IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	
	)	Case I.D. - 9911016309
	)	
MICHAEL JONES,	)	
Defendant.	)	
	)	

Submitted: September 8, 2003
Decided: September 26, 2003

UPON DEFENDANT'S MOTION
TO PROHIBIT APPLICATION OF HOUSE BILL NO. 287 AND
DISPENSE WITH DEATH QUALIFICATION OF JURY
DENIED.

UPON DEFENDANT'S MOTION FOR CHANGE OF VENUE
DENIED.

ORDER

Stephen M. Walther, Esquire and Valerie Farnan, Esquire, Deputy Attorney General, New Castle County, State of Delaware.

Kester I.H. Crosse, Esquire and Raymond D. Armstrong, Esquire, Assistant Public Defender, Attorneys for Defendant.

ABLEMAN, JUDGE

Michael Jones, a/k/a Laquan Robinson ("Defendant"), has filed a pretrial Motion to Prohibit Application of House Bill No. 287[1] and Dispense With Death Qualification of Jury and a Motion for Change of Venue pursuant to Rule 21(a) of the Criminal Rules of the Superior Court. Trial in this case is scheduled to commence the third week of November 2003. This is the Court's decision on both motions.

Statement of Facts

Defendant was arrested on or about October 29, 2001 in connection with the murders of Maneeka Plant Davis and Cedric Reinford and the attempted murder of Muhammed Reinford. The arrest followed an indictment on January 29, 2001 by the Grand Jury of New Castle County. Wherein, Defendant and his co-defendant, Darrel Page, were charged with two counts of Murder First Degree in violation of Title 11, § 636(a)(1) of the Delaware Code; one count of Murder First Degree in violation of Title 11, § 636(a)(2) of the Delaware Code; one count of Attempted Murder First Degree in violation of Title 11, § 531 of the Delaware Code; six

[1] House Bill No. 287 amended 11 *Del. C*. § 4209 accordingly:
Section 1. Amend Section 4209(d)(1) of Title 11 of the Delaware Code by inserting between the fourth and fifth sentences of said paragraph the following: "The jury's recommendation concerning whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist shall be given such consideration as deemed appropriate by the Court in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the Court. The jury's recommendation shall not be binding upon the Court."
Section 2. Amend Section 4209(d)(4) of Title 11 of the Delaware Code by striking said paragraph in its entirety, and by substituting in lieu thereof the following: "(4) After the Court determines the sentence to be imposed, it shall set forth in writing the findings upon which its sentence is based. If a jury is impaneled, and if the Court's decision as to whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist differs from the jury's recommended finding, the Court shall also state with specificity the reasons for its decision not to accept the jury's recommendation." H.B. 287, 142nd Gen. Assem. (Del. 2003).

counts of Possession of a Firearm During the Commission of a Felony in violation of Title 11, § 1447A of the Delaware Code; one count of Possession of a Firearm By a Person Prohibited in violation of Title 11, § 1448 of the Delaware Code; one count of Conspiracy First Degree in violation of Title 11, § 513(1) of the Delaware Code; two counts of Conspiracy Second Degree in violation of Title 11, § 512 of the Delaware Code; one count of Robbery First Degree in violation of Title 11, § 832 of the Delaware Code; one count of Arson Second Degree in violation of Title 11, § 802 of the Delaware Code; and one count of Endangering the Welfare of a Child in violation of Title 11, § 1102 of the Delaware Code.

Discussion

I. Applicability of House Bill No. 287

On August 1, 2003, the Defendant filed a Motion to Prohibit Application of H.B. 287 and Dispense With Death Qualification of Jury, or in the alternative, to certify questions of law pursuant to Rule 41 of the Rules of the Delaware Supreme Court concerning the construction and constitutionality of H.B. 287. The foregoing legislation was signed into law by the Governor on or about July 13, 2003,

amending 11 *Del. C.* § 4209(d)(1) and (4).[2] Defendant contends that application of the provisions of H.B. 287 would violate the *Ex Post Facto* Clause of the United States Constitution because Defendant's alleged crime occurred prior to the effective date of this new law.

