IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	CRIMINAL ACTION NUMBERS
v.	)	
	)	IN-95-11-1323 thru IN-95-11-1325 &
MICHAEL MANLEY	)	IN-95-12-0684 thru IN-95-12-0685
	)	
Defendant	)	ID No. 9511007022
	)	
and	)	
	)	
STATE OF DELAWARE	)	CRIMINAL ACTION NUMBERS
	)	
v.	)	IN-95-11-1047 thru IN-95-11-1049 &
	)	IN-95-12-0687 thru IN-95-12-0689
DAVID STEVENSON	)	
	)	ID No. 9511006992
Defendant	)	

Submitted: September 2, 2004
Decided: October 18, 2004

MEMORANDUM OPINION

Upon Motion of Defendants Manley and Stevenson
for Recusal - ***DENIED***

HERLIHY, Judge

Defendants Michael Manley and David Stevenson have jointly moved to have this judge recuse himself from further participation in this case. Citing several sentences in this Court's earlier decision, the defendants argue that this judge's impartiality might be reasonably questioned. The decision in question denied the defendants' motions for post-conviction relief and their motion to bar a new penalty hearing.

As a result of the unique history of this case, part of which involved the removal of the first judge involved in this case, this judge carefully weighed the language utilized in his earlier decision. This judge has re-examined that opinion and the sentences cited by the defendants. That re-examination satisfies this judge that, employing any test applicable in this situation, there is no basis for recusal. The defendants' motions are DENIED.

Procedural History

On November 12, 1996, defendants were found guilty of the November 13, 1995, first degree murder of Kristopher Heath ("Heath"). After a penalty hearing, the jury determined that four statutory aggravating circumstances existed with regard to the defendants. The jury also found that, as to Manley, the aggravating factors outweighed the mitigation factors by a vote of seven to five. As for Stevenson, the jury found that the mitigating factors were outweighed by the aggravating circumstances by a vote of eight to four. Upon consideration of these jury's sentencing recommendations, the originally assigned trial judge sentenced Manley and Stevenson to death by lethal injection.[1]

[1] *State v. Manley and Stevenson,* 1997 WL 27094 (Del. Super.).

The defendants, thereafter, filed a direct appeal which was consolidated with their automatic appeals. The Supreme Court affirmed the guilty verdicts and the imposition of the death penalty for both Manley and Stevenson.[2]

Subsequent to that affirmance, Stevenson moved to recuse the originally assigned trial judge. That judge denied that motion on January 8, 1999.[3] Manley and Stevenson both then presented motions for postconviction relief and an evidentiary hearing. The original judge denied Stevenson's motions on December 21, 1999.[4] Manley's motions were denied on April 27, 2000.[5] Both appealed to the Supreme Court seeking review of the Superior Court's rejection of their claims of ineffective assistance of counsel. In addition, Stevenson petitioned the Supreme Court to review the trial judge's refusal to recuse himself from consideration of the postconviction relief motions. His claim of alleged bias or appearance of impropriety stemmed from that judge's participation in a suppression hearing involving Heath.[6] On remand order of the Supreme Court, the trial judge rendered supplemental factual determinations pertaining to *Stevenson v. State*.[7]

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[2] *Stevenson v. State,* 709 A.2d 619 (Del. 1998) and *Manley v. State,* 709 A.2d 643, (Del. 1998).

[3] *State v. Stevenson,* 1999 WL 167779 (Del. Super.).

[4] *State v. Stevenson,* 1999 NL 1568333 (Del. Super.).

[5] *State v. Manley,* 2000 WL 703812 (Del. Super.).

[6] Stevenson had been arrested for fraudulent use of a credit card at Macy's. Heath was a security office at the store. Heath testified at a suppression hearing prompted by Stevenson's motion to suppress. The judge at the murder trial presided over the suppression hearing.

[7] 2000 WL 33726918 (Del. Super.).

After getting the case back, the Supreme Court determined that there was an appearance of impropriety in the original trial judge's involvement in this case. First, that judge had presided over the suppression hearing at which Heath had testified. Second, that judge had volunteered to be assigned to preside over the murder trial involving these defendants. The Supreme Court took particular note that the role of a trial judge in Delaware's capital punishment system is unique: while the jury recommends, the judge makes the ultimate sentencing decision.[8] That role received special attention in this case when the Supreme Court took particular note of the "narrow" margins of the jury's vote recommending the death penalty for these defendants.

