IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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<tr><td>STATE OF DELAWARE

v.

MICHAEL MANLEY

Defendant

and

STATE OF DELAWARE

v.

DAVID STEVENSON

Defendant</td><td>)
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CRIMINAL ACTION NUMBERS

IN-95-11-1323 thru IN-95-11-1325 &
IN-95-12-0684 thru IN-95-12-0685

ID No. 9511007022

CRIMINAL ACTION NUMBERS

IN-95-11-1047 thru IN-95-11-1049 &
IN-95-12-0687 thru IN-95-12-0689

ID No. 9511006992</td></tr>
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Submitted: May 23, 2003
Decided: October 2, 2003

MEMORANDUM OPINION

Upon Motion of Defendants Manley and Stevenson for Post-conviction Relief and Defendant Manley to Preclude a New Penalty Hearing - ***DENIED***

HERLIHY, Judge

Michael Manley and David Stevenson have been convicted of murder in the first degree. They have been sentenced to death. Those convictions and sentencing were upheld on direct appeal. Subsequently, the defendants moved for post-conviction relief. This Court denied their motions.

The Supreme Court reversed. But it did not address the substance of the post-conviction claims. Instead, it determined that there was an appearance of impropriety by the trial judge arising from his involvement in a separate earlier proceeding involving the victim in this case. That appearance of impropriety, the Supreme Court said, tainted the trial judge as the ultimate sentencing authority. In that circumstance, the Supreme Court remanded this case for a new penalty hearing and directed that a new judge be assigned. That judge is also to preside over that hearing. Additionally, the remand directed that the newly assigned judge was to re-address the defendants' claims for post-conviction relief.

The remand was in May, 2001. Subsequent to that date, there have been decisions and statutory changes concerning capital punishment procedures that have raised questions about whether the penalty hearing can proceed.

The Court has determined that the defendants' post-conviction claims should be denied. It has also determined that there will be a new penalty hearing.

Procedural History

In addition to the outline above of some of the salient procedural history of this case, it is necessary to fill in other aspects of that history. The first step on remand was the

appointment of a new judge. It is important to know how the judge was appointed by the President Judge. The importance arises from the reasons which the Supreme Court said created the appearance of impropriety on the part of the original trial judge in this case.[1] This judge did not volunteer to take this case nor solicit in any manner to be assigned to it. This judge has had no connection with the trial, penalty hearing, prior Rule 61 opinion, or any matter involving the victim in this case, prior to being assigned to handle it after the remand.

The next directive on remand was for the newly assigned judge to allow each defendant to amend his motion for post-conviction relief which had been denied by the prior judge but which had not been considered on appeal.[2] That opportunity was afforded and each defendant offered additional grounds for relief.

In addition, there had been no evidentiary hearing on the earlier filed motions. Trial counsel had submitted affidavits and, upon remand, each defendant requested one. The State did not oppose their requests. The Court granted the defendants' requests.[3] After meeting with counsel on the case, all agreed that there should be a separate hearing for each defendant, in large part because the evidentiary issues were not all identical. Another reason for the pre-hearing meeting with counsel was to narrow, to the extent possible, the

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[1] *Stevenson v. State,* 782 A.2d 249, 253-60 (Del. 2001).

[2] *Id.* at 261.

[3] Super. Ct. Crim. R. 61(h).

issues to be covered and to allow the defense and the State to know which witnesses would be needed.

Manley's hearing was held first on January 11, 2002. The only witnesses were his two trial counsel. It should be noted that both trial counsel represented Manley on direct appeal. Subsequently, new counsel were appointed for Manley in connection with his earlier filed motion for post-conviction relief.

Stevenson's initial hearing was held on February 22, 2002. At trial, he was represented by two members of the Public Defender's office. The only witness to testify at the evidentiary hearing was one of his two trial attorneys. Unlike Manley, Stevenson was represented on his direct appeal, and on the later appeal resulting in the remand, by private counsel. That same attorney represented Stevenson at the initial evidentiary hearing.

As part of the pre-hearing issue narrowing process, which included Stevenson's then private counsel and the State, it was agreed that one issue not to be covered at the hearing was the one of accomplice liability in the light of *Chance v. State.*[4] But, at the evidentiary hearing, during the questioning of Stevenson's trial counsel, Stevenson's private counsel asked questions about *Chance.* The State objected on the grounds that such questions were outside the scope of the hearing. The Court, however, expressed greater concern about the questions. First, because trial counsel had asked for an instruction along the

[4] 685 A.2d 351 (Del. 1996).

lines enunciated in *Chance,* which the trial judge declined to give. Further, and more importantly, private counsel asking the questions had not himself raised that denial as an issue on direct appeal.

If the failure to raise the "*Chance*" issue on direct appeal were to be pursued in any post-conviction proceedings, the Court expressed concerns whether Stevenson's private counsel could continue representing him. The Court said that the choice would be for Stevenson to either forever waive any ability to raise it in any court and allow private counsel to continue his representation, or have new counsel who could pursue it. After several recesses in the hearing, Stevenson indicated he wanted more time to consider what he should do. The Court granted him that request, adjourned the hearing and awaited for Stevenson's decision.

In June 2002, the Court received a letter from Stevenson declaring that he wanted new counsel. Since his counsel up to that point had been privately retained, the Court held a hearing to determine whether he was going to get or afford new private counsel, or have court appointed counsel due to indigency. It was the latter. New counsel were appointed in late June 2002.

Shortly after new counsel were appointed for Stevenson, the United States Supreme Court handed down its decision in *Ring v. Arizona,*[5] which is one of the post-remand events raising the issue of whether a new penalty hearing could be held. By this time all

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[5] 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002).

the briefing on Manley' s issues had been completed. But the Court met with counsel in July to determine the effect of the decision in *Ring* on the penalty hearing and Delaware' s death penalty statute. As a result of the office conference, it was agreed to postpone deciding Manley' s issues until the Delaware Supreme Court decided, in an unrelated case, some issues being certified concerning the death penalty statutes.

In Stevenson' s case, the decision was made to proceed with a resumed evidentiary hearing once new counsel indicated to the Court that they were prepared to do so. Such indication came in November and a resumed hearing was scheduled for February 6, 2003, consistent with counsels' and the Court' s schedule.

The witnesses at that hearing included several potential witnesses to events at the time of the murder, who had not been called by trial counsel, and both of Stevenson' s trial counsel. Following the hearing the parties briefed the issues raised.

Factual Background

To understand the defendants' claims, it is necessary to recite in some detail the events surrounding the murder for which they were convicted. Those events actually began over a year prior to the killing.

Stevenson was arrested on September 30, 1994, by Delaware State Police Detective Thomas Ford for fraudulent use of credit cards. The credit cards had been used to buy Macy' s gift certificates. Stevenson had worked at Macy' s. Information leading to his arrest came from Macy' s security officers Parmender Chora and Kristopher Heath.

Stevenson made inculpatory statements to these two security officers.

After his indictment, Stevenson moved to suppress his statements. A hearing was held during which Chora and Heath testified and over which the trial judge in the murder trial presided. The motion was denied. After several continuances, the case was set for trial on November 13, 1995. Chora and Heath were to be witnesses.

On the 13th, the defendants left Stevenson's Wilmington residence in the early morning hours. They left in a vehicle of which Stevenson and his sister were the co-owners. It was a Mercury Topaz with dark blue paint which had peeled off in many spots leaving silvery splotches. A gold and red tassel dangled from the rearview mirror. It had a Delaware tag of 727970.

Heath lived at the Cavalier Country Club Apartments. Around 7 a.m., a tenant there, Michael Chandler, observed a vehicle in the apartment complex parking lot. It had a gold and red tassel hanging from the rearview mirror. Chandler was suspicious because the two occupants, both African-American males, were slouched down in their seats. The driver was wearing a dark winter wool hat.

Other Cavalier tenants heard gunshots around 7:40 a.m. One such resident was Susan Butler. She saw a stocky African-American male wearing a dark blue sweatshirt, or jacket, and dark jeans running across the parking lot immediately after the shots were fired. Another tenant, Philip Hudson, saw the same person and clothing. When Manley was apprehended less than an hour later, he was wearing a dark blue pullover shirt and

blue jeans. He also matched the physical description.

Another tenant, Lance Thompson, heard shots. He went to his window and saw a man getting into the passenger side of a vehicle which backed up towards him and left. The car had peeling paint on its top. He was suspicious and wrote down the vehicle's tag number, Delaware 727970.

Thompson gave the number to a New Castle County Police officer who arrived shortly after the shots. The officer broadcasted the information and ran the tag number which came back as registered at 206 W. 20th Street in the City of Wilmington.

Heath lay on the surface of the parking lot. He was shot five times from behind, once in the head, three in the back and one struck his left arm. He died from massive internal bleeding from the chest and head wounds. The shots came from a 9 mm, semi-automatic handgun. At the scene, the police recovered several cartridge cases, bullet fragments and two copper bullet jackets.

As a result of the County Police broadcast, several Wilmington Police officers were dispatched shortly after 8 a.m. to Stevenson's residence at 206 W. 20th Street. One of the officers approached the Mercury Topaz just as two African-American males were getting out. They spotted the officer, got back in the vehicle and sped off. The police chased it until it hit a curb. The occupants got out and fled.

Manley was caught first after a foot chase. He had cuts on the palms of his hands and was breathing heavily. Stevenson ran and boarded a bus, but the police apprehended him

on the bus. He too was breathing heavily and had cuts on his palms. He was wearing a dark green sweatshirt and blue jeans. Stevenson was put in one Wilmington Police car. Later, when it was searched, an officer found on the rear passenger seat floor a piece of paper with Chora's (the other Macy's security officer) name, address and phone number.

The police obtained a warrant to search the Mercury Topaz. In the trunk, they found a camouflage U.S. Army jacket with a Specialist E4 insignia on it. Other evidence indicated that Manley was in the Army Reserves, the jacket was Army issue and that his rank was E4. The jacket was an extra large, which is Manley's size. The police also found twenty-four copper-jacketed 9 mm live rounds of ammunition. They were of the same type and manufacturer as the cartridge cases and fragments recovered at the scene and from Heath's body. The murder weapon was not found. Atomic absorption tests performed on the defendants and their clothing were negative for gun powder residue.

There was additional evidence in the State's case-in-chief.[6] In October 1994, Melissa Magalong moved into the Newark residence where Heath used to live. At around 8 p.m. to 9 p.m. on November 12, 1995, she heard a knock on her door. She did not answer the door, although she heard male voices mumbling outside. Then the male voices went away.

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[6] The following recitation is from the Supreme Court's direct appeal decision, *Stevenson v. State,* 709 A.2d 619, 626 (Del. 1998), and the original trial judge's sentencing decision, *State v. Manley,* Del. Super., No. 9511007022, Barron, J. (Jan. 10, 1997)(ORDER).

Earlier on the evening of November 12, 1995, Debbie Dorsey was at the Cavalier Country Club apartment which she shared with Heath. At approximately 7 p.m., there was a knock at the apartment door. She opened it and observed an African-American man who asked if Kris was home. She responded that he was not in but was expected to return at around 9 p.m. She had never seen this man before. He was wearing a puffy black jacket and was a little shorter than Heath.[7] Dorsey knew Stevenson since she also worked at Macy's department store. She was sure it was not Stevenson even though the lighting was not very good. She had never met Manley.

Anna Hawley, who works at the University of Delaware library, recalled that Stevenson worked at the library from 9 p.m. to midnight on the evening of November 12, 1995. She saw him and his friend, Michael Manley, together at some point during Stevenson's shift. Janet Hedrick, an officer with the University of Delaware Police, also saw Manley waiting for Stevenson at the library at approximately 11:45 p.m.

About one week prior to the murder, Stevenson told his friend Kevin Powlette that he wanted to get a gun for his protection. Powlette also saw Manley and Stevenson together early in the morning of November 13, 1995.

Neither defendant testified but each presented evidence.

Manley's mother, Rita Manley, testified that her son graduated from high school in

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[7] Heath was 5 feet, 10 inches tall. A police detective testified that Manley is 5 feet, 8 inches tall. There was also testimony that David Stevenson appeared to be 3 or 4 inches taller than Manley.

1992 and thereafter joined the United States Army Reserves. She testified that the Army camouflage jacket taken from the trunk of Stevenson's car did not belong to her son. Mrs. Manley observed that on most weekends her son and Stevenson were together and that it was not unusual for him to visit Stevenson at the University of Delaware.

On Sunday, November 12, 1995, Mrs. Manley recalled that Stevenson arrived at her home in the afternoon and that he and her son watched a football game on television. They left in the evening at around 6 p.m. or 6:30 p.m. to pick up Stevenson's sister, Elissa Brown. Myla Fisher testified that the defendants were at her house on November 12, 1995, at around 6:45 - 7 p.m. to pick up Elissa Brown, who needed a ride home, but these times were questioned on cross examination.

Two cousins, an aunt, a friend of Manley's mother and a Philadelphia police dispatcher all testified that Manley's reputation for peacefulness was very good.

Stevenson called Det. Craig Weldon, who was the officer that had investigated whether Stevenson had ever purchased a handgun. He testified that his investigation revealed no evidence that Stevenson had attempted to make a legal purchase of a handgun. He also testified that there was a report during the pursuit of the defendants that a man with a green sweatshirt had been seen entering a church near where Stevenson was apprehended. In rebuttal, the State recalled Officer Pete Stark who testified that the person who went into the church was older than Stevenson and that the sweatshirt was a lighter shade of green than Stevenson's. He also testified that the church was in a direction

opposite than that in which the chase had occurred.