Article I, Section 10, of the United States Constitution provides that, "No State shall . . . pass any . . . ex post fact Law . . ."[3] This exclusion of *ex post facto* laws applies only to retroactive penal statutes that disadvantage a defendant.[4] "It is equally well established that, '[e]ven though it may work to the disadvantage of

[2] 11 *Del. C.* § 4209. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder.
§ 4209 provides, in part:
(c) *Procedure at punishment hearing.* (3)a. Upon the conclusion of the evidence and arguments the judge shall give the jury appropriate instructions and the jury shall retire to deliberate and report to the Court an answer to the following questions: 1. Whether the evidence shows beyond a reasonable doubt the existence of at least 1 aggravating circumstances as enumerated in subsection (e) of this section; and 2. Whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist. b.1. The jury shall report to the Court its findings in the question of the existence of statutory aggravating circumstances as enumerated in subsection (e) of this section. In order to find the existence of a statutory aggravating circumstance as enumerated in subsection (e) of this section beyond a reasonable doubt, the jury must be unanimous as to the existence of that statutory aggravating circumstance.... 2. The jury shall report to the Court by the number of the affirmative and negative votes its recommendation on the question as to whether, … the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.
(d) *Determination of sentence.* – (1) . . . A sentence of death shall not be imposed unless the jury, if a jury is impaneled, first finds unanimously and beyond a reasonable doubt the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section…. If a jury has been impaneled and if the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section has been found beyond a reasonable doubt by the jury, the Court, after considering the findings and recommendation of the jury and without hearing or reviewing any additional evidence, shall impose a sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist. DEL. C. ANN. tit. 11 § 4209 (2001 & Supp. 2002).
[3] U.S. CONST. art. I, § 10.
[4] *Collins v. Youngblood*, 497 U.S. 37, 41 (1990).

a defendant, a procedural change [in the law] is not *ex post facto*.'"[5] Further, the United States Supreme Court has held that only substantive, not procedural, changes in a penal statute would be *ex post facto*.[6] In addition, the party challenging a law as *ex post facto* bears the burden of demonstrating that the new law represents a substantive change.[7] In order to meet this burden, the challenging party must establish that: 1) the new law is retrospective – in other words, it applies to events occurring before its enactment; and 2) that the new law disadvantages the defendant.[8] As the Court will subsequently explain, Defendant's failure to satisfy this burden, coupled with the legislative history and the related case law, which have evolved subsequent to the enactment of Delaware's death penalty statute, clearly suggest that this latest challenge to Section 4209 is unwarranted and constitutionally invalid.

Defendant claims that it would be unconstitutional for the State to apply the new law to a capital crime occurring before the effective date of the amendment. He contends that H.B. 287 symbolizes a substantive change to Section 4209, thereby disadvantageously and retroactively affecting his rights.

A historical look at 11 *Del. C.* § 4209 reveals that Delaware's death penalty

[5] *State v. Cohen*, 604 A.2d 846, 853 (Del. 1992) (quoting *Dobbert v. Florida*, 432 U.S. 282, 293 (1977)); *see also Hopt v. Utah*, 110 U.S. 574, 590 (1884) (holding that a change is procedural if it does "[n]ot increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.").
[6] *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).
[7] *California Dept. of Corrections v. Morales*, 514 U.S. 499, 510 (1995).
[8] *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

statute applicable to first-degree murder convictions has undergone three significant transformations since its enactment in 1977. As originally enacted, the jury possessed the authority to sentence the defendant. A death sentence could be imposed only if the jury unanimously: 1) found at least one statutory aggravating circumstance beyond a reasonable doubt; and 2) recommended death after weighing the aggravating and mitigating evidence presented.[9]

In October 1991, the death penalty statute was revised to allow a sentence of death to be imposed only under the bifurcated system prescribed by 11 *Del. C.* § 4209. Under the revised statute, it was for the jury to determine during the penalty phase: 1) whether the evidence shows beyond a reasonable doubt the existence of at least one statutory aggravating circumstance; and 2) whether, by a preponderance of the evidence, the aggravating circumstances outweigh any mitigating circumstances found to exist.[10]

