INDEX TO APPENDICES

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL MANLEY,	§	
	§	No. 165, 2018
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	Case ID No. 9511007022
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: December 5, 2018
Decided: December 6, 2018

Before **STRINE**, Chief Justice; **VALIHURA** and **TRAYNOR**, Justices.

ORDER

(1) This appeal presents a familiar issue that has arisen multiple times since this Court's opinions in *Rauf v. State*[1] and *Powell v. State*,[2] which respectively held that Delaware's death penalty statute is unconstitutional and that *Rauf*'s holding applies retroactively. Although we concluded in *Powell* that the defendant "must be sentenced to 'imprisonment for the remainder of his natural life without benefit of probation or parole or any other reduction,'"[3] a number of defendants who were convicted of first-degree murder and sentenced to death before *Rauf* have argued

[1] 145 A.3d 430 (Del. 2016).
[2] 153 A.3d 69 (Del. 2016).
[3] *Id.* at 70–71.

that they must instead be resentenced to imprisonment for 15 years to life. As these defendants see it, *Rauf* struck down the entirety of Delaware's first-degree murder sentencing statute, not just the death penalty portion. Thus, they argue, they must be resentenced under the still-valid sentencing statute for felonies generally (*i.e.*, for 15 years to life).[4]

(2) The appellant and defendant below, Michael Manley, is another one of those defendants. Although he tries hard to give his case a new constitutional gloss based on the Eighth and Fourteenth Amendments, we rejected those same arguments earlier this year in *Cook v. State*.[5]

(3) Consistent with our prior decisions on this issue,[6] we affirm the Superior Court's judgment on the basis of its well-reasoned order denying Manley's motion for resentencing.[7] As we have now held many times, *Rauf* did not strike down the entirety of the first-degree murder statute—it struck down only the death penalty portion—and the proper sentence for a defendant convicted of first-degree murder is "imprisonment for the remainder of his natural life without benefit of probation or parole or any other reduction."[8]

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[4] *See* 11 *Del. C.* § 4205(b)(1).
[5] 181 A.3d 152, 2018 WL 1020106, at *1 (Del. 2018) (TABLE); *see also Zebroski v. State*, 179 A.3d 855, 863 (Del. 2018).
[6] *See, e.g.*, *Cook*, 2018 WL 1020106, at *1; *Zebroski*, 179 A.3d at 859–60, 863.
[7] *State v. Manley*, 2018 WL 1110420 (Del. Super. Ct. Feb. 28, 2018).
[8] 11 *Del. C.* § 4209(a).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Leo E. Strine, Jr.

Chief Justice

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	**Case ID No. 9511007022**
	)	
v.	)	**Cr. A. Nos. IN95-11-1323R3 – 1325R3,**
	)	**IN95-12-0684R3 – 0686R3.**
	)	
MICHAEL R. MANLEY,	)	
Defendant.	)	
	)	
STATE OF DELAWARE,	)	
	)	**Case ID No. 9511006992**
	)	
v.	)	**Cr. A. Nos. IN95-11-1047R2 – 1049R2,**
	)	**IN95-12-0687R2 – 0689R2.**
	)	
DAVID STEVENSON,	)	
Defendant.	)	

Submitted: January 26, 2018
Decided: February 28, 2018

ORDER DENYING MOTIONS TO VACATE DEATH SENTENCE AND RESENTENCE PURSUANT TO 11 *DEL. C.* § 4205

This 28th day of February, 2018, upon consideration of the Defendant Michael R. Manley ("Manley") and the Defendant David Stevenson's ("Stevenson") Motions to Vacate Death Sentence and Resentence Pursuant to 11 *Del. C.* § 4205 (D.I. 469, D.I. 394); the State's Responses thereto (D.I. 470, D.I. 395); and the record in these matters, it appears to the Court that:

(1) Manley and Stevenson were convicted of Murder in the First Degree at a joint trial on November 13, 1996,[1] and sentenced to death by this Court on January 10, 1997.[2] Both sentences were affirmed by the Delaware Supreme Court on direct appeal.[3] Although the Supreme Court later reversed the sentences,[4] a second penalty hearing again established beyond a reasonable doubt the existence of three statutory aggravators in Manley's case and three in Stevenson's.[5] This Court again sentenced each defendant to death; each sentence was later affirmed by the Delaware Supreme Court.[6] More recently, in 2017, the Delaware Supreme Court followed its decision in *Rauf v. State*[7] and ruled that Manley and Stevenson's death sentences must be vacated and the two defendants resentenced to life without parole.[8]

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1 *State v. Manley*, 1997 WL 27094, at *5 (Del. Super. Ct. Jan. 10, 1997).

2 *Id.* at *15.

3 *Manley v. State*, 709 A.2d 643 (Del. 1998); *Stevenson v. State*, 709 A.2d 619, 622 (Del. 1998).

4 *Stevenson v. State*, 782 A.2d 249, 261 (Del. 2001).

5 *Manley v. State*, 918 A.2d 321, 324 (Del. 2007).

6 *Id.*

7 145 A.3d 430 (Del. 2016).

8 *Manley v. State*, 2017 WL 4772572, at *1 (Del. Oct. 20, 2017); *Stevenson v. State*, 2017 WL 6330741, at *1 (Del. Nov. 2, 2017).

(2) Manley and Stevenson now ask this Court to vacate their death sentences but—notwithstanding the Supreme Court's mandate, which neither defendant sought reargument or other review of—to resentence them under Delaware's Class A Felony penalty provisions.[9] Manley contends: (a) that this Court is not obligated by *Rauf* to impose a mandatory sentence of life without parole; and (b) that such a mandatory sentence of life without parole would violate his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Stevenson just adopts Manley's arguments.[10]

(3) In *Rauf*, which invalidated certain portions of Delaware's death penalty statute (11 *Del. C.* § 4209), the Supreme Court held that those procedural provisions of the statute that didn't comply with the federal Constitution could not be severed "[b]ecause the respective roles of the judge and jury are so complicated under § 4209" that the Court was "unable to discern a method by which to parse the statute so as to preserve it."[11] But *Rauf* did not speak to the severability of the substantive life-without-parole penalty provisions of § 4209.[12] And later decisions, including

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9 DEL. CODE ANN. tit. 11, § 4205(b)(1) (1995) ("The term of incarceration which the court may impose for a felony is fixed as follows . . . For a class A felony not less than 15 years up to life imprisonment to be served at Level V . . .").

10 Stevenson's Mot. at ¶¶ 1, 4.

11 *Rauf*, 145 A.3d at 434.

