IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,)	
)	
)	
v.)	
)	
MICHAEL E. KEYSER,)	ID No. 0310021647
)	
Defendant.)	

FINDINGS AFTER PENALTY HEARING

Penalty Hearing Commenced: November 17, 2004 Penalty Hearing Concluded: November 22, 2004 Jury Recommendation: November 23, 2004 Allocution: November 22, 2004 Decided: June 3, 2005

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CARPENTER, J.

I. Background

The Defendant, Michael E. Keyser, was charged with one count of Murder in the First Degree and one count of Conspiracy in the First Degree for the murder of Kimberly Holton on September 30, 2003.¹

Jury selection began on October 19, 2004 and continued until October 26, 2004. The trial commenced on October 27, 2004 and the guilt phase lasted until November 15, 2004. The jury deliberated for approximately seven hours over the course of several days and delivered their verdict of guilty of First Degree Murder and First Degree Conspiracy on November 16, 2004.

Between November 17, 2004 and November 23, 2004, a penalty hearing was held as required by 11 *Del. C.* § 4209(b). At the penalty hearing, the State argued that it had established the statutory aggravating circumstance found in 11 *Del. C.* § 4209(e)(1)(u) which required the State to establish beyond a reasonable doubt that the murder was premeditated and the result of substantial planning.

The State also presented evidence that the following non-statutory aggravating circumstances existed: (1) the victim was defenseless; (2) the vulnerability of the victim; (3) Defendant's explosive temper; (4) Defendant's disciplinary record while

¹ Defendant was also charged with one count of Abuse of a Corpse but this count was not pursued by the State at trial.

incarcerated; (5) the victim impact evidence; (6) Defendant's deceptive propensities; (7) future dangerousness; (8) senseless murder without provocation; (9) nature and circumstances of this crime; (10) concealment of the body; and (11) luring the victim to her death.

The defense presented evidence that the following mitigating circumstances existed in the case: (1) lifestyle as a child and teenager; (2) the lack of a male role model; (3) chronic and extreme depression; (4) the lack of social skills; (5) Attention Deficit Hyperactivity Disorder (ADHD), which was undiagnosed and largely untreated; (6) the lack of a criminal record; (7) Defendant's youthful age; (8) Defendant's lack of significant disciplinarian record; (9) the acceptance of responsibility; (10) remorse; (11) Defendant suffers from an immature personality; (12) Defendant, notwithstanding his upbringing, has a supportive family; (13) Defendant's tendency to perpetuate shallow emotional relationships; (14) Defendant has a general feeling of inadequacy; (15) Defendant has undue concern over his health; (16) Defendant has a tendency to be paranoid; (17) Defendant does not exhibit traits traditionally associated with possessing either a serious character or personality disorder; (18) Defendant tends to be a follower rather than a leader; (19) Defendant enlisted and sought to serve in the United States Air Force; (20) Defendant is not a danger to himself or others within a prison setting; and (21) mercy. Finally, Defendant exercised his right of allocution pursuant to 11 Del. C. § 4209(c)(2).

At the completion of the evidence, the Court instructed the jury regarding the statutory framework of the Delaware death penalty statute and how their deliberations should be conducted.

The jury returned its sentencing recommendation on November 23, 2004 and found that the aggravating circumstances outweighed the mitigating circumstances by a vote of ten to two.

II. Defendant's Motion for Judgment of Acquittal

The jury also found that the evidence showed beyond a reasonable doubt that the State had established the murder was premeditated and the result of substantial planning.² Despite this finding, Defendant has moved for judgment of acquittal, pursuant to Super. Ct. Crim. R. 29 ("Rule 29") arguing that he should be sentenced to life imprisonment because the evidence does not support the jury's statutory aggravator findings. The Court disagrees.

The evidence clearly establishes that on September 29, 2003 Defendant and his accomplice Jacob Jones developed a plan to accomplish Jones' desire to kill Kimberly Holton in order to resolve the family disputes that were occurring in his girlfriend's household which he believed were being caused by the victim. The Defendant assisted Jones in luring the victim to the hotel room and even drove her to

² 11 Del. C. § 4209(e)(1)(u).

the hotel with full knowledge that the plan was to kill her that evening. After fulfilling their own sexual pleasures, Defendant held the victim down as Jones proceeded to suffocate her. After the killing, the Defendant and Jones completed their plan of disposing the body in the Atlantic Ocean which was accomplished with the assistance of the Defendant. This evidence developed through witnesses, forensic findings, and Defendant's own statements to the police clearly establish that the murder was planned, organized and developed at least hours and perhaps even days before the killing. The plan was sophisticated and included an understanding between Jones and the Defendant as to how the murder would be accomplished as well as to how they would avoid being implicated by disposing of the body in a way they believed it would never be discovered. The near perfect murder. The killing of a young woman who had been nearly abandoned by her family, living with friends and who if suddenly was discovered missing would simply be considered the latest act of rebellion by a troubled youth. The Defendant had numerous opportunities to walk away but decided his friendship to Jones was more important than the life of a woman he had befriended. The evidence of premeditation and substantial planning is overwhelming and the jury's decision is clearly supported by that evidence.

