 188 (1987). The State claims that defendant initially struck Schnaps in the head with the hatchet to cause her severe physical pain and suffering prior to her death. Only later did he strike the fatal blows. The State further argues that there was evidence of post-death mutilation of the body that indicates depravity of mind.

**497 Because the trial occurred before our opinion in *Ramseur*, the trial court did not analyze the evidence under our narrowed construction of c(4)(c). Given the factual nature of that issue, we will not pass on it without the trial court's having had the opportunity to evaluate the evidence. See *State v. Hightower supra*, 120 N.J. at 420, 577 A.2d 99.

—IV—

Defendant's capital-murder conviction is reversed. The cause is remanded for a new trial.

O'HERN, Justice, concurring and dissenting in part.

I concur in the opinion and judgment of the majority, except to the extent that it invalidates defendant's confession.

This case is far removed from our recent confession case of *State v. [Walter] Johnson*, 120 N.J. 263, 576 A.2d 834 (1990). In that case the Court found the defendant's privilege against self-incrimination had been violated, but under circumstances in which "defendant repeatedly responded to questions by saying, *436 'I can't talk about it.'" *Id.* at 284, 576 A.2d 834. Such repeated refusals had to create an ambiguity about whether he had thereby expressed a "desire to cut off questioning." *Ibid.* We noted that "[d]efendant's reluctance to answer questions was not confined to an isolated ambiguous remark. He persisted, for well over an hour, in a pattern of prolonged silences and unresponsiveness, refusing to answer any and all questions about the * * * murders." *Id.* at 284, 576 A.2d 834. In the face of that kind of record we could conclude only that defendant's right to remain silent had been violated by the persistent renewal of questioning.

Nonetheless, in this case there is no ambiguity about what defendant said. He quite simply said, "I'll tell you about the murder, but first I want to see my father." Defendant's brief recites that "they stopped talking to him" and arranged for Harvey's father to be brought to the jail. Although defendant claims that he told his father that he did not commit the murder in question and that he had been struck by the police, there is no evidence that Harvey's father, much less Harvey, asked that the questioning cease after the father and son had met. It took some time for the police to arrange for defendant's father to be brought to the station house, but that ought not make the interruption qualitatively different from an interruption for food, rest, or other requests.

Here, as in the fourth-amendment context, there is no "litmus-paper test" of constitutionality. See *Florida v. Royer*, 460 U.S. 491, 506, 103 S.Ct. 1319, 1329, 75 L.Ed.2d 229, 242 (1983). After all, the warnings in *State v. Hartley*, 103 N.J. 252, 511 A.2d 80 (1986), do not necessarily guarantee that a constitutional violation will not occur. Were the *Hartley* admonition all that there were to the constitutional obligation, interrogators

might continue to question suspects indefinitely by repeated recitations of the *Miranda* warnings. Rather, the question is whether the suspect has at least ambiguously invoked his right to remain silent or to request that questioning cease. In that regard, the confession obtained in *437 *State v. Bey II*, 112 N.J. 123, 548 A.2d 887 (1988), provides guidance. There, the defendant claimed that his request to lie down and "think about what happened" was an invocation of his right to cut off questioning, and that the police failed to "scrupulously honor" his right by resuming interrogation without reissuing a *Miranda* warning after his one hour of rest. In rejecting defendant's argument, the Court observed that any reasonable police officer could not have construed the statement as an assertion of his right to remain silent:

Defendant merely communicated his desire to spend some time thinking about the events that were the subject of the interrogation. He did not ask for an attorney or refuse to sign a waiver of his rights. Similarly, he did not refuse to continue the questioning, and did not indicate in any manner that he wanted to end the interrogation. Not every break in questioning compels renewed administration of the *Miranda* warnings. Otherwise, **498 police would be obliged to administer these warnings each time a defendant requested or was offered something to eat or drink, the use of toilet facilities, the opportunity to stand and stretch, or, as here, time to lie down. [*Id.* at 138–39, 548 A.2d 887.]

Harvey did not ask that questioning should end. A contrasting case is *State v. Bey I*, 112 N.J. 45, 64, 548 A.2d 846 (1988), in which the defendant told the police that "he did not want to talk to

[them] about [the victim].” As noted, in this case Harvey specifically told the police that he would tell them about the murder, but first he wanted to see his father. How could the police have concluded in the face of defendant's willingness to continue testifying after he had seen his father that his request was anything other than what it appeared to be on its face? After all, this was not a case of a single set of warnings and desultory questioning. Recall that this was an evolving investigation into a series of burglaries that occurred in the vicinity of West Windsor; therefore, it was not surprising that the questioning had to continue over an extended period of time.

In short, the defendant never invoked his right to silence in the first place, wherefore *Hartley* is not triggered. Were I to conclude, as does the majority, that the defendant had requested that questioning cease, I would agree that we would then have to consider the retroactive application of *Hartley* in lieu of *438 the totality of circumstances test suggested by Justice Stein in his separate opinion.

STEIN, Justice, concurring in part and dissenting in part.

Except for its conclusion that our decision in *State v. Hartley*, 103 N.J. 252, 511 A.2d 80 (1986), must be applied retroactively to police interrogations that occurred before the *Hartley* opinion had been published, I join in the opinion of the majority. I write separately to emphasize and explain my disagreement with the Court's holding concerning *Hartley*'s retroactive application. I find that *Hartley*'s purpose to “avoid * * * confusion and conflict in future cases, * * * on the question of the *minimum* requirement for ‘scrupulously honoring’ [the right to silence],” *id.* at 268, 511 A.2d 80, and its recognition of “[t]he necessity for our giving guidance to our own law-enforcement officials * * *,” *id.* at 285, 511 A.2d 80, are irreconcilable with today's holding that *Hartley* must be applied to invalidate confessions elicited by interrogations conducted *before* law-enforcement officials learned of *Hartley*'s bright-line rule requiring mandatory rewarning whenever a suspect asserts a right to silence. The result of applying *Hartley* to the interrogation in this case, in the course of which police officers

administered *Miranda* warnings to defendant on *seven* separate occasions between his arrest and confession, highlights the anomaly of the Court's determination to accord *Hartley* full retroactivity.

I.

In *State v. Hartley*, this Court held that

before an accused's previously-asserted right to remain silent may be deemed to have been “scrupulously honored,” law-enforcement authorities must, at a minimum, readminister the *Miranda* warnings. In the absence of those renewed warnings any inculpatory statement given in response to police-initiated custodial interrogation after the right to silence has been invoked is inadmissible. [*Id.*, 103 N.J. at 256, 511 A.2d 80.]

The Court based its decision “not only on our understanding of federal constitutional law, but on our state common-law *439 privilege against self-incrimination as well.” *Id.* at 284, 511 A.2d 80. It acknowledged, however, that the United States Supreme Court had not yet ruled on the issue, and that its prediction concerning how that Court would rule, if confronted with the *Hartley* question, might be incorrect:

In respect of federal constitutional law, therefore, ours is a predictive exercise, one conducted on the basis of our best understanding of the authorities, but nonetheless predictive. We think our reading of the federal law is right. We acknowledge that it may be wrong. Given **499 the importance of the question involved, we see our

duty to settle it as a matter of state law. [*Id.* at 284–85, 511 A.2d 80.]

Whether *Hartley* is based primarily on federal constitutional law or state law is critical to the question of its retroactive application. As we acknowledged in *State v. Lark*, 117 N.J. 331, 567 A.2d 197 (1989),

[t]o the extent that retroactivity issues arise in the context of criminal-procedure decisions implicating rights guaranteed under the federal constitution, United States Supreme Court precedents control the scope of retroactivity. [*Id.* at 335, 567 A.2d 197 (citation omitted).]

In *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the Supreme Court held that new constitutional rules of criminal procedure apply retroactively to cases pending on direct review, whether or not the rule constitutes a “clean break” with the past. *Id.* at 328, 107 S.Ct. at 716, 93 L.Ed.2d at 661. Thus, if our holding in *Hartley* is rooted primarily in federal constitutional law, its retroactive application to cases on direct appeal is mandated by *Griffith*.

