IN THE SUPREME COURT OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| DERRICK POWELL, | § | |
| | § | Nos. 266/270, 2011 |
| Defendant Below, | § | |
| Appellant, | § | Court Below: Superior Court of |
| | § | the State of Delaware, in and for |
| v. | § | Sussex County |
| | § | |
| STATE OF DELAWARE, | § | Cr. I.D. No. 0909000858 |
| | § | |
| Plaintiff Below, | § | |
| Appellee. | § | |

Submitted: July 5, 2012
Decided: August 9, 2012

Before **HOLLAND**, **BERGER**, **JACOBS** and **RIDGELY**, Justices, and **STRINE**, Chancellor,[1] constituting the Court *en Banc*.

Upon appeal from the Superior Court. **AFFIRMED**.

Bernard J. O'Donnell, Nicole M. Walker (argued) and Santino Ceccotti (argued), Esquires, Office of the Public Defender, Wilmington, Delaware; for Appellant.

Paul R. Wallace (argued), Abby L. Adams and Gregory E. Smith, Esquires, Department of Justice, Wilmington, Delaware; for Appellee.

**JACOBS**, Justice:

[1] Sitting by designation pursuant to Art. IV, § 12 of the Delaware Constitution and Supreme Court Rules 2 and 4.

Pending before this Court is Derrick Powell's direct appeal from a judgment of conviction and death sentence for the murder of Georgetown Police Officer, Chad Spicer. Powell claims that legal flaws in the police investigation of the homicide and in the jury trial fatally tainted his conviction, and that his death sentence is both unconstitutional and disproportionate to sentences handed down in similar past cases. We conclude Powell's claims lack merit and affirm.

## I. *FACTS*

On the evening of September 1, 2009, Derrick Powell, Luis Flores ("Flores") and Christopher Reeves ("Reeves") drove to a McDonald's restaurant in Georgetown, planning to rob a drug dealer.[2] An acquaintance of Reeves, Thomas Bundick ("Bundick"), had arranged for Darshon Adkins ("Adkins") to sell Reeves marijuana. Bundick did not know that Powell, Flores and Reeves were actually planning to take the drugs by force, specifically by robbing the dealer while he was sitting inside Flores' Chrysler Sebring.

Because Bundick knew only Reeves, Reeves was chosen to drive the Sebring. The front passenger seat was left empty for either Bundick or Adkins to occupy. Powell sat in the rear seat behind Reeves, and was carrying a gun. Flores sat in the rear seat behind the seat reserved for Bundick or Adkins. The three men

[2] A detailed recitation of relevant events preceding that meeting at McDonald's is set forth in the Superior Court's opinion, upon which our more abbreviated factual recitation is based. *State v. Powell*, 2011 WL 2041183, at *3-7 (Del. Super. May 20, 2011).

parked the car in the McDonald's parking lot and waited for Bundick and Adkins, who arrived separately.

The robbery plan went awry because Adkins refused to get into the Sebring. Bundick soon fled the scene. Adkins remained and walked towards the McDonald's, followed by Powell. Outside the restaurant, Powell pulled his gun and fired the weapon at Adkins, while Adkins was fleeing. Reeves, meanwhile, began to drive off in the Sebring, but at Flores' insistence, Reeves stopped so that Powell could get back into the car. Flores remained seated in the rear passenger's side seat. Powell returned to the same rear driver's side seat he had occupied before leaving the car in search of Adkins. After Powell re-entered the car, Flores and Powell began to argue about Powell's decision to confront and shoot at Adkins.

At 6:42 p.m., a call was made to 911 reporting the gunshot fired outside the McDonald's. The police responded promptly, but by then Powell, Flores and Reeves had driven away. As the three men drove past a school in Georgetown, Reeves told his companions that he wanted to stop the car. Powell ordered Reeves to continue driving. Reeves complied. By the time the three men reached The Circle in Georgetown, they were being followed by a police car which was attempting to pull them over. At that point, Powell threatened out loud that if

Reeves stopped the car, he (Powell) would shoot at the pursuing police, who (it later developed) were Officers Shawn Brittingham and Chad Spicer.

After turning on North King Street, Reeves decided to pull his car over—despite Powell's earlier threat. Reeves stopped abruptly and opened his driver's side door to leave the car. That, in turn, caused the police cruiser to stop quickly and strike Reeves' door as it opened. The two cars then came to a halt about two feet apart. Reeves jumped out of the Sebring, climbed over the hood of the police cruiser, and fled. As Officer Brittingham got out of the police car to chase Reeves, he heard a gunshot. Flores testified that he saw Powell fire his gun at the stopped police car. The bullet struck Officer Spicer and fatally wounded him. At 6:46 p.m., only four minutes after the first 911 call from McDonald's, Officer Brittingham, who was then pursuing Reeves, reported that he and Officer Spicer had been fired at.

After hearing the shot, witnesses reported seeing Powell get out of the Sebring holding a gun, and then flee. Flores also exited the car, but remained at the scene and expressed immediate shock, exclaiming "Why did you do that?" Flores then approached the police cruiser and tried to help Officer Spicer out of the car. Flores had to move the Sebring several feet so that the door on Officer Spicer's side could open fully. Officer Spicer, who by then was immobile, was

laid down on the sidewalk, and died of his gunshot wound shortly thereafter, despite efforts to revive him.

Less than 20 minutes later, Powell was found with the gun used to kill Officer Spicer, and was taken into custody. Powell had been inside a nearby house, having just persuaded the owner to allow him to use the bathroom. Flores was also detained by the police, but later was released. Reeves escaped, but eventually turned himself in.

At the crime scene, the police gathered samples from Flores' hands to be tested for gunshot residue. Later that evening, while Powell was in a holding cell, the police also gathered samples from Powell's hands for testing. The test results were positive for gunshot residue. While Powell was in custody, the police also gathered his clothing and later sent Powell's shirt, together with ballistic evidence from the crime scene, to a State Police firearms examiner. The examiner tested one section of Powell's shirt—the left shoulder area—for gunshot residue, to determine the angle or position from which the gun had been fired.[3] No gunshot residue was found on that portion of Powell's shirt. The police also collected DNA samples from the gun that was used in the shooting, and took DNA samples from Powell, Flores and Reeves. State officials found Powell's DNA to be consistent with the DNA found on the gun in "every comparison area." Those officials also

[3] The investigator testified that if the shot were fired "across [Powell's] shirt," then it could have left residue on Powell's shirt as the shot "bl[ew] past."

determined that "there was not enough consistency between Flores' [and] Reeves' DNA and [the DNA found] on the gun to draw any conclusions definitively linking the gun to Reeves or Flores."[4]

On November 23, 2009, Powell was indicted on 14 charges arising from Officer Spicer's killing and the attempted robbery of Adkins. Those charges included two counts of first-degree murder—one count for recklessly causing the death of a law enforcement officer during the lawful performance of his duties (Officer Spicer); and the other, for recklessly causing the death of Officer Spicer while fleeing from an attempted robbery. Reeves was charged with Resisting Arrest and Failure to Stop at a Police Signal. Flores was not charged with any offense.

## II. *PROCEDURAL BACKGROUND*

### *A. Pre-Trial Proceedings*

During the period between Powell's November 23, 2009 indictment and the beginning of trial in January 2011, Powell's counsel filed several pre-trial motions. On March 12, 2010, Powell moved to transfer the venue of the trial from Sussex County to either Kent or New Castle County. Powell claimed that the entire Sussex County jury pool had been irreparably prejudiced by the intense media

[4] A defense expert later testified that "she obtained one full [DNA] profile that was consistent with Flores from the trigger swab."

coverage of Officer Spicer's death and Powell's arrest. The Superior Court denied that motion on April 21, 2010, finding that neither the news coverage nor the other evidence presented was sufficient for the court to "presume" juror prejudice. The denial of that motion, however, was without prejudice to a later motion to transfer venue, if the jury selection process disclosed evidence that a venue transfer was warranted.

