STATE V. ROBERT MARSHALL

Death Penalty Proportionality Review Project

A Report to

The New Jersey Supreme Court

By: David C. Baldus
Special Master

September 24, 1991

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REPORT TO THE NEW JERSEY SUPREME COURT CONCERNING STATE v. MARSHALL

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*. I am grateful for the substantial contribution of the staff of the Administrative Office of the Courts in the preparation of this report. I particularly appreciate the assistance of John P. McCarthy, Jr., Esq., Assistant Director, in the formulation of legal, policy, and planning decisions, of Joseph Barraco, Esq., and Nina Rossi, Esq., in the collection and analysis of data, of Ingrid Morton, who served as research analyst for the project, and Barbara Moore, who coordinated preparation of the narrative summaries. I have also been substantially assisted in the preparation of this report by Dr. George Woodworth, Department of Statistics and Actuarial Science, University of Iowa, and Barbara Broffitt, Iowa City, Iowa.

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I. Introduction

The purpose of this report is to provide a factual basis for assessing whether Robert Marshall's death sentence is excessive and disproportionate given the crime and the defendant. As suggested in our Final Report, we will analyze the case using both the frequency and comparative culpability approaches to proportionality review.

A. The Marshall Case

The following is the detailed narrative summary of the Marshall case, drawn from the Supreme Court's opinion and from the Marshall record.

STATE V. MARSHALL

Co-D1, an acquaintance of D, put him in contact with Co-D2, a private detective, to arrange investigative services. D subsequently agreed to pay Co-D2 $65,000 to kill his wife V, so that D could collect over $1 million in life insurance and be free to live with his paramour. On September 7, 1984, as planned, D pulled his car into a highway picnic area, feigning car trouble. V was shot twice in the back (with the bullet also penetrating her arms) while asleep or resting in the car. D was hit in the head to simulate a robbery. Co-D2 claimed the actual shooting was done by Co-D3. Jury verdict: murder 3/5/86. Penalty trial. One aggravating factor found: 4e. Two mitigating factors found: 5f, 5h. Death.

The facts excerpted below from State v. Marshall, 123 N.J. 1 (1991) are in quotations.

> "The State's case against defendant was weighty and compelling . . . [T]he State proved and Marshall acknowledged his long-standing extramarital relationship with Sarann Kraushaar, which had developed to the extent that both contemplated leaving their respective spouses and living together. Marshall had taken preliminary steps toward renting a house in Beach Haven West for that purpose." 123 N.J. at 28.
>
> Marshall appears to have been very much in love with Kraushaar. He never acknowledged this relationship to

victim (V)

his wife, but unknown to him she had knowledge of it. He believed nevertheless that she was deeply suspicious of his fidelity. T. 2/25/86, pp. 19-25. Kraushaar described his situation as follows: "Well to use his expression she was "pulling in the range.' She was hovering over him. She was aware that there was some problem between them, and she was suspicious that there was a relationship between us. She was bombarding him with these suspicions to the point that he was very upset with her and in the conversation with me said something like, 'I swear if there were a way that I could either do away or get rid of her I would.'" T. 2/13/86, p. 11.

In spite of [redacted] concerns, she wanted to keep the marriage together "to start over, to forget everything." In the meantime, she continued to cook and clean for the defendant and to sleep with him. T. 2/26/86, p. 74.

A counterpoint to Marshall's affection for Kraushaar, however, was his testimony that within a month or two after the termination of his relationship with her, he went to Florida to see a woman named Christy. During that trip, he also visited another woman, Karin O'Dell, and while incarcerated in October 1985 he requested from the authorities a contact visit with O'Dell, whom he characterized as "a woman who will be my future wife." T. 2/26/91, pp. 90-93.

By the summer of 1984, Marshall also appears to have been feeling financial pressure. He had a gross income of $130,000 in 1983. He owned a home, with a value he estimated to be $230,000 (with a $49,000 first mortgage), a building from which he operated his insurance business worth $130,000 (encumbered with an $80,000 mortgage), and a $6,000 boat. His other assets, which he appeared to own jointly with his wife, were $40,000-50,000 worth of stock, $5,000-8,000 in bullion and coins. He also owned pension rights worth $80,000-100,000, and interests in future insurance premiums (the "renewal account"). T. 2/26/86, pp. 122-29.

In spite of this apparent wealth, most of Marshall's assets were nonliquid and his standard of living called for more than his annual income. To meet his needs, he obtained a number of loans from a variety of financial institutions. Most significant was a $128,000 second mortgage on his home. His obligations on this loan were met with monthly payments. He also had the following short-term loans: $18,600, $15,000, $12,000, $29,250, $2,100. Beyond the first mortgages on his home and business, Marshall had outstanding debts of about $200,000. T. 2/25/86, pp. 151-55. To alleviate his situation, Marshall unsuccessfully sought in the summer of 1984 to borrow more. In July, a bank declined his request for an additional $20,000. And in August his effort to increase his credit card borrowing limit from

$2,500 to $10,000 was refused. T. 2/25/86, pp. 161-62. He testified, however, that he was not insolvent. T. 2/26/86, p. 127.

Marshall clearly perceived life insurance on his wife's life as a way to "take care of the debts." T. 2/13/86, Afternoon Session, p. 9. In July, he sought more insurance. T. 2/25/86, p. 186. Toward that end, he signed his wife's name to the application for the policy on her life, although it is unknown whether she consented to his doing so.[1] Id. at p. 197. Also, to ensure the vitality of the policies on [redacted] life, which totaled $1,400,000, Marshall paid the August premium on her life but deferred payment on his own policy until after she died. Id. at p. 90. Finally, both Marshall and his wife were examined for an additional policy on the morning before Maria's death. Id. at pp. 169-90.

"The testimony of Co-defendant Billy Wayne McKinnon was the most incriminating evidence against Marshall. McKinnon was a former sheriff's officer from Louisiana who was referred to Marshall by Co-defendant Cumber, whom Marshall had met at a party in New Jersey in May 1984. Marshall conceded that he had hired McKinnon to investigate his wife, in order to determine whether she knew of his relationship with Kraushaar and to attempt to account for several thousand dollars in casino winnings Marshall had given Maria. Marshall admitted that he had met with McKinnon at least twice in Atlantic City, the last meeting occurring at Harrah's casino on the night of the murder. Marshall also acknowledges that he paid McKinnon $6,300 for his investigative services, without receiving any work product, and that the last payment of $800 was made in cash at Harrah's on the night of the homicide." 123 N.J. at 28-29.

"McKinnon testified that Marshall hired him not to investigate his wife but to kill her. He testified that Marshall had paid him $20,000 or $22,00 prior to the murder, that an additional $15,000 was supposed to have been available for him in Marshall's pockets at the scene of the homicide, and that $50,000 more was to be paid to him out of the insurance proceeds." 123 N.J. at 29.

Although Marshall clearly wanted his wife dead, he may have been concerned about the suffering or disfigurement she might endure and how the killing might affect his three children (in secondary school and college). He instructed McKinnon that he did not want a knife or shotgun used, and that he did not want the murder to be carried out in their home or on vacation

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1. It appears that this fact only came to light as a result of an examination of the signature by the State's handwriting experts.

where they were joined by their children. T. 2/3/86, p. 36-37; T. 2/3/86, p. 51.

"McKinnon testified that the Oyster Creek Picnic Area had been selected with Marshall's concurrence as the crime scene. By prearrangement, Marshall was to feign car trouble on the way home from Atlantic City and pull into the picnic area on the pretext of checking to see what was wrong with his car . . . He testified that the prearranged plan was for Thompson to hit Marshall on the head without seriously injuring him, and then to shoot and kill his wife." 123 N.J. at 29.

The Supreme Court's opinion indicates that the earliest evidence of Marshall's premeditation occurred in 1983. "According to Investigator Mahoney's report of the Kraushaar interrogation, she told police of a conversation with Marshall prior to Christmas in 1983 in which, while discussing his financial difficulties, Marshall had observed that 'the insurance on [redacted] would take care of his debts' and that he 'wished she wasn't around.' The report indicates that Marshall had asked Kraushaar whether she knew 'of any one who could take care of it.' Kraushaar had responded by identifying an individual who had been 'in trouble with the law,' but had stated that she 'never wanted to be involved with him if he could do anything like that to his wife.'" 123 N.J. at 36.

The planning commenced seriously however in June of 1984 when McKinnon met Marshall in Atlantic City. "Marshall arrived at McKinnon's room at noon the next day. McKinnon testified that he [McKinnon] 'patted him down' to check for weapons or recording devices. According to McKinnon, Marshall began talking about an investigation of his wife, . . . " 123 N.J. at 42. "McKinnon testified that after fifteen or twenty minutes Marshall told him that 'what he really wanted to do was to get rid of his wife.'" McKinnon asked what he meant, and testified that Marshall replied, "I want her killed, done away with." Responding to McKinnon's question, Marshall suggested that the murder could take place that evening at the Rams Head Inn where the Marshalls had dinner reservations, or after dinner at a place on Route 30 called the Porthole. McKinnon testified that he informed Marshall that he would not kill his wife, but could get someone else to do it. 123 N.J. at 43.

"They then negotiated a price for the homicide. According to McKinnon, after asking for $100,000 he agreed to accept $65,000. McKinnon had already received $5,000, and Marshall agreed to pay an additional $10,000 in advance and $50,000 out of the anticipated insurance proceeds . . . " 123 N.J. at 43. "McKinnon stated that after looking at those 'places' -- apparently referring to Rams Head Inn and the Porthole -- he returned to

Atlantic City."

"McKinnon testified that Marshall called him at his room the next morning to ask 'why the job wasn't done.' Although McKinnon testified that he had no weapon with him, he told Marshall that he had only a shotgun and would have to return to Shreveport to get what he needed. McKinnon left Atlantic City on June 19th." 123 N.J. at 43-44.

Marshall then sent numerous messages seeking to get the job done. Eventually they arranged to meet again in Atlantic City on July 19th. "According to McKinnon, Marshall expected that the homicide would occur that night, and described to McKinnon an all-night restaurant at which he would stop on the way home from Atlantic City. McKinnon testified that Marshall told him he would park behind the restaurant and leave the car, ostensibly to use the restaurant's bathroom. He said he would attempt to leave the car doors unlocked but that his wife would probably lock them after he left."

"McKinnon testified that he . . . had a pistol in his car. When he arrived at the restaurant, he observed several police cars parked in front. He waited thirty or forty minutes, but Marshall did not arrive. McKinnon returned to the motel. He and Gentry left New Jersey for Shreveport the next morning." 123 N.J. at 45.

Marshall again urged in numerous messages that McKinnon should do what he had been paid to do. "McKinnon next heard from Marshall through Cumber, who informed him that Marshall had said there would be an 'extra fifteen' for McKinnon if he would do the 'job' before Labor Day. McKinnon testified that he assumed Marshall meant fifteen thousand dollars, and told Cumber he would try to do it . . . . 123 N.J. at 46. According to McKinnon, Marshall told him that he would be going to Harrah's that night, but asked McKinnon to meet him at 11:30 that morning in the parking lot of the Roy Rogers service area just south of Toms River. McKinnon testified that he and Thompson drove to the service area, arriving about noon. Thompson remained in the car. McKinnon walked to the north end of the parking lot and found Marshall there. According to McKinnon, he and Marshall then drove southbound on the Parkway in Marshall's car to check out possible sites for the homicide. After McKinnon rejected two other locations, Marshall drove into Oyster Creek Picnic Area and McKinnon said that it was satisfactory. They returned to the service area. McKinnon asked about the extra $15,000 and Marshall said it would be in his pocket that night...."

"McKinnon testified that he met Marshall at about 9:30 that evening outside of Harrah's. At Marshall's request, McKinnon returned to him the pictures of [redacted] and of their residence that Marshall had given him when

they met in June. Marshall told McKinnon they would be leaving Harrah's around twelve or twelve-thirty. According to McKinnon, he and Thompson ate dinner, later stopping at a hardware store to buy a pair of rubber gloves. McKinnon stated that he had with him a .45 caliber Colt pistol, Army special, from which he had eliminated any fingerprints by wiping it down." 123 N.J. at 47.

"McKinnon testified that he dropped Thompson off at the picnic area between twelve and twelve-thirty. Because it was cold, he gave Thompson one of his knit shirts to wear. McKinnon then drove southbound on the Parkway, exited, reentered the northbound lane, and waited for the Marshalls at the toll plaza. When they passed him, he delayed about two minutes and then drove northbound and entered the picnic area. He saw Marshall's car parked with the passenger door open and Marshall lying on the ground at the rear of the car. Thompson got into the car, put something on the floor, then got out and ran to the right rear tire of Marshall's car. McKinnon testified that he saw Thompson 'squat down' and then heard air 'hissing out' of the tire. Thompson reentered the car and they drove out of the picnic area onto the Parkway southbound lanes." 123 N.J. at 48.

The state trooper responding to the call, based on a report by people Marshall had flagged down to report the incident, testified that he "saw [redacted] lying face down across the front seat, both arms under her, and her head near the steering wheel. Mathis checked for a pulse but found none. The victim did not appear to be breathing."

"Other police officers soon arrived at the scene.... Specifically, they found Marshall's wallet on the ground near the passenger door. The right rear tire was flat and had a clean one-inch cut on the upper sidewall. There was a puddle of blood on the ground to the rear and right of the car. The glove compartment and trunk of Marshall's Cadillac were closed...." 123 N.J. at 31.

"An autopsy performed on the victim revealed two entry bullet wounds on the mid-portion of the victim's back. The wounds were 'very close together,' about three millimeters apart. There were two corresponding exit wounds on the front of the chest, one near the collar bone and the other on the left breast. There was also an entry and exit wound, described as a superficial grazing wound, in the medial or inner area of the left forearm. There was also an entry wound without an exit wound in the left forearm, the bullet having been lodged in the rear of the forearm and protruding slightly through the skin. Based on the close proximity of the two entry wounds in the back, the pathologist who performed the

autopsy expressed the opinion that two shots had been fired in succession and at very close range. The pathologist removed the bullet protruding from the left forearm during the autopsy. He identified it as a .45 caliber bullet, and indicated that it had entered the victim's back, passed through the chest, and lodged in the left forearm. The other bullet, following a similar course, had passed through the left arm. The pathologist determined that when the shooting occurred, the victim was lying down with her left arm under her body. The cause of death was "massive hemorrhage due to laceration * * * of the left lung and the main artery of the chest." 123 N.J. at 33-34.

Marshall told police that when he stopped to check a flat tire, [redacted] was killed by unknown assailants who struck him on the head, rendering him unconscious. "At some point before the police arrived, Marshall realized that the $2,000 was missing from his pants pocket." 123 N.J. at 33. Contrary to Marshall's story, "a forensic chemist . . . testified that he had found no marking on the tire or rim indicating that the car had been driven while the tire was in a deflated or semi-deflated condition." 123 N.J. at 34.

Sarann Kraushaar later told the authorities of Marshall's desire to be rid of his wife and of their plans to move in together. T. 2/13/86, pp. 11-15.

On September 27, 1984, police searched a motel where Marshall was staying. There they seized an envelope Marshall sent to his brother-in-law. Inside was an audio cassette tape, with a recording of Marshall discussing his relationship with Sarann Krausharr, his need to get out of debt, the hiring of codefendant Billy Wayne McKinnon to "investigate" [redacted], and his intent to commit suicide because he feared being indicted and tried despite being "innocent".

On December 15, 1984, codefendant Billy Wayne McKinnon promised to testify against Marshall in exchange for a maximum five-year jail term on a plea of guilty to conspiracy to commit murder.

Prior to his arrest, Marshall was an insurance broker and estate planner, who became engaged to Maria Marshall during their senior year of college. Marshall had a good reputation in his community as a law abiding citizen. Marshall was involved in many charitable, community and business organizations. Marshall has three sons, ages 13, 18 and 19. Marshall has no prior criminal record.

Marshall, Robert Cumber, Billy Wayne McKinnon and Larry Thompson were all charged in the same indictment. This indictment, filed on January 10, 1985, charged the defendants as follows: Count 1 charged all four defendants with conspiracy to murder [redacted].

Count 2 charged Robert Cumber and Billy Wayne McKinnon with the purposeful or knowing murder of [redacted] as accomplices. Count 3 charged Marshall as an accomplice to the purposeful or knowing murder of [redacted] Marshall by procuring her death by the payment of promise of money. Count 4 charged Larry Thompson with the purposeful or knowing murder of Maria Marshall by his own conduct.

Marshall and Larry Thompson were tried together on January 27, 1986. In Marshall's guilt trial, the state sought to develop two motives:

> Defendant Marshall was having an extramarital affair with another woman and he had been having that affair for about fourteen to fifteen months before his wife was killed, meeting this woman several days a week, several hours a day, in various places [including motel rooms] . . . Not only was Marshall's having this extramarital affair, but he had been making plans that . . . he and his girlfriend would leave their respective spouses and take up residing together . . .
>
> And this same defendant during that period of time while making plans to leave his wife kept increasing her life insurance policies, wherein he was named beneficiary to a staggering amount in excess of one and a half million dollars. This same defendant, ladies and gentlemen, while filling out these life insurance applications like it was going out of style, was in dire financial straits, in debt in excess of three hundred dollars . . .

T., 1/27/86, pp. 46-48

On March 5, 1986, Marshall was found guilty of conspiracy and capital murder, and Larry Thompson was acquitted of all charges.

Less than two and a half hours after the jury announced Marshall's guilty verdict, the penalty phase began. In this proceeding, the State and Marshall incorporated the evidence from the guilt trial, which had concluded two days earlier. Neither party presented any additional evidence in the penalty trial, and the entire hearing lasted 25 minutes.

The State presented a brief closing penalty-trial argument that covers fewer than two transcript pages.[2/] Its essence was as follows:

> The Court was correct in indicating that

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2. The penalty-trial argument on Marshall's behalf covered four transcript pages.

it is the State's position that the aggravating factor in this case is that this murder was committed by a defendant who paid a sum of money or gave a promise to pay an additional sum of money to have his wife killed, and that is our position as far as the aggravating factor is concerned.

I really cannot think of anything more heinous in our society than to, you know, hire somebody to kill somebody else, let alone a family member; in this case, your wife. . . . And I say to you, ladies and gentlemen, to be fair about it. I cannot see how those mitigating factors come even close to, let alone outweigh, this aggravating factor. [redacted] had no prior criminal history. [redacted] was civic-minded, and this defendant did not give her the option of thirty years.