Particularly because our holding in *Hartley* purports merely to predict federal constitutional law, it would be realistic to consider *Hartley* as based primarily on state law. Although decided in 1986, *Hartley*'s holding has yet to be adopted by the Supreme Court, and several federal courts had previously decided confession cases in a manner inconsistent with *Hartley*'s bright-line rule. See *Stumes v. Solem*, 752 F.2d 317, 321 (8th Cir.1985) (“[W]e believe that *Stumes* was aware of his *Miranda* rights and voluntarily chose not to exercise them. To require the police to reissue *Miranda* rights under these circumstances would serve no real purpose.”), *cert. denied*, 471 U.S. 1067, 105 *440 S.Ct. 2145, 85 L.Ed.2d 502 (1985); *Jarrell v. Balkcom*, 735 F.2d 1242, 1254 (“We conclude that no violation of petitioner's rights occurred by the failure to reissue the *Miranda* warnings * *

*.”), *reh'g denied*, 740 F.2d 979 (11th Cir.1984), and *cert. denied*, 471 U.S. 1103, 105 S.Ct. 2331, 85 L.Ed.2d 848 (1985); *United States v. Hackley*, 636 F.2d 493, 500, 504–05 (D.C.Cir.1980) (third set of *Miranda* warnings not required and statement made two hours after last warnings held admissible; dissenting opinion views colloquy with accused as reinterrogation); *Brown v. Tard*, 552 F.Supp. 1341, 1349 (D.N.J.1982) (“*Miranda* does not require that a fresh set of warnings be repeated each time the police resume interrogation after an interruption.”); see also *Miller v. United States*, 396 F.2d 492, 496 (8th Cir.1968) (rewarning not required each time interrogation process renewed), *cert. denied*, 393 U.S. 1031, 89 S.Ct. 643, 21 L.Ed.2d 574 (1969); *United States v. Kinsey*, 352 F.Supp. 1176, 1178 (E.D.Pa.1972) (*Miranda* warnings do not become stale).

Because *Hartley*'s federal constitutional underpinning is questionable, and because there is no doubt about the availability of state common law as a source of *Hartley*'s bright-line rule, it is appropriate that the issue of *Hartley*'s retroactivity be determined by state standards. Cf. *State v. Lark*, *supra*, 117 N.J. 331, 335, 567 A.2d 197 (retroactivity of *State v. Howard*, 110 N.J. 113, 539 A.2d 1203 (1988), determined by state law, although *Howard* collaterally implicates federal constitutional rights).

In *State v. Burstein*, 85 N.J. 394, 427 A.2d 525 (1981), we summarized the options available in determining the retroactive application of our decisions:

[W]e note that this Court has four options open to it in any decision involving retroactivity: (1) make the new rule of law purely prospective, applying it only to cases whose operative facts arise after the new rule is announced; (2) apply the new rule to future cases and to the parties in the case announcing the new rule, while applying the old rule to all other pending and past litigation; (3) grant the

new rule limited retroactivity, applying it to cases in (1) and (2) as well as to pending cases where the parties have not yet exhausted all avenues *441 of direct review; and, finally, (4) give the new rule complete retroactive effect, applying it to all cases, even those where final judgments have been entered and all avenues **500 of direct review exhausted. [*Id.* at 402–03, 427 A.2d 525 (citation omitted).]

Our choice among those four options has been informed generally by weighing

(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice. [*State v. Nash*, 64 N.J. 464, 471, 317 A.2d 689 (1974).]

All three of the *Nash* factors counsel against retroactive application of *Hartley*. To the extent that the purpose of *Hartley* is to give “guidance to our own law-enforcement officials,” 103 N.J. at 285, 511 A.2d 80, and “avoid * * * confusion and conflict in future cases,” *id.* at 268, 511 A.2d 80, retroactive application is a *non sequitur*. Applying the second *Nash* factor, the degree of reliance placed on the pre-*Hartley* law requiring *Miranda* warnings before custodial interrogation, and mandating that law-enforcement officials “scrupulously honor” a suspect's assertion of the right of silence, *Michigan v. Mosley*, 423 U.S. 96, 105, 96 S.Ct. 321, 327, 46 L.Ed.2d 313, 321 (1975), is amply illustrated by the interrogation in this case. Police officers administered *Miranda* warnings to defendant on seven separate occasions between his arrest and his confession. As the majority opinion acknowledges,

“[t]here is no evidence of police coercion or misconduct. There were no extended interrogations designed to wear down defendant's will.” *Ante* at 418, 581 A.2d at 488. It is entirely reasonable to assume that if *Hartley* had been decided before defendant's interrogation, the police officers who had so diligently attempted to comply with the dictates of the *Miranda* rule might well have rewarded defendant after his meeting with his father and prior to resuming interrogation. To invalidate defendant's confession because the police did not observe *Hartley*'s bright-line rule—a rule that did not then exist—is manifestly inappropriate and inconsistent with our retroactivity jurisprudence.

*442 Finally, retroactive application of *Hartley* may very well generate a multitude of post-conviction relief applications from defendants whose confessions were elicited by pre-*Hartley* interrogations. Those confessions may have passed muster under *Michigan v. Mosley*, *supra*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313, which required that a suspect's assertion of the right to silence be scrupulously honored, but may not satisfy *Hartley*'s bright-line rule mandating readministration of *Miranda* warnings before resumption of questioning. Thus, it is likely that retroactive application of *Hartley* would adversely affect the administration of justice.

The majority correctly observes that prior decisions of this Court, although not deciding the issue, assumed that *Hartley* applied retroactively, citing *State v. Bey*, 112 N.J. 45, 548 A.2d 846 (1988) (*Bey I*), and *State v. Bey*, 112 N.J. 123, 134–43, 548 A.2d 887 (1988) (*Bey II*), *ante* at 424, 581 A.2d at 491. In my view, our assumptions in *Bey I* and *Bey II* were unfounded, and should not impel us to decide the issue incorrectly.

The majority compares retroactive application of *Hartley* to the treatment given by the Supreme Court to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), observing that “*Miranda* applies to interrogations that took place before that rule was announced if the trial did not commence until after the *Miranda* decision.” *Ante* at 422, 581 A.2d at 490 (citations omitted). The majority suggests that application of *Hartley*

should be no less broad than that of *Miranda*, noting the “obvious similarity” between the “nature and effect” of the two decisions. However, the Supreme Court decision applying *Miranda* to cases tried after the date of decision in that case explicitly rejected full retroactive application of the rule:

In the light of * * * various considerations, we conclude that * * * *Miranda* * * * should not be applied retroactively.

* * * * *

*443 * * * Future defendants will benefit fully from our new standards governing *501 in-custody interrogation * * *. Law enforcement officers and trial courts will have fair notice that statements taken in violation of these standards may not be used against an accused. Prospective application only to trials begun after the standards were announced is particularly appropriate here. Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are now obligatory. Consequently they have adopted devices which, although below the constitutional minimum, were not intentional evasions of the requirements of the privilege. In these circumstances, to upset all of the convictions still pending on direct appeal which were obtained in trials preceding * * * *Miranda* would impose an unjustifiable burden on the administration of justice.

At the same time, we do not find any persuasive reason to extend * * * *Miranda* to cases tried before those decisions were announced, even though the cases may still be on direct appeal. [*Johnson v. New Jersey*, 384 U.S. 719, 732–33, 86 S.Ct. 1772, 1780–81, 16 L.Ed.2d 882, 891–92 (1966).]

Thus, the Court rejected both full retroactivity and retroactive application to cases pending on appeal but tried prior to *Miranda*. The limited form of retroactive application employed by the Court in *Johnson* need not guide our determination of retroactivity under State law.

Relying on the *Nash* factors, this Court has in the past rejected retroactive application of new rules of law that would have invalidated “law enforcement actions undertaken in good-faith reliance upon then long-standing legal authority.” *State v. Carpentieri*, 82 N.J. 546, 549, 414 A.2d 966 (1980); cf. *State v. Lark*, *supra*, 117 N.J. 331, 567 A.2d 197 (limiting retroactive application of *State v. Howard*, *supra*, 110 N.J. 113, 539 A.2d 1203, to pipeline cases); *State v. Catania*, 85 N.J. 418, 446, 427 A.2d 537 (1981) (minimization standards adopted by court to be applied only prospectively); *State v. Burstein*, *supra*, 85 N.J. 394, 411, 427 A.2d 525 (holding in *State v. Cerbo*, 78 N.J. 595, 397 A.2d 671 (1979) that delay in presenting wiretap tapes for sealing required suppression absent explanation for delay, would be applied only prospectively); *State v. Carpentieri*, *supra*, 82 N.J. 546, 414 A.2d 966 (holding that *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), applies only to random traffic stops occurring after date of decision); *State v. Howery*, 80 N.J. 563, 404 A.2d 632 (1979) *444 holding that *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), applies only to search warrants issued after date of decision).