The Supreme Court reversed the original trial judge's decision denying Stevenson's motions to recuse and his motion for postconviction relief. The Court remanded both defendants' appeals. The remand was to (1) have a new judge assigned, (2) consider both defendants' motions for post-conviction relief, (3) allow the defendants to amend those motions, if desired and (4) conduct an evidentiary hearing, if needed, and (5) conduct a new penalty hearing.[9]

This judge, upon remand, was assigned to undertake these tasks. One threshold issue involved whether Stevenson's appellate counsel could continue to represent him in the renewed proceedings in this Court. The reasons, explained in detail in this judge's prior

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[8] *Stevenson v. State,* 782 A.2d 249, 260 (Del. 2001).

[9] 782 A.2d at 261.

ruling and irrelevant to the recusal motions, revolved around the question of the applicability of *Chance v. State*[10] to the facts of this case. His counsel who had handled the prior appellate procedures had not raised the *Chance* issue in the Supreme Court. During an early hearing before this judge, this judge *sua sponte* informed Stevenson that, as long as he was represented by that counsel, he would forever be barred from raising the *Chance* issue in these post-conviction proceedings. Stevenson, thereafter, requested new counsel and such counsel were appointed.

While additional matters were being sorted out in connection with the motions for post-conviction relief, the United States Supreme Court decided *Ring v. Arizona*.[11] Based on the issues spawned by *Ring* and its possible affect on Delaware's capital sentencing scheme, Manley moved to preclude the holding of a new penalty hearing. Obviously, since *Ring* was decided subsequent to the remand in this case which included holding a new penalty hearing, this judge had to address those issues and determine whether there could be a new penalty hearing. Further, the legislature, prompted by *Ring*, amended the capital punishment statute in 2002 regarding the jury's role in the sentencing phase.

The nature of the defendants' post-conviction claims caused the Court to hold evidentiary hearings on their motions. And all sides briefed the applicability, if any, of *Ring* to a new penalty hearing and the role of the 2002 amendment.

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[10] 685 A.2d 351 (Del. 1996).

[11] 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002).

The Court in a 91 page opinion, denied both defendants' motions for post-conviction relief. The Court also decided the *Ring* issues declaring a new penalty could be held, as those issues had necessarily injected themselves into the remand.[12] Both defendants appealed. The Supreme Court affirmed all aspects of this Court's rulings.[13]

Following the affirmance, counsel and the Court established the date for a new penalty hearing. The date on which jury selection will start is February 1, 2005. Subsequently, the defendants filed their recusal motion.

Defendants' Claims

The defendants premise their recusal motions on four discrete portions from this judge's opinion denying their motions for post conviction relief and holding the penalty hearing would proceed, citing these passages:

1. In fact, the *Swan* Court distinguished that case from *Chance* by noting that there was " no credible argument, as in *Chance*, that Warren's death was an unintended consequence of either Swan's or (co-defendant) Norcross' actions. The same can be said about the evidence in this case.

2. The evidence conclusively showed a planned and intentional killing in which two persons, these defendants, participated. *Chance*, therefore, is inapplicable to the facts of this case.

3. The evidence was overwhelming.

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[12] *State v. Manley, Supra, State v. Stevenson,* Del. Super., Cr. A. Nos. IN95-11-1047-1049, IN95-12-0687-0689, Herlihy, J. (October 2, 2003).

[13] *Stevenson v. State,* Del. Supr., No. 502, 2003, Holland, Jr. (April 7, 2004)(ORDER); *Manley v. State*, Del.Supr., No. 519, Holland, J. (April 7, 2004)(ORDER).

4. There is a key element of the record in this case which both defendants ignore or have chosen not to address. Whatever infirmities the Supreme Court found with the original trial judge's penalty decision, the fact remains that before his sentencing decision was made, the unanimously found beyond a reasonable doubt that four statutory aggravating factors existed.[14]

The defendants contend these statements, when viewed in light of the fact-finding this judge would have to make in the new penalty hearing, establish an objective impropriety that means this judge should not preside over that hearing. Defendants argue that the Due Process Clause of the Fourteenth Amendment incorporates their right to judicial proceedings presided over by a neutral and detached judge. They continue that the Delaware Code of Judicial Conduct implements this constitutional guarantee and that disqualification is required when the impartiality of the Court might be reasonably questioned.

Discussion

On remand, the newly assigned Judge was directed to address the defendants' Rule 61 motions and to preside over a new penalty hearing. There was no suggestion that a single judge would be incapable of doing both. In order to address all the Rule 61 issues these defendants raised, it was necessary to recite and review the factual record established in the first trial and set out in the earlier decision forming the basis for the recusal motions.

[14] Quotations are from this Court's decision but the four points of contention are from the defendants' Motion to Recuse (docket #209).

As this judge noted, that recitation came from those earlier decisions.[15] There could be no other way to properly weigh the defendants' motions than to do so in the light of the existing factual record.