12 *Norcross v. State*, 2018 WL 266826, at *1 n.3 (Del. Jan. 2, 2018).

the Supreme Court's in *Powell v. State*[13] and this Court's in *State v. Swan*,[14] upheld the mandatory sentence of life without parole in *Rauf*'s wake.

(4) If there was any doubt about the viability of those substantive sentencing provisions before, the Supreme Court has recently put that doubt fully to rest: *Rauf* simply did not strike down the entirety of § 4209.[15]

(5) In *Zebroski v. State*—the case of a defendant formerly sentenced to death who challenged his resentencing to mandatory life without parole under the very same statutory language at issue here—the Supreme Court ruled that *Rauf*'s severability question was "only . . . whether it was possible to sever the constitutionally-infirm parts of the capital punishment scheme from the constitutionally-sound ones in a way that would preserve the death penalty."[16] *Zebroski* made clear that "the statute's life-without-parole alternative is the correct

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[13] *Powell v. State*, 153 A.3d 69, 70–71 (Del. 2016) ("Powell's death sentence must be vacated and he must be sentenced to 'imprisonment for the remainder of his natural life without benefit of probation or parole or any other reduction.'" (quoting DEL. CODE ANN. tit. 11, § 4209(d)(2) (2009))).

[14] *State v. Swan*, __ A.3d __, __, 2017 WL 7736122, at *3. (Del. Super. Ct. Feb. 10, 2017) ("There is no reason why the court cannot give effect to the portions of section 4209 which require imposition of a sentence of life without parole in murder first degree cases if the death penalty is not imposed.").

[15] *Cooke v. State*, 2018 WL 1020106, at *1 (Del. Feb. 21, 2018); *Zebroski v. State*, __ A.3d __, __, 2018 WL 559678, at *1 (Del. Jan. 25, 2018).

[16] *Zebroski v. State*, 2018 WL 559678, at *3; *id.* at *3, n.13 (*Rauf* addressed only the sentencing procedures prescribed by § 4209, not whether the procedural scheme could be severed from the alternative punishment provisions prescribing life without parole).

sentence to impose on a defendant whose death sentence is vacated."[17] And so, the Court must and shall impose upon both Manley and Stevenson the alternative life-without-parole sentence required by 11 *Del. C.* § 4209.[18]

(6) Manley and Stevenson next posit that a mandatory life-without-parole sentence violates their rights under the Eighth and Fourteenth Amendments. This supposed constitutional fault they divine from a suggestion that "Delaware would be an outlier among all other states if it imposed a mandatory sentence of life without parole for the broadly defined offense of intentional killing."[19] The *Zebroski* court considered and rejected this very argument, as well.[20] Like Craig Zebroski's, Michael Manley's and David Stevenson's first-degree murder sentences are not based "upon a mere finding that [their] killing was intentional."[21] No, Manley's jury found, unanimously and beyond a reasonable doubt, the existence of three statutory

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17 *Id.* at *1.

18 DEL. CODE ANN. tit. 11, § 4209(a) (1995) ("Any person who is convicted of first-degree murder shall be punished by death ***or*** by imprisonment for the remainder of the person's natural life without benefit of probation or parole or any other reduction") (emphasis added); *id.* at § 4209(d)(2) ("Otherwise, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life without benefit of probation or parole or any other reduction.").

19 Manley's Mot. at ¶ 11.

20 *Zebroski*, 2018 WL 559678, at *6. Like our high Court in *Zebroski*, this Court too finds that even if Manley and Stevenson's "outlier" and "breadth of acts" arguments were true—which this Court also expresses no opinion on—Manley and Stevenson, like Zebroski, are the wrong first degree murderers to raise that challenge.

21 *Id.*

aggravating circumstances: first, that Manley killed Kristopher Heath to prevent Mr. Heath's appearance as a witness in a criminal case; second, that Manley murdered Mr. Heath as Stevenson's agent; and third, that Mr. Heath's murder was premeditated and the result of substantial planning.[22] While Stevenson's jury also found the existence of three statutory aggravating circumstances: first, that Stevenson killed Kristopher Heath to prevent Mr. Heath's appearance as a witness in a criminal case; second, that Stevenson directed Manley to kill Mr. Heath; and third, that Mr. Heath's murder was premeditated and the result of substantial planning.[23] Manley and Stevenson themselves recognize that "the non-death penalty states that include provisions for a mandatory sentence of life without parole do so only for a narrow set of first degree murders," including, in several states, those committed "with some . . . enumerated aggravating circumstance."[24] Both Manley and Stevenson were convicted with such attendant aggravating factors.

(7) The real question posed by the defendants, therefore, is not whether the imposition of a mandatory life-without-parole sentence for an intentional killing violates the Eighth Amendment;[25] but instead whether the imposition of a mandatory

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22 *Manley*, 918 A.2d at 329.

23 *Id.* at 328–29.

24 Manley's Mot. at ¶ 8.

25 Even if this were the right question to be answered here, it's well-settled that "[t]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its

life-without-parole sentence for an intentional killing attended by numerous statutory aggravating factors violates the Eighth Amendment. Our Supreme Court, in *Zebroski*, found that Delaware is not "an outlier for imposing [a] sentence of life without parole under these circumstances."[26] And the circumstances supporting Manley's and Stevenson's sentences are surely no less compelling than Zebroski's.

(8) Finally, Manley argues that imposing the mandatory life sentence would violate his right to effective assistance of counsel under the Sixth and Fourteenth Amendments, because "at the time of his trial, had [he] been on notice that a sentence of life without parole would be the only . . . sentence upon conviction of first-degree murder, trial preparation and strategy surely would have been different."[27] Addressing this same argument in *Zebroski*, our Supreme Court explained:

> Under [this] line of reasoning, all defendants convicted under a capital punishment regime that is later declared unconstitutional would be entitled to have their convictions vacated because their trial lawyers may have employed different strategies had the possibility of death not loomed over their cases. That has never been true in Delaware on any past occasions when the State's capital punishment scheme has been struck down[.][28]

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sisters over how to best administer its criminal laws." *Cooke*, 2018 WL 1020106, at *1 (internal citations and quotations omitted).

26 *Zebroski*, 2018 WL 559678, at *6.

27 Def.'s Mot. at ¶ 12.

28 *Zebroski*, 2018 WL 559678, at *6.

And Manley and Stevenson, like Zebroski (Swan, and others), cite no authority for this notion that due process somehow requires vacatur of their death sentences and the possibility of imposition of something less than life without parole.[29]

(9) Accordingly, Manley's request that his death sentence be vacated and that he be resentenced under 11 *Del. C.* § 4205 must be **DENIED**. Manley will be scheduled for resentencing in accord with the Supreme Court's order of October 20, 2017[30] and 11 *Del. C.* § 4209(a) and (d)(2).

