IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)
	)
v.	)
	)
ROBERT A. GATTIS,	)
(ID. No. 90004576DI)	)
	)
Defendant.	)

Submitted: July 7, 2010
Decided: March 22, 2011

Gregory E. Smith, Esq., Elizabeth R. McFarlan, Esq., Timothy J. Donovan, Esq., Department of Justice, Wilmington, Delaware. Attorneys for the State.

Stamatios Stamoulis, Esq., Richard C. Weinblatt, Esq., Stamoulis & Weinblatt, Wilmington, Delaware. Delaware Attorneys for Defendant. Leigh M. Skipper, Esq., Michael Wiseman, Esq., Helen A. Marino, Claudia Van Wyk, Esq., Andrew L. Harris, Esq., Federal Community Defender Office, Philadelphia, Pennsylvania. Attorneys admitted *Pro Hac Vice* for Defendant.

Upon Consideration of the Defendant's
Third Motion For Postconviction Relief
DENIED

VAUGHN, President Judge

State v. Robert A. Gattis
ID. No. 90004576DI
March 22, 2011

OPINION

Pending before the Court is the defendant's third motion for postconviction relief.

The case's procedural history is as follows: The Superior Court sentenced the defendant to death on October 29, 1992 after he was convicted at a jury trial of Murder in the First Degree, Burglary in the First Degree, Possession of a Deadly Weapon by a Person Prohibited and two counts of Possession of a Firearm During the Commission of a Felony.[1] In his direct appeal, the Delaware Supreme Court affirmed his conviction and sentence on February 24, 1994.[2] The United States Supreme Court denied the defendant's petition for certiorari.[3]

The defendant filed his first motion for postconviction relief in November 1994. The Superior Court denied that motion on August 24, 1995.[4] On appeal of that decision, the Delaware Supreme Court ordered a remand for evidentiary hearings. After completion of that process, the Delaware Supreme Court affirmed the denial of the first Rule 61 motion on July 10, 1996.[5] The United States Supreme Court denied the defendant's petition for certiorari.[6]

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[1] *State v. Gattis*, 1992 WL 358030 (Del. Super.).

[2] *Gattis v. State*, 637 A.2d 808 (Del. 1994).

[3] *Gattis v. Delaware*, 513 U.S. 843 (1994).

[4] *State v. Gattis*, 1995 WL 562254 (Del. Super.).

[5] *Gattis v. State*, 697 A.2d 1174 (Del. 1997).

[6] *Gattis v. Delaware*, 522 U.S. 1124 (1998).

The defendant then filed a petition for *writ of habeas corpus* in District Court for the District of Delaware in November 1997. The District Court denied the defendant's *habeas* petition on March 25, 1999.[7] The Third Circuit affirmed the District Court.[8] The United States Supreme Court denied the defendant's petition for certiorari on December 2, 2002.[9]

The defendant field a second motion for postconviction relief in April 2002. This Court denied that motion on November 28, 2005.[10] Following a remand in which a different Superior Court judge issued a report regarding the defendant's motion to disqualify the Superior Court judge who denied the second motion for postconviction relief, the Delaware Supreme Court affirmed the Superior Court's denial of the defendant's second motion for postconviction relief on July 24, 2008.[11] The United States Supreme Court denied the defendant's petition for certiorari on January 12, 2009.[12]

Next, the defendant applied to the Third Circuit for leave to file a successive petition for *writ of habeas corpus*. On May 28, 2009, the Third Circuit denied that

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[7] *Gattis v. Snyder*, 46 F.Supp. 344 (D. Del. 1999).

[8] *Gattis v. Snyder*, 278 F.3d 222 (3d Cir. 2002).

[9] *Gattis v. Snyder*, 537 U.S. 1049 (2002).

[10] *State v. Gattis*, 2005 WL 3276191 (Del. Super.).

[11] *Gattis v. State*, 955 A.2d 1276 (Del. 2008).

[12] *Gattis v. Delaware*, 129 S. Ct. 914 (2009).

application.[13] On May 21, 2009, the defendant filed a motion in District Court styled as a Rule 60(d) motion for relief from judgment. The District Court denied the defendant's motion as an unauthorized successive *habeas* petition on February 25, 2010.[14] The defendant appealed that February 2010 District Court order and filed an application for a certificate of appealability ("COA") in the Third Circuit. On October 6, 2010, the Third Circuit denied the defendant's application for a certificate of appealability. All federal litigation in which the defendant is involved is concluded.