Elissa Brown, Stevenson's sister, testified as to his reputation for peacefulness. She testified that her prior statement to the police must have been mistaken wherein she said that Stevenson and Manley picked her up at Myla Fisher's house, on November 12, 1995, during the first quarter of the Dallas football game. She testified that she thought it was at the end of the game because it was dark. In rebuttal, the State recalled Det. Rand Townley who had talked to Elissa Brown following her brother's arrest. He testified that she told him that she, Manley and Stevenson left Fisher's house during the first quarter of the Dallas football game. The News Journal sports section was introduced to show that on November 12, 1995, the Dallas game started at 4 p.m.

The jury found both defendants guilty of murder in the first degree and conspiracy in the first degree (conspiracy to commit murder). Following that verdict, the Court convened a penalty hearing before the same judge in accordance with 11 *Del.C.* § 4209 as it was then written. The State argued that four statutory aggravating circumstances existed.[8] These circumstances are further explained later.[9]

The jury was instructed that to determine if a statutory aggravating circumstance existed, it had to find that it had been established beyond a reasonable doubt. The jury unanimously found that each of the four aggravating circumstances had been proven

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[8] 11 *Del.C.* § 4209(e)(1)g, e(1)m, (e)(1)t, and (e)(1)u.

[9] *Infra* pp. 79-81.

beyond a reasonable doubt. It also, by a vote of eight to four, recommended the death sentence for Stevenson and by a vote of seven to five such a sentence for Manley.

The original trial judge sentenced both to death in a decision issued January 10, 1997.

Both defendants appealed. On direct appeal, Manley argued several reasons why his conviction and sentence should be reversed:

1) This Court erred by not granting his motion for severance. There had been a pre-trial motion which was denied. He argued that the trial showed there were antagonistic defenses.

2) This Court erred by admitting a statement Stevenson had made.

3) The jury selection process was biased because the jury was "death qualified".

4) This Court erred in rulings excusing several jurors.

5) The death sentence was arbitrary and capricious.

The Supreme Court rejected these arguments and affirmed the conviction and sentence.[10]

Stevenson raised several issues on his direct appeal. As noted earlier, he had private counsel representing him on appeal. That attorney had not represented him at trial. The issues Stevenson raised were:

1) This Court had erred when it denied his motion for severance.

2) This Court erred by denying his (last minute) request for a trial continuance to allow new (privately retained) counsel to enter his appearance.

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

3) This Court erred by not giving a limiting instruction at the time the evidence was introduced concerning Macy's theft charges.

4) The prosecutor made improper remarks to the jury in his closing summation.

5) This Court erred when instructing on accomplice liability by not telling the jury it had to be unanimous in deciding whether he was a principal or an accomplice.

6) The trial judge should have recused himself since he presided over the suppression hearing during which the murder victim testified.

The Supreme Court rejected all of Stevenson's arguments raised during this direct appeal.[11]

In the Procedural History section,[12] it was noted that subsequent to the Supreme Court's decisions on the defendants' direct appeals, each of them filed motions for post-conviction relief. Stevenson's appellate counsel was still representing him, but new counsel were appointed to represent Manley. Trial counsel for both defendants submitted affidavits in response to the defendants' allegations of ineffective assistance.

Manley raised various issues in this first round of seeking post-conviction relief. His original post-conviction motion was filed by his newly appointed attorneys on January 25, 1999, and presented three grounds for relief. Those grounds were that:

1) During the course of the trial, it became obvious that the State's theory of the case was that Manley was the shooter such that counsel was ineffective

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[11] *Stevenson,* 709 A.2d 619.

[12] *Supra* p. 2.

in failing to develop and present evidence which would have at least created reasonable doubt as to the identity of the shooter.

2) Defense counsel was ineffective in failing to move for a severance during trial when it became obvious that Stevenson's defense strategy was pinning Manley as the shooter.

3) Defense counsel was ineffective in failing to request the trial court to give a *Chance* instruction based on Section 274 of Title 11 and failing to pursue this issue on direct appeal.

An addendum subsequently supplemented these claims. Manley, though represented by counsel, filed it *pro se* on May 14, 1999. This handwritten addendum added four additional grounds for relief. Those grounds are that:

4) The limiting instruction that the trial judge gave to the jury was erroneous and violated Manley's right to due process.[13]

5) Manley's counsel was ineffective in failing to properly object to and pursue on appeal the trial court's erroneous limiting instruction as to the evidence admitted regarding Stevenson's theft charges.

6) The State knowingly allowed Debra Dorsey to testify falsely concerning her identification of the man who knocked at her door the night before the homicide.

7) Defense Counsel was ineffective in failing to uncover the false testimony and in failing to pursue the issue on appeal.

Stevenson in this same first round claimed the following grounds for post-conviction relief. Stevenson's original post-conviction motion, filed on February 8, 1999, contained

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[13] The limiting instruction relates to the introduction into evidence of the pending charges and trial involving Stevenson's fraudulent use of credit cards while employed at Macy's. Manley argued that the limiting instruction was erroneous because it included his name.

nine grounds for relief, plus several sub-grounds. Those grounds were as follows:

1) Ineffective Assistance of Counsel

   A. Trial counsel failed to file a motion to recuse the trial judge.

   B. Trial counsel failed to investigate the procedure by which the trial judge was assigned to the case and interview and call witnesses in furtherance of Stevenson's defense during the guilt phase of the trial.

   C. Trial counsel failed to investigate and present exculpatory evidence, including alibi evidence, despite the objection of Stevenson and his family.

   D. Trial counsel failed to object to inflammatory evidence presented at trial.

   E. Trial counsel failed to file any motion to exclude or limit evidence pursuant to the requests of Stevenson.

   F. Trial counsel failed to adequately prepare for trial and presented evidence that was damaging to Stevenson and Manley.

   G. Trial counsel was ineffective and ill prepared and did not adequately represent Stevenson and did not allow Stevenson to present his defense himself.

2) The State presented insufficient evidence to establish the conviction, such that it should never have gone to the jury.

3) Trial court erred in not ruling that Stevenson's detention, arrest and seizure were illegal and in not allowing Stevenson to present suppression arguments in an evidentiary hearing.

4) Trial court allowed in evidence of other crimes without providing the jury with a proper limiting instruction as to the use of that evidence.

5) Trial court erred in not allowing Stevenson to have a separate trial apart

from Manley, thereby allowing the State to present evidence that would not have been admitted had they been tried separately.

6) Trial court erred in denying Stevenson private counsel and by refusing Stevenson's request for a continuance so that private counsel could be obtained.

7) Trial court erred in its interpretation of the law with regard to accomplice liability and should have provided the jury with a specific unanimity instruction.

8) Stevenson was denied a fair trial because potential jurors were excused for being opposed to the death penalty and the trial court failed to distinguish the case of *State v. Rodriguez.*[14]

9) Trial judge should have recused himself from the case.

When the original judge's denial of the defendants' motions was reversed, the new judge to be assigned was to consider these issues and give the defendants an opportunity to amend their original motions.[15]

Upon receiving the case on remand, this Court scheduled an office conference for the purpose of narrowing the issues to be pursued by the defendants. At the August 3, 2001, office conference, later memorialized by this Court's letter of August 7, 2001,[16] the parties agreed that each defendant would file an amended motion for post-conviction relief incorporating any prior claims that they wish to pursue as well as raising any new claims.

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[14] 656 A.2d 262 (Del. Super. Ct. 1993).

[15] *Stevenson,* 782 A.2d at 261.

[16] Court's letter of 8/7/01, at 1.

It was further agreed that any claims previously made, but which are being withdrawn, should be noted so in writing.[17]

Manley's amended and restated motion for post-conviction relief was filed on September 7, 2001, and contains six grounds for relief. Those grounds are:

1) During the course of a trial, it became obvious that the State's theory of the case was that Manley was the shooter such that counsel was ineffective in failing to develop and present evidence which would have at least created reasonable doubt to the identity of the shooter.

2) Defense counsel was ineffective in failing to move for a severance during trial when it became obvious that Stevenson's defense strategy was pinning Manley as the shooter.

3) Defense counsel was ineffective in failing to request the trial court to give a *Chance* instruction based on Section 274 of Title 11 and failing to pursue this issue on direct appeal.

4) During the trial, prior bad acts committed by Stevenson (Macy's thefts) were admitted into evidence, but that the trial judge's limiting instruction was erroneous, and counsel was ineffective in failing to object to the instruction and in failing to raise the issue on direct appeal.

5) The State knowingly allowed Debra Dorsey to testify falsely concerning her identification of the man who knocked at her door the night before the homicide.

6) The trial court's discretionary pretrial rulings during the course of the trial, including, but not limited to, the ruling on defendant's motion for severance was tainted by the appearance of judicial bias.

Manley's opening brief filed March 18, 2002, however, presents only three grounds

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[17] *Id.*

for relief.[18] Those grounds are:

1) His former attorneys rendered ineffective assistance in Manley's direct appeal insofar as they failed to raise the trial judge's refusal to include a jury instruction based on *Chance* and Section 274 of Title 11 as grounds for reversal.

2) His former attorneys rendered ineffective assistance of counsel in Manley's trial and direct appeal in failing to pursue the trial judge's improper and prejudicial limiting instruction with regard to the evidence of Stevenson's Macy's thefts.

3) His former attorneys were ineffective for failing to renew their request for a severance during the course of the trial.

In addition, on March 26, 2003, Manley also filed a motion to preclude a new penalty hearing. That motion presents the following arguments:

1) Delaware's 1991 Death Penalty Statue, under which Manley's sentence was imposed, is unconstitutional under the Supreme Court's decision in *Ring v. Arizona.*

2) The doctrine of severability requires a default sentence of life imprisonment be imposed on Manley, such that no new penalty hearing need be conducted.

3) The 2002 Death Penalty Statute is not applicable in this case.

Stevenson filed his amended and restated motion for postconviction relief on September 7, 2001. The amended and restated motion is nearly identical to the original motion and contains the following grounds for relief:

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[18] The brief also contains a fourth line of argument, but it is actually just a subsection of Manley's severance claim. In that subsection, Manley urges this Court to not find his ineffective assistance claim to be procedurally barred as previously adjudicated.

1) Ineffective Assistance of Counsel

   A. Trial counsel failed to file a motion to recuse the trial judge.

   B. Trial counsel failed to investigate the procedure by which the trial judge was assigned to the case and interview and call witnesses in furtherance of Stevenson's defense during the guilt phase of the trial.

   C. Trial counsel failed to investigate and present exculpatory evidence, including alibi evidence, despite the objection of Stevenson and his family.

   D. Trial counsel failed to object to inflammatory evidence presented at trial.

   E. Trial counsel failed to file any motion to exclude or limit evidence pursuant to the requests of Stevenson.

   F. Trial counsel failed to adequately prepare for trial and presented evidence that was damaging to Stevenson and Manley.

   G. Trial counsel was ineffective and ill prepared and did not adequately represent Stevenson and did not allow Stevenson to present his defense himself.

2) The State presented insufficient evidence to establish the conviction, such that it should never have gone to the jury.

3) The trial court erred in not ruling that Stevenson's detention, arrest and seizure were illegal and in not allowing Stevenson to present suppression arguments in an evidentiary hearing.

4) The trial court allowed in evidence of other crimes without providing the jury with a proper limiting instruction as to the use of that evidence.

5) The trial court erred in not allowing Stevenson to have a separate trial apart from Manley, thereby allowing the State to present evidence that would not have been admitted had they been tried separately.

6) The trial court erred in denying Stevenson private counsel and by refusing Stevenson's request for a continuance so that private counsel could be obtained.

7) The trial court erred in its interpretation of the law with regard to accomplice liability and should have provided the jury with a specific unanimity instruction.

8) The trial judge should have recused himself from the case.

In Stevenson's opening brief, however, filed on March 13, 2003, Stevenson only addresses three grounds for relief. Those grounds are as follows:

1) Stevenson's former appellate counsel rendered ineffective assistance of counsel in his direct appeal when he failed to raise issues regarding the trial court's decision not to include an instruction based on *Chance* and Section 274 of Title 11.

2) Stevenson's trial attorneys were ineffective in failing to interview and call as witnesses certain persons identified in police reports who could have supported his "reasonable doubt" defense.

3) The Delaware death penalty under which Stevenson was convicted is unconstitutional under *Ring v. Arizona,* such that he should not have to face a new penalty phase, but should rather be sentenced to life under the severability clause of the Delaware Code.

   A. The 1991 Statute is unconstitutional because it calls for the judge, instead of the jury, to make the decision about the existence of aggravating factors.

   B. The 1991 Statute is unconstitutional because it permits a capital case to be tried without having the grand jury indict as to the elements of the statutory aggravating factors.

   C. The 1991 Statute is unconstitutional because it permitted a death sentence to be imposed as a result of a hearing in which the rules of evidence are not enforced.

D. The 1991 Statute is unconstitutional because under the Delaware constitution, the jury is required to make the decision to sentence a defendant to death.

E. The jury selection under the 1991 Statute is unconstitutional, in part under the reasoning of *Caldwell v. Mississippi.*

F. *Ring v. Arizona* established a substantive rule of criminal law.

Stevenson has also submitted a supplemental memorandum, in response to a Court invitation, concerning the applicability of Section 274 of Title 11 of the Delaware Code. That memorandum was filed on May 12, 2003 and contains one argument, as follows:

4) The Supreme Court's reasoning in *Swan v. State* is fundamentally flawed because it ignores *Demby's* mandate and contains incorrect assumptions about the liability of injuries to assign culpability to defendants.