In 1992, the Delaware Supreme Court responded to questions of constitutionality raised by the newly revised Section 4209 in *State v. Cohen*.[11] Several defendants, awaiting trial for first-degree murder in which the State intended to seek the death penalty, challenged the construction and constitutionality of the amended 11 *Del. C.* § 4209. This Court presented certified

[9] *Flamer v. Delaware*, 68 F.3d 736, 741 (3d Cir. 1995) (en banc).
[10] DEL. C. ANN. tit. 11 § 4209(c)(3) (1991).
[11] *State v. Cohen*, 604 A.2d 846 (Del. 1992).

questions of law to the Delaware Supreme Court for a determination of the validity of construction and constitutionality of the 1991 amendments.

In *Cohen*, the Court rejected all the defendants' challenges, including the alleged *ex post facto* application of the revised death penalty statute, holding that Section 4209 mandated "the judge to make the final determination as to whether a person convicted of first degree murder should be sentenced to death or life imprisonment."[12] In support of its ruling, the Delaware Supreme Court stated that, under the newly revised statute, "[t]he jury now functions only in an advisory capacity."[13] Also, in *Cohen*, the Court noted that under the amended statute, the penalty phase processes established by the amendment were applicable to defendants tried or sentenced after the effective date of the act.[14]

The Delaware Supreme Court based its holding in *Cohen* on its interpretation of similarly situated issues of construction, constitutionality, and *ex post facto* laws as set forth in the analogous case of *Dobbert v. Florida*.[15] In *Cohen*, the Court held that:

> Given the teaching in *Dobbert*, it is clear that the changes effected by Delaware's new death penalty statute are procedural. The revisions in the new law, like those in *Dobbert*, merely alter the method of determining imposition of

[12] 68 Del. Laws, ch. 189 (1991), Synopsis. *See State v. Cohen*, 604 A.2d 846, 856 (Del. 1992).
[13] *Cohen*, 604 A.2d at 856.
[14] *Id*. at 852.
[15] *Dobbert v. Florida*, 432 U.S. 282 (1977).

> the death penalty. The quantum of punishment for the crime of first-degree murder in Delaware remains unchanged.[16]

In conjunction with its analysis and adoption of the teachings in *Dobbert*, the Court also relied upon a then-recent decision by the United State Supreme Court in *Collins v. Youngblood* [17] for additional confirmation in support of the constitutionality of the amendments to Section 4209. In *Collins*, the Court rejected an *ex post facto* claim, thereby overruling the long-standing cases of *Kring* [18] and *Thompson* [19] and establishing that procedural statutes which merely act to the disadvantage of those affected by their enactment, are not prohibited as *ex post facto*.[20]

In light of *Dobbert*, and drawing upon *Collins*, the Delaware Supreme Court decided that the newly revised 1991 death penalty statute "[d]oes not involve 'a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause.'"[21] The Court embraced the teachings of *Cohen* and rejected the defendants' *ex post facto* claims, holding that "[t]he revised statute 'simply altered the methods employed in determining whether the death penalty statute was to be imposed; …'"[22]

---

[16] *Cohen*, 604 A.2d at 853.
[17] *Collins v. Youngblood*, 497 U.S. 37 (1990).
[18] *Kring v. Missouri*, 107 U.S. 221 (1883).
[19] *Thompson v. Utah*, 170 U.S. 343 (1898).
[20] *Cohen*, 604 A.2d at 854.
[21] *Id*. at 854 (citing *Collins*, 497 U.S. at 51).
[22] *Id*. at 853 (quoting *Dobbert*, 432 U.S. at 293-94).