Prospective application of our decision in *Hartley* is fully consistent with these decisions. It avoids the invalidation of confessions admissible in evidence but for the non-observance of *Hartley*'s bright-line rule, which was not only unknown but unanticipated before this Court's decision in *Hartley* was published.

II.

As I view this record, defendant asserted his right to cut off questioning when he told the police officers that “he would tell [them] about the murder but he first wanted to speak to his father.” The resumption of interrogation after defendant spoke to his father, even without fresh *Miranda* warnings, did not constitute a failure by the police to “scrupulously honor” defendant's right to remain silent. In the context of the numerous administrations of *Miranda* warnings over the past several days, the officers could reasonably have assumed that defendant was aware of his right to cut off

questioning at any time. The trial court determined that the police officers “fully * * * complied with all of the defendant's constitutional rights,” and that defendant knowingly and voluntarily waived his right to remain silent. I would hold that defendant's confession was properly admitted in evidence.

GARIBALDI, J., joins in this opinion.

HANDLER, Justice, concurring and dissenting in part.

In November 1985, the State indicted defendant, Nathan Harvey for capital murder, **502 robbery in the second degree, and burglary in the second degree. Following a jury trial, in October 1986, defendant was convicted on all counts.

*445 The Court now reverses defendant's capital murder conviction and death penalty. I concur in its judgment. I am in accord with the Court's determinations that reversible error occurred in the admission into evidence of defendant's confession and in the failure to provide defendant with a charge that clearly distinguished between intentional murder and murder based only on intent to cause serious bodily injury resulting in death. I write separately to stress what I believe to be additional reasons for the reversals of the conviction and sentence. These relate to the admission and use of expert testimony and of evidence of other crimes. I also reiterate my view that the State's capital murder statute is unconstitutional as enacted, construed and applied, also warranting the reversals in this case. See State v. DiFrisco, 118 N.J. 253, 284, 571 A.2d 914 (1990) (Handler, J., dissenting and concurring).

I.

The Court recognizes, and the State concedes, that defendant's confession is the most significant evidence of guilt in this case. The Court now rules that the confession was unconstitutionally obtained because the police failed to scrupulously honor his request to remain silent. *Ante* at 421, 581 A.2d at 489–490. I agree with that ruling.

The Court emphasizes that the murder charge in this case clearly failed to comply with the standards of State v. Gerald, 113 N.J. 40, 69, 549 A.2d 792 (1988). I concur in the Court's determination that defendant is entitled to a murder charge that distinguishes intentional murder from serious-bodily-injury murder. *Ante* at 412–414, 581 A.2d at 485–486. It is also clear that the failure to give a *Gerald* charge resulted in a determination that cannot be the basis of a capital murder conviction. The jury verdict sheet stated that a finding of intent to cause either death or serious bodily injury resulting in death constituted capital murder. Moreover, as the Court points out, there was adequate evidential support for a *Gerald* *446 charge. *Ante* at 413–414, 581 A.2d at 486; see State v. Coyle, 119 N.J. 194, 209, 574 A.2d 951 (1990). Because the jury was charged on felony-murder, aggravated manslaughter, and manslaughter, there was sufficient evidence to support murder verdicts that were neither knowing nor purposeful. See State v. Pennington, 119 N.J. 547, 562, 575 A.2d 816 (1990).

II.

The Court recognizes the problematic quality of much of the expert testimony in this case. *Ante* at 425–431, 581 A.2d at 492–495. I have the same misgivings as does the Court with respect to much of this evidence. In my view, however, portions of it were unquestionably incompetent and inadmissible, and the resultant prejudice constitutes added grounds for reversal of the conviction.

I concur in the Court's determination that the trial court abused its discretion in admitting the purportedly expert testimony of Dr. Lovejoy. *Ante* at 425–429, 581 A.2d at 492–493. Dr. Lovejoy's analysis of the blood-stained pillowcase, and conclusion that a “small man” or an “average-size woman” with a shoe size of 6 ½ plus or minus one-half size left the print on the pillowcase, were based on an unproven and unreliable methodology. See State v. Zola, 112 N.J. 384, 447–48, 548 A.2d 1022 (1988). Moreover, because this opinion testimony was central identification evidence linking Harvey to the crime, as stressed by the prosecutor in his

guilt-phase summation, the error in admitting Dr. Lovejoy's opinion is reversible in my view.

Another serious error involves the expert opinion of Dr. Marvin Shuster. Dr. Shuster performed the autopsy on the victim and testified as a State witness to his opinions and conclusions regarding the cause of death. Defendant claims that the trial court erroneously allowed critical aspects of this opinion testimony which were not based on a reasonable degree of medical certainty or probability. The Court acknowledges **503 *447 the validity of that standard, noting that "opinions as to possibility are inadmissible," but rules only that it must be satisfied on a retrial. *Ante* at 431, 581 A.2d at 495. This opinion testimony was important, the error in its admission serious, and the prejudice caused thereby substantial. I believe it constitutes an independent ground for reversal and the Court, rather than content itself with a precatory admonition, should so state.

On direct examination, Dr. Shuster testified about the length and location of a major head wound. He then indicated the "particular wound ... looked like it was a confluence or at least two." He also stated that "there were pressure marks on the neck" and that "[i]t usually takes quite a number of minutes, probably more in the realm of an hour," to apply that pressure.

That testimony had the potential of being highly significant evidence of the manner in which the killing occurred. Nevertheless, the witness' conclusions were based on no more than "possibilities." He testified as follows:

Q. And [the autopsy report] talks about that six inch opening?

A. That's right.

Q. And it says, does it not, obvious fracturing of the skull is present in the depths of this wound which *may* represent the confluence of several wounds, is that correct?

A. That's correct.

Q. In other words you say that its *possibly* two wounds?

A. Yes.

Q. And it's *possibly not*?

A. That's correct.

Q. This marking on the neck you said *could have been* the result of pressure for approximately an hour, is that correct?

A. That's what I said, yes, sir.

Q. And again this is in the area of *possibility*, is that correct, *it could be possibly less, possibly more*?

A. That's correct, yes.

* * * * *

Q. And you said that it was a blunt object that caused these injuries, is that correct?

A. I said *object or objects*.

Q. You said object or objects?

A. Yes.

*448 Q. Outside the presence of this jury you had voiced an opinion that there was *possibly two objects*?

A. Either two objects or one object with several either sides or characteristics capable of giving different patterns to the injuries, yes.

Q. And this in the range, again, of *possibility*?

A. That's correct.

* * * * *

Q. And the number of blows as you said, *this is the range of possibilities, too, you can't say that definitely or probably that it was fifteen, as far as you know it's possibly fifteen or more*?

A. Fifteen or more, yes.

Critical portions of Dr. Shuster's testimony were not couched in terms of sufficient medical certainty. I believe the failure to explicitly categorize *all*

significant portions of Dr. Shuster's testimony in terms of reasonable medical certainty resulted in the disclosure of speculative and inadmissible evidence.

Dr. Shuster's testimony cannot be minimized with respect to its force and influence in this case. His opinions about the number of blows and the type of instrument causing the victim's injuries were crucial to the prosecution's theory that this was not a reflexive or impulsive homicide justifying a manslaughter verdict. The opinion evidence escalated the case into an intentional homicide coupled with a purpose to inflict gratuitous pain and suffering, clearly prejudicing defendant's ability to have a fair determination under *Gerald* as well as to avoid the death penalty under aggravating factor c(4)(c). Yet that opinion evidence was so patently inadequate in terms of the standards that govern medical testimony that its admission must be deemed reversible error.