On December 23, 2009, while his Rule 60(b) motion was pending in District Court, the defendant filed his third motion for postconviction relief in this Court.

FACTS

The facts as stated by the judge who presided at trial in his decision denying the defendant's first motion for postconviction relief, are as follows:

> The evidence presented at trial revealed the following sequence of events. Gattis and Shirley Slay had been in a boyfriend-girlfriend relationship for almost six years prior to her shooting death on May 9, 1990. The testimony of family and friends was that the relationship had been stormy and violent. Gattis himself testified that he was extremely jealous and possessive of the victim. On more than one occasion, his jealously expressed itself in physical violence. For example, in 1987, Gattis confronted the victim in a bar while she was talking to another man.

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[13] *In re Gattis*, No. 09-9002, Rendell J. (3d Cir. May 28, 2009).

[14] *Gattis v. Snyder*, C.A. No. 97-619, Mem. Op. Robinson, J (D. Del.).

Gattis threatened the victim with a loaded handgun, fired a shot into the floor and pistol-whipped the man. Gattis was prosecuted for this conduct and pleaded guilty to Assault Second Degree and Reckless Endangering First Degree. He received a sentence of five years of incarceration suspended for probation.

At one point in their relationship, Slay lived in an apartment in Wilmington to which Gattis had a key and where he occasionally spent the night. In April 1990, Slay moved to an apartment outside Wilmington, partly to avoid contact with Gattis. On the day of her death, Slay told her supervisor at work that she intended to terminate her relationship with Gattis that evening.

On May 9, Slay went to a softball game after she left work. Gattis appeared at the game and apparently persuaded a reluctant Slay to leave with him. They went to Slay's apartment where they argued about the reason that Gattis had not been able to reach Slay on the telephone the previous evening. Slay claimed that her telephone had not been operating, but Gattis arranged for a friend to call the apartment and, when the phone rang, he became enraged. He accused Slay of seeing another man, beat her and left the apartment. Slay called the police. While a police officer was present in the apartment, Gattis called several times. The officer spoke with Gattis, warning him to have no further contact with Slay and to stay away from her apartment.

Gattis returned to Slay's apartment later that evening after borrowing a friend's car, apparently to avoid detection by the police. He carried with him a loaded .38 caliber handgun. Outside the apartment, Gattis encountered a friend and neighbor of Slay, Lisa Watson, who urged Gattis

> to stop fighting with Slay. The neighbor then telephoned Slay to advise her that Gattis had returned. Watson then heard the sound of Slay's door being knocked in. As Watson ran out of her apartment and up a flight of stairs, she saw a flash and heard a gunshot. She then observed Gattis leaping down the stairs and exiting the apartment building. Slay died from a bullet that hit her directly between the eyes. The autopsy revealed that she was shot by a .38 caliber handgun from a distance of from 4 to 18 inches. Gattis surrendered to police the following day in the course of admitting himself to the Delaware State Hospital.
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> At trial, Gattis testified in his own defense. He claimed that the shooting of Shirley Slay was an accident which occurred when the gun discharged while he struggled with her to enter the apartment. The jury rejected this version of the events and found Gattis guilty of Murder First Degree as well as the burglary and the weapons offenses. After hearing evidence and argument in the penalty phase, the jury found by a vote of ten to two that the aggravating factors outweighed the mitigating factors. This Court subsequently heard additional argument from counsel and determined that the death sentence was appropriate for the intentional, premeditated and cold-blooded execution-style murder of Shirley Slay.[15]

DEFENDANT'S CONTENTIONS

The defendant's motion sets forth five contentions. The first two contentions rely in part upon evidence which was presented at trial and in part upon evidence

[15] *State v. Gattis*, 1995 WL 790961, at *1 (Del. Super.).

which the defendant contends was not presented at trial ("unpresented evidence").