And so I would ask you to continue with your deliberation and follow the law as his Honor instructs. Thank you.
T. March 5, 1986, pp. 17-19

One aggravating factor was charged to the jury -- that Marshall procured the commission of the offense by payment or promise of payment of anything of pecuniary value (4e).[3]

The defense submitted two mitigating factors: (5f) Marshall had no history of criminal activity, and (5h) any other factor relevant to D's character or record or to the circumstances of the offense. On March 5, 1986, the jury found the aggravating factor and both mitigating factors present and further found that the aggravating factor outweighed the mitigating factors. Marshall was sentenced to death.

On April 8, 1986, Billy Wayne McKinnon entered his guilty plea to conspiracy to commit murder. He was sentenced to five years in prison.

Robert Cumber was found guilty of conspiracy to commit murder and murder as an accomplice and sentenced to 30 years without parole.

Marshall's conviction and sentence were affirmed by the Supreme Court of New Jersey. State v. Marshall, 123 N.J. 1 (1991).

Supreme Court Docket Number 25532.

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3. The State had earlier served the 4d, pecuniary gain, factor, but withdrew it before trial.

II. The Frequency Approach

For the reasons stated in our final report, we consider the frequency method, when feasible, the preferred method for conducting a proportionality review.[4] Under that approach, the threshold issue concerns the frequency with which death sentences have been imposed in the past and are likely to be imposed in the future in cases similar to the death-sentence case under review. In the balance of this section, we estimate death-sentencing frequencies among prior similar cases, using three related measures for assessing the relative criminal culpability of similar defendants: (a) the salient factors method, (b) the number of aggravating and mitigating circumstances found and present, and (c) statistically derived culpability indices and scales.

The application of the frequency approach to proportionality review to Marshall presents two methodological problems. The first is the difficulty of estimating reliable death-sentencing frequencies on the basis of a small sample of similar cases. Marshall's 4e aggravating circumstance, which we characterize as the contract principal aggravating circumstance, is common to only three other contract principal cases in our proposed universe which are noted in boldface in table 1.[5] Moreover, Marshall's is the only 4e case in which a death sentence has been imposed. Because of the small number of 4e cases to date, the question of how

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4. See Final Report, pp. 39-41.

5. Like Marshall, all of the other 4e cases in the universe involve only that one aggravating circumstance.

frequently we are likely to see death sentences imposed in 4e cases over the long run would present a difficult issue, even if all of the 4e cases in our sample were identical either factually or in terms of their overall level of criminal culpability. These small numbers complicate the process of estimating death sentencing frequencies among similar cases by introducing uncertainty and instability into the estimates.[6/] In this regard, 4e cases are distinguishable from cases in which the statutory aggravating circumstance implicated is found in many other cases (e.g. a contemporaneous robbery implicating the 4g factor was present in 30 penalty trial cases and in a total of 75 cases in the proposed universe; the prior murder circumstances (4a) was involved in 12 penalty trial cases and 14 death eligible cases).

The second complication in Marshall's cases is the uniqueness of the features bearing on his overall criminal culpability.[7/] When

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6. This instability is reflected in our statistical results in large confidence intervals for the estimates. See infra note 50 and accompanying text.

7. In assessing the overall criminal culpability of capital defendants, we consider it useful to characterize their cases in terms of the qualitative culpability model presented in the final report. It compares cases on three major dimensions of criminal culpability:

a. The blameworthiness of the defendant, that is, the defendant's moral guilt as indicated by factors such as the role of the defendant, the motive, the degree of premeditation and planning, the clarity of a settled intent to kill, the intent to cause pain and suffering or knowledge that it will occur, the presence of victim provocation, and any evidence of a problem which would alter or diminish the defendant's mental capacity;

b. The degree of victimization or harm for which the defendant is responsible as indicated by the violence, brutality, and terror of the killing, the extent of the victim's physical or mental suffering, his or her

(continued...)

compared to death eligible cases generally Marshall is highly mitigated in terms of his character and record (he had no record and was a model citizen) and the level of victimization (Maria Marshall was unaware of her impending death and appears to have suffered little if any physical pain).[8/] However in terms of moral blameworthiness Marshall exceeds that found in the three other 4e cases, and as far as we can determine, all other cases in our universe of New Jersey cases.

There are six aspects of Marshall's case that support a perception of him as a particularly depraved, cold-blooded killer and make him stand out so dramatically on the blameworthiness dimension. First is the long period of premeditation and extensive planning, with no suggestion of second thoughts. Second is the pecuniary motive[9/] associated with the insurance proceeds on his wife's life.[10/] He sought the funds in part to pay his wife's

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7. (...continued)
awareness of impending death, and impact upon other victims; and
c. The character, community background, and reputation of the defendant as exemplified by his prior record, remorse, cooperation with authorities, age, and other personal attributes.

See Final Report, pp. 70-74, for further discussion of the model.

8. See infra p. 44 for more detail on Marshall's character and the level of victimization.

9. The pecuniary motive associated with the insurance should be distinguished from the other pecuniary aspect of his case, i.e., his payment to an assailant to kill his wife, which brings his case under the 4e factor.

10. In his closing argument at the guilt trial, the prosecutor emphasized the insurance proceeds and implied at one point that he had already received $600,000 of the proceeds and if acquitted would receive the rest. The Court gave corrective instructions to counter any false perception these remarks may have (continued...)

killer[11] and in part to alleviate his current financial difficulties and maintain a high standard of living after her death, when he planned to take up housekeeping with his paramour. In his closing argument in the guilt trial, the prosecutor bore down at several points on his "desperate" financial situation. T. 3/3/86, pp. 155-57, 160, 183. Moreover, because of his high income and general affluence, this second aspect of Marshall's pecuniary motive smacks of greed, thereby producing a further aggravating edge to his case.[12] In the State's closing guilt trial argument, the prosecutor referred to his greed on several occasions. T. 3/3/86, pp. 155-57, 160. The State's summation characterized Marshall as follows: "But the defendant is a coward, he's self-centered, he's greedy, he's desperate, he's materialistic, and he's a liar." T. 3/3/86, pp. 155-56. These comments were allowed by the trial court over the objection of Marshall's counsel.

The third aggravating aspect of his case is the deception of his wife (plotting her death and sleeping with his paramour) while living and sleeping with his wife and pretending that all was

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10. (...continued)
created. T. 3/3/86, pp. 147, 177. The prosecution's closing argument at the guilt trial is important because it was presented only a few hours before the penalty trial, at which no additional evidence was presented and only perfunctory arguments were presented by counsel for the State and Marshall.

11. It seems clear that without the insurance proceeds, Marshall would have been unable to secure the services of McKinnon.

12. Indeed, his guilt trial testimony suggesting that he was not insolvent and in no great need of funds at the time of the crime may have strengthened this impression. The testimony was offered, of course, to support his not-guilty plea in the guilt trial.

well.[13] Fourth was the deceptive plan that led her into a death trap.

Fifth was the absence of any of the excuses or justifications that are often found to mitigate the blameworthiness of a capital murder. To be sure, his passion for his paramour and his concern about his financial situation constitute an explanation for his conduct but do relatively little to justify or excuse.[14] This may explain why the 5a (disturbance), 5e (duress), or 5d (capacity to appreciate wrongfulness) factors were not served by Marshall's counsel. The absence of any meaningful excuse or justification takes on added significance when one considers Marshall's maturity, education, and sophistication.

Sixth was his total lack of remorse for his crime.

The unique combination of characteristics bearing on Marshall's criminal culpability means that there are no factually comparable cases in the universe. As a consequence, the search for cases with a "similar" level of criminal culpability, even among the other 4e cases, requires weighing blameworthiness, victimization, and character. And because of the small number of 4e cases, this search will necessitate a consideration of factually disparate cases.

The unique level of Marshall's blameworthiness also draws into

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13. This infidelity, which the State emphasized in the opening and closing arguments of the guilt trial, gave an additional aggravating edge to the case.

14. The State's guilt trial closing argument referred to Marshall and his paramour as "lovers" (T. 3/3/86, p. 146) and as noted above, it dwelt at length on his "desperate" financial situation.

question the relevance and probative face of actuarial/statistical methods as a method for identifying cases that are similar to Marshall.[15] It is generally recognized that the validity of actuarial methods as a basis for judgment depends upon the extent to which the relevant factors informing the judgment are reflected in the actuarial categories upon which the judgment is based. For example, a homicide culpability classification system which failed to differentiate between cases that did and did not involve a contemporaneous offense would be of questionable validity. Moreover, any actuarially based system will have difficulty in classifying highly idiosyncratic cases like Marshall's. In his case, our actuarial predictions do not adequately reflect Marshall's level of blameworthiness. One group of our quantitative results are based on an assessment of death sentencing rates among defendants with the same number of aggravating and mitigating circumstances as Marshall. Those results clearly do not account for the enhanced level of blameworthiness in Marshall. We also produced actuarial predictions based on formulas developed in multivariate statistical analyses. The variables in these formulas adequately reflect only two of the six factors that relate to his case on the blameworthiness dimension.[16]

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15. See Final Report, pp. 27-29 for a discussion of the difference between the actuarial/statistical method and the clinical method; see also Meehl, "When Shall We Use Our Heads instead of the Formula?" in Psychodiagnosis: Selected Papers 81, 83 (P. Meehl ed 1973) (on the importance of "special cases").

16. Our formulas do reflect Marshall's lack of remorse and the absence of any justification or excuse. However the formulas (continued...)

Given these limitations on the actuarial methods as applied to Marhsall's case, one approach would be to disregard the quantitative results completely and to base a judgment about how future cases with Marshall's level of criminal culpability are likely to be sentenced on the prior experience and knowledge and intuition.[17] Another possibility would be to abandon altogether the frequency approach and simply consider whether Marshall's death sentence is morally justifiable when compared to the other cases that have resulted in life and death sentences (the comparative culpability approach).

We recommend neither of these alternatives. First, as noted above we consider the frequency approach to be the preferred approach.[18] Second in spite of the difficulties associated with the application of the actuarial method, we believe that the frequency data produced with our actuarial methods are relevant. However, because of the limitations noted, those results should not be taken at face value. Specifically, they call for the validation of the estimated frequencies through close comparisons of the cases involved, which do take into account the unique features of the Marshall's case. So qualified, we believe the actuarial frequency results provide a valuable supplement to the court's prior

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16. (...continued)
do not reflect the duration of his premeditation, his pecuniary motive (he is the only other defendant in this study with an insurance motive) and the deception associated with the third and fourth aggravating features of his case mentioned above.

17. Given the uniqueness of Marshall it is unlikely we are likely to see many, if any, future cases that are factually comparable to his.

18. See supra note 4, p. 10 and accompanying text.

experience and knowledge. To provide the bases for a frequency analysis, we have considered a number of possible comparison groups. For each we first present the overall death sentencing frequency and then adjust those figures on the basis of an analysis of Marshall's relative criminal culpability vis a vis comparison cases. The following is a list of the comparison groups:

1. Other factually comparable defendants, who are described in table 2:
   a. Contract murder principals
   b. Contract murder hitmen
   c. Spousal murders involving high levels of blameworthiness and a defenseless victim.
   d. Premeditated robbery/kidnap murder cases including a pecuniary motive, deception/entrapment of the victim, and a defenseless victim.
2. Other defendants like Marshall with a single statutory aggravating circumstance and two mitigating circumstances in their case.
3. Other defendants that our statistical indices predict as having a likelihood of receiving a death sentence comparable to Marshall.
4. A group of cases described in table 3 in which our measures indicate death sentences are likely to be regularly imposed among similar cases.

In considering death-sentencing frequencies among similar cases, the logic of a proportionality review suggests that the death-sentenced case under review not be included in the count of death cases among similar cases. The purpose of the frequency calculations is to estimate death-sentencing rates among cases that are similar to the defendant.[19/] Those results provide the basis

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19. Since the review case will invariably have received a death sentence, its inclusion in the calculation will bias upward the death sentencing rate that does exist among similar cases. The amount of this bias is inversely proportional to the number of similar cases in the analysis. The amount of the bias can be

(continued...)

for estimating the comparative proportionality or disproportionality of the review case. An alternative view begins with the premise that a proportionality review is, in part, a search for community values. And since the case before the Court is a partial reflection of those values (even if aberrational), it should be considered. In the balance of this section, we report in the text the death-sentencing frequency among similar cases without including Marshall's case. These figures are supplemented in the footnotes with frequencies that include his case.

Our purpose here is not to determine whether the aggravating characteristics of his case justify the imposition of a death sentence in his case. That is the focus of the comparative culpability approach to proportionality review that we discuss in part III of this report. Rather, our focus here is on whether the elevated blameworthiness of Marshall's case reasonably supports an expectation that cases like his will generally result in death sentences. To be sure, the question is speculative. But it is a question of fact. In contrast, under the comparative culpability approach, which we discuss below, the issue is primarily moral and ethical -- does the high level of blameworthiness in his case sufficiently distinguish him from the cases that generally result in life sentences to justify his execution? Or is his criminal

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19. (...continued)
expressed as follows: $\frac{1-(\text{true rate among similar cases})}{\text{number of similar cases}} \times 100.$
Thus, if the true death sentencing rate among 10 similar cases is .80 the upward bias resulting from the inclusion of the review cases is 2%.

culpability sufficiently less than the defendants who normally receive a death sentence to justify a sentence reduction?

As noted, both the frequency approach and the comparative culpability approach focus on the criminal culpability of the review case and the relevant comparison cases. To limit the repetition in our description of the comparison cases under the two approaches, we present more detailed case descriptions of the cases that are most factually comparable to Marshall in part III, which presents our comparative proportionality analysis. In this section, we only briefly describe in table 2 of the report these factually comparable comparison cases in the order that they are discussed.

A. Factually Comparable Cases

A summary of the results of these culpability comparisons is presented in table 4.

1. Contract Murder Principals

There are three other 4e cases each of which involved a single statutory aggravating circumstance, two advanced to a penalty trial (W. Engel & H. Engel). One, Brand, did not. All received a life sentence.

In our culpability analysis, we concluded that Marshall's case was somewhat more aggravated than W. Engel, and significantly more aggravated than the other two defendants, H. Engel and Brand. The most relevant question is whether Marshall's higher level of criminal culpability vis-a-vis the most aggravated of these three life-sentenced comparison cases (W. Engel) seems great enough to

produce regular death sentencing in cases like Marshall's. Marshall's case is more aggravated vis-a-vis W. Engel by a greater involvement in the planning, the pecuniary motive, the long term deception of his wife and the absence of the type of mitigation found in Engel's case, i.e., his hatred of his former wife that was nurtured by a jealous, obsessive (and incorrect) belief that she was promiscuous.[20]

2. Contract Murder Hitmen

The proposed universe includes six hitman cases[21] with a death-sentencing rate of .50 (2/4) among the penalty-trial cases and .33 (2/6) among all death-eligible hitman cases.[22] When we consider the entire contract murder pool, the rate is .33 (2/6) for penalty-trial cases and .22 (2/9) for all death-eligible cases.[23] In our culpability analysis, we concluded that Marshall's case was significantly less aggravated than one death-sentenced case (Clausell IA) and one life-sentenced case (Clausell IB) and less aggravated than one death-sentenced case (DiFrisco). Each of these three more aggravated cases included the 4d factor plus one additional statutory aggravating circumstance. The remaining three hitmen cases involved a single statutory aggravating circumstance,

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20. A detailed discussion of the Engel case is presented infra pp. 45-54.

21. DiFrisco, Clausell IA, Clausell IB, Melendez, Rose, and Burroughs.

22. DiFrisco and Clausell IA resulted in death sentences. The 4d factor was not found in Rose. Therefore, among the penalty-trial cases in which 4d was found, the rate was .66 (2/3).

23. If Marshall is included, the rates are .43 (3/7) and .30 (3/10) respectively.

and had an overall culpability that was either lower than or significantly lower than Marshall's (Melendez, Rose, and Burroughs).[24]

The contract hitman cases are important because they are the only class of cases in which a pecuniary motive appears to have independent importance.[25] In those cases, the hitman pecuniary motive is not merely a nonstatutory aggravating factor; rather, it provides the factual basis for the separate and distinct 4d statutory aggravating circumstance. Among the five triggerman 4d cases in the proposed universe, four advanced to a penalty trial with the 4d factor charged (Melendez, Rose, Clausell IA, and DiFrisco). Among those four cases, the jury found the 4d factor present in three cases[26] and imposed a death sentence in two.[27]

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24. A more detailed analysis of these cases is presented infra pp. 59-63.

25. We also tested the statistical effect that other types of pecuniary motives have on the chances of receiving a death sentence. A pecuniary motive generally has no effect even though it is involved in a large number of cases because it does not differentiate between the life- and death-sentenced cases. The more specific pecuniary motive cases are few in number. Marshall's was the only case in our quantitative analysis with an insurance pecuniary motive. Because he received a death sentence, the factor had an important statistical effect but because of the small number of insurance cases in our universe it does not reliably predict the effect insurance motives would likely have over time. When the insurance variable was included in the two principal models PTDEATH and DEATH the predicted likelihood of a death sentence for Marshall was .99. Darrell Collins' case, which involved insurance, was not included in this statistical analysis because it included only penalty-trial cases in which aggravating factors were found, which did not occur in his case. The only other more specific pecuniary motive case was Williams (2715), which involved an inheritance. Because the case resulted in a life sentence, it produced no statistical effect.

26. The factor was not found in Rose. DiFrisco and Clausell IA were sentenced to death. Clausell's death sentence was

(continued...)

26. (...continued)
vacated in appeal and on remand he was sentenced on an additional noncapital murder charge returned against him with his capital murder conviction. DiFrisco's sentence was vacated and is awaiting disposition on remand.

27. One issue concerns the effect of the Supreme Court's decisions vacating the death sentences in Clausell and DiFrisco on their precedential value for proportionality review. As noted in our Final Report, some appellate courts exclude from the universe any case in which a conviction or death sentence was reversed on appeal, while others ignore results of the appellate process. An intermediate position is to evaluate the basis of the appellate court decision vacating the death sentence and determine whether it impairs the precedential value of the decision as a basis for assessing community attitudes about the propriety of death sentencing. Because of the relatively small number of death sentences imposed to date in New Jersey and the high proportion of them in which the death sentence has been vacated, we recommended that the Court adopt the intermediate position.

