

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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|----------------------|---|----------------|
| STATE OF DELAWARE |) | |
| |) | |
| |) | |
| v. |) | |
| |) | |
| DESMOND TORRENCE and |) | ID #0205014445 |
| EARNEST COOPER, |) | ID #0206007408 |
| |) | |
| Defendants. |) | |

Submitted: September 20, 2002
Decided: October 31, 2002

**UPON DEFENDANT DESMOND TORRENCE’S “MOTION TO
CERTIFY ADDITIONAL QUESTIONS OF LAW TO THE
DELAWARE SUPREME COURT.” DENIED.**

ORDER

This 31st day of October, upon consideration of a “Motion to Certify Additional Questions of Law to the Delaware Supreme Court” (the “Motion”) filed by Desmond Torrence (“Torrence”), it appears to this Court that:

1. This is a capital murder prosecution. Torrence and Earnest M. Cooper (“Cooper”) (collectively “Defendants”) have collectively been charged with one count of Murder First Degree (title 11, section 636 of the Delaware Code), two counts of Possession of a Firearm During the Commission of a Felony (title 11, section 1447A of the Delaware Code), one

count of Robbery First Degree (title 11, section 832 of the Delaware Code), and one count of Conspiracy Second Degree (title 11, section 512 of the Delaware Code). Torrence has additionally been charged with a second count of Murder First Degree, a third count of Possession of a Firearm During the Commission of a Felony, and a single count of Wearing a Disguise During the Commission of a Felony (title 11, section 1239 of the Delaware Code). The basis for these indictments was the alleged homicide of Arvind Patel on March 20, 2002. A third defendant, Stephen Kattes (“Kattes”) (ID #0205014476) was originally indicted along with Defendants but he has pleaded guilty to two counts of Possession of a Firearm During the Commission of a Felony, one count of Robbery First Degree, one count of Conspiracy Second Degree, and one count of Wearing a Disguise During the Commission of a Felony.

2. On August 9, 2002, this Court certified 16 questions of law to the Delaware Supreme Court in the case of State of Delaware v. Miles Brice and Leon Caulk, ID #0107007736, ID #0107007679. The certified questions related to the constitutionality and construction of certain aspects of the Delaware death penalty statute (title 11, section 4209 of the Delaware Code) in light of the recent United States Supreme Court decision in Ring v.

Arizona.¹ The Delaware Supreme Court accepted four of the 16 questions that this Court certified but simultaneously determined that “[t]he decision whether or not to accept any of the other questions certified by the Superior Court in this matter is deferred.”²

Shortly before the Supreme Court issued its order in the Brice and Caulk case, Torrence had moved this Court to enter an order “join[ing] [in] to the questions of law certified to the Supreme Court of the State of Delaware....”³ This Court had not acted on that request when the present Motion was filed. Torrence now seek the certification of three additional questions of law relating to the constitutionality and construction of the Delaware death penalty statute; these questions were questions that the Delaware Supreme Court had earlier declined to accept in the Brice and Caulk case.

3. The three questions of law previously considered in the Brice and Caulk case that were “deferred” by the Delaware Supreme Court and

¹ 536 U.S. ___ (2002) (holding that an Arizona statute under which the trial judge alone determined the presence or absence of aggravating factors required under Arizona law for imposition of the death penalty violated the Sixth Amendment right to a jury trial in capital prosecutions).

² Brice and Caulk v. State, Del. Supr., No. 468, 2002 (Aug. 30, 2002) (en banc), Order at 4.

³ Letter from Kevin J. O’Connell, Esquire to the Court of 8/19/02.

which Torrence now seeks to have certified to the Delaware Supreme Court in this case are:

- []1. Does the failure of...[title 11, section 4209 of the Delaware Code], as it existed on June 24, 2002 to require that the statutory aggravators be part of the indictment, render it unconstitutional?
- []2. Does the failure of the newly enacted...[title 11, section 4209 of the Delaware Code], to required that the statutory aggravators be part of the indictment render it unconstitutional?
- []3. Is a unanimous jury required to make the factual determination as to whether a defendant is a major participant in a felony that led to a killing....⁴

Torrence argues that “under existing United States Supreme Court precedent, it is appropriate for the Court to require an indictment of those aggravating factors which will be utilized by the State in seeking the enhanced penalty of death, as well as to have a jury consider the factual determination as to whether...[Torrence] is a major participant in a felony that led to a killing....”⁵

4. Although the Brice and Caulk case may be factually distinguishable from the current prosecution of Defendants, the Delaware Supreme Court, through that case, has already determined that it would not accept the three questions sought by Defendants to be certified in this case. Notably, the Supreme Court “deferred” ruling on whether or not to accept

⁴ Certification of Questions of Law, State of Delaware v. Miles Brice and Leon Caulk, ID #0107007736, ID #0107007679, ¶¶ 11, 12, 13.

⁵ Defs.’ Mot. ¶ 2.

any additional questions certified to it by this Court in that case. It may well be that the Supreme Court will address some or all of the “deferred” questions in its decision in the Brice and Caulk case. However, in its discretion, this Court declines to certify any additional questions in this case, given that the Supreme Court has already ruled what questions of law concerning the death penalty statute are now to be considered by that Court where there is potentially more than one participant in a crime the penalty for which may include death.⁶ Torrence’s Motion is therefore **DENIED**.

IT IS SO ORDERED.

Richard R. Cooch, J.

oc: Prothonotary
xc: Stuart E. Sklut, Esquire and Gregory M. Johnson, Esquire, Deputy
Attorneys General
Kevin J. O’Connell, Esquire, Attorney for Desmond Torrence
Michael C. Heyden, Esquire, Attorney for Desmond Torrence
Neil R. Lapinski, Esquire, Attorney for Earnest Cooper
Anthony A. Figliola, Jr., Esquire, Attorney for Earnest Cooper
Jennifer-Kate Aaronson, Esquire, Attorney for Stephen Kattes
Joseph M. Bernstein, Esquire, Attorney for Stephen Kattes

⁶ Although Supreme Court Rule 41(b)(iii) identifies issues of the constitutionality and/or construction of a statute as potential grounds for accepting a certified question, this Court need not reach the application of that rule here given the Supreme Court’s earlier decision.