

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES E. COOKE,	§	
	§	No. 309, 2017
Defendant-Below,	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware
v.	§	
	§	Cr. ID. No. 0506005981 (N)
STATE OF DELAWARE,	§	
	§	
Plaintiff-Below,	§	
Appellee.	§	

Submitted: February 7, 2018
Decided: February 21, 2018

Before **STRINE**, Chief Justice; **VAUGHN**, and **SEITZ**, Justices.

ORDER

This 21st day of February, 2018, having considered the briefs and the record below, it appears to the Court that:

(1) On April 13, 2012, a jury convicted James E. Cooke of two counts of first degree murder, first degree burglary, first degree rape, first degree arson, first degree reckless endangering, two counts of second degree burglary, second degree robbery, and misdemeanor theft. He was sentenced to death. On April 4, 2017, after this Court declared the death penalty unconstitutional in *Rauf v. State*¹ and applied

¹ 145 A.3d 430 (Del. 2016).

it retroactively in *Powell v. Delaware*,² Cooke filed a motion to vacate his death sentence. The Superior Court granted the motion and resentenced Cooke to life without parole or reduction.

(2) On appeal, Cooke argues that the Superior Court violated his constitutional rights because it did not consider a term of years under 11 *Del. C.* § 4205, and because a mandatory life sentence without parole for first degree murder violates the Eighth and Fourteenth Amendments of the United States Constitution.³ We review questions of law and constitutional violations *de novo*.⁴

(3) Cooke first argues that this Court declared 11 *Del. C.* § 4209 unconstitutional in its entirety, and thus the court should have sentenced him under 11 *Del. C.* § 4205.⁵ We rejected this argument in *Norcross v. State*.⁶ Thus, the argument is without merit.

(4) Cooke next argues that a mandatory life sentence without parole or reduction for first degree murder violates the Eighth and Fourteenth Amendments to the United States Constitution.⁷ He cites no cases to support this argument; rather,

² 153 A.3d 69 (Del. 2016).

³ U.S. CONST. amends. VIII, XIV.

⁴ *State v. Reyes*, 155 A.3d 331 (Del. 2017).

⁵ Opening Br. at 8–9, 11.

⁶ 2018 WL 266826, at *1 (Del. Jan. 2, 2018) (TABLE).

⁷ Opening Br. at 14–15.

he points out that other states apply different sentences.⁸ But “[t]he Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how to best administer its criminal laws.”⁹ As we explained in *Williams v. State*, “[t]he Delaware legislature’s determination to draw the line as it did . . . is justifiable because of the violent nature of the crimes involved.”¹⁰ We thus defer to the General Assembly’s determination.¹¹

(5) Cooke argues the sentence violates his Fourteenth Amendment rights because he would have tried the case differently had he known that a mandatory life sentence was the only sentence for first degree murder.¹² He does not explain, however, how his strategy would have differed, or why it would have changed the outcome of the case. Lacking any support for his argument, we find that the Superior Court did not violate Cooke’s constitutional rights in sentencing him to life without parole or reduction.

⁸ *Id.* at 12–14. This Court has routinely upheld mandatory life sentences for first degree murder, and even for habitual violent offenders. *See, e.g., Norcross*, 2018 WL 266826; *Stevenson v. State*, 2017 WL 6330741 (Del. 2017) (TABLE); *Manley v. State*, 173 A.3d 85, 2017 WL 4772572 (Del. 2017) (TABLE); *Reyes*, 155 A.3d 331; *Phillips*, 154 A.3d 1130; *Wallace v. State*, 956 A.2d 630 (Del. 2008); *Bryant v. State*, 620 A.2d 856, 1993 WL 22040 (Del. 1993) (TABLE); *Tate v. State*, 571 A.2d 788, 1990 WL 17762 (Del. 1990) (TABLE).

⁹ *Williams v. State*, 539 A.2d 164, 180 (Del. 1988) (quoting *Spaziano v. Florida*, 468 U.S. 447, 464 (1984)).

¹⁰ *Id.*

¹¹ *Solem v. Helm*, 463 U.S. 277, 290 (1983) (“Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is [constitutional].”).

¹² Opening Br. at 14–15.

NOW, THEREFORE, it is hereby ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Collins J. Seitz, Jr.
Justice

A4

SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DE 19801-3733
TELEPHONE (302) 255-0670

May 16, 2017

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Wilmington, DE 19801

Christopher S. Koyste, Esquire
Law Office of Christopher S. Koyste, LLC
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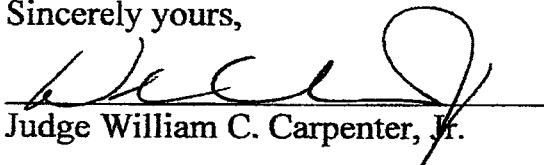
RE: State of Delaware v. James Cooke
ID No. 0506005981

Dear Counsel:

The Court has before it Defendant's Amended Motion to Vacate Death Sentence and for a New Sentencing Proceeding in the above case. Based upon Defendant's Reply to the State's Response to his Motion, he agrees with the State that upon re-sentencing the Court is mandated to sentence Mr. Cooke to life. To formally pronounce this sentence, Mr. Cooke will be scheduled on this Court's sentencing calendar of June 2, 2017 at 9:30 a.m.

To the extent that any issues raised in Mr. Koyste's Motion to Vacate Death Sentence remain, the Court finds the arguments made by the State are persuasive and to the extent that Mr. Cooke argues that life without parole violates the Eighth and Fourteenth Amendments of the Constitution, those arguments are found to be unpersuasive and are denied.

Sincerely yours,



Judge William C. Carpenter, Jr.

WCCjr:twp

A5

SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DE 19801-3733
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May 31, 2017

Elizabeth R. McFarlan, Esquire
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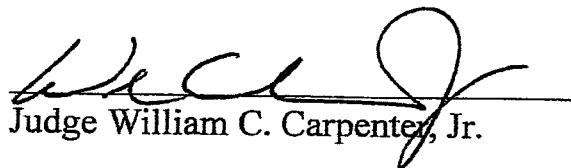
Christopher S. Koyste, Esquire
Law Office of Christopher S. Koyste, LLC
709 Brandywine Boulevard
Wilmington, DE 19809

RE: State of Delaware v. James Cooke
ID No. 0506005981

Dear Counsel:

Since it appears that everyone is in agreement that a sentencing hearing is not required, and Mr. Cooke has specifically requested to be excused from any hearing, the Court will cancel Mr. Cooke's sentencing which was scheduled for Friday, June 2, 2017. The Court will simply issue an Order sentencing Mr. Cooke to life without the benefit of any reduction.

Sincerely yours,


Judge William C. Carpenter, Jr.

WCCjr:twp
cc: Prothonotary

A6

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

STATE OF DELAWARE,

Plaintiff,

v.

James Cooke

Defendant.

I.D. No.: 0506005981

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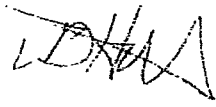
NOTICE OF MOTION

To: All Counsel of Record

PLEASE TAKE NOTICE that the attached Motion to Vacate Death Sentence and for a New Sentencing Proceeding will be presented to the Court for consideration at the earliest convenience.