Clausell's conviction was reversed because the jury was not properly instructed that he could be convicted of capital murder only if he knowingly or purposefully caused the death of his victim. State v. Clausell, 121 N.J. 298, 313-16, 343-45, 580 A.2d 221, 228-29, 244-45 (1990). Because that instruction may have enhanced Clausell's risk of a capital conviction, it raises a question about the probability that his case would result in a capital murder conviction under a proper instruction. Clausell also identified four errors in the trial court's penalty-trial jury instructions, to wit, (a) a failure to instruct the jury that, under the 4b factor, it had to be proven that Clausell knew that other people were close to the victim in the house, (b) a mere reading of statutory definitions of the mitigating factors was insufficient to apprise a reasonable juror of their meaning and function, (c) the charge did not adequately apprise the jury that a nonunanimous verdict was authorized and that it would result in a life sentence, and (d) by posing to the jury the question of whether the case involved "murder for hire," the Court did not adequately inform the jury of the precise factual issues it must answer under factor 4d. These errors, especially the first three, could have enhanced the likelihood that a death sentence would be imposed.

It is important, however, to consider the record in Clausell. At least on the question of intent to kill, the evidence was quite strong. State v. Clausell, 121 N.J. 298, 373, 580 A.2d 221, 260 (1990) (Stein, J., concurring in part and dissenting in part) ("On this record, I find no rational basis for a jury verdict of noncapital murder, which would have required the jury to conclude that the defendant had shot at the victim intending only to injure him and not to cause death"). But on remand, he was sentenced to

(continued...)

This very high death-sentencing rate, albeit in a small sample of cases, produced in our principal penalty-trial analysis a large and statistically significant multiple regression coefficient for the 4d factor.[28/]

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27. (...continued)
life for noncapital murder, and the capital charge was dropped. To the extent that this decision was based on deathworthiness considerations, it may also undercut the precedential value of Clausell's death verdict.

DiFrisco's death sentence was vacated because of the sentencing judge's failure to include in his sentencing opinion and judgment a "declaration of law" explaining how he had considered evidence corroborating the confession that "directly and inexorably ties the killing to Mr. Franciotti [the principal], the tie that establishes capital murder." Although his omission was the basis for vacating the death sentence, it appears much less likely to have tipped the scales in favor of the death sentence than was the case in Clausell. As a consequence, DiFrisco appears to have considerably more precedential value than Clausell.

28. The logistic coefficient for the 4d factor was 10.2, significant at the .0001 level. See Final Report technical appendix 10, schedule 5, p. 3. In the analysis of all death-eligible cases, which included five cases in which the 4d factor was charged or found, the coefficient for the 4d variable was 7.1, significant at the .008 level. The five 4d cases in this latter analysis were Clausell 1A (Death), Clausell 1B (Life), DiFrisco (Death), Melendez (Life), and Burroughs (Life).

Multiple regression is a computational procedure that produces a formula (the regression formula or regression equation) describing how the average value of a dependent or outcome variable relates to differences in the levels of two or more predictor or independent variables. Logistic multiple regression, the type employed in this study, is designed for the analysis of dichotomous (yes/no) outcomes, e.g., whether or not a death sentence was imposed.

A regression coefficient is a number estimated as part of a regression formula that indicates how the average value of the dependent variable (in this case the logarithm of the odds of a death-sentence variable) varies with changes in the level of the independent or predictor variable that is associated with the regression coefficient. When independent variables take values of one or zero to reflect the presence or absence of particular characteristics (as they do for the statutory aggravating and mitigating circumstances), regression coefficients estimated for them can be interpreted as the weights attached to those characteristics.

(continued...)

An important question therefore is whether the enhanced level of blameworthiness in Marshall's case described above, particularly that flowing from his pecuniary motive, is comparable to that of 4d defendants sentenced to death. Because Marshall had a pecuniary motive that could have been charged and found under the 4d factor, it could be argued that his case is factually comparable to the hitman cases in which that factor was charged and found. The issue here, however, is not whether Marshall's motive is comparable on a priori grounds to the motive of a hitman. Rather, it is whether Marshall's jury did, and other juries in closely comparable cases would, perceive the insurance motive to be as aggravating a feature of his case as the pecuniary motive of a hitman. Of course, a priori considerations are not irrelevant to this issue, since they also can be expected to influence the judgment of jurors. But it is equally important to compare the significant attributes of the

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28. (...continued)
Tests of statistical significance are computational tools which can be used to evaluate disparities observed in a sample of decisions, e.g., a 20-percentage-point difference in death-sentencing rates between cases with and without the 4d factor. The test of significance provides an estimate of the probability that the observed level of disparity would result from chance variation if no such disparity exists in the capital sentencing system. The term "test of significance" is used interchangeably with "significance test," "hypothesis test," "test of hypothesis," and "test of statistical significance."

A regression coefficient is statistically significant when it has a *p* (probability) value small enough to support the conclusion that a null (or no association) hypothesis is not true. Typically, if the *p* value associated with a result is less than 0.05, the result is considered statistically significant. If the *p* value is sufficiently small, say less than 0.01 or 0.001, the result is considered highly statistically significant. In this case, because the *p* value for the 4d factor is .18, it does not meet the .05 level of statistical significance.

respective motives, both procedurally and in the State's arguments to the sentencing jury. For example, in a frequency analysis, it would be inappropriate to characterize an insurance motive case in which 4e was not charged or found and mentioned only in passing as comparable to a contract murder case that turned on a 4d finding of a hitman motive.

Thus, it is relevant that in New Jersey, death sentences have only been returned in hitmen cases in which the jury found the 4d factor present. Read literally, Marshall's motive, as noted, could have supported a 4d finding, although one could argue that the "defendant committed the murder" language in the 4d statutory aggravating circumstance limits its applicability to defendants who kill by their own hand, either as hitmen or otherwise. Indeed, it may have been for just such a reason that the 4d factor, although originally charged in Marshall's case, was withdrawn before trial.[29] In spite of this procedural decision, in Marshall's guilt trial, the State focused hard not only on his relationship with his girlfriend and their plans to live together after the murder but also on his insurance motive, his greed, and his desperation (which in part fueled the need for the money).[30] Moreover, as noted

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29. It is also worth noting that in Martini, which involved a kidnapping and the payment of a $25,000 ransom, the 4d factor was not served even though the defendant killed by his own hand.

30. See T. 3/3/86, pp. 155-57. As noted earlier, the State's guilt trial case and arguments are important because the State relied on that evidence at the penalty trial and gave only a perfunctory penalty trial closing argument, which did not develop at length Marshall's moral blameworthiness. In his penalty-trial closing argument to the jury, the prosecutor emphasized that the (continued...)

earlier, the prosecutor even intimated that Marshall has received $600,000 of the insurance and would receive the rest if acquitted. Even though the Court issued corrective instructions on the point, the argument certainly brought the insurance issue to center stage of the State's closing argument. Thus, even though no factual findings were made concerning Marshall's pecuniary motive, and the jury was not instructed to weigh the pecuniary motive in its sentencing deliberations, the prominent role of the insurance motive in the State's closing guilt trial argument, delivered only a few days earlier, must certainly have had an effect on the penalty-trial deliberations, which commenced within hours of the jury's return of its guilty verdict.

However, in terms of predicting sentencing outcomes in future Marshall-like cases, it is relevant that in both DiFrisco and Clausell IA, the jury found one additional aggravating circumstance in addition to the 4d factor. Finally, both those defendants had a criminal record and/or connections with organized crime.

There are two reasons why the reaction of jurors and prosecutors to contract hitmen may be more punitive than it is to defendants in other pecuniary motive cases. First, jurors may have more trouble identifying with triggermen, especially professionals linked to organized crime.[31] Second, hitmen are more likely to

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30. (...continued)
case involved only a single statutory aggravating circumstance and never mentioned the insurance motive.

31. See, e.g., State v. Adamson, 655 P.2d 972, 989 (Ariz. 1983) ("The fact that the defendant in this case was a hired killer makes the killing especially foul.").

have had solely a pecuniary motive and less likely to have had an additional motive with which jurors can identify, e.g., lust or anger.[32] For similar reasons, one can argue that contract principals may be distinguishable from hitmen. They are less likely to be professional killers (and therefore less likely to have a reason to repeat their crime), less likely to have a pecuniary motive and, if they do have a pecuniary motive, it is not likely to be the sole motive. However, the counter-argument with respect to Marshall is that his pecuniary motive was the crucial means of accomplishing his wife's murder, since he otherwise lacked the funds to pay his killers. Moreover, the State argues that because the New Jersey death sentencing statute makes no distinctions between the 4d and 4e aggravating circumstances, there is no basis for characterizing hitman as either more or less criminally culpable than contract principals.

3. Spousal Murders Involving High Levels of Blameworthiness and a Defenseless Victim

We also compared Marshall with three cases involving highly premeditated, coldblooded murders of a defenseless wife (Collins, Dreher, and Williams). Collins and Williams advanced to a penalty trial and all three defendants received life sentences.[33] In our

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32. State v. Blair, 638 S.W.2d 739, 759 (Mo. 1982) (distinguishing a hitman case from a two-victim case, the victim in Blair "was the victim of a contract killing. It represents the ultimate in disregard for human life: the commission of murder purely for money."; Stockton v. Commonwealth, 314 S.E.2d 371, 389 (Va. 1984) (a murder "performed for a purely pecuniary motive").

33. A more detailed description of their cases is presented infra, pp. 63-69.

culpability analysis, we found Williams and Dreher to have a level of overall criminal culpability comparable to Marshall, and Collins to have a significantly lower aggravation level.[34] The Williams and Dreher cases are particularly relevant in assessing the likely outcome of cases involving one statutory aggravating circumstance and an extreme level of blameworthiness, since both cases shared these characteristics with Marshall and in addition involved high levels of victimization.

4. Premeditated Robbery/Kidnap Murder Cases Involving Extensive Premeditation, A Pecuniary Motive, Deception/Entrapment of the Victim, and a Defenseless Victim

There is another group of five cases that have some factual comparability with Marshall.[35] In addition to extensive premeditation to kill, these cases share with Marshall a pecuniary motive, a significant measure of deception or entrapment, and often a defenseless victim. Three advanced to a penalty trial[36] and one, Martini, resulted in a death sentence.

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34. Because the Collins jury found no aggravating circumstances, we have not classified the case as death-eligible under current law. In an individual proportionality review, this classification may be appropriately reconsidered if it appears that the jury decision not to find the factors was based on deathworthiness rather than evidentiary considerations. And the more or less it appears to have been a deathworthiness decision, the greater or less relevance the decision should have in assessing community values. In this case, the failure to find the 4f (avoid detection) factor could quite plausibly have been based on evidentiary concerns. However, the trial judge who heard the evidence in two different trials stated without qualification that a $5,000 insurance policy was a motive in the child's killing, suggesting that the jury outcome reflected a deathworthiness decision.

35. Martini, McIver, Russo, Scales, Thompson. A more detailed description of these cases is presented infra pp. 69-74.

36. Martini, Scales and Russo.

In terms of criminal culpability, we ranked Martini higher than Marshall. His case involved two aggravating circumstances, extreme blameworthiness, substantial victimization, and a defendant with poor character. We found the overall criminal culpability of one of the life-sentenced defendants (Russo) comparable to Marshall because he attempted an execution-style murder of three gas station attendants. One died and two were injured. Of the remaining three cases (with life sentences), one was less aggravated (Scales) and two (Thompson and McIver) were significantly less aggravated than Marshall.

When we combine all of the categories of factually comparable cases discussed in this section and presented in table 2, we observe the following death-sentencing frequencies.

1. All cases - .18 (3/17)
2. Cases vis-a-vis Marshall that are:
   a. More culpable - .75 (3/4)
   b. Of comparable culpability - .0 (0/3)
   c. Less culpable - .0 (0/10)[37]

B. Cases With Similar Numbers of Aggravating and Mitigating Circumstances

Among all cases involving a single aggravating and two mitigating circumstances, the death-sentencing rate was .05 (2/43).[38] Because these cases vary in terms of criminal culpability, we sorted them into five culpability levels from 1 (low) to 5 (high). The sorts were done on the basis of information

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37. If Marshall were included in these counts, the frequencies would be (1) .22 (4/18); (2a) .75 (3/4); (2b) .25 (1/4); (2c) .0 (0/10).

38. When Marshall's case is included, the rate is .07 (3/44). See Final Report, table 9, row 3, column E.

in the narrative summaries without regard to the sentence or any jury findings of aggravating and mitigating circumstances. Rather, the cases were ranked on the three dimensions of the qualitative culpability model mentioned above.[39] The most aggravated group of cases included Marshall and 13 other cases, two of which resulted in a death sentence. We further rank-ordered those cases as indicated in the margin.[40] Marshall was ranked fifth most aggravated. The two death sentences, Long and Oglesby,[41] were imposed among cases deemed less aggravated than Marshall. Also, life sentences were imposed in four cases deemed more aggravated than Marshall.

Also relevant is the death-sentencing frequency among capital cases generally that, like Marshall, involve a single aggravating

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39. See supra note 7, p. 11.

40. The 14 cases were ranked as follows (from least to most aggravated):

1. Mendez (4002)
2. Long (1459) (Death)
3. Melendez (1638)
4. Dinkins (658)
5. Oglesby (1823) (Death)
6. Deeves (603)
7. Jacoby (1163)
8. Messam (1650)
9. Armstrong (4004)
10. **Marshall (1529)**
11. Williams (2715)
12. Dreher (684)
13. Jones (1257)
14. Reyes (2053)

Williams and Dreher were ranked only marginally more aggravated than Marshall, which explains why in table 4 we characterize all three cases as being essentially comparable in overall culpability.

41. To use less aggravated cases like Long and Oglesby as benchmarks, it is important to determine that they are not comparatively excessive.

circumstance. The penalty-trial death-sentencing rate for these cases is .08 (4/49).[42] And among the penalty-trial cases which, like Marshall, involve one aggravating and two mitigating circumstances, the rate is .14 (2/14).[43]

Particularly relevant are the death-sentencing frequencies among the cases involving the 4a, 4d, 4e, or the 4h factor. They are important because cases with one or more of these factors have above-average death-sentencing rates, but commonly do not involve extensive victimization. The results are shown in appendix H, table 9 of the Final Report. They reveal a sharp difference between the cases with one statutory aggravating circumstance found or present and those with two or more such factors. Not including Marshall, the rate among the cases with one aggravating circumstance is .0 (0/8).[44] For the cases with two or more aggravating circumstances, the rate is .62 (13/21).

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42. See Final Report, table 8, last row, col. E. If Marshall is included, the rate is .10 (5/50).

43. See Final Report, table 8, line 3, column E. The rate is .20 (3/15) if Marshall is included.

44. If Marshall is included, the rate is .11 (1/9) for the cases with a single aggravating circumstance. The other seven defendants with a single aggravating circumstance were Muhammed, J. (4a); Melendez, M. (4d); Montalvo (4a); Biegenwald 2 (4a); Burroughs (4d); Engel, H. (4e); Engel, W. (4e).

3. Cases With A Similar Predicted Likelihood of Receiving a Death Sentence

We have also recommended the consideration of death-sentencing frequencies among cases deemed similar in terms of their classification with statistically based culpability indices and scales.[45] The use of such indices in Marshall's review presents an issue that is related to the one discussed above concerning the inclusion of Marshall's case in estimates of death-sentencing rates among similar cases. The question is whether a statistically derived index should be influenced by the imposition of the death sentence in the case being reviewed for comparative proportionality.[46] In this case, the issue is whether the indices used should reflect the statistical effects of the inclusion of Marshall's death sentence. It can be argued that it is inappropriate to assess the proportionality of Marshall's sentence on the basis of an index that reflects the effects of the death sentence imposed in his case; the focus of the inquiry is on the disposition of the other cases and the index should only reflect the effects of sentences imposed in those cases. The counter-argument is that the sentence actually imposed in his case, while not controlling, is certainly some evidence of how cases like his

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45. See Final Report, pp. 85-100.

46. This issue has importance only if the case under review involves aggravating circumstance(s) shared by only a small number of cases. Since Marshall is the only 4e case that resulted in a death sentence, the size of the regression coefficient for the 4e aggravating circumstance is attributable to Marshall's sentence. The logistic coefficient for 4e was quite large but not statistically significant ($b = 3.3$, $p = .20$). See Final Report, technical appendix 10, schedule 5 (PTDEATH).

will be sentenced over the long run. Moreover, because the inclusion of Marhsall's case in the analysis increases the aggravation level of his case, that enhancement may be considered a proxy for the enhanced level of blameworthiness which our regression based formulas do not adequately reflect. Primarily for the second reason we consider the estimates based on the indices that include Marshall's case to be the most relevant. However, we also report in footnotes the results estimated with indices that do not reflect the statistical effect of his case.

We first present the results estimated with our expanded models that include both statutory aggraving and mitigating circumstances and a number of variables for nonstatutory aggravating and mitigating circumstances.[47] We then present the results from the more limited models that include only the statutory aggravating and mitigating circumstances.[48]

1. Predictions Based on Expanded Indices That Include Nonstatutory Case Characteristics

a. Penalty Trial Cases

When we apply the index that reflects the impact of Marshall's death sentence, the predicted probability of a death sentence in his case calculated with our principal model of penalty trial decisions is .50.[49] It should be noted that, because of the small sample problem described above (three 4e penalty-trial cases and

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47. See Final Report, pp. 94-99, 104, 107.
48. See Final Report, pp. 99-100.
49. See Final Report, table 12, p. 2.

only one death sentence imposed among them), this estimate is quite unstable.[50] An alternative estimate which averages the death-sentencing predictions for a small group of cases that are similar to Marshall in terms of the predicted likelihood of a death sentence produces an estimate of .50 (8/16).[51] We conducted

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50. The 95% confidence interval around that estimate is .04 and .96. A confidence interval is a range of values for some characteristic of a universe, in this case the likelihood that defendants in future cases similar to the case under review will be sentenced to death. Confidence intervals are computed using formulas which assure that, if the same formula is used to construct intervals from each of a large number of samples drawn from the universe, then a suitably high percentage (typically 95%) of these intervals will contain the true value of the estimated quantity. This percentage is referred to as the "level of confidence" associated with the confidence interval. Tables 12 and 14 and figures 2 and 3 of the Final Report report 95% confidence intervals.