Powell's counsel also moved, before trial, to preclude the State from seeking the death penalty, claiming that the imposition of a death sentence in Powell's case would be constitutionally infirm. On September 3, 2010, the Superior Court denied that motion, relying primarily on *Tison v. Arizona*[5] and this Court's adoption of the *Tison* ruling in *Lawrie v. State*.[6] The trial court concluded that if "the State presents evidence at trial that Powell . . . recognized the substantial and unjustifiable risk that Officer Spicer would be killed if Powell pointed a gun at Officer Spicer and fired it[,] then the jury could find Powell acted with a reckless disregard [for] human life."[7]

[5] 481 U.S. 137 (1987).

[6] 643 A.2d 1336 (Del. 1994).

[7] *State v. Powell*, 2010 WL 5551767, at *3 (Del. Super. Sept. 3, 2010).

### *B. The Guilt Phase*

Beginning January 20, 2011, a jury trial on the "guilt phase" was held in the Sussex County Superior Court. At the conclusion of trial, but before the jury began its deliberations, Powell requested the trial judge to give two jury instructions at issue on this appeal: (1) a "lesser-included offense" instruction that would permit the jury to find that Powell was criminally negligent, as distinguished from reckless, in causing Officer Spicer's death; and (2) a "*Deberry* instruction,"[8] to the effect that the State's failure to collect certain "missing" evidence—specifically, Flores' shirt—warranted an inference that that missing evidence would have been exculpatory.

The Superior Court denied both requests. The court declined to give the "lesser-included" instruction because it found no rational basis in the evidence to support the defense's theory that the gun had discharged accidentally at the time the police cruiser struck the Sebring driver's side door. The court denied Powell's request for a *Deberry* instruction because it concluded that the police had no duty to collect and preserve Flores' shirt at the crime scene as potential evidence.

During their deliberations, the jurors sent the following note to the trial court: "Please clarify the difference between Count 1 [reckless murder of a police officer] and Count 3 [reckless murder in the course of fleeing a robbery]. Both

[8] *Deberry v. State*, 457 A.2d 744 (Del. 1983).

charges are murder in the first degree." The court responded by instructing the jury that:

> I think that where that may have created a puzzle or a question, there was the death of only one person, but they are charging two separate counts of murder. Some may ask: How can that be if you only have the death of one person? Under the law of the State of Delaware, a person can be convicted under different subsections of the murder statute and can be convicted of murder two times for one death . . . What distinguishes [Counts 1 and 3] is, Count 1, you caused the death recklessly of a law enforcement officer engaged in his official duties. Count 3 is recklessly causing the death of a person while committing or attempting to commit robbery or flight therefrom. So there are two separate theories. They are not one or the other. Count 3 does have a lesser of manslaughter which the other count does not have.[9]

The "guilt phase" of Powell's case ended with the jury returning guilty verdicts on 8 of the 12 counts presented.[10] The jury acquitted Powell of the first-degree murder charge that was predicated upon Officer Spicer being a law enforcement officer engaged in the lawful performance of his duties when Powell killed him. The jury returned a guilty verdict, however, on the charge that Powell recklessly caused Officer Spicer's death while fleeing the attempted robbery. That is, the jury found Powell guilty of one capital offense, but acquitted him of a

[9] The jury was instructed on a lesser-included manslaughter charge, in the event that it could not conclude beyond a reasonable doubt that Powell was fleeing from an attempted robbery when he recklessly killed Officer Spicer.

[10] Two of the 14 counts originally charged were dismissed and were not considered by the jury.

second capital offense, although both offenses arose from the killing of Officer Spicer.[11]

### *C. The Penalty Phase*

The "penalty phase" of the trial began on February 14, 2011. A hearing was held to present evidence to the jury on two issues: (1) whether the State had proved at least one statutory aggravating factor beyond a reasonable doubt; and (2) whether, by a preponderance of the evidence, the aggravating factors outweighed the mitigating factors.[12]

On the first issue, the jury found that the State had proved two statutory aggravators beyond a reasonable doubt, namely, that: (i) the murder was committed while Powell was fleeing from the attempted robbery,[13] and (ii) the murder was committed "for the purpose of avoiding or preventing an arrest." On the second issue the jury, by a seven-to-five vote, found that the aggravating

[11] Powell was also convicted of resisting arrest with force or violence by shooting at the officers with a handgun; first-degree attempted robbery; first-degree reckless endangering by shooting at the victim of the attempted-robbery; and four weapons charges related to each of those offenses (including the reckless murder charge for which he was convicted). Besides being acquitted of the other reckless murder charge, Powell was also acquitted of second-degree assault and two weapons charges related to those counts. *See State v. Powell*, 2011 WL 2041183, at *1 (Del. Super. May 20, 2011).

[12] 11 *Del. C.* § 4209(d)(1).

[13] Because of Powell's reckless murder and attempted robbery convictions, that statutory aggravator was established as a matter of law. *See infra* note 49 and accompanying text.

factors outweighed the mitigating factors, and recommended that Powell be sentenced to death.[14]

As required by statute, the Superior Court then independently evaluated all the relevant evidence. The court chose to give the jury's recommendation "great weight" and found that the aggravating circumstances outweighed the mitigating factors. The court also considered Powell's personal circumstances, and found that his "path toward a violent and deadly event was set in motion not by others but by the decisions of Powell," who "chose to be a career criminal." The court also found that, "twice before he shot Officer Spicer, [Powell] informed others he would take care of the police . . . establish[ing] that a policeman seemed destined to become a victim of some crime [of Powell's, and] Powell's propensity for violence." The Superior Court cited, among other factors, Powell's "criminal lifestyle, disregard of others and use of firearms" as "weigh[ing] heavily in aggravation." The Superior Court sentenced Powell to death.

This appeal followed.

## *III. POWELL'S "GUILT PHASE" CLAIMS OF ERROR*

On appeal Powell presents six claims of error: three addressed to the "guilt phase" of his trial, and three relevant to the "penalty phase." Powell's three guilt-

[14] The jury's vote on this issue was not binding on the trial court, which by statute has the ultimate authority to determine whether or not to impose the death penalty. 11 *Del. C.* § 4209(d)(1).

phase claims raise three questions: (1) did the Superior Court commit legal error by declining to grant a transfer of venue; (2) was there a rational evidentiary basis for a jury to find that Powell's gun accidentally discharged because of the two cars colliding—as distinguished from Powell having fired the gun intentionally; and (3) did the police have a duty to collect and preserve Flores' shirt at the scene in order to test it for gunshot residue?

For the reasons next discussed, our answer to these questions is no.

***A. Powell's Motion to Change Venue Was Properly Denied.***

Powell first claims that he was denied his Sixth Amendment right to a trial by an impartial jury, because the Superior Court erroneously denied his request for a transfer of venue out of Sussex County. This Court has long held that Superior Court Criminal Rule 21(a) is the provision that applies to criminal defendants in Delaware "to comply with the requirement of the Sixth Amendment . . . that in all criminal prosecutions, an accused has a right to trial by an impartial jury."[15] We review the Superior Court's denial of a motion to transfer venue under that Rule for abuse of discretion.[16]

Rule 21(a) provides as follows:

---

[15] *Parson v. State*, 275 A.2d 777, 785 (Del. 1971); *see also McBride v. State*, 477 A.2d 174, 185 (Del. 1984).

[16] *Sykes v. State*, 953 A.2d 261, 272 (Del. 2008) (citing *Riley v. State*, 496 A.2d 997, 1015 (Del. 1985)).

> (a) For prejudice in the county. The court upon motion of the defendant shall transfer the proceeding . . . to another county . . . if the court is satisfied that there exists in the county where the prosecution is pending a reasonable probability of so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial in that county.

The Superior Court denied Powell's motion to transfer venue, because it found that the news coverage and the other evidence Powell presented were insufficient for the court to "presume" juror prejudice. The court denied Powell's motion without foreclosing a later venue transfer if the *voir dire* process established that, in fact, the jury pool was prejudiced. In this capital case there was individual *voir dire* of the jurors. No evidence of juror prejudice was developed during the *voir dire* process. Ultimately, a jury of Sussex County residents was empaneled to decide Powell's case. As a consequence, the only venue-related claim before us is that the Superior Court reversibly erred by refusing to "presume" prejudice from the evidence Powell submitted in his initial venue transfer motion.[17]

The fact that a criminal case generates publicity does not, without more, require a change of venue to preserve a defendant's right to a fair trial.[18] Rather, a defendant must present "highly inflammatory or sensationalized pre-trial publicity" that on its face is "sufficient for the court to *presume* prejudice [of the potential

[17] *Riley*, 496 A.2d at 1014.