Date: April 4, 2017

EDSON A. BOSTIC
FEDERAL PUBLIC DEFENDER
DISTRICT OF DELAWARE



Tiffani D. Hurst, Esq. (MA Bar # 629858)
First Assistant Federal Defender
& Chief, Capital Habeas Unit
800 King Street, Suite 200
Wilmington, DE 19801
(302) 442-6545

Counsel for James Cooke

A7

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

STATE OF DELAWARE,

Plaintiff,

v.

JAMES COOKE,

Defendant.

I.D. No.: 0506005981

**DEFENDANT'S MOTION TO VACATE DEATH SENTENCE
AND FOR A NEW SENTENCING PROCEEDING**

Comes now Defendant, James Cooke, through undersigned counsel, and respectfully moves this Court to vacate his death sentence and order a new sentencing proceeding. Mr. Cooke'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). Because *Rauf* struck down the penalty provision for first degree murder, Mr. Cooke contends that he must be resentenced pursuant to the class A felony sentencing statute, 11 Del. C. § 4205.1. He also contends that imposing a mandatory sentence of life without parole violates his rights under the Eighth and Fourteenth Amendments to the United

1 Mr. Cooke's claims of innocence and other challenges to his convictions will be presented to the court in a Rule 61 Motion. This motion for a new sentencing proceeding does not waive any of those claims.

States Constitution. Accordingly, he moves this Court for a new sentencing proceeding pursuant to 11 Del. C. § 4205. In support of this motion, Mr. Cooke 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” 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 never acknowledged the portions of § 4209 that address first degree murder cases in which the death penalty is not imposed, nor did it carve any caveats or exceptions to its holding that § 4209 is not severable.

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.”). Accordingly, there currently exists no particular sentencing scheme for first degree murder in Delaware.

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). Without clear legislative intent, the court cannot presume that the Delaware legislature would have enacted a mandatory sentence of life without parole in the absence of a valid death penalty procedure.

5. The Delaware legislature could have provided for an alternative sentence in the event that the death penalty provision was declared unconstitutional. In fact, the legislature included express language to that effect 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 (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.

7. First degree murder in Delaware is a class A felony. 11 Del. C. § 636(b). In the absence of a valid particular penalty provision for first-degree murder, the court should look to the penalty provision for Delaware class A felonies.² 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 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.³ And the non-death penalty states that include provisions

² In prior instances without a valid penalty provision for first degree murder, Delaware courts have looked for guidance to the maximum sentence of the lesser included offense of second degree murder. *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.

³ Alaska, Hawaii, Illinois, Iowa (statute permits governor commutation to a term of

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. Gen. Stat. §§ 53a-54-b, 53a-35a; New Jersey, N.J. Stat. 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.⁴ Two more allow for the possibility of parole if the

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., Crim. 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.

⁴ 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

first-degree conviction was for felony murder.⁵ Four states allow for parole if no statutory aggravators are found.⁶ 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 mere finding that the killing was intentional.⁷ 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 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 Amendment. As discussed above, Delaware would be an outlier among states if it imposed a mandatory sentence of life without

without parole via governor action. Tex. Penal Code §§ 19.03, 12.31. Mo. Ann. Stat. 565.020.

⁵ 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).

⁶ 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).

⁷ 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).

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.

12. Finally, imposing a mandatory sentence of life without parole would violate Mr. Cooke's rights under the Fourteenth Amendment Due Process Clause. At the time of his trial, had Mr. Cooke 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 strategy would surely have been different. There would have been no penalty phase proceeding at which to present evidence to mitigate the crime. If defense counsels' thinking had not been influenced by the statutory framework struck down by *Rauf*, they would have given different advice to Mr. Cooke and may well have changed his approach to the presentation of evidence at guilt.

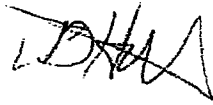
WHEREFORE, for the foregoing reasons, Mr. Cooke's death sentence must be vacated pursuant to *Hurst*, *Rauf*, and *Powell*, and he is entitled to a new sentencing hearing. In the absence of a valid penalty provision for first degree murder, the Court should resentence Mr. Cooke pursuant to the class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

Date: April 4, 2017

Respectfully submitted,

7
A14

EDSON A. BOSTIC
FEDERAL PUBLIC DEFENDER
DISTRICT OF DELAWARE



Tiffani D. Hurst, Esq. (MA Bar # 629858)
First Assistant Federal Defender
& Chief, Capital Habeas Unit
800 King Street, Suite 200
Wilmington, DE 19801
(302) 442-6545

[illegible]

Defendant.

I.D. No.: 0506006981

NOTICE OF MOTION

Honorable William C. Carpenter, Jr.
Superior Court of Delaware
New Castle County Courthouse
500 N. King Street, 10th Floor
Wilmington, DE 19801

PLEASE TAKE NOTICE that the attached Amended Motion to Vacate Death Sentence and for a New Sentencing Proceeding will be presented to the Court for consideration at the earliest convenience.

Christopher S. Koyste, Esq. (#3107)
Law Office of Christopher Koyste, LLC
709 Brandywine Boulevard
Wilmington, DE 19809
(302) 762-5195
Counsel for James Cooke

Date: April 12, 2017

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

Plaintiff,

v.

JAMES COOKE,

Defendant.

I.D. No.: 0506006981

**DEFENDANT'S AMENDED MOTION TO VACATE DEATH SENTENCE
AND FOR A NEW SENTENCING PROCEEDING**

COMES NOW, Defendant, James Cooke, through undersigned Counsel, respectfully moves this Court to vacate his death sentence and order a new sentencing proceeding.¹ Mr. Cooke'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). Because *Rauf* struck down the penalty provision for first degree murder, Mr. Cooke contends that he must be resentenced pursuant to the class A felony sentencing statute, 11 *Del. C.* § 4205.² He also contends that imposing a mandatory sentence of life without parole violates his rights under the Eighth and Fourteenth Amendments to the United States Constitution. Accordingly, he moves this Court for a new sentencing proceeding pursuant to 11 *Del. C.* § 4205. In support of this motion, Mr. Cooke states the following:

¹ An identical motion was filed by Co-Counsel in this case. However, as there is a pending resolution of an issue relating to whether Co-Counsel has a conflict of interest and can remain in this case, Counsel and the Parties believed it was wise to re-file this motion under Counsel's name.

² Mr. Cooke's claims of innocence and other challenges to his convictions will be presented to the Court in a Rule 61 Motion. This motion for a new sentencing proceeding does not waive any of those claims.

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...." 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 never acknowledged the portions of § 4209 that address first degree murder cases in which the death penalty is not imposed, nor did it carve any caveats or exceptions to its holding that § 4209 is not severable.

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."). Accordingly, there currently exists no particular sentencing scheme for first degree murder in Delaware.

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the death penalty provision was declared unconstitutional. In fact, the legislature included express language to that effect 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 (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.

7. First degree murder in Delaware is a class A felony. 11 *Del. C.* § 636(b). In the absence of a valid particular penalty provision for first-degree murder, the court should look to the penalty provision for Delaware class A felonies.³ 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 majority of states, even those with the death penalty. The vast majority of states without

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the death penalty employ penalty schemes that allow for the possibility of parole upon a conviction for first degree or aggravated murder.⁴ 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. Gen. Stat. §§ 53a-54-b, 53a-35a; New Jersey, N.J. Stat. 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.⁵ Two more allow for the possibility

⁴ 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., Crim. 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.

⁵ 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.

of parole if the first-degree conviction was for felony murder.⁶ Four states allow for parole if no statutory aggravators are found.⁷ 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 mere finding that the killing was intentional.⁸ 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 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 Amendment. As discussed above, Delaware would be an outlier among 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.