The defendant first contends that his two trial counsel were ineffective in not thoroughly investigating and presenting an "extreme emotional distress" defense. In support of this contention, he contends that the central disputed question at trial was his state of mind; that the State's own evidence indicated his agitated emotional state; that he and the victim were involved in a stormy, unstable and at times violent relationship; that the couple frequently argued, sometimes because of jealousy; that each was jealous of the other, but he was more so; that they often argued because of this jealousy and sometimes these arguments escalated to physical confrontations; that he feared that the victim would leave him for another man; that he would become uncomfortable in the relationship, and they would break up for a while, only to get back together again; that she moved to her new apartment to get away from him; that in the weeks preceding the victim's death, it appeared that he and the victim were arguing more; that on the day of her death, the victim told her friend that she was going to end the relationship, again, that evening; that it appeared that the victim was avoiding the defendant, and he could not reach her by phone; that he drove around looking for her; that on the day of the crime he continued unsuccessfully to try to contact and speak with the victim; that he was drinking alcohol that day; that when the defendant finally made contact with the victim that day, she put him off, saying they would talk later; that he later located her at a softball game; that after they spoke there, the defendant went to a friend's house and drank more alcohol; that he then picked the victim up at the softball game and drove her back to her apartment; that they argued; that he became convinced she had been with another man, and became

jealous and struck her and left; that he later called the apartment while a policeman was there, and after the policeman told the defendant by phone to stay away, he thought the policeman was a boyfriend; that he became "real mad" and "just going off," upset and angry; that he was acting crazy; that when the defendant went back to the apartment, he took his gun because he thought she might be with a man who might become confrontational; that the victim would not open the door; that her refusal further aroused his suspicions that another man was in there; that when he heard the phone ring and the victim say "Robert is here and I don't know what he is going to do," the defendant kicked in the door and the shooting occurred; that the defendant's memory of the seconds surrounding the shooting was less than sharp; that the defendant was scared and ran away; that he did not think he had shot the victim; that he was not thinking straight; that he called a friend, then decided not to talk to him "because I didn't know what happened;" that he told another friend when asked what happened, "I don't really know," "I could have" or "I think I have," and "Maybe I did. I don't know;" that after being shown a newspaper article about the shooting, his eyes filled with tears and he began to rock and bite his hand, as he sometimes did when he was upset, and said to a friend "I think I shot Shirley;" that after hearing a news broadcast about the killing, he told a friend "I was p----d off, I was mad and lost it"; that he told the friend he wanted to kill himself; that the friend convinced him to allow him to take him to Delaware State Hospital; and that the trial evidence abounded with "red flags" signaling his actions were influenced by severe mental illness.

He further contends that substantial evidence never presented at trial

("unpresented evidence") existed which showed that he was a witness to and victim of extreme and pervasive intra-familial violence, sexual misconduct and sexual abuse as a child and teenager; that this evidence is documented in detail in numerous declarations from relatives and others who were familiar with the defendant and the violence, sexual misconduct and sexual abuse. He further contends that Dr. Richard G. Dudley, Jr., after reviewing the declarations and speaking with the defendant over a period of time, concluded that he is a severely impaired individual whose illnesses are consistent with his history of sexual and physical abuse and parental neglect and abandonment; that Dr. Dudley concludes further that, at the time of the offense, the defendant was under the influence of extreme emotional distress; and that Dr. Dudley explains that a valid guilt phase defense would have resulted from the investigation and presentation of the defendant's mental health evidence in ths case. He further contends that Drs. Cooke and Sadoff, who were trial counsel's experts, agree with Dr. Dudley, and would have so testified at the time of trial had the unpresented evidence been provided to them. He further contends that Dr. Stephen Michael Mechanick, a defense psychiatrist who evaluated the defendant prior to trial, also concludes that the newly discovered life history information presents a "far more clinically significant and comprehensive view of Mr. Gattis' background, upbringing and mental health impairments than I was aware of at the time of my examination;" and that as a result of that information and his opinions about the defendant's mental disorders, he would have explored whether the defendant was under the influence of extreme emotional distress at the time of the offense, as both a guilt phase and penalty phase defense. The defendant further contends that trial counsel has a fundamental duty to conduct

a thorough examination, especially in a capital murder case; that trial counsel's failure to properly investigate a diminished capacity defense based on a history of mental impairment is ineffective; that in the absence of such a thorough investigation, strategic choices such as were made in the defendant's case are not reasonable ones; that trial counsel failed in their duty in this case; that Joseph M. Bernstein, Esquire, the trial lawyer who was responsible for investigating and presenting relevant aspects of the defendant's background and functioning recognizes his shortcomings. He further contends that Mr. Bernstein admits that trial counsel did not explore or try to develop an "extreme emotional distress" defense; that trial counsel conducted only a very limited lay witness investigation regarding the defendant's life history; that "the Delaware capital defense bar was behind the curve at the time of Mr. Gattis' trial"; that he and co-counsel "represented Mr. Gattis without any formal training on how to defend a capital defendant"; that "I have since learned, with experience and from working with seasoned capital defense attorneys, that the manner in which we handled capital cases at the time of Mr. Gattis' trial was inadequate."[16]