As noted in this decision in the Procedural History, this Court held evidentiary hearings on some of the issues the defendants had raised. The witnesses at Manley's hearing were his original two trial counsel. At Stevenson's initial hearing, the only witness who testified was one of his two trial counsel. His testimony was interrupted and then stopped when the representation issue arose over the *Chance* questions.[19]

The evidentiary hearing resumed with new, court appointed counsel. Four persons who had been tenants at Cavalier Apartments at the time of the murder testified. They were Valerie Era Mossinger (who was then Valerie Era), Marlene Ijames (formerly Marlene Farmer), Jessica Wing, and Carol Schweda Trzepacz (formerly Carol Schweda).

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[19] *Supra* p. 4.

None had testified at the trial. Each, however, spoke to the police on the day of the murder and/or shortly thereafter. Ijames was the only one to testify that she had never been contacted by an attorney or anyone for the defense until Stevenson's newly-appointed counsel in the current proceeding did. Wing recalled being contacted several weeks after the shooting by some lawyers who said they did not need her. Trzepacz said only the police spoke to her and no defense counsel contacted her until new court appointed counsel did.

Valerie Era Mossinger testified that she was awakened between 7 and 8 a.m. by gunshots. She saw a car which she described as black. She saw it moving but could not see the occupants. When she called her roommate, Carol Schweda, at work, Schweda told her that when she went to her car that morning there was a car next to her car with two men slouched down in it. She said she was startled. Schweda did not testify at the defendants' trial.

She did, however, testify at the evidentiary hearing. She recalled, that while she was walking to her car in the morning, she glanced and saw someone in a car in the middle row of parking spaces. She believed the person was Caucasian or Hispanic and was occupying the passenger seat. She may have told the police at the time of the murder that the man she saw was white.

Marlene Ijames said that she heard the gunshots, too. She was already awake when she heard the gunshots. She looked out her window about three minutes later. She could

not see the parking lot and returned to getting ready for work. Then she heard screams and went back to the window.

According to the summary of her statement, which the defense had, she told the police she saw a white male wearing a dark jacket and light colored pants with a short hair cut. He was about 5' 8" and of medium build. She told the police this person walked very quickly from the person who was lying on the ground. He looked back at that person lying on the ground and got into a car. The car was dark colored and it drove by the window out of which she was looking.

Stevenson's trial counsel, who was testifying in the initial hearing when the "*Chance*" interruption occurred, resumed the stand at the second hearing and was asked about these witnesses. He resumed his testimony by saying that the State's argument at trial was that Manley was the shooter. Manley's trial strategy, however, was that while Manley was at the murder scene, Stevenson was the shooter. Stevenson's defense, on the other hand, was alibi. Stevenson had given him and co-counsel alibi information, but they were unable to verify it since the store where he was supposedly going was not open. Besides, Stevenson was due in Superior Court that day for his fraud trial.

Co-counsel, who had defended twenty-five capital cases, also testified in the evidentiary hearing. Both counsel were aware of the four witnesses prior to trial and had a lot of information about the State's case. There had been a preliminary hearing and a

"proof positive"[20] hearing. Prior to trial, the State had supplied counsel copies of police reports with summaries of witness interviews.[21]

There were a number of considerations of which both counsel were aware. One was that the State's case was very strong. The license number Thompson copied down belonged to Stevenson's car. The dangling tassel made the case stronger. They were aware of several witnesses who said the man they saw was white. But they were also dealing with an African-American client the back of whose hands were fairly light skinned, almost Caucasian. They are lighter than his face, and they could readily be mistaken as hands of a Caucasion.

Stevenson's trial counsel were aware that the State's witnesses would describe the shooter as a dark-skinned African-American, which would not match Stevenson's description. If any of the four witnesses not called at trial had been called, they could have pointed the finger at Stevenson as the shooter because of their description of the shooter as white. Stevenson's trial defense was that he was not present. The evidence at trial was that the passenger was the shooter.

Both counsel, therefore, were concerned that calling these witnesses could backfire on Stevenson. They were aware, however, that some or all four of these witnesses could possibly cast doubt on the State's case. Yet with the State's case being so strong, they

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[20] 11 *Del. C.* § 2103.

[21] Defense exhibit 2, at the evidentiary hearing.

were worried about damaging their case's credibility during the penalty hearing and the threat of a backlash at the penalty hearing based on their assessment that Stevenson would be convicted.

Investigators for trial counsel did attempt to contact the four witnesses. Calls were made and cards were left. None of the four witnesses responded, however. Nonetheless, none were subpoenaed for trial either.

Stevenson's trial counsel said his newly retained private counsel contacted them after the trial. While recalling there was a discussion with appellate counsel about possible appeal issues, neither recalled if *Chance* issues were discussed. The record shows that trial counsel did, however, request the original trial judge to include a "*Chance*" instruction to the jury.

Unlike Stevenson's claims about witnesses who should have been called to testify but were not, Manley makes no such claims. The only testimony at his evidentiary hearing, therefore, was from his original trial counsel, both of whom represented him on direct appeal. The focus of the questioning of these attorneys concerned their failure to renew at trial a motion for severance, their failure to raise the *Chance* issue on appeal, some matters relating to the testimony of Heath's girlfriend, and their trial strategy.

Their trial strategy was that Manley was present but was not the shooter. Manley had told his lawyers he was going that day with Stevenson to the University of Delaware to monitor a class. He was, however, asleep in the car when Stevenson got out (apparently,

according to Manley, to kill Heath). After that, Stevenson got in and drove back to Wilmington telling Manley of the shooting. Their trial strategy that Manley was there but not the shooter, counsel said, was influenced by what Manley told them.

That strategy also influenced their approach to questioning Heath's girlfriend, who had described a dark-skinned African-American male coming to the apartment the night before the murder. She could not identify the visitor and she knew Stevenson. She was emotional on the stand and they did not want her there any longer than necessary.[22]

Prior to trial, the original trial judge had denied the defendant's motions for severance.[23] At the evidentiary hearing, trial counsel were asked why they did not renew the severance motion during the trial. It became clearer, Manley now claims, that several post-decision events compelled renewing the motion. Such events included the testimony about Stevenson getting a gun, the testimony against Stevenson and the Macy's theft charges, and testimony that indicated Manley may have been the shooter. Nevertheless, trial counsel did not renew the severance motion.

Manley's trial counsel were aware of 11 *Del. C.* §§ 271 and 274 prior to the *Chance* decision. With that decision in hand, at or around the time of the prayer conference, they asked the original trial judge to give a "*Chance*" instruction. Their request was denied. Both trial counsel testified at the evidentiary hearing they believed then that the basis for

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[22] *State v. Manley,* Del. Super., No. 9511007022, Barron, J. (Aug. 1, 1996)(Mem. Op.).

[23] *Id.*

the denial was correct. They also believed, in presenting Manley's direct appeal, that the *Chance* issue was not persuasive. They, therefore, did not raise it. With hindsight and in light of *Demby v. State,*[24] it might have been more prudent, they testified, to have raised a *Chance* issue on direct appeal.

The Court noted earlier,[25] the various claims for post-conviction relief which each defendant has raised since and including those in their original motions. Each defendant's briefing, however, did not address all of those claims. The Court will deem those claims not briefed as waived.[26] The Court, of course, will address the claims which were raised and briefed.

Applicable Standards

Before undertaking consideration of claims on a motion for post-conviction relief, the Court must first determine whether there is any procedural impediment to doing so.[27] None of the claims are time barred.[28] Further, when remanding this matter, the Supreme Court directed that the issues raised in the defendants' first round of post-conviction relief motions, albeit denied by the prior judge, be considered. That Court also directed that the

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[24] 744 A.2d 976 (Del. 2000).

[25] *Supra* p. 14-21.

[26] *Murphy v. State,* 632 A.2d 1150 (Del. 1993).

[27] *Stone v. State,* 690 A.2d 924, 925 (Del. 1996).

[28] Super. Ct. Crim. R. 61(i)(1).

defendants be given an opportunity to supplement their original motions. They were given that opportunity and did so. In short, there is no apparent bar to any issue as having been previously adjudicated.[29] With regard to the *Chance* claims, which both defendants have raised, and Manley's severance claim, there, however, is an arguable basis to say that these issues were previously adjudicated.[30] Further discussion of that arguable basis is deferred until the detailed review of these claims.

Claims of Ineffective Assistance of Counsel

The Supreme Court remanded this case for two purposes: (1) to have this Court reconsider the defendants' claims for post-conviction relief plus any others they wished to make; and (2) to conduct a new penalty hearing. All their claims for post-conviction relief involve assertions of ineffective assistance of counsel. In turn, each of those claims relate to the trial, whether it is conduct of counsel at trial or on appeal. The resolution of these claims effects whether there needs to be a new trial. Logically, therefore, before considering the separate issues relating to the penalty hearing, the Court will analyze the claims of ineffective assistance of counsel.

Both defendants make such claims. Manley's claims relate to his trial counsel in that role and in their role as his appellate counsel. Stevenson's claims are against his trial counsel and against his separate private attorney who represented him on direct appeal.

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[29] Super. Ct. Crim. R. 61(i)(4).

[30] *See discussion, infra* pp. 30-49.

To proceed on these claims, each defendant must prove that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's errors prejudiced his defense.[31] Prejudice has been defined as a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.[32] "Reasonable probability" has been defined, in turn, to mean a probability sufficient to undermine confidence in the outcome.[33] When considering claims of ineffectiveness, courts are admonished to give deference to counsel's tactical decisions, not to employ hindsight and give counsel the benefit of a strong presumption of reasonableness.[34]

A claim of ineffectiveness of appellate counsel, while subject to these same tests, are also judged by additional standards. Delaware has not articulated those standards in its reported decisions to the same extent as federal case law. The seminal Delaware case and the one most often cited is *Flamer v. State*: "A strategy, which structures appellate arguments on 'those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.'"[35]

In an unreported order, the Delaware Supreme Court stated later, "[e]qually clear,

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[31] *Shelton v. State,* 744 A.2d 465, 475 (Del. 2000).

[32] *Stone,* 690 A.2d at 925.

[33] *Righter v. State,* 704 A.2d 262, 264 (Del. 1997).

[34] *Deputy v. Taylor,* 19 F.3d 1485, 1493 (3rd Cir. 1994).

[35] 585 A.2d 736, 758 (Del. 1990) (quoting *Smith v. Murray,* 477 U.S. 527, 536 (1986)).

however, is the principle that [the defendant] could not constitutionally require his attorney to present any non-frivolous issue that he wanted to advance, but which counsel, exercising his professional judgment, decided not to present."[36] The Delaware Supreme Court cited the United States Supreme Court's decision in *Jones v. Barnes.*[37] These two standards overlap but are not co-terminous. Both should be employed.

Joint Claim
Failure to Raise Chance Issue

Potentially the most significant claim of ineffective assistance is one which both defendants make. It is the failure of the counsel representing them on direct appeal to claim error in the trial judge's decision not to instruct the jury in accordance with *Chance v. State.*[38] Both defendants sought such an instruction and the original trial judge denied it, finding *Chance* inapplicable to the facts of the case. If a *Chance* instruction should have been given, ineffectiveness would be shown and a new trial warranted.

To understand their present argument, it is necessary to review the *Chance* decision. That case dealt with the relationship between Sections 271 and 274 of Title 11 of the Delaware Code with regard to accomplice liability and jury instructions. Section 271 in part provides:

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[36] *McGonigle v. State,* Del. Supr., No 294, 1992, Moore, J. (Mar. 3, 1993) at 4.

[37] 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 987 (1983).

[38] 685 A.2d 351 (Del. 1996).

A person is guilty of an offense committed by another person when:

1) Acting with the State of mind that is sufficient for commission of the offense, the person causes an innocent or irresponsible person to engage in conduct constituting the offense; or

2) Intending to promote or facilitate the commission of the offense the person:

   a) Solicits, requests, commands, importunes or otherwise attempts to cause the other person to commit it; or

   b) Aids, counsels or agrees or attempts to aid the other person in planning or committing it; or

   c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

Section 274 provides:

> When pursuant to §271 of this title, 2 or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible with that person's own culpable mental State and with that person's own accountability for an aggravating fact of circumstance.

In *Chance*, the Supreme Court ruled that because Section 274 incorporates Section 271 by reference, the use of the word "offense" in Section 271 and the use of that same word in Section 274 must be construed *in pari materia*. There, the charged crime was Murder in the Second Degree, such that the Court construed the term "offense" to mean homicide. The Court held, therefore, as a matter of law, that the jury was required to distinguish between an accomplice's liability for the offense of homicide and that accomplice's culpability for the degree of homicide, i.e., murder in the second degree, manslaughter, etc.

In other words, under *Chance*, the jury must first decide whether the State has established that the defendant was an accomplice to a criminal offense committed by another person, pursuant to Section 271. Second, *Chance* holds if a defendant is found liable for a criminal offense under a theory of accomplice liability, and if that offense is divided into degrees, then the jury must determine which degree is applicable based on the mental State and culpability of each individual defendant.