The Court also disagrees with the State's position that the Court has no power to review the jury's finding as to the death qualifying question regarding the

establishment of a statutory aggravating circumstance. Instead, the Court holds that the standard for reviewing claims asserted in a Rule 29 motion is whether any rational³ juror could reach the conclusion arrived at by the jury, after considering the evidence and inferences therefrom, in the light most favorable to the State.⁴ The Court concludes that the evidence supports the jury's finding of the existence of the aggravating factor and this finding is one that could have easily been made by a rational juror who viewed the evidence consistent with that argued by the State. As a result, Defendant's first ground for acquittal fails.

Defendant also asserts that the death penalty statute is rendered unconstitutionally overbroad by the inclusion of twenty-two aggravators. However, this Court in *State v. Steckel*⁵ held that the twenty-two aggravators did not create a constitutional infirmity.⁶ Instead, the Court stated that "[t]he fact that the legislature has set forth twenty-two specific statutory aggravating circumstances manifests society's concern that certain actions are so heinous as to be worthy of capital

³Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P., 794 A.2d 1141, 1150 (Del. 2002) (noting that criminal law cases use the adjective "rational", rather than "reasonable", to describe the hypothetical fact-finder).

⁴Vouras v. State, 452 A.2d 1165 (Del. 1982).

⁵708 A.2d 994 (Del. Super. Ct. 1996).

⁶State v. Capano, 1998 WL 729736, at * 1-2 (Del. Super.).

punishment.... [I]n promulgating this legislation, the General Assembly has done so with due regard for the gravity of the subject matter." The Court continues to believe this is within the appropriate province of the legislature and not the Court to dictate.

Furthermore, the Attorney General's Office has the exclusive authority to decide whether to pursue first degree murder cases as capital offenses.⁸ The Court will not interfere with those decisions unless a clear discriminatory practice has been demonstrated which establishes a clear constitutional violation based upon an inappropriate class designation. Since this requisite pattern of discrimination has not been established by Defendant, the second ground for acquittal also fails.

III. Non-Statutory Aggravating Circumstances

The Court finds that the following non-statutory aggravating circumstances have been established through sufficient and reliable evidence.

A. The Victim was Defenseless

Kimberly Holton was sixteen years old when she was murdered. She arrived at the Budget Inn hotel room on the evening of September 29, 2003, never knowing that Defendant and his friend Jones already had a plan in action to murder her and

⁷Steckel, 708 A.2d at 1001.

⁸29 Del. C. §2504(6); see State v. Hines, 919 S.W.2d 573 (Tenn. 1995).

dispose of her body. She was overpowered by the strength of the two men and was eventually suffocated. Despite the fact the she was defenseless, Defendant confessed to Detective Porter that Holton kicked, screamed and fought until her last breath.

B. The Vulnerability of the Victim

Not only was Holton younger than her attackers, but she was also physically disadvantaged as she tried to fight back against their strength. Holton was a foster child who had been passed from home to home and as a result, never seemed to develop a true sense of those whom she could trust. Holton was a physically and psychologically vulnerable young girl.

C. Defendant's Explosive Temper

Several witnesses testified during the trial that Defendant had an explosive temper which scared those around him. Shawn Coho, an employee of the Delaware Department of Correction, recalled a day when he worked with Defendant at the Army Aviation Support Facility. According to Coho, Defendant exhibited unusual and disturbingly violent behavior when he brought a bag containing knives, Chinese stars, a revolver and hollow point bullets into work. Defendant used a pizza box from lunch for target practice with his Chinese stars. Coho felt threatened and became alarmed when he went to leave to conduct a perimeter search and Defendant said something to the effect of "I wonder what it would be like to hit a moving target" with one of the Chinese stars.

Immediately after leaving Defendant's presence, Coho used his cellular phone to contact his supervisor, Lieutenant Colonel Racki and reported Defendant's menacing behavior. As a result, when Defendant departed at the end of the day he was no longer permitted on the Army Aviation Support Facility. Delbert Brown, from the private security agency that employed Defendant, testified that he was Defendant's supervisor at the time and as a result of the incident, Defendant was stripped of his weapon and transferred.