12. Finally, imposing a mandatory sentence of life without parole would violate Mr. Cooke's rights under the Fourteenth Amendment Due Process Clause. At the time of his trial, had Mr. Cooke been on notice that a sentence of life without parole would be the only—indeed, the

⁶ 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).

⁷ 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).

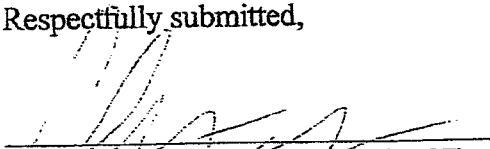
⁸ A killing is intentional in Delaware if it was the defendant's "conscious objective or purpose to cause the person's death." *Del. Super. P.J.I. Crim.* § 11.636(a)(1) (2016).

mandatory-sentence upon conviction of first-degree murder, trial strategy would surely have been different. There would have been no penalty phase proceeding at which to present evidence to mitigate the crime. If defense counsels' thinking had not been influenced by the statutory framework struck down by *Rauf*, they would have given different advice to Mr. Cooke and may well have changed his approach to the presentation of evidence at guilt.

WHEREFORE, for the foregoing reasons, Mr. Cooke'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. Cooke pursuant to the class A felony statute, 11 *Del. C.* § 4205.

Date: April 12, 2017

Respectfully submitted,



Christopher S. Koyste, Esq. (#3107)
Law Office of Christopher Koyste, LLC
709 Brandywine Boulevard
Wilmington, DE 19809
(302) 762-5195
Counsel for James Cooke

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

Plaintiff,

v.

JAMES COOKE,

Defendant.

ID No. 0506005981

**STATE'S RESPONSE TO DEFENDANT'S
MOTION TO VACATE DEATH SENTENCE AND
FOR A NEW SENTENCING PROCEEDING¹**

COMES NOW the State of Delaware, by the undersigned, and agrees in part and opposes in part Defendant James Cooke's Motion to Vacate Death Sentence and for a New Sentencing Proceeding for the following reasons:

1. The Delaware Supreme Court, in *Rauf v. State*,² found the capital sentencing procedure in 11 *Del. C.* § 4209 to be unconstitutional under the Sixth Amendment. On December 15, 2016, the Delaware Supreme Court found, in *Powell v. State*,³ that its decision in *Rauf* should have retroactive application to a defendant already under a sentence of death. Cooke, like Powell, was sentenced to death pursuant to 11 *Del. C.* § 4209. The Delaware Supreme Court ordered that Powell's

¹ The State objects to the filing and acceptance by the Prothonotary of this motion unsigned by local counsel. *See Del. Super. Ct. Civ. R.* 90.1.

² 145 A.3d 430 (Del. 2016).

³ 2016 WL 7243546 (Del. Dec. 15, 2016).

sentence of death be vacated, and that Powell must be sentenced to “imprisonment for the remainder of his natural life without benefit of probation or parole or any other reduction.”⁴ Because Cooke is similarly situated to Powell, he should receive the same application of *Rauf* to his sentence. Accordingly, this Court should vacate Cooke’s death sentence and resentence Cooke to imprisonment for the remainder of his natural life without the benefit of probation, parole or any other reduction of sentence in accordance with 11 *Del. C.* § 4209(a).

2. Cooke “contends that he must be resentenced pursuant to the class A felony sentencing statute, 11 *Del. C.* § 4505.” Mtn. at 1. Further, he alleges that “imposing a mandatory sentence of life without parole violates his rights under the Eighth and Fourteenth Amendments to the United States Constitution.” Mtn. at 1-2. Cooke’s contentions are unavailing, and other Judges of this Court have rejected the same claims.⁵

3. The *Swan* Court looked to the Delaware Supreme Court’s decisions in *Powell*, *Phillips*, and *Reyes*, and found “no meaningful distinction.”⁶ The Court

⁴ *Id.* *5. See also *State v. Reyes*, __A.3d__, 2017 WL 243360, at *18 (Del. Jan. 19, 2017); *Phillips v. State*, __A.3d__, 2017 WL 203601, at *11 (Del. Jan. 17, 2017). Cf. *Juan Ortiz v. State*, Del., No. 650, 2015, Order at ¶ 4, Valihura, J. (Jan. 26, 2017) (Ex. A).

⁵ *State v. Ambrose Sykes*, Del. Super., ID No. 0411008300, Witham, R.J. (Apr. 3, 2017) (Order) (Ex. B); *State v. Ralph Swan*, Del. Super., ID No. 0002004767A, Parkins, J. (Feb. 10, 2017) (Mem. Op.) (Ex. C).

⁶ *Swan*, Mem. Op. at 3.

noted that, in *Rauf*,⁷ the Supreme Court “found some, but not all, of section 4209’s provisions are unconstitutional.”⁸ The *Swan* Court expressly rejected the argument that because the Supreme Court found that section 4209 could not be severed, the statute is unconstitutional in its entirety.⁹ The *Swan* Court was correct. The Supreme Court has clarified any ambiguity in its holding of non-severability in *Rauf* by directing that those affected by that decision be sentenced to life without parole.

4. Cooke argues that because section 4209 is unconstitutional in its entirety, the Court should look to 11 *Del. C.* § 4205 and sentence Cooke under the provision for a Class A felony. What Cooke fails to mention, however, is that section 4205(b)(1), the subsection applicable to Class A felonies, specifically states that the subsection does not apply to convictions for first degree murder.¹⁰ Rather, in the case of a first degree murder conviction, a defendant is sentenced pursuant to 11 *Del. C.* § 4209(a) to either life without parole or death. The Supreme Court has consistently cited to 11 *Del. C.* § 4209(a), in directing that those who received the benefit of the court’s decisions in *Rauf* and *Powell* should be resentenced to life without parole.

⁷ *Rauf v. State*, 145 A.3d 430 (Del. 2016).

⁸ *Id.* at 4.

⁹ *Id.* at 6-8.

¹⁰ 11 *Del. C.* § 4205(b)(1).

5. In *State v. Spence*, the Supreme Court considered three certified questions regarding section 4209.¹¹ One of the questions was whether the capital sentencing scheme under 11 *Del. C.* § 4209 was constitutional; the second question posed was if the answer to the first question was no, then what sentence could be imposed; and the third question was what a sentence of life without parole, if such a sentence were imposed, would mean in light of the parole eligibility statute.¹² The Supreme Court found the capital sentencing scheme to be unconstitutional, and that the legislative intent was to sentence those found guilty of first degree murder to life without parole pursuant to the provisions of subsection 4209(a).¹³ The *Spence* Court specifically found that “[t]he second sentence of s 4209(a) may be ‘given effect’ standing alone, thus meeting the tests of severability prescribed by 1 *Del. C.* § 308.”¹⁴

6. In contrast to the certified questions in *Spence*, the *Rauf* Court addressed the following question: “If any procedure in 11 *Del. C.* § 4209’s capital sentencing scheme does not comport with federal constitutional standards, can the provision for such be severed from the remainder of 11 *Del. C.* § 4209, and the Court proceed with instructions to the jury that comport with federal constitutional

¹¹ 367 A.2d 983, 985 (Del. 1976).

¹² *Id.*

¹³ *Id.* at 989.