51. When Marshall's sentence is included the rate is .53 (9/17). See Final Report, table 11, levels 3 and 4. Marshall is classified in level 3 of table 11, which has a death sentencing rate of .67(8/12), including Marshall. Because of the small number of cases at level 4 in table 11, we have more confidence in the .53 estimate based on a combination of cases in levels 3 and 4. See Final Report table 11, note 2. The five cases immediately below Marshall on the index underlying table 11 were (from low to high) Oglesby (Death), Biegenwald 2 (Life), Martini (Death), Erazo (Death), Reyes (Life). These cases involve multiple statutory aggravating circumstances, a prior murder conviction, 4a, or extreme violence. The five cases immediately above Marshall were, in order, Jackson, K. (Death), Moore, S., 1st vic. (Death), Moore, S., 2d vic. (Death), Booker, 2d vic. (Life), Monturi, 1st vic. (Life). The cases involved multiple aggravating circumstances, multiple victims, extreme brutality or a combination of these factors. The characteristics of Marshall's near neighbors in table 11 suggest that in terms of his overall criminal culpability the underlying index has validity. When we base the prediction for Marshall on an analysis of penalty-trial cases that does not include his case, it declines from .50 to .19. In this alternative analysis, the only circumstances aggravating in his case are the BLAME1 factor (1.053), reflecting "no remorse," and the BLAME2 factor (3.08), reflecting coperpetrators and an execution style murder. See Final Report, technical appendix 10, schedule 6, at p. 4. This lower estimate does not fully reflect Marshall's blameworthiness.

validation analyses of these results to determine the extent to which Marshall is misclassified in terms of overall criminal culpability because of the failure of our formulas to account fully for the level of blameworthiness in his case. We reclassified with our qualitative culpability model the 20 cases that were most comparable to Marshall on the original regression based index ranking discussed above.[52] The purpose of this reanalysis was to bring to bear our experience and judgment to determine whether the statistical index that was the basis for that ranking may have given inadequate weight to Marshall's blameworthiness.[53] Among the reranked cases, the overall death-sentencing rate among Marshall's 10 nearest neighbors was .60 (6/10).[54] Among the five immediately less aggravated cases the rate was .40 (2/5),[55] while among the five more aggravated cases the rate was .80 (4/5).[56]

b. All Death-Eligible Cases

When we look at all death-eligible cases in the proposed

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52. We commenced this reanalyses with the 10 cases that were more aggravated than Marshall on the statistical index and the 10 cases that were less aggravated on that index. The qualitative culpability index guiding this reanalysis is summarized supra note 7, p. 11, and discussed in more detail in the Final Report, pp. 70-74.

53. In any proportionality review that relies on statistically based indices that compare factually distinct cases in terms of their comparative criminal culpability, a validation procedure of the type we conducted is essential to increase confidence in validity of the rankings produced by the statistical model and to make any required adjustments in the case rankings.

54. Including Marshall, the frequency was .64 (7/11).

55. They were, in order of culpability, Harvey (Death), Biegenwald 2 (Life), Erazo (Death); Reyes (Life), Prater (Life).

56. The five more aggravated cases were, in order of culpability, Martini (Death), Jackson, K. (Death), Moore, 1st vic. (Death), Moore, 2d vic. (Death), Booker, 2d vic. (Life).

universe and use the index that reflects the impact of Marshall's death sentence, the estimated probability of a death sentence is .17.[57] Again, because of the small sample problem noted above, this estimate has a large margin of uncertainty.[58]

The rate among the cases with a similar predicted likelihood of a death sentence is .02 (4/177).[59] The death sentencing rate among the 5 cases immediately above and the five cases immediately below Marshall on the index was .20 (2/10). Among the five less aggravated cases, the rate was .20 (1/5). Among the five more aggravated cases the rate was .20 (1/5).[60]

To validate these rankings, we reclassified with our qualitative culpability model the 20 cases that were most comparable to Marshall on the original regression based index.

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57. At our September 6, 1991 meeting of the parties, we discussed the question of whether Marshall involved a contemporaneous robbery thereby implicating the second element of the VICTIM5 factor in the DEATH model. In fact, CONROB was coded "0" in the Marshall case and the weight for the VICTIM5 factor reflects only the presence of coperpetrators.

58. The 95% confidence interval for this estimate is .0 to .92. See Final Report, table 14, p.2. When a similar estimate is based on the model that does not include Marshall, the estimated probability is .05. In this second analysis, the only facts aggravating Marshall's case are the VICTIM5 factor (1.21), which reflects the coperpetrators in the case, and the ambush and no remorse variables. See Final Report, technical appendix 10, schedule 12, p. 8-9. This lower estimate does not fully reflect Marshall's blameworthiness.

59. With Marshall included, the estimate is .03 (5/178). See Final Report, table 13, row 1.

60. The less aggravated cases were, from less to more culpable, Mendez (Life), Biegenwald 2 (Life), Reese (Life), Martini (Death), and Gaugenti (Life). The more aggravated cases were, in order of culpabiliy, Zola 1A (Death), Zola 1B (Life), Engel, W. (Life), Muhammed, J. (Life), and Brand (Life).

Among the 20 reranked cases, the overall death-sentencing rate among Marshall's 10 nearest neighbors was .20 (2/10).[61] Among the five immediately less aggravated cases the rate was .00 (0/5), while among the five more aggravated cases the rate was .40 (2/5).[62]

2. Predictions Based on Indices Limited to Statutory Aggravating and Mitigating Circumstances

a. Penalty Trial Cases

We also estimated death sentencing predictions based on the model containing only the statutory aggravating and mitigating circumstances. In the penalty trial model, Marshall's predicted likelihood of a death sentence was .52. Among his near neighbors the actual death sentencing rate was .69 (11/16).[63]

b. All Death Eligible Cases

When we applied the death sentencing model estimated with all death-eligible cases, Marshall's predicted likelihood of a death sentence was .27. Among his near neighbors, the actual death sentencing rate was .50 (11/22).[64]

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61. Including Marshall, the frequency was .27 (3/11).

62. The five less aggravated life sentenced cases were, in order of culpability, Mendez, Muhammed, Biegenwald 2, Reese and Engel, W. The five more aggravated cases were, in order of culpability, Dreher (Life), Martini, (Death), Zola 1A (Death), Zola 1B (Life), Collins, David (Life).

63. The rate with Marshall included is .71 (12/17). See Final Report, table 15, col. B, row 3 and table 16, p. 2

64. With Marshall included, the rate was .52 (12/23). See Final Report, table 15, col. C, row 2 and table 17, p. 2.

D. Marshall Compared to Cases in Which the Evidence Suggests Death Sentences are Generally Imposed Among Similar Cases

The final stage of our frequency analysis involved a comparison of Marshall with the group of cases listed in table 3 that our measures indicate are likely to result frequently in a death sentence. For each of these cases, one or more of our principal measures estimated a death-sentencing rate of .75 or higher among similar cases.[65] This produced a list of 25 cases in which 33 deathworthiness decisions have been made to date. The actual death sentencing rate for all of these decisions is .73 (24/33).

The high risk cases in table 3 are characterized by (a) two or more aggravating circumstances,[66] (b) frequently high levels of blameworthiness reflected in premeditation and intent to cause great pain, (c) high levels of victimization (generally involving a contemporaneous offense), and/or (d) a defendant with a prior murder conviction or a police officer victim.[67]

E. Summary

Marshall's frequency data support several observations. First, among the cases that are most factually most comparable to Marshall (tables 2 and 4), the death sentencing rates are low .18

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65. See Final Report, tables 19 and 20, which list four estimates of a death sentencing rate among similar cases for each case in the universe of New Jersey cases. All but one of the cases in table 3, Henderson (4033), advanced to a penalty trial.

66. The only exception is Savage (2228) a 4c dismemberment case.

67. See infra pp. 76-78 for additional culpability analysis of these cases.

(3/17), except among the four cases deemed more aggravated than Marshall. And among the most factually comparable cases involving comparable or lesser levels of criminal culpability, none resulted in a death sentence.[68]

Second, except for Marshall's case, we identified no other case in which a death sentence was imposed in a case with a very high level of blameworthiness that is otherwise quite mitigated compared to other capital cases. It should be noted, however, that aside from the 4e cases, there are few such cases in the data set. Moreover, as we have emphasized from the outset, there appears to be no other defendant in the data base with a level of blameworthiness as extreme as Marshall's. It is this fact, plus the small number of 4e cases, that makes Marshall a difficult case.

Third, among the other penalty trial cases with only one aggravating circumstance, the death sentencing rate is low .08 (4/49). And among penalty trial cases with one aggravating and two mitigating circumstances, it is also low .14 (2/14). However, we found in this analysis two death sentences imposed in cases classified as less culpable than Marshall.[69]

Fourth, the death sentencing rates estimated for similar cases

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68. Supra p. 29. In assessing prosecutorial charging and jury sentencing behavior in the long run, the decline in the death sentencing rate since 1987, the year after Marshall's death sentence was imposed, is relevant. See Final Report, p.15. In that regard, it is also relevant that two of the three death sentences imposed among the cases that are factually most comparable to Marshall were imposed since 1987 -- DiFrisco (1988) and Martini (1990). Clausell, like Marshall, was a 1986 case.

69. See supra pp. 29-31.

with actuarial/statistical methods were generally higher.[70] The predictions for Marshall's own case based on the penalty trial models were .50 with the expanded model and .52 with the model that was limited to statutory aggravating and mitigating circumstances. The actual death sentencing rates among the near neighbor penalty trial cases were somewhat higher, from .50 to .60, for the expanded model and .69 for the index based on the limited model. As expected, the models based on all cases in the universe, produced lower death sentencing estimates.[71] The results of these analyses identified a number of death sentences imposed in cases less aggravated than Marshall.[72]

Fifth, among the cases that one or more of our measures predict will result in death sentences more than 75% of the time, the actual death sentence rate was .73. With one exception, these cases involved multiple statutory aggravating circumstances. They were also generally characterized by lower levels of blameworthiness, much higher levels of victimization and higher overall levels of criminal culpability than Marshall.[73]

Sixth, because of the importance of sample size in estimating death-sentencing frequencies, we have considerable confidence that

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70. See supra pp. 32-37.

71. The prediction for Marshall was .17 in the expanded model, and .27 in the limited model. The actual death sentencing rates among the near neighbors were .03 for the expanded model and .50 for the limited model.

72. For example, the expanded penalty trial model reports nine death sentences in cases that were less aggravated than Marshall (Final Report, figure 2) and the expanded model for all cases reports three such cases (Final Report, figure 3).

73. See supra pp. 37-38.

certain case characteristics, which occur with substantial regularity, are associated with frequent death-sentencing, e.g., defendants with a prior murder conviction, murder cases with extensive blameworthiness and victimization, and multiple aggravating circumstances. However, because of the small number of 4e cases, and no 4e cases that match Marshall on both the blameworthiness and victimization dimensions, we have a much less solid basis for saying that cases like his either will or will not be associated with frequent death sentencing over the long run. Because of this small sample problem, there is no way to resolve with confidence the uncertainty associated with predicting the future for defendants like Marshall.

III. The Comparative Culpability Approach

If the Court were also to apply a comparative culpability analysis, the questions that would inform the final judgment on the proportionality of Marshall's death sentence may be stated as follows:

> Does Marshall's criminal culpability (a) so far exceed that of the life-sentenced cases to justify his death sentence, or (b) is his culpability sufficiently comparable to the life-sentenced cases to justify a sentence reduction?
>
> Is Marshall's criminal culpability (a) sufficiently comparable to the death-sentenced cases to justify his death sentence or (b) is his culpability so far less than the death-sentenced defendants to justify a sentence reduction?

In this analysis, we follow the pattern of comparisons used in the case-specific aspect of the frequency analysis. We first compare Marshall with the other contract principal defendants. Second, we compare him with the contract hitmen and other arguably comparable cases in table 2 involving extensive premeditation. Third, we compare Marshall with the table 3 cases in which death sentences among similar cases are commonly imposed.

Our assessments of the comparative culpability of defendants are guided by the qualitative culpability model presented in our Final Report and applied in Part II of this report. It focuses on the defendant's moral blameworthiness, the level of victimization, and the defendant's character and prior record. On the basis of New Jersey's sentencing law in the noncapital context, we have given the defendant's character the least weight.[74/] As between moral blameworthiness and victimization, we have received no guidance from New Jersey case law. However, the United States Supreme Court opinions which partially informed our model and the literature on punishment appear to give blameworthiness somewhat greater weight than victimization.[75/] Accordingly, until the Supreme Court speaks to the issue, we also will give blameworthiness somewhat greater weight than victimization.

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74. See Final Report, note 89 and accompanying text, p. 74.

75. See Final Report, nn. 77-87 and accompanying text, pp. 72-74; H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968).

A. Pecuniary Motive Cases

1. Contract Murder Principals

a. Robert Marshall

A detailed description of the Marshall case is presented above at pp. 1 to 9 of this report.

Regarding blameworthiness, Robert Marshall's extensive premeditation, detailed planning, and settled intent to have his wife killed persisted over a period of nearly three months. During this time he continued to live and sleep with the victim, knowing he would have her killed. When the murder did not occur as expected on two prior occasions, he still persisted to urge his codefendants on to kill his wife and he worked to develop yet another plan.

His motive stemmed from his desire (a) to be with another woman and (b) to alleviate a difficult financial situation by collecting $1,400,000 in life insurance on his wife's life, much of which he had recently obtained and increased on several occasions. The funds were to be used to pay his wife's assailant, to alleviate his financial situation, and to maintain a high standard of living in the new living arrangement. Although his marriage was troubled, there is no evidence of victim provocation and no arguable justification or excuse for the crime. He was present at the scene of the murder to which he had taken his wife under false pretenses, but he was not physically involved in the killing. There is evidence that defendant's instructions were not to use a shotgun or a knife, so as not to mar his wife's beauty. He also endeavored to

reduce the suffering of his children. There is no evidence that the defendant acted under duress, emotional disturbance, mental disease, substance abuse impairment, or any other diminution of mental capacity. He was a mature, experienced, responsible adult of 44 years of age.

As such, the degree of blameworthiness of this defendant is extraordinarily high.

Regarding victimization, the victim was shot two times in the back while presumably asleep or resting, and was unaware of her impending death. There were no other direct victims, although there were three children greatly affected by the loss of their mother. There is evidence, however, that Marshall's instructions were not to use a shotgun or a knife so as not to mar his wife's beauty. He also endeavored to reduce the suffering of his children, by assuring that the murder did not occur in their residence.

As such, the level of victimization in this crime is extremely low relative to murders generally.

Regarding character, defendant maintains his innocence and thus has yet shown no remorse for his crime.[76] However, he has no prior record, had a good reputation in the community for law-abiding honesty, integrity, and for being a family man. He was well educated, a successful businessman, a church-goer, and active

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76. Marshall's counsel has pointed out, however, the practical difficulty of expressing remorse while at the same time presenting a not-guilty defense. However, he has shown no remorse subsequent to his sentencing, although the relevance of that fact appears to be questionable.

in charitable, civic, and social activities.

As such, the defendant's character, but for his lack of remorse, is a significant mitigating factor.

b. William Engel and Herbert Engel

> William told his younger brother Herbert to hire someone to kill William's former wife. Defendant hated and distrusted her and was obsessed with her alleged but unfounded promiscuity. Herbert hired Co-D1, who killed William's wife. Identical outcomes for both defendants. Jury verdict: murder 6/17/86. Penalty trial. One aggravating factor found: 4e. Four mitigating factors found: 5a, 5e, 5f, 5h. Life.

Because of the strong factual similarity between Marshall and the Engels, particularly William, we set forth here a detailed description of their crimes, drawn from the Superior Court's decision affirming the convictions of the Engels. A5961-85T5; A5963-85T5 (Slip Op. pp. 3-14).

> On December 14, 1984, [redacted] Engel's body was discovered by South Carolina law enforcement officers in a tire well of a burned-out station wagon. The heat from the fire had been so intense as to cause the windows to explode. Glass fragments were discovered some 20 feet from the automobile. The license plates had been removed and the automobile was totally destroyed by fire. [redacted]'s body was burned beyond recognition. It is undisputed that James McFadden had murdered the victim in New Jersey and along with Lewis "Pee Wee" Wright had transported her body to South Carolina where her automobile was set afire. The sole question presented at trial was whether William Engel, [redacted]'s former husband, and his brother Herbert procured the killing. In that respect, we disagree with defendants' characterization of the State's evidence as "weak" and "inconclusive." Instead, the voluminous trial record fairly reeks of defendants' guilt.
>
> We recount the evidence in detail. From the inception of their stormy relationship, William was distrustful of [redacted]. At one point, William hired an investigator to monitor the victim's activities, suspecting that she was seeing other men. Although the investigator's probe revealed nothing untoward, William's

concerns remained unalleviated. Substantial evidence was presented that William's jealousy often manifested itself in fits or rage during which he confronted [redacted] with unfounded suspicions, and verbally and physically abused her.

At trial, the victim's mother recounted two incidents in September and October 1984 in which William repeatedly struck [redacted] and accused her of being unfaithful. On one occasion, William pushed the victim onto the floor. When [redacted] mother attempted to intercede, shouting that he might kill her, William replied "that's what she deserves, but not now." On another occasion, she observed William angrily strike [redacted] apparently cutting her mouth. Similar episodes were observed by the victim's aunt, who threatened to contact the police. William responded that [redacted] "deserve[d]" the beatings, noting that he had "hit her very soft" and that "if [he] beat her hard [he would] kill her."

The marriage of William and [redacted] ended in an annulment. However, William's obsession with the victim continued unabated and resulted in the constant harassment of [redacted] and her family. Both [redacted] mother and her aunt testified that William would call at all hours of the day and night, often leaving insulting messages containing implications of the victim's alleged promiscuity. William sought to prevent [redacted] from obtaining employment because he was concerned she would meet other men.

After the annulment, [redacted] developed a relationship with Andres Diaz, an attorney for whom she had briefly worked as a secretary. Diaz testified that he suddenly began receiving telephone calls from an individual who identified himself as Raul Valdievia, inquiring whether he "fooled around" with his secretaries. The individual later left a telephone number corresponding to William's residence. Toll records from Decor, a glass etching factor owned by William located in Englewood, disclosed several telephone calls to Diaz's office.

Despite the continued harassment and strife, [redacted] agreed to meet William at his office in Decor in the evening hours of December 13, 1984, in order to purchase birthday and Christmas gifts for their daughter. At approximately 6:30 p.m., [redacted] and her children left their home in North Arlington and obtained take-out dinners at a local restaurant. The victim ate her dinner while driving, explaining to her grandfather, whom she had picked up to babysit for her children, that she was to meet William at 7:15 p.m. and was running late. Upon arriving at her apartment, [redacted] dropped off her children and grandfather in the parking lot and left to

meet William. At approximately 8:30 p.m., William called [redacted]'s apartment and told her grandfather that she had not yet arrived. Sometime later that evening, after the children had gone to bed, William again called and said that [redacted] had apparently missed their appointment.

