IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	**)**	
	)	
Plaintiff,	**)**	**I.D. Nos. 9506017661 and**
	)	**9506017682**
5.	)	
	)	Cr.A. Nos. IN97-02-1356 and
	)	IN97-1359
HECTOR S. BARROW and	)	
JERMAINE BARNETT,	)	Cr.A. Nos. IN97-02-1331 and
	)	IN97-02-1334
Defendants.	)	

FINDINGS AFTER SECOND PENALTY HEARING

This 4th day of January, 2002, it appears from the record in this case:

Procedural Posture

1. A penalty hearing held on June 26 and 27, 2001 as a result of the reversal and remand by the Delaware Supreme Court of this Court's decision to impose the death penalty on both Defendants on February 3, 1998. Because the facts and procedural history are clearly outlined and have not changed up to the date each was issued, that information will not be repeated here with limited exception as indicated below. Both opinions are, however, incorporated by reference in their entirety herein as Exhibits A & B.

2. Following the remand, the State elected not to continue with the prosecution of the Murder First Degree (Intentional) charge, but did indicated its desire to proceed with the prosecution of the Defendants on the remaining two counts of Murder First Degree (Felony). The State then asked that the Court proceed to hold a second penalty hearing regarding the convictions of Murder First Degree (Felony). Following the State's declaration of its intentions, the parties asked the Court to hear the matter without a jury and the Court agreed to do so. The parties also agreed that by virtue of the felony murder convictions, the statutory aggravating factor required by 11 Del. C. §4209(e) had been established and that the record produced by the trial and first penalty hearing, which were conducted between April 17 and May 28, 1997, would be made a part of the second penalty hearing which was scheduled to begin on June 26, 2001. The lone exception was the statement by Lawrence Johnson the admission of which the Delaware Supreme Court had ruled was reversible error.

3. The parties filed with the Court notice of the aggravating and mitigating factors upon which each intended to rely on as required by 11 Del. C. §4209(c). The State

submitted the notice of the aggravating factors upon which it intended to rely on June 26. Counsel for Defendants Barnett and Barrow provided the requisite notice of the mitigating factors on June 25 and 27 respectively. The notices provided did not differ in any material way from that provided prior to the first penalty hearing.

4. The hearing began as scheduled and concluded that same day. The records from the trial and the first penalty hearing were entered into evidence as agreed. Additional testimony and evidence was also presented on behalf of both Defendants. At the conclusion of the hearing, the parties asked for and received the opportunity to summarize their arguments in writing. That process was completed on or about August 20, 2001.

Findings of Fact

5. After a careful review of the record as presently constituted, the Court continues to rely upon the findings and conclusions made in its February 3, 1998 decision as set forth in pages 1 thru 22. Stated differently, the State has met its burden and established the existence of the statutory aggravating factor as required by 11 Del. C. §4209(e) as well as the existence of the additional

aggravating factors as noticed. In addition, the Court again finds that both Defendants have established the existence of mitigating factors to the extent reflected in that opinion. The additional information provided at the second penalty hearing does not alter any of the conclusions reached. Rather, it only supports them.

6. Notwithstanding the continued reliance upon those findings and conclusions, the process of weighing the aggravating factors versus the mitigating factors found to exist as required by 11 Del. C. §4209(d)(1)(b), now compels a different result.

Weighing of Aggravating & Mitigating Factors

7. In overturning the conviction for Murder First Degree (Intentional) and the death sentences imposed as a result of that conviction and the two convictions for Murder First Degree (Felony) arising out of the burglary/robbery of the Black Sheep Gun Shop, the Delaware Supreme Court made certain rulings which have altered the weighing process along with the sentence to be imposed. In relevant part, the Supreme Court held that this Court erred as a matter of law when it admitted the stipulation relative to the statement given by Defendant Johnson at trial and when it refused to

allow Defendant Barnett to introduce evidence of his attempted cooperation with the police in identifying the shooter during the first penalty hearing.

8. In terms of the Johnson statement stipulation, the Supreme Court found that the underlying statement constituted inadmissible hearsay in that it was unreliable, violated the Confrontational Clause of the Sixth Amendment to the United States Constitution and that the error was not harmless. Our Supreme Court relied upon the then recent decision by the United States Supreme Court in Lilly v. Virginia, 527 U.S. 116 (1998). Barrow v. State, Del. Supr., 749 A.2d 1230, 1244-1247. As to the evidence of Defendant Barnett's attempt to cooperate with the police, the Supreme Court held that its introduction during the first penalty phase was not prohibited by Delaware Rule of Evidence 410 as this Court opined. Nor was the statement hearsay because it was not admitted for its contents. Instead its introduction should have been allowed since the evidence might have impacted upon the jury's view of the level of Defendant Barnett's responsibility for the death of Thomas Smith. Barrow, 749 A.2d at 1248-1249.