The trial judge in this case, while declining to give a *Chance* instruction, did give an accomplice liability instruction:

> A person indicted for committing an offense may be convicted either as a principle for acts which he committed himself or as an accomplice to another person who actually committed the offense. With respect to the charges of Murder First Degree, 2 counts of Possession of a Firearm During the Commission of a Felony, and 1 count of Aggravated Act of Intimidation, one or both of the defendants may be found guilty either as a principal for acts he committed himself or as an accomplice if he intended to aid another person in committing some or all of the acts necessary for the commission of the offenses. The pertinent section of our Criminal Code is as follows:
>
> > A person is guilty of an offense committed by another person when intending to promote or facilitate the commission of the offense, he aids, counsels, or agrees . . . to aid the other person in planning or committing it.
>
> So, in order to find either one of the defendants guilty of an offense committed by another person, you must find that all three of the following elements have been proven to your satisfaction beyond a reasonable doubt:
>
> > 1. Another person committed the offenses charged, namely, Murder First Degree, 2 counts of Possession of a Firearm During the Commission of a Felony, and 1 count of Aggravated Act of Intimidation, as I will explain those offenses for you.

AND

2. The named defendant intended to promote or facilitate the commission of the offenses. In other words, it was his conscious object or purpose to further or assist the commission of the offenses.

AND

3. The named defendant aided, counseled, or agreed to aid another person in planning or committing the offense.

Mere presence at the scene of a crime, without proof a those elements that I have outlined for you, does not support a finding of guilt under this section. You may find a defendant guilty of offenses committed by another person only if you are satisfied beyond a reasonable doubt that the offenses were within the scope of the agreed activity or were reasonably to be expected as incidental to that activity.

You should also be aware that in any prosecution for an offense in which the criminal liability of the accused is based upon the conduct of another person, it is no defense that the other person has not been prosecuted for or convicted of any offense based on the conduct in question.

Finally, the law provides that a person indicted as a principal for committing an offense may be convicted as an accomplice to another person guilty of committing the offense. Likewise, a person indicted as an accomplice to an offense committed by another person may be convicted as a principal.

Your verdicts must be unanimous, and the jury must unanimously find that a principal-accomplice relationship existed between the participants. However, there is no requirement that the jury be unanimous as to which of the parties was the principal and which was the accomplice as long as you are all agreed as to guilt.[39]

In addition to being indicted for murder in the first degree, the defendants were

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[39] Jury instructions at 7 - 8.

charged with conspiracy in the first degree, namely conspiracy to commit murder in the first degree. In accordance with that charge, the original trial judge instructed the jury as follows:

> Delaware law defines the offense of Conspiracy First Degree, in pertinent part, as follows:
>
> A person is guilty of conspiracy in the first degree, when intending to promote or facilitate the commission of a class A felony, the person:
>
> * * * * *
>
> (2) Agrees to aid another person or persons in the planning or commission of the felony . . . and the person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy.
>
> In order to find the defendant guilty of Conspiracy First Degree, you must find that all of the following elements have been established beyond a reasonable doubt:
>
> 1. The defendant intended, that is, it was his conscious object or purpose, to promote or facilitate the commission of a class A felony, in this case, Murder First Degree, as I have defined that offense for you.
>
> AND
>
> 2. The defendant agreed to aid another person or persons in the planning or commission of the class A felony.
>
> AND
>
> 3. The defendant or another person with whom he conspired committed an overt act in pursuance of the conspiracy. An overt act is any act in pursuance of or tending toward the accomplishment of the conspiratorial purpose.

> If, after considering all of the evidence, you find that the State has established beyond a reasonable doubt that the defendant acted in such a manner as to satisfy all of the elements which I have just stated, at or about the date and place stated in the indictment, you should find that defendant guilty of Conspiracy First Degree. If you do not so find, or if you have a reasonable doubt as to any element of this offense, you must find the defendant not guilty of Conspiracy First Degree.[40]

On direct appeal, Stevenson did attack the original trial judge's accomplice liability instruction. Relying upon *Probst v. State,*[41] he argued that the jury should have been instructed that it had to be unanimous about whether Stevenson was a principal or an accomplice. The Supreme Court rejected that argument:

> Stevenson's argument is not persuasive for two reasons. First, the specific identification of the principal and accomplice is not a prerequisite to a finding of guilt for two persons under an accomplice liability theory. *See Claudio v. State,* 585 A.2d 1278,1282 (Del. 1991). Second, Stevenson's reliance on *Probst*, for the proposition that the defendants were entitled to a single theory unanimity instruction, is misplaced. A single theory unanimity instruction is required "if (1) a jury is instructed that the commission of any one of several alternative actions would subject the defendant to criminal liability, (2) the actions are conceptually different and (3) the State has presented evidence on each of the alternatives." *Probst v. State,* 547 A.2d at 121 (citations omitted).
>
> In *Probst*, "a specific unanimity instruction was desirable since there was one charge (assault) and evidence of two separate incidents (Probst's shots and Miller's shots) to support a conviction on alternate theories of liability." *Id.* at 124 (Opinion on Motion for Rehearing en Banc). Unlike *Probst*, the fatal shooting of Heath involved a single individual with a single gun and not distinct contemporaneous actions by two individuals who were each firing weapons at the same victim. This Court has stated:

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[40] Jury instructions at 16 - 17.

[41] 547 A.2d 114 (Del. 1988).

> In a criminal charge involving one incident and two people, the jury is regarded as being unanimous if, without specifically identifying who was the principal and who was the accomplice, they all agree that one of the two actors performed all of the elements of the offense charged as a principal and that both actors knowingly participated in the alleged criminal act.
>
> *Probst v. State,* 547 A.2d at 123 (Opinion on Motion for Rehearing en Banc)(footnote omitted). Consequently, a single theory unanimity instruction was not required in this case. The Superior Court's instructions to the jury were a correct statement of Delaware law. Stevenson's argument on this issues is without merit.[42]

Manley made no such argument, however. At first glance, however, there is a threshold issue of whether the *Chance* issue now raised has been, by implication, formerly adjudicated. If so, it would be procedurally barred.[43] In other words, since the convictions for first degree murder, conspiracy to commit first degree murder and the accomplice liability instruction were affirmed several years <u>after</u> the *Chance* decision, does the procedural bar apply? And, even though now couched as a claim of ineffective assistance, if the Supreme Court decided this Court had not committed legal error, by definition, counsel cannot be ineffective.[44]

This Court is not inclined to say the procedural bar applies. First, there is the questionable policy of finding prior adjudication by implication. Second, as inferred by

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[42] *Stevenson,* 709 A.2d at 634-635.

[43] Super. Ct. Crim. R. 61(i)(4).

[44] *Ross v. State,* Del. Supr., No. 278, 1997, Hartnett, J. (November 17, 1997)(ORDER).

that caution, is that the defendants' *Chance* claim deserves to be explicitly addressed. When doing so, this Court, nevertheless, finds the full factual and legal context of this case as one in which a *Chance* instruction was and is not needed.

A review of the factual setting of *Chance* and its progeny demonstrate why. *Chance*, itself, arose from a fistfight that turned deadly. The defendant was seen repeatedly kicking the victim in the head until the victim was left motionless in the street. Chance and several other assailants were separately charged with murder in the second degree. At the prayer conference, Chance's attorney requested lesser-included jury instructions on assault in the first, second, and third degree. The trial court decided to instruct the jury as to assault in the first and second degree. Chance then withdrew his prior request for an instruction on assault in the third degree and made no other objections. At the State's request, the trial court also charged the jury on the State's alternative theory that Chance could be held liable as an accomplice. The jury convicted Chance of murder in the second degree.

On appeal, Chance maintained that it constituted plain error for the trial court to not instruct the jury to assess his guilt for the degree of homicide offense in accordance with his own culpable mental State pursuant to Section 274. The Supreme Court found that while the instructions should have included the provisions of Section 274, the omission of that specific instruction did not constitute plain error because certain questions from the jury showed that it had understood its duty to judge Chance's individual culpability in accordance with the hierarchy of instructions given.

Less than a year later, the Supreme Court was once again confronted with the Section 274 issue in *Harris v. State.*[45] Harris had been convicted of murder in the second degree, conspiracy in the first degree, conspiracy in the second degree, riot, reckless endangering in the first degree, and three counts of possession of a firearm during the commission of a felony. The chain of events leading to Harris' conviction started with the shooting of a well-known resident from the community in which Harris lived. In response, Harris and a group of men rounded up guns and ammunition and proceeded to hunt for the man they suspected was responsible for the shooting. On the way, for no apparent reason, a shooting erupted. Witnesses testified that Harris had fired at two bicyclists, killing one of them.

On appeal, Harris, like Chance, argued that the court's failure to include a Section 274 instruction constituted plain error. The Supreme Court disagreed. Since the State had sought a conviction for murder in the second degree and the lesser included offense of manslaughter, the Court found that the instructions correctly required the jury to distinguish between Harris' liability for the offense of the homicide and Harris' culpability for the degree of the homicide. Therefore, while the instructions should have included the provisions of Section 274, that omission did not constitute plain error.

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[45] 695 A.2d 34 (Del. 1997).

A year later, the Supreme Court again faced a *Chance* issue in *Johnson v. State.*[46] Johnson was convicted of assault in the first degree and possession of a deadly weapon during the commission of a felony. The charges arose from a bar brawl in which another person suffered multiple fractures to his face, requiring surgery. The State had presented evidence that three men simultaneously assaulted the victim, and Johnson based his defense, in part, on the assertion that he did not participate in the attack. The trial judge instructed the jury, pursuant to Section 271, that the defendant can be held responsible for a crime which is a foreseeable consequence of the underlying criminal conduct, but refused Johnson's request for a Section 274 charge. The Supreme Court reversed. In the context of the case, the Court said, the term "offense" meant "assault," which has three different degrees. Therefore, the Court concluded, it was reversible error for the trial court to deny Johnson's request for a jury instruction requiring the jury to decide what degree of that offense was consistent with Johnson's mental State.

The Supreme Court's broadest *Chance* pronouncement came in *Demby v. State,*[47] which was decided on January 10, 2000, approximately two years after these defendants' convictions were affirmed on direct appeal. Demby had been convicted of murder in the first degree and possession of a firearm during the commission of a felony. Demby appealed and argued that the trial court erred by failing to give a missing witness

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[46] 711 A.2d 18 (Del. 1998).

[47] 744 A.2d 976 (Del. 2000).

instruction. But more importantly for this discussion, the State filed a cross-appeal that alleged that the trial court erred in instructing the jury on lesser-included offenses. The case arose from an argument and shooting death of a 14 year-old. According to Demby, however, he did not want to fight the victim and it was his friend, Flonnory, who actually shot him.

On appeal, the State argued that Section 274 does not apply unless there is evidence in the record that the crime committed by the principal might not be intentional murder, but rather some lesser-included offense. In support of its contention, the State cited to Section 206(c), which provides that lesser-included offenses need not be charged unless there is a rational basis in the record for a verdict acquitting the defendant of the offense charged and convicting the defendant of the lesser-included offense. The Supreme Court disagreed and concluded:

> [I]n *Chance* we held, as a matter of Delaware law, the jury was required to distinguish between an accomplice's liability for the offense of homicide and that accomplice's culpability for the degree of homicide, i.e., the crime of Murder in the Second Degree, Manslaughter or Criminally Negligent Homicide.
>
> Because Demby was charged with an "offense which is divided into degrees," Section 274 directed the jury to find Demby "guilty of an offense of such a degree as is compatible with that person's own mental State." The Superior Court properly concluded that this Court's holding in *Chance* required it to instruct the jury in Demby's case with regard to the lesser-included degrees of homicide.[48]

The *Demby* court, therefore, appeared to rule that whenever the prosecution seeks to

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[48] *Id.* at 980.

hold a defendant liable as an accomplice for an offense which has lesser-included degrees, regardless of the circumstances of the crime, Section 274 requires a jury instruction be given directing the jury to assess the defendant's individual mental State with regard to the hierarchy of lesser-included degrees.

More recently, the Supreme Court handed down *Swan v. State.*[49] Swan had been convicted of three counts of murder in the first degree (one count of intentional murder and two counts of felony murder), robbery in the first degree, burglary in the first degree, five counts of possession of a firearm during the commission of a felony, and conspiracy in the second degree. The charges arose from the shooting death of Kenneth Warren. Two masked men, each armed with a handgun, had burst into Warren's home and shot him four times, killing him. Each of the two intruders shot Warren, but it was impossible to determine which of the shooters had fired the fatal shot.