On the next morning, [redacted]'s mother was told by the victim's oldest daughter that she had not come home the night before. Later that morning, William called and told her that [redacted] had never arrived at his office. When [redacted]'s mother expressed her intention to contact the police, William suggested that they wait until the afternoon at which time he would accompany her to the police station. However, William never called back. At approximately 11:00 p.m., the victim's mother, accompanied by Diaz, reported [redacted]'s disappearance.

The North Arlington police immediately commenced a search for [redacted]'s whereabouts. When the search proved unavailing, a teletype was sent to all eastern states. In addition, the police interviewed William at his home. William, who appeared "very nervous" and "chain smoked," told the police that he and [redacted] had arranged to meet the night before. William said that [redacted] called him at 6:00 p.m. to confirm their shopping plans. When she did not arrive as scheduled, William allegedly called her apartment and spoke to her daughter. He said that he received another call from [redacted] at 8:30 p.m. from what he believed to be a public telephone based on the noise of automobiles in the background. [redacted] allegedly told him that she "would be right over." William stated that when [redacted] had not arrived by 8:50 p.m., he called her apartment and again spoke to her daughter, who said her mother was not at home. William said he made another call to [redacted]'s apartment at about 9:15 p.m., before leaving his office. William recounted that from his residence he called [redacted]'s home again at 10:10 p.m. and then at midnight, each time speaking with her daughter who said her mother was not there. At that point, William claimed to have gone to bed and made no further inquiries until the next morning.

Meanwhile, South Carolina law enforcement officers had found [redacted]'s body in the burned station wagon. The body was finally identified as that of [redacted] several days later after the vehicle identification number was traced to her and her dental records were examined.

William was apprised of his former wife's death during an interview at the Bergen County Prosecutor's office. Upon being told of the circumstances, William placed his hands over his face and "appeared to sob." When he lifted his head, however, the police observed that there were "no tears anywhere on his face or in his eyes" and his voice "did not break" during the remainder

of the interview.

James McFadden was the State's chief witness. Under his agrement with the prosecutor, McFadden's testimony was given in exchange for the State's waiver of the death penalty and its promise to recommend that any sentences imposed run concurrently. McFadden testified that he was acquainted with Herbert Engel for approximately three years prior to the murder. In December 1984, McFadden was hired by Herbert as a salesman for Cooper Nationwide, a trucking enterprise. Herbert was the owner of the company. The terms of McFadden's employment were somewhat problematical in that he and Herbert never agreed upon a particular salary or formula for remuneration.

In any event, shortly after he was hired, McFadden was invited to attend a meeting with Herbert at Bennigan's Restaurant in Englewood. Herbert met McFadden at Kassa, a warehouse owned by William, and the two drove to the restaurant. While in the parking lot before entering the restaurant, Herbert asked McFadden, "Are you bad?" McFadden asked Herbert what he meant, and Herbert simply repeated the question. Still confused, McFadden responded "If somebody hurts me, make [sic] me mad, I would hurt somebody, . . . [t]hat's normal." The two men then proceeded into the restaurant and sat at the bar.

While seated at the bar, another man, who was identified to McFadden as Herbert's cousin, joined them. After a brief conversation, the man who McFadden later learned was Herbert's brother William walked to a nearby booth. While McFadden remained at the bar, Herbert followed William to the table where they engaged in an animated conversation. After William left the restaurant, Herbert returned to the bar and told McFadden that "his cousin had a girlfriend [who] was hassling [him], giving him a hard time, [and] that he wanted this girlfriend taken care of, [taken] off the map." Herbert said that his "cousin" would pay $25,000 for the proposed killing. Taken aback by Herbert's offer, McFadden did not immediately respond.

At Herbert's request, a second meeting occurred several days later, again at Bennigan's. Herbert repeated William's offer to pay him $25,000 to kill his "girlfriend." At this point, McFadden agreed to the proposal. Herbert insisted that the killing take place on the following Friday evening. However, Herbert later telephoned McFadden at Cooper Nationwide and stated that "the situation had changed" and that he was to meet him at Kassa at 5:00 p.m. on Thursday instead.

In accordance with their agreement, on the designated date, McFadden took a cab from his home in Passaic Park to Kassa, arriving at approximately 5:15 p.m. McFadden brought with him an attache case

containing a wire cord he had taken from the back of a refrigerator. The cab driver dropped McFadden off directly in front of the entrance to Kassa. The parking lot was empty, with the exception of Herbert's automobile. McFadden walked up to the door and Herbert "buzzed him in." The two immediately proceeded to Herbert's office where McFadden showed Herbert the cord he intended to use in killing the victim. Herbert then asked whether McFadden had a gun. When McFadden replied that he did not, Herbert opened his briefcase, which contained a revolver.

At that point, Herbert described in detail his plan to kill the victim. Herbert explained that his cousin and the intended victim would enter a hallway located on the left side of the building. McFadden was to remain hidden in a nearby bathroom. Herbert told McFadden to "strangle" the victim when his "cousin . . . pretended to turn on the light." Pursuant to Herbert's investigation, the two went to a storage area and obtained a "film plastic" to cover the body. McFadden was to transport the body to Atlanta, South Carolina, the home of his grandparents. For this purpose, McFadden gave Herbert his grandparents' telephone number. Herbert then showed McFadden which garage door would be unlocked, noting that the burglar alarm had been disengaged. When the two returned to Herbert's office, McFadden was given $1,300 in cash. Herbert suggested that McFadden have the victim's automobile "crushed." He also proposed that the body be placed in a hole and covered with acid. Although McFadden's response was somewhat equivocal, Herbert gave him a pair of "acid gloves" made of thick rubber with sleeves "going up to the elbow." Herbert then departed, leaving McFadden hidden in the bathroom with the door slightly ajar.

Approximately ten minutes later, William arrived with [redacted]. The lights in the bay area had been extinguished. As planned, William walked into the bay area, turned left, and fumbled around with the light switch. Exclaiming that the light was defective, William obtained a flashlight. [redacted] followed William to the "far corner of the bay." When [redacted] passed the bathroom, McFadden jumped out, slipped the "cord around her neck and started pulling it tight" in cross-wrist fashion. [redacted] fell to the floor and McFadden straddled her, pulling tightly on the cord. McFadden strangled [redacted] for approximately four minutes while William stood over the victim smoking a cigarette. At one point, while McFadden was strangling [redacted], William exclaimed, "you bitch."

After McFadden finally released his hold on the victim, he went outside, as planned, through the garage door that Herbert had said would be unlocked and

disconnected from the alarm system. Using the key that Herbert had given him previously, McFadden backed [redacted]'s station wagon into the garage. With William's assistance, McFadden threw [redacted]'s lifeless body into the station wagon. While McFadden covered the body, William disappeared. McFadden then suddenly heard a police radio from a distance.

William returned to the bay area in an agitated state and told McFadden that the police were outside. Upon hearing a knock on the door, McFadden instructed William to tell the police that he owned the factory and that nothing was amiss. McFadden then hid in the bathroom while William dealt with the police. William returned shortly thereafter and told McFadden that he would "circle" the area to "make sure everything was okay" and would "blow his horn twice" to signal when it was safe to leave. Fearing that he "was being set up," McFadden did not wait for the signal but instead left in [redacted]'s station wagon.

McFadden then drove to Cooper Nationwide where he met Pee Wee Wright, one of the Engels' employees. Wright had previously agreed with McFadden to accompany him on the ride to South Carolina.

* * *

When Wright returned from [a shopping excursion in South Carolina] he told McFadden that he had noticed "blond hair in the back of the car." Angered by the fact that he had been kept ignorant of the presence of the body, Wright told McFadden that he "could have instruct[ed] [him] how to handle it better." Wright then asked McFadden for the car keys, stating that he was "going to burn" the automobile . . . McFadden responded that his "nerves [were] shot" and that he "wanted nothing else to do with it." McFadden added, however, that he had been instructed by his "boss" to remove the license plates.

Approximately two hours later, Wright returned and advised McFadden that the car had been destroyed and that "it was a blaze of glory." The two went to a local bar to celebrate, along with McFadden's uncle and his girlfriend. McFadden and Wright then took a train to New Jersey, arriving at approximately 10:00 a.m. on Saturday.

McFadden met Herbert on Monday afternoon, December 17, at Cooper Nationwide. From there, the two men drove to a local bar where McFadden was given a plain white envelope containing $5,000 in cash. Once inside the bar, Herbert closely questioned McFadden with respect to the killing, asking whether "everything [was] taken care of [as they had] planned." McFadden told him that he had followed the plan, hiding the fact that he had neither used acid in disposing of the body nor had the station wagon "crushed," as Herbert had proposed. After leaving

the bar, McFadden gave Wright the $2,000 he had promised.

McFadden next met Herbert "a few days later" at a bar in Clifton. Herbert told McFadden that "he needed to know everything . . . because they had found the package." Apparently, Herbert had become aware of the fact that Wright had accompanied McFadden to South Carolina and had disposed of the body and the automobile. McFadden thus gave Herbert a truthful account of all that had occurred. Herbert merely inquired whether "everything [had been] burned up."

McFadden's last meeting with Herbert before his arrest took place on January 12, 1985. Herbert had contacted McFadden and had demanded that they meet because "there was a problem." When McFadden arrived, Herbert told him he wanted him to "take care of" Wright because he "was bad news." McFadden did not agree to kill Wright, but he assured Herbert that he would "take[] care" of things. He also accepted $1,000 in cash from Herbert.

McFadden was arrested on January 18, 1985. At that time,, McFadden agreed to give a statement, noting that had he not been arrested he would have confessed in any event because the killing "was bothering [his] conscience." McFadden described the killing in lurid detail and fully apprised the police of the Engels' involvement. In addition, McFadden was shown a photograph of [redacted] and William together. He identified [redacted] as the woman he had strangled and William as the man who had been present and had witnessed the killing.

Factually, William Engel is the closest case to Marshall. Marshall shares with Engel the status as contract principal in the execution murder of his wife, and the jury in each case found only the 4e aggravating factor.

However, respecting blameworthiness, Engel had a less culpable motive. He acted solely out of jealousy and an obsession about his ex-wife, with whom he had had a quarrelsome and sometimes violent relationship during their marriage. This obsession and jealousy persisted thereafter in the form of constant harassment of the victim. There is, however, nothing in the case to suggest any wrongdoing on his wife's part. This obsession likely explains why

his jury found present the 5a (mental/emotional disturbance) and the 5e (duress) mitigating factors in addition to the 5f (no prior record) and the 5h factors. The crime was somewhat less complicated than Marshall's and W. Engel delegated much of the planning to his younger brother Herbert, who procured the services of an employee to do the killing for $25,000. Furthermore, W. Engel's crime is distinguished from Marshall by his lack of a pecuniary motive.[77] Thus Engel's blameworthiness is mitigated relative to Marshall by his obsession and lack of a pecuniary motive, and overall is substantially lower than Marshall's. W. Engel was, however, clearly the but-for cause of his wife's murder.

William's blameworthiness is enhanced, however, by his settled unabiding hatred of and cruelty to his wife for no justifiable reason. Although it is unclear if he desired that she suffer a cruel death, since his brother arrived at the scene with a revolver, the level of depravity of Engel's mind is symbolized by his standing over his wife smoking a cigarette for four minutes as she was struggling on the ground for her life, and at one point during the ordeal calling her a "bitch." He also helped the assailant load the corpse into a waiting car.

The victimization in Engel is significantly greater than in Marshall. His wife was strangled for 4 minutes with an electrical

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77. Marshall's counsel claims that W. Engel was also partly motivated by a desire to terminate a $200-a-week child support payment to his wife, the victim. Whatever role this may have played, it appears to have been trivial compared to his unabiding hatred of his wife. Also, his liability for the support of his child would not be abated by the death of his wife.

cord, and was quite aware of her impending death. And as noted, she also was confronted by the defendant who stood over and berated her as she struggled. The victim had two young daughters.

As to character and background, William Engel was also a very successful businessman, had received humanitarian awards for charitable work, and had no prior criminal record. T. 6/23/86, pp.31-32. He also showed no remorse, and otherwise compares similarly to Robert Marshall. T. 6/23/86, pp. 93,95-96.

Overall, William Engel's level of criminal culpability is lower than Marshall's.

Herbert Engel's criminal culpability is lower than both Marshall and his brother. Like Marshall, Herbert played a major role in arranging for the murder, including the procurement of a gun, although he was clearly not the instigator and prime mover and was not present during the actual killing. He acted under the influence and direction of his older brother and was not a but-for-cause of the homicide, which probably explains why the jury also found the 5a (mental/emotional disturbance) and the 5e (duress) mitigating factors for him in addition to the 5f and 5h factors.

Herbert's case has other aggravating features, however. He induced, under false pretenses, a reluctant employee to do the killing. Later, he attempted to arrange the murder of a second employee who had accompanied McFadden to South Carolina. In general, Herbert appears as hard-hearted as his brother. However, because his responsibility was considerably less than his

brother's, his blameworthiness is considerably less.

While Herbert did not directly participate in the homicide, the victimization, as stated earlier, was significantly greater than that of Marshall's crime. Moreover, his character and community background, including his lack of a prior criminal record, T. 6/23/86, pp. 34,40, compare less favorably to that of his brother, and is somewhat less of a mitigating factor than Marshall's. Overall, Herbert's level of criminal culpability appears to be significantly less than both his brother's and Marshall's.

c. Francis Brand

D wanted his brother killed, and reportedly pursued Co-D for at least 17 months to do it, offering increasing sums of money from $350-$2000. V was involved in drugs and abusive to his family. D was both angry with and afraid of V. Jury verdict: murder. No penalty trial. Aggravating factor: 4e. Mitigating factors: 5a, 5f, 5h.

Francis Brand seems quite substantially less blameworthy than Marshall, even though his premeditation and settled intent to kill were extensive and endured over years. T. 5/23/91, p. 6. His intention increased in intensity until the end, in the form of constant pressure and badgering of his friend Randy Burroughs and others to kill his brother. T. 5/23/91, pp. 37-38; T. 5/29/91, pp. 54-59. However, his motive was not that of a cold-blooded killer. The victim had engaged in a reign of terror for years over his household, turned it into a drug parlor, and repeatedly threatened and beat family members. T. 5/29/91, p. 36. Brand was afraid of his older brother, concerned about his supplying drugs to his other

brother, and wanted him dead. T. 5/29/91 p. 40. Victim provocation here was substantial, and there was no evidence of intent to cause the victim great pain beyond the death itself. Moreover, this crime was not as planned as Marshall. The killer, Burroughs, chose the time and the method. The evidence of a promise of payment seems clear, but it was not the primary motive or cause of this crime. T. 5/23/91, pp. 35-37, 70. Brand suffers from no mental or substance abuse impairment.

Regarding victimization, defendant was shot as he awoke and likely had little sense of his impending death. T. 5/23/91, p. 45. Shotgun blows are brutal, but death came very quickly. The victimization in this case compares similarly with Marshall.

Overall, Brand's criminal culpability seems significantly lower than Marshall's, and is also lower than that of both the Engels.

2. Contract Murder Hitmen

a. Anthony DiFrisco

D was offered $3,000 by a person he met in jail to kill V because V was going to inform about the person's drug business. D shot V in the head in V's pizzeria. Murder plea 1/11/88. Bench penalty trial. Two aggravating factors found: 4d, 4f. One mitigating factor found: 5g. Death.

As with contract killings generally, DiFrisco's murder was significantly premeditated. Although his planning role in this murder was slight, he did the killing. His motive, similar to Marshall's, was in part pecuniary ($2500) State v. DiFisco, 118 N.J. 253, 256 (1990), but he also was endeavoring to earn a hitman reputation ("earn his bones") since his principal seemed to have

links with organized crime. T. 1/25/88, p.5. The victim, a total stranger to the defendant, had threatened to inform police regarding the principal's drug business but was otherwise clearly undeserving. T. 1/11/88, p. 9. Also, DiFrisco had a substantial drug addition and had consumed a few drinks that day, although no mitigating mental impairment was found by the judge who bench-tried the case. Id. at 8. The Court also found the 4f factor (escape detection) although this seems to have been more imputed from the purpose of the instigator of the murder. 118 N.J. at 259.

Overall, the enhanced aggravation from doing the actual killing, from endeavoring to become a professional hitman, from knowledge that the purpose was to silence a complainant, seems to balance the greater duration and calculation of Marshall's planning and his pecuniary motive. Both were cold-blooded executions, and so these defendants seem to compare fairly similarly regarding blameworthiness.

Regarding victimization, the victim, a pizza store owner, was shot unexpectedly from behind in the head four times, and once in the arm. Id. at 256. His suffering and awareness of his impending death was minimal and this also compares similarly to the Marshall case.

Regarding character, Anthony DiFrisco was a drug addict, had served time in prison, and appeared to fit the model of a professional hitman. He completely and substantially lacks the mitigation inherent in Marshall's strong background. The judge found mitigation (factor 5g, substantial cooperation) in his

bizarre confession to this crime, given for the purpose of avoiding prison on other unrelated charges. Id. at 259. No other mitigating factors were found.

Overall, DiFrisco seems more culpable than Marshall.

b. James Clausell

> D and Co-D1 were paid $1,000 each to shoot V. They went to V's house, and when V answered the door, Co-D1 asked for Ed. V said "You have the wrong guy," and tried to close the door. D fired two shots through the door hitting V once in the chest. Jury verdict: murder 4/18/86. Penalty trial. Two aggravating factors found: 4b, 4d. Three mitigating factors found: 5c, 5f, 5h. Death.

Clausell bears a strong resemblance to DiFrisco respecting blameworthiness. The killing was quite premeditated. Both defendants were endeavoring in part to earn their way into the underworld by their murders. The principal was a drug dealer seeking revenge against an otherwise clearly undeserving victim who took him to municipal court in a dispute over the principal's dog. State v. Clausell, 121 N.J. 298, 309, 311 (1990). The victim, a total stranger to defendant, was killed at home in the presence of his family. Id. at 307.

[redacted]

Furthermore, the defendant was only 20 years of age and substantially lacked the maturity of the 44-year-old Marshall.