(10) Stevenson's request that his death sentence be vacated and that he be resentenced under 11 *Del. C.* § 4205 must also be **DENIED**. Stevenson will be scheduled for resentencing in accord with the Supreme Court's order of November 2, 2017[31] and 11 *Del. C.* § 4209(a) and (d)(2).

SO ORDERED this 28th day of February, 2018.

Paul R. Wallace, Judge

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29 *Id.*; *Swan*, 2017 WL 7736122, at * 4; *Cooke*, 2018 WL 1020106, at *1. *See also* Manley's Mot. at ¶ 12 (setting forth a bare one-paragraph due process claim with zero citations to any authority).

30 *Manley*, 2017 WL 4772572, at *1 ("Manley's death sentence must be vacated and he must be sentenced to imprisonment for the remainder of his natural life without benefit of probation, parole, or any other reduction.").

31 *Stevenson*, 2017 WL 6330741, at *1 ("Stevenson's death sentence must be vacated and he must be sentenced to imprisonment for the remainder of his natural life without benefit of probation, parole, or any other reduction.").

Original to Prothonotary

cc: Elizabeth R. McFarlan, Deputy Attorney General
Maria T. Knoll, Deputy Attorney General
Christopher S. Koyste, Esquire
Beth Ann Muhlhauser, Esquire
Anne Saunders, Esquire
Herbert W. Mondros, Esquire
Shawn Nolan, Esquire
Claudia Van Wyk, Esquire

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

VS.

MICHAEL R MANLEY

Alias: No Aliases

DOB: 07/29/1974
SBI: 00338485

CASE NUMBER:
N9511007022

IN AND FOR NEW CASTLE COUNTY
CRIMINAL ACTION NUMBER:
IN95-11-1323R3
MURDER,1ST(F)
IN95-11-1324R3
PFDCF(F)
IN95-11-1325R3
CONSP 1ST(F)
IN95-12-0684R3
AGG.ACT/INTIMI(F)
IN95-12-0685R3
PFDCF(F)
IN95-12-0686R3
CONSP 2ND(F)

COMMITMENT
ALL SENTENCES OF CONFINEMENT SHALL RUN CONSECUTIVE

MODIFIED SENTENCE ORDER

NOW THIS 13TH DAY OF MARCH, 2018, IT IS THE ORDER OF THE COURT THAT: THE ORDER DATED February 3, 2006 IS HEREBY MODIFIED AS FOLLOWS:

The defendant is adjudged guilty of the offense(s) charged. The defendant is to pay the costs of prosecution and all statutory surcharges.

AS TO IN95-11-1323-R3 : TIS
MURDER,1ST

Effective November 13, 1995 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

AS TO IN95-11-1324-R3 : TIS
PFDCF

STATE OF DELAWARE
VS.
MICHAEL R MANLEY
DOB: 07/29/1974
SBI: 00338485

- The defendant is placed in the custody of the Department of Correction for 20 year(s) at supervision level 5

AS TO IN95-11-1325-R3 : TIS
CONSP 1ST

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

AS TO IN95-12-0684-R3 : TIS
AGG.ACT/INTIMI

- The defendant is placed in the custody of the Department of Correction for 8 year(s) at supervision level 5

AS TO IN95-12-0685-R3 : TIS
PFDCF

- The defendant is placed in the custody of the Department of Correction for 20 year(s) at supervision level 5

AS TO IN95-12-0686-R3 : TIS
CONSP 2ND

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
MICHAEL R MANLEY
DOB: 07/29/1974
SBI: 00338485

CASE NUMBER:
9511007022

For the purposes of ensuring the payment of costs, fines, restitution and the enforcement of any orders imposed, the Court shall retain jurisdiction over the convicted person until any fine or restitution imposed shall have been paid in full. This includes the entry of a civil judgment pursuant to 11 Del.C. 4101 without further hearing.

NOTES

Consistent with the Delaware Supreme Court's ruling of October 20, 2017, the previously imposed death sentence for Murder in the First Degree (Criminal Action Number IN95-11-1323-R3) is vacated.

As to the sentence for Murder in the First Degree (Criminal Action Number IN95-11-1323-R3), the natural life term is without benefit of probation or parole or any other reduction and is a mandatory sentence under 11 Del. C. 4209(e) and (d)(2).

JUDGE PAUL R WALLACE

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
MICHAEL R MANLEY
DOB: 07/29/1974
SBI: 00338485

CASE NUMBER:
9511007022

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	240.00
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	100.00
PROSECUTION FEE ORDERED	
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	6.00
DELJIS FEE ORDERED	6.00
SECURITY FEE ORDERED	60.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	90.00
SENIOR TRUST FUND FEE	
AMBULANCE FUND FEE	
TOTAL	502.00

11 Del.C. § 4209

§ 4209. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder committed by adult offenders

Effective: June 4, 2013

Currentness

(a) *Punishment for first-degree murder.*--Any person who is convicted of first-degree murder for an offense that was committed after the person had reached the person's eighteenth birthday shall be punished by death or by imprisonment for the remainder of the person's natural life without benefit of probation or parole or any other reduction, said penalty to be determined in accordance with this section.

(b) *Separate hearing on issue of punishment for first-degree murder.*--

(1) Upon a conviction of guilt of a defendant of first-degree murder, the Superior Court shall conduct a separate hearing to determine whether the defendant should be sentenced to death or to life imprisonment without benefit of probation or parole as authorized by subsection (a) of this section. If the defendant was convicted of first-degree murder by a jury, this hearing shall be conducted by the trial judge before that jury as soon as practicable after the return of the verdict of guilty. Alternate jurors shall not be excused from the case prior to submission of the issue of guilt to the trial jury and may, but need not be, separately sequestered until a verdict on guilt is entered. If the verdict of the trial jury is guilty of first-degree murder said alternates shall sit as alternate jurors on the issue of punishment. If, for any reason satisfactory to the Court, any member of the trial jury is excused from participation in the hearing on punishment, the trial judge shall replace such juror or jurors with alternate juror or jurors. If a jury of 12 jurors cannot participate in the hearing a separate and new jury, plus alternates, shall be selected for the hearing in accordance with the applicable rules of the Superior Court and laws of Delaware, unless the defendant or defendants and the State stipulate to the use of a lesser number of jurors.