On appeal, Swan argued that the trial judge erred by refusing to give the jury specific instructions that clearly separated the State's theories of intentional murder and accomplice liability. It was urged that the trial judge should have provided a *Chance* instruction commanding the jury to find either that Swan was the principal in committing first degree murder by firing the fatal shot, or that he was the accomplice by firing the other shots that did not kill the victim. Swan contended that his constitutional rights had been violated because his jury could have convicted him even though some jurors

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[49] 820 A.2d 342 (Del. 2003).

considered him as the principal, while others thought he was the accomplice. The Court held:

> Were a *Chance* instruction required under these circumstances, this Court would face the same problem noted in *Liu* [*v. State,* 628 A.2d 1376 (Del. 1993)]. Since the jurors cannot determine who was the principal and who was the accomplice, both Swan and Norcross could escape liability because the jury could not make a specific culpability assessment for each defendant. As the jury may find both defendants guilty of the first degree murder offense without definitively finding one the principal actor, the jury must also be permitted to assign the same level of culpability to both actors since they were involved in the same criminal enterprise and where one could conclude it to be equally possible for both to have fired the fatal shot. *There is here no credible argument, as in Chance, that Warren's death was an unintended consequence of either Swan's or Norcross' actions.* Therefore, the trial judge did not err by refusing to give an instruction setting forth the varying degrees of culpability for accomplice liability.[50]

The *Swan* court's reference to *Liu v. State* is not without significance to this case. The issue there was whether the Court erred in not instructing the jury that it had to be unanimous in deciding whether Liu was a principal or an accomplice to another person charged with the same murder. This Court had instructed the jury, as the original trial judge did in this case, that while it did not have to unanimously decide whether he was either the principal or an accomplice, it did have to be unanimous about his guilt. In affirming that instruction, the Supreme Court said:

> [T]his is a case involving two people and a single incident where the State may have difficulty proving their respective roles. In such a case, a general unanimity instruction serves to prevent both persons from escaping criminal responsibility, where there is compelling evidence that they jointly planned and

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[50] *Id.* at 357-58 (emphasis added).

carried out the criminal enterprise.[51]

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.

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."[52] The same can be said about the evidence in this case.

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

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[51] *Liu v. State,* 628 A.2d 1376, 1386 (Del. 1993).

[52] *Swan,* 820 A.2d at 358.

the same crime. This result is especially true where there is compelling evidence that two people jointly planned and carried out an intentional murder.

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.[53]

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.[54] 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.[55] In the case at bar, no evidence was offered by the State or either defendant to show that the killing was a consequential crime. This fact again underscores the different scenario and

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[53] *Chance,* 685 A.2d at 360 n. 8.

[54] *See* 11 *Del. C*. § 231 (c) and (d).

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

issues addressed in the *Chance* opinion.

That conclusion, however, does not end the analysis. It must be viewed through the unique prism of the duties of appellate counsel. Earlier,[56] the Court quoted two standards which partially overlap. The first is the standard that to structure appellate arguments to focus on those more likely to prevail. The other is that appellate counsel is not required to raise every non-frivolous issue.

With these standards, it is difficult to say whether counsel were deficient in not arguing this issue on direct appeal. For one, *Demby* had not been decided. For another, this case differed factually from *Chance* and all counsel here, and certainly Manley's, believed it was a lightweight issue. Stevenson's trial counsel and Manley's trial counsel, who also represented him on appeal, have basically said that they did not put much stock in the success of raising a "*Chance*" instruction issue. Now, with the benefit of hindsight with regard to *Demby*, the "*Chance*" argument assumes more significance and counsel have now said as much.

This Court does not consider that it would have been raising a non-frivolous issue to have argued *Chance* in direct appeal. But in the context of the case law then known, *Chance* having been decided within days of the case going to the jury in the guilt phase, and counsels' choice to raise other weightier non-frivolous appellate arguments, this Court cannot say, however, that there was attorney deficiency. Even assuming that there were

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[56] *Supra* pp. 29-30.

such deficiency by all counsel representing these defendants on direct appeal, the defendants still cannot meet the second prong of inefficient assistance, namely prejudice. They cannot show that if the *Chance* issue had been raised, they would have succeeded and their convictions reversed for that reason.

While *Demby* was not decided until two years later, it nevertheless, suggests why counsel should have raised the *Chance* issue on appeal. Even so, these defendants cannot meet their burden of showing that the direct appeal proceeding was unfair or unreliable.[57] The discussion earlier reflecting the series of opinions from *Liu* to, and including, *Swan* demonstrates why. In addition, it is far less than clear or certain that with the facts in this case, the Supreme Court on direct appeal would have reversed the convictions and ordered a new trial for failure to give a *Chance* instruction. The facts of this case do not lend themselves even to the holding in *Demby*; Demby was not convicted of conspiracy to commit intentional murder.

The elements of the first degree conspiracy charge included this language:

> The defendant [meaning each one] intended, that is, it was his conscious object or purpose, to promote or facilitate the commission of a class A felony in this case, Murder First Degree....[58]

And, one of the elements of the accomplice liability instruction was:

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[57] *Bell v. Jarvis,* 198 F.3d 432, 444 (4th Cir. 1999); *Matire v. Wainwright,* 811 F.2d 1430, 1439 (11th Cir. 1987).

[58] Jury instructions at 16.

> The named defendant intended to promote or facilitate the commission of the offense. In other words, it was his conscious object or purpose to further or assist the commission of the offenses.[59]

In light of the defendants' convictions of conspiracy in the first degree, coupled with the original trial judge's instruction on accomplice liability, there is no factual or legal basis for a *Chance* instruction, and if the issued were raised, the probability was high that no error would have been found. This conclusion is further buttressed by the fact that Stevenson claimed on appeal that the trial judge erred in not giving a unanimity instruction. As noted earlier,[60] this claim of error was rejected.

Finally, the facts of this case show that no reasonable jury could have convicted either Manley or Stevenson of any lesser degree of homicide.

For all these reasons, the claims that the defendants assert based on *Chance* and its progeny fail. They fail to meet their burden of showing that a standard for appellate counsel was violated. Moreover, even if the defendants had shown attorney deficiency, they still could not show prejudice.

In addition to the "*Chance*" issue, which both defendants raised, they have questioned whether there can be a new penalty hearing. But each has raised other trial issues individual to each defendant. Consistent with the remand and the resolution of those issues effecting whether there is a new trial, the Court will first address those trial issues.

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[59] Jury instructions at 7.

[60] *Supra* pp. 35-36.

Manley's Claims
Severance

Manley first asserts that his trial counsel were ineffective because they failed during the trial to renew a severance motion which originally he had made prior to trial. The claim was that there would be antagonistic defenses. The record then known to the original trial judge was that there was one shooter and one gun, but two people in the car. It was known that the ammunition retrieved at the scene was similar to that found in a military jacket, most likely Manley's, which was discovered a short while later in Stevenson's car. It was also known that only Stevenson was the defendant scheduled to go to trial that day on the Macy's charges.

The trial judge denied Manley's motion.[61] He did note, however, that neither defendant proffered to the Court what his core defense would be. He also noted that there was no evidence that mutually antagonistic defenses existed.[62]

On direct appeal, Manley's appellate counsel (who were also his trial counsel) claimed it was error for the trial judge to have denied his motion for severance. In making that argument, they renewed the argument that antagonistic defenses compelled severance. When doing so, they pointed to specific events occurring during trial, namely cross-examination of a State witness and Stevenson's closing argument, as examples of why

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[61] *State v. Manley,* Del. Super., Cr.A. No. IN 9511007022, Barron, J. (August 1, 1996).

[62] *Id.* at 16.

severance was necessary. None of these events, however, prompted them to renew the severance motion during the trial. The Supreme Court, referring to these trial events, rejected these arguments and found no severance was needed.[63]

In his motion for post-conviction relief, Manley refers again to these events at trial but adds several others which he contends compelled his trial counsel to renew the severance motion. In part, his reason for citing to the additional trial events not raised on direct appeal is to seek to avoid the consequences of Rule 61(i)(4), which bars reconsideration in post-conviction proceedings of previously adjudicated issues.[64] Ordinarily, therefore, the Court would be procedurally prevented from considering this claim. Manley invokes, however, the provision which provides relief to that bar, namely where the interest of justice warrants reconsideration.[65]

Even though Manley couches his current severance claims as (1) involving a previously adjudicated issue, (2) but one which the interest of justice merit reconsideration, the Court does not share that view. Rather, the Court views the Supreme Court's recitation of the trial events cited by Manley on direct appeal as a guide to determine whether trial counsel were ineffective. Accordingly, the usual standards applicable to

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[63] *Manley v. State,* 709 A.2d at 653.

[64] Super. Ct. Crim. R. 61(i)(4).

[65] *Id.*

claims of ineffective assistance apply, namely attorney deficiency and prejudice.[66]

Manley cannot satisfy either standard. It is undisputed that his trial counsel did not renew the severance issue during the trial. On appeal, they were claiming error in the trial judge's pretrial decision. But in their appellate argument, they cited to events during the trial as support for their contention that there should have been severance. While the trial judge did not, obviously, have those events before him when ruling pre-trial, the Supreme Court did. The additional trial events Manley now cites, namely the testimony of the other Macy's security person and the testimony, direct and on cross, of Dorothy Hackett, are in the same genre as those argued before and discussed by the Supreme Court in the direct appeal.

The consequence of that observation is that even if those events prompted trial counsel to renew on one or more occasions Manley's severance motion, it would likely have been denied by the trial judge and that denial would have most probably been affirmed. Therefore, if no legal error would have occurred, counsel cannot be deficient either at the trial level or the appellate level.[67] Further, since the Supreme Court has decided that there was no prejudice in the joint trial, Manley cannot show prejudice. His claim fails to meet that standard.[68]

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[66] *Bialich v. State,* 773 A.2d 383 (Del. 2001).

[67] *Righter,* 704 A.2d 262.

[68] *Gattis v. State,* 697 A.2d 1174 (Del. 1997).

Manley, as noted, however, approached this claim of ineffectiveness on the basis that the consideration of the severance issue was barred as formerly adjudicated, but, nevertheless, that the relief to that bar allowed reconsideration. The relief which he cites is that reconsideration is warranted in the interest of justice.[69] His contention is that reconsideration is warranted as a result of *Demby,*[70] which he asserts establishes a new rule of law which should be applied retroactively and which would require severance.

It should be noted that if the Court's analysis were in the context of Rule 61(i)(4), the "interest of justice" relief Manley invokes has been construed narrowly to mean he has to show the trial court lacked the authority to convict or punish him.[71] The concept of "authority" includes not only jurisdictional, but also any constitutional error meeting the two-part test set forth in *Teague v. Lane*.[72] The first *Teague* exception dictates that a new constitutional rule should be applied retroactively if it placed certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe.[73] Under the second exception, a rule may be applied retroactively if it requires

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[69] Super. Ct. Crim. R. 61(i)(4).

[70] 744 A.2d 976.

[71] *State v. Wright,* 653 A.2d 288 (Del. Super. Ct. 1994).

[72] *Bailey v. State,* 588 A.2d 1121, 1126 n.5 (Del. 1991) (citing *Teague v. Lane,* 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989).

[73] *Flamer,* 585 A.2d at 749 (citing *Teague*, 489 U.S. at 311, 109 S. CT at 1075, 103 L.Ed. 2d at 356.

the observance of procedures that are implicit in the concept of ordered liberty.[74] The alleged change of law upon which Manley relies is the *Demby* Court's alleged restatement of Section 274 as to its application to cases involving clearly intentional crimes. Even if this Court were to accept Manley's rather expansive view of that case's holding and significance, that change of law would still not rise to the level of demonstrating that the trial court lacked authority to convict or punish him. Also, for the reasons discussed earlier,[75] *Demby's* holding is inapplicable to this case. Accordingly, any change of law resulting from *Demby* would not be retroactively applied if the current analysis were within Rule 61(i)(4).

For all these reasons, Manley's counsel were not ineffective for failing to renew his severance motion. This claim fails.

Macy's Evidence

Manley next challenges the limiting instruction given to the jury regarding the admissibility of the evidence relating to Stevenson's alleged scheme to defraud Macy's. Manley's attorneys agreed at trial that this evidence was properly admitted to show motive for the homicide, but argued that any limiting instruction given should not refer to Manley. In other words, Manley argued that the Macy's evidence was admissible to show Stevenson had a motive to murder Heath, but that it was irrelevant as to the State's case

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[74] *Id.* (citing *Teague,* 489 U.S. at 313).

[75] *Supra* pp 47-48.

against Manley. The trial judge disagreed and instructed the jury in his final instructions in this fashion:

> Ladies and Gentleman of the Jury. You have heard evidence that one of the defendants, namely, David Stevenson, allegedly committed thefts while an employee at Macy's and that the deceased, Kristopher Heath, participated in the investigation which led to the theft charges being placed against Stevenson.
>
> You may not use this evidence as proof that David Stevenson is a bad person and therefore probably committed the offenses contained in the indictment. You may use this evidence only to help you in deciding whether David Stevenson or Michael Manley was one of the persons who committed the offenses contained in the indictment.
>
> The State claims that the prior alleged theft evidence might tend to show a motive on Stevenson's part or on Manley's part to commit the offenses contained in the indictment.
>
> You may consider the prior alleged theft evidence to help you decide whether or not such evidence tends to show a motive on Stevenson's part or on Manley's part to commit the offenses and to help you decide whether or not such evidence tends to identify them as the perpetrators of the offenses contained in the indictment for which the defendants are now on trial. You are instructed that you may not use the prior alleged theft evidence for any other purpose whatsoever. Further, the fact that defendant Stevenson had been indicted for the alleged offenses arising out of the Macy's internal theft investigation is not evidence as of his guilt with regard to those offenses. As previously stated, an indictment is a mere accusation and is not evidence of guilt.[76]

Manley argues that trial counsel were ineffective for failing to object to this instruction and again ineffective when representing him on appeal by not raising it as a claim of error.

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[76] Guilt Phase Jury Instructions at 26.

The trial record shows that when the "Macy's evidence" was introduced, Manley's counsel asked that a limiting instruction be given and that Stevenson be the only person mentioned.[77] No instruction was given at that point. During the prayer conference, there was an extensive discussion of the wording of the instruction ultimately given. Manley's counsel did not object to the charge as a whole but sought to limit the references in it to Stevenson.[78] At counsel's request, Manley's name was deleted from the first sentence of the second paragraph.[79] The appellate record shows that his counsel did not raise on appeal a claim that the trial court erred in giving this instruction. When testifying during the evidentiary hearing, one of Manley's trial/appellate counsel indicated that the trial court's instruction was not an appealable issue.