¹⁴ *Id.* at 988.

standards?”¹⁵ The Supreme Court answered this question: “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. Because we see no way to sever § 4209, the decision whether to reinstate the death penalty—if our ruling ultimately becomes final—and under what procedures, should be left to the General Assembly.”¹⁶ This question, unlike the questions in *Spence*, did not address the sentence to be imposed in place of a death sentence found to have been imposed in an unconstitutional manner. There was no need to address the issue in *Rauf*, because the Supreme Court had already addressed the issue in *Spence* and again in *Hooks v. State*.¹⁷ Contrary to Cooke’s assertions, the General Assembly’s expressed intent to require imposition of a sentence of life without the benefit of parole where a death sentence is not, or cannot be, imposed has consistently remained a part of section 4209(a), and remains so today.¹⁸ Cooke’s contention that

¹⁵ 145 A.3d at 434.

¹⁶ *Id.*

¹⁷ 429 A.2d 1312, 1314 (Del. 1981).

¹⁸ 11 Del. C. § 4209(a) (“(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.” (emphasis added)).

the legislative intent is unclear, is unsupported. His reference to *State v. Dickerson*,¹⁹ a case that predates *Spence*, does not assist his argument. The statute at issue in *Dickerson* provided for a mandatory sentence of death upon conviction of murder in the first degree.²⁰ At that time, there was a separate Mercy Statute, allowing a judge to instead impose a sentence of life imprisonment should a jury recommend life when providing the verdict.²¹ The intent of the legislature has consistently been that those found guilty of first degree murder should receive a sentence of life imprisonment. Cooke has offered nothing to demonstrate another intent. The legislative intent on this issue is clear.

7. Cooke's argument that life without parole violates the Eighth Amendment is equally unavailing. Neither the Delaware Supreme Court nor the United States Supreme Court has ever held that a mandatory sentence of life without parole for a murder with at least one aggravating circumstance found unanimously beyond a reasonable doubt by a jury violated the Eighth Amendment. The Delaware Supreme Court has upheld mandatory life sentences without parole for habitual

¹⁹ 298 A.2d 761, 771 (Del. 1972).

²⁰ See 11 Del. C. § 571 (1972) ("Whoever commits the crime of murder with express malice aforethought, or in perpetrating, or attempting to perpetrate the crime of rape, kidnapping or treason, is guilty of murder in the first degree and of a felony, and shall suffer death.").

²¹ See *Dickerson*, 298 A.2d at 762 (citing 11 Del. C. § 3901).

violent offenders, not just murderers.²² The jury did not just find Cooke guilty of intentional murder, but also an aggravating circumstance - Cooke murdered his victim while engaged in the commission of, or attempt to commit, rape in the first degree and burglary in the first degree - and felony murder. Regardless of Cooke's argument about other defendants who could be sentenced to mandatory life without parole for intentional murder, he is not in that category (and neither are any of the other defendants convicted of capital murder). Cooke's argument fails.

8. Finally, Cooke's argument that imposition of a life sentence without the possibility of parole violates the Fourteenth Amendment Due Process Clause is without legal or factual support. Without explaining what Cooke's trial strategy was, he now asserts that whatever the strategy was, it "would surely have been different" had he known "[t]here would have been no penalty phase proceeding at which to mitigate the crime." Mtn. at 7. Cooke does not explain how he would have altered his strategy. Speculating as to how Cooke's trial counsel might have altered their advice or trial strategy is insufficient to establish a Due Process violation.

²² See, e.g., *Stanley v. State*, 2011 WL 2183712, at *3 (Del. Mar. 15, 2011) (addressing mandatory life sentences under the habitual offender statute); *Tate v. State*, 1990 WL 17762, at *3 (Del. Jan. 31, 1990); *Williams v. State*, 539 A.2d 164, 179-80 (Del. 1988). See also *United States v. Charley*, 417 F. App'x 627, 629-30 (9th Cir. 2011) (citing *United States v. LaFleur*, 971 F.2d 200, 209 (9th Cir. 1991) (applying *Harmelin v. Michigan*, 501 U.S. 957 (1991) to murder sentence)); *United States v. Forbes*, 282 F. App'x 324, 325-26 (5th Cir. 2008).

WHEREFORE, the State requests this Court grant Cooke's request to vacate his death sentence and set a sentencing date, but requests this Court, consistent with its current practice and the law, impose a sentence of "imprisonment for the remainder of his natural life without benefit of probation or parole or any other reduction."²³

STATE OF DELAWARE
DEPARTMENT OF JUSTICE



Elizabeth R. McFarlan
Bar ID No. 3759
Chief of Appeals
820 North French Street, 7th Floor
Carvel State Building
Wilmington, DE 19801
(302) 577-8500

Date: April 12, 2017

²³ *Powell*, 2016 WL 7243546, at *5.



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JUAN ORTIZ,	§
	§
Defendant Below,	§ No. 650, 2015
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware
STATE OF DELAWARE,	§
	§ Cr. ID No. 0107004046A
Plaintiff Below,	§
Appellee.	§

HOLLAND, VALIHURA, and SEITZ, Justices.

ORDER

This 26th day of January 2017, having considered the appellant's motion for remand and stay of appeal, it appears to the Court that:

(1) The appellant, Juan Ortiz, filed this appeal from the Superior Court's October 28, 2015 opinion, reissued on November 4, 2015, denying his supplemental motion for postconviction relief. At the time he filed the appeal, Ortiz had been sentenced to death.

(2) Ortiz' appeal has been stayed twice pending decisions by this Court in *Rauf v. State* and *Powell v. State*. In *Rauf*, the Court determined that Delaware's death penalty scheme was unconstitutional,¹ and in *Powell*, the Court held that the decision in *Rauf* applies retroactively.²

¹ *Rauf v. State*, 145 A.3d 430, 433–434 (Del. 2016).

² *Powell v. State*, ___ A.3d ___, 2016 WL 7243546, at *5 (Del. Dec. 15, 2016)

(3) Ortiz' opening brief is due to be filed by February 3, 2017. Ortiz has filed a motion for remand and to stay this appeal so that he can file a motion to vacate his death sentence in the Superior Court. Ortiz' counsel represents that the State takes no position on the motion.

(4) The Court concludes that the motion for remand and stay of appeal should be granted. This matter will be remanded to the Superior Court, with jurisdiction retained, to allow for resentencing.³ To the extent that the only alternative sentence is life in prison, as dictated by *Hooks v. State*, the Superior Court may, in the exercise of its discretion, vacate Ortiz's death sentence and enter a new sentencing order without the need for a defense motion and without holding a hearing.⁴

NOW, THEREFORE, IT IS ORDERED that the motion for remand and stay of appeal is GRANTED. This matter is remanded to the Superior Court for further action consistent with this Order. Jurisdiction is retained.

BY THE COURT:

/s/ Karen L. Valihura
Justice

³ See *State v. Reyes*, ___ A.3d ___, 2017 WL 243360, at *19 (Del. Jan. 19, 2017) (remanding for resentencing on first degree murder convictions).

⁴ *Hooks v. State*, 429 A.2d 1312, 1314 (Del. 1981).

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

v.

AMBROSE L. SYKES,

Defendant.