****504 III.**

The Court finds no major difficulty with respect to a prior conviction admitted for impeachment purposes, nor is particularly troubled by the admission of other-crimes evidence. *Ante* at 431–432, 581 A.2d at 495. I believe the conventional standards under which these evidentiary rulings were made are inadequate in the capital-murder context and that, in both *449 instances, reversible error occurred. See *State v. Long*, 119 N.J. 439, 513–18, 575 A.2d 435 (1990) (Handler, J., concurring and dissenting).

The Court finds unexceptional the admission of a prior rape conviction to impeach defendant's credibility under *State v. Sands*, 76 N.J. 127, 386 A.2d 378 (1978). “Given the seriousness of his prior offenses, we see no reason to second-guess the trial court.” *Ante* at 432, 581 A.2d at 495. It is extraordinary that such evidence could be received in light of other evidence relating to a single pubic hair attributable to a black person found on the victim, which disclosure had the unmistakable potential to inject sexual assault into the case. *Ante* at 429–430, 581 A.2d at 493–494.

The Court rules that, “[o]n retrial the prosecution should refrain from referring to the hair as a ‘pubic hair.’ ” *Ibid.* That does not eliminate the grave potential for prejudice inherent in the prior rape conviction, however. Informing the jury that defendant had committed another serious, violent crime in the past has the clear capacity to influence its determination of *substantive* guilt on the capital-murder count. In a capital case, the slight bearing on credibility that such a prior conviction may have can never outweigh such profound prejudice in my estimation. See *State v. Pennington*, *supra*, N.J. at 561–63, 575 A.2d 816 (Handler, J., concurring and dissenting).

The Court recognizes that the other-crimes evidence pertaining to defendant's theft of a hatchet could have a prejudicial impact with respect to the penalty phase of the trial. *Ante* at 434–435, 581 A.2d at 496. In my view, it is imperative that the potential for prejudice of such evidence in the *penalty* -phase trial be considered by the trial court in determining its admissibility in the *guilt* -phase trial. I stressed in *State v. Long*, *supra*, that

under *Evidence Rule 55* and *Evidence Rule 4*, the court must go further and determine the existence of potential prejudice, and weigh the prejudice against the probative worth of the evidence. Because “other-crime evidence has a unique tendency to turn a jury against the defendant,” *450 *State v. Stevens*, 115 N.J. 289, 302–03 [558 A.2d 833] (1989), that weighing process is particularly critical in a capital-murder prosecution. Such proof offered in the guilt phase of a capital-murder trial has an “evidentiary fallout” that can taint not only the jury's determination of guilt but also its determination of life or death. [119 N.J. at 515, 575 A.2d 439 (Handler, J., concurring and dissenting).]

I repeat:

Those several considerations underscore the need in a capital-murder prosecution to require that any *Evidence Rule 4* hearing to determine the admissibility of other-crimes evidence—other uncharged

crimes, other charged crimes, and other prior convictions—must take into account not only the prejudicial effect on the determination of guilt but also the prejudicial effect on the determination of sentence. *See State v. Pennington, supra*, 119 N.J. at 586–87 [575 A.2d 816]. The court must, in the guilt-phase of a capital-murder prosecution, I submit, bring into the equation a consideration of the prejudice such evidence can have in terms of arousing, inflaming, or confusing a jury in its critical assessment of aggravating and mitigating factors, and in terms of the capacity of such evidence to mark defendant as an evil, violent and dangerous person. [*Id.* at 516, 575 A.2d 439

(Handler, J., concurring and dissenting).]

Those considerations apply here. As I view the record they justify reversal.

****505 IV.**

I concur and dissent in part from the judgment of the Court.

*Concurring in part, dissenting in part—*Justices HANDLER, O'HERN, GARIBALDI and STEIN—4.

*For reversal and remandment—*Chief Justice WILENTZ, and Justices CLIFFORD and POLLOCK—3.

All Citations

121 N.J. 407, 581 A.2d 483

Negative Treatment

Negative Citing References (4)

The KeyCited document has been negatively referenced by the following events or decisions in other litigation or proceedings:

Treatment	Title	Date	Type	Depth	Headnote(s)
Called into Doubt by Constitutional Amendment as Stated in	1. <u>State v. Cruz</u> ” MOST NEGATIVE 749 A.2d 832 , N.J. CRIMINAL JUSTICE - Homicide. Conviction for serious bodily injury capital murder requires proof of various elements.	May 08, 2000	Case		1 2 A.2d
Distinguished by	2. <u>State v. Martini</u> ” 619 A.2d 1208 , N.J. Death Penalty. Imposition of death penalty upon defendant convicted of murdering victim during kidnapping was warranted.	Feb. 09, 1993	Case		3 5 6 A.2d
Distinguished by	3. <u>State v. Brooks</u> ” 706 A.2d 757 , N.J.Super.A.D. CRIMINAL JUSTICE - Confessions. Defendant did not invoke his right to silence when he told police officers that he would talk after he telephoned his mother.	Feb. 24, 1998	Case		3 5 6 A.2d
Distinguished by	4. <u>State v. Roman</u> ” 887 A.2d 715 , N.J.Super.A.D. CRIMINAL JUSTICE - Prosecutorial Misconduct. Cumulative effect of prosecutorial improprieties in murder trial did not deprive defendant of his right to a fair trial.	Dec. 23, 2005	Case		5 6 A.2d

Citing References (113)

