IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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

Submitted: December 10, 2004
Decided: January 27, 2005

UPON DEFENDANT'S MOTION
TO DECLARE DELAWARE'S DEATH PENALTY STATUTE
UNCONSTITUTIONAL
DENIED.

ORDER

Kevin J. O'Connell, Esquire, Assistant Public Defender, New Castle County, State of Delaware, and Jerome M. Capone, Esquire, Wilmington, Delaware, Attorneys for Defendant.

Stephen M. Walther, Esquire, Deputy Attorney General, and John A. Barber, Esquire, Deputy Attorney General, State of Delaware, Wilmington, Delaware, Attorneys for the State.

ABLEMAN, JUDGE

Upon consideration, Defendant's Motion To Declare Delaware's Death Penalty Statute Unconstitutional must be **DENIED**. It appears to the Court that:

1. Defendant Michael Jones has been convicted of two counts of first degree murder, a capital offense. Defendant now moves the Court to declare that Delaware's Death Penalty statute, 11 Del. C. § 4209, violates the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Defense counsel's primary support for this motion, which he candidly informed the Court that he files for every first-degree murder defendant, are the familiar cases of *Ring v. Arizona*[1] and *Apprendi v. New Jersey*.[2] In the defense's view, these cases invalidate so-called "hybrid" death penalty statutes such as Delaware's. The Court disagrees.

2. The Delaware Supreme Court carefully considered *Ring*, *Apprendi*, and the post-*Ring* amendments to § 4209 in the 2003 case of *Brice v. State*.[3] The *Brice* Court found that § 4209 fulfills *Ring*'s requirement that all facts necessary to enhance a defendant's sentence from life to death must be found by a jury beyond a reasonable doubt. Specifically, Delaware satisfies this requirement by making a defendant death eligible only if the jury finds, beyond a reasonable doubt, the existence of one of twenty-two statutorily enumerated aggravating factors. Under

[1] 536 U.S. 584 (2002).
[2] 530 U.S. 466 (2000).
[3] 815 A.2d 314 (Del. 2003).

the Supreme Court's interpretation of § 4209 in *Brice*, this finding is the only one necessary for a defendant to receive the death penalty.

3. The jury then makes a recommendation whether, in its opinion, a preponderance of the evidence shows that all the aggravating circumstances in the case outweigh all the case's mitigating factors. This recommendation may be non-unanimous, and is not binding upon the trial judge, who makes the final sentencing decision. The function of the jury's recommendation is only to advise the judge of the conscience of the community regarding a particular defendant; it is in no way a finding of fact necessary for the trial judge to issue the death penalty, nor does it remove any of the judge's sentencing authority. In fact, when the Delaware Supreme Court attempted to limit the trial judge's traditional sentencing discretion by enhancing the importance of the jury's sentencing recommendation[4], the General Assembly promptly and emphatically rejected the change.[5]

4. This motion urges the Court to do what the United States Supreme Court specifically declined to do in *Ring*, i.e. find that the only constitutional capital system is one in which the jury decides whether to impose the death penalty, leaving the judge no room for input or discretion.[6] Even if the Court were inclined

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[4] *Garden v. State*, 815 A.2d 327 (Del. 2003).
[5] House Bill No. 287, 74 Del. Laws Ch. 174.
[6] *Ring*, 536 U.S. at 612-613, Scalia concurring. ([T]he unfortunate fact is that today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so--by requiring a prior jury finding of

to so find, I cannot ignore the fact that the General Assembly has made its rejection of this "judge-as-a-figurehead" regime crystal clear, on numerous occasions.[7] Nor can I, sitting as a trial judge, overrule *Brice* to find that *Ring* made § 4209 unconstitutional after all. While the Court appreciates that defense counsel must raise these arguments in anticipation of ultimately appealing to the United States Supreme Court, at this level, the Motion must be and hereby is **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Kevin J. O'Connell, Esquire
Jerome M. Capone, Esquire
Stephen M. Walther, Esquire
John A. Barber, Esquire
Prothonotary

aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.); *see also Arkansas v. Sullivan,* 532 U.S. 769, 772 (2001) ("[W]hile a state is free *as a matter of its own law* to impose greater restrictions on police activity than those this court holds to be necessary upon federal constitutional standards, [it] may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.") (emphasis in original, internal quotation marks omitted)..

[7] § 4209 was amended in 1991, 2002, and 2003 with the obvious intent of lodging capital sentencing authority with the trial judge, and keeping it there despite evolving Supreme Court precedent.