The defendant's second contention is that trial counsel's failure to investigate and present readily available mitigating evidence deprived the defendant of the effective assistance of counsel and a fair and reliable capital sentencing proceeding. This contention is based upon substantially the same unpresented evidence as is summarized above, with the opinions of the medical experts being expanded more fully into mitigation areas.[17] This contention is supported by the affidavit of Mr.

[16] Def.'s Mot. at 24-65.

[17] *Id.*

Bernstein,[18] and the affidavit of Kevin O'Connell,[19] who represented the defendant in his two previous Rule 61 postconviction proceedings.

The defendant's third contention is that hearsay statements of the victim were admitted in violation of the hearsay rule, the defendant's right to confront the witnesses against him, and his right to the effective assistance of counsel. In support of this contention, the defendant contends that throughout the trial, witnesses repeatedly testified that the victim told them about previous conflicts and altercations between the defendant and the victim; that the State relied heavily on testimony from family, friends, and police officers about moving – but unreliable – words from the victim's own mouth in support of a conviction and death sentence; that this evidence was admitted without challenge from the defendant's trial counsel; that although many of the victim's statements were inadmissible hearsay, the trial court admitted them on relevance grounds without analyzing whether they violated the rule against hearsay; that the introduction of these statements violated not only the Delaware Rules of Evidence, but the defendant's Sixth Amendment right to confront the witnesses against him; that trial counsel could have objected to the statements on confrontational grounds but failed to do so; that trial counsel made only a single pretrial hearsay objection, which was inadequate, and failed to pursue it; that trial counsel did not make hearsay or confrontational challenges to any of the statements on direct appeal; that the statement's were testimonial statements whose admission

[18] *Id.* at 52-3 & 92-3.

[19] *Id.* at 18-9, 23 & 93.

violated the confrontation clause as construed in *Crawford v. Washington*;[20] that the trial judge made an erroneous pretrial ruling that many statements inadmissible under the Delaware Rules of Evidence would be admitted; that the victim's historical hearsay statements to lay witnesses crowded the trial record, and included statements about the altercation with the defendant early in the evening of the shooting, that scratches on her face were from a fight with the defendant, that she was afraid because once, years before, the defendant tried to scare her with a gun and threatened to pull the trigger, that she and the defendant had "got into an argument and he cut me on my leg," that "he was hitting her," and that the defendant followed her when she moved, that they got into frequent verbal and physical fights, and other statements describing the reasons he was angry with her; that none of such statements were supported by any exception to the hearsay rule; that the State relied heavily in the trial on the evidence of the prior assaults, including those recounted to the lay witnesses, and did so again in the penalty phase; that equally voluminous hearsay statements of the victim to police were introduced; that inadmissible statements the victim made to the police were erroneously admitted at trial, including statements that the defendant had assaulted her earlier on the night she was killed, more statements describing that altercation, a statement describing an incident of violence at the American Legion Club, and a statement essentially accusing the defendant of breaking into her apartment; that the statements just mentioned also violated the defendant's right to confrontation; that trial counsel's failure to make appropriate objections and arguments, at trial or on appeal, deprived the defendant of effective assistance of

[20] 541 U.S. 36 (2004).

counsel; that there is a reasonable probability that if appellate counsel had sought relief from the admission of the victim's inadmissible statements that the appellate court would have ordered a new trial; that *Crawford* should apply retroactively; and that the Delaware Supreme Court's failure to apply *Crawford* retroactively is a miscarriage of justice in this case.[21]