Treatment	Title	Date	Type	Depth	Headnote(s)
Distinguished by NEGATIVE	1. State v. Roman 887 A.2d 715, 727+ , N.J.Super.A.D. CRIMINAL JUSTICE - Prosecutorial Misconduct. Cumulative effect of prosecutorial improprieties in murder trial did not deprive defendant of his right to a fair trial.	Dec. 23, 2005	Case		5 6 A.2d
Distinguished by NEGATIVE	2. State v. Brooks 706 A.2d 757, 760+ , N.J.Super.A.D. CRIMINAL JUSTICE - Confessions. Defendant did not invoke his right to silence when he told police officers that he would talk after he telephoned his mother.	Feb. 24, 1998	Case		3 5 6 A.2d
Distinguished by NEGATIVE	3. State v. Martini 619 A.2d 1208, 1235+ , N.J. Death Penalty. Imposition of death penalty upon defendant convicted of murdering victim during kidnapping was warranted.	Feb. 09, 1993	Case		3 5 6 A.2d
Examined by	4. State v. Diaz-Bridges 34 A.3d 748, 757+ , N.J. CRIMINAL JUSTICE - Confessions. Defendant did not invoke right to remain silent by requesting to speak with his mother during custodial interrogation.	Jan. 12, 2012	Case		3 5 A.2d
Examined by	5. State v. Harvey 2017 WL 3687939, *1+ , N.J.Super.A.D. After being twice convicted by a jury and sentenced to death for the June 1985 murder of Irene Schnaps, defendant Nathaniel Harvey filed a pro se petition for post-conviction...	Aug. 28, 2017	Case		8 9 A.2d
Examined by	6. State v. Hreha 2012 WL 43589, *11+ , N.J.Super.A.D. Defendant Carl Hreha appeals from his conviction for second-degree computer criminal activity, in violation of N.J.S.A. 2C:20-25(b), and fourth-degree bias intimidation, in...	Jan. 10, 2012	Case		5 6 A.2d
Examined by	7. State v. Demetrius M. Diaz-Bridges 2010 WL 3932392, *10+ , N.J.Super.A.D. CRIMINAL JUSTICE - Confessions. Confession given by pretrial detainee shortly after officer accused him of murder was not involuntary.	Sep. 21, 2010	Case		3 5 6 A.2d
Discussed by	8. State v. Maltese 120 A.3d 197, 209+ , N.J. CRIMINAL JUSTICE - Confessions. Police obtained murder confession in violation of defendant's right to remain silent.	Aug. 17, 2015	Case		3 5 A.2d
Discussed by	9. State v. Harvey 826 A.2d 597, 598+ , N.J. CRIMINAL JUSTICE - Prosecutorial Misconduct. Bare allegation of prosecutorial misconduct did not disqualify prosecutors in post-conviction case.	Jan. 15, 2003	Case		19 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Discussed by	10. State v. Timmendequas 737 A.2d 55, 109+ , N.J. CRIMINAL JUSTICE - Jury. Empaneling foreign jury was justified in capital case.	Aug. 11, 1999	Case		3 5 6 A.2d
Discussed by	11. State v. Marshall 586 A.2d 85, 214+ , N.J. Defendant was convicted in the Superior Court, Law Division, Atlantic County, of conspiracy and murder, and was sentenced to death, and he appealed. The Supreme Court, Stein, J.,...	Jan. 24, 1991	Case		19 A.2d
Discussed by	12. State v. Moore 585 A.2d 864, 884+ , N.J. Defendant was convicted of murder of his wife and child by the Superior Court, Law Division, Essex County, and defendant appealed. The Supreme Court, O'Hern, J., held that...	Jan. 23, 1991	Case		1 A.2d
Discussed by	13. State v. Hinds 2015 WL 4078339, *5+ , N.J.Super.A.D. A Camden County grand jury returned Indictment No. 11-02-0440, charging defendant Clive Hinds with two counts of first-degree murder in the deaths of Muriah Huff and Michael...	July 07, 2015	Case		3 A.2d
Discussed by	14. State v. Laurance 2014 WL 8481101, *3+ , N.J.Super.A.D. Following a jury trial, defendant Lenroy Laurance was convicted of first-degree kidnapping, N.J.S.A. 2C:13-1(b)(1) (count one); first-degree felony murder during a kidnapping,...	Apr. 07, 2015	Case		6 A.2d
Called into Doubt by Constitutional Amendment as Stated in	15. State v. Cruz 749 A.2d 832, 836+ , N.J. CRIMINAL JUSTICE - Homicide. Conviction for serious bodily injury capital murder requires proof of various elements.	May 08, 2000	Case		1 2 A.2d
Cited by	16. State v. Wessells 37 A.3d 1122, 1131 , N.J. CRIMINAL JUSTICE - Confessions. Holding of Maryland v. Shatzer applied retroactively to require suppression of defendant's custodial statement.	Feb. 29, 2012	Case		6 A.2d
Cited by	17. State v. Moore 902 A.2d 1212, 1227 , N.J. CRIMINAL JUSTICE - Evidence. Hypnotically refreshed testimony of victim identifying defendant as her attacker was inadmissible.	Aug. 10, 2006	Case		—
Cited by	18. Kemp ex rel. Wright v. State 809 A.2d 77, 87+ , N.J. HEALTH - Vaccines. Evidentiary hearing was required on reliability of expert opinion that vaccination of student caused injuries to student's daughter.	Aug. 20, 2002	Case		10 11 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	 19. State v. Hernandez  784 A.2d 1225, 1233+ , N.J. CRIMINAL JUSTICE - Evidence. Accomplice's uncorroborated other-crimes testimony in drug prosecution was inadmissible.	Nov. 21, 2001	Case		18 A.2d
Cited by	 20. State v. G.V.  744 A.2d 137, 150 , N.J. CRIMINAL JUSTICE - Evidence. Evidence of sexual assault against victim's sister was inadmissible in sexual assault prosecution.	Jan. 27, 2000	Case		18 A.2d
Cited by	 21. State v. Muhammad 678 A.2d 164, 186+ , N.J. CRIMINAL JUSTICE - Sentencing. New Jersey victim impact statute is constitutional under both United States and New Jersey Constitutions.	June 28, 1996	Case		7 A.2d
Cited by	 22. State v. Mejia 662 A.2d 308, 315 , N.J. Homicide. Failure to instruct jury at guilt phase that it need not be unanimous on intent constituted reversible error.	July 12, 1995	Case		2 A.2d
Cited by	23. Boland v. Dolan  657 A.2d 1189, 1196+ , N.J. Jury Deliberations. Jury could be permitted to use magnifying glass to examine properly admitted photograph even in absence of expert testimony about magnifying glass.	May 17, 1995	Case		9 A.2d
Cited by	 24. State v. Reed 627 A.2d 630, 638 , N.J. Confession. Failure of police to inform murder suspect that attorney was present and asking to speak with him violated suspect's New Jersey privilege against self-incrimination.	July 23, 1993	Case		—
Cited by	 25. State v. Bey 610 A.2d 814, 823+ , N.J. In prosecution for murder, defendant appealed denial by the Superior Court, Law Division, Monmouth County, of his motion for change of venue and grant of state's motion to...	July 28, 1992	Case		2 A.2d
Cited by	 26. State v. Marshall 613 A.2d 1059, 1084 , N.J. Defendant was convicted of murder and his conviction was affirmed, 123 N.J. 1, 586 A.2d 85, but proportionality review was reserved and a special master was appointed. After the...	July 28, 1992	Case		19 A.2d
Cited by	 27. Jacober by Jacober v. St. Peter's Medical Center  608 A.2d 304, 316 , N.J. A child and his parents filed a medical malpractice action against hospital and physicians. The jury in the Superior Court found for defendants, and plaintiff appealed to the...	July 08, 1992	Case		14 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	28. <u>State v. Biegenwald</u> 594 A.2d 172, 179 , N.J. Defendant was convicted in the Superior Court, Law Division, Monmouth County, of capital murder, and he appealed. The Supreme Court, 106 N.J. 13, 524 A.2d 130, affirmed in part,...	Aug. 08, 1991	Case		1 2 A.2d
Cited by	29. <u>State v. Erazo</u> ” 594 A.2d 232, 239+ , N.J. Defendant was convicted in the Superior Court, Law Division, Essex County, of capital murder and possession of weapon for unlawful purpose. Defendant appealed. The Supreme...	Aug. 08, 1991	Case		1 A.2d
Cited by	30. <u>State v. Dixon</u> 593 A.2d 266, 280 , N.J. Defendant was convicted by jury in the Superior Court, Law Division, Camden County, of murder and other offenses and was sentenced to death, and he appealed. The Supreme Court,...	July 25, 1991	Case		—
Cited by	31. <u>State v. Perry</u> 590 A.2d 624, 656 , N.J. Defendant was convicted of capital murder and lesser offenses. Judgment was entered in the Superior Court, Law Division, Camden County. Defendant appealed directly to Supreme...	May 20, 1991	Case		1 A.2d
Cited by	32. <u>State v. Smith</u> ” 2014 WL 4251859, *4 , N.J.Super.A.D. A grand jury indicted defendant Christopher Smith on charges of first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3 (counts one through three); second-degree...	Aug. 29, 2014	Case		5 A.2d
Cited by	33. <u>Rojas v. Rubenstein</u> 2012 WL 4935498, *6 , N.J.Super.A.D. In this personal injury case, plaintiff Elliot Rojas appeals the involuntary dismissal of his claims for damages against defendants Glenn Peterson, the rent receiver for the...	Oct. 18, 2012	Case		10 A.2d
Cited by	34. <u>State v. Gardner</u> 2011 WL 4808257, *5 , N.J.Super.A.D. Defendant Richard Ramon Gardner appeals from his conviction for first-degree robbery, N.J.S.A. 2C:15-1; second-degree conspiracy, N.J.S.A. 2C:5-2; fourth-degree theft, N.J.S.A....	Oct. 12, 2011	Case		—
Cited by	35. <u>State v. Vaughn</u> 2011 WL 6047, *6 , N.J.Super.A.D. Defendant, James Vaughn, appeals from his convictions for murder, N.J.S.A. 2C:11-3(a)(1) and (2); felony murder, N.J.S.A. 2C:11-3(a)(3); attempted murder, N.J.S.A. 2C:5-1 and...	Aug. 12, 2010	Case		—