:
:
:
:
:
:
:

I.D. No. 0411008300 WLW
Kent County

ORDER

Submitted: March 30, 2017

Decided: April 3, 2017

At Mr. Sykes' resentencing, his counsel presented an oral and written motion¹ to the Court, seeking to have him sentenced according to the provisions of 11 *Del. C.* § 4205 instead of 11 *Del. C.* § 4209. The Court reserved decision on the motion and resentenced Mr. Sykes on the relevant counts according to the Supreme Court's direction in *Powell v. State*.²

The Court has carefully examined the defendant's Motion for a New Sentencing Proceeding and reviewed Judge Parkins' decision in *State v. Swan*.³ The Court is satisfied that Judge Parkins' decision is sound and can find no ground on which to distinguish that case from the present one.

Moreover, Mr. Sykes' position has already been settled by our Supreme Court's mandate that defendants like him be resentenced to "imprisonment for the remainder

¹ Given that the motion was raised at the resentencing proceeding (although without earlier notice to the Court), the Court will not construe it as a motion under Rule 35.

² 153 A.3d 69, 76 (Del. 2016) (per curiam).

³ Slip op., No. 0002004767A (Del. Super. Feb. 10, 2017). Swan's motion, unlike the present one, also raised Eighth Amendment and Due Process issues. *Id.* at 7.

State v. Ambrose L. Sykes
I.D. No. 0411008300 WLW
April 3, 2017

of his natural life without benefit of probation or parole or any other reduction.”⁴

The motion is **DENIED** on the grounds⁵ explained in Judge Parkins’s well-reasoned decision in *State v. Swan*.

IT IS SO ORDERED.



Hon. William L. Witham, Jr.
Resident Judge

WLW/dmh

oc: Prothonotary

xc: John Williams, Esquire

Stephen R. Welch, Jr., Esquire

Herbert W. Mondros, Esquire

Samuel J.B. Angell, Esquire, Federal Community Defender Office

⁴ *Powell*, 153 A.3d at 76 (quoting 11 *Del. C.* § 4209(d)(2)).

⁵ This Court, however, expresses no opinion as to the Eighth Amendment and Due Process arguments raised by the defendant in *Swan*. *Swan*, slip op. at 7. Those issues are not in controversy here.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)

)

v.)

)

RALPH SWAN,)

)

Defendant.)

I.D. No. 0002004767A

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Submitted: February 9, 2017

Decided: February 10, 2017

Introduction

Presently before the court is Defendant's February 9 application for a sentencing hearing. Defendant is scheduled to be resentenced to a mandatory sentence life without parole on February 21, 2017. In his application, Swan contends that the court is not obligated to sentence him to life without parole and he is entitled to a sentencing hearing after which the court may sentence him to something less. The court finds the petition is without merit and has decided to rule upon it without waiting for a response from the State.¹

Background

Defendant was convicted of a 1996 home invasion murder in the first degree of Kenneth Warren and sentenced to death. In 2016 the Delaware

¹ The State has previously taken the position that Swan must be sentenced to life without parole.

Supreme Court in *Rauf v. State*² declared unconstitutional Delaware's statutory scheme for imposing the death penalty. A few months later the same court held in *Powell v. State*³ that its decision in *Rauf* must be retroactively applied to death sentences imposed before *Rauf* was announced. Following *Powell*, this court issued a Rule to Show Cause to the State directing it to show cause why Swan's death penalty should not be vacated and he be resentenced to life without parole. In response the State conceded that *Rauf* and *Powell* require that Swan's death sentence be vacated. This court has set Swan's resentencing for February 21.

Swan, through his counsel, has filed a motion seeking to be sentenced as a Class A felon, claiming he cannot be subjected to mandatory sentence of life without parole. He argues that the Delaware Supreme Court declared the death penalty unconstitutional in its entirety and therefore he cannot be sentenced under the portion of that statute which calls for a life sentence without parole in cases in which a sentence of death is not imposed. He also argues that a sentence of life without parole violates the Eighth and Fourteenth Amendment. His arguments are without merit.

Analysis

A. Rauf did not invalidate the portion of the statute calling for life without parole.

The analysis begins and ends with the obvious: the question of what sentence is to be imposed in lieu of the current death sentences has already

² 145 A.3d 430 (Del. 2016).

³ 2016 WL 7243546 (Del. Dec. 15, 2016).

Lest the language in this opinion about adherence to the Supreme Court's rulings be viewed as an implicit disagreement with the Supreme Court's rulings that a sentence of life without parole must be imposed, this court will indulge itself with its musings that Swan is incorrect when he asserts that the Supreme Court invalidated 11 Del. C. § 4209 in its entirety in *Rauf*. Section 4209 is a comprehensive statute governing punishment for murder in the first degree. It sets the penalty as either death or life without parole; limits the circumstances in which a sentence of death may be imposed; establishes substantive elements which must be proven as a requisite to the imposition of the death sentence; specifies the procedures to be employed in determining whether to impose the death sentence; and describes the evidentiary standard applicable to some of the determinations which go into this calculus. The *Rauf* court found some, but not all, of section 4209's provisions are unconstitutional.

The constitutional flaws in section 4209 found in *Rauf* are limited to some of the procedures required by the statute and the standard the trial judge was to employ when deciding whether to impose a sentence of death. Under the mechanism provided by section 4209, the jury was required to determine if one or more of the statutory aggravating factors had been proven beyond a reasonable doubt. If the jury found the existence of at least one statutory aggravating factor it was next required to weigh the aggravating factors (both statutory and non-statutory) against any mitigating factors and then make a

recommendation to the trial judge whether the death penalty should be imposed. In turn the trial judge,

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 statute was silent as to whether the jury could rely upon non-statutory aggravating factors which it did not unanimously find, nor did it require that the jury's recommendation be unanimous.

The *Rauf* court found the statutory scheme unconstitutional because at many points in the decision-making process it allowed for a less than unanimous decision or for a finding based on less than proof beyond a reasonable doubt. The Chief Justice summarized the point in his concurring opinion:

There is no circumstance in which it is more critical that a jury act with the historically required confidence than when it is determining whether a defendant should live or die. If, as a majority of us have concluded, the Sixth Amendment requires a jury to make all the necessary factual determinations relevant to a capital defendant's fate, there is no reason to depart from the long-standing beyond a reasonable doubt standard when the jury is making the crucial fact-laden judgment of whether the defendant should be executed. Put simply, the Sixth Amendment right to a jury includes a right not to be executed unless a jury

concludes unanimously that it has no reasonable doubt that is the appropriate sentence.⁷

The *Rauf* court found that "[b]ecause the respective roles of the judge and jury are so complicated under § 4209, we are not able to parse through it to preserve it."⁸ Rather, according to the court, that task should be left to the General Assembly.

Swan argues that the Supreme Court found that section 4209 "cannot be severed" and therefore it is unconstitutional in its entirety. Thus, according to him, the provisions of section 4209 providing for a life sentence without parole fall with the rest of the un-severable statute and cannot provide the basis for substituting a life without parole sentence for the vacated death penalty. Swan reads *Rauf* much too broadly. The Supreme Court itself severed portions of section 4209 in *Powell* wherein it directed that "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."⁹ It cited 11 Del. C. § 4209(d)(2) for the proposition that Powell should be sentenced to life without parole.

Swan's argument that section 4209 cannot (or should not) be severed runs afoul of a basic principle of statutory construction. The General Assembly has mandated that, whenever possible, courts must sever invalid provisions of the Delaware Code and give effect to the valid portions which remain:

⁷ 145 A.3d at 481-82.

⁸ *Id.* at 434.

⁹ 2016 WL 7243546 at *5 (Del. Dec. 15, 2016).