In addition, Defendant's ex-girlfriend, Cathleen Pippin, testified that Defendant had a "temper" and when he became upset he would "throw things." If he got agitated while driving he would become "violent . . . yell, cuss, give the finger." Pippin recalled that Defendant was the kind of person who would "get up in somebody's face" when he became mad.

D. Defendant's Disciplinary Record While Incarcerated

Defendant arrived at the Delaware Correctional Center ("DCC") on October 28, 2003. Rebecca McBride, the records custodian at the Delaware Correctional Center, testified that during the time leading up to his trial for murder, Defendant was written-up on two separate occasions for disciplinary infractions, with an additional third write-up pending. First, on May 22, 2004, Defendant was charged with a "Class 1, major write-up of "disorderly or threatening behavior, failing to obey an

order and possession of non-dangerous contraband." Defendant was found guilty of the charge and was sentenced to five days of confinement to quarters.

The second write-up occurred on July 9, 2004, Defendant was charged with "failing to obey an order, disorderly or threatening behavior, and possession of non-dangerous contraband." Defendant received this charge after stating "If I get a chance, I will kick the door closed on the cell when you enterduring the shake-down" and then refusing to obey the officer's order to stand at least ten feet away from his cell during the mandatory shake-down. Finally, on October 8, 2004, Defendant was written up for kicking an officer in the leg, while he was attempting to shake-down Defendant's cell. However, there is no disposition regarding this charge. While the Court acknowledges these disciplinary infractions have been established, the Defendant's prior institutional record is minimal and not particularly reflective of violent or disruptive conduct.

E. The Victim Impact Evidence

Several witnesses testified about the devastation they suffered as a result of Holton's murder. The Court is cognizant of the danger of placing too much weight on victim impact evidence. However, the consideration of such evidence in the

Court's weighing process has been previously ruled constitutional. Thus, the impact of the loss of the victim to her family will be considered by the Court as an aggravating factor. Samantha Seeney, the victim's aunt, testified that she was close to Holton, who "was always like a big sister" to Seeney's eight year old daughter. Seeney reminisced about her niece, Holton, playing with Seeney's daughter, and recalled tearfully how much she had enjoyed spending time with Holton.

In addition, Joseph Harris was Holton's boyfriend at the time of her death. He remembered first meeting her in eighth grade. Harris wept as he testified about the love he and the victim shared. He recalled speaking to her the night of her murder and said Holton was happy. In her final words to him, Holton said that she loved him and that she would talk to him later. After Holton's death, Harris was devastated and sought the counseling of a psychologist to deal with the overwhelming grief he felt at her loss.

Christina Lanouette, a licensed clinical social worker, who was one of the victim's counselors at the Wellness Center at Dover High School testified that the victim was helpful and nice to be around. In addition, she explained that the victim was estranged from her mother and had been living with the Machettes family, but

⁹See e.g., Payne v. Tennessee, 111 S. Ct. 2597 (1991); Petition of State, 597 A.2d 1, 2 (Del. 1991).

that the Division of Family Services had recently notified Ms. Lanouette that they would be coming in to meet with the victim because she needed to find a new place to live. On September 29, 2003, the victim met with Ms. Lanouette to discuss the possibility that she go and live with Brenda Wingle, a neighbor. Ms. Lanouette also admitted that the loss of the victim was one of the hardest things she has had to endure during her seven years working at the Center. To aid their grieving process, the members of the Center organized a memorial service for the victim.

Brenda Wingle testified that she and her daughter, Cathy, developed a close familial relationship with the victim. She testified that the victim referred to her as "mom" and thought of herself as Cathy's little sister. The victim and Cathy became "the very best of friends" and the victim would often spend the night at the Wingle's home when she was having difficulty at the Machettes. Wingle explained that the victim stayed with her family for almost four months at a time. Before the victim's death, she had resided with the Wingle family "from the summer until September 25th." Wingle recalled fondly how she and her family had spent time with the victim, helping her with her homework and playing computer games and explained that she had really become a part of the family. Wingle now has a tattoo which states "In Loving Memory of Kimberly Holton, taken but not forgotten." The Court also feels compelled to pause and recognize the unselfish love and devotion that the Wingle

family had to this stranger they befriended through their daughter. They appeared to be the only stabilizing force in Kimberly's life at the time it was needed the most.