[18] *Id.*

jurors]."[19] The newspaper articles discussed in Powell's brief confirm the Superior Court's finding that the coverage reflected "media and public interest as to such matters [the facts related to Powell's case] at a level that could be reasonably expected," and amounted to a "historical reporting of events concerning which an informed citizenry would want to know."[20] Nor did the media coverage (the court found) "inject[] race into the case" or otherwise "sensationaliz[e] the coverage . . . or persecut[e]" Powell. The trial court's characterization of the news coverage—which is supported by the record—does not establish the requisite risk of prejudice that, as a matter of law, would require a change of venue.[21]

In addition to, and apart from, the press reports, Powell points to other evidence that, he claims, demonstrates that a venue transfer was constitutionally required. Specifically: (1) Officer Spicer's killing prompted a highly publicized memorial service attended by several prominent Delaware public officials, as well as the Vice President of the United States; (2) during Officer Spicer's also well-

[19] *Id.* (italics added).

[20] Although Powell argues that those articles are a mere sampling of the coverage, we are given no reason to doubt that the sampling accurately captures the tone of the entirety of the news coverage for purposes of determining whether that coverage was "highly inflammatory" or "sensationalized."

[21] Powell relies on two earlier Superior Court cases, *State v. Reed*, 1990 WL 161229 (Del. Super. Oct. 2, 1990), and *State v. Robinson*, Cr. I.D. 9411016190 (Del. Super. March 9, 1995), where a venue transfer was granted. The trial court rejected *Robinson* as having "no value," because the court's reasons for transferring the case were not set forth, and Powell did not establish that the trial judge's characterization was wrong. The Superior Court also properly distinguished *Reed*, which involved a defendant who was a well-known, controversial local political figure, whereas Powell was not.

attended funeral service, which was broadcast on local radio, a clergyman's eulogy referred to "a person . . . obviously guilty beyond a shadow of a doubt," and called for justice for "that guilty criminal;" (3) vitriolic messages were posted online by unidentified readers of news Web sites. And lastly, (4) a poll commissioned by Powell's counsel disclosed that (a) nearly all Sussex County residents knew something about the case, (b) between 69.9% and 78.9% who knew about the case believed Powell could get a fair trial, and (c) a nearly identical percentage believed that Powell was either probably or definitely guilty of killing Officer Spicer. From this evidence Powell argues that "it is at least reasonable to presume" that the jury pool was prejudiced.

Powell has established that Officer Spicer's killing and the facts surrounding it, including Powell's arrest for that crime, were well-publicized and a source of notable public concern in Sussex County and Delaware generally. But, publicity, even if continuous and prominent, will not alone establish a presumption of prejudice.[22] The test is whether that publicity was so "highly inflammatory or sensationalized," as to justify that presumption.[23]

The only "highly inflammatory" language to which Powell specifically points is attributable to a handful of anonymous Internet comments from persons

[22] *Sykes v. State*, 953 A.2d 261, 272 (Del. 2008) (citing *Riley*, 496 A.2d at 1014).

[23] *Id.*

who, as the Superior Court noted, "may or may not be Sussex Countians, or for that matter may or may not be Delawareans." Those online comments deserved the minimal weight the court gave them. Nor did the reverend's remarks, inferentially accusing Powell of "obvious[] guilt," in a eulogy at Officer Spicer's funeral service create a presumption of prejudice that would compel a venue change. Those remarks, although improper, constituted the only exception to what was generally (as the trial court found) a "historical reporting of events." Whatever adverse force those remarks may have had at the time of the funeral had dissipated by the time of trial, more than one year later.

Nor did the poll commissioned by Powell require a transfer of venue. That poll showed that a high percentage of those polled believed Powell was probably or definitely guilty of Officer Spicer's murder, reflecting the reported fact that Powell had been arrested for and charged with the crime. As the Superior Court observed, that fact must be balanced against the fact that the same number of polled persons also believed that, were they selected for the jury, they "could be fair and impartial." That evidence does not establish that "[t]he community and media . . . reaction [was] so hostile and so pervasive as to make it apparent that even the most careful *voir dire* process would be unable to assure an impartial jury."[24]

[24] *Flamer v. Delaware*, 68 F.3d 736, 754 (3d Cir. 1995) (citation omitted).

For those reasons, we conclude that the trial court did not abuse its discretion in denying Powell's motion to transfer venue.

### *B. The Trial Court Correctly Denied Powell's Request for Lesser-Included Negligence and Deberry Instructions.*

Powell next challenges the Superior Court's refusal to grant two requested jury instructions, each relating to an alternative defense theory that (Powell argues) should have been presented to and considered by the jury. We review *de novo* the Superior Court's denial of Powell's request for jury instructions.[25]

#### *1. Because Powell's "Accident" Theory Lacks a Rational Basis in the Record, No "Lesser-Included" Negligence Instruction Was Required.*

Powell first claims that the Superior Court reversibly erred in denying his request for a jury instruction for a "lesser-included" criminal negligence offense. He urges that the jury could have found that Powell was criminally negligent, as distinguished from reckless, when firing his weapon at Officer Spicer.

The Superior Court is legally required to give a "lesser-included" instruction if there exists a rational basis in the record to acquit the defendant of the charged offense and convict him of an alternative, lesser-included crime.[26] Powell claims that there was a rational evidentiary basis for the jury to conclude that he killed

[25] *McNair v. State*, 990 A.2d 398, 403 (Del. 2010); *Miller v. State*, 893 A.2d 937, 948 (Del. 2006).

[26] *Parker v. State*, 981 A.2d 551, 553 (Del. 2009); *see also Capano v. State*, 781 A.2d 556, 631 (Del. 2001) ("Allowing a conviction on the basis of speculation would be inconsistent with . . . our prior case law requiring a 'rational basis' standard.").

Officer Spicer negligently. Powell insists that the gun went off accidentally while resting on his lap, as a result of the police cruiser striking the Sebring's door. The evidentiary argument for this claim runs as follows: First, Flores testified that Powell was carrying the gun in his lap while seated in the car, and he (Flores) heard the automobile collision and the gunshot "all at the same time." Because "[i]t was like everything happened right there," the jury could conclude that the collision caused the gun to go off. Second, the forensic evidence showed that the gun was fired not more than 12 inches from the car window and that the bullet went through the window glass; therefore, the jury could infer that the gun had discharged accidentally. Neither argument, considered alone or together, provides a rational evidentiary basis for a jury to conclude that the gun went off accidentally.

Powell's argument rests on an out-of-context portion of Flores' testimony, where Flores stated that he "heard the sound and the shot 'all at the same time. It was like everything happened right there.'"[27] If considered in a vacuum, that testimony might be understood to mean the accident and gunshot occurred

[27] Powell also claims that Officer Brittingham testified "that the gunshot occurred simultaneously with the car crash and Reeves' exit from the Chrysler," based on a similar general description of the accident and the gunshot "seem[ing]" to occur "at the same time." But, Officer Brittingham clearly stated that Reeves "was in the process of jumping over the hood of [the police cruiser]" when the shot went off. Officer Brittingham also testified that Reeves jumped over the hood of the police cruiser immediately *after* that car struck the Sebring's door because, given the position of the stopped cars, that was Reeves' only way to escape.

simultaneously. Powell's "spin" of Flores' testimony, however, ignores the fact that Flores himself later clarified the precise sequence of events that he witnessed. Specifically, Flores testified that (i) the police car struck the Sebring; (ii) Reeves fled; and then (iii) Powell shot at the police.[28]

Even more problematic for Powell is the forensic evidence, which affirmatively disproves his "accidental gunshot" theory. That theory rests on Flores' testimony that the gun was sitting on Powell's lap—and was *not* pointed outside from behind the window—at the moment the car collision occurred. Even if that were true, it does not exclude the possibility that Powell later picked up the gun and intentionally fired it. Nor does this version of the events explain how the gun could have spontaneously fired so that the bullet penetrated the rear side window at the precise angle that enabled the bullet to strike Officer Spicer. Specifically, Powell cannot explain how, if the gun was positioned on his lap, the gun would have accidentally discharged, causing a bullet to penetrate the Sebring's

[28] The relevant portion of the transcript reads as follows:

> State: You said the police car hit your car and you heard that sound?
> Flores: Yeah.
> State: Was that before or after Christopher Reeves got out of your car?
> Flores: Before.
> . . .
> State: What happened after Christopher Reeves got out of the car?
> Flores: Derrick [Powell] shot out the window.