(2) If the defendant was convicted of first-degree murder by the Court, after a trial and waiver of a jury trial or after a plea of guilty or nolo contendere, the hearing shall be conducted by the trial judge before a jury, plus alternates, empaneled for that purpose and selected in accordance with the applicable rules of the Superior Court and laws of Delaware, unless said jury is waived by the State and the defendant in which case the hearing shall be conducted, if possible, by and before the trial judge who entered the finding of guilty or accepted the plea of guilty or nolo contendere.

(c) *Procedure at punishment hearing.*--

(1) The sole determination for the jury or judge at the hearing provided for by this section shall be the penalty to be imposed upon the defendant for the conviction of first-degree murder. At the hearing, evidence may be presented as to any matter that the Court deems relevant and admissible to the penalty to be imposed. The evidence shall include matters relating to any mitigating circumstance and to any aggravating circumstance, including, but not limited to, those aggravating circumstances enumerated in subsection (e) of this section. Notice in writing of any aggravating circumstances and any mitigating circumstances shall be given to the other side by the party seeking to introduce evidence of such

circumstances prior to the punishment hearing, and after the verdict on guilt, unless in the discretion of the Court such advance notice is dispensed with as impracticable. The record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant or the absence of any such prior criminal convictions and pleas shall also be admissible in evidence.

(2) At the hearing the Court shall permit argument by the State, the defendant and/or the defendant's counsel, on the punishment to be imposed. Such argument shall consist of opening statements by each, unless waived, opening summation by the State, rebuttal summation by the defendant and/or the defendant's counsel and closing summation by the State.

(3) a. Upon the conclusion of the evidence and arguments the judge shall give the jury appropriate instructions and the jury shall retire to deliberate and report to the Court an answer to the following questions:

1. Whether the evidence shows beyond a reasonable doubt the existence of at least 1 aggravating circumstance as enumerated in subsection (e) of this section; and

2. Whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

b. 1. The jury shall report to the Court its finding on the question of the existence of statutory aggravating circumstances as enumerated in subsection (e) of this section. In order to find the existence of a statutory aggravating circumstance as enumerated in subsection (e) of this section beyond a reasonable doubt, the jury must be unanimous as to the existence of that statutory aggravating circumstance. As to any statutory aggravating circumstances enumerated in subsection (e) of this section which were alleged but for which the jury is not unanimous, the jury shall report the number of the affirmative and negative votes on each such circumstance.

2. The jury shall report to the Court by the number of the affirmative and negative votes its recommendation on the question as to whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

(4) In the instructions to the jury the Court shall include instructions for it to weigh and consider any mitigating circumstances or aggravating circumstances and any of the statutory aggravating circumstances set forth in subsection (e) of this section which may be raised by the evidence. The jury shall be instructed to weigh any mitigating factors against the aggravating factors.

(d) *Determination of sentence.--*

(1) If a jury is impaneled, the Court shall discharge that jury after it has reported its findings and recommendation to the Court. A sentence of death shall not be imposed unless the jury, if a jury is impaneled, first finds unanimously and beyond a reasonable doubt the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section. If a jury is not impaneled, a sentence of death shall not be imposed unless the Court finds beyond a reasonable doubt the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section. If a jury has been impaneled and if the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section has been found beyond a reasonable doubt by the jury, the Court, after considering the findings and recommendation of the jury and without hearing or reviewing any additional evidence, shall impose a sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist. The jury's recommendation concerning whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist shall be given such consideration as deemed appropriate by the Court in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the Court. The jury's recommendation shall not be binding upon the Court. If a jury has not been impaneled and if the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section has been found beyond a reasonable doubt by the Court, it shall impose a sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist.

(2) Otherwise, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life without benefit of probation or parole or any other reduction.

(3) a. Not later than 90 days before trial the defendant may file a motion with the Court alleging that the defendant had a serious intellectual developmental disorder at the time the crime was committed. Upon the filing of the motion, the Court shall order an evaluation of the defendant for the purpose of providing evidence of the following:

1. Whether the defendant has a significantly subaverage level of intellectual functioning;

2. Whether the defendant's adaptive behavior is substantially impaired; and

3. Whether the conditions described in paragraphs (d)(1) and (d)(2) of this section existed before the defendant became 18 years of age.

b. During the hearing authorized by subsections (b) and (c) of this section, the defendant and the State may present relevant and admissible evidence on the issue of the defendant's alleged serious intellectual developmental disorder, or in rebuttal thereof. The defendant shall have the burden of proof to demonstrate by clear and convincing evidence that

the defendant had a serious intellectual developmental disorder at the time of the offense. Evidence presented during the hearing shall be considered by the jury in making its recommendation to the Court pursuant to paragraph (c)(3) of this section as to whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist. The jury shall not make any recommendation to the Court on the question of whether the defendant had a serious intellectual developmental disorder at the time the crime was committed.

c. If the defendant files a motion pursuant to this paragraph claiming he or she had a serious intellectual developmental disorder at the time the crime was committed, the Court, in determining the sentence to be imposed, shall make specific findings as to the existence of a serious intellectual developmental disorder at the time the crime was committed. If the Court finds that the defendant has established by clear and convincing evidence that the defendant had a serious intellectual developmental disorder at the time the crime was committed, notwithstanding any other provision of this section to the contrary, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life without benefit of probation or parole or any other reduction. If the Court determines that the defendant has failed to establish by clear and convincing evidence that the defendant had a serious intellectual developmental disorder at the time the crime was committed, the Court shall proceed to determine the sentence to be imposed pursuant to the provisions of this subsection. Evidence on the question of the defendant's alleged serious intellectual developmental disorder presented during the hearing shall be considered by the Court in its determination pursuant to this section as to whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

d. When used in this paragraph:

1. "Adaptive behavior" means the effectiveness or degree to which the individual meets the standards of personal independence expected of the individual's age group, sociocultural background and community setting, as evidenced by significant limitations in not less than 2 of the following adaptive skill areas: communication, self-care, home living, social skills, use of community resources, self-direction, functional academic skills, work, leisure, health or safety;

2. "Serious intellectual developmental disorder" means that an individual has significantly subaverage intellectual functioning that exists concurrently with substantial deficits in adaptive behavior and both the significantly subaverage intellectual functioning and the deficits in adaptive behavior were manifested before the individual became 18 years of age; and

3. "Significantly subaverage intellectual functioning" means an intelligent quotient of 70 or below obtained by assessment with 1 or more of the standardized, individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.

(4) After the Court determines the sentence to be imposed, it shall set forth in writing the findings upon which its sentence is based. If a jury is impaneled, and if the Court's decision as to whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist differs from the jury's recommended finding, the Court shall also state with specificity the reasons for its decision not to accept the jury's recommendation.