F. Defendant's Deceptive Propensities

The State contends that Defendant's involvement in this crime is exacerbated by his deceptive propensities. Defendant's ex-girlfriend, Cathleen Pippin, testified that Defendant was fired from his employ with Proctor & Gamble after he failed a drug test. In addition, she recalled a story Defendant had told her about having had a daughter, Lindsey, who was approximately five years old who lived in California with her mother Megan, who had kidnapped her. However, when Pippin asked Defendant's parents about "Lindsey" they denied that Defendant had a child and knew nothing about Lindsey or Megan. It was also clear from the testimony during the guilt phase that Defendant had consistently mislead and lied to Ms. Pippin regarding his whereabouts on the date of the murder and the days which followed.

G. Future Dangerousness

The State argued that the Defendant will pose a risk for danger in the future as a result of his past disciplinary record while incarcerated. While even the defense's expert Dr. Edward Dougherty admitted that past behavior is a factor in determining future behavior, the Court finds the evidence to suggest that the Defendant poses a threat of future violent behavior is minimal and this argument is simply a restatement

of the claims made by the State regarding Defendant's conduct while incarcerated.

As such, this factor will not be given any weight by the Court.

H. Senseless Murder Without Provocation

One aspect of this case which is painfully clear is the senselessness of this murder. Unlike many defendants who find themselves before this Court for similar crimes, the Defendant was not motivated by money or power. Instead, he seems to have been motivated by his unhealthy friendship with Jones and a diabolical sense of loyalty. The plan which resulted in Holton's murder was devised when Jones began having problems with his girlfriend, who was also the victim's foster sister. Jealousy, immaturity and depravity spawned this plan to solve Jones' troubles and there is nothing to suggest that the victim's prior contact, especially with the Defendant would in any way have provoked the murder. How both Defendant and Jones ever decided that murdering a young woman, full of hope for the future, would provide a rational solution to a common interpersonal dilemma is beyond the reasoning of this Court or any rational human being.

I. Nature and Circumstances of this Crime

There is no question that the Defendant participated in a plan to lure the victim from her home, to the Budget Inn where she would be murdered. In addition, the attempt to conceal the murder by disposing of the body, wrapped in a blanket, duct taped, weighted down with cement blocks and then thrown from a flying plane into

the Atlantic Ocean reveals substantial planning and premeditation, and the conduct was done with the assistance and knowledge of the Defendant.

After developing a plan to gain the victim's trust and attempting to establish an alibi through conversations with Ms. Pippin, the Defendant picked Holton up at her home and took her to the Wawa, while Jones rented a room at the Budget Inn. Later, Defendant and the victim met Jones in the room where both Defendant and Jones engaged in sexual relations with the victim before carrying out their plan to murder her. Defendant admitted that Holton pleaded for her life to no avail and later she was placed in the trunk of Jones' car in order to carry out the plan to dispose of her body.

J. Concealment of the Body

While there is no evidence to suggest that the Defendant was physically in the plane disposing of the victim's body, the circumstantial evidence suggests that Defendant assisted in the disposal of the body. Cell phone records show that Jones called Defendant at approximately 11:35 p.m. on September 30th. The aircraft log from the Dover Aero Club reveals that Jones took an airplane out around 11:45 p.m. for a two-hour flight. In addition, one of the State's experts presented radar evidence which tracked an aircraft departing from Dover Air Force Base at approximately 11:37 p.m. The plane flew to Cheswold and then to the Cape May, New Jersey area

and returned to Dover at approximately 1:39 a.m. on the morning of October 1st. Cell phone records show that Jones called Defendant at approximately 1:47 a.m.

The evidence suggests that Defendant met up with Jones the night of September 30th in order to dispose of the victim's body. After establishing an alibi for his girlfriend, Defendant picked up Jones and drove him to the Dover Aero Club, located next to the Dover Air Force Base. There, Jones boarded the plane and flew to Cheswold. The evidence further suggests that Defendant met Jones at Cheswold and helped him to load the body from the trunk of Jones' car into the plane, which was then flown to Cape May, New Jersey. After the plane returned, it appears the Defendant drove to Dover Air Force Base to pick up Jones in order take him to his car which was left earlier that evening at Cheswold.

K. Luring the Victim to Her Death

It was Defendant, not Jones, who picked Holton up from her home on the night of her murder. He recalled later that she had not wanted to go because, unlike Defendant whose high school days were in the past, she had school early the following day. However, she succumbed to the peer pressure to go out and was lured to her death by the Defendant.

IV. Mitigating Circumstances

The Court finds that the defense presented reliable and sufficient evidence to establish the following mitigating circumstances.