A year later, in *Wright*, the Delaware Supreme Court espoused its further support of the bifurcated procedures prescribed by the 1991 death penalty statute as substantiated in *Cohen*, noting that "[t]he Superior Court bears the ultimate responsibility for imposition of the death sentence while the jury acts in an advisory capacity 'as the conscience of the community.'"[23]

In 2002, Section 4209 was further amended [24] with the introduction of S. B. 449 [25] in response to the recent Supreme Court decision in *Ring*.[26] S. B. 449 was successful in amending the death penalty statute by revitalizing the jury's role in the narrowing segment of the penalty phase from one that was advisory under the 1991 version of Section 4209 into one that now was determinative as to the existence of any statutory aggravating circumstances.[27] Furthermore, the newly amended version of Section 4209 again was applicable to "[a]ll defendants tried, re-tried, sentenced or re-sentenced after its effective date."[28]

Once again, with the advent of the 2002 amendments to Section 4209, the construction and constitutionality of the statute was challenged. In response to the

[23] *Wright v. State*, 633 A.2d 329, 335 (Del. 1993) (quoting *Cohen*, 604 A.2d at 856).
[24] 73 Del. Laws, ch. 423 (2002).
[25] S.B. 449, 141st Gen. Assem. (Del. 2002).
[26] *Ring v. Arizona*, 536 U.S. 584 (2002) (holding that capital defendants are entitled to a jury determination of any fact upon which a legislature conditions an increase in their maximum punishment). *Id*. at 589.
[27] S.B. 449, 141st Gen. Assem. (Del. 2002), Synopsis ("This Act will bar the Court from imposing a death sentence unless a jury (unless waived by the parties) first determines unanimously and beyond a reasonable doubt that at least one statutory aggravating circumstance exists…. The Court will continue to be responsible for ultimately determining the sentence to be imposed, after weighing all relevant evidence presented in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offenses and the character and propensities of the offender.").
[28] S.B. 449, § 6, 141st Gen. Assem. (Del. 2002).

plight of Miles Brice and Leon Caulk, two first-degree murder defendants facing pending prosecutions, and subject to the State's desire to seek the death penalty, this Court certified questions of law pertaining to the amended statute to the Delaware Supreme Court. The Supreme Court accepted four of the certified questions of law as handed down in its *Brice v. State* decision.[29]

Relying on the procedural *ex post facto* doctrines enumerated in *Cohen* and *Dobbert*, the Court in *Brice* held that the amendments contained in S. B. 449, 73 Del. Laws, ch. 423, to Delaware's death penalty statute were procedural in nature and, therefore, not in violation of the *Ex Post Facto* Clause of the United States Constitution.[30] Specifically, the newly revised 2002 death penalty statute simply required that the jury find the existence of at least one aggravating circumstance beyond a reasonable doubt and that this finding was binding on the judge. "In other words, rather than requiring an advisory verdict followed by a separate finding by the judge, the 2002 statute alters the procedure of Section 4209 and makes a jury's determination as to the existence or absence of aggravating factors binding upon the trial judge."[31]

The Court further stipulated that "[t]o the extent that the jury's role at the narrowing phase has become one of a mandatory finding of an aggravating factor

[29] *Brice v. State*, 815 A.2d 314 (Del. 2003).
[30] *Brice*, 815 A.2d at 321.
[31] *Id*.

to permit the weighing process to occur, it seems the 2002 Statute actually benefits defendants by requiring a binding and unanimous verdict as to the existence of an aggravating factor."[32] Finally, in comparing the 1991 version of Section 4209 to the 2002 amended version, the Court noted that "[u]nder the 1991 Statute, Delaware juries had an advisory role in the penalty phase and merely made recommendations to the judge … While the judge would expressly inform the jury that its recommendations would be accorded 'great weight,' their role was nevertheless advisory." [33]

Within days of handing down its decision in *Brice*, the Delaware Supreme Court further modified its interpretation of Section 4209 in its *Garden* decision. [34] Specifically, it redefined the significance of the independent "weighing process" as envisioned under Section 4209(d).