(e) *Aggravating circumstances.--*

(1) In order for a sentence of death to be imposed, the jury, unanimously, or the judge where applicable, must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances which shall apply with equal force to accomplices convicted of such murder:

a. The murder was committed by a person in, or who has escaped from, the custody of a law-enforcement officer or place of confinement.

b. The murder was committed for the purpose of avoiding or preventing an arrest or for the purpose of effecting an escape from custody.

c. The murder was committed against any law-enforcement officer, corrections employee, firefighter, paramedic, emergency medical technician, fire marshal or fire police officer while such victim was engaged in the performance of official duties.

d. The murder was committed against a judicial officer, a former judicial officer, Attorney General, former Attorney General, Assistant or Deputy Attorney General or former Assistant or Deputy Attorney General, State Detective or former State Detective, Special Investigator or former Special Investigator, during, or because of, the exercise of an official duty.

e. The murder was committed against a person who was held or otherwise detained as a shield or hostage.

f. The murder was committed against a person who was held or detained by the defendant for ransom or reward.

g. 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's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime, or in retaliation for the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime.

h. The defendant paid or was paid by another person or had agreed to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

i. The defendant was previously convicted of another murder or manslaughter or of a felony involving the use of, or threat of, force or violence upon another person.

j. The murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of rape, unlawful sexual intercourse, arson, kidnapping, robbery, sodomy, burglary, or home invasion.

k. The defendant's course of conduct resulted in the deaths of 2 or more persons where the deaths are a probable consequence of the defendant's conduct.

l. The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering the victim.

m. The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person.

n. The defendant was under a sentence of life imprisonment, whether for natural life or otherwise, at the time of the commission of the murder.

o. The murder was committed for pecuniary gain.

p. The victim was pregnant.

q. The victim was particularly vulnerable due to a severe intellectual, mental or physical disability.

r. The victim was 62 years of age or older.

s. The victim was a child 14 years of age or younger, and the murder was committed by an individual who is at least 4 years older than the victim.

t. At the time of the killing, the victim was or had been a nongovernmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity, and the killing was in retaliation for the victim's activities as a nongovernmental informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency.

u. The murder was premeditated and the result of substantial planning. Such planning must be as to the commission of the murder itself and not simply as to the commission or attempted commission of any underlying felony.

v. The murder was committed for the purpose of interfering with the victim's free exercise or enjoyment of any right, privilege or immunity protected by the First Amendment to the United States Constitution, or because the victim has exercised or enjoyed said rights, or because of the victim's race, religion, color, disability, national origin or ancestry.

(2) In any case where the defendant has been convicted of murder in the first degree in violation of any provision of § 636(a)(2)-(6) of this title, that conviction shall establish the existence of a statutory aggravating circumstance and the jury, or judge where appropriate, shall be so instructed. This provision shall not preclude the jury, or judge where applicable, from considering and finding the statutory aggravating circumstances listed in this subsection and any other aggravating circumstances established by the evidence.

(f) *Method and imposition of sentence of death.*--The imposition of a sentence of death shall be upon such terms and conditions as the trial court may impose in its sentence, including the place, the number of witnesses which shall not exceed 10, and conditions of privacy, and shall occur between the hours of 12:01 a.m. and 3:00 a.m. on the date set by the trial court. The trial court shall permit one adult member of the immediate family of the victim, as defined in § 4350(e) of this title, or the victim's designee, to witness the execution of a sentence of death pursuant to the rules of the court, if the family provides reasonable notice of its desire to be so represented. Punishment of death shall, in all cases, be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such person sentenced to death is dead, and such execution procedure shall be determined and supervised by the Commissioner of the Department of Correction. The administration of the required lethal substance or substances required by this section shall not be construed to be the practice of medicine and any pharmacist or pharmaceutical supplier is authorized to dispense drugs to the Commissioner or the Commissioner's designee, without prescription, for carrying out the provisions of this section, notwithstanding any other provision of law. Such sentence may not be carried out until final review thereof is had by the Delaware Supreme Court as provided for in subsection (g) of this section. The Court or the Governor may suspend the execution of the sentence until a later date to be specified, solely to permit completion of the process of judicial review of the conviction.

If the execution of the sentence of death as provided above is held unconstitutional by a court of competent jurisdiction, then punishment of death shall, in all cases, be inflicted by hanging by the neck. The imposition of a sentence of death shall be upon such terms and conditions as the trial court may impose in its sentence, including the place, the number of witnesses and conditions of privacy. Such sentence may not be carried out until final review thereof is had by the Delaware Supreme Court as provided in subsection (g) of this section. The Court or the Governor may suspend the execution of the sentence until a later date to be specified, solely to permit completion of the process of judicial review of the conviction.

(g) *Automatic review of death penalty by Delaware Supreme Court.*--

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the recommendation on and imposition of that penalty shall be reviewed on the record by the Delaware Supreme Court. Absent an appeal having been taken by the defendant upon the expiration of 30 days after the sentence of death has been imposed, the Clerk of the Superior Court shall require a complete transcript of the punishment hearing to be prepared promptly and within 10 days after receipt of that transcript the clerk shall transmit the transcript, together with a notice prepared by the clerk, to the Delaware Supreme Court. The notice shall set forth the title and docket number of the case, the name of the defendant, the

name and address of any attorney and a narrative statement of the judgment, the offense and the punishment prescribed. The Court shall, if necessary, appoint counsel to respond to the State's positions in the review proceedings.

(2) The Supreme Court shall limit its review under this section to the recommendation on and imposition of the penalty of death and shall determine:

a. Whether, considering the totality of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender, the death penalty was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty recommended or imposed in similar cases arising under this section.

b. Whether the evidence supports the jury's or the judge's finding of a statutory aggravating circumstance as enumerated in subsection (e) of this section and, where applicable, § 636(a)(2)-(6) of this title.

(3) The Supreme Court shall permit the defendant and the State to submit briefs within the time provided by the Court, and permit them to present oral argument to the Court.

(4) With regard to review of the sentence in accordance with this subsection, the Court shall:

a. Affirm the sentence of death.

b. Set aside the sentence of death and remand for correction of any errors occurring during the hearing and for imposition of the appropriate penalty. Such errors shall not affect the determination of guilt and shall not preclude the reimposition of death where appropriately determined after a new hearing on punishment.

c. Set forth its findings as to the reasons for its actions.

(h) Ordinary review not affected by section.--Any error in the guilt phase of the trial may be raised as provided by law and rules of court and shall be in addition to the review of punishment provided by this section.