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	36. <u>State v. Mitchell</u> 2007 WL 1827242, *2 , N.J.Super.A.D. Defendant Alan Mitchell appeals from the order of the Law Division denying his petition for post-conviction relief (PCR). We affirm. In December 1991, a jury convicted defendant of...	June 27, 2007	Case		11 A.2d
Cited by	37. <u>State v. Figueroa</u> 2007 WL 1745289, *4+ , N.J.Super.A.D. Defendant Jose Figueroa appeals from a judgment of conviction arising out of Indictment No. 01-05-0621 (the first indictment) for third degree possession of a controlled dangerous...	June 19, 2007	Case		17 A.2d
Cited by	38. <u>State v. Purnell</u> 925 A.2d 71, 84 , N.J.Super.A.D. CRIMINAL JUSTICE - Competency to Stand Trial. Evidence was insufficient to support finding that defendant was competent to stand trial.	June 18, 2007	Case		16 A.2d
Cited by	39. <u>State v. Burgess</u> 2007 WL 93163, *3 , N.J.Super.A.D. Tried to a jury, appellant Mary Burgess and co-defendant Benjamin Cox were convicted of third-degree possession of cocaine, N.J.S.A. 2C:35-10a(1) (count one); first-degree...	Jan. 11, 2007	Case		7 A.2d
Cited by	40. <u>State v. Price</u> 2006 WL 3299754, *5 , N.J.Super.A.D. Following a reversal and remand resulting from plain error as to the questioning of a discharged juror, defendant Alonzo Price was convicted by a jury of two counts of first-degree...	Nov. 15, 2006	Case		7 A.2d
Cited by	41. <u>State v. Thomas</u> 2006 WL 3077643, *6 , N.J.Super.A.D. On August 6, 2004, a jury convicted defendant, Luther C. Thomas, of first-degree murder of Jermaine Stephenson, N.J.S.A. 2C:11-3a(1) and/or N.J.S.A. 2C:11-3a(2) (Count One);...	Nov. 01, 2006	Case		18 A.2d
Cited by	42. <u>State v. Brown</u> 2006 WL 1667349, *3 , N.J.Super.A.D. After losing his motion to suppress, defendant was tried before a jury and found guilty of first degree robbery, N.J.S.A. 2C15-1 (count one); fourth degree possession of a weapon,...	June 19, 2006	Case		—
Cited by	43. <u>State v. R.R.</u> 2006 WL 770593, *8 , N.J.Super.A.D. Defendant R.R. appeals from his conviction after a jury trial of seven counts of an eight-count indictment charging two counts of first-degree aggravated sexual assault against his...	Mar. 28, 2006	Case		18 A.2d
Cited by	44. <u>State v. C.S.</u> 2005 WL 3050972, *3 , N.J.Super.A.D. Following a jury trial, defendant was convicted of two counts of first degree sexual assault, contrary to N.J.S.A. 2C:14-2a(1) (Counts One and Four); two counts of second degree...	Nov. 16, 2005	Case		—

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	45. <u>State v. Burgess</u> 689 A.2d 730, 736+ , N.J.Super.A.D. CRIMINAL JUSTICE - Drugs. Opinion mandating definitional jury instructions in prosecutions under drug-kingpin statute applied retroactively in postconviction relief proceeding.	Feb. 18, 1997	Case		6 A.2d
Cited by	46. <u>State v. Cupe</u> ” 672 A.2d 1233, 1238 , N.J.Super.A.D. Postconviction Relief. Decision prohibiting sequential jury charges under certain circumstances did not apply retroactively so as to provide ground for granting petitioner...	Mar. 15, 1996	Case		6 A.2d
Cited by	47. <u>State v. Yothers</u> 659 A.2d 514, 517+ , N.J.Super.A.D. Death Penalty. Enactment of constitutional amendment allowing death penalty for commission of murder resulting from serious bodily injury required implementing legislation.	June 15, 1995	Case		1 A.2d
Cited by	48. <u>State v. Ellis</u> 656 A.2d 25, 31 , N.J.Super.A.D. Double Jeopardy. Guilty plea in New York court for same kidnapping was admissible in New Jersey kidnapping prosecution, and prosecution was not barred by double jeopardy.	Apr. 05, 1995	Case		18 A.2d
Cited by	49. <u>State v. Gregg</u> 650 A.2d 835, 839 , N.J.Super.A.D. Prosecutor Misconduct. New trial on aggravated manslaughter stemming from drunk driving was required where prosecutor made repeated and excessive derogatory remarks concerning...	Dec. 21, 1994	Case		7 A.2d
Cited by	50. <u>State v. Jackson</u> 640 A.2d 863, 872 , N.J.Super.A.D. Confessions. Remand would be required to determine if improperly obtained inculpatory statement tainted later confession.	Apr. 25, 1994	Case		6 A.2d
Cited by	51. <u>State v. Smith</u> 621 A.2d 493, 510+ , N.J.Super.A.D. Attempted Murder. HIV-positive inmate could be convicted of attempted murder for biting corrections officer if inmate believed he could cause death by biting officer and intended...	Feb. 17, 1993	Case		16 A.2d
Cited by	52. <u>Theer v. Philip Carey Co.</u> 611 A.2d 148, 152 , N.J.Super.A.D. Plaintiff brought wrongful death action based on her husband's continued exposure to defendants' asbestos products and action for damages from her own injuries allegedly resulting...	Aug. 04, 1992	Case		9 A.2d
Cited by	53. <u>State v. Stelzner</u> 608 A.2d 386, 393 , N.J.Super.A.D. Defendants were convicted in the Superior Court, Law Division, Atlantic County, and they appealed. The Superior Court, Appellate Division, Gruccio, J.A.D., held that: (1)...	June 11, 1992	Case		3 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	54. <u>State v. Skidmore</u> 601 A.2d 729, 733+ , N.J.Super.A.D. The State appealed from orders of the Superior Court, Law Division, Morris County, which granted motions to suppress. The Superior Court, Appellate Division, O'Brien, J.A.D.,...	Jan. 17, 1992	Case		6 A.2d
Cited by	55. <u>State v. Sharp</u> 928 A.2d 165, 173 , N.J.Super.L. CRIMINAL JUSTICE - Experts. Opinion from state's expert that cause of fire was arson was not an inadmissible "net opinion" in arson trial.	Dec. 05, 2006	Case		16 A.2d
Cited by	56. <u>In re PPA (Phenylpropanolamine)</u> 2005 WL 646146, *2 , N.J.Super.L. This application was brought by Defendants to preclude expert physicians from relying, in part, on a study conducted by the Korean Pharmaceutical Manufacturers Association. For the...	Mar. 21, 2005	Case		—
Cited by	57. <u>State v. Williams</u> 599 A.2d 960, 963 , N.J.Super.L. The prosecution sought to admit DNA and Gm/Km blood tests in the retrial of defendant after the jury was unable to reach a verdict in the defendant's first murder trial. The...	Aug. 05, 1991	Case		11 A.2d
Cited by	58. <u>Schulz v. Celotex Corp.</u> 942 F.2d 204, 207+ , 3rd Cir.(Pa.) Worker brought action against asbestos products manufacturers and, after worker's death, his widow was substituted as plaintiff. The United States District Court for the Eastern...	Aug. 21, 1991	Case		16 A.2d
Cited by	59. <u>Price v. Warren</u> 2015 WL 3970124, *9 , D.N.J. Petitioner is a state prisoner and is proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was convicted by a jury on multiple...	June 30, 2015	Case		7 A.2d
Cited by	60. <u>Dandor v. Ricci</u> 2011 WL 735065, *11 , D.N.J. Petitioner Daniel Dandor, a convicted state prisoner, has submitted a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his New Jersey state court...	Feb. 22, 2011	Case		4 A.2d
Cited by	61. <u>Romano v. Atkins</u> 2004 WL 945140, *3 , E.D.Pa. In this action, Plaintiffs sued Defendants in connection with a surgery performed upon Mr. Romano by Drs. Atkins and Cohen at Pennsylvania Hospital. During discovery, the parties...	Apr. 27, 2004	Case		—
Cited by	62. <u>Dean v. U.S.</u> 938 A.2d 751, 763 , D.C. CRIMINAL JUSTICE - Homicide. Statute providing for mandatory life imprisonment without possibility of parole for murder of police officer does not offend principles of equal...	Dec. 28, 2007	Case		5 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	63. <u>Galloway v. State</u> 122 So.3d 614, 667 , Miss. CRIMINAL JUSTICE - Death Penalty. Exclusion of testimony as to how defendant might behave in prison did not violate right to present mitigating evidence.	June 06, 2013	Case		16 A.2d
Cited by	64. <u>Catchings v. State</u> 684 So.2d 591, 597 , Miss. Defendant was convicted in the Hinds County Circuit Court, First Judicial District, L. Breland Hilburn, Jr., J., of murder, and he appealed. The Supreme Court, Prather, P.J.,...	May 16, 1996	Case		16 A.2d
Mentioned by	65. <u>State v. Cooper</u> 700 A.2d 306, 357 , N.J. CRIMINAL JUSTICE - Homicide. Requisite guilt-phase jury instructions on noncapital homicide charges set out.	Aug. 20, 1997	Case		1 A.2d
Mentioned by	66. <u>State v. Loftin</u> 680 A.2d 677, 748 , N.J. CRIMINAL JUSTICE - Death Penalty. Evidence supported finding of aggravating factor that murder was committed so that defendant could avoid apprehension for robbery of victim.	Aug. 08, 1996	Case		—
Mentioned by	67. <u>State v. Jackson</u> 607 A.2d 974, 979 , N.J. This matter having been presented to the Court on the applications of defendant for leave to appeal the May 8, 1992, order of the Law Division denying defendant's motion for...	May 29, 1992	Case		7 A.2d
Mentioned by	68. <u>State v. Gomez</u> 2012 WL 6698742, *3 , N.J.Super.A.D. Defendant Carlos Gomez appeals from his conviction for third degree burglary, N.J.S.A. 2C:18-2; third degree theft, N.J.S.A. 2C:20-3; and third degree hindering apprehension,...	Dec. 27, 2012	Case		8 10 11 A.2d
Mentioned by	69. <u>State v. Williams</u> 2012 WL 6652511, *8 , N.J.Super.A.D. Defendant Camile Williams appeals from his convictions of multiple crimes arising out of a series of armed robberies committed in Jersey City. Defendant argues the trial court...	Dec. 24, 2012	Case		—
Mentioned by	70. <u>State v. DeLuca</u> 739 A.2d 455, 464 , N.J.Super.A.D. CRIMINAL JUSTICE - Searches and Seizures. Exigent circumstances justified warrantless search of pager.	Nov. 08, 1999	Case		8 A.2d
Mentioned by	71. <u>State v. Marcus</u> 683 A.2d 221, 231 , N.J.Super.A.D. CRIMINAL JUSTICE - Identification. Results of properly conducted DNA tests using restriction fragment length polymorphism method are admissible.	Oct. 17, 1996	Case		—