Transcript of Proceedings at R-149-50, Testimony of Luis Garza-Flores, *State v. Powell* (Del. Super. Feb. 2, 2011) (Cr. I.D. No. 0909000858).

rear side window and proceed directly into the adjacent police cruiser. Powell's theory is wholly speculative and unsupported by any evidence. What the evidence does show is that the gun was held up to the height of the rear driver's side window of the Sebring, and that when it discharged it was aimed at the police—an act that, at a minimum, could only have evidenced recklessness, not negligence.[29] The Superior Court properly concluded that there was no rational basis in the evidence to give the jury a lesser-included negligence instruction.

*2. Powell Was Not Entitled to a "Deberry" Instruction.*

Powell next claims that the police should have, but did not, collect Flores' shirt at the crime scene to test it for gunshot residue. As a consequence, Powell argues, he was entitled to a *Deberry* instruction that the jury could draw an inference that Flores' "missing" shirt would have been exculpatory evidence. Delaware case law prescribes an elaborate doctrinal framework for determining when a *Deberry* instruction is or is not warranted.[30] We need only address one

[29] *Zebroski v. State*, 715 A.2d 75, 82 (Del. 1998); *Lawrie v. State*, 643 A.2d 1336, 1341 (Del. 1994).

[30] That analytic framework requires the court to address the following questions:

> (1) Would the requested material, possessed by the State at the time of the defense request, have been subject to disclosure under Criminal Rule 16 or *Brady v. Maryland*?
>
> (2) If so, did the State have a duty to preserve the material?
>
> (3) If the State breached its duty to preserve the material, what consequences should "flow from a breach"?

element of that analysis to dispose of Powell's claim—whether the police had a duty to collect and preserve Flores' shirt.

In *Weber v. State*, this Court recently held that "[a]bsent any basis for the police to believe the shirt exculpated [the defendant], we fail to see what duty the police had to preserve [it]."[31] Although *Weber* involved materially different facts, it articulated a broadly applicable principle—for the police to have a duty to collect and preserve specific evidence, the police must have had a reason, at that time, to believe the evidence might be exculpatory. In that regard, we have also held that "the duty to *preserve* exculpatory evidence does *not* include a duty to *seek out* exculpatory evidence."[32]

At the scene where Officer Spicer was shot, the police learned that: (1) a gunshot had been fired through the Sebring's rear driver's side window; (2) Flores

---

The "consequences" analysis, in turn, calls for a separate three-part balancing test of the following factors:

> (1) The degree of negligence or bad faith involved;
>
> (2) The importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and
>
> (3) The sufficiency of the other evidence produced at trial to sustain the conviction.

*Johnson v. State*, 27 A.3d 541, 545-46 (Del. 2011).

[31] *Weber v. State*, 38 A.3d 271, 275 (Del. 2012).

[32] *Mason v. State*, 963 A.2d 139 (Del. 2009) (italics added).

remained at the scene, unarmed and distraught, and tried to help the mortally wounded officer; and (3) Powell immediately fled but was found nearby less than 20 minutes later with a gun that, it was later determined, was used to shoot Officer Spicer.

Under Delaware law, the police had a duty to conduct a reasonably thorough investigation.[33] The police did that: they exercised diligence by collecting a sample from Flores' hands for gunshot residue testing.[34] The police were *not* required, however, to seek out and exhaust every exculpatory possibility, especially given the considerable evidence that Powell had shot Officer Spicer. The State credibly argues that, because of the limited evidentiary value of gunshot residue testing[35] and because samples from Powell's and Flores' hands were collected, there was little reason to collect and test Flores' shirt. Nor does the record disclose any reason to infer that a positive test would have meaningfully

[33] This Court has repeatedly "declined to prescribe the exact procedures that are necessary for the various [state] law enforcement agencies . . . to follow, in order to fulfill their duties to preserve evidence," but we have exhorted agencies to develop rules and practices that "are broad enough to [capture] any material that could be favorable to a defendant." *Hammond v. State*, 569 A.2d 81, 88 (Del. 1989) (citation omitted). The "extent of the duty [of law enforcement] to gather and test evidence in any case will vary with the circumstances." *Id*. at 90, n. 21.

[34] In addition to the shooting of Officer Spicer, the police were also called to investigate the earlier shooting incident at McDonald's.

[35] As the State's expert witness testified, the presence of gunshot residue supported one of three possibilities: (1) the person discharged the gun; (2) the person was nearby the gun when it was shot; or (3) the person made contact with an area that contained gunshot residue. That witness also testified that gunshot residue is transferable.

altered the ability of the police (or ultimately a jury) to identify the shooter.[36] Because there was no reason to believe that Flores' shirt might be exculpatory evidence, the Superior Court properly held that the police had no duty to collect that shirt.

Even if (*arguendo*) the State had breached a duty to collect Flores' shirt as evidence, Powell still would not have been entitled to a *Deberry* instruction. A *Deberry* instruction is not required in cases where: (1) the defendant cannot show negligence or bad faith on the part of the police, and (2) the missing evidence "does not substantially prejudice the defendant's case."[37] Powell has not shown that these criteria are satisfied.

To show the police were negligent in failing to gather his shirt, Powell emphasizes a purported discrepancy in the evidence collection process: the police gathered samples from both Flores' and Powell's hands for gunshot residue testing, but collected only Powell's (not Flores') clothing. That argument, although accurate, overlooks the fact that Powell was arrested and imprisoned, while Flores was not. Powell attempts to minimize that fact by describing Flores as having been

[36] Flores testified that he had shot the gun about a week earlier while with Powell, and that he had handled it again the night before, when Powell was staying with him. Flores was seated next to Powell when the shot was fired, and tried to help Officer Spicer out of the police cruiser, after Spicer was shot. *See also supra* note 35.

[37] *McCrey v. State*, 941 A.2d 1019 (Del. 2008) (citing *Wainer v. State*, 869 A.2d 328 (2005)); *see also Turner v. State*, 894 A.2d 407 (Del. 2006).

"taken into custody," but that overstates what actually occurred: Flores was detained by the police, but was later released and was never charged.

Powell's argument also fails to address the overwhelming evidence, at the crime scene, that pointed to Powell having shot Officer Spicer, and the limited evidentiary value of testing Flores' shirt (samples already having been taken of Flores' hands). The possibility that Flores' shirt *also* contained gunshot residue did not carry the exculpatory significance that Powell now seeks to attribute to it. Powell has failed to show that the police were negligent in failing to collect and preserve Flores' shirt.

Nor can a speculative possibility of "missing evidence" fairly be said to have "substantially prejudice[d]" Powell's case. Powell claims that a positive result for gunshot residue on Flores' shirt would have constituted relevant, admissible exculpatory evidence. Even if that were so, Powell has not shown that that evidence, alone and without more, would have significantly altered the mix of the totality of evidence, let alone exonerated Powell, whose hands tested positive for gunshot residue.

For these reasons, we reject Powell's claim of error relating to the denied *Deberry* instruction.

## *IV. POWELL'S "PENALTY PHASE" CLAIMS OF ERROR*

We turn next to Powell's penalty phase claims of error, which generate three separate issues. The first is whether the imposition of the death penalty in Powell's case violates the Eighth Amendment. The second is whether the Superior Court mistakenly believed it was *required* to afford "great weight" to the jury's recommendation that Powell be sentenced to death. The third is whether this Court, in conducting its statutorily-mandated review of Powell's death sentence, must overturn that sentence as disproportionate to sentences imposed in similar cases.

We conclude that the answer to each of these questions is no.[38]

### *A. Imposing the Death Penalty Did Not Violate the Eighth Amendment.*

Powell's first "penalty phase" claim is that imposing the death sentence in his case violates the Eighth Amendment of the United States Constitution. We review questions of law, including constitutional claims, *de novo*.[39] Controlling United States Supreme Court precedent holds that a death sentence is constitutionally proper where it is shown that a defendant displayed "reckless indifference to human life."[40]

---

[38] We address Powell's "proportionality" claim *infra* in Part V, which focuses on the statutorily-mandated review of his sentence.