Credits

58 Laws 1972, ch. 497, § 2; 59 Laws 1974, ch. 284, § 2; 61 Laws 1977, ch. 41, § 1; 63 Laws 1982, ch. 357, § 1; 65 Laws 1986, ch. 281, § 1; 65 Laws 1986, ch. 494, § 4; 66 Laws 1988, ch. 269, § 29; 68 Laws 1991 (2nd Sp. Sess.), ch. 189, §§ 1-4; 69 Laws 1994, ch. 206, § 1; 69 Laws 1994, ch. 439, § 1; 70 Laws 1995, ch. 33, § 1, eff. May 15, 1995; 70 Laws 1995, ch. 137, § 1, eff. July 6, 1995; 70 Laws 1995, ch. 182, § 1, eff. Oct. 8, 1995; 70 Laws 1995, ch. 186, § 1, eff. July 10, 1995; 71

Laws 1998. ch. 430, § 2, eff. July 13, 1998; 73 Laws 2002, ch. 423, §§ 1-5, eff. July 22, 2002; 73 Laws 2002, ch. 424, § 1, eff. July 22, 2002; 74 Laws 2003, ch. 174, §§ 1, 2 and 4, eff. July 15, 2003; 75 Laws 2005, ch. 166, § 1, eff. July 12, 2005; 77 Laws 2009, ch. 191, § 2, eff. July 31, 2009; 78 Laws 2012, ch. 224, §§ 20, 21, eff. April 19, 2012; 78 Laws 2012, ch. 252, § 10, eff. June 1, 2012; 79 Laws 2013, ch. 37, § 2, eff. June 4, 2013.

Codifications: 11 Del.C. 1953, § 4209

Notes of Decisions (627)

11 Del.C. § 4209, DE ST TI 11 § 4209
Current through 80 Laws 2015, ch. 194. Revisions to 2015 Acts by the Delaware Code Revisors were unavailable at the time of publication.

End of Document

West's Delaware Code Annotated
Title 11. Crimes and Criminal Procedure
Part II. Criminal Procedure Generally
Chapter 42. Classification of Offenses; Sentences

11 Del.C. § 4205

§ 4205. Sentence for felonies

Currentness

(a) A sentence of incarceration for a felony shall be a definite sentence.

(b) The term of incarceration which the court may impose for a felony is fixed as follows:

(1) For a class A felony not less than 15 years up to life imprisonment to be served at Level V except for conviction of first degree murder in which event § 4209 of this title shall apply.

(2) For a class B felony not less than 2 years up to 25 years to be served at Level V.

(3) For a class C felony up to 15 years to be served at Level V.

(4) For a class D felony up to 8 years to be served at Level V.

(5) For a class E felony up to 5 years to be served at Level V.

(6) For a class F felony up to 3 years to be served at Level V.

(7) For a class G felony up to 2 years to be served at Level V.

(c) In the case of the conviction of any felony, the court shall impose a sentence of Level V incarceration where a minimum sentence is required by subsection (b) of this section and may impose a sentence of Level V incarceration up to the maximum stated in subsection (b) of this section for each class of felony.

(d) Where a minimum, mandatory, mandatory minimum or minimum mandatory sentence is required by subsection (b) of this section, such sentence shall not be subject to suspension by the court.

(e) Where no minimum sentence is required by subsection (b) of this section, or with regard to any sentence in excess of the minimum required sentence, the court may suspend that part of the sentence for probation or any other punishment set forth in § 4204 of this title.

(f) Any term of Level V incarceration imposed under this section must be served in its entirety at Level V, reduced only for earned "good time" as set forth in § 4381 of this title.

(g) No term of Level V incarceration imposed under this section shall be served in other than a full custodial Level V institutional setting unless such term is suspended by the court for such other level sanction.

(h) The Department of Correction, the remainder of this section notwithstanding, may house Level V inmates at a Level IV work release center or halfway house during the last 180 days of their sentence; provided, however, that the first 5 days of any sentence to Level V, not suspended by the court, must be served at Level V.

(i) The Department of Correction, the remainder of this section notwithstanding, may grant Level V inmates 48-hour furloughs during the last 120 days of their sentence to assist in their adjustment to the community.

(j) No sentence to Level V incarceration imposed pursuant to this section is subject to parole.

(k) In addition to the penalties set forth above, the court may impose such fines and penalties as it deems appropriate.

(l) In all sentences for less than 1 year the court may order that more than 5 days be served in Level V custodial setting before the Department may place the offender in Level IV custody.

Credits

67 Laws 1989, ch. 130, § 6; 67 Laws 1990, ch. 260, § 1; 71 Laws 1997, ch. 98, § 6, eff. June 30, 1997; 74 Laws 2003, ch. 106, §§ 9, 10, eff. June 30, 2003.

11 Del.C. § 4205, DE ST TI 11 § 4205

Current through 82 Laws 2019, ch. 4. Revisions to 2019 Acts by the Delaware Code Revisors were unavailable at the time of publication.

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

STATE OF DELAWARE,	)	DUC # 9511007022
	)	Criminal Action Numbers:
	)	
	)	IN95111323R3 - Murder - 1st
	)	IN95111324R3 - PFDCF
	)	IN95111325R3 - Consp. - 1st
v.	)	IN95120684R3 - Agg/Act-Intim.
	)	IN95120685R3 - PFDCF
MICHAEL R. MANLEY,	)	IN95120686R3 - Consp-2nd
	)	
Defendant.	)	ID No. 9511007022

FILED
2017 NOV 21 AM 11:19

NOTICE OF MOTION

TO: Elizabeth R. McFarlan, Esquire
Maria T. Knoll, Esquire
Deputy Attorneys General
820 N. French Street, 7th Floor
Wilmington, DE 19801

Defendant's Motion to Vacate Death Sentence and Resentence Pursuant to 11 Del. C. § 4205 in light of *Rauf v. State*

CHRISTOPHER KOYSTE, ESQUIRE
709 Brandywine Boulevard
Bellefonte, DE 19809
(302) 762-5195

BETH ANN MUHLHAUSER, ESQUIRE
ANNE SAUNDERS, ESQUIRE
Federal Public Defender
Middle District of Pennsylvania
Capital Habeas Unit
100 Chestnut Street, Suite 300
Harrisburg, PA 17101
Tel. No. (717) 782-3843