The defendant in *Garden* was convicted by a jury of two counts of first-degree murder. After the penalty hearing, the jury recommended a finding that the mitigating circumstances outweighed the aggravating circumstances by a vote of ten to two on the intentional murder count and nine to three on the felony murder count. In compliance with 11 *Del. C*. § 4209, this Court considered the jury's recommendation but rejected it, stating that the jury's recommendation is not

[32] *Id*.
[33] *Id*. at 324.
[34] *Garden v. State*, 815 A.2d 327 (Del. 2003).

binding and the statute requires only that the court "consider" the jury's recommendation in arriving at its sentencing decision.[35] In overriding the jury's recommendation, the Court exercised its separate duty imposed by the death penalty statute, concluding that the aggravating circumstances linked to the murders and to the defendant outweighed the mitigating circumstances and sentenced the defendant to death. Specifically, the Court explained that the jury's recommendation constituted an:

> [A]dvisory verdict, which need not be unanimous, is therefore nothing more than its name implies: an aid to the trial judge in forming the ultimate judgment. In close and difficult cases, it should guide the trial judge to a sentence consistent with the verdict. But it is not a shackle to inhibit the Court from the independent exercise of the duty imposed on it by law.[36]

On appeal, the Delaware Supreme Court affirmed the defendant's conviction, but vacated his sentence and remanded for reconsideration, holding that this Court did not apply the proper standard in determining the sentence .[37] The Supreme Court instructed the Court to apply the *Tedder* standard.[38] In adopting the *Tedder* standard, on appeal, the Court held "[t]hat a trial judge must give a jury recommendation of life 'great weight' and may override such a recommendation only if the facts suggesting a sentence of death are so clear and

[35] *See State v. Garden*, 792 A.2d 1025, 1028 (Del. Super. Ct. 2001).
[36] *Garden*, 792 A.2d at 1030.
[37] *Garden*, 815 A.2d at 343.
[38] *See Tedder v. State*, 322 So.2d 908 (Fla. 1975).

convincing that virtually no reasonable person could differ."[39] Further, the Court distinguished the significance of the instructions given to capital juries regarding their role, noting that they are instructed of the importance of their role and that their considered recommendations will be accorded great weight in the judge's ultimate decision.[40] On remand, this Court found the *Tedder* standard to be incompatible with the determinative authority afforded a trial judge under Delaware's 11 *Del. C.* § 4209 penalty procedures and re-imposed the sentence of death.[41]

The General Assembly responded to the apparent uncertainty created by the *Garden* decision regarding the sentencing judge's ultimate responsibility for determining the penalty to be imposed under Section 4209. The Synopsis of H. B. 287, approved on July 15, 2003, clarifies any misunderstanding attributable to the judiciary branch, stating that "[t]his Act re-affirms the intent of the General Assembly that the sentencing judge in a capital murder case shall be ultimately responsible for determining the penalty to be imposed."[42] The General Assembly further elucidated on its intent to clarify, explaining that:

---

[39] *Garden*, 815 A.2d at 343.
[40] *Id*.
[41] *State v. Garden*, 2003 WL 21040273, at *6, n.42 (Del. Super. Ct.) ("The singular focus of a *Tedder* inquiry is whether there is 'a reasonable basis in the record to support the jury's recommendation of life' rather than the weighing process which a judge conducts after a death recommendation." (citation omitted). "In contrast, the Delaware statute clearly directs the judge to weigh aggravating and mitigating factors regardless of the jury's recommendation. The Florida practice is thus starkly at odds with the law of this State."). *Id.* at *6.
[42] H.B. 287, 142nd Gen. Assem. (Del. 2003), Synopsis.

> [T]his Act will reverse the Delaware Supreme Court's judicial misinterpretation of Delaware's death penalty statute by repealing the *Tedder* standard adopted by the Supreme Court in *Garden*. It will clarify that it is and has been the intent of the General Assembly that while the sentencing judge must consider a jury's recommended finding on the question of whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist, he or she shall not be bound by the recommendation, but instead shall give it such weight as he or she deems appropriate under the circumstances present in a given case.[43]

In addition, the General Assembly once more reinforced the fact that the death penalty statute, as amended, "[s]hall apply to all defendants tried, re-tried, sentenced or re-sentenced after its effective date."[44]