The standards governing disqualification require neutrally of the presiding judge as well as the appearance of impartiality.[16] These standards are codified in The Delaware Code of Judicial Conduct (" Code"). The pertinent section of Canon 3 states that:

> (C) Disqualification. (1) A judge should disqualify himself or herself in a proceeding in which the judge' s impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.…

To succeed in their motion for disqualification, the defendants must be able to show that this Court is biased or has a disqualifying interest.[17] In a disqualification analysis, the Court must make a painstaking examination of the facts.[18] A two-step analysis is to be used when reviewing whether recusal is necessary in a given situation.[19] First , the Court

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[15] *State v. Manley, supra.,* footnote 6.

[16] *Los V. Los*, 595 A. 2d 381, 383 citing *Ungar v. Sarafite*, 376 U. S. 575, 588, 84 S. Ct. 841, 849, 11 L. Ed. 2d 951-52 (1988).

[17] *Bowen v. State,* 1995 WL 496932 at *1 (Del. 1995).

[18] *State v. Outten,* 1992 WL 390660 (Del. Super.), citing *Duncan v. Merrill Lynch, Pierce, Fenner, and Smith,* 646 F. 2d 1020, 1029 (5th Cir. 1981).

[19] *Jackson v. State,* 684 A.2d 745, 752-53 (Del. 1996).

must be satisfied, as a matter of subjective belief, it can proceed to hear the cause free of bias or prejudice towards Manley and/or Stevenson.[20] Second, even if the judge believes that he has no bias, the Court must determine whether there is the appearance of bias sufficient to cause doubt as to the judge's impartiality.

A

The Court will first turn its attention to whether this judge can proceed to preside over the penalty hearing free of bias or prejudice towards Manley and/or Stevenson. As stated in the October 2, 2003, memorandum opinion, this judge did not volunteer to take this case nor did he solicit to be assigned the case. Prior to this appointment to handle this case after remand, this judge did not have any contact with the trial, the penalty hearing, the prior Rule 61 opinion or any matter involving either Stevenson, or Manley, or Heath, the victim of the crime. The defendants' motion for recusal does not alter this judge's feeling that he is disinterested and impartial. This judge finds that, as a matter of subjective belief, he can proceed to preside at the penalty hearing free of bias and prejudice towards Manley and Stevenson.[21]

B

The Court will now turn its attention to whether there is the appearance of this judge's personal bias sufficient to cause doubt as to the judge's impartiality. Defendants

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[20] *Los v. Los,* 595 A.2d at 384-85

[21] *Id.*

claim that this judge created a scenario where he cannot be objectively viewed as a neutral and detached fact finder at the upcoming penalty hearing because of portions of language in its opinion dated October 2, 2003. As noted, the defendants have pointed to four instances in the opinion where they believe the words of this judge establish an objective appearance of impropriety.

To be disqualified, the alleged bias or prejudice of the judge " must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."[22] All evidentiary facts now known to this judge are taken from previous Supreme Court and Superior Court decisions in this case, the transcripts of the first trial, the pre-hearing conferences held after the remand, the separate Rule 61 evidentiary hearings, and the amended post-conviction motions.[23] In short, all evidence known to this judge is a matter of record. That record, as this Court' s October 2003 opinion demonstrates, contains evidence both favorable and unfavorable to the defendants. That is the record to which this judge referred and upon which he had to necessarily rely in his 91 page ruling.

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[22] *United States v. Grinnell Corp.,* 684 US 563, 583, 86 S.Ct. 1968, 16 L.Ed.2d 778 (1966), citing *Berger v. United States,* 255 Us 22, 31, 41 S.Ct. 230, 65 L.Ed. 481, 484 (1921).

[23] Any facts mentioned in this opinion are taken from *State v. Manley and Stevenson,* 1997 WL 27094, *Manley v. State,* 709 A.2d 643, and *Stevenson v. State,* 709 A.2d 619.

Previous contact between the judge and a party or adverse rulings in the same proceeding does not require automatic disqualification.[24] There is no extrajudicial source for this judge' s knowledge. In addition, this judge' s knowledge arises only from the sources indicated.[25] Thus, this judge has no knowledge of any facts from any extrajudicial source. Whatever disputed facts that exist are in the record of the prior trial including inconsistencies of witnesses testifying at that trial. The evidentiary hearings also uncovered other inconsistencies.

The Court will now consider whether the record, viewed objectively, reasonably supports the defendants' claims of the appearance of prejudice or bias. The recusal inquiry becomes whether, when considered objectively, the four cited instances in the October 2, 2003 opinion, either individually or collectively, display a deep-seated antagonism towards defendants that would make fair judgment impossible.[26] In order to succeed with this claim, defendants must how that this judge has a personal bias against the defendants, not a judicial bias.[27]

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[24] *Steigler v. State,* 277 A.2d 662, 668 (Del. Super. 1971).