Counsel for Michael Manley

Dated: November 21, 2017

Comes now Defendant, Michael R. Manley, through undersigned counsel, to respectfully move this Court to vacate his death sentence and order a new sentencing proceeding. As the Delaware Supreme Court declared in the Order of October 20, 2017, Mr. Manley's death sentence must be vacated pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Rauf v. State*, 145 A.3d 430 (Del. 2016), and *Powell v. State*, 49 A.3d 1090 (Del. 2016).[1] Because *Rauf* struck down the penalty provision for first degree murder, Mr. Manley respectfully asserts pursuant to the class A felony sentencing statute, 11 Del. C. § 4205, that imposing a mandatory sentence of life without parole violates his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Accordingly, Mr. Manley moves this Court for a new sentencing proceeding pursuant to 11 Del. C. § 4205. In support of this motion, Mr. Manley states the following:

1. In *Rauf v. State*, 145 A.3d 430 (Del. 2016), the Delaware Supreme Court struck down 11 Del. C. § 4209 as unconstitutional in light of *Hurst v. Florida*. The Court held: "Delaware's current death penalty statute violates the Sixth Amendment...." *Rauf*, 145 A.3d at 433. The Court then considered whether the statute was severable and answered simply, "**No**. . . . Because the respective roles of the judge and jury are so complicated under § 4209, we are unable to discern a method by which to parse the statute so as to preserve it." *Id.* at 434 (emphasis in original).

2. The *per curiam* opinion does not cite any particular subsection of § 4209, nor does it quote any particular language. The Court did not carve out any caveats or exceptions to its holding that § 4209 is not severable.

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[1] The Court vacated Mr. Manley's death sentence and declared that the parties agree to a sentence of imprisonment for the remainder of his natural life without benefit of probation, parole or any other reduction. *Order*, 10/20/17. Mr. Manley agrees that the death sentence must be vacated, however, applicable law does not mandate a sentence of life without benefit of parole. *See Appellant's Reply Brief* at 1 (06/20/17).

3. Based on the plain language in *Rauf*, § 4209 is therefore void and unenforceable. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-685 (1987); *Hill v. Wallace*, 259 U.S. 44, 70 (1922) (valid provisions interwoven with invalid provisions of Future Trading Act and cannot be separated. "None of them can stand."); *United Food & Commercial Workers Local 99 v. Bennett*, 934 F.Supp.2d 1167, 1195 (D. Ariz. 2013) (unconstitutional applications cannot be severed from statute "and the subsection is struck in its entirety."). Currently, Delaware lacks a sentencing scheme for first-degree murder.

4. Courts have no inherent authority to impose sentences; they must instead look to the parameters established by the legislature. *Ohio v. Johnson*, 467 U.S. 493, 499 (1984). The Delaware legislature adopted parameters to determine a death sentence in 11 Del. Code § 4209. The clear legislative intent in enacting §4209 was to establish a capital sentencing scheme, *in toto*, that requires the trial judge to exclusively and unconstitutionally determine either a death sentence or a sentence of life without parole. *State v. Cohen*, 604 A.2d 846 (Del.1992); *Gattis v. State*, 637 A.2d 808, 822 (Del.1994) (emphasizing that "[w]hile the trial judge must consider the recommendation of the jury, he or she functions independently in deciding whether to impose the death penalty or life imprisonment...."); *Lawrie v. State*, 643 A.2d 1336 (Del.1994); *Wright v. State*, 633 A.2d 329 (Del.1993). By enacting § 4209, the legislature opted not to mandate a life without parole sentence for all capital murder convictions.[2] Without clear legislative intent, this Court cannot presume that the Delaware legislature would have enacted such a mandatory sentence of life without parole in the

[2] The Delaware legislature has provided many mandatory minimum penalties, *see 11 Del. C. § 4381(a); 11 Del C. § 825; 16 Del. C. 4751(a), et. al.*

absence of a valid death penalty procedure.[3]

5. The Delaware legislature could have, but did not, provide an alternative sentence in the event that the death penalty provision failed. An alternative was, in fact, expressly included in the 1974 death penalty statute. Act of March 29, 1974, Ch.284, 1974 Del. Laws (repealed by *State v. Spence*, 367 A.2d 983 (Del. 1976)) ("In any case in which a person is convicted of first degree murder the court shall impose a sentence of death. *If the penalty of death is determined to be unconstitutional the penalty for first degree murder shall be life imprisonment without benefit of parole.*") (emphasis added). In striking down the 1974 statute, the Delaware Supreme Court held that the provision for life without parole could be given effect standing alone as the express intent of the legislature. *Spence*, 367 A.2d at. 989. The 1974 statute was therefore severable. *Id.*

6. The Delaware Supreme Court reached the opposite conclusion in striking down the 2002 statute in *Rauf*. Section 4209 is not severable; it is void and unenforceable. Unlike the severable 1974 statute, in which the legislature clearly provided for life without parole in the event that the death penalty was determined to be unconstitutional, the 2002 statute contained no such language.[4]

7. Since the dichotomous death penalty scheme is not severable, Section 4209 fails

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[3] The life without parole sentence also lacks the validity resulting from judicial oversight provided by mandatory appellate review of a death sentence. The legislature commanded that after a death sentence, appellate courts must review the record to determine if the aggravating circumstances were adequately supported by the evidence and review whether the death penalty was arbitrarily selected. 11 Del. C. 4209(g) (2). The legislature did not mandate appellate review for a life without parole sentence.

[4] Mr. Manley was initially sentenced under the 1991 statute, which contains the same constitutional infirmities of the 2002 statute, and similarly lacks any language on the legislature's intent regarding mandatory life without parole.

entirely; it cannot be used to authorize a sentence of life without parole. This Court must choose a punishment from a valid sentencing statute. First-degree murder in Delaware is a class A felony. 11 Del. C. § 636 (b). In the absence of a valid penalty provision for first-degree murder, the penalty provision for Delaware class A felonies provides the sole basis for sentencing.[5] 11 Del. C. § 4205. Section 4205 provides for a sentence with a mandatory minimum term of fifteen years.

8. Providing for the possibility of a sentence other than life without parole would be in line with the evolving standards of decency established by a majority of states, even those with the death penalty. The vast majority of states without the death penalty employ penalty schemes that allow for the possibility of parole upon a conviction for first-degree or aggravated murder.[6] And the non-death penalty states that include provisions for a mandatory sentence of life without parole do so only for a narrow set of first degree murders: those committed with premeditated malice aforethought (Massachusetts, Mass. Gen. Laws 265 §§ 1,2; Michigan, Mich. Comp. Laws § 750.316); or in the perpetration of another serious felony (Michigan); or with some other enumerated aggravating circumstance (Connecticut, Conn. Cen. Sat. §§53a-54-b, 53a-35a; New Jersey, N.J. Stat.