If any provision of this Code or amendments hereto, or the application thereof to any person, thing or circumstances is held invalid, such invalidity shall not affect the provisions or application of this Code or such amendments that can be given effect without the invalid provisions or application, and to this end the provisions of this Code and such amendments are declared to be severable.¹⁰

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. That section unequivocally requires that the penalty for murder in the first degree must be life without parole in such cases:

- Section 4209(a) provides that any adult convicted of murder in the first degree "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."
- Section 4209(d)(2) provides that if the death penalty is not imposed "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."

Swan does not explain how these provisions are dependent upon, or relate to, the portions of the statute found to be unconstitutional. As discussed earlier,

¹⁰ 1 Del. C. § 308.

those constitutional infirmities are imbedded in the portions of section 4209 which permitted the jury to rely upon aggravating factors which it may not have unanimously found or rely upon factors it may not have found beyond a reasonable doubt. The section also allows trial judges to impose death sentences on the basis of weighing of the aggravating and mitigating circumstances on the basis of a preponderance-of-the-evidence standard. None of this, however, touches upon the portion of the statute that requires the imposition of sentence of life without parole in the event the death penalty is not imposed.

In short, this court is obligated to follow the holding in *Powell* which it finds controlling here. But even if the court were writing on a clean slate, it would still find that Swan must be sentenced to life without parole.

B. Life Without Parole does not violate the Eighth Amendment or the Due Process Clause.

Swan argues, without citation to authority, that imposition of a sentence of life without parole violates his right to be free from cruel and unusual punishment. Suffice it to say that there is a long line of judicial opinions holding that a sentence of life without parole does not violate the Eighth Amendment. Perhaps most notable of these is the United States Supreme Court held in *Harmelin v. Michigan*¹¹ wherein it held that a sentence of life without parole was not unconstitutional when imposed for possession of 650 grams or more of cocaine. He asserts that a life without parole sentence could

¹¹ 501 U.S. 967 (1991).

result "upon a mere finding that the killing was intentional" and apparently suggests it violates the Eighth Amendment. But courts have upheld the constitutionality of life without parole for crimes far less odious than a "mere finding the killing was intentional." For example the Third Circuit held in 2012 that a life without parole sentence was not unconstitutional when the defendant was convicted of 19 counts of wholesale distribution of drugs.¹² To support his theory Swan engages in a truncated statutory survey and concludes that Delaware would be an outlier if it imposed mandatory life without parole sentences for first degree murder convictions. He argues "[r]are usage indicates societal rejection of mandatorily imposing this extreme penalty, rendering it cruel and unusual under the Eighth Amendment." Contrary to his contention, provisions for mandatory life sentences abound. Indeed, the United States Code provides for them in certain instances.¹³

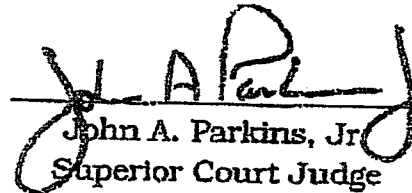
Swan lastly argues in a single paragraph that the substitution of life without parole for his death sentence deprives him of due process. Once again he cites to no authority. Rather his entire argument is based on the unsupported supposition that if he "had been on notice that a sentence of life without parole would be the only—indeed, the mandatory—sentence upon conviction of first-degree murder, trial strategy would surely have been different."

¹² *United States v. Martorano*, 697 F.3d 216 (3rd Cir. 2012).

¹³ *E.g.*, 28 U.S.C. § 3359.

Wherefore, Defendant's application to be sentenced as a Class A felon is
DENIED.

February 10, 2017


John A. Parkins, Jr.
Superior Court Judge

cc: Prothonotary

cc: John R. Williams, Esquire, Department of Justice, Dover, Delaware
Stamatis Stamoulis, Esquire, Stamoulis & Weinblatt LLC, Wilmington,
Delaware
Tiffani D. Hurst, Esquire, Office of the Federal Defender, District of
Delaware, Wilmington, Delaware

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

Plaintiff,

v.

JAMES COOKE,

Defendant.

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L.D. No.: 0506006981

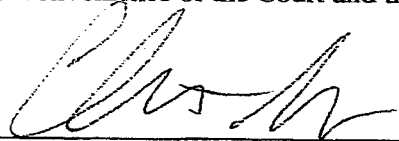
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NOTICE OF REPLY MOTION

To: Elizabeth McFarlan, Esquire
Maria Knoll, Esquire
Deputy Attorney General
820 N. French Street, 7th Floor
Wilmington, DE 19801

Honorable William C. Carpenter, Jr.
Superior Court of Delaware
New Castle County Courthouse
500 N. King Street, 10th Floor
Wilmington, DE 19801

PLEASE TAKE NOTICE that the attached Reply to the State's Response to Defendant's Motion to Vacate Death Sentence and for a New Sentencing Proceeding will be presented to the Court for consideration at the earliest convenience of the Court and the Parties.



Christopher S. Koyste, Esq. (#3107)
Law Office of Christopher Koyste, LLC
709 Brandywine Boulevard
Wilmington, DE 19809
(302) 762-5195
Counsel for James Cooke

Date: April 24, 2017

A45

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

Plaintiff,

v.

JAMES COOKE,

Defendant.

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I.D. No.: 0506006981

**DEFENDANT'S REPLY TO THE STATE'S RESPONSE
TO DEFENDANT'S MOTION TO VACATE DEATH SENTENCE
AND FOR A NEW SENTENCING PROCEEDING**

COMES NOW, Defendant, James Cooke, through undersigned Counsel, hereby replies to the State's Response to Defendant's Motion to Vacate Death Sentence and for a New Sentencing Proceeding. Pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Rauf v. State*, 145 A.3d 430 (Del. 2016), and *Powell v. State*, 2016 WL 7243546 (Del. Dec. 15, 2016), Mr. Cooke respectfully moves this Court to vacate his death sentence and order a new sentencing proceeding. In support of this reply motion, Mr. Cooke asserts that following:

1. The Parties agree that pursuant to *Powell v. State*, 2016 WL 7243546 (Del. Dec. 15, 2016), this Court is required to vacate Mr. Cooke's death sentence. Although Mr. Cooke preserves his argument that the Delaware Supreme Court should reconsider the remedy in *Powell*, and instead order a hearing under 11 Del. C. § 4205, Mr. Cooke acknowledges that this Court is bound by *Powell*, in which the Delaware Supreme Court ordered that upon vacating a death sentence under *Rauf v. State*, 145 A.3d 430 (Del. 2015), the defendant is to be sentenced to life.

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WHEREFORE, for the foregoing reasons, Mr. Cooke's death sentence must be vacated pursuant to *Hurst, Rauf, and Powell*, and a new sentencing hearing should be scheduled.

A handwritten signature in black ink, appearing to read 'Christopher S. Koyste', is written over a horizontal line.

Christopher S. Koyste (#3107)
Law Office of Christopher S. Koyste, LLC
709 Brandywine Blvd.
Wilmington, DE 19809
(302) 762-5195

Date: April 24, 2017

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Law Office Christopher S. Koyste, LLC

709 Brandywine Boulevard
Wilmington, Delaware 19809
(302) 762-5195 Fax (302) 762-1919

May 12, 2017

The Honorable William C. Carpenter Jr.
Superior Court
Leonard L. Williams Justice Center
500 North King Street
Wilmington, DE 19801

Dear Judge Carpenter:

On April 12, 2017, Mr. Cooke filed a motion to vacate his death sentence and to have a resentencing hearing on his First Degree Murder Conviction pursuant to 11 Del. C. § 4205. On the same date, the State responded, conceding this Court should vacate Mr. Cooke's death sentence and arguing that this Court must resentence Mr. Cooke to life without parole.