Manley characterizes the use of the Macy's evidence, which he urges related solely to Stevenson, as creating an inference of culpability for the murder through improper "guilt by association" evidence. The rationale behind prohibiting "guilty by association" evidence is that by presenting such evidence, the jury is basically asked to infer that because the defendant associates with unsavory characters, he is more likely to have committed the particular unsavory crime for which he is being tried.[80] Such evidence is

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[77] Trial transcript 11/4/96, p. 63.

[78] Trial transcript 11/7/96, pp. 119-124.

[79] *Id.* at 121-22.

[80] *See, e.g., United States v. Goodoak,* 836 F.2d 708, 714-15 (1st Cir. 1988).

essentially, therefore, character evidence inadmissable under Rule 404(b).[81]

Manley's relies principally on the Fifth Circuit's discussion of "guilt of association" in *United States v. Polasek.*[82] In that case, the defendant appealed her conviction of various offenses relating to fraudulent manipulation of automobile odometers. The defendant worked with used car dealerships, transferring motor vehicle title and registration documents from dealers to purchasers. On appeal, the Court of Appeals reversed the conviction based on the fact that certain evidence was improperly presented to the jury regarding bad acts and convictions relating to odometer fraud by various dealers with whom the defendant had associated. In particular, Manley cites to footnote 2, where the Court of Appeals discusses at length the purpose of the prohibition on "guilt by association" evidence and states:

> Accordingly, there are two arguments against guilt by association evidence: first, that it is not relevant as that term is defined in Rule 401 and hence is inadmissable under Rule 402, and second, that even if it is relevant, it is unduly prejudicial and excludable under Rule 403. [The defendant's] associates' convictions are simply irrelevant to her case. The government never demonstrated that [she] participated in or even knew of the schemes for which the associates were convicted. Even assuming the evidence was relevant for some purpose, its prejudicial effect substantially outweighed its probative value: It altogether failed to prove any wrongdoing on [the defendant's] part but insidiously linked her with criminals in such a way that the jury might have concluded, as the government argued in its closing

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[81] D.R.E. 404(b), labeled "Other crimes, wrongs or acts," provides: Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity or absence of mistake or accident.

[82] 162 F.3d 878, 884 (5th Cir. 1998).

> argument, that it was no coincidence that many of her associates had been convicted of the crime for which she was on trial.[83]

While the Court agrees with the Fifth Circuit's analysis, its reasoning is inapplicable to the case at hand. There, the evidence of the defendant's associates' convictions could only serve to show that the defendant's confederates broke the same law that she was accused of breaking. The evidence did not show motive or intent or opportunity or notice. Here, Stevenson's indictment for fraud was the alleged motive for Heath's murder and the conspiracy to commit murder. The inference being urged upon the jury was that because Stevenson was implicated in the thefts and because of the friendship between Stevenson and Manley, Manley agreed to participate in the crime. And while the motive was more compelling with regard to Stevenson than to Manley, because it was Stevenson who was facing the possibility of jail time should he be convicted, that fact goes to the evidence's probative value, not its relevance. In short, the evidence was relevant because it tended to show that Manley had a motive to eliminate Heath, to help his friend avoid a conviction of imprisonment.

Of course just because the evidence is relevant, it does not necessarily mean that it is admissible. A Rule 403 balancing of prejudice and probative value is necessary. But as Wright and Graham explain:

> In some conspiracy cases, the "other" act that is proved is not that of the defendant himself but involves conduct of third persons. While Rule 404(b) is not limited to other acts of the defendant, proof of conduct of third persons

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[83] *Id.*

> does not normally support a strong inference as to the character of the defendant himself. The jury might infer that the defendant has a bad character by virtue of his association with his co-conspirators, but the prejudice is usually less than in cases where it is the defendant's own acts that are proved. Of course, the defendant can object to such evidence if its sole relevance is to prove the character of a co-conspirator to prove the co-conspirator's conduct, but this is seldom the case.[84]

The instruction did not imply that Manley was implicated in the thefts from Macy's. It was properly fashioned to explain the State's intention about this evidence and how, while Stevenson was the lone defendant, on those charges, the jury could assess that evidence as to Manley. With all the other evidence linking Manley to Heath's murder, the relevance is manifest and there was no 403 bar to it. The limiting instruction was appropriate. Counsel's limited objection was appropriate, too.

Therefore, as to how counsel handled the limiting instruction at the trial stage, the Court sees no attorney deficiency. Assuming *arguendo* that there were a deficiency, Manley has not made a convincing case that he was prejudiced by that deficiency. He has not shown but for such counsel error there is a reasonable probability that the result of the trial would have been different, which is the prejudice standard.[85]

Manley also contends that when representing him on appeal, the same counsel should have argued it was error to have included him in the limiting instruction. One of those counsel testified there was no merit to the argument. While it is somewhat unclear

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[84] Wright and Graham, Federal Practice and Procedure § 5239, c. 5 at 451.

[85] *Shelton,* 744 A.2d at 475.

how much the decision to not make this claim on appeal was the result of deliberative appellate strategy, the decision to focus on severance and juror selection issues is manifestly reasonable. When examining the totality of the evidence and the trial judge's instruction, the Court is unconvinced that the Supreme Court would have found error in the instruction if asked to review it. This means that without such an error, there cannot be counsel deficiency.[86]

In sum, Manley has not met his burden of showing that counsel at trial and/or on appeal were ineffective for failure to object to the limiting instruction given and failure to raise the claim on appeal. His contention of ineffective assistance on this issue must fail.

Stevenson's Claim
Failure to Call Witnesses

Stevenson claims that his trial attorneys were ineffective in failing to interview and call as witnesses certain individuals identified and interviewed by the police around the time of Heath's killing whom he asserts would have supported his "reasonable doubt" defense. Police reports provided to the defense prior to the trial identified four people who were at or around the scene of the crime at the time of the shooting, but whose observances conflicted in various respects with portions of the State's version of the events. In short, Stevenson alleges ineffective assistance of counsel because his trial attorneys, while aggressively cross-examining the State's witnesses to discredit their

[86] *Winston v. State,* Del. Supr., No. 53, 1996, Berger, J. (September 3, 1996) (ORDER).

recollection, and in an effort to cast doubt on his presence, "inexplicably" failed to call any of these witnesses to cast doubt on the testimony of the State's witnesses.

Each of these four witnesses testified at the evidentiary hearing on February 6th. None appeared at trial and none were contacted by Stevenson's trial counsel. Those counsel explained that investigators in their office sought to contact them prior to trial. According to trial counsel, none of the witnesses returned phone calls or responded to business cards. Each, however, responded to newly appointed counsel's subpoenas or requests to appear at the hearing.

The first witness at issue is Valerie Era Mossinger. Detective Quinton Watson's investigation report indicates that he questioned Mossinger afer the shooting and states:

> On 11/13/95 at 0851 hrs., writer spoke with Valerie in the hallway of her apartment building. Valerie sated that she saw (sic) five shots then looked out of her window and saw a black colored car drive away. Valerie stated that the vehicle was a med size vehicle and she thought it was a four door vehicle. Valerie stated she had called her roommate Carol Schweda at work after finding out what happened. Valerie stated that her roommate stated that she saw a white male sitting in a small dark colored vehicle parked next to her's when she left for work this morning.

At the evidentiary hearing, Mossinger said she heard gun shots and looked out her window. A few minutes later she saw the tail lights of a car moving away. She could not see the occupant nor did she note the number of doors. She described it as blue/bluish, but admitted describing it years ago as black. Shortly after seeing all this, she called her roommate Carol Schweda, who was at work, who said she had seen people in the car next to her car when she went to her car to go work, and that seeing them had startled her.

The next witness at issue was Carol Schweda Trzepacz, Mossinger's roommate and the person Mossinger called. Detective Watson's report about his interview with her provides:

> On 11/13/95 at 1655 hrs., writer spoke with Carol over the telephone at her place of employment. Carol stated that all she saw this morning was a white male seated on the passenger side of a dark colored vehicle (unknown what type vehicle). Carol stated that she was sure that it was a white male and that she saw the subject when she came out of her apartment building around 0715 hrs. Carol stated that she got into her vehicle and as she began to drive off she saw a subject move around in the passenger seat of the dark vehicle that was parked next to her vehicle. Carol stated that she remembers this because it kind of startled her when she saw him moved (sic).
>
> On 11/16/95 at 0715 hrs., writer met with Carol at her residence. This meeting had been set up by writer on 11/15/95. Writer called Carol at about 0830 hrs., at her place of employment in reference to setting a date and time when she could show writer where her vehicle was parked, in reference to the dark colored vehicle with the white male in same on the morning of 11/13/95.
>
> Carol advised writer on 11/16/95 that the subject was on the passenger side of the dark colored vehicle and that she did not see the subject when she walked to her vehicle which, was parked on the left side of the dark colored vehicle. Carol stated that the subject had short dark hair and that she thought that the subject was white and that she is pretty sure of that. Carol stated that the vehicle was a darker blue or black colored vehicle. Writer and Carol walked outside of Carol's apartment building and Carol pointed out to writer that she was parked in the fourth parking space directly across from the front of her apartment building. Carol stated that the dark vehicle was parked in the third parking space directly across from the front of her apartment building.
>
> Carol stated that the police had arrested black guys for the murder and that she saw the subject's pictures in the newspaper. Carol stated that the subject she saw in the dark vehicle was white.

Trzepacz said, at the February hearing, she left for work before the gun shots. In

the parking lot she "glanced" at the car next to hers. She saw a white or hispanic male. She told the police that the person was in the passenger seat, but had no recollection at the hearing of where the male was seated.

The next witness to testify at the evidentiary hearing at issue is Jessica Wing. She was interviewed by New Castle County Det. Donovan, whose report provides:

> Wing stated at approx. 0740 hrs., she heard 5 shots. Looked out of her window, saw a blue car next to her m/v, in the parking lot. Wing stated she saw the blue m/v flee and did not see it's occupants, but believes she saw white hands operating the m/v, she then heard a woman scream, and called 9-1-1.

During the evidentiary hearing, Wing testified that her apartment windows faced the parking lot. She heard gun shots and looked outside within minutes. She observed a car in front of her building driving out of the lot headed toward the exit. It was a small dark car. She noted that the passenger's hands appeared to be white. She also testified that several weeks later she talked to some lawyers whom, she said, did not identify themselves in any way or capacity. They told her that they would not need her.

The last of the four witnesses is Marlene Farmer Ijames. She was also questioned several times by Det. Watson shortly after the shooting and his report of the interviews states:

> On 11/13/95 at 0855 hrs., writer spoke with Marlene at her residence. Marlene stated that around 0739 hrs., she heard five shots then went to a window and saw a subject who she describes as a white male wearing a dark jacket and light colored pants, short haircut. Marlene stated that she doesn't feel that the subject was wearing a hat. The subject was about 5'8'', med.,

build with no facial hair. Marlene stated that she saw the subject walk very quickly away from the guy lying on the ground. Marlene stated that the subject looked back at the guy on the ground before getting into a small dark colored vehicle that drove by the window that she was looking out of. Marlene stated that the car had Delaware tags but that she could not get the tag number. Marlene stated that she did not see anything in the subject's left hand and that he opened the vehicle door with his left hand and that his right hand was down and she couldn't see that hand.

On 11/16/95 at 0737 hrs., writer spoke with Marlene again by telephone. Writer had called Marlene several times at home and at work, leaving messages on her answering machine to contact writer in reference to a follow up interview. Marlene was not returning writer's calls.

Writer called Marlene at her residence on the morning of 11/16/95 after speaking with a Carol Schweda. Marlene advised writer that she does not want to get involved. Marlene stated that it was obvious that the subject's (sic), that the police arrested, were not the guy (sic) that she saw that morning. Marlene stated that she is going through a personal situation right now and really does not want to be involved in this incident. Marlene did say that the guy she saw that morning got into the driver's side of the dark colored vehicle.

But at the February 6th hearing, Ms. Ijames testified that her view of the parking lot from her window was very limited and that all she saw the day in question was a dark car driving slowly out of the parking lot into the street. This was after she had heard more than two shots and later a scream. She did not remember telling the police she saw a man getting into the car or that the car had Delaware plates.

Stevenson now argues that each of these witnesses could have cast reasonable doubt on the testimony of several of the State's witnesses at trial. For instance, one of those witnesses, Michael Chandler testified that he saw two black men slouched in a blue car in

the parking lot before the shooting.[87] Another, Deborah Dorsey testified that she saw a stocky black man, about 5' 7", fleeing from the victim.[88] Susan Butler and Philip Hudson both testified that they saw a stocky black man running from the parking lot.[89]

Both of Stevenson's trial counsel testified at the evidentiary hearings. Only one, however, had an opportunity to testify at the first hearing. He appeared to have had a greater role in preparing for the guilt phase, but had no current explanation why none of these witnesses were not put on the stand. He acknowledged the investigator tried to reach them. Also, he said his co-counsel knew from the police reports (quoted above) what each of the witnesses had told the police. They were aware that Jessica Wing and Carol Schweda (their names at the time of the murder) would place a white male in the car. Wing saw "white" hands on the steering wheel, and Schweda saw a white male sitting on the passenger side.