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[5] In prior instances without a valid penalty provision for first-degree murder, Delaware courts have relied upon the maximum sentence of the lesser-included offense of second-degree murder for guidance. *See State v. Dickerson*, 298 A.2d 761, 771 (Del. 1972) (supplemental opinion). Second-degree murder, like first-degree murder, is a class A felony, which provides for a sentence of imprisonment from 15 years to life. 11 Del. C. § 635; *id.* §4205.

[6] Alaska, Hawaii, Illinois, Iowa (statute permits governor commutation to a term of years), Maine, Maryland, Minnesota, New Mexico, North Dakota, Vermont, West Virginia, Wisconsin, and the District of Columbia provide for the possibility of parole. Alaska Stat. §§ 11.41.100, 12.55.125; Haw. Rev. Stat. §§ 706-656, 707-701; 730 Ill. Comp. Stat. 5/5-4.5-20; 720 Ill. Comp. Stat. 5/9-1; Iowa Code Ann. §§ 707.2, 902.1; Me. Rev. Stat. Ann. Tit. 17-A, §§ 1251, 201; Md. Code Ann., criminal law §§ 2-201, 2-203, 2-304; Minn. Stat. § 609.185; N.M. Stat. Ann. 1978 §§ 30-2-1, 31-18-14; N.D. Cent. Code Ann. §§ 12.1-16-01, 12.1-32-01; Vt. Stat. Ann. tit. 13 §§ 2301, 2303; W. Va. Code §§ 61-2-1, 61-2-2, 62-3-15; Wis. Stat. Ann. §§ 940.01, 939.50; D.C. Code §§ 22-2101, 22104.

Ann. 2C:11-3(a), (b)(2)-(4); New York, N.Y. Penal Law §§ 60.06, 125.26, 125.27, 70.00(3)(a)(1); Rhode Island, R.I. Gen. Law 1956 §§ 11-23-1, 11-23-2).

9. Even in states that currently have valid death penalty statutes, most include sentencing options other than death or life without parole. Ten states contemplate indeterminate life sentences with the possibility of parole in the absence of a death sentence.[7] Two more allow for the possibility of parole if the first-degree conviction was for felony murder.[8] Four states allow for parole if no statutory aggravators are found.[9] The remaining death penalty states (14) do not allow for the possibility of parole, but the strong majority of those states' statutes of conviction define specifically capital murder or otherwise include a prerequisite finding of an aggravating special circumstance.

10. In contrast, a trier of fact in Delaware could convict a defendant of first-degree murder upon a finding that the killing was intentional, which would result in a mandatory life without parole sentence.[10] 11 Del. C. § 636(a)(1). Delaware would be the only non-death penalty state to punish an act defined as broadly as "intentional killing" with mandatory life without the

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[7] Georgia, Indiana, Kentucky, Montana, Nevada, Oklahoma, Oregon, Tennessee, Utah, and Wyoming provide for the possibility of parole. Ga. Code Ann. §§ 16-5-1, 17-10-601; Ind. Code 35-50-2-3, 35-42-1-1; Ky. Rev. Stat. §§ 532.025, 532.030; Mont. Code Ann. 45-5-102; Nev. Rev. Stat. 200.030; 21 Okla. Stat. Ann. §§ 701.7, 701.9; Or. Rev. Stat. §§ 163.095, 163.105; Tenn. Stat. §§ 29-13-202, 39-13-204; Utah Code Ann. 1953 §§ 76-5-202, 76-3-206; Wyo. Stat. Ann. 1977 §§ 6-2-101, 6-2-102. In addition, Texas allows for the possibility of parole if the state does not seek the death penalty, while Missouri permits an alternative to life without parole via governor action. Tex. Penal Code §§ 19.03, 12.31. Mo. Ann. Stat. 565.020.

[8] Arizona and Colorado allow for parole for felony-murder. Ariz. Rev. Stat. Ann. §§ 13-1105, 13-751; Colo. Rev. Stat. Ann. §§ 18,-102, 18-1.3-401(4)(a)

[9] Alabama, California, Idaho, South Carolina allow for parole if no statutory aggravators are found. Ala. Code 1975 §§ 13A-6-2, 13A-5-6; Cal. Penal Code § 190(a).

[10] A killing is intentional in Delaware if it was the defendant's "conscious objective or purpose to cause the person's death." Del. Super. P.J.I. Crim. § 11.636(a)(1) (2016).

possibility of parole. The breadth of acts punished by mandatory life without parole would stand out even among death penalty states.

11. Even if §4209 were severable, such that life without parole could stand alone as the only alternative to a death sentence, a mandatory life without parole sentence violates the Eighth and Fourteenth Amendments. As discussed above, Delaware would be an outlier among all other states if it imposed a mandatory sentence of life without parole for the broadly defined offense of intentional killing. Rare usage indicates societal rejection of mandatorily imposing this extreme penalty, rendering it cruel and unusual under the Eighth Amendment. *See Sanders v. State*, 585 A.2d 117, 138 (Del. 1990).

12. Finally, imposing a mandatory sentence of life without parole would violate Mr. Manley's rights to effective assistance of counsel under the Sixth Amendment and the Fourteenth Amendment Due Process Clause. At the time of his trial, had Mr. Manley been on notice that a sentence of life without parole would be the only—indeed, the mandatory—sentence upon conviction of first-degree murder, trial preparation and strategy would surely have been different. There would have been no penalty phase proceeding at which to present evidence to mitigate the crime.[11] If defense counsel's thinking had not been influenced by the statutory framework struck down by *Rauf*, they would have given different advice to Mr. Manley and may well have changed their approach to the presentation of evidence at guilt.

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[11] In the recent oral argument before the Delaware Supreme Court, Chief Justice Strine suggested that trial counsel's strategy was to preserve credibility during the trial hearing by not aggressively confronting Mr. Manley's alleged status as the shooter then rely on that credibility during the penalty hearing. If §4209 is severable, and life without parole is mandatory, then trial counsel pointlessly denied Mr. Manley a full and fair examination of the evidence against him at trial.

WHEREFORE, for the foregoing reasons, Mr. Manley's death sentence must be vacated pursuant to *Hurst*, *Rauf*, and *Powell*, and he is entitled to a new sentencing hearing. In the absence of a valid penalty provision for first-degree murder, the Court should resentence Mr. Manley pursuant to the class A felony statute, 11 Del. C. § 4205.

Respectfully submitted,

BETH ANN MUHLHAUSER, ESQUIRE
ANNE L. SAUNDERS, ESQUIRE
Federal Public Defender
Middle District of Pennsylvania
Capital Habeas Unit
100 Chestnut Street, Suite 300
Harrisburg, PA 17101
Tel. No. (717) 782-3843
Fax. No. (717) 782-3966