[39] *Cooke v. State*, 977 A.2d 803, 840 (Del. 2009).

[40] *See generally Tison v. Arizona*, 481 U.S. 137, 158 (1987).

Powell contends that standard was not satisfied, for two reasons. *First*, Powell claims that the evidence was sufficient to support a conclusion that *either* Powell *or* Flores killed Officer Spicer, thereby likening his case to *State v. Rodriguez*,[41] where the Superior Court imposed a life sentence on Eighth Amendment grounds.[42] The *Rodriguez* court found that the constitutional "culpability" requirement had not been satisfied, in part because a "reasonable inference could be drawn from the record evidence that *either* of the two robbers fired the fatal shots."[43] But that finding is what distinguishes *Rodriguez* from this case. Here, no such reasonable but opposing inferences can be drawn from the Superior Court record.[44] Powell's defense was that Flores—not Powell—shot Officer Spicer. The jury flatly rejected that defense, by convicting Powell of both reckless murder and resisting arrest with force by firing a gun at the police officers. Those verdicts, together with the Superior Court's independent penalty phase finding that Powell chose to point the gun at the police and pull the trigger, were amply supported by the evidence.

[41] 656 A.2d 262 (Del. Super. 1994).

[42] *Id*. at 280-81.

[43] *Id.* (italics added).

[44] The Superior Court in *Rodriguez* also stated that "[a]lthough it is not known for certain, it may be inferred that . . . [Rodriguez's] conviction on the felony murder charge was based upon his accomplice status." *Id*. at 265.

*Second*, Powell argues that even if he was guilty of reckless murder for shooting Officer Spicer, his conduct did not evince "reckless indifference to human life," because the killing was "sudden or impulsive." Powell's argument conflates "premeditation to kill" with "reckless indifference to human life." The former requires planning. The latter does not. Awareness of, and conscious disregard for, a substantial, unjustifiable risk will suffice to constitute recklessness.[45] Whether or not Powell specifically intended to kill Officer Spicer, the record evidence establishes that Powell evinced "reckless indifference" to the unjustified risk of death, by firing his weapon at the police to avoid apprehension.[46] Powell's constitutional claim therefore fails.

### *B. The Superior Court Did Not Err By Giving the Jury's Death Sentence Recommendation "Great Weight."*

Powell next claims that the Superior Court misapprehended the statutory allocation of authority as between the judge and jury under Delaware's death penalty sentencing law. The Delaware death penalty statute mandates that the trial

[45] *Cf.* 11 *Del. C.* § 231(e).

[46] *Lawrie v. State*, 643 A.2d 1336, 1348-49 (Del. 1994) (concluding, based on the "clear and supportable finding that [the defendant] acted recklessly," that "there is no constitutional obstacle to the imposition of the death penalty"). *See also Workman v. Mullin*, 342 F.3d 1100, 1111 (10th Cir. 2003) ("[W]hen a felony murderer has 'actually killed' his victim . . . the Eighth Amendment's culpability determination for imposition of the death penalty has then been satisfied.").

judge, not the jury, has the ultimate authority to impose a death sentence.[47] Powell argues that the Superior Court's decision to afford "great weight" to the jury's death sentence recommendation contravenes that statutory mandate. Powell's claim of error rests on the premise that the Superior Court believed itself *required* to afford the jury recommendation "great weight." That premise is unfounded.

The Superior Court did not articulate any such belief. The record establishes that the court, as was its prerogative,[48] *chose* to give the jury's recommendation "great weight." The court did *not* hold that it was *bound* to do so, and there is no basis in the record to infer otherwise. For that reason, this claim lacks merit as well.

## V. *STATUTORILY-MANDATED REVIEW OF POWELL'S DEATH SENTENCE*

Finally, we turn to that portion of our review of Powell's sentence that is legislatively mandated. 11 *Del. C.* § 4209(g) requires this Court to review Powell's death sentence to determine: (1) whether there was sufficient evidence to support the jury's finding, beyond a reasonable doubt, of the existence of applicable statutory aggravating circumstances; (2) whether the sentence was arbitrarily or capriciously imposed; and (3) whether the sentence is

[47] 11 *Del. C.* § 4209(d)(1).

[48] *Starling v. State*, 882 A.2d 747, 759 (Del. 2005) ("[A] sentencing judge may choose to" give "great weight" to the jury recommendation "on the particular facts before [that court]").

disproportionate to other penalties imposed in similar cases under Section 4209. We answer the first question in the affirmative, and the second and third in the negative.

***A. Statutory Aggravators***

Powell was convicted after a jury trial for recklessly causing Spicer's death during the course of fleeing from an attempted robbery. Powell's conviction of that first-degree murder charge, coupled with his conviction for the underlying attempted first-degree robbery charge, established one statutory aggravator as a matter of law and beyond a reasonable doubt—that the defendant committed the murder while fleeing from the commission of an attempted robbery.[49] The jury also unanimously found beyond a reasonable doubt that Powell committed the murder for the purpose of avoiding arrest—a second statutory aggravator. The Superior Court accepted that conclusion as well-founded in the evidence, as do we.

Reeves testified that Powell threatened that he (Powell) would shoot at the police if Reeves stopped the car while the police were in pursuit. That testimony, together with Flores' eyewitness testimony recounting the shooting, with the fact that Powell fled the scene with the gun, and with the forensic evidence establishing that the shot was fired through the rear driver's side window, all support the jury's

[49] *Sykes v. State*, 953 A.2d 261, 273 (Del. 2008) (citing *Dawson v. State*, 637 A.2d 57, 66 (Del. 1994)); *see also Flamer v. State*, 490 A.2d 104, 127 (Del. 1984).

finding that Powell shot at Officer Spicer to avoid arrest. That evidence also supports the jury's separate conviction of Powell for intentionally resisting arrest by firing his gun at the police (thereby establishing the second statutory aggravator). The evidence was sufficient to support the jury's finding that both statutory aggravating circumstances were proved beyond a reasonable doubt.

***B. Arbitrary or Capricious Sentence***

The second issue is whether the imposition of Powell's sentence was arbitrary or capricious.[50] The trial court's reasoned and detailed sentencing opinion dispels any such concern. Extensive mitigating evidence was presented to the trial court, which carefully weighed "all [the] relevant evidence"[51] before articulating its decision to impose the death penalty. The trial court's conclusion was neither arbitrary nor capricious.

***C. Disproportionality***

The final issue this Court is statutorily required to determine is whether Powell's death sentence was disproportionate to other sentences "recommended or

[50] 11 *Del. C.* § 4209 (g)(2)(a).

[51] 11 *Del. C.* § 4209 (d)(1).

imposed in similar cases arising under [Section 4209]."[52] To support his claim that his sentence is disproportionate, Powell seeks to limit the universe of "similar cases" to those instances where the jury (like the jury here) made a nonbinding recommendation to impose the death penalty by a 7-to-5 vote. Powell emphasizes that a death sentence has been imposed under Section 4209 by a 7-to-5 vote in only two cases—*Outten v. State*[53] and *Swan v. State*.[54] Powell further claims that his case is distinguishable because in *Outten* and *Swan* the killings bespoke a level of brutality or cruelty that was not involved here.

Powell's effort to limit the universe of past cases applicable to our proportionality review has no support in our case law or in the statutory text. The statute broadly requires a comparison of this case with "similar cases" arising under Section 4209. This Court has repeatedly defined the universe of cases, for purposes of judging the proportionality of a particular defendant's death sentence, as "those First Degree Murder cases which have included a penalty hearing and in which a sentence of either life or death has become final, without or following a

[52] 11 *Del. C.* § 4209 (g)(2)(a). References to Section 4209 are intended in this Opinion to be only to that version of the statute in existence since 1991. This Court has held that only cases decided under the post-1991 version of the statute are "directly applicable," and therefore are "more persuasive" than cases decided under the previous statutory scheme, which required a unanimous jury verdict to impose a death sentence. *Clark v. State*, 672 A.2d 1004, 1010 (Del. 1996); *Lawrie v. State*, 643 A.2d 1336, 1345-46 (Del. 1994).