[25] *United States v. Grinnell Corp.,* 384 U.S. at 583, 86 S.Ct. At 1710, 16 L.Ed.2d 778.

[26] *Liteky v. United State,* 510 US 540, 541 114 S. Ct. 1147, 1150, 127 L. Ed. 2d 474 (1994).

[27] *Dickens v. Costello*, 2004 WL 1731136 at *2 (Del. Super).

Adverse rulings, in and of themselves, will seldom, if ever, constitute a valid *per se* basis for disqualification on the ground of bias.[28] The mere fact that a judge rules against a party on a motion is not sufficient to meet the objective standard for recusal.[29] The bias envisioned by Canon 3(C)(1)(a) is not created merely because the judge has made adverse rulings during the course of a proceeding.[30]

Under Canon 3(C)(1), a judge should disqualify himself when that judge's impartiality might reasonably be questioned. The Court will now consider each of the four instances mentioned by defendants to see fi the judge's impartiality toward the defendants might reasonable be questioned.

The first two of the four cited instances of bias which the defendants claim show this judge cannot be objectively viewed as neutral or detached relate to this judges' s ruling on the *Chance*[31] issue raised in their motions for post-conviction relief. That issue and the role in this case is set out over 18 pages of the 91 in this judge's October 2003 ruling. It is a complex and important issue and was one deserving of an extensive discussion. The whole issue of *Chance* and its applicability required a review and discussion of the record established at the first trial. The issue could not have been decided in a vacuum devoid of that record.

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[28] *In re Wittrock,* 649 A.2d 1053, 1054, citing *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 1157, 127 L.Ed.2d 474 (1994).

[29] *Baxter v. State,* 2002 WL 27435 (Del.), at *1.

[30] *Weber v. State,* 547 A.2d 948, 952 (Del. 1988).

[31] 685 A.2d 351 (Del. 1996).

After 13 pages of the discussion of the *Chance* issue, this judge said the following (the alleged offending language is underlined):

> This review of precedents reveals a certain lack of clarity. *Demby* is the case most helpful to these defendants' claims that their appellate counsel should have raised *Chance* on direct appeal. But in *Demby*, unlike here, there was scant, if any, evidence the two people - Demby and another - had conspired to kill the victim. They were not even convicted of conspiracy to commit intentional murder, unlike this case.
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> While the literal interpretation of the *Demby* Court's language dictates that a Section 274 instruction be given whenever the State seeks to impose accomplice liability for an offense that contains lesser-included degrees, such as homicide, the *Demby* Court recognized, at least implicitly, that there are situations where such a charge would be improper. In fact, the *Swan* Court distinguished that case from *Chance* by noting that there was " no credible argument, as in *Chance*, that Warren's death was an unintended consequence of either Swan's or (co-defendant) Norcross' actions." <u>The same can be said about the evidence in this case</u>.
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> Based on that language in *Swan*, it appears that the Supreme Court senses the potential mischief in an across-the-board use of a *Chance* instruction. Rather, the Supreme Court again recognizes the concern expressed in *Liu* that, under certain circumstances, a *Chance* instruction may result in inconsistent verdicts for defendants allegedly involved in the same crime. This result is especially true where there is compelling evidence that two people jointly planned and carried out an intentional murder.
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> And that is what the evidence in this case showed. Stevenson was the defendant to be tried for theft. He was not, however, the person who came to Heath's apartment the night before the murder. On the morning of the shooting, a tenant observed two people slouched down in a car parked near or next to Heath. Heath was shot from behind five times on the morning he was heading to court to testify against Stevenson. The physical description of the shooter more closely matches Manley. Similar ammunition to that used to kill Heath was found in a jacket in Stevenson's car. That jacket closely matched a type of jacket Manley owned. A paper with the name, address and telephone number of another witness against Stevenson was

found in a police car in which Stevenson had been transported. Both were seen together hours before the murder, and within minutes after it, and when approached by the police, both ran.

The evidence conclusively showed a planned and intentional killing in which two persons, these defendants, participated. *Chance*, therefore, is inapplicable to the facts of this case.

Moreover, *Chance* is clear that the instruction included in its Appendix I is a sample based on the evidence presented in that case. In the footnote directing the reader to the Appendix, the *Chance* Court describes the instruction as follows:

> One possible form of a Section 274 instruction is set forth in Appendix I. The instruction is intended to illustrate the facts of Chance's case, to wit: the trial of a single defendant, no charge of felony murder, no weapon, and an assault resulting in a homicide where the homicide might be either the intended or a consequential offense.