[redacted] The jury found the pecuniary motive factor (4d) since he received $1,000 for the killing, and also found the grave risk factor (4b) since the victim's family was in

the immediate area of the shooting. 121 N.J. at 312, 313.

The substantially enhanced aggravation by virtue of Clausell's personal involvement in, and apparent predisposition to do, the killing, as well as the grave risk he caused to others, is balanced somewhat by his youth and by the less calculated nature of the plan (as compared to Marshall). But on balance, Clausell's culpability seems to be somewhat greater than Marshall's.

Respecting victimization, the victim was shot once in the chest, but was at least momentarily aware of his impending murder. Also, the entire family appeared somewhat alarmed by the earlier appearance of the defendant and his accomplice. Id. at 307, 308. Moreover, the crime occurred in front of his wife, children, and grandparents, and a bullet narrowly missed his daughter's face. Id. at 374, 375. Therefore, the victimization in this case exceeds that of both DiFrisco and Marshall.

[redacted] However, he substantially lacks the level of mitigation found in Marshall's strong community background. As a consequence, Clausell's character is less mitigated than Marshall's.

Overall, Clausell seems more criminally culpable than DiFrisco and significantly more so than Marshall. Yet we note that Clausell is black, and our results on the impact of the race of the defendant on jury sentencing decisions raises a question regarding

the death sentence in his trial.[78]

c. Miguel Melendez

Co-D, a middleman, paid $5,000 to kill V on behalf of another person. D waited for V in V's apartment building. When V entered, D asked about the car V was selling to identify him. D shot V 2 times in the head. Jury verdict: Capital murder 6/3/87. Penalty trial. Aggravating factor: 4d. Mitigating factors: 5g, 5h. Hung jury on weighing of the factors. Life.

Regarding blameworthiness, Melendez' crime is typical of the other hitmen. It was highly premeditated and his settled intent to kill endured for a period of time. Da 20-25 to 28. The underlying motive for the killing is unknown. Thus, the record does not reveal whether the victim had provoked the principal, although there is evidence that the victim was a quiet man who neither drank nor smoked. [redacted] Of course, his other motive was $2,500, one-half of the $5,000 paid to the middleman. Da 27-1 to 2. The defendant had no role in the planning of the crime, even the weapon was provided. Da 22-3. He was driven to the scene and told what to do. Da 20-29 to 30, Da 21-24 to 26. There is no evidence of grave risk to the victim's nearby daughter. However, the presence of the daughter did not change defendant's mind. There is evidence that the defendant consumed some pills and alcohol and was mildly mentally retarded

78. See Final Report, pp. 100-106 for a discussion of the implications of possible race effects on proportionality review. See supra note 27, p. 22 for a discussion of the precedential value of Clausell's death sentence generally.

and suffering from organic brain damage. Da 21-23 to 24, T. 6/4/87, p. 50.

As such, this defendant's blameworthiness in this cold-blooded execution seems somewhat less aggravated than both Marshall and DiFrisco.

Regarding victimization, the victim here was shot twice in the head, apparently as he turned when called by the defendant. T. 6/1/87, pp. 38, 43; T. 5/27/87, pp. 53-54. His suffering was likely minimal in duration and his awareness of impending death slight. The suffering here compares similarly with that of [redacted] Marshall. The victim's ten year old daughter witnessed the crime, and this somewhat aggravates the offense. T. 5/28/87, p. 21.

Regarding character and community background, not much is known of this defendant at this time. He expressed remorse at his trial. His overall character compares unfavorably with that of Robert Marshall to a significant degree.

Miguel Melendez seems somewhat less culpable than Marshall regarding blameworthiness, and the victimization and character factor seem to balance each other also. Overall, his criminal culpability seems less than Marshall's.

d. Michael Rose

D, age 31, was hired by Co-D1 to kill V for $1,000 so she would not inherit his father's money. D stabbed V 83 times, and bludgeoned V approximately 20 times. V was 8 months pregnant when she was killed. D claimed self-defense. Jury verdict: murder 12/21/84. Penalty trial. One aggravating factor found: 4c. Four mitigating factors found: 5e, 5f,

5g, 5h (possibly 5d). Hung jury on weighing the factors. Life.

Regarding blameworthiness, Rose is highly premeditated with a settled intent to kill for about a month. State v. Rose, No. 4874-84T4 (App. Div. 1989), p.3. The victim offered no provocation and was killed so that she could not receive an inheritance. T. 12/4/84, p. 157. The defendant's motive was money, a paltry $1,000, although the jury declined to find the 4d factor present. T. 12/19/84, p. 20. He also must have realized his victim was with child, as she was eight months' pregnant. However, Rose was not a professional hitman, quite the contrary. He was pressured to do the killing, and his mild retardation evinces an ability to be manipulated. There is evidence (in the way the jurors marked the verdict sheet) that at least some of the jurors may have been convinced that his mental state was impaired by mental disease and by alcohol or drug abuse, although testimony on this was conflicting. T. 12/17/84, V.I, pp. 61-63. The crime was primarily planned by the principal. There is, however, evidence that after the victim became too weak to defend herself, Rose smoked a cigarette and then proceeded to beat the victim's head and neck with a sump pump. T. 12/19/84, pp. 21-26. On balance, however, the culpability of Rose seems significantly less than that of Marshall.

However, the victimization here is at the other extreme to Marshall. First, he killed two persons, the target of the attack and her unborn fetus. Second, the killing was bloody, with 83 stab, knife and hacksaw wounds, 36 of which were defensive, and

repeated heavy blows, some with a sump pump. Third, the victim struggled, and certainly was aware of an impending horrible death.T. 12/17/84, V.I, pp. 55-66.

The defendant's character is a mitigating factor, but not quite as mitigating as Marshall. [redacted] completed only the tenth grade, and had a fairly continuous employment before receiving a job-related injury in 1981 for which he received workmens compensation. He has no prior record. T. 12/17/84, V.I p. 3; [redacted] The evidence is mixed regarding remorse, although he substantially cooperated with the police. Numerous character witnesses testified to defendant's good nature, and helpful and friendly disposition.

On balance, the overall culpability of Rose seems to be significantly lower than Marshall.

e. Randy Burroughs

Co-D is brother of V. V dealing drugs out of house and generally abusive. Co-D solicits D (his friend), to kill V. Co-D promises to pay D $2,000. Murder plea: 2/14/90. No penalty trial. Life. Aggravating factor: 4d. Mitigating factors: 5e, 5f, 5g, 5h.

Burroughs seems quite substantially less culpable than Marshall regarding his blameworthiness. He resisted the constant pressure and badgering of his close friend Francis Brand to kill the violent and abusive victim, [redacted] for a very long time. T. 5/23/91, pp. 15-16. It was not until the victim scuffled with Burroughs a week earlier, as Burroughs tried to stop the victim

from beating his (the victim's) younger brother, that Burroughs decided to kill [redacted] T. 5/23/91, p. 33. The pecuniary motive was present, as Burroughs testified, but was not apparently his primary motive. T. 5/23/91, pp. 35-37, 70. He agreed that [redacted] deserved to die, wanted to help his friend and the Brand family to be free of this scourge, and also wanted to end the constant pressure from his friend to do the killing. T. 5/23/91, p. 33. There was no extensive planning, no great calculation. He even testified that he was not sure he would do it until the moment came, and he had "chickened" out on an earlier occasion. T. 5/23/91, pp. 15, 93.

The victimization in this case involved no unnecessary suffering beyond that needed to kill. The crime was at 3:00 a.m., the victim was asleep, and was awakened for only a moment. T. 5/23/91, p. 66. The two shotgun blasts ensured a quick death. T. 5/23/91, p. 45.

Burroughs has no significant criminal history and expressed remorse for his act, confessing the next day, and also voluntarily testified against the principal, Francis Brand.

Overall, the culpability of Burroughs is quite significantly lower than Marshall's.

B. Spousal Murders Involving High Levels of Blameworthiness and A Defenseless Victim

1. Walter Williams

D (police officer) poisons wife with cyanide to avoid detection of bigamy and forgery, and to inherit wife's estate. No priors. Jury verdict: Murder 5/9/86. Alleged that D murdered his mother-in-law after wife's murder. Penalty trial. One aggravating factor found:

4f. Two mitigating factors found: 5f, 5h. Life.

Williams' principal motive was to cover up his bigamous marriage, which he concealed from his wife. T. 5/7/86, pp. 109,110. There is evidence that he also desired to gain his wife's estate, and he forged his will to that end after her death. T. 4/24/86, pp. 2.28-2.29; T. 4/23/86, pp. 1.10-1.11. However, the jury rejected the pecuniary factor, and only the 4f factor was found. T.5/13-14/86, pp. 230-233. Williams also deceived his wife while planning to kill her, claiming that he was sleeping at night at a hospital while actually sleeping with his second wife. T. 4/22/86, p. 94. He also deceived his bigamous wife and forged documents to cover up his bigamous marriage. T. 4/16/86, pp. 141-147. His planning apparently endured for at least the five-month period commenced by his obtaining the cyanide. T. 4/18/86, p. 158; T. 4/21/86, pp. 11-12. There is no evidence that the defendant was influenced by mental disease, substance abuse impairment, or any other diminution of mental capacity. It was, however, somewhat less coldblooded since it occurred soon after his wife confronted him on his deception, and thus defendant reacted to the pressure of things closing in on him.

The degree of blameworthiness of this defendant is quite aggravated, but somewhat less so than Marshall's.

Regarding victimization, the victim died a painful death from cyanide poisoning after hours of suffering. Symptoms include severe headache, an acrid taste in the mouth, difficulty breathing, and nausea. T. 5/2/86, pp. 99-101. It is not known whether she

was aware of her impending death. There were three daughters who were separated and alienated from each other as a result of the murder of their mother. T. 4/23/86, p. 1.2-1.5; T. 4/24/86, p. 2.2-2.3. As such, the level of victimization is significantly greater than that of Marshall.

Regarding character, again the comparison is similar. Defendant showed no remorse. [redacted] His character is a mitigating circumstance and is similar to Marshall's.

Overall, the criminal culpability of Walter Williams seems similar to Marshall's.

2. John Dreher[79]

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79. The Dreher case was not prosecuted as a capital case; however, the 4c factor was implicated. Dreher murdered his wife in a brutal manner and placed her in extreme fear, evidenced by her defecation. We do not know, having been unable to speak to the prosecutor, whether his evaluation was that the facts fall short of the Ramseur test for intent to cause suffering in addition to death or whether he did not view the case as deathworthy. Since the evidence of her suffering was substantial and well beyond that needed to kill, including blows to the head and chest, followed by manual and then ligature strangulation, a slit throat, multiple stabbings, and head blows with a cobbler's tool, we believe there is substantial evidence that Dreher intended to cause his wife severe suffering. See State v. Erazo, ___ N.J. ___ (1991) (Slip opinion at 29).

We considered the Morris County case (85-10-0848-I) of Thomas Johnston, which falls under this general category of cases, but deleted him from the universe since there was insufficient clear evidence to substantiate either the 4c or 4d aggravating factors. This was a "close case" on the 4d factor. Johnston, who was profoundly mentally disturbed, was on disability and his wife was largely supporting him. Thus, her decision to file for divorce created severe financial pressures on defendant. They argued frequently about money issues. However, there is no direct evidence that the killing was done for pecuniary reasons; no

(continued...)

> D (43 yr., M) and V (39 yr., F) in troubled marriage. Plot by D and paramour (Co-D) to kill V. D drags V to basement, binds her hands, strangles V a with cord, stabs V in throat. Paramour hits V over head with cobbler's tool 3x and stabs her 8x after she is dead or very nearly dead. D's motive was to free himself to live with his paramour and avoid the expense of a divorce. No priors. Jury verdict: murder 2/23/89. No penalty trial. Life. Aggravating factor: 4c. Mitigating factors: 5f, 5h.

Regarding blameworthiness, Dreher, like Marshall, was an aggravated cold-blooded execution murder. He considered the crime for months, seeking a gun from codefendant two to three months prior to the murder. T. 1/30/89, V.I, p. 39. He was a mature adult, 43 years of age. However, the level of planning for the actual killing was much less than that of Marshall. Codefendant testified she was unaware of his plan, and the circumstances of the murder do not evidence much calculation and planning. The circumstances of the crime (multiple weapons) reflect an intent to cause severe suffering. T. 2/6/89, V.II, p. 41.

The record does not reveal victim provocation, except that the

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79. (...continued)
statements by defendant of such intent and no overt acts to indicate such intent. The killing itself did not seem planned in advance, in fact, it seemed to be a sudden act, since Johnston used a hammer, and dragged the body to the woods behind the house, merely covering it with a tarp. Also prior arguments with his wife had led to physical violence. This fact pattern seems more akin to killings during a violent argument rather than planned pecuniary motive killings. Moreover, the tape-recorded conversation with a neighbor earlier in the day included statements that the defendant intended merely to annoy his wife that night, since he suspected that she was with another man, by piling her clothes on her bed. The conversation was jocular and evidenced no intent to kill her. While the killing, as with spousal homicides generally, would certainly yield a pecuniary advantage to a successful offender, this killing seems to fall short of 4d and was more likely induced by a violent argument. In any event, given his severe mental problems, Johnston would seem to be substantially less culpable than Marshall.

depressed victim wanted to leave the defendant. Dreher's marriage was troubled, and the state's theory was that he wanted to end a bad marriage, avoid a costly divorce, keep custody of his sons, and further his affair with codefendant. The evidence of any pecuniary motive was distinguishable from Marshall's, in that he sought merely to avoid the expense of a divorce and anticipated no financial windfall from his wife's death. T. 2/21/89, p. 48. There was no evidence of mental impairment, emotional disturbance, or substance abuse.

Accordingly, while Dreher did perform the killing himself, his blameworthiness seems somewhat less than that of Marshall in planning, duration of settled intent to kill, and lack of clear pecuniary motive.

However, the victimization in this crime is extreme. The victim was beaten, strangled, throat slit, bludgeoned, and stabbed repeatedly. She was clearly aware of her impending death and her defecation evidenced her terror and extreme fear. She had two sons by her marriage to defendant. T. 1/30/89, V.I, pp. 55-75; T. 2/6/89; V.II, pp. 6-16, 20, 69-71, 92-96.

Regarding character, the defendant was a very successful businessman and college graduate. He showed no remorse. He had no prior record, although there was evidence of an abusive past with both of his wives. T. 2/14/89, V.I, pp. 11-14. While his character is a mitigating circumstance, his community background is significantly less favorable than Marshall's.

Overall, when the level of violence is balanced against

Dreher's lesser blameworthiness, the criminal culpability of this case seems comparable to Marshall's.

3. Darrell Collins (469)[80/]

> D stabbed his wife (V2) multiple x and beat and suffocated his child (V1). D's apparent motive was to collect insurance benefits on the lives of his wife and son. Jury verdict: murder 3/2/90. Capital murder conviction and penalty trial for murder of son only. No aggravating factors found. Life.

Collins' blameworthiness is less than Marshall's. He plotted the death of his wife and child for insurance proceeds on their lives while living with them, although the planning was much less complicated and devious, and apparently of short duration. T. 3/12/90, pp. 106, 111. He appears to have sought the money in part to avoid the consequences of a recent garnishment on his wages of $100 a week. T. 2/22/90, V.II, pp. 47-49; T. 2/26/90, V.I, p. 20. Also, Collins was acquitted of capital murder in his wife's case and convicted of capital murder only in the case of his son. T. 3/30/90, p. 23. The jury did not find the 4e factor or any other factor present, although it was charged on it. The jury decision appears likely to reflect a deathworthiness decision, since the sentencing judge stated unequivocally that the motives for both killings were a $100,000 policy on his wife and a $5,000 policy on his child. T. 3/30/90, pp. 34,38, 40. The evidence showed that the wife or the two of them jointly obtained the policy, but the record suggests no other motive beyond the insurance motive and the desire to silence the boy as a potential witness (4f), which

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80. See supra note 34, p. 28 for a discussion of this case's status in the universe.

circumstance was also not found by the jury. T. 2/22/90, V.II, p. 31-32. No other woman appears to have been in the picture.

Collins appears to have no prior record. His noncapital murder involved extensive victimization (violent stabbing and slashing of his wife), but his capital conviction was only for the death of the 18-month-old boy who was suffocated with a pillow. T.2/14/90, V.I, pp. 23-31; T. 2/14/90, V.II, pp. 32 Overall, Collins' level of criminal culpability appears to be significantly lower than Marshall's.

C. Premeditated Robbery/Kidnap Murder Cases Involving A Pecuniary Motive, Extensive Premeditation, Deception/Entrapment of the Victim, and a Defenseless Victim

Another group of pecuniary motive cases that can be compared with Marshall are those with a robbery or kidnapping that involve (a) extensive and settled premeditation to kill, (b) a pecuniary motive, (c) deception and entrapment of the victim, and (d) a generally helpless victim. We have identified five cases which meet this description. They are Martini, McIver, Russo, Thompson, and Scales.

1. John Martini

D and Co-D kidnapped V and held him for $25,000 ransom. After D received the ransom money, he shot V 3x in the back of the head. Jury verdict: murder 12/4/90. Penalty trial. Two aggravating factors found: 4f, 4g. Two mitigating factors found: 5c, 5h. Death.

Martini considered kidnapping his victim, a former acquaintance, for about two weeks. T. 11/21/90, pp. 72-73. He knew about the victim's daily routines and his bank balance. T. 11/21/90, pp. 74, 80. He planned the abduction carefully and

accomplished it by luring the victim into his car with a lie about their former relationship. T. 11/21/90, pp. 81-82. The kidnapping and murder seem quite premeditated, despite Martini's assertion that he decided to kill only a half hour before the event and his claim that the victim tried to escape (a claim that was clearly refuted by the forensic evidence). T. 11/21/90, p. 95; T. 11/26/90, pp. 16-19.

The level of victimization in Martini was also high. The victim was held hostage for the better part of a day, and his wrists, feet, and ankles were bound with masking tape. T. 11/21/90, p. 86. Martini obtained the ransom from the victim's wife by threatening both her and her husband's life if she informed the authorities, which she ultimately did. T. 11/15/90, p. 67. The victim's death came quickly with three shots to the back of the head. T. 11/21/90, p. 95.

[redacted] He alleged a $400-a-day cocaine habit. T. 11/21/90, p. 78.

In terms of blameworthiness, Martini is comparable to Marshall, but in terms of victimization and character, he is considerably more culpable. Overall, his criminal culpability seems greater than Marshall's.