A. Lifestyle as a Child and Teenager

The defense argued that Defendant's experiences in childhood and as a teenager should be considered as a mitigator. It presented evidence in the form of testimony from Linda Keyser, Defendant's mother and Anne Fisher, his maternal grandmother, that Defendant and the family moved frequently because Barry Keyser, Defendant's husband, was in the Air Force. She explained that Defendant attended three different schools in his first grade year. At one point, Defendant's father was assigned to duty in Iceland for approximately one year, and Defendant and his mother moved back to Dover. Despite the moves, Fisher maintained a relationship with Defendant through letters, phone calls and visited the family in California many times.

Later, when Defendant's father retired from the military, the family moved again; this time back to Delaware. After retirement, Mr. Keyser had difficulty adjusting to life outside of the military and according to Defendant's mother, he began to drink. At times, according to the testimony, Mr. Keyser's drinking caused arguments in the family and the father was verbally abusive to Defendant. In

October of 1998, the Keysers separated and were divorced in February 1999. After attending counseling, the couple reconciled and remarried in December 1999. Linda described the relationship between Mr. Keyser and Defendant as strained. However, she felt that their relationship had improved in the last couple years as the two began to recognize their similarities. Defendant's decision to follow in his father's footsteps by entering the Air Force and their shared interest in computers provided a common ground for their relationship to develop.

In addition to testimony from Defendant's mother regarding Defendant's childhood and teenage years, Stanley Parker, a school counselor at Polytech, also recollected that Defendant had difficulty with his family. Parker testified that Defendant was kicked out of his home in October 1998, when his parents separated and lived with a classmate until returning home in November 1998. However, Parker also recalled that despite whatever issues Defendant might have had at home, he was a strong "C" student.

There is little debate that the Defendant endured a strained relationship with his father and his difficulty adapting because of frequent moves created the feelings of isolation and inadequacy which still haunt the Defendant. While the Defendant did not live in a dysfunctional family unit, the family problems have clearly contributed to the Defendant's immaturity and the lack of good judgment.

B. The Lack of a Male Role Model

By all accounts, Barry Keyser was a devoted father and husband who proudly served his country for many years. He functioned well in a structured environment but appeared to have difficulty dealing with the rebellion and questioning conduct of normal teenagers. He seldom praised his son or provided the necessary encouragement to develop a mature and confident young man. This lead to the Defendant questioning his own values and looking to others for guidance. In other words, the Defendant lacked self confidence and became a follower of his friends. This situation appeared to be particularly acute when his father left the military and had his own problems adjusting to civilian life. This circumstance is an appropriate mitigating factor.

What is particularly unfortunate here is that the father and son relationship that one hopes for had begun to develop over the past few years. The Defendant had been accepted by his father and their relationship had matured to a supportive level. While fighting for his own life, the Defendant was told during the penalty phase of the trial of the terminal illness of his father who had been unable to be present for most of the trial to support him because of his deteriorating condition. It is clearly a tragic and sad situation that will affect the Defendant for years to come.

C. Chronic and Extreme Depression

Dr. Edward Dougherty testified on behalf of the defense, after examining Defendant on October 4, 2004 and October 15, 2004. On each occasion the doctor spent approximately three and a half to four hours with Defendant. Among other things, he concluded that Defendant was suffering from chronic depression. While incarcerated, Defendant began taking Prozac for depression. The officials at DCC gave Defendant the liquid form of Prozac to prevent him from hoarding the pills and attempting suicide for a second time. The doctor found no evidence that Defendant was a danger to himself or others, aside from one report where he threw a tantrum when asked to leave his cell so that officers could perform a search of it.

The Court will consider Defendant's depression as a mitigating factor because it may have had an influence on his decision to participate in these crimes. Furthermore, Defendant's current struggles with depression suggest a genuine attempt by Defendant to come to terms with his actions.

D. The Lack of Social Skills

To the extent this mitigator is intended to reflect the Defendant's immaturity and inability to use common sense in decision making and in particular as it related to his interaction with friends, the Court finds these factors have been established. However, the record does reflect that Defendant had friends, had developed a long

term relationship with a woman and appeared to be socially interactive with his group of associates. So, while the Court finds it is fair to consider this as a mitigator, its effect is minimal.

E. Attention Deficit Hyperactivity Disorder (ADHD), which was undiagnosed and largely untreated

Dr. Dougherty also testified that Defendant suffers from the impulsive type of Attention Deficit Hyperactive Disorder. Dr. Dougherty is a well-respected psychologist whose opinions were the product of extensive testing of the Defendant and interviews during an eight hour period. His report and testimony set forth the bases for the opinion and nothing has been presented by the State to significantly undermine that opinion. As such, it will be accepted by the Court as an appropriate mitigator.