Treatment	Title	Date	Type	Depth	Headnote(s)
Mentioned by	72. <u>State v. Loftin</u> 670 A.2d 557, 567, N.J.Super.A.D. Jury. Rule which limited defendant's posttrial interviews of jurors did not violate free speech or fair trial rights.	Jan. 12, 1996	Case		18 A.2d
Mentioned by	73. <u>State v. Abronski</u> 657 A.2d 1224, 1227, N.J.Super.A.D. Self-Incrimination. Reed rule that when an attorney has communicated a desire to confer with suspect, police must make that information known to the suspect before custodial...	May 10, 1995	Case		12 A.2d
—	74. <u>Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like</u> 50 A.L.R.3d 8 This annotation collects and discusses those cases which have considered the propriety or prejudicial effect of a prosecutor's reference, during opening or closing argument, to the...	1973	ALR	—	7 A.2d
—	75. <u>Footprints as evidence</u> 35 A.L.R.2d 856 This annotation supplements one in 31 A.L.R. 204. Its purpose is to collate those cases decided subsequently to the earlier treatment, in which some question has arisen in regard...	1954	ALR	—	8 A.2d
—	76. <u>Admissibility of evidence of other offenses in criminal prosecution to prove identity of defendant</u> 63 A.L.R. 602 (Supplementing annotations in 3 A.L.R. 1540; 22 A.L.R. 1016; and 27 A.L.R. 357.) The recent cases appear to sustain the general rule stated in the original annotation in 3 A.L.R....	1929	ALR	—	18 A.2d
—	77. <u>Constitutional Rights of the Accused s 6:16, Custodial interrogation and the protection of the Fifth Amendment privilege against self-incrimination-The Miranda- warnings-Resuming the dialogue after an assertion of the right: The Mosley- rule</u> When the privilege is asserted effectively, the authorities are not thereby precluded from asking the accused if he wishes to speak at anytime in the future. In this regard, the...	2017	Other Secondary Source	—	3 A.2d
—	78. <u>Criminal Procedure, Second Edition s 6.9(g), Ambiguous, equivocal, limited and untimely assertions of rights</u> The Court in Miranda emphatically declared that if "the individual indicates in any manner at any time prior to or during questioning, that he wishes to remain silent, the...	2017	Other Secondary Source	—	5 A.2d
—	79. <u>Criminal Trial Techniques s 12:30, Footprints and shoeprints</u> Footprints often indicate the sex, size, and weight of a person as well as his or her direction, and whether the person was walking or running. Quite often, odd signs of wear on...	2017	Other Secondary Source	—	10 11 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	80. <u>Handbook of Federal Evidence s 702:1, Testimony by expert witnesses: an overview</u> Testimony providing scientific, technical, or other specialized knowledge, in the form of an opinion or otherwise, is admissible only if (1) the knowledge is based upon sufficient...	2017	Other Secondary Source	—	16 A.2d
—	81. <u>Lane Goldstein Trial Technique s 10:5, Purpose and scope of opening statement</u> The purpose of an opening statement is to set forth a general forecast of the evidence. An opening statement advises the jury of the overall case to prevent confusion. It also...	2017	Other Secondary Source	—	7 A.2d
—	82. <u>2B N.J. Prac. Series N.J.R.E. 101, Scope; Definitions</u> N.J. Prac. Series Rule 101 is based on N.J.Evid.R. 1, 2, and 3 of the 1967 Rules of Evidence; Fed.R.Evid. 101 and 1101 deal with the scope and applicability of the federal rules. Paragraph (a) of...	2017	Other Secondary Source	—	10 11 A.2d
—	83. <u>2B N.J. Prac. Series N.J.R.E. 404, Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes; Evidence</u> N.J. Prac. Series Rule 404 generally follows Fed.R.Evid. 404 and replaces N.J.Evid.R. 46, 48, and 55. It also incorporates a portion of N.J.Evid.R. 47. Paragraph (a) of Rule 404 is almost identical...	2017	Other Secondary Source	—	18 A.2d
—	84. <u>2C N.J. Prac. Series N.J.R.E. 607, Credibility and Neutralization</u> N.J. Prac. Series The proposed rule appearing on page 469 of the Main Volume is the New Jersey Evidence Committee's proposed Rule 607 not the federal rule. It was inadvertently placed on page 469....	2017	Other Secondary Source	—	17 A.2d
—	85. <u>2C N.J. Prac. Series N.J.R.E. 702, Testimony by Experts</u> N.J. Prac. Series Rule 702 follows Fed.R.Evid. 702 verbatim and makes only minor language changes in the first sentence of N.J.Evid.R. 56(2). The foundation requirement set forth in N.J.Evid.R. 19...	2017	Other Secondary Source	—	10 12 14 A.2d
—	86. <u>31 N.J. Prac. Series s 1:46, Admissibility of footprint (shoe print), tire track and fabric comparison evidence</u> N.J. Prac. Series Evidence that footprints (shoe prints) found near the scene of a crime match the shoes of the defendant is admissible to identify the defendant as the perpetrator. Plaster casts of...	2016	Other Secondary Source	—	—
—	87. <u>31 N.J. Prac. Series s 1:59, Admissibility of novel scientific evidence</u> N.J. Prac. Series The term "novel scientific evidence" means scientific evidence which has not previously been determined to be admissible. When such evidence is offered, the court should hold an...	2016	Other Secondary Source	—	12 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	88. 32 N.J. Prac. Series s 17:24, Waiver after suspect indicates that he/she wishes to remain silent N.J. Prac. Series The opinion in Miranda v. Arizona states: Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or...	2016	Other Secondary Source	—	5 A.2d
—	89. 48 N.J. Prac. Series s 1:10, Appeals-Pipeline retroactivity N.J. Prac. Series The United States Constitution does not include any direction on whether the decisions of the Supreme Court are to be given prospective or retroactive effect. Instead, federal...	2017	Other Secondary Source	—	6 A.2d
—	90. 48 N.J. Prac. Series s 5:88, Break to consult with family members-In general N.J. Prac. Series Generally speaking, investigating police may urge criminal suspects to cooperate and make incriminating statements. The only restriction on this type of law enforcement activity is...	2017	Other Secondary Source	—	—
—	91. 55 N.J. Prac. Series s 8:9, Supporting authorities-Inadmissible hearsay-Treatises, documents & texts N.J. Prac. Series Evidence Rule 803(c)(18) provides that "[t]o the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination,...	2017	Other Secondary Source	—	—
—	92. 55 N.J. Prac. Series s 7:55, Opposing authorities-Remoteness of conviction N.J. Prac. Series Note that, effective July 1, 2014, N.J.R.E. 609 limits the use of remote convictions, for which ten years have passed since the latter of the witness's conviction or release from...	2017	Other Secondary Source	—	17 A.2d
—	93. 55 N.J. Prac. Series s 8:29, Opposing authorities-Hearsay-Treatises, documents and text N.J. Prac. Series Evidence Rule 803(c)(18) provides that "[t]o the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination,...	2017	Other Secondary Source	—	—
—	94. Wharton's Criminal Evidence s 12:10, Comparisons Just as lay witnesses are permitted to compare the image in a photograph or videotape with their personal knowledge of an individual's appearance and to make an identification, so...	2017	Other Secondary Source	—	8 A.2d
—	95. Wharton's Criminal Evidence s 13:56, Footprint Experts Expert testimony comparing footprints and shoe prints is not required; a court may permit lay witnesses to compare shoe prints or footprints, A court does, however, have the...	2017	Other Secondary Source	—	—