On April 24, 2017, Mr. Cooke filed a reply to the State's response, acknowledging that this Court is bound by *Powell*, in which the Delaware Supreme Court ordered that upon vacating a death sentence under *Rauf v. State*, 145 A.3d 430 (Del. 2015), the defendant is to be sentenced to life without parole. *Powell v. State*, 2016 WL 7243546 (Del. Dec. 15, 2016).

At this point, the Parties agree that this Court must vacate Mr. Cooke's death sentence and resentence him to life without the possibility of parole pursuant to *Powell*. Mr. Cooke respectfully requests that a resentencing hearing be scheduled at this Court's earliest convenience.

Respectfully Submitted:


Christopher S. Koyste, Esquire

cc: Prothonotary
Elizabeth McFarlan, Esquire
Maria Knoll, Esquire
Tiffani D. Hurst, Esquire
Mr. James Cooke

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

Plaintiff,

v.

JAMES COOKE,

Defendant.

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I.D. No.: 0506006981

FILED
2016 MAY 30 PM 4:50
CLERK OF COURT
DELAWARE

**NOTICE OF MOTION TO WAIVE APPEARANCE AT
RESENTENCING HEARING**

To: **Elizabeth McFarlan, Esquire**
Maria Knoll, Esquire
Deputy Attorney General
820 N. French Street, 7th Floor
Wilmington, DE 19801

Honorable William C. Carpenter, Jr.
Superior Court of Delaware
New Castle County Courthouse
500 N. King Street, 10th Floor
Wilmington, DE 19801

PLEASE TAKE NOTICE that the attached Motion to Waive Appearance at Resentencing Hearing will be presented to the Court for consideration at the earliest convenience.



Christopher S. Koyste, Esq. (#3107)
Law Office of Christopher Koyste, LLC
709 Brandywine Boulevard
Wilmington, DE 19809
(302) 762-5195
Counsel for James Cooke

Date: May 30, 2017

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

Plaintiff,

v.

JAMES COOKE,

Defendant.

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I.D. No.: 0506006981

**DEFENDANT'S MOTION TO WAIVE APPEARANCE AT
RESENTENCING HEARING**

COMES NOW, Defendant, James Cooke, through undersigned Counsel, respectfully moves this Court, to grant his knowing, voluntary and intelligent waiver of his right to appear at the resentencing hearing. In support of this motion, Mr. Cooke asserts the following:

1. It is undisputed that the Court will be required to issue a sentence of life without parole at Mr. Cooke's resentencing hearing. Mr. Cooke currently has extensive, painful damage to his feet and transporting him to Court will cause Mr. Cooke to experience significant additional pain. Accordingly, Mr. Cooke knowingly, voluntarily and intelligently waives: his right to attend the resentencing hearing, to participate in the hearing, and his right of allocution at the hearing, as well as to possibly respond to any comments made at the hearing. Mr. Cooke's affidavit asserting his waiver of these rights is attached. (Attached as "Exhibit A").

2. Pursuant to Rule 43 of the Delaware Superior Court Rules of Criminal Procedure, the presence of the defendant is required "at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule."¹ The presence of the defendant is not

¹ Del. Super. Ct. Crim. R. 43(a).

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required “[a]t a reduction of sentence under Rule 35.”² Rule 43 also identifies situations in which the defendant may waive the right to be present at trial, either through voluntary absence after trial has commenced or through persistent disruptive conduct despite being warned that such conduct would result in the removal of the defendant from the courtroom.³

3. Delaware’s Rule 43 is modeled after the Federal Rule 43, and as such, the Delaware Supreme Court has held that the “precedent regarding that rule is germane.”⁴ Federal Rule of Criminal Procedure 43 also permits the absence of the defendant, otherwise required at all of the criminal stages identified by Delaware Rule 43, in a proceeding involving the correction or reduction of a sentence pursuant to Rule 35 or 18 U.S.C. §3582(c).⁵ Additionally, Federal Rule 43 allows for the waiver of the right to be present “when the defendant is voluntarily absent during sentencing” in a “noncapital case.”⁶

4. Although the Third Circuit Court of Appeals and other federal courts have yet to conclusively hold that a defendant’s presence is not required when resentencing will result in a nondiscretionary reduction in sentence, the federal courts have implicitly accepted this position.⁷

Similarly, the federal courts have emphasized the trial court’s discretion, or lack thereof, in

² Del. Super. Ct. Crim. R. 43(c)(4).

³ Del. Super. Ct. Crim. R. 43(b)(1), (2).

⁴ *Bradshaw v. State*, 806 A.2d 131, 135 (Del. 2002).

⁵ Fed. R. Crim. P. 43(a), (b)(4).

⁶ Fed. R. Crim. P. 43(c)(1)(B).

⁷ See *Mooney v. United States*, 938 A.2d 710, 720 (D.C. 2007) (“The federal circuits also recognize that where the trial court is vested with discretion on remand for resentencing, the defendant has a constitutional right to allocute, but that where there is no such discretion, the defendant’s presence is not required.”) (citing *United States v. Faulks*, 201 F.3d 208, 211-12 (3d Cir. 2000); *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996) (finding defendant’s presence to be unnecessary when resentencing is nondiscretionary and results in a reduction of the original sentence); *United States v. Tamayo*, 80 F.3d 1514 (11th Cir. 1996); *United States v. Nolley*, 27 F.3d 80 (4th Cir. 1994)); see also *Wilmore v. United States*, 565 F.2d 269, 272 n.4 (3d Cir. 1977) (“We imply neither acceptance nor rejection of the Curtis theory that, at least in NARA cases, the defendant may waive the right to be present at sentence. That question is not before us.”) (citing *United States v. Curtis*, 173 U.S.App.D.C. 185, 523 F.2d 1134 (1975)).

analyzing a defendant's right to attend sentencing and/or present an allocution.⁸

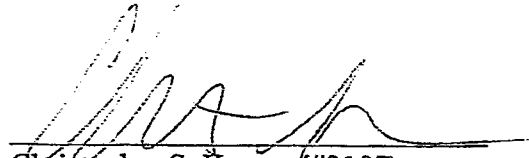
5. As this Court has no discretion in resentencing Mr. Cooke, his presence should not be required at the resentencing hearing, as Mr. Cooke will not be prejudiced by his absence from the hearing. Accordingly, Mr. Cooke's knowing, voluntary and intelligent waiver of his right to attend sentencing⁹ is sufficient to relinquish the rights protected by Delaware Superior Court Rule of Criminal Procedure 43.

6. Counsel notified the Attorney General's Office via email the morning of May 30, 2017 about the filing of this motion seeking the waiver of Mr. Cooke's presence at the resentencing hearing. The Attorney General's Office replied via email noting that the State will finalize its position on May 30, 2017.