2. David Mark Russo

D had made friends with 3 gas station employees (V, NDV1, NDV2). D decides to rob station and murder the employees. D makes V, NDV1, and NDV2 lie on floor. D shoots V and NDV1 in head and NDV2 in hand. Jury

verdict: murder 5/13/87. Penalty trial. Two aggravating factors found: 4b, 4g. Five mitigating factors found: 5a, 5c, 5d, 5f, 5h. Life.

Russo met the gas station attendants a week or two earlier, when his car was towed to their station and he observed how and when receipts were closed in the evening. State v. Russo, No. 5791-86T4 (App. Div. 1990) at 3. He befriended and chatted with the attendants then and engaged them in casual conversation on the night of the murders. Id. at 3. The exact duration of Russo's premeditation to rob and kill is unknown, but his intent to kill it appears clearly to have been formed when he entered the gas station and ordered his intended victims to the floor. Defendant's blameworthiness was mitigated, however, by a serious history of alcoholism, cocaine abuse, and depression. Id. at 7-9. The penalty trial jury found the 5a (emotional disturbance) and 5d (mental impairment) factors. Thus, Russo seems somewhat less blameworthy than Marshall, in spite of his intent to kill three people.

The level of victimization and terror in this case is extreme. The three attendants were forced to lie on the floor, and Russo attempted to execute them at point-blank range. He killed only one, but hit another in the head and the other in the arm. Id. at 4. The jury found two aggravating factors: 4b and 4g.

Defendant was an Air Force enlisted man at the time of the offense and had a minor prior record.

Overall, because of the high level of blameworthiness and victimization, Russo seems as criminally culpable as Marshall.

3. Terrence Scales and Howard Thompson

Scales and Thompson planned to commit a robbery. They met V in a bar and lured V to an apartment, and all used cocaine. Thompson got a clothesline. Both defendants beat and strangled V. They took V's car and credit cards. In Scales' case: Jury verdict: murder 10/31/86. Penalty trial. One aggravating factor found: 4f. Two mitigating factors found: 5d, 5h. Life. In Thompson's case: Jury verdict: murder 11/20/85. No penalty trial. Life. Aggravating factor: 4g. Mitigating factors: 5a, 5c, 5d, 5h.

Scales (age 27) and Thompson (age 20) were roommates and in serious financial difficulty. They decided to lure the victim, whom they met in a tavern, back to their apartment. They had been drinking and smoking marijuana for some time that day. The plan was to steal his car and sell it. It is not clear when the plan to murder developed, but after the victim had arrived, Thompson got a clothesline, made a noose, told a witness they planned to kill the victim, and proceeded to do it. Their moral guilt is also enhanced by their telling the victim of their intent to kill him.

The victim died of strangulation and was beaten about the face and body, and thrown down a river embankment.

[redacted] Both were unskilled high-school dropouts. [redacted]

Scales' case advanced to a penalty trial. The jury found the 4f factor but rejected the 4c factor. Thompson was convicted of knowing and purposeful murder and felony murder. His case did not advance to a penalty trial. State v. Thompson, No. 5355-85T4 (App. Div. 1989), p. 17.

Both cases involve less moral blameworthiness than Marshall, especially given Thompson's age. However, the level of victimization aggravates the cases vis-a-vis Marshall, as do their characters and records, especially Scales. Overall, Thompson seems considerably less culpable than Marshall, while Scales seems only slightly less so.

4. Vernon McIver

> D, a male prostitute, went to the home of V, his client, intending to kill and rob V. D spends the evening with V, then stabs V 1 time in the neck and took money and V's car. D charged with felony murder. Guilty plea 3/22/85. No penalty trial. Life. Aggravating factor: 4g. Mitigating factors: 5c, 5d, 5f, 5h.

The fifth defendant, Vernon McIver, a 19-year-old male prostitute, intended to rob and kill a client he had met three days before. He called the victim for another tryst. They went to bed together. After struggling with himself over the decision to kill, D thrust a large butcher knife into the back of the victim's neck as he lay on the bed. State v. McGiver, No. 4909-84T4 (App. Div. 1986), p. 2. [redacted] He showed no remorse. Because of his age and lack of a long-term settled intent to kill, McIver's blameworthiness is less than Marshall's. However, the level of victimization and McIver's character/record aggravate his case somewhat vis-a-vis Marshall. But overall, he seems significantly less criminally culpable than

Marshall.[81/]

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81. We have reviewed all cases in the universe to ascertain whether other cases or sets of cases should be compared to Marshall. We considered the following nonpenalty trial cases which had a pecuniary element and concluded that there was insufficient evidence of the 4D factor to classify them as clearly death-eligible.

Eugene Berta. Berta had a wide "open" marriage. The sentencing judge found that he milked the victim who had gained $140,000 in insurance, etc., from her husband's death. She "lent" D $4,500 2 1/2 years before her death, but nothing was ever paid back, another $1,000 was "lent" six months earlier. Finally, a $5,000 "loan" several weeks before her death, and $5,000 on the day of her death. D's wife knew of the sham, and she is the only one who said it was a loan. V's best friend testified V had "given" D the money. Three other close friends made no mention of the money in their testimony.

In any event, D and V had a falling out when V learned that D lied to her about being separated. However, D conned her into forgiving him and promised they would go to Minnesota. V made all the arrangements for the trip, and took vacation time. D had apparently planned however to take a third woman. He picked V up at her job on 7/8, and she died sometime that afternoon or evening. The state theorizes that she got very disturbed when D told her there would not be a trip, and a violent confrontation took place.

We are not sure how a 4d theory emerges from this. Killing someone doesn't forgive a loan, if it even was a loan (and the non-payment on prior "loans" casts doubt on this). Perhaps he killed her to get the last $5,000 check, since she may have decided to hold onto it until they got to Minnesota (but this just becomes a robbery). Maybe he killed her so she would not stop payment, and while this starts to move in a 4d direction, it is purely speculative. In any event, the evidence here is purely circumstantial, and weak at that. It is clearly defensible on the factor.

Edward Freeman. We see no motive other than a love triangle. D was having an affair with another woman. We talked to the trial judge who recalled no pecuniary motive and indicated it was not a death case.

Amos Blocker. D and his girlfriend V were arguing over money, but D had nothing to gain financially by killing her. They were fighting and D beat and stabbed V. There is no evidence of 4d here.

Bert Rindner. D killed V during an argument and later used credit cards and checks. Even the 4g is questionable since the theft of cards may have been an afterthought.

Finally, we have evaluated William Todd Lewis. This case is in the universe (although as a recent arrival, it is not yet in the DCI data base) as a 4c mutilation case. Counsel for Marshall also

(continued...)

81. (...continued)
seeks to characterize it as a 4D case on the ground that Lewis would gain $5,000 in value from the death of his brother, who owned the house in common along with another brother and defendant's wife. However, victim's interest would fall to his son, not defendant, upon victim's death. If the argument is that defendant killed the victim to avoid having to come up with the $5,000 if victim's suit for partition succeeded, then we would note that defendant would not receive pecuniary value - it would merely add to his interest in the property to buy out his brother, a net wash. Therefore, we see no facts supporting the proposition that defendant killed "in expectation of the receipt of anything of pecuniary value."

This case involved a lot of arguing over who would pay utility bills, since victim lived in 1/3 of the house and did not want to pay 1/2 of the bills. Defendant kept turning off the heat and electricity. Defendant killed the victim, after the victim sued for a partition and sale of the house. This case is about anger and vengeance, not 4d.

Another line of cases bear a slight similarity in that they involve murder of a relative or other close friend for a pecuniary motive, money. Some involved an aunt or uncle (Reigle 2044 - uncle died, Clark 439), a mother (Allen 52, Ferrari 772), a grandmother (N. Johnson 1219), or a close friend (Castellano 407, Diaz 673, Russo 2190, Sullivan 4029). However, these cases are also quite different from Marshall. These cases lack extensive premeditation and were more akin to typical robberies. Moreover, in six of the eight, the defendant was on drugs and needed the money for his habit.

We also considered another line of cases that involved the murder of a spouse or paramour. It includes cases involving some form of rejection of the defendant by the victim (Telford 4030, Vasquez 2574, Oglesby 1823, Sette 2270, Neapolitano 1783, Bertino 190 - 1st vic., Deeves 603); several involved the victim's attention to or affair with another (Basha 4014, Rogers 2146, Ethridge 742, Melendez, A. 1637, Holmes 1110, Pitts 2d vic. 2809, Thomas 2463, Darrian 576, Eaton 703). In still another set, the violence was fueled by argument or discord (Wider 2673, Saxton 2230, Richardson 2061, Carr 382, Mandich 1509, McCoy 1588, Messam 1650, S. Moore - 1st vic. 1720, Erazo 728, Weston 2647, D. Washington 2627, McKenzie 1612), two of which (Jalil 1164, Machado 1489) seemed to involve significant premeditation.

However, the passion underlying the motives in these cases distinguishes them from Marshall. The heated angst of the defendant-victim relationship in these cases is not present in Marshall, who was not rejected by, jealous of, or in furious argument with his wife. In fact, it was Marshall who wanted another lover, and his wife was an obstacle to be removed in a cold and calculated killing.

D. Summary of Analysis of Factually Comparable Cases

Table 4 summarizes the results of our comparative culpability analysis of factually comparable cases. The cases classified as having "significantly higher" or "higher" levels of criminal culpability than Marshall are characterized by (a) high levels of blameworthiness (DiFrisco, Clausell, and Martini) and substantial victimization (Martini), hitman status with links to the underworld (DiFrisco and Clausell) or a substantial prior record (Martini).

The defendants with "significantly lower" culpability had much less blameworthiness and no offsetting victimization, while those with "lower" culpability had only slightly less blameworthiness or offsetting victimization.

E. Cases With High Predicted Death-Sentencing Frequencies Among Similar Cases

Finally, we compared Marshall's case with the cases listed in table 3, which are characterized by high predicted death-sentencing frequencies among similar cases. The largest category of these cases involves defendants with a prior murder and generally a high level of victimization.[82] The next two categories, of five cases each, involve respectively (a) violent sexual assault murder[83] and (b) a pecuniary motive (two contract

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82. Defendants with a prior murder are : Booker 1st vic. (231), Booker 2d vic. (2825), Koedatich 1A (1337), Koedatich 1B (3018), Bey 2A (160), Bey 2B (3000), Biegenwald 1A (200), Biegenwald 1B (3002), Coyle (520), Erazo (728), Purnell (2026), Ramseur (2015), Nieves (1793), Pennington (1914).

83. Henderson (4033), Manfredonia (1510), K. Jackson (1158), Lodato (1453), J. Williams 1A (2687).

hitman and three robberies with extreme violence).[84] The fourth category involves highly premeditated, extremely aggravated murder without a pecuniary motive.[85] The final category involves police victims.[86]

With one exception the cases in each of these categories involve two or more statutory aggravating factors.[87] Second, many of them are mitigated vis-a-vis Marshall because of mental deficiency,[88] drug/alcohol impairment,[89] or emotional disturbance.[90] Third, except for Rose, a police-victim case, all of these cases are aggravated vis-a-vis Marshall on the victimization dimension and most are extremely aggravated in this regard. Also, a large proportion of them involve premeditation.[91] Finally, on the

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84. Clausell (443), DiFrisco (119), Gerald (868), Harvey (1031), Johnson (1227).

85. McDougald 1st vic. (1598), McDougald 2d vic. (2811), Zola 1A (2795) Savage (2228).

86. Rose 1A (2172), Rose 1B (3003), Schiavo (2241).

87. The exception is Savage (2228), a 4c mulitation case.

88. The following is a sample of the problems and any relevant mitigating factors found. History of mental institutions: Lodato, 5a, 5d; Pennington, 5d; Biegenwald IA&IA, 5d. No institutionalization but mental problems: Ramseur, 5a, 5d; Manfredonia, 5a; Jackson, 5a; Henderson, 5a, 5d; Bey, 5a in Bey, 2B. Low IQ: Manfredonia, 5a; Johnson, W.

89. The following is a sample of the problems and any relevant mitigating factors found. History of chemical problems: Johnson, 5a; Jackson, 5a; Henderson, 5a, 5d; Booker, 5a; Bey 2, Clausell. Evidence of chemical use at time of the offense: Erazo, Booker, Bey 2, Williams J. Zola, Coyle.

90. The following is a sample of cases and any relevant mitigating factors found: Johnson, W, 5a; Pennington, 5d; Biegenwald 1, 5d; Jackson, 5a; Henderson, 5a, 5d; Rose T., 5a for 1A; 5a, 5d for 1B; Bey 2, 5a for 2B; Williams J. The following cases showed no evidence of any impairment: Gerald, Savage, McDougald, DiFrisco, Harvey, Koedatich I, Purnell, Schiavo, Nieves.

91. In terms of premeditation, the cases can be classified as follows: less than a minute, Rose; a few minutes, Purnell,

(continued...)

character/prior record dimension, all of these defendants are aggravated or extremely aggravated vis-a-vis Marshall.

91. (...continued)
Manfredonia, Schiavo, Harvey, Bey 2, Pennington, Johnson W, Coyle, Gerald; several hours, Williams, Henderson, Erazo, Zola, Ramseur; days, Nieves, Booker, Biegenwald 1, Jackson; weeks, McDougald, Clausell; months, DiFrisco; unknown Koedatich 1, Lodato, Savage.

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Table 1. New Jersey Contract Principal Cases, With Hitmen Indicated: 1982-1991[1/]

Contract Principal	Hitman
1. a. **Marshall, Robert** (penalty trial/death) b. McKinnon, Billy Wayne (conspiracy plea/5 years)	Thompson, Larry (capital murder trial/acquittal)
2. a. **Engel, William** (penalty trial/life) b. **Engel, Herbert** (penalty trial/life)	McFadden, James (penalty trial, but more akin to plea, to murder/30 years)
3. a. Gerome, Pedro (fugitive) b. Trimino, Lazaro (conspiracy plea/10 years)	**Melendez, Miguel** (penalty trial/life)
4. Cveticanin, Zoran (foreign trial and conviction/ life)	**Rose, Michael** (penalty trial/life)
5. Bartlett, Roland (capital trial/noncapital murder/life)	**Clausell, James** IA. (penalty trial/death) IB. (plea to murder/life)
6. Franciotti, Anthony (no indictment)	DiFrisco, Anthony (penalty trial/death/vacated, pending)
7. Mancine, Robert (noncapital murder trial/agg. manslaughter 20 years)	Unknown
8. **Brand, Francis** (noncapital murder trial/life)	**Burroughs, Randy** (plea to murder/30 years)

1. Cases in boldface are in the proposed universe. Convictions and sentences are in parenthesis. This table does not include other coperpetrators who were not principals or hitmen. The term "principal" in this table includes middlemen, persons requested to procure the killing. Trimino, Engel, H., and McKinnon were middlemen.

Trimino and Franciotti were excluded from the universe because we cannot determine, due to a lack of prosecutorial cooperation, whether the outcomes of these cases were based on blameworthiness or evidentiary considerations. For a discussion of the evidence in DiFrisco, see State v. DiFrisco, 118 N.J. 223, 260-68 (1990).

Three other contract principal cases in table 1, Bartlett, Mancine, and McKinnon, have been excluded from further consideration in this report for evidentiary reasons. Bartlett was

Table 1. New Jersey Contract Principal Cases, With Hitman Indicated: 1982-1991

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1. (...continued)

tried for capital murder (his triggerman was sentenced to death), but acquitted on that charge, apparently because the jury did not believe there was enough proof that he knew that the hired assailants intended to kill the victim. In Mancine (whose triggerman is unknown), the prosecutor brought the case to trial on a non-capital-murder charge. Mancine was convicted off aggravated manslaughter, presumably because the jury gave some credibility to the defendant's claim that he hired the assailants only to rough up and frighten the victim, not to kill him. McKinnon was excluded because his plea was negotiated in exchange for the evidence he gave in Marshall's case, which was critical to Marshall's prosecution. Finally, Cveticanin is excluded because he appears to have fled the country before he could be apprehended by the New Jersey authorities.

Table 1 does not include the Hudson county case of John Turner and David Howard (T. 124-2-85). Turner's case raises an issue of whether 4e applies, since he was the triggerman and Howard, whom he paid, was only a driver. Turner did, however, procure the commission of the offense of murder (as an accomplice) for which Howard was convicted and received a 30-year sentence. Whether Howard had to be further involved in the fatal violence for 4e to apply is the question. We have also not considered him on evidentiary grounds because of his conviction merely of conspiracy, which strongly suggests an evidentiary problem.

Timothy White (Hudson County, I-2517-12-89) was also excluded from our analysis. He allegedly hired two people to kill his cousin, was charged with murder, and pled to manslaughter. There was conflicting evidence as to whether the assailant was actually paid or promised payment and whether defendant intended the victim to be killed.

The Essex County (I-0019795-88) case of Matthew Couser and Samuel Clark is also not in the universe. Clark was excluded because of his acquittal and Couser was excluded on evidentiary grounds because his statement that Clark hired him was rejected by Clark's jury and was probably concocted.

We have not considered further the possible contract killing in Passaic County (A91-010027, 28), involving codefendants Rodney Bell, Dalton Williams, and Horace Brimley; the codefendants gave conflicting statements on who did the stabbing, and also stated that the agreement was only to beat up the victim. The only direct evidence as to a contract killing was from a jail inmate.

The Burroughs and McFadden cases (hitmen for Brand and Engel respectively) raise an interesting issue since they testified against the principal codefendant. Our recommended standard for excluding such cases from a proportionality review requires that their testimony be necessary to the state's case against another defendant in a murder

Table 1. New Jersey Contract Principal Cases, With Hitman Indicated: 1982-1991

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1. (...continued)

case, and that the testimony be explicitly negotiated in return for a life sentence. In Burroughs, the defendant's death-eligibility was quite evident, since he earlier confessed to an arguably capital offense, and the prosecutor did not even seek death thereafter for the principal, Brand. However, Burroughs' testimony was not explicitly part of a plea bargain, and thus it would appear that his case reflected more a deathworthiness decision and, for this reason, we believe he should be considered in the proportionality review. McFadden, in contrast, underwent a penalty trial of sorts, although the outcome was predetermined to be "life" since it was clear he could withdraw his plea to capital murder if the outcome were a death sentence. His testimony was both necessary to the state's case and specifically bargained for in return for a nondeath sentence. Because this decision does not represent a deathworthiness decision, we have not considered it in this analysis.