[53] 650 A.2d 1291 (Del. 1994).

[54] 820 A.2d 342 (Del. 2003).

review by this Court."[55] Because capital cases involve many variables, "this Court looks to the *factual background* of relevant cases to determine the proportionality of the sentence imposed" in the specific case on appeal.[56]

This Court's proportionality review therefore starts by acknowledging a unique element of the factual background of this case. Powell is the first person to be sentenced under Delaware's current statutory scheme for the first-degree murder of an on-duty police officer.[57] That unique fact adds to the already inherent difficulty that a "definitive comparison of the 'universe' of cases is almost impossible."[58] For that reason this Court's function is not to search for proof that the defendant's death sentence is perfectly symmetrical to that imposed by another case within that universe. Rather, it is to determine whether a death sentence in a

[55] *Sykes v. State*, 953 A.2d 261, 273 (Del. 2008) (citation omitted). The current universe of cases relevant to our analysis here appears as Appendix A to this Opinion.

[56] *Clark v. State*, 672 A.2d 1004, 1010 (Del. 1996) (italics added) (citation omitted).

[57] About forty years ago, Marilyn Ann Dobrolenski was convicted of the first-degree murder of Delaware State Troopers Ronald Carey and David Yarrington. She was sentenced to death by a Pennsylvania court. Dobrolenski's death sentence was later vacated on constitutional grounds in light of the U.S. Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). *See Commonwealth v. Dobrolenski*, 334 A.2d 268 (Pa. 1975). Nearly fifty years ago, Thomas Winsett was convicted of first-degree murder by a Delaware court for the shooting of Delaware State Trooper Robert Paris, and received a life sentence according to the jury's prerogative. *See State v. Winsett*, 205 A.2d 510 (Del. Super. 1964).

[58] *Reyes v. State*, 819 A.2d 305, 318 (Del. 2003) (citing *Pennell v. State*, 604 A.2d 1368, 1376 (Del. 1992)).

particular case markedly diverges from the norm as established by our precedent.[59] Because this case involves an important circumstance of first impression, our scrutiny requires us to consider a broader legal context in assessing the proportionality of Powell's death sentence.

The Delaware General Assembly, when enacting our criminal code, embraced the widespread[60] policy determination that violent crimes committed against on-duty police officers are considered to be more serious offenses because of the identity of the victim. Accordingly, those offenses are eligible for harsher penalties than in cases where the victim is not an on-duty police officer.[61] The

[59] *Lawrie v. State*, 643 A.2d 1336, 1346 (Del. 1994) ("In order for a death sentence to be disproportionate, the circumstances of the crime, the character of the defendant, and the statutory scheme must be so similar to those of other cases where a life sentence without parole was imposed that it would be fundamentally unfair to sustain the death sentence.").

[60] *See, e.g.*, 18 U.S.C. § 3592(c)(14)(D) (making murder of a federal law enforcement officer an aggravating circumstance when determining whether to impose a death sentence); *U.S. v. Barrett*, 496 F.3d 1079 (10th Cir. 2007) (affirming death sentence of defendant convicted of killing a law enforcement officer); *State v. Jones*, 744 N.E.2d 1163 (Ohio 2011) (same); *Bailey v. State*, 998 So.2d 545 (Fla. 2008) (same); *State v. Reynolds*, 836 A.2d 224 (Conn. 2003) (same).

[61] *See, e.g.*, 11 *Del. C.* § 636(a)(4) (defining first-degree murder based on victim's status as police officer); *see also* 11 *Del. C.* § 4209(e)(1)(c) (same for statutory aggravating factor in capital sentencing); 11 *Del. C.* § 613(a)(5) (same for first-degree assault); 11 *Del. C.* §§ 612(a)(3), (6) (same for second-degree assault); *State v. Roberts*, 1968 WL 93266, at *1 (Del. Super. Sept. 16, 1968) (describing 1967 legislative amendment increasing the penalty for assaulting a police officer as reflecting that the legislature "must have considered it to be a serious offense").

Recently, the legislature amended 11 *Del. C.* § 636(a)(4) to include any "paramedic, emergency medical technician, fire marshal or fire police officer," so as to "ensur[e] that any person who recklessly kills one of Delaware's first responders is eligible to be punished to the fullest extent of the law." DE B. Summ., 2009 Reg. Sess. H.B. 204 (titled "Michelle Smith's Law").

United States Supreme Court has approved that principle. It has recognized that a "special interest" in protecting police officers justifies its application to death penalty sentencing.[62]

The principle of increased sentencing severity based on the identity of the victim has not been restricted to police officers;[63] it has also been applied in cases involving other categories of victims.[64] In the case of law enforcement victims, that sentencing principle protects officers' physical security, and condemns as particularly egregious crimes committed against public officials who responsible

---

[62] In *Roberts v. Louisiana*, 431 U.S. 633 (1977), the U.S. Supreme Court struck down as unconstitutional a statute that imposed the death penalty for the murder of a police officer without regard for the defendant's particularized mitigating circumstances. In so ruling, however, the Court also stated as follows:

> "To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. *There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property*."

*Id.* at 637 (italics added).

[63] *See, e.g.*, 11 *Del. C.* § 4209(e)(1)(d) (making murder victim's status as a judicial officer, prosecutor, state detective or investigator a statutory aggravating circumstance for death penalty sentencing); *id.* at (e)(1)(p)-(s) (same for persons who are pregnant, disabled, elderly or children).

[64] *Sykes v. State*, 953 A.2d 261, 273, n. 55 (Del. 2008) (describing cases involving "defenseless, helpless" victims) (citing *Flamer v. State*, 490 A.2d 104, 144 (Del. 1983) ("[W]e discern a pattern of death sentences . . . involving multiple unprovoked murders of helpless elderly victims")); *Lawrie v. State*, 643 A.2d 1336, 1350 (Del. 1994) (addressing "young, helpless, and frightened" child victims).

for upholding our laws and ensuring public safety.[65] Powell's repeated indications that he intended to use deadly force on law enforcement officers to avoid arrest, and his decision to shoot at the police, thereby causing Officer Spicer's death, properly implicates that principle.

The jury's mixed verdict—acquitting Powell of the separate substantive charge of the reckless murder of a police officer, but convicting him of the charge of the reckless murder of the same victim (Officer Spicer) in the course of fleeing from an attempted robbery—does not alter our disproportionality analysis. The jury convicted Powell of intentionally resisting arrest "by shooting at the officers with a handgun." That same jury later found beyond a reasonable doubt that Powell murdered Officer Spicer "for *the purpose* of avoiding" arrest. The statute requires a review of "all relevant evidence,"[66] which inescapably includes Officer Spicer's status as an on-duty police officer.

Powell does not dispute that Officer Spicer's status as a police officer was properly considered as an aggravating factor. Instead, Powell argues that his

[65] *See, e.g.*, *State v. Golphin*, 533 S.E.2d 168, 247 (N.C. 2000) ("The murder of a law enforcement officer engaged in the performance of his duties . . . is a direct attack upon the rule of law") (citation and emphasis omitted). *See also* Frederick M. Lawrence, *Commentary*, Symposium: Federal Bias Crime Law, 80 B.U. L. Rev. 1437, 1447 (2000) ("Many states . . . have special penalties for crimes against police officers. The justification for such laws includes the recognition that a crime against a public peace officer is a crime that affects the society well beyond the harm done to that individual.").

[66] 11 *Del. C.* § 4209 (d)(1); *see also* 11 *Del. C.* § 4209 (g)(2)(a) (requiring appellate review of "totality of evidence").

conduct does not justify grouping him with "the worst of the worst," because he did not "intentionally kill anyone," and did not kill Officer Spicer "in a manner that was gruesome, vicious, or brutal." Powell instead describes his shooting of Spicer as occurring "at the time of impact of an unexpected car accident following a police chase . . . [which] is not nearly as heinous" as other cases, such as *Outten*.