Wing placed her white male in a blue car which fled the scene. That color matched Stevenson's car. Trial counsel believed her testimony could be helpful and harmful. Schweda, too, identified the car she saw as dark blue, the color of Stevenson's car.

Both trial counsel testified at the second hearing. The counsel who had testified at the earlier hearing again could not offer an explanation why these four witnesses were not called. Counsel's trial strategy was to claim Stevenson was not there. It is Stevenson's

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[87] Tr. (10/31/96) at 40-46.

[88] Tr. (10/30/96) at 101-04.

[89] Tr. (10/31/96) at 57-59, 69-75.

claim, now, that these witnesses would have helped that strategy. Stevenson had given them an alibi; that he was due at work at a store on Concord Pike (US 202) and he was due in court that day for the trial on the Macy's charges. Counsel said the difficulty with that defense was that the store was not open at the time of Heath's murder.

The other trial counsel (for convenience to be referred to as second counsel) testified at the second evidentiary hearing. He has defended twenty-five capital cases. He believed the State's case against his client was very "overwhelming." His focus was on the penalty phase since he believed Stevenson would get there. He was in constant communication with co-counsel about the case. As the trial developed, the State's strategy became clearer. That strategy was to identify, to the extent it could, Manley as the shooter and that the shooter was the passenger.

Second counsel observed what the questioning at the evidentiary hearing brought out. Stevenson, an African-American, has hands which are very light in color. The back of his hands are lighter than his facial color. The Court also noted both these observations. Stevenson's hands could readily be mistaken for those of a Caucasian. The "white" hands that Wing saw could easily have been Stevenson's. Also, it should be noted that Manley is a much darker skinned African-American.

At the hearing, this exchange took place between this second counsel and a prosecutor:

> Q: Were you concerned at all that the State would be able to suggest that Ms. [Schweda] was mistaking your light-skinned client, Mr. Stevenson,

for a white person?

A: That could have happened.

Q: And that if she had done that and the State was able to convince a jury of that, she would have placed him in the passenger's side of the car?

A: That's correct.

Q: And what implications would that have had for you, for your theory of the case, your fall-back theory, or hope that the jury would believe that your client, if he was there, was not the shooter?

A: That would have supported an argument that Mr. Stevenson was the shooter and at least some of the jurors could have come up with that as a scenario.

* * * * *

Q: And the reason for that conclusion was, wasn't it, that you believed it was the State's theory that the shooter was the passenger and not the driver of the vehicle?

A: Correct.[90]

In addition to these questions and answers, second counsel was questioned:

Q: Okay. So you knew that the State would be presenting evidence that a witness at the scene of the Cavalier Country Club took down a license plate from a car which he saw fleeing the scene, the car which matched your client's car, and which license plate was the license plate of your client's car?

A: I think it was a partial, some of the digits, not -- but the sum of what you say is accurate.

Q: Well, okay, and you knew that, also, that the police, Wilmington Police, came in contact with your client driving that car near his

[90] Tr. (2/6/03) at 88-89.

mother's home in Wilmington shortly after the murder?

A: Yes.

Q: And that there was a brief chase and the police would testify that he fled from that chase?

A: Yes.

Q: And that he was captured on a bus near -- several blocks away?

A: Yes.

Q: And the co-defendant Manley was captured in the backyard or some place nearby?

A: Yes.

Q: You were also aware, weren't you, that in the car was a jacket, an army jacket that contained bullets; right?

A: Yes.

Q: And that those bullets were matched in terms of type of bullet to shell casings and bullets that were found either in Mr. Heath or nearby; correct?

A: Yes.

Q: You were also aware that Mr. Manley was in the Army and had that rank which was listed on the insignia on the jacket?

A: Yes.

Q: You were also aware, weren't you, that your client had been investigated by the victim in connection with an internal theft at Macy's?

A: Yes.

Q: And that the victim was scheduled to testify against your client that day --

A: Yes.

Q: -- in that trial?

A: Yes.

Q: And you were also aware, weren't you, that another investigator from Macy's was named Parminder Chona?

A: Yes, I believe so.

Q: And a piece of paper with Mr. Chona's name and either address or telephone number or some other identification was found in the police car after your client was removed from that police car?

A: That's correct.

Q: Okay. And would it be fair to say that you -- that that evidence made a fairly compelling case against your client?

A: That was not good evidence for our defense.

Q: Right. And you weren't able to support his alibi either, were you, about the -- going up to Verizon or whatever the cell phone store was?

A: No.

Q: They weren't open at that time, were they?

A: No.

Q: Now, would it be fair to say, also, that one thing you wanted to avoid in the guilt phase was doing something which would undermine your credibility for a possible penalty phase?

A: That was one of our theories or strategies.[91]

As the excerpt demonstrates, the State's case against Stevenson was overwhelming. In fact, the prosecution's case was so overwhelming that second counsel testified as follows:

> Q: Would it be fair to say, you know, that your client maintained that he was not at the scene of the murder?
>
> A: Correct.
>
> Q: But if the jury didn't believe that, you were at least hopeful that they would believe he was not the shooter?
>
> A: Well, we desperately did not want him to be fingered as the shooter in this case, that's correct.
>
> Q: Right; not only for the guilt phase reasons, but especially for penalty phase reasons?
>
> A: In my mind, there really wasn't an issue about the guilt/innocence phase. The real issue was whether he was going to live or die.[92]

The penalty phase was the focus of Stevenson's defense. This fact is further demonstrated by how the defense attorneys divided their responsibilities between them. Second counsel further testified:

> Q: And was there a way that you, as you formulated the strategy for this case, did you decide to divide your efforts where one person would take the lead on the penalty phase, if it became necessary, and one person would take the lead on the guilt or innocence phase?

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[91] Tr. (2/6/03) at 53-56.

[92] Tr. (2/6/03) at 86.

A: Yes.

Q: And can you tell us how that was broken down?

A: My recollection is that other trial counsel handled the guilt/innocence phase and I was in charge of the sentencing phase.

Q: And if you can, tell me what reasons were factored into the decision to split the responsibilities in that fashion.

A: Well, I think its pretty customary to make decisions like that and I -- my recollection was that the State's case was pretty overwhelming in this particular case, even absent a confession, and, you know, obviously we were concerned about the guilt and innocence phase, but we were very concerned, obviously, about the sentencing phase. And we discussed it, and I think pretty naturally the senior guy gets the burden of doing the sentencing and the junior guy gets, or gal, gets the responsibility for the guilt/innocence phase.

Q: Was part of the reasons why you made that decision was the concern that in the event that you took a loss at the guilt phase, you wanted to have a fresh face, which hadn't been rejected by the jury, get up and make a fresh pitch in the penalty phase?

A: I confirmed that we wanted a fresh face for the sentencing phase and not someone whose arguments had been rejected at the guilt/innocence phase.[93]

As stated earlier, Stevenson now claims his trial counsel were deficient for not having any of the four witnesses testify. Since the trial strategy was to argue that he was not there and to cast reasonable doubt on the State's witnesses, he argues these four witnesses would have dovetailed well with that strategy.

[93] Tr. (2/6/03) at 73-74.

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."[94]

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.[95] 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

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[94] *Albury v. State,* 551 A.2d 53, 59 (Del. 1988) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

[95] ___ U.S. ___, 1235 S. Ct. 2527, 156 L. Ed. 471 (2003).

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.

In sum, while the investigation was deficient, and the <u>choice</u> of a strategy flawed to a degree as a result, that choice, nonetheless, remains reasonable. Trial counsel were not deficient.

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.[96] 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.

Trial counsel's failure to interview and/or call to the stand some or all of these witnesses was not deficient and Stevenson has not shown prejudice even if it were. This

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[96] *Gattis v. State,* 697 A.2d 1174.

claim of ineffective assistance must fail.

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.[97] 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,*[98] raising questions about the statutory procedure under which Arizona's penalty hearings occurred. Further, in response to *Ring,* the Delaware legislature amended that procedure.[99] 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*.[100] They further claim they cannot be subjected to a new penalty hearing with, therefore, the

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[97] *Stevenson,* 782 A.2d at 261.
[98] 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556.
[99] 73 Del. Laws c. 423 amending 11 *Del. C.* § 4209.
[100] 536 U.S. 584.

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*.[101] 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.[102] The jury's verdict on that question did not have to be unanimous.[103] 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.[104]

Both defendants rely heavily on *Ring*. In that case, the United States Supreme

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[101] *Norcross v. State,* 816 A.2d 757 (Del. 2003); *Swan v. State,* 820 A.2d 342 (Del. 2003); *Zebroski v. State,* 822 A.2d 1038 (Del. 2003); *see also Brice v. State,* 815 A.2d 314 (Del. 2003).

[102] Former 11 *Del. C.* § 4209(c)(3)a.1.

[103] 11 *Del. C.* § 4209(c)(3)b.

[104] 11 *Del. C.* § 4209(c) and (d); *Brice v. State,* 815 A.2d at 323.

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.[105] 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"[106] 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*.[107] 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

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[105] *Ring,* 536 U.S. at 609.

[106] Under the "hybrid" system, while the jury play an important advisory role, the ultimate determination of the sentence lies with the Court. *Id.* at 608 n.6.

[107] 815 A.2d at 314.

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.[108] 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.[109]

Subsequent to both *Ring* and *Brice*, the Supreme Court affirmed three capital sentences handed down under the 1991 statute.[110] 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*.[111] 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

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[108] 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).
[109] *Brice,* 815 A.2d at 326.
[110] *See* 11 *Del. C.* § 4209(e)(2).
[111] *Norcross,* 816 A.2d at 767; *Swan,* 820 A.2d at 359-60; *Zebroski v. State,* 822 A.2d 1038, 1051 (Del. 2003).

of jury fact-finding is satisfied.[112] 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*[113] and *State v. Dickerson.*[114] In light of the Supreme Court's decision in *Brice*, finding no structural error in the 1991 statute,[115] 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

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[112] *Zebroski,* 822 A.2d at 1051.
[113] 367 A.2d 983 (Del. 1976).
[114] 298 A.2d 761 (Del. 1972).
[115] *But see Summerlin v. Stewart,* 341 F.3d 1082 (9th Cir. 2003) (finding that the infirmity in Arizona's capital murder law affects the sentence framework (as opposed to mere process) and therefore constitutes structural error).

> 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.[116]

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."[117] 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."[118] 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

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[116] *Stevenson,* 782 A.2d at 260-61.
[117] 73 *Del. Laws* c. 423, § 6 (2002).
[118] *Id.*

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.[119]

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*.[120]

Ex Post Facto, Equal Protection, Double Jeopardy and Due Process

Manley also contends that subjecting him to a second sentencing phase pursuant to the 2002 statute would violate the Ex Post Facto, Double Jeopardy, Equal Protection, and the Due Process Clauses of the State and/or federal constitutions. While his argument on these issues is not entirely clear, it appears to this Court that each of his arguments is premised on the proposition that his prior sentencing under the 1991 statute was constitutionally defective. On this ground alone, his claims fail because he has not demonstrated any such constitutional error, and the jury's verdicts on the statutory factors moots his argument. Second, Manley, along with most of the case law upon which he relies, does not address each conceptually distinct theory of relief separately, but rather

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[119] Penalty Phase instructions, at 4 and 7, 11/15/96.
[120] *Norcross,* 816 A.2d at 767.

tends to conflate them within a larger discussion of case law. The Court will attempt to parse out each of his different arguments, but the different theories will inevitably overlap.

Manley first asserts that the retroactive application in a new penalty hearing of the 2002 statute to him would constitute an improper *ex post facto* law. But it is well established that mere procedural changes do not implicate *ex post facto* concerns. And the Delaware Supreme Court has already determined that the changes made by the 2002 amendment are procedural in nature.[121] Accordingly, Manley's *ex post facto* argument fails.

Manley's next contention is that the Equal Protection Clause prevents the State from seeking re-sentencing under the new statute. This argument relies upon the Florida Supreme Court's decision in *Lee v. State*.[122] There, the defendant was tried, convicted and sentenced to death one week before the United States Supreme Court handed down *Furman v. Georgia*, which struck down death penalty statutes across the country.[123] The trial court granted his motion to change his sentence to life imprisonment and the State appealed. Soon thereafter, the sentences of every other defendant condemned to death under Florida's pre-*Furman* death penalty statute were reduced, but Lee's sentence, having already been reduced, was not affected. Before the case was heard on appeal, however, the Florida legislature passed a new death penalty statute. The District Court of Appeals

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[121] *Brice*, 815 A.2d at 321.
[122] 340 So. 2d 474 (Fla. 1976).
[123] 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

reversed the order reducing Lee's sentence to life and ordered him to be re-sentenced under the new statute. Lee was, once again, sentenced to death and appealed, arguing that equal protection required that he be treated similarly to all of the similarly situated defendants who had their sentences reduced to life. The Florida Court agreed. Manley also cites to cases in Pennsylvania,[124] South Carolina,[125] and Nevada,[126] as well as a Ninth Circuit Court of Appeals case.[127]

While these cases are interesting, they are simply inapplicable, if not inapposite, to the case at hand. First and foremost, Manley has failed to demonstrate that he was sentenced to death under an unconstitutional death penalty statute. Also, the jury's unanimous verdicts on the statutory aggravating circumstances satisfied the *Ring* requirement of jury determination of such factors. Manley himself successfully sought re-sentencing from the Supreme Court based on the appearance of impropriety by the trial judge. Second, the State, in seeking a re-sentencing hearing, is not treating Manley differently than any other similarly situated defendants, thereby potentially implicating equal protection. The Delaware Supreme Court has found no structural flaw in the 1991 or the 2002 statutes requiring the reduction of capital defendant's sentences, as was the case in Florida. In any case, Manley's equal protection claim fails.