In other words, the fact-driven sample instruction is not a categorical imperative for every case involving accomplice liability. As discussed above, the facts of *Chance* are significantly different from those in the case at bar. Although the jury instruction of defendants Manley and Stevenson was not a paraphrase of the sample *Chance* instruction, it explicitly provided that, in order to find either defendant guilty of murder in the first degree as an accomplice, the jury was required to find that the accomplice intended to further or assist in the commission of first degree murder. This instruction was consistent with the evidence, which did not support a basis for a finding of either reckless or criminally negligent mental states, which was the focal point of the *Chance* decision. Finally, the Court notes that, in the *Chance* Court's comparison of § 274 with the parallel provision of the Model Penal Code, the Court focused on a hypothetical where the defendants agreed to participate in an unlawful assault and the result was a homicide.[32] In the case at bar, no evidence was offered by the State or either defendant to show that the killing was a consequential crime.[33]

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[32] *Chance,* 685 A.2d at 356-57.

[33] *State v. Manley,* Supra. at 43-5. Footnotes omitted.

First, the alleged offending language must be taken in the context of the rest of the language quoted above. Second, even that language must be taken in the context of the 18 pages of discussion of the *Chance* issue. Third, that language must be viewed in the context of the record and all 91 pages of this judge's decision. Fourth, the *Chance* issue is often very intensely fact driven and it was here. Those same facts formed the basis of the jury's guilty verdicts and were cited by the Supreme Court in affirming the original convictions. The subsequent proceedings did little or nothing to undermine the facts necessary to this judge's recent ruling. Finally, this judge's ruling on the *Chance* issue and the factual basis for it have been affirmed.

The third area to which the defendants point as showing lack of neutrality or detachment is where this judge rejected another of their Rule 61 claims. The discussion of that particular claim covered nearly 14 pages in this judge's earlier opinion. Again it is instructive to show the context of the one allegedly offending sentence forming the basis of this claim (offending language underlined):

> There is little argument that some of what these witnesses would have said on the stand might have furthered the trial strategy. But Wing puts a person with white hands behind the wheel of Stevenson's car and that physical description matches his hands. Schweda's testimony could easily have turned into real trouble by putting Stevenson in the passenger seat which is where the likely shooter came from and went to. And both saw a car closely matching the color of Stevenson's car.
>
> Mossinger did not see that much and her description of the car she saw could have been that of a color matching or similar to Stevenson's car.

Of the four uncalled witnesses, Marlene Farmer Ijames, might have been the most helpful. She saw a white male near Heath's body and that this person got into the driver's side of a dark colored vehicle. But what she saw was a mixed bag to Stevenson's case, even though she told the police the newspaper photos of Stevenson and Manley were not of the person she saw. The car she saw was dark and the person whom she saw, who may have been the shooter and whom she describes as white, got into the driver's side. These were, and are, potential trouble areas for Stevenson.

The fact remains, however, that Stevenson's defense counsel did not speak to these witnesses to further explore whether they might have been helpful or harmful. Trial counsel's strategy was admittedly dictated by a very strong State case in the guilt phase. When evaluating counsel's conduct, the Court must indulge in a "strong presumption that counsel's conduct was professionally reasonable."

Trial counsel's choice of strategies here was made without consulting with these four potential witnesses; four witnesses who testified at an evidentiary hearing over six years after the trial. It is unclear why they would come forward now, or be responsive now to subpoenas, but not in 1996. There is an appearance of insufficient follow-up in 1996. That is where the problem lies.

The recent United State Supreme Court case of *Wiggins v. Smith* makes it clear that counsel, either on their own or by pressing their investigator(s), should have done more. It cannot be said their strategy decision was made after a thorough investigation, even if they had copies of what the four witnesses told the police. They had access to their witness' names, but in the end, they were not interviewed by the defense. There is no indication that any of these witnesses were unavailable at or for trial, albeit the record is that none of these four responded to phone calls or business cards. None were asked at the evidentiary hearing about those contacts or if they would have not responded to a trial subpoena.