Additionally, shortly before the newly amended statute became law, the Governor requested an advisory opinion from the Delaware Supreme Court as to whether the provisions of H. B. 287 were valid under the United States and Delaware Constitutions, either generally, or specifically, as applied to all defendants tried, re-tried, sentenced or re-sentenced after its effective date. The Court concluded in its advisory opinion that "[n]one of the provisions of House Bill No. 287 is unconstitutional on its face, at least to the extent that they operate prospectively to defendants whose crimes are committed after the statute is enacted."[45] Conjunctively, the Court left the door open as to whether the

[43] *Id*.
[44] H.B. 287, § 4, 142nd Gen. Assem. (Del. 2003).
[45] *Re: House Bill No. 287*, 2003 WL 21694743, at *2 (Del.).

provisions of H. B. 287, i.e., Sections 1, 2 or 4, were or would be deemed unconstitutional should they be applied retrospectively to a particular defendant.[46] Such a legal dilemma, according to the Court, "[m]ay be determined only on a case-by-case basis."[47] The Court did note that it is the exclusive task of the legislature to pass, and the Governor to sign, such laws as they deem fit and for the courts to supervise the legislation that may come later.[48]

In reserving its comment as to a finite determination on the constitutional validity of applying the statute's provisions retrospectively to a defendant's case, the Court opined that to do such would: 1) undermine the adversary system by preventing a lawyer, who may be representing a defendant sentenced to death, from fulfilling his obligation of zealous advocacy in raising good faith constitutional challenges; and 2) be inappropriate at that juncture because there was a pending appeal in the Court of the death sentence re-imposed by the Superior Court in the *Garden* case, the same case discussed in the Synopsis of H. B. 287.[49]

In conclusion, based on the findings set forth in *Cohen*, *Dobbert*, and *Brice*, and in consideration of the legislative intent evolved from 11 *Del. C.* § 4209 since its enactment, it is evident that these latest amendments to Section 4209, similar in

[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] *Id*.

purpose and consideration to those instituted in 1991 and 2001, do not serve to alter the fundamental objective or inherent import of Delaware's death penalty statute. Instead, these latest modifications simply focus on explicating the role of the sentencing judge in the final determination of the sentence to be imposed. The amendments, as applied, do not increase the quantum of punishment, but merely illuminate the procedure by which it is to be imposed. The newly enacted law simply clarifies the method and means by which the death penalty is determined. Section 4209 does not alter the substance or degree of punishment to be imposed on the defendant, nor inflicts a greater punishment for an existing criminal offense, nor produces a law resulting in evidentiary changes that require less proof in order to convict a defendant. Accordingly, Defendant has failed to meet the burden of proving that the 2003 amendments to 11 *Del. C.* § 4209 are substantive.[50] The amendments are procedural, not substantive in nature, and do not invoke the repercussions of an *ex post facto* law as envisioned in the United States and Delaware Constitutions.

Having determined that the provisions of H. B. 287 are applicable to Defendant's case, the Court addresses Defendant's alternative claim, that it is not necessary for the jury to be "death qualified" since any recommendation made by the jury may be summarily rejected, and therefore, serves little purpose.

[50] *See supra* note 7.

The current provisions of 11 *Del. C*. § 4209, as amended by H. B. 287, provide for an advisory recommendation from the jury, predicated on a balancing test between the aggravating and mitigating circumstances. They endow the trial judge with the ultimate sentencing authority. Even though its assigned role is making advisory recommendations, it is undisputed in Delaware case law that the jury's role comprises the "conscience of the community" in recommending life or death.[51]

The Court in *Cohen* emphatically affirmed the need for a "death qualified" jury in capital cases where the jury's recommendation is purely advisory.[52] Just as the defendants in *Cohen* attempted to trivialize the importance and function of the jurors under the then-new statute, the Defendant here endeavors to minimize the relevancy of a jury by purporting that it need not be "death qualified." In essence, Defendant contends that if H. B. 287 is applicable, then under the revised Section 4209, there is no need to prohibit inclusion of prospective jurors simply because their views "prevent or substantially impair" their ability to impartially and fairly

[51] *Cohen*, 604 A.2d at 856 ("Although not the final arbiters of punishment, jurors still play a vital and important role in the sentencing procedure. The jury sits as the conscience of the community in deciding whether to recommend life imprisonment or the death penalty." *Sanders v. State*, 585 A.2d 117, 133 (Del. 1990) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968))). *See also Capano v. State*, 781 A.2d 556, 670 (Del. 2001); *Gattis v. State*, 697 A.2d 1174, 1181 (Del. 2001); *Wright v. State*, 633 A.2d 329, 335 (Del. 1993).