9. As indicated above, the Supreme Court, based

upon the errors that it concluded had occurred, invalidated the Defendants' convictions and sentences for Murder First Degree (Intentional), and the sentences imposed for the two counts of Murder First Degree (Felony). The State would have to retry the case in its entirety as to the former if it elected to go forward with that charge. A new penalty phase would have to be conducted as to the latter notwithstanding the acknowledgment by the Supreme Court as to the difficulties in conducting a second joint penalty phase hearing. Barrow, 749 A.2d at 1250.

10. As counsel for the Defendants point out, the State relied upon the same evidence that was presented during the trial and the first penalty hearing. Consequently, without the Johnson statement, the there is no evidence of anything other than a homicide committed during the course of the two felonies as charged by three participants. This is particularly consequential in light of the State's decision not to continue with the prosecution of the intentional murder charge and Defendant Barnett's decision not to introduce his attempted cooperation with the State. It is true that there was one hearsay statement boasting of responsibility for the death of Thomas Smith attributed to Defendant Barrow.

However, that statement was made by an individual who was not present during or otherwise charged as a result of the commission of the crimes in question, and the Supreme Court determined that its probative value was minimal at best. Barrow, 749 A.2d at 1246-1248.

11. As a result of the change in the evidentiary and legal posture of the case following the Supreme Court's reversal and remand, this Court is unable to say beyond a reasonable doubt which of the Defendants, including Defendant Johnson, did what or to what degree/level of culpability to assign to each defendant. To impose the death penalty under such circumstances would run a foul of the decisions by the United States Supreme Court in Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987) as well the decisions of our Supreme Court following those decisions in State v. Rodriguez, Del. Supr., 659 A.2d 228 (1994) and other progeny. Simply put, the weighing process mandated by 11 Del. C. §4209(d)(1)(b) requires more before the scales of justice are tipped in favor of the death penalty. This is particularly true where, as the Supreme Court noted, one-third of the jury voted to impose a life sentence. Barrow, 749 A.2d at 1250.

12. Taking on additional weight and/or significance are Defendant Barnett's history of abusive treatment and lack of direction as does the lack of any prior criminal history on the part of Defendant Barrow. The Court must also consider the sentence imposed on Defendant Johnson who was also found guilty of the same felony murders and not guilty of the intentional murder involving Thomas Smith. As noted, Defendant Johnson received what constituted a life sentence after a separate trial. Finally, the Court must take note of what appears to be the adjustment made to prison by both Defendants since the initial imposition but prior to the Supreme Court's reversal in part of the convictions as well as since that event.

13. As this Court indicated in its February 3, 1998 opinion, this was a truly heinous crime. It had a disastrous and tragic impact upon the victim, Thomas Smith, and his family, as well as the families of the Defendants. Moreover, the Defendants have lost the ability to have any say in where or how they live. The best they could hope for is that they will die of natural causes as opposed to lethal injection. In its initial form following the trial and first penalty hearing, this Court indicated that if we are to have a death

penalty, this was the case in which it should have been imposed. Since the posture of the case has changed, that conclusion no longer applies.[1]

In light of the foregoing, and after reviewing the evidence, making the statutorily required findings and weighing the factors found to exist following the decision of Delaware Supreme Court and the second penalty hearing, the Court concludes that the imposition of a life sentence in prison is the appropriate sentence to be imposed on both Defendants for the convictions of First Degree Murder (Felony) in Criminal Action Nos. IN97-02-1356 and IN97-02-1359 and IN97-02-1331 and IN97-02-1334. Those sentences will be imposed by separate order.

IT IS SO ORDERED.

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Toliver, Judge

[1] Although decided after the appeal of the Defendants in this case had been resolved, this Court also feels compelled to consider and be guided by the pronouncements of the Delaware Supreme Court in Flonnory v. State, Del. Supr., 778 A.2d 1044, 1050-1052 (2001). In that case, the Supreme Court evidenced its concern in enhancing the public's confidence in the impartial administration of justice in the retrial of capital cases.