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[124] *Commonwealth v. Story*, 440 A.2d 488, 491 (Pa. 1981).
[125] *State v. Rodgers*, 242 S.E.2d 215, 217-18 (S.C. 1978).
[126] *Meller v. State*, 581 P.2d 3 (Nev. 1978).
[127] *Coleman v. McCormick*, 874 F.2d 1280, 1286-89 (9th Cir. 1989) (due process).

Next, Manley argues that to subject him to a second sentencing hearing would violate the Double Jeopardy Clause. He relies on the California Court of Appeals decision in *People v. Harvey*.[128] However, the Court finds the Arizona Supreme Court's reasoning in *State v. Ring*[129] to be more persuasive. There, following the Supreme Court's decision in *Ring v. Arizona*,[130] the Arizona Supreme Court examined the impact of the United States Supreme Court's decisions on the sentences of all other defendants sentenced to death under the unconstitutional statute. The Arizona legislature had amended its death penalty statute to conform to the Supreme Court's decision by allowing the jury to determine the existence of aggravating and mitigating circumstances and to determine whether the defendant should receive a sentence of death. The State sought to re-sentence the death row inmates under the new statute, rather than automatically reducing their sentences to life imprisonment.

The defendants argued, *inter alia*, that the double jeopardy provisions of the United States and Arizona Constitutions precluded re-sentencing under the new statute. The Court disagreed. The Court rejected *Harvey,* and the *Harvey* court's attempt to distinguish that case from *Dobbert v. Florida*.[131] In *Dobbert*, the United States Supreme Court rejected

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[128] 142 Cal. Rptr. 887 (Cal. Ct. App. 1978)(holding that where the defendant has been convicted of murder and sentenced to death under an earlier invalid statute, double jeopardy protects the defendant from imposition of the death penalty under a new statute).

[129] 65 P. 3d 915 (Ariz. 2003).

[130] 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556.

[131] 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).

a similar argument, holding that double jeopardy did not attach because an, albeit unconstitutional, capital punishment statute existed at the time of the defendant's crimes. Under *Dobbert*, the existence of a death penalty statute placed the defendant on notice that he faced capital punishment. The Arizona Court concluded:

> The basic issue we must resolve is not whether a death sentence metaphysically existed when the defendants were sentenced, but rather whether any defendant was "acquitted" at his original trial of whatever findings were necessary to impose a death sentence. While a defendant can be re-sentenced following an appellate reversal of his or her original sentence, the Double Jeopardy Clause prohibits imposing any sentence of which the defendant was either actually or impliedly "acquitted" in the first instance. Thus, a defendant cannot be sentenced to death at a subsequent sentencing proceeding if "the sentencer or reviewing court has decided that the prosecution has not proved its case that the death penalty is appropriate."
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> . . .
>
> Like the defendants in *Poland [v. Arizona*, 476 U.S.147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986)], the defendants on direct appeal all received death sentences at their original trials. The fact-finder made those findings necessary to impose a death sentence. In no sense has a fact-finder concluded that the State failed to prove aggravating circumstances beyond a reasonable doubt. On remand, no defendant can receive a sentence greater than that which has been imposed. Accordingly, we hold that jeopardy has not attached.[132]

This Court agrees with the Arizona Court's interpretation of Double Jeopardy.[133] As such, even if Manley were successful in demonstrating some sort of constitutional

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[132] *State v. Ring,* 65 P. 3d at 930 (citations omitted), 931.

[133] Arizona's reasoning is underscored by the United State's Supreme Court in *Bellington v. Missouri*, 451 U.S. 430, 444-46, 101 S. Ct. 1852, 1861-63, 68 L. Ed. 2d 270, 282-85 (1981). The *Bellington* Court held that a person convicted of capital murder but sentenced to life imprisonment, upon retrial, is protected by double jeopardy with regard to the death penalty, where the guilt and penalty phases are bifurcated and the prosecution must prove certain elements beyond a reasonable doubt to render the person eligible for the death penalty. *Id.*

infirmity with the 1991 statute under which he was sentenced, which he has failed to do, the Double Jeopardy Clause would still be no barrier to re-sentencing under the new 2002 statute. Once again, the jury earlier made the now required threshold finding to render these defendants eligible for the death penalty. They, therefore, face no greater potential penalty than before.

Other Constitutional Claims

Stevenson raises other constitutional challenges to the 1991 statute, which seem moot in light of the remand for a new penalty hearing. However, some of the issues could also pertain to the 2002 statute and the upcoming penalty hearing. The Court notes that while these arguments are not based strictly on *Ring*, they are tangentially related and are premised on Stevenson's overly expansive view of *Ring* already rejected in *Brice*.

Stevenson first maintains that the 1991 scheme was constitutionally defective because it did not provide for a grand jury indictment to include the statutory aggravating factors. In other words, he asserts that because the 1991 statute did not define aggravating factors as elements of a capital offense and did not provide for grand jury consideration of such factors in order to indict, the indictment was or is constitutionally infirm. But Stevenson has cited to no authority supporting this contention. In fact, no Delaware court has ever interpreted the Delaware Constitution's indictment requirement so broadly. Nor is the Court satisfied that the United States Constitution mandates such aggravating circumstances to be included in the indictment. In fact, as the State correctly

points out, several other states have faced similar challenges and have decided that the inclusion of the statutory aggravating circumstances in indictments is not required.[134] The Court finds particularly persuasive the Alabama decisions, because Alabama uses a hybrid death penalty scheme very similar to Delaware's system.[135]

Alabama courts, relying on *dicta* contained in *Apprendi*,[136] have consistently held that a fact which could elevate a sentence beyond the statutory maximum need not be alleged in the indictment.[137] The *Ring* decision does not address this issue because

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[134] *See Duke v. State*, No. CR-98-1218, 2003 WL 1406536 (Ala. Crim. App. May 31, 2002); *Terrell v. State*, 572 S.E.2d 595, 602-03 (Ga. 2002); *Baker v. State*, 790 A.2d 629, 652-54 (Md. Ct. App. 2002); *State v. Edwards*, 810 A.2d 226, 231-34 (R.I. 2002).

[135] *See Duke v. State*, 2003 WL 1406536; *Stallworth v. State*, No. CR-98-0366, 2003 WL 203463 at *7-8 (Ala. Crim. App. Jan. 31, 2003); *Poole v. State*, 846 So. 2d 370, 381-87 (Ala. Crim. App. 2001).

[136] *See Apprendi v. New Jersey,* 530 U.S. 466, 477 n.3, 120 S. Ct. 2348, 2355-56, 147 L. Ed. 2d 435, 447 (2000) (observing that the Fourteenth Amendment "has not . . . been construed to include the Fifth Amendment right to 'presentment of indictment of a Grand Jury. . .' ").

[137] *Duke v. State,* 2003 WL 1406536 at *3 (rejecting defendant's argument that his indictment was void because it failed to include aggravating circumstances that the State intended to prove in a capital case); *Stallworth v. State,* 2003 WL 203463 at *7 - 8 (rejecting capital defendant's claim that his indictment was void because it failed to include aggravating factors); *Poole v. State*, 846 So. 2d at 386 (holding that "[b]ased on the language of *Apprendi* and on prior holdings of that court, we do not believe that the Supreme Court intended to impose presentment and indictment requirements on the individual states' rights to define criminal activity." (citing *Apprendi*, 530 U.S. at 477 n.3); *Hurtado v. California*, 110 U.S. 5164 S. Ct. 111, 28 L. Ed. 232 (1984) (recognizing that due process, as applied to states by Fourteenth Amendment does not apply to State grand jury proceedings); *Alexander v. Louisiana*; 405 U.S. 625, 633 92 S. Ct. 1221, 1227, 31 L. Ed. 2d 536, 543-44 (1972) (recognizing that trial by jury in criminal cases is guaranteed to State defendants by the Fourteenth Amendment, but that federal concepts of a grand jury are not alligatory for the states); *Patterson v. New York,* 432 U.S. 197, 201-02 97 S. Ct. 2319, 2322, 53 L. Ed. 2d 281, 286-87 (1977) (stating that federal courts should not intrude on states' regulation of criminal procedures unless they violate fundamental principles of justice).

Timothy Ring did not raise it.[138] *Ring* is narrowly tailored to resolve only the question of whether a capital defendant has a Sixth Amendment right to have a jury determine the existence of an aggravating factor which will render him eligible for the death penalty. This Court finds no requirement in either federal or State constitutional law that statutory aggravating circumstances must be alleged in the indictment. This Court, therefore, rejects Stevenson's argument.

Stevenson next argues that the 1991 death penalty statute, and by extension the 2002 statute, is unconstitutional because it allows for death penalty hearings in which the rules of evidence were not enforced. That is, by placing the question of the existence of aggravating factors, which are necessary elements of the charge under *Ring*, in the sentencing phase of the trial, the statute allows the State to present this "life or death" portion of the case without affording the defendant the protections of the Delaware Rules of Evidence. This claim has already been rejected by the Eastern District of Virginia in *United States v. Regan*.[139] That court reasoned:

> The narrow holdings of *Jones* [v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999)], *Apprendi,* and *Ring* do not require that the Federal Rules of Evidence be imposed on the penalty phase. Moreover, regardless of whether the statutory aggravating factors are substantive elements, or merely functional equivalents of elements, the Federal Rules of Evidence are not constitutionally mandated. The Supreme Court has recognized that, "subject to the requirements of due process, 'Congress has

[138] *Ring,* 536 U.S. at 597 n.4.

[139] 221 F. Supp. 2d 672, 681 (E.D. Va. 2002).

power to prescribe what evidence is to be received in the courts of the United States.' "[140]

There is no Delaware case holding that the Delaware Rules of Evidence do not the apply to penalty hearings. They may apply, with the caveat that for certain purposes the rules should be relaxed to insure, consistent with constitutional protections, the jury hears all relevant evidence, particularly mitigating.[141] Stevenson has not identified any evidentiary decision that violated his due process rights, and the Court is satisfied that the death penalty hearing procedure is constitutionally sound. Accordingly, this argument also fails.

Stevenson's next contention is that the 1991 statute is unconstitutional because it allowed a defendant to be executed based on findings proved merely to a "preponderance of the evidence" standard, as opposed to a "beyond a reasonable doubt" standard. While Stevenson purportedly attacks the burden of proof, his argument is actually just another formulation of the *Ring* argument already rejected in *Brice*.[142] Defendant submits that the weighing process of aggravators versus mitigators, a true life and death decision, is too fundamentally important to be left to a single person, especially when the standard is as low as a " preponderance of the evidence." Stevenson has cited no authority which

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[140] *Regan*, 221 F. Supp. 2d. at 681 (citations omitted); *accord United States v. Johnson*, 239 F. Supp. 2d 924, 944-46 (N.D. Iowa 2003); United States v. Matthews, 2002 WL 31995520 at *3-6 (N.D.N.Y. Dec. 31, 2002).

[141] *See State v. Cohen*, 634 A.2d 380, 386 (Del. Super. Ct. 1992).

[142] *Brice*, 815 A.2d at 322.

dictates jettisoning the preponderance of the evidence standard. Accordingly, his argument fails.

Stevenson would next have this Court decline to follow *Cohen's* rejection of the claim that the 1991 death penalty statute was unconstitutional because it empowered the judge to make the ultimate sentence determination, because, it was argued, under common law, a convicted murderer had a jury decide his punishment. *Cohen* has resolved this issue, and this Court will not consider it anew.[143]

Stevenson and Manley both argue that the 1991 capital jury selection procedure was unconstitutional. They maintain that because the jury was instructed that its role was advisory, the jury may have improperly shifted its sense of responsibility to the courts. This argument fails for two reasons. First, the defendants will undergo a new penalty hearing under the 2002 statute, rendering this claim moot. Second, this argument is a restatement of the argument based on *Caldwell v. Mississippi*[144] already rejected by the Supreme Court in *Brice*. Footnote 13 of the *Brice* decision states, in part:

> It has been argued that a potential *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), problem exists in that juries under the 1991 Statute were improperly misled into believing that the ultimate decision on the existence of statutory aggravating circumstances rested with the court. If this argument were accepted, the "object" upon which harmless error analysis would operate -- the numerical vote representing a finding of statutory aggravators – would arguably be tainted because the jury may have been misled into believing that its finding on the issue was ultimately meaningless. The holding in *Caldwell*, however, rested

[143] *State v. Cohen,* 604 A.2d 846, 851 (Del. 1992).
[144] 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).

on Eighth Amendment grounds, 105 S. Ct. at 2639, and not upon a finding of structural error.[145]

Therefore, Stevenson's jury responsibility argument, which Manley echoes, fails.

Lastly, Stevenson submits that *Ring* established a substantive rule of criminal law and did not simply clarify proper criminal procedure. However, this argument is another reformulation of the *Ring* argument already raised and rejected in *Brice*.

Conclusion

For the aforementioned reasons, the defendants' Motions for Postconviction Relief and Manley's Motion to Preclude a New Penalty Hearing are **DENIED**.

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J.

[145] *Brice*, 815 A.2d at 326, n. 13.