Despite that deficiency, Stevenson's claim must still fail. First, even though counsel's strategic choice was made with a less than adequate investigation, it remains an appropriate one. The evidence was overwhelming. It was his car. He had a motive, he was caught within less than an hour, he fled at the first sight of the police, he had the Macy's co-

> investigator's name and address on him, and so forth. In a case where the trial counsel confront a strong State's case in a capital setting, the decision to focus on saving the client's life through the mitigating evidence in the penalty phase and to avoid a credibility clash between the guilt and penalty phases, is neither novel nor unreasonable. That does not mean counsel here "gave up" on the guilt phase but only that their strategy was premised on the facts in the guilt phase, concern about having credibility in the penalty phase and working to get a recommendation for life.
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> In sum, while the investigation was deficient, and the choice of a strategy flawed to a degree as a result, that choice, nonetheless, remains reasonable. Trial counsel were not deficient.
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> Nor has Stevenson met his burden of showing that if any or all four witnesses testified, there is a probability that the outcome of the guilt phase would have been different. The evidence against Stevenson was overwhelming. There were flaws in it, of course, and these witnesses might have added to those flaws. But several or all might have added to the strength of the State's case, and may never have been called if interviewed by the defense as their evidentiary hearing testimony demonstrates.[34]

The use of the word "overwhelming" by this Court derived from Stevenson's trial co-counsel's words as well as the facts determined at trial. Stevenson's other trial co-counsel stated: "my recollection was that the State's case was pretty overwhelming in this particular case...."[35] The Court later remarked again: "The evidence was overwhelming."[36] The Court is still talking about Stevenson's trial counsel. A reasonable person, knowing all the relevant facts and the full record, would not harbor any doubts

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[34] *State v. Manley,* Supra. at 71-3. Footnotes omitted.

[35] *Id* at 70.

[36] *Id.* at 73.

about this judge's impartiality. One of the two prongs of whether there had been ineffective assistance of counsel is, as noted in the earlier decision, whether the defendants can show prejudice. Quite simply, could they show that but for any errors there was a strong probability the original trial's outcome would have been different? To properly weigh and determine that issue this judge had to (1) set out the facts in the earlier record and (2) view them in light of the Rule 61 claims and the record from the evidentiary hearings. In effect, the defendants are criticizing not this judge's partiality, as they view it, but the determination, affirmed on appeal, that whatever counsel error occurred (if any) did not cause prejudice.

The final and fourth sentence about which the defendants raise the issue of impartiality is contained in this Court's discussion about the issues surrounding whether a new penalty hearing could be held. Again, to provide appropriate context, it is necessary to quote a few pages from the nearly 17 pages in which the penalty hearing issues were considered (the offending language is underlined):

Penalty Hearing

> The Supreme Court remanded this case in May 2001 for a different judge to consider the post-conviction issues reviewed above. Assuming none of those issues required the award of a new trial, the remand was for a new penalty hearing. With the disposition of the postconviction issues, this opinion would ordinarily have ended. However, two events subsequent to the remand have called into question whether a penalty hearing can be held. The first is the United States Supreme Court's opinion in *Ring v. Arizona,* raising questions about the statutory procedure under which Arizona's penalty hearings occurred. Further, in response to *Ring,* the Delaware

legislature amended that procedure. Because of those events, both defendants contend there can be no penalty hearing and that they must be sentenced to life. Manley has expressly moved to preclude a penalty hearing.

Constitutionality of Delaware Death Penalty in Light of Ring v. Arizona

Both Manley and Stevenson maintain that the death penalty statute under which they were originally tried and sentenced, 11 *Del. C.* § 4209, as enacted in 1991, was unconstitutional for various reasons, including those enunciated in *Ring v. Arizona*. They further claim they cannot be subjected to a new penalty hearing with, therefore, the possibility of a death sentence, even under the procedures for such hearings as specified in the 2002 amendment to § 4209. Because the former statute, according to them, is unconstitutional and the 2002 version inapplicable to them, they assert that the doctrine of severability means they must get life sentences. As Stevenson correctly recognizes, however, the Delaware Supreme Court recently upheld three death sentences despite challenges to the 1991 version of § 4209 based on *Ring*. Thus, the practical significance of defendants' claim is primarily to preserve their rights to pursue similar arguments in any subsequent proceedings. Nevertheless, the Court addresses each of the arguments.

To make defendants' arguments more clear, it is necessary to review the pertinent portions of the 1991 statute governing their prior penalty hearing and the 2002 amendment to that statute and hearing procedure enacted in response to *Ring*. The 1991 statute required two questions be presented to the jury. One was whether the evidence showed beyond a reasonable doubt the existence of at least one statutory aggravating factor. The jury's verdict on that question did not have to be unanimous. As a result of *Ring* and the 2002 amendment, the jury's finding must now be both unanimous and beyond a reasonable doubt in order to render a defendant eligible for the death penalty.