F. The Lack of a Criminal Record

The parties stipulated that Defendant had no prior criminal record. Defendant's lack of a criminal record indicates that his involvement in these crimes was anomalous. The fact that the Defendant has been a law-abiding citizen in the past is an appropriate mitigating factor.

G. The Youthful Age of Defendant

Defendant was twenty-three years old when he assisted in the murder of Ms. Holton. While he had graduated from high school, spent some time in the work force

and even entered the Air Force, he had not matured into a responsible nor particularly productive citizen. The Defendant's immature personality and young age are appropriate mitigators to consider.

H. Defendant's Lack of Significant Disciplinarian Record

The defense presented evidence that Defendant did not have a serious or significant record of disciplinary infractions while incarcerated. The lack of such a significant record indicates that Defendant's involvement in this crime was a departure from his normal, lawful and socially acceptable path in life. Therefore, the aberrant nature of Defendant's participation in this crime is a valid mitigating factor for consideration in determining Defendant's penalty.

I. The Acceptance of Responsibility

Defendant admitted responsibility for this crime in his allocution and saying:

I can't say I'm sorry and address words, because there are no words to say I'm sorry, but just to say I am sorry. I wished I could sit there and take back what happened. I wished I did try more. I wished she still was alive I cannot ask for your forgiveness because something was taken away that was dear to you I'm sorry, I really am; and I know that does not make up for what happened. It's really nothing words can explain, and there's nothing I can really say to justify your grief.

J. Remorse

As evidenced from his allocution, Defendant has true remorse for the crimes he committed and the consequences of those crimes. The following is a portion of

Defendant's allocution:

I apologize to a [sic] friends of the family that are sitting here in the courtroom today. I know it does not make up for the actions that was on my part. Especially to her brother, her mom, and aunt that are sitting out there right now, and anybody else that I may have missed because I don't know everybody that's out there right now, and I know that you guys want to see justice done. Justice has been done All I can say is I am sorry, I really am; and I know that does not make up for what happened.

K. Defendant Suffers from an Immature Personality

On this point Dr. Dougherty stated, in response to the question of whether the Defendant has an immature personality, the following:

Well, repeatedly throughout the personality inventory, the Basic Personality Inventory and the other tests I gave, Manson information which measures personality factors, the information when you gleaned – when you talk to him, he's extremely immature. Basically, emotional immaturity is very evident, more like adolescent, like he's stuck as an adolescent.

The Court recognizes the immaturity that one demonstrates when he chooses to participate in a plan to murder a young girl in order to help a friend deal with an interpersonal conflict. Obviously, Defendant's judgment was horribly tainted when he made this life-changing decision and it is conceivable that his immaturity played an influential role in this decision.

L. Defendant, Notwithstanding his Upbringing, Has a Supportive Family

Anne Fisher, Defendant's maternal grandmother, testified that she would visit

Defendant "all the time" if she had the opportunity and encourage him to take classes,

keep his faith and try to improve himself while incarcerated. Similarly, Defendant's mother testified that she would continue to visit and support Defendant as she had since his arrest.

M. Defendant's Tendency to Perpetuate Shallow Emotional Relationships

The Court finds this claimed mitigator is again simply another way of expressing the Defendant's immaturity and feelings of inadequacy that have been accepted by the Court.

N. Defendant Has a General Feeling of Inadequacy

Throughout the penalty phase, the defense attempted to present evidence that Defendant suffered from a lack of confidence and a sense of social ineptitude which played a role in his decision to participate in the plan to murder Holton and dispose of her body. Testimony regarding his childhood and teenager years did reveal some justification for Defendant to have feelings of inadequacy.

O. Defendant Has Undue Concern over His Health

The defense suggests that Defendant is preoccupied by concern for his health and was forced to leave the Air Force as a result of such illness. However, aside from the episode which precipitated his discharge, the evidence presented regarding his health concerns is minimal.

P. Defendant Has a Tendency to be Paranoid

The defense's expert, Dr. Dougherty, testified that, like many prison inmates Defendant is a little paranoid, but that in his professional opinion, Defendant does not suffer from chronic paranoia. As such, while the evidence suggests "some" paranoia, it is not a significant mitigating factor.

Q. Defendant Does Not Exhibit Traits Traditionally Associated with Possessing Either a Serious Character or Personality Disorder

Dr. Dougherty's opinion has been accepted by the Court and this is again simply another way of expressing the same issues previously discussed.