The short answer to this argument is that it attempts to resurrect, in the proportionality context, Powell's "accident" defense which, for reasons earlier discussed, has no basis in the evidentiary record. To reiterate: (1) Powell shot Spicer *after*—not "at the time of"—the "impact" with the cruiser, (2) Powell expressed his intention to shoot at the police immediately *before* the accident, (3) Powell previously alluded to his intention to fire at the police if they attempted to interfere with his criminal activity, and (4) the jury unanimously and explicitly found two statutory aggravating circumstances beyond a reasonable doubt: that Powell killed Officer Spicer "*for the purpose of avoiding . . . arrest*," and also while fleeing from the commission of the attempted robbery. In assessing the "heinous[ness]" of Powell's crime, the Superior Court properly emphasized that "a policeman seemed destined to become a victim of [Powell's crimes]." That court found that Powell brought that "destin[y]" to fruition by purposefully "firing his handgun at the police" to prevent being arrested for a violent attempted robbery that he chose to commit.

Powell also attempts to distinguish cases from other jurisdictions where defendants who killed police officers were sentenced to death, on the ground that those cases involved an intentional, not reckless, killing. That distinction does not help Powell. This Court has previously upheld the imposition of the death penalty for reckless murder under Section 4209, even though "[m]ost of the persons who have been sentenced to death in Delaware have committed 'an unprovoked, cold-blooded murder of a helpless person (or persons),'" and "[w]ith few exceptions, deliberation has preceded the murder."[67] In *Lawrie v. State*,[68] we upheld the death penalty imposed on a defendant convicted of reckless murder, following our consideration of the defendant's "intentions, expectations, and actions."[69] Because the defendant "intentionally set in motion lethal forces . . . which had the likely consequence of causing death to innocent victims, and he did so without concern for those consequences,"[70] we found that imposing the death penalty for a reprehensible reckless killing was not disproportionate to similar past cases.

---

[67] *Lawrie v. State*, 643 A.2d 1336, 1349, 1351 (Del. 1994) ("To rule otherwise would establish a precedent that only intentional murders are subject to the death penalty despite the egregious circumstances (as here) of recklessly-caused felony murder. Such a precedent would clearly be contrary to the law passed by the General Assembly.").

[68] *Id.*

[69] *Id.* at 1349 ("An analysis of [the defendant's] 'intentions, expectations, and actions' is appropriate to determine whether [his] level of culpability is sufficient to justify the death penalty under the proportionality analysis.").

[70] *Id.* at 1350-51.

Similarly, we conclude here that Powell's sentence is not disproportionate to the sentences imposed in similar cases arising under Section 4209.

## VI. *CONCLUSION*

For the foregoing reasons, the judgment of the Superior Court is affirmed.

## APPENDIX A*

| | |
|---|---|
| Name: | Robert Ashley |
| Criminal ID: | 9605003410 |
| County: | New Castle |
| Sentence: | Life imprisonment (following retrial and second penalty hearing) |
| Decision on appeal: | 2006 WL 797894 (Del. Mar. 27, 2006) |

| | |
|---|---|
| Name: | Meri-Ya C. Baker |
| Criminal ID: | 90011925DI |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 1993 WL 557951 (Del. Dec. 30, 1993) |

| | |
|---|---|
| Name: | Jermaine Barnett |
| Criminal ID: | 9506017682 |
| County: | New Castle |
| Sentence: | Life imprisonment (following second penalty hearing) |
| Decision on appeal: | 749 A.2d 1230 (Del. 2000) (remanding for new sentencing) |

| | |
|---|---|
| Name: | Hector S. Barrow |
| Criminal ID: | 9506017661 |
| County: | New Castle |
| Sentence: | Life imprisonment (following second penalty hearing) |
| Decision on appeal: | 749 A.2d 1230 (Del. 2000) (remanding for new sentencing) |

| | |
|---|---|
| Name: | Tyreek D. Brown |
| Criminal ID: | 9705011492 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 1999 WL 485174 (Del. Mar. 1, 1999) |

*The universe of cases prior to 1991 is set forth in appendices to prior opinions by this Court, and those appendices are incorporated herein by reference. *See, e.g.*, *Lawrie v. State*, Del. Supr., 643 A.2d 1336, 1352-56 (1994).

| | |
|---|---|
| Name: | Justin L. Burrell |
| Criminal ID: | 9805012046 |
| County: | Kent |
| Sentence: | Life imprisonment |
| Decision on appeal: | 766 A.2d 19 (Del. 2000) |

| | |
|---|---|
| Name: | Luis G. Cabrera |
| Criminal ID: | 9703012700 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 747 A.2d 543 (Del. 2000) |

| | |
|---|---|
| Name: | Luis G. Cabrera |
| Criminal ID: | 9904019326 |
| County: | New Castle |
| Sentence: | Death |
| Decision on appeal: | 840 A.2d 1256 (Del. 2004) |

| | |
|---|---|
| Name: | James B. Clark, Jr. |
| Criminal ID: | 9406003237 |
| County: | New Castle |
| Sentence: | Death (judge only) |
| Decision on appeal: | 672 A.2d 1004 (Del. 1996) |

| | |
|---|---|
| Name: | Charles M. Cohen |
| Criminal ID: | 90001577DI |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | No direct appeal taken |

| | |
|---|---|
| Name: | Donald Cole |
| Criminal ID: | 0309013358 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 922 A.2d 364 (Del. 2007) |

| | |
|---|---|
| Name: | James T. Crowe, Jr. |
| Criminal ID: | 9508008979 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 1998 WL 736389 (Del. Oct. 8, 1998) |

| | |
|---|---|
| Name: | David F. Dawson |
| Criminal ID: | 88K00413DI |
| County: | New Castle (venue changed) |
| Sentence: | Death |
| Decision on appeal: | 637 A.2d 57 (Del. 1994) |

| | |
|---|---|
| Name: | Byron S. Dickerson |
| Criminal ID: | 90011926DI |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 1993 WL 541913 (Del. Dec. 21, 1993) |

| | |
|---|---|
| Name: | Cornelius E. Ferguson |
| Criminal ID: | 91009926DI |
| County: | New Castle |
| Sentence: | Death |
| Decision on appeal: | 642 A.2d 772 (Del. 1994) |

| | |
|---|---|
| Name: | Donald Flagg |
| Criminal ID: | 9804019233 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | No direct appeal taken |

| | |
|---|---|
| Name: | Freddy Flonnory |
| Criminal ID: | 9707012190 |
| County: | New Castle |
| Sentence: | Life imprisonment (following second penalty hearing) |
| Decision on appeal: | 893 A.2d 507 (Del. 2006) |

| | |
|---|---|
| Name: | Sadiki J. Garden |
| Criminal ID: | 9912015068 |
| County: | New Castle |
| Sentence: | Life imprisonment ordered on appeal |
| Decision on appeal: | 844 A.2d 311 (Del. 2004) |

| | |
|---|---|
| Name: | Robert J. Garvey |
| Criminal ID: | 0107010230 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Appeal: | 873 A.2d 291 (Del. 2005) |

| | |
|---|---|
| Name: | Robert A. Gattis |
| Criminal ID: | 90004576DI |
| County: | New Castle |
| Sentence: | Death (death sentence commuted in 2012) |
| Decision on appeal: | 637 A.2d 808 (Del. 1994) |

| | |
|---|---|
| Name: | Arthur Govan |
| Criminal ID: | 92010166DI |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 1995 WL 48359 (Del. Jan. 30, 1995) |

| | |
|---|---|
| Name: | Tyrone N. Guy |
| Criminal ID: | 0107017041 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 913 A.2d 558 (Del. 2006) |

| | |
|---|---|
| Name: | Jason Anthony Hainey |
| Criminal ID: | 0306015699 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Appeal: | 878 A.2d 430 (Del. 2005) |

| | |
|---|---|
| Name: | Ronald T. Hankins |
| Criminal ID: | 0603026103A |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 976 A.2d 839 (Del. 2009) |

| | |
|---|---|
| Name: | Akbar Hassan-El |
| Criminal ID: | 010701704 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 911 A.2d 385 (Del. 2006) |

| | |
|---|---|
| Name: | Robert W. Jackson, III |
| Criminal ID: | 92003717 |
| County: | New Castle |
| Sentence: | Death |
| Decision on appeal: | 684 A.2d 745 (Del. 1996) |

| | |
|---|---|
| Name: | Larry Johnson |
| Criminal ID: | 0309013375 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 878 A.2d 422 (Del. 2005) |