Both defendants rely heavily on *Ring*. In that case, the United States Supreme Court struck down the aspect of the Arizona capital sentencing procedure whereby the presiding judge alone, sitting without a jury, had authority to determine the existence of aggravating factors. The Court held that the statutory enumerated aggravating factors operated as functional

equivalents of elements of greater offenses, thereby requiring them to be found by a jury beyond a reasonable doubt. Concluding that those aggravating factors were in fact elements of the greater, capital offense, the Court held that the Arizona sentencing scheme violated the defendant's Sixth Amendment right to a jury trial. The same reasoning, both defendants here argue, applies to Delaware's "hybrid" system under the 1991 death penalty statute. Therefore, they conclude, Delaware's death penalty statute in effect at the time of their trial was unconstitutional because the judge, and not the jury, ultimately determined whether statutory aggravating factors existed in order to make them eligible for the death penalty.

However, as noted above, the Delaware Supreme Court recently addressed several questions regarding the 2002 amendment to Section 4209 in *Brice v. State*. And held that *Ring* applies only to the "narrowing" phase of the sentencing process. The 2002 statute transformed the jury's role, at the narrowing phase, from one that was advisory under the 1991 statute into one that is now determinative as to the threshold requirement of the existence of any statutory aggravating circumstance, thereby curing any possible *Ring* defect in the 1991 scheme. Under the amended statute, the jury must find unanimously and beyond a reasonable doubt the existence of at least one statutory aggravating circumstance before the sentencing judge may consider the death penalty. The Court also considered and rejected a challenge to the 1991 statute based on *Caldwell v. Mississippi,* which held that the jury's role in a capital case cannot be minimized. The Court continued its analysis and found that since any error under the 1991 statute does not fit into any of the established structural error categories, harmless error analysis is appropriate.

Subsequent to both *Ring* and *Brice*, the Supreme Court affirmed three capital sentences handed down under the 1991 statute. In affirming each of the defendants' sentences, the Supreme Court relied on *Brice* for the proposition that a felony murder conviction establishes a statutory aggravator which withstands constitutional scrutiny under *Ring*. In *Zebroski v. State*, the Court stated that "once a jury finds unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance, the defendant becomes death eligible and *Ring's* constitutional requirement of jury fact-finding is satisfied.. None of these cases distinguished, for purposes of *Ring,* the difference between a statutory aggravator found beyond a reasonable doubt at the penalty phase, as here,

and one established at the guilt phase by a verdict of guilty on a felony murder charge. This Court finds no such distinction.

Both Manley and Stevenson argue that if the 1991 statute were unconstitutional, the doctrine of severability requires that a life sentence be imposed, regardless of the constitutionality of the new 2002 death penalty statute. For this proposition, they rely on *State v. Spence* and *State v. Dickerson*. In light of the Supreme Court's decision in *Brice*, finding no structural error in the 1991 statute, the Court need not address severability.

Even if there were constitutional problems with the 1991 scheme, severability would be irrelevant. In this case, after finding that the defendants' original trial judge should have recused himself to avoid the appearance of impropriety, the Supreme Court ordered this Court to conduct a new penalty hearing, stating:

> We recognize that the remedy directed in this matter, a new penalty hearing, is not the result of evidentiary rulings or errors that occurred during the penalty hearing and that may have affected the jury's recommendation. The capital sentencing procedure mandated by 11 Del. C. § 4209 is a unitary process, however, involving a "hearing conducted by the trial judge before a jury," § 4209(b)(2), with the judge imposing sentence "after considering the recommendation of the jury," § 4209(d). Thus, to correct any appearance of impropriety that occurred through the personal participation of the trial judge in the sentencing process, we have no alternative but to order a new penalty hearing to be conducted by a different judge who, in turn, will be required to consider, anew, the recommendation of a jury.

As this Court reads this language, the Supreme Court nullified the previous penalty phase hearings, including the prior jury recommendations, and ordered another Superior Court judge to conduct everything anew. By the express terms of the 2002 amendment, it was intended to "apply to all defendants tried, re-tried, sentenced or re-sentenced after its effective date." And if that language were not clear enough to include these defendants, the amendment continues, "[t]his Act shall not apply to any defendant sentenced prior to its effective date unless a new trial or new sentencing hearing is ordered in the case." Accordingly, insofar as the defendants' new penalty

hearings are to be conducted under the 2002 amendment, their *Ring*-based challenges to the 1991 statute are moot.

There is a key element of the record in this case which both defendants ignore or have chosen not to address. Whatever infirmities the Supreme Court found with the original trial judge's penalty decision, the fact remains that before his sentencing decision was made, the jury unanimously found beyond a reasonable doubt that four statutory aggravating factors existed. The trial judge instructed the jury about what the factors were and the applicable burden of proof:

1. The murder was committed against a person who was a witness to a crime and who was killed for the purpose of preventing the witness' appearance and testimony in a criminal proceeding involving the crime. *See* 11 *Del. C.* § 4209(e)(1)g.