⁸ *Fatir v. Thomas*, 106 F. Supp. 2d 572, 585 (D. Del. 2000) (“[F]ederal appellate courts continue to stress the presence or absence of discretion when faced with questions regarding defendants’ rights to be present with counsel and to allocute in various sentencing contexts.”) (citing *Faulks*, 201 F.3d at 211-12 (remanded for resentencing but expressly distinguished the case from those in which the trial court has no sentencing discretion on remand); *Parker*, 101 F.3d at 528 (defendant had no right to be present at resentencing, as case was remanded only for “a nondiscretionary correction of the original sentence”); *Nolley*, 27 F.3d at 81; *United States v. Barnes*, 948 F.2d 325, 329 (7th Cir. 1991) (right to allocution at a subsequent sentencing hearing “arises precisely because the scope of the punishment is not preordained”)).

⁹ “Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748 (1970).

WHEREFORE, for the foregoing reasons, Mr. Cooke respectfully requests that the Court grant his knowing, voluntary and intelligent waiver of his right to appear at the resentencing hearing.



Christopher S. Koyste (#3107)
Law Office of Christopher S. Koyste, LLC
709 Brandywine Blvd.
Wilmington, DE 19809
(302) 762-5195

Date: May 30, 2017

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

Plaintiff,

v.

JAMES COOKE,

Defendant.

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I.D. No.: 0506006981

ORDER

AND NOW, TO WIT, this _____ day of _____, 2017, the foregoing Motion to Waive Appearance at Resentencing Hearing having been heard and considered, it is hereby GRANTED:

The Honorable William C. Carpenter, Jr.

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EXHIBIT A

ASS

Affidavit of James Cook

I, James Cooke, declare as follows:

1. I understand that Newcastle County Superior Court Judge Carpenter has set a hearing for my resentencing for June 2, 2017. I understand that I have a constitutional right to be present for and participate in that hearing. I understand that at that hearing I will be resentenced to life without the possibility of parole or any other sentence.
2. I wish to waive my appearance for the resentencing hearing on June 2, 2017. Although I understand my right to be present for and participate in that hearing, I do not wish to be present for that hearing. Instead, I request that my attorneys handle it in my absence.
3. Due to my current health and mobility conditions, it is painful for me to be transported and I am confined to a wheelchair. I ask that the Court allow me to remain at the prison and for the hearing to proceed in my absence.

Date: 5/30/2017

Signature: [Signature]

State of: Delaware

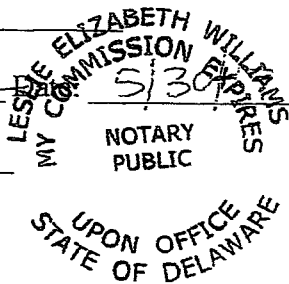
County of: New Castle

Signed before me this 30th date of May 2017, by

JAMES COOK 00403972

Notary: [Signature]

My commission expires: upon office





MATTHEW P. DENN
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
NEW CASTLE COUNTY
820 NORTH FRENCH STREET
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400
FAX (302) 577-6630
CRIMINAL DIVISION (302) 577-8500
FAX (302) 577-2496
FRAUD DIVISION (302) 577-8600
FAX (302) 577-6499

May 31, 2017

The Honorable William C. Carpenter, Jr.
The Superior Court of the State of Delaware
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware 19801

Re: *State of Delaware v. James Cooke*, ID No. 0506006981

Dear Judge Carpenter:

The State is in receipt of Mr. Koyste's Motion to Waive Appearance at Resentencing hearing filed on behalf of Mr. Cooke. In light of Mr. Cooke's medical issues, the State reached out to the Bonistalls, the victim's family members, regarding their desire to attend the resentencing. The Bonistalls do not wish to attend Mr. Cooke's resentencing if Mr. Cooke will not be present. As a result, the State requests that this resentencing hearing be cancelled.

Although Mr. Cooke has apparently waived his right to attend the resentencing hearing, a hearing is not required, and thus neither is a waiver. Because the Court has no discretion as to the sentence to be imposed, and the sentence is a reduction from Mr. Cooke's current capital sentence, there is no Constitutional requirement for a hearing and a waiver is not required. As the Delaware Supreme Court has noted in another former capital case:

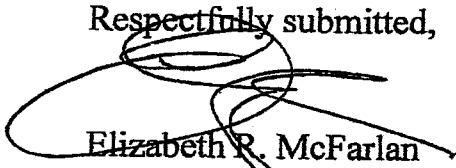
To the extent that the only alternative sentence is life in prison, as dictated by *Hooks v. State*, the Superior Court may, in the exercise of its discretion, vacate Ortiz's death sentence and enter a new sentencing order

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without the need for a defense motion and without holding a hearing.¹

The State does not believe Mr. Cooke can be compelled to attend a resentencing hearing that is not legally required, and the victim's family has no interest in attending a hearing at which Mr. Cooke is not present. In light of the situation, the State respectfully requests that this Court simply issue a new sentence order vacating Mr. Cooke's death sentence and imposing in its place a sentence of imprisonment for the remainder of Mr. Cooke's natural life without benefit of probation or parole or any other reduction.

Respectfully submitted,



Elizabeth R. McFarlan
Chief of Appeals

cc: Criminal Prothonotary
Christopher S. Koyste, Esq.
Maria T. Knoll, DAG
Danielle Brennan, DAG

¹ *Juan Ortiz v. State*, Del. Supr., No. 650, 2015, Order at ¶ 4, Valihura, J. (Jan. 26, 2017) (Ex. A) (citation omitted).

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§ Cr. ID No. 0107004046A

(3) Ortiz' opening brief is due to be filed by February 3, 2017. Ortiz has filed a motion for remand and to stay this appeal so that he can file a motion to vacate his death sentence in the Superior Court. Ortiz' counsel represents that the State takes no position on the motion.

(4) The Court concludes that the motion for remand and stay of appeal should be granted. This matter will be remanded to the Superior Court, with jurisdiction retained, to allow for resentencing.<sup>3</sup> To the extent that the only alternative sentence is life in prison, as dictated by *Hooks v. State*, the Superior Court may, in the exercise of its discretion, vacate Ortiz's death sentence and enter a new sentencing order without the need for a defense motion and without holding a hearing.<sup>4</sup>

NOW, THEREFORE, IT IS ORDERED that the motion for remand and stay of appeal is GRANTED. This matter is remanded to the Superior Court for further action consistent with this Order. Jurisdiction is retained.

BY THE COURT:

/s/ Karen L. Valihura  
Justice

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<sup>3</sup> See *State v. Reyes*, \_\_\_ A.3d \_\_\_, 2017 WL 243360, at \*19 (Del. Jan. 19, 2017) (remanding for resentencing on first degree murder convictions).

<sup>4</sup> *Hooks v. State*, 429 A.2d 1312, 1314 (Del. 1981).

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

|                    |   |                      |
|--------------------|---|----------------------|
| STATE OF DELAWARE, | ) | CRIMINAL ACTION NOS. |
|                    | ) | IN11-04-2162         |
| v.                 | ) | IN11-04-2161         |
|                    | ) |                      |
| JAMES E. COOKE,    | ) | MURDER FIRST DEGREE  |
|                    | ) | ID No. 0506005981    |
|                    | ) |                      |
| Defendant.         | ) |                      |

**ORDER**

IT IS HEREBY ORDERED this 10<sup>th</sup> day of August, 2015, that Christopher Koyste is appointed to represent the defendant, James Cooke, in Case ID No. 0506005981, to assist in the presentation of the defendant's Rule 61 petition. The representation was effective January 26, 2015.

IT IS SO ORDERED.

  
Judge William C. Carpenter Jr.