[52] *Id*. at 855-56 ("The jury must be "death qualified." A prospective juror in a capital case is subject to excusal for cause if his or her views would 'prevent or substantially impair' the performance of his or her duties as a juror in accordance with the court's instructions and the juror's oath." *Deshields v. State*, 534 A.2d 630, 634 (Del. 1987), *cert. denied*, 486 U.S. 1017 (1988) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985))).

decide the question of punishment, because the judge is the ultimate sentencing authority.

The Court in *Cohen* struck down the same illogical and unfounded reasoning, noting that "[t]here is no merit to this proposition, and defendants present no rational authority for it."[53] Likewise, Defendant in this case does not present any rational authority to support its contention. Further, the *Cohen* Court held that "[a]ny personal views which would prevent its members from impartially performing this solemn responsibility [sitting as the conscience of the community] in accordance with the trial court's instructions are impermissible and contrary to law."[54] The provisions of H. B. 287 empower the trial judge with the ultimate decision making process of imposing life imprisonment or death, but the trial judge still must consider the jury's recommendation and afford it such "weight" as he or she deems appropriate. Therefore, a "death qualified" jury is an integral and necessary component in this judicial formula.

II. Change of Venue

Pursuant to Superior Court Criminal Rule 21(a),[55] Defendant has moved for

[53] *Id*. at 856.
[54] *Id*. (alteration in original).
[55] Rule 21. Transfer from the county for trial.
(a) *For prejudice in the county*. The court upon motion of the defendant shall transfer the proceeding as to the defendant to another county whether or not such county is specified in the defendant's motion 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*. DEL. SUP. CT. CRIM. R. 21(a). (emphasis added).

a change of venue based upon newspaper, radio and television coverage of his co-defendant, Darrel Page's, murder trial which commenced on May 20, 2003 and concluded on June 11, 2003. Defendant's motion contains copies of seven newspaper articles, all dated around the time of his co-defendant's trial, except for one dated September 13, 2001, and published in the Wilmington News Journal. Defendant asserts that the compilation of media coverage has resulted in prejudice against him, such that it is unlikely he can obtain a fair and impartial trial in New Castle County. He further alleges that the media coverage, in particular, the newspaper articles, have instilled fear in some of the defense witnesses, and they may be reluctant to testify at trial for fear of possible reprisals from the victims' family and friends.

The standard for determining a decision regarding change of venue resides within the sound discretion of the trial judge.[56] Although a criminal case may be subject to, or even subsumed by, routine pre-trial publicity, this does not justify the granting of a motion for change of venue.[57] Venue will be changed only upon a reasonable probability of prejudice.[58]

In the seminal case of *McBride v. State*, the Delaware Supreme Court stated that it is well established the Sixth Amendment of the United States Constitution,

[56] *State v. Ploof*, 2003 WL 21537911, at *1 (Del. Super. Ct.) (citing *Riley v. State*, 496 A.2d 997 (Del. 1985)).
[57] *Id*.
[58] *State v. Ploof*, 2003 WL 21537911, at *1 (citing *McBride v. State*, 477 A.2d 174, 185 (Del. 1984)).

as well as Article 1, § 7 of the Delaware Constitution, guarantee a defendant in a criminal case a speedy and public trial by an impartial jury.[59] When a defendant asserts a claim of pretrial prejudicial publicity, the defendant must, by and large, establish that the venire was actually prejudiced by pretrial publicity.[60] In *Irwin*, however, the United States Supreme Court held that due process does not entitle a defendant to a trial by jurors ignorant of all the facts surrounding the case.[61] The Delaware Supreme Court stated the same in *Parson v. State*.[62]