The defendant's fourth contention is that the trial court deprived the defendant of due process of law and his sixth amendment right to a jury trial by failing to instruct the jury on the statutory "remote causation" standard, an element of the crime, and trial counsel provided ineffective assistance by failing to request such an instruction or object to its absence. In support of this contention, the defendant contends that the defense at trial was that the victim's death happened unexpectedly and fortuitously in the course of an emotional argument; that the defense counsel argued at trial that the jury should find the defendant not guilty of murder in the first degree, and, if it did not acquit him outright, should find him guilty of lesser included homicide offenses involving reckless or negligent conduct; that the trial court was required to instruct the jury that causation was established only if the actual result is "not too remote or accidental in its occurrence to have a bearing on the actor's liability or on the gravity of the offense;" that defense trial counsel failed to request such an instruction or object to its absence even though such an instruction dovetailed with counsel's own defense strategy; that neither the instruction on accident nor the instructions on the mental state required for each charge could substitute for a remote causation instruction; that where the facts present a "remote causation" issue, a failure

[21] *Id.* at 95-116.

to instruct the jury on the statutory standard is plain error; that failure to instruct the jury on "remote causation" was a failure to instruct the jury on all elements of the offense; that the trial court's complete omission of any "remote causation" instruction deprived the defendant of due process; that trial counsel's failure to request a "remote causation" instruction or object to its omission deprived the defendant of effective assistance of counsel; that there is a reasonable probability that if the jury had been instructed properly it would have acquitted the defendant or found him guilty of a lesser included offense; that the failure rendered the result of the trial constitutionally unreliable; and that counsel's ineffectiveness resulted in a miscarriage of justice under Rule 61(i)(5).[22]

The defendant's fifth and final contention is that he is innocent of the felony murder aggravating factor, and his jury was improperly instructed; that the Delaware Supreme Court has held that the felony murder statute requires not only that the murder occur "during the course of the felony but also that the murder occur to facilitate commission of the felony;" that the Delaware Supreme Court has held that this rule is retroactive; that under the State's theory of the case, the shooting did not occur to facilitate commission of the felony; that the defendant's felony murder aggravating factor should be stricken and the resulting death sentence vacated in accordance with Delaware authority and federal due process principles; that the defendant's jury was inadequately instructed, since the jury instruction failed to

[22] *Id.* at 116-26.

explain, in accordance with *Williams v. State*[23] and *Chao v. State*[24], that the death must be a consequence of the underlying felony of burglary; and that allowing the death sentence to stand under these circumstances would be a constitutional violation resulting in a miscarriage of justice that would undermine the fundamental legality, reliability, integrity or fairness of the proceedings.[25]

The relief requested by the defendant is that the Court permit such discovery as may be necessary to assist the defendant in proving the truth of his allegations; that evidentiary hearings be conducted with respect to all material disputed facts related to both the merits of his claims and any issues with respect to waiver of claims, defaults of claims or timeliness of claims and his current motion; that appropriate briefing and argument be held with respect to the just mentioned requests as well as regarding whether the defendant is entitled to relief; and that the Court vacate the defendant's judgments of conviction and sentences, including his death sentence.

PROCEDURAL BARS

I will first address the procedural requirements of Superior Court Criminal Rule 61, specifically the Bars to Relief. In order for this Court to consider a motion for postconviction relief, a petitioner must overcome the substantial procedural roadblocks contained within Rule 61(i).[26] There are four:

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[23] 818 A.2d 906 (Del. 2003).

[24] 931 A.2d 1000 (Del. 2007).

[25] *Id.* at 126-7.

[26] *Bailey v. State*, 588 A.2d 1121, 1127 (Del. Super. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)); *State v. Rosa*, 1992 WL

SET FORTH THE RULE

> (i) *Bars to relief.* (1) Time limitation. A motion for postconviction relief may not be filed more than [three years] after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than [three years] after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.[27]
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> (2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.
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> (3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgement of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows
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> (A) Cause for relief from procedural default and
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> (B) Prejudice from violation of the movant's rights.
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> (4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus

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302295, *3 (Del. Super. 1992); *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

[27] A subsequent amendment to Rule 61(i)(1) has reduced the three year period to one year.

> proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.
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> (5) Bars inapplicable. The bars to relief in paragraph (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

DISCUSSION

Rule 61(i)(1) provides that a motion for postconviction relief must be brought, in this defendant's case, within three years after the judgment of conviction is final, or, with respect to a retroactively applicable right that is newly recognized after the judgment of acquittal is final, within three years after the right is first recognized.[28]

I find that the defendant's first contention regarding "extreme emotional distress," his second contention regarding mitigation evidence, his third contention regarding victim's statements, and his fourth contention, regarding a "remote causation" instruction, are all time barred under Rule 61(i)(1), unless the time bar is not applicable under Rule 61(i)(5). Therefore, I will now address Rule 61(i)(5).