| | |
|---|---|
| Name: | Shannon Johnson |
| Criminal ID: | 0609017045 |
| County: | New Castle |
| Sentence: | Death |
| Decision on appeal: | 983 A.2d 904 (Del. 2009) |

| | |
|---|---|
| Name: | David Jones |
| Criminal ID: | 9807016504 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 798 A.2d 1013 (Del. 2002) |

| | |
|---|---|
| Name: | Michael Jones |
| Criminal ID: | 9911016309 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 940 A.2d 1 (Del. 2007). |

| | |
|---|---|
| Name: | Michael Keyser |
| Criminal ID: | 0310021647 |
| County: | Kent |
| Sentence: | Life imprisonment |
| Decision on appeal: | 893 A.2d 956 (Del. 2006) |

| | |
|---|---|
| Name: | David J. Lawrie |
| Criminal ID: | 92K03617DI |
| County: | Kent |
| Sentence: | Death |
| Decision on appeal: | 643 A.2d 1336 (Del. 1994) |

| | |
|---|---|
| Name: | Thomas M. Magner |
| Criminal ID: | 9509007746 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 1998 WL 666726 (Del. July 29, 1998) |

| | |
|---|---|
| Name: | Michael R. Manley |
| Criminal ID: | 9511007022 |
| County: | New Castle |
| Sentence: | Death |
| Decision on appeal: | 918 A.2d 321 (Del. 2007) |

| | |
|---|---|
| Name: | Frank W. Moore, Jr. |
| Criminal ID: | 92S03679DI |
| County: | Sussex |
| Sentence: | Life imprisonment |
| Decision on appeal: | 1994 WL 202289 (Del. May 9, 1994) |

| | |
|---|---|
| Name: | Adam Norcross |
| Criminal ID: | 0002006278A |
| County: | Kent |
| Sentence: | Death |
| Decision on appeal: | 816 A.2d 757 (Del. 2003) |

| | |
|---|---|
| Name: | Juan Ortiz |
| Criminal ID: | 0104013797 |
| County: | Kent |
| Sentence: | Death |
| Decision on appeal: | 869 A.2d 285 (Del. 2005) |

| | |
|---|---|
| Name: | Darrel Page |
| Criminal ID: | 9911016961 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 934 A.2d 891 (Del. 2007) |

| | |
|---|---|
| Name: | James W. Perez |
| Criminal ID: | 93001659 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | No. 207, 1993, Moore, J. (Del. Feb. 3, 1994) |

| | |
|---|---|
| Name: | Gary W. Ploof |
| Criminal ID: | 0111003002 |
| County: | Kent |
| Sentence: | Death |
| Decision on appeal: | 856 A.2d 539 (Del. 2004) |

| | |
|---|---|
| Name: | James Allen Red Dog |
| Criminal ID: | 91001754DI |
| County: | New Castle |
| Sentence: | Death (judge only) |
| Decision on appeal: | 616 A.2d 298 (Del. 1992) |

| | |
|---|---|
| Name: | Luis Reyes |
| Criminal ID: | 9904019329 |
| County: | New Castle |
| Sentence: | Death |
| Decision on appeal: | 819 A.2d 305 (Del. 2003) |

| | |
|---|---|
| Name: | James W. Riley |
| Criminal ID: | 0004014504 |
| County: | Kent |
| Sentence: | Life imprisonment (following retrial) |
| Decision on appeal: | 2004 WL 2085525 (Del. Oct. 20, 2004) |

| | |
|---|---|
| Name: | Jose Rodriguez |
| Criminal ID: | 93001668DI |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 1994 WL 679731 (Del. Nov. 29, 1994) |

| | |
|---|---|
| Name: | Richard Roth, Jr. |
| Criminal ID: | 9901000330 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 788 A.2d 101 (Del. 2001) |

| | |
|---|---|
| Name: | Reginald N. Sanders |
| Criminal ID: | 91010161DI |
| County: | New Castle (venue changed) |
| Sentence: | Life imprisonment (following 1992 resentencing) |
| Decision on appeal: | 585 A.2d 117 (Del. 1990) (remanding for new sentencing) |

| | |
|---|---|
| Name: | Nelson W. Shelton |
| Criminal ID: | 92000788DI |
| County: | New Castle |
| Sentence: | Death |
| Decision on appeal: | 652 A.2d 1 (Del. 1995) |

| | |
|---|---|
| Name: | Donald J. Simmons |
| Criminal ID: | 92000305DI |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | No direct appeal taken |

| | |
|---|---|
| Name: | Chauncey Starling |
| Criminal ID: | 0104015882 |
| County: | New Castle |
| Sentence: | Death (on two counts) |
| Decision on appeal: | 903 A.2d 758 (Del. 2006) |

| | |
|---|---|
| Name: | Brian David Steckel |
| Criminal ID: | 9409002147 |
| County: | New Castle |
| Sentence: | Death |
| Decision on appeal: | 711 A.2d 5 (Del. 1998) |

| | |
|---|---|
| Name: | David D. Stevenson |
| Criminal ID: | 9511006992 |
| County: | New Castle |
| Sentence: | Death |
| Decision on appeal: | 918 A.2d 321 (Del. 2007) |

| | |
|---|---|
| Name: | Willie G. Sullivan |
| Criminal ID: | 92K00055 |
| County: | Kent |
| Sentence: | Death |
| Decision on appeal: | 636 A.2d 931 (Del. 1994) |

| | |
|---|---|
| Name: | Ralph Swan |
| Criminal ID: | 0002004767A |
| County: | Kent |
| Sentence: | Death |
| Decision on appeal: | 820 A.2d 342 (Del. 2003) |

| | |
|---|---|
| Name: | Ambrose L. Sykes |
| Criminal ID: | 04011008300 |
| County: | Kent |
| Sentence: | Death |
| Decision on appeal: | 953 A.2d 261 (Del. 2008) |

| | |
|---|---|
| Name: | Antonio L. Taylor |
| Criminal ID: | 9404018838 |
| County: | Kent |
| Sentence: | Life imprisonment |
| Decision on appeal: | 685 A.2d 349 (Del. 1996) |

| | |
|---|---|
| Name: | Emmett Taylor, III |
| Criminal ID: | 0708020057 |
| County: | Sussex |
| Sentence: | Death |
| Decision on appeal: | 28 A.3d 399 (Del. 2011) |

| | |
|---|---|
| Name: | Milton Taylor |
| Criminal ID: | 0003016874 |
| County: | New Castle |
| Sentence: | Death |
| Decision on appeal: | 822 A.2d 1052 (Del. 2003) |

| | |
|---|---|
| Name: | Desmond Torrence |
| Criminal ID: | 0205014445 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 2005 WL 2923501 (Del. Nov. 2, 2005) |

| | |
|---|---|
| Name: | Charles H. Trowbridge |
| Criminal ID: | 91K03044DI |
| County: | Kent |
| Sentence: | Life imprisonment |
| Decision on appeal: | 1996 WL 145788 (Del. Mar. 4, 1996) |

| | |
|---|---|
| Name: | James W. Virdin |
| Criminal ID: | 9809015552 |
| County: | Kent |
| Sentence: | Life imprisonment |
| Decision on appeal: | 780 A.2d 1024 (Del. 2001) |

| | |
|---|---|
| Name: | John E. Watson |
| Criminal ID: | 91008490DI |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | No direct appeal taken |

| | |
|---|---|
| Name: | Dwayne Weeks |
| Criminal ID: | 92010167 |
| County: | New Castle |
| Sentence: | Death |
| Decision on appeal: | 653 A.2d 266 (Del. 1995) |

| | |
|---|---|
| Name: | Joseph Williams |
| Criminal ID: | 9809018249 |
| County: | New Castle |
| Sentence: | Life imprisonment |
| Decision on appeal: | 2003 WL 1740469 (Del. Apr. 1, 2003) |

| | |
|---|---|
| Name: | Roy R. Williamson |
| Criminal ID: | 93S02210DI |
| County: | Sussex |
| Sentence: | Life imprisonment |
| Decision on appeal: | 669 A.2d 95 (Del. 1995) |

| | |
|---|---|
| Name: | Craig A. Zebroski |
| Criminal ID: | 9604017809 |
| County: | New Castle |
| Sentence: | Death |
| Decision on appeal: | 715 A.2d 75 (Del. 1998) |