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Table 2. Brief Narrative Summaries of Factually Comparable Comparison Cases

A. Contract Murder Principals

William Engel. William (D) told his younger brother Herbert (Co-D2) to hire Co-D1 to kill V, D's wife. Defendant hated and distrusted his former wife and was obsessed with her alleged though unfounded promiscuity. Jury verdict: murder 6/17/86. Penalty trial. One aggravating factor found: 4e. Four mitigating factors found: 5a, 5e, 5f, 5h. Life.

Herbert Engel. Herbert (Co-D2) was told by his older brother William (D) to hire Co-D1 to kill V, Co-D2's wife. William hated and distrusted his former wife and was obsessed with her alleged though unfounded promiscuity. Jury verdict: murder 6/17/86. Penalty trial. One aggravating factor found: 4e. Four mitigating factors found: 5a, 5e, 5f, 5h. Life.

Francis Brand. D wanted his brother killed, and reportedly pursued Co-D for at least 17 months to do it, offering increasing sums of money from $350-$2000. V was involved in drugs and abusive to his family. D was both angry with and afraid of V. Jury verdict: murder. No penalty trial. Aggravating factor: 4e. Mitigating factors: 5a, 5f, 5h.

B. Contract Murder Hitmen

Anthony DiFrisco. D was offered $3,000 by his principal, a person he met in jail, to kill V because V was going to inform about the principal's drug business. D shot V in the head in V's pizzeria. Murder plea 1/11/88. Bench Penalty trial. Two aggravating factors found: 4d, 4f. 1 Mitigating factor found: 5g. Death.

James Clausell, IA & IB. D and Co-D1 were paid $1,000 each to shoot V. They went to V's house, and when V answered the door, Co-D1 asked for Ed. V said "You have the wrong guy," and tried to close the door. D fired two shots through the door hitting V once in the chest. Jury verdict: murder 4/18/86. Penalty trial. Two aggravating factors found: 4b, 4d. Three mitigating factors found: 5c, 5f, 5h. Death. Death sentence vacated. Life sentence imposed on remand.

Miguel Melendez. Co-D, a middleman, paid D $5,000 to kill V on behalf of another person. D waited for V in V's apartment building. When V entered, to identify him, D asked about the car V was selling. D shot V 2 times in the head. Jury verdict: Capital Murder 6/3/87. Penalty trial. Aggravating factor: 4d. Mitigating factors: 5g, 5h. Hung jury on weighing of the factors. Life.

Michael Rose. D, age 31, was hired by Co-D1 to kill V for $1,000 so she would not inherit his father's money. D stabbed V 83 times, and bludgeoned V approximately 20 times. V was 8 months pregnant when she was killed. D claimed self-defense. Jury verdict: murder 12/21/84. Penalty trial. One

Table 2. Brief Narrative Summaries of Factually Comparable Comparison Cases (Cont)

aggravating factor found: 4c. Four mitigating factors found: 5e, 5f, 5g, 5h (possibly 5d). Hung jury on weighing the factors. Life.

Randy Burroughs. Co-D is a brother of V. V dealing drugs out of house and generally abusive. Co-D solicits D (his friend), to kill V. Co-D promises to pay D $2,000. Murder plea: 2/14/90. No penalty trial. Life. Aggravating factor: 4d. Mitigating factors: 5e, 5f, 5g, 5h.

C. Highly Premeditated Spouse Murders

Walter Williams. D (police officer) poisons wife with cyanide to avoid detection of bigamy and forgery. No priors. Jury verdict: Murder 5/9/86. Alleged that D murdered mother-in-law after wife's murder. Penalty trial. One aggravating factor found: 4f. Two mitigating factors found: 5f, 5h. Life.

John Dreher. D (43 yr., M) and V (39 yr., F) in troubled marriage. Plot by D and paramour (Co-D) to kill V. D drags V to basement, binds her hands, strangles V with cord, stabs V in throat. Paramour hits V over head with cobbler's tool 3x and stabs her 8x after she is dead or very nearly dead. D's motive was to free himself to live with his paramour and avoid the expense of a divorce. No priors. Jury verdict: murder 2/23/89. No penalty trial. Life. Aggravating factor: 4c. Mitigating factor: 5f, 5h.

Darrell Collins. D stabbed his wife (V2) multiple x and beat and suffocated his child (V1). D's apparent motive was to collect insurance benefits on the lives of his wife and son. Jury verdict: capital murder only for death of the child 3/2/90. Penalty trial. No aggravating factors found. Life.

D. Premeditated Robbery/Kidnap Murder Cases

John Martini. D and Co-D kidnapped V and held him for $25,000 ransom. After D received the ransom money, he shot V 3x in the back of the head. Jury verdict: murder 12/4/90. Penalty trial. Two aggravating factors found: 4f, 4g. Two mitigating factors found: 5c, 5h. Death.

David Mark Russo. D had made friends with 3 gas station employees (V, NDV1, NDV2). D decides to rob station and murder the employees. D makes V, NDV1, and NDV2 lie on floor. D shoots V and NDV1 in head and NDV2 in hand. Jury verdict: murder 5/13/87. Penalty trial. Two aggravating factors found: 4b, 4g. Five mitigating factors found: 5a, 5c, 5d, 5f, 5h. Life.

Terrence Scales. D and Co-D planned to commit robbery. They met V in a bar and lured V to apartment and all used cocaine. Co-D got a clothesline. D and Co-D beat V. Co-D and D strangled V. They took V's car and credit cards. Jury

Table 2. Brief Narrative Summaries of Factually Comparable Comparison Cases (Cont)

verdict: murder 10/31/86. Penalty trial. One aggravating factor found: 4f. Two mitigating factors found: 5d, 5h. Life.

Howard Thompson. D and Co-D met V in a bar, took him home with them so they could rob him. D and Co-D shared cocaine with V, then beat and strangled him. D and co-D took V's car and credit cards. Jury Verdict: Murder 11/20/85. No penalty trial. Life. Aggravating factor: 4g. Mitigating factors: 5a, 5c, 5d, 5h.

Vernon McIver. D, a male prostitute, went to the home of V, his client, intending to rob V. D spends the evening with V, then stabs V 1 time in the neck and took money and V's car. D charged with felony murder. Guilty plea 3/22/85. No penalty trial. Life. Aggravating factor: 4g. Mitigating factors: 5c, 5d, 5f, 5h.

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Table 3. Cases in Which Death-Sentencing Frequencies Among Similar Cases are .75 or Higher on One or More Measures of Death-Sentencing Frequency Among Similar Cases[1/]

I. Life-Sentenced Cases

 # 231 BOOKER GEORGE 1ST VICT; 2ND VIC. (2825). D goes on three day crime spree. First, D rapes his female neighbor and steals her car. Then D runs down a male pedestrian in the stolen car and steals his wallet. D then enters the home of two lesbian lovers, rapes, sodomizes, gags, strangles and beats one of the lovers; then, when the other comes home, stabs the other lover to death. The following day, D enters the home of an elderly woman and rapes her. Jury verdict: murder 7/1/87. Penalty trial. Three aggravating factors found for V1: 4a, 4c, 4g. Three aggravating factors found for V2: 4a, 4c, 4f. Two mitigating factors found for V1: 5a, 5h. Two mitigating factors found for V2: 5a, 5h. Life.

#4033 HENDERSON JAMES. Defendant (D) and Co-D picked up V and drove to a secluded area, where V was beaten, raped, strangled, stabbed and tortured with a stick, before being hoisted into a tree, twisted around it, hidden, left to die. Guilty Plea: Murder, 06/17/87, Life 30 yrs. No Parole. No Penalty Trial. Aggravating factor 4c, 4g. Mitigating factors 5a, 5d, 5h.

#1510 MANFREDONIA MICHAEL J. D asked V to go out w/him. V began yelling at D and made insulting remarks that angered D. D got a knife, pushed V to the ground and attacked her. V was sexually assaulted and stabbed 26x in the chest and back area. Bench verdict: murder 6/11/86. Penalty trial. Three aggravating factors found: 4c, 4f, 4g. Three mitigating factors found: 5a, 5c, 5f. Life.

#1793 NIEVES ALBERTO D. (27 yr., M) was jealous of V (M) because V liked D's g.f. On prior occasion, D threatened V with gun. D shot V at close range 1x in head, while V in car, next to V's son. Bullet went through head, missed son, lodged in seat between them. D had prior murder. Jury verdict: murder 5/25/88. Penalty trial. Two aggravating factors found: 4a, 4b. Two mitigating factors found: 5b, 5h. Life.

II. Death-Sentenced Cases

 # 160 BEY MARKO 2A, 2B (3000). D, an 18-year-old male, approached V to rob her. D took V to a shed and stole $8. Once V saw his face, D beat V severely, raped her, and strangled her. D also stole V's car. Jury verdict: murder 9/27/84. Penalty trial. Two aggravating factors found: 4c, 4g. No mitigating factors found. Death. Retrial of penalty phase. Two aggravating factors found: 4a, 4g. Two mitigating factors found: 5a, 5h. Death.

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1. See tables 19 and 20 of Final Report.

Table 3. Cases in Which Death-Sentencing Frequencies Among Similar Cases are .75 or Higher on One or More Measures of Death-Sentencing Frequency Among Similar Cases (Cont)

 # 200 BIEGENWALD RICHARD 1A, 1B (3002).[2/] D drove up to V, who was walking on the boardwalk, and offered her marijuana. V got into D's car. Later, D shot V four times in the head. Jury verdict: murder 12/8/83. Penalty trial. Two aggravating factors found: 4a, 4c. Two mitigating factors found: 5d, 5h. Death. Retrial of penalty phase. Two aggravating factors found: 4a, 4c. Two mitigating factors found: 5d, 5h. Death.

 # 443 CLAUSELL JAMES DOUGLAS 1A D and Co-D1 were paid $1,000 each to shoot V. They went to V's house, and when V answered the door, Co-D1 asked for [redacted]. V said "You have the wrong guy," and tried to close the door. D fired two shots through the door hitting V once in the chest. Jury verdict: murder 4/18/86. Penalty trial. Two aggravating factors found: 4b, 4d. Three mitigating factors found: 5c, 5f, 5h. Death.

 # 520 COYLE BRYAN PATRICK. D (age 28) lived next door to V (age 26). D had sex with V's wife. V went to D's house to retrieve wife after argument. Wife ran up street and V pursued her. D pursued V with a gun and shot V 3x, including once in the head. One prior murder. Jury verdict: murder 3/14/85. Penalty trial. Two aggravating factors found: 4a, 4c. One mitigating factor found: 5b. Death.

 # 119 DIFRISCO ANTHONY. D was offered $3,000 by a person he met in jail to kill V because V was going to inform about the person's drug business. D shot V in the head in V's pizzeria. Murder plea 1/88. Bench penalty trial. Two aggravating factors found: 4d, 4f. 1 mitigating factor found: 5g. Death. Reversed. Pending.

 # 728 ERAZO SAMUEL. D and V (husband and wife) had a party. Both drank heavily. D and V argued and fought. V tried to leave, D brought her back. They continued fighting. D stabbed V 8x. D had a prior murder. Jury verdict: murder 10/14/87. Penalty trial. Two aggravating factors found: 4a, 4c. Four mitigating factors found: 5a, 5b, 5d, 5e. Death. Vacated 8/8/91.

 # 868 GERALD WALTER MEIN. D and Co-Ds break into Vs' home to rob them. They hit V in face with a golf trophy, stomped on V's face, and threw a large television on his head. NV1 beaten badly, later dies. NV2 also beaten. D and Co-Ds leave with money and property. Jury verdict: murder 5/16/84. Penalty trial. Two aggravating factors found: 4c, 4g. Four mitigating factors found: 5a, 5d, 5f, 5h. Death.

#1031 HARVEY NATHANIEL. D burglarized V's apartment while V was asleep, and was stealing things when V awakened and confronted him. D hit V 15 times with a hammer-like object. Jury verdict: murder 10/10/86. Penalty trial. Three aggravating factors found: 4c, 4f, 4g. No mitigating factors found. Death.

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2. Both penalty trials resulted in a death sentence.

Table 3. Cases in Which Death-Sentencing Frequencies Among Similar Cases are .75 or Higher on One or More Measures of Death-Sentencing Frequency Among Similar Cases (Cont)

#1227 JOHNSON WALTER 2D VICT D had done some carpentry work for V1 and V2, a married couple. D went back to their house and asked to use the phone. V2 caught D stealing jewelry. D shot V1 in the head and beat V2 to death with a poker. Jury verdict: murder 8/2/85. Penalty trial. For both murders, three aggravating factors found: 4c, 4f, 4g. Two mitigating factors found for V2: 5a, 5h. Death. One mitigating factor found for V1: 5h. Life.

#1158 JACKSON KEVIN. D broke into V's apartment, raped her, then stabbed her 53 times. Murder plea 9/19/86. Penalty trial. Two aggravating factors found: 4c, 4g. Two mitigating factors found: 5a, 5e. Death.

#1337 KOEDATICH JAMES JEROLD 1A, 1B (3018).[3/] D kidnapped V from a shopping mall, sexually assaulted her, then stabbed her 2 times in the chest. Jury verdict: murder 10/26/84. Penalty trial. Two aggravating factors found: 4a, 4g. No mitigating factors found. Death. Re-trial, penalty phase. Four aggravating factors found: 4a, 4c, 4f, 4g. One mitigating factor found: 5h. Life.

#1453 LOLATO BENJAMIN. D had raked leaves for V in the past. D went to V's house and asked for a drink of water. V let D in. D sexually assaulted then bound V. D then stabbed and slashed V, torturing her before stabbing her in the heart. Murder plea 7/6/84. Penalty trial. Two aggravating factors found: 4c, 4g. Two mitigating factors found: 5a, 5d. Death

#1598 MC DOUGALD ANTHONY 1ST VIC., 2D VIC (2811). D had been dating the 13-year-old daughter of V2 (mother) and V1 (father). The Vs fought with D because they didn't want him to continue having sex with their daughter. One night, D and a 13-year-old Co-D kicked in the door of the Vs' home. He attacked V1, cutting his throat, stabbing him and hitting him with a baseball bat. D then hit V2 with a cinderblock and a baseball bat and cut her throat. Jury verdict: murder 3/27/86. Penalty trial. 1st Vic.: Three aggravating factors found: 4c, 4f, 4g. Two mitigating factors found: 5a, 5h. Death. 2nd Vic: Three aggravating factors found: 4c, 4f, 4g. Two mitigating factors found: 5a, 5h. Death.

#1914 PENNINGTON FRANK D and look-out Co-D (D's wife) robbed a tavern. When V, the owner of the tavern threw a beer glass at D, D shot V in the chest. D then aimed the gun at V's daughter and demanded money. V's daughter complied with D's demand. Jury verdict: murder 6/9/87. Penalty trial. Two aggravating factors found: 4a, 4g. One mitigating factor found: 5d. Death.

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3. The first penalty trial resulted in a death sentence (1377), while the second produced a life sentence (3018).

Table 3. Cases in Which Death-Sentencing Frequencies Among Similar Cases are .75 or Higher on One or More Measures of Death-Sentencing Frequency Among Similar Cases (Cont)

#2026 PURNELL BRAYNARD ANDRA. D attempts to buy drugs from V. D and V fight. D stabs V 15x, steals V's drugs. D has prior murder. Jury verdict: murder 2/20/90. Penalty trial. Two aggravating factors found: 4a, 4g. Two mitigating factors found: 5b, 5h. Death.

#2015 RAMSEUR THOMAS C. D (male) and V (female) were paramours. V had told D not to come around anymore. The next day, D stabbed V several times on the street in front of V's grandchildren. D has a prior murder. Jury verdict: murder 5/12/83. Penalty trial. Two aggravating factors found: 4a, 4c. Two mitigating factors found: 5a, 5d. Death.

#2172 ROSE TEDDY 1A, 1B (3003).[4] D was walking with his friends carrying a shotgun in a canvas bag. Police officer (V) stops to ask D what is in the bag. D panics and shoots V one time in stomach. Jury verdict: murder 6/4/85. Penalty trial. Two aggravating factors found: 4f, 4h. Two mitigating factors found: 5a, 5h. Death. Re-trial. Two aggravating factors found: 4f, 4h. Three mitigating factors found: 5a, 5d, 5h. Life.

#2228 SAVAGE ROY D lived with V and three other women. All were Muslim converts. V was the sister of one of the women, W1. W1 and V were D's paramours. D killed V and dismembered her body. When W1 asked what happened, D said "They were gonna kill you and they were gonna kill me." Jury verdict: murder 1/24/85. Penalty trial. One aggravating factor found: 4c. One mitigating factor found: 5d. Death.

#2241 SCHIAVO DOMINICK RICHARD. D, a drug manufacturer, fired a shotgun at a group of police officers who were executing a search warrant in D's home. V, a police officer, was shot and killed. Jury verdict: murder 5/26/87. Penalty trial. Three aggravating factors found: 4b, 4f, 4h. Three mitigating factors found: 5c, 5f, 5h. Death.

#2687 WILLIAMS JAMES EDWARD 1A. D was drinking beer with friends and he decided to go out and make some money. D and his brother, W1, went in to a nursing home. D sexually assaulted the receptionist then stabbed her 36 times. Jury verdict: murder 1/31/84. Penalty trial. Two aggravating factors found: 4c, 4g. One mitigating factor found: 5h. Death.

#2795 ZOLA JAMES EDWARD 1A. D had worked as a maintenance man in V's apartment building. V filed a complaint against D and, partly for this reason, D was fired. D broke into V's apartment, beat, scalded and then strangled her. Jury verdict: murder 5/31/84. Penalty trial. Two aggravating factors found: 4c, 4g. Two mitigating factors found: 5a, 5h. Death.

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4. The first trial resulted in a death sentence (2172), while the second resulted in a life sentence.

Table 4. Summary of Case-Specific Comparative Culpability Analysis: State v. Marshall[1]

A Level of Criminal Culpability vis-a-vis Marshall	B	C	D Other Cases	E Other Cases
	Contract Principals	Contract Hitmen	Premeditated Spousal Murder	Premeditated Murder in Robbery/ Kidnapping
1. Significantly higher		(Clausell IA (D) (Clausell IB		
2. Higher		DiFrisco (D)		Martini (D)
3. Comparable			(Williams (Dreher	Russo
4. Lower	W. Engel	Melendez		Scales
5. Significantly lower	H. Engel Brand	Rose Burroughs	Collins	Thompson McIver

1. The death-sentenced cases are in boldface, with a (D).