Treatment	Title	Date	Type	Depth	Headnote(s)
—	96. <u>Winning Evidence Arguments s 701:1, Opinion testimony of lay witnesses</u> Harry witnesses a bank robbery which involved the shooting of three people. He was outside the bank when the shooting began. Harry is called to testify. His testimony is as...	2018	Other Secondary Source	—	—
—	97. <u>Winning Evidence Arguments s 702:1, Testimony by expert witnesses: an overview</u> Testimony providing scientific, technical, or other specialized knowledge, in the form of an opinion or otherwise, is admissible only if (1) the knowledge is based upon sufficient...	2018	Other Secondary Source	—	16 A.2d
—	98. <u>Am. Jur. 2d Evidence s 761, Assertion of Miranda rights and subsequent questioning</u> Am. Jur. 2d Evidence Once Miranda warnings have been given, if an individual indicates in any manner, at any time prior to or during questioning, that he or she wishes to remain silent, the...	2018	Other Secondary Source	—	5 6 A.2d
—	99. <u>Am. Jur. 2d Evidence s 972, Generally</u> Am. Jur. 2d Evidence The correspondence of footprints or tracks found near the scene of a crime to the shoes or tracks of the accused is admissible to identify the accused as the guilty actor. While...	2018	Other Secondary Source	—	—
—	100. <u>Am. Jur. 2d Expert and Opinion Evidence s 203, Generally</u> Am. Jur. 2d Expert and Opinion Evidence Generally, the comparison of footprints may properly be made a subject of nonexpert testimony. This is not to say, however, that expert testimony on this subject is not...	2018	Other Secondary Source	—	9 A.2d
—	101. <u>s 1286. Right to remain silent and terminate interrogation, generally</u> Corpus Juris Secundum Criminal Procedure and Rights of the Accused Once Miranda warnings have been given, if the accused indicates in any manner, at any time prior to or during questioning, that he or she wishes to remain silent, the interrogation...	2017	Other Secondary Source	—	5 A.2d
—	102. <u>CASE LAW DEVELOPMENTS</u> 31 Mental & Physical Disability L. Rep. 834 , 870 A California appeals court found that, although a proposed conservatee has both a statutory and procedural due process right to be present at his conservatorship hearing under the...	2007	Law Review	—	12 A.2d
—	103. <u>THE ABOLITION OF THE DEATH PENALTY IN NEW JERSEY AND ITS IMPACT ON OUR NATION'S "EVOLVING STANDARDS OF DECENCY"</u> 15 Mich. J. Race & L. 223 , 263+ In 2007, New Jersey became the first state in over forty years to abolish the death penalty legislatively. Twenty-five years earlier, in 1982, New Jersey had followed a state-level...	2009	Law Review	—	1 2 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	<u>104. JUDICIAL ANARCHY: THE ADMISSION OF CONVICTIONS TO IMPEACH: STATE SUPREME COURTS' INTERPRETATIVE STANDARDS, 1990-2004</u> 2007 Mich. St. L. Rev 307 , 401+ Introduction 308 I. Summary of Federalism Gone Far Astray: Comparatively Evaluating and Critiquing State Rules Regulating the Admission of Convictions to Impeach, 1990-2004. 311...	2007	Law Review	—	17 A.2d
—	<u>105. PAYNE v. TENNESSEE: THE EFFECT OF VICTIM HARM AT CAPITAL SENTENCING TRIALS AND THE RESURGENCE OF VICTIM IMPACT STATEMENTS</u> 27 New Eng. L. Rev. 713 , 748 In Payne v. Tennessee, the United States Supreme Court held that the Eighth Amendment did not erect a per se bar prohibiting victim impact evidence relating to the victim's...	1993	Law Review	—	19 A.2d
—	<u>106. ARTICLE I, PARAGRAPH 22-VICTIM'S RIGHTS AMENDMENT-VICTIM IMPACT EVIDENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT AND IS PERMISSIBLE IN A CAPITAL MURDER CASE IN NEW JERSEY- STATE OF NEW JERSEY v. MUHAMMAD, 145 N.J. 23, 678 A</u> 7 Seton Hall Const. L.J. 723 , 747 In our capital cases we have concluded that even when not required by Constitutional compulsion, our common sense of humanity would not permit a jury to sentence a person to death...	1997	Law Review	—	19 A.2d
—	<u>107. THE IMPORTANCE OF SAVING THE UNIVERSE: KEEPING PROPORTIONALITY REVIEW MEANINGFUL</u> 26 Seton Hall L. Rev. 1423 , 1468 The New Jersey Capital Punishment Act provides for mandatory appeal to the state supreme court and, in the event the appeal results in the affirmation of the conviction and death...	1996	Law Review	—	—
—	<u>108. THE DEATH PENALTY IN NEW JERSEY: A DEFENSE LAWYER'S PERSPECTIVE</u> 26 Seton Hall L. Rev. 1573 , 1581 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...	1996	Law Review	—	1 A.2d
—	<u>109. MITIGATING "THE FRAILTIES OF HUMAN JUDGMENT": JUSTICE ROBERT CLIFFORD AND THE SOURCES OF JUDICIAL LEGITIMACY</u> 25 Seton Hall L. Rev. 1027 , 1073+ [A] judicial approach does not make the future more readily foreseeable and the assurance of our decision, whatever it be, is unfortunately circumscribed by the frailties of human...	1995	Law Review	—	6 A.2d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	110. THE BATTERED WOMEN AS REASONABLE PERSON: A CRITIQUE OF THE APPELLATE DIVISION DECISION IN STATE v. MCCLAIN 22 Seton Hall L. Rev. 365 , 388 In State v. Kelly, the New Jersey Supreme Court reflected an emerging understanding of the application of battered woman's syndrome testimony to justifications and excuses for...	1992	Law Review	—	9 A.2d
—	111. HELL BENT ON INTENT: NEW JERSEY BROADENS THE CLASS OF DEATH ELIGIBLE DEFENDANTS 19 Seton Hall Legis. J. 195 , 230+ On April 26, 1983, a woman named Carol Peniston was beaten, sexually assaulted, and strangled to death in a shed in Asbury Park, New Jersey. The New Jersey Supreme Court,...	1994	Law Review	—	1 2 19 A.2d
—	112. KILLING CAPITAL PUNISHMENT IN NEW JERSEY: THE FIRST STATE IN MODERN HISTORY TO REPEAL ITS DEATH PENALTY STATUTE 41 U. Tol. L. Rev. 485 , 543 "Though legislatures across the country have tried to abolish capital punishment since 1976, none have succeeded." N.Y. Times, Dec. 11, 2007 "Governor Corzine Signs Legislation...	2010	Law Review	—	1 A.2d
—	113. THE PAYNE OF ALLOWING VICTIM IMPACT STATEMENTS AT CAPITAL SENTENCING HEARINGS 45 Vand. L. Rev. 1621 , 1662 I. Introduction. 1621 II. The Victims' Rights Movement and the Legislative Response. 1623 A. The Rise of the Victims' Rights Movement. 1624 B. The Victim Impact Statement. 1627...	1992	Law Review	—	—