R. Defendant Tends to be a Follower Rather Than a Leader

The family of the Defendant, his teachers at Polytech as well as Dr. Dougherty all support the argument that the Defendant had minimal leadership skills and was basically a follower. This is further evidenced by his mindless following of Jacob Jones' plan to kill the victim without having the good sense to walk away and reject his friend's request for assistance.

S. Defendant Enlisted and Sought to Serve in the United States Air Force

There is no dispute that Defendant enlisted in the U.S. Air Force and was medically discharged after getting pneumonia in basic training. The only possible relevance of this action is that it perhaps evidences the first steps in Defendant's

attempt to take responsibility for his life and to develop an honorable career. To the extent this is evidence of some new found maturity, it will be considered a positive step regarding Defendant's character.

T. Defendant is Not a Danger to Himself or Others within a Prison Setting

Despite, Dr. Dougherty's testimony that Defendant is chronically depressed, the defense contends that the Defendant is not a danger to himself or others within the prison setting. In support of their position, they point out that, aside from one reported episode in which Defendant refused to vacate his cell and had to be physically removed by officers, attempting to conduct a routine search, there is no evidence that Defendant is a threat.

The Court agrees that his prison record reflects very few disciplinary infractions and that the Defendant has adjusted well in the prison environment. However, the Defendant did attempt to commit suicide while in prison, and particularly if not property medicated, may continue to be a danger to himself. Whether he poses a danger to others around him is unclear at this point. If Defendant is willing to harm himself and even attempt suicide, it is certainly conceivable that he would have little respect for the welfare of others. However, at the moment the Court must agree the disciplinary infractions do not reflect an attitude that is dangerous to others.

U. Mercy

The Court acknowledges that the Defendant has requested the Court to be merciful and has requested forgiveness.

In his allocution, Defendant plead with the jury and the Court to spare his life, saying:

I cannot ask for your forgiveness because something was taken away that was dear to you. I cannot ask you to forgive me or ask the jury to sit here and to take pity on my childhood or me. I cannot ask that.

All I can ask is that you will still consider me a human being despite everything. And hopefully some day, with your blessing, I can make up for my actions in some way, or maybe change somebody's life for the better. All I can say is I am sorry, I really am; and I know that does not make up for what happened. It's really nothing words can explain, and there's nothing I can really say to justify your grief.

V. Defendant's Motion for Judgment of Acquittal Challenge to 11 *Del. C.* § 4209(c)(3)(a)(2)

In his motion for judgment of acquittal Defendant also argues that the Delaware death penalty statute violates due process and the Sixth Amendment. He contends that a portion of 11 *Del. C.* § 4209(c)(3)(a)(2), which governs part of the jury's determination, should utilize the "reasonable doubt" standard rather than the less stringent "preponderance" standard. The provision at issue states that the jury shall retire to deliberate and answer the following question "[w]hether, *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, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist."¹⁰ Defendant's claim that 11 *Del. C.* § 4209(c)(3)(a)(2) violates the due process clause and the Sixth Amendment fails.

The standard set forth in 11 *Del. C.* § 4209(c)(3)(a)(2) is appropriate because the determination it governs does not have the potential to increase the maximum penalty to which Defendant may be subjected.¹¹ As a result, the jury need not apply the stricter "reasonable doubt" standard in this phase of its fact-finding duty. In addition, the Delaware Supreme Court has recently examined the death penalty statute and concluded that its hybrid form of sentencing satisfies the Sixth Amendment and is not constitutionally defective.¹² Consequently, Defendant's final ground for acquittal fails.

VI. Conclusion

The Court finds this sentence to be particularly difficult. The murder here was a senseless killing of a young woman for the simple purpose of resolving the

¹⁰11 *Del. C.* § 4209(c)(3)(a)(2)(emphasis added).

¹¹Brice v. State, 815 A.2d 314, 322 (Del. 2003).

¹²Ortiz v. State, 869 A.2d 285, 305 (Del. 2005).

turbulence created by her interaction and relationship with the family of Jacob Jones' girlfriend. Neither the Court or society will ever find justification for the actions of Jacob Jones or the assistance provided to him by the Defendant. On the other side, Mr. Keyser's life to this point has been free of legal trouble and appeared to have made a turn for the better. He reconciled with his father and had formed a relationship with a stable young woman who appears to have loved him. There was simply no way of predicting that he would have made the horrible decision to help Jacob Jones.