2. Defendant Stevenson caused or directed another to commit murder. Defendant Manley committed murder as an agent of another person. *See* 11 *Del. C.* § 4209(e)(1)m.

3. At the time of the killing, the victim had provided a police agency with information concerning criminal activity, and the killing was in retaliation for the victim's activities in providing information concerning criminal activity to a police agency. *See* 11 *Del. C.* § 4209(e)(1)t.

4. The murder was premeditated and the result of substantial planning. *See* 11 *Del. C.* § 4209(e)(1)u.

In instructing the jury on those four factors, the judge also instructed the jury in pertinent part:

> Delaware law specifies certain "statutory aggravating circumstances", at least one of which must be found to exist beyond a reasonable doubt in order to render death an available punishment. The law also permits you to consider any other aggravating factors not defined to be "statutory aggravating circumstances" which may exist in a particular case. The law does not specify mitigating circumstances, but the defendants may offer evidence relating to any

> mitigating circumstances which they contend exist in a particular case.
>
> If you find beyond a reasonable doubt that any one of the four of these statutory aggravating circumstances exist in this case and have been proven by the State beyond a reasonable doubt, then you should answer in the affirmative the question regarding that alleged statutory aggravating circumstance as it pertains to each defendant. If you have a reasonable doubt as to the existence of one, two, three or four of the statutory aggravating circumstances, then you must answer in the negative the question regarding that alleged statutory aggravating circumstance as it pertains to each defendant.
>
> The judge, of course, instructed the jury, in accordance with the 1991 law, to cast affirmative and negative votes on each of these four statutory aggravating factors. Even so, the jury unanimously found beyond a reasonable doubt that each factor existed. While none of these statutory factors was " imbedded" in the indictment (such as felony murder, or killing two or more people), the unanimous finding beyond a reasonable doubt of these four factors satisfies *Ring*.[37]

The allegedly offending sentence was simply a matter of stating what the defendants' briefing had not covered. Their arguments seeking to bar a new penalty hearing encompassed other grounds.

A mythical objective observer, knowing and understanding all the relevant facts, the record and the context of the alleged offending sentences, would not believe that this judge has a bias or prejudice against the defendants. This judge was appointed by the President Judge to preside over, as the Supreme Court ordered, the presentation of the defendants' revised post-conviction relief motions and the new penalty hearing: " While

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[37] *State v. Manley,* Supra. At 74-81. Footnotes omitted.

a new penalty hearing is required in any event, the successor judge should first consider the reasserted post-conviction petitions. . . ."[38] This Court considered and rejected the revised post-conviction motions. That decision was upheld by the Supreme Court: " The Court has concluded that the judgment of the Superior Court should be affirmed on the basis of its well-reasoned Memorandum Opinion dated October 2, 2003."[39] This judge believes that a reasonable person, knowing all the relevant facts, would not harbor any doubts about this judge' s impartiality.

In the October 2003 opinion this judge noted that he was relying upon, for his own statement of facts, the prior judge' s sentencing decision and the Supreme Court' s original affirmance. That was self-evident because this judge only knew what was a matter of record. Nor was this statement made idly. This judge had to be free of bias and remain free of bias when considering the myriad of important issues in this capital murder case.

One of the facts leading this judge' s involvement was the Supreme Court' s determination that there was an appearance of impropriety by the original trial judge. Any subsequent appearance was and is especially to be avoided. Further, the remand was to conduct a new penalty hearing, assuming, of course, that there was nothing in the defendants' Rule 61 motions warranting a new trial.

Essentially, the defendants' current claims revolve around statements this judge

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[38] *Stevenson v. State,* 782 A.2d at 261.

[39] *Stevenson v. State,* 2004 WL 771657 at *1 and *Manley v. State,* 2004 WL 771659 at *1.

made about and on the record from the first trial. There will now be a new penalty hearing. The defendants' guilt has been found by a jury and their convictions affirmed. There will be a new jury to hear the evidence in the penalty hearing. While it will necessarily have to know the defendants have already been convicted, it will still have to hear the nature and circumstances of the murder and the respective roles of each of the defendants. All of this is necessary for that jury to make the appropriate sentencing recommendations and this judge the appropriate sentencing decisions. That decision will be based on the new record.

This judge cannot, of course, predict what those recommendations might be. But they will be based on the evidence presented to that new jury. As that identical evidence is presented to this judge, this judge will base his sentences on the facts presented in the new hearing and the new jury's recommendations. Neither the jury nor the judge will make any appropriate findings or recommendations based on the evidence in the earlier proceedings. The exception is, of course, the fact of the convictions, without more.

Conclusion

For the aforementioned reasons, the defendants' joint motion for recusal is **DENIED**.

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J.