In *Parson*, the Court declared that Superior Court Criminal Rule 21(a) was enacted by the General Assembly to comply with the Sixth Amendment requirement of trial by an impartial jury.[63] The Court in *McBride* later held that:

> [A]lthough the substance of Rule 21 is consistent with the Sixth Amendment, it should be amended to eliminate the requisite showing by a defendant that there exists "*so great* a prejudice against defendant that he cannot obtain a fair and impartial trial in that county." (emphasis added). Rather, a criminal defendant should hereafter be granted a change of venue upon a showing that there exists a "reasonable probability" or "reasonable likelihood" of prejudice against a petitioner. (citation omitted). [64]

As such, Rule 21(a) provides that a criminal defendant should be granted a change of venue upon a showing that there exists a "reasonable likelihood" of

[59] *McBride v. State*, 477 A.2d 174, 185 (Del. 1984).
[60] *Id*.
[61] *Irwin v. Dowd*, 366 U.S. 717, 722 (1961).
[62] *Parson v. State*, 275 A.2d 777, 786 (Del. 1971).
[63] *Id*. at 785.
[64] *McBride*, 477 A.2d at 185.

prejudice against the defendant.[65] Under this lesser standard of proof of "reasonable likelihood" or "reasonable probability," the criminal defendant must substantiate that a potential juror was prejudiced in fact by pretrial publicity.[66] "Prejudice my be presumed when a moving party proffers evidence of highly inflammatory or sensationalized media coverage prior to trial."[67] To validate such a substantiation of prejudice, a defendant must present evidence of highly inflammatory or sensationalized pre-trial publicity sufficient for the court to presume prejudice if it finds the publicity to be inherently prejudicial. Absent such a showing, a defendant must demonstrate actual prejudice through *voir dire*.[68]

The publicity surrounding Defendant's case has not been so pervasive, sensational, or inflammatory as to allow this Court to make a presumption of prejudice. Nor is the Court convinced that Defendant has shown that there exists a "reasonable likelihood" of prejudice against the Defendant. The news and media accounts referenced by Defendant are, for the most part, purely informational in nature and characteristic of daily, routine reporting. Also, the News Journal is a newspaper with statewide circulation. Thus, there is no basis to conclude that news coverage in this capital murder case has been, is, or would be, any less

[65] *See supra* note 55; *State v. Flagg*, 1999 WL 167774, at *1 (Del. Super. Ct.) (quoting *McBride*, 477 A.2d at 185).
[66] *McBride*, 477 A.2d at 185 (citing *Irvin*, 366 U.S. at 728).
[67] *Flagg*, 1999 WL 167774, at *1 (quoting *McBride*, 477 A.2d at 185).
[68] *State v. Ploof*, 2003 WL 21537911, at *1 (Del. Super. Ct.) (citing *Riley v. State*, 496 A.2d 997, 1014-1015 (Del. 1985)).

intense in Sussex and Kent Counties as it has been, is, or would be in New Castle County.

Under these circumstances, Defendant's motion for change of venue is denied without prejudice. At the conclusion of *voir dire* examination of the prospective jurors and upon a demonstration of actual prejudice at jury selection, Defendant may renew his motion at which time the Court will then revisit the issue.

Conclusion

For the foregoing reasons, the Court finds that House Bill No. 287 is applicable to Defendant's case and that prospective jurors must be "death qualified." Therefore, Defendant's Motion to Prohibit Application of H.B. 287 and Dispense With Death Qualification of Jury is hereby **DENIED**.

For the foregoing reasons, Defendant's Motion for Change of Venue pursuant to Rule 21(a) of the Criminal Rules of the Superior Court is **DENIED** without prejudice.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Stephen M. Walther, Esquire
Valerie Farnan, Esquire
Kester I. H. Crosse, Esquire
Raymond D. Armstrong, Esquire,
Prothonotary