In making my decision, I start from the premise that Kimberly Holton was truly a victim here, basically abandoned by her mother and sent to live with her grandparents in Dover and when that did not work out to be taken in by an unrelated foster family. Unfortunately this was not the ideal family unit for her either, and one is left with the impression that this young girl had been basically left to grow and defend for herself with occasional help from friends and neighbors. It was a tragic situation that no child should ever be exposed to and one has to wonder whether Kimberly would still be alive today if her family had exhibited the same love and affection during her lifetime that they expressed after her death. Unfortunately, it is because of Kimberly's personal situation that Jacob Jones and the Defendant believed they could get away with this murder. For who would have second guessed the logical conclusion that Kimberly had finally had enough and simply had decided to

disappear as a runaway. If not for the discovery of Kimberly's body, the Defendant and Mr. Jones would have gotten away with the perfect murder. Few would have cared that she was missing, and time would have diminished the effort to find her.

But we know the body was found, and the Court has no question that Kimberly was killed by Jacob Jones and then he dumped her body in the middle of the night in the Atlantic Ocean from the plane that he piloted. This was a horrible crime, masterminded by Jacob Jones, to solve a problem he wanted to eliminate in the life of his girlfriend. If he had not cowardly taken his own life and was standing now before the Court, I am confident the death penalty for him would be appropriate. It is unfortunate that his death has left Mr. Keyser to stand alone as the only person the community can now hold accountable for this senseless killing.

But Jacob Jones is not before me, Mr. Keyser is, and it is his conduct and his role that I must judge. Even after listening to weeks of testimony, it is difficult to understand what motivated Mr. Keyser to participate in this killing. Kimberly's conduct and her interaction with her surrogate family had no effect on his life, and he knew little about her or her situation other than what he may have learned from Jacob Jones or his friends. It appears that Jacob Jones had only one problem with his plan to kill Kimberly. He knew that she would probably not go to the hotel room with him alone so he needed someone to help him lure the victim to the place of her killing.

Mr. Keyser was his solution to this problem, and he played upon their friendship to convince the Defendant to participate.

At some point, Mr. Keyser turned from simply being a conduit to achieve Jacob Jones' plan to being a participant. He convinced Kimberly to go with him, knowing it was Jones' intent to kill her at the hotel. After satisfying his own sexual needs and desires, he held her down and Jones suffocated her. He then helped wrap her up in a blanket and assisted in putting her in Jones' car. While there is nothing to suggest he was in the plane when the body was dumped in the ocean, it does appear on the following day he assisted Jones with this effort.

While the Court is outraged by the actions of Defendant, it is equally convinced that but for the request of his good friend, Mr. Keyser would never have participated in this conduct. While his young adult life has not been particularly productive, there is nothing to suggest he would ever have contemplated such conduct. This is a case where Mr. Keyser's immaturity and unquestionable loyalty to a friend lead him to do an unthinkable act inconsistent with and out of character of his previous conduct. This immaturity has continued to be reflected in the decisions and comments made by Mr. Keyser, even since he was charged with these crimes. He has now attempted to blame the attorneys for his conviction when it was his own statements to the police that sealed his fate early in the case. In addition, this

immaturity and his inability to make rational decisions was evident in his refusing to accept the State's plea offer to a reduced charge which would have significantly limited his time in jail. Clearly Mr. Keyser has difficulty making the correct, logical, common sense choices in life.

The Court is mindful of the jury's vote and has given it significant weight. However, the Court also believes that the jury's decision may perhaps simply reflect the outrage that each member had for what happened to Kimberly, a senseless, brutal and unjustified murder, and because of Jacob Jones' suicide, Mr. Keyser is the only person they now can hold accountable and express their community's outrage. The Court agrees with this assessment by the jury since Kimberly did not deserve to die. However, the Court also must weigh all the factors presented and must consider Defendant's role and his conduct in this case in deciding whether the Defendant lives or dies. In the Court's review, it believes a different result is mandated for Mr. Keyser than the Court would have given to Mr. Jones. The Court wants Mr. Keyser to remember every day of the remainder of his life that he is in jail because he had the opportunity to save the life of another human being and failed to do the right thing. Mr. Keyser made a wrong decision, but he is not a horrible, despicable and violent human being to whom society would be better served by executing.

It is the Court's finding 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 present in this case

do not outweigh the mitigating circumstances present. Accordingly, the Court

concludes that as to Count I, Murder in the First Degree, the Defendant shall be

imprisoned for the remainder of his natural life without the benefit of probation,

parole or any other reduction in sentence. As to Count II, Conspiracy First Degree,

the Defendant is sentenced to five years at Level 5. The sentences are effective on

October 27, 2003, the date of the Defendant's arrest for these offenses.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.

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