The procedural bars are not absolute.[29] Under Rule 61(i)(5) a defendant may overcome a procedural bar when the Court is faced with "a colorable claim '[not previously adjudicated]' that there was a miscarriage of justice because of a

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[28] *Bailey*, 588 A.2d at 1127.

[29] *Id.* at 1125 (citing *Boyer v. State*, 562 A.2d 1186, 1188 (Del. 1989)).

constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."[30] This is known as the fundamental fairness exception.

A defendant who summarily proclaims that there has been a miscarriage of justice, however, does not immediately create a judicial duty to laboriously investigate the original proceeding. Quite to the contrary, a Court must first determine whether the defendant can substantiate the existence of a constitutional violation,[31] and then determine whether the violation undermined the fundamental fairness of the original proceeding.[32] Plainly stated, the petitioner has the burden of proof and must show that he was deprived of a substantial constitutional right.[33] The petitioner does not have the burden to conclusively prove trial error, but the contention must be more than mere speculation that there has been a constitutional violation.[34] And, furthermore, conclusory allegations are insufficient for the purpose of establishing a colorable claim under Rule 61(i)(5).

Once the defendant has established a colorable claim of a constitutional violation, the focus shifts to whether there has been a miscarriage of justice. Not

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[30] *Id.*; (citing Super. Ct. Crim. R. 61(i)(5)).

[31] *State v. Getz*, 1994 WL 465543, at *11 (Del. Super. 1994).

[32] The Delaware Supreme Court has, on several occasions, gone to great lengths to underscore that the terms "interest of justice" and "miscarriage of justice" have two distinct meanings. *State v. Condon*, 2003 WL 1364619, *2 (Del. Super. 2003).

[33] *Bailey*, 588 A.2d at 1130 (citing *Younger v. State*, 580 A.2d 552, 555 (Del. 1990)); *Condon*, 2003 WL at *3.

[34] *Getz*, 1994 WL at *11.

every constitutional violation results in a miscarriage of justice, so as to warrant relief under Rule 61(i)(5).[35] In fact, the exception embodied within Rule 61(i)(5) has historically been very narrowly construed, and only applicable in limited circumstances.[36] When dealing with a jury instruction, found to be constitutionally defective, this Court in *State v. Rosa* stated that the test for miscarriage of justice consisted of determining whether there was "a reasonable probability that a constitutionally defective jury instruction affect[ed] the outcome of the jury decision."[37] If the petitioner can establish a reasonable probability that the outcome was tainted, then the constitutional violation has undermined the fundamental fairness of the proceeding,[38] and the conviction must be set aside. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[39]

Extreme Emotional Distress Defense

The defendant contends that his trial counsel were ineffective in not thoroughly investigating and presenting an "extreme emotional distress" defense.

To succeed on a claim of ineffective assistance of counsel, the defendant must

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[35] *Rosa*, 1992 WL at *7.

[36] *Younger*, 580 A.2d at 555 (citing *Teague v. Lane*, 489 U.S. 288, 297-99 (1989)); *see also Nasir v. State*, 1991 WL 78453, *2 (Del. 1991)(ORDER).

[37] *Rosa*, 1992 WL at *8.

[38] *Id.*

[39] *Atkinson v. State*, 778 A.2d 1058, 1063 (Del. 2001) (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

engage in the two-part analysis enunciated in *Strickland v. Washington*.[40] He must show first that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness; and, second, that there is a reasonable degree of probability that but for counsel's unprofessional errors the outcome of the proceedings would have been different.[41]

The defense of "extreme emotional distress" is one which may apply where the defendant intentionally causes the death of another.[42] If the defense is established by the defendant by a preponderance of the evidence, the crime of murder in the first degree is reduced to manslaughter.[43]

As the statute existed at the time of the defendant's offense, in addition to proving by a preponderance of the evidence that he acted under the influence of "extreme emotional distress," the defendant must "prove by a preponderance of the evidence ... a reasonable explanation or excuse for the existence of extreme emotional distress ... The reasonableness of the explanation ... shall be determined from the viewpoint of a reasonable person in the accused's situation under the circumstances as he believed them to be."[44]

The defendant contends that the decision to pursue an accident defense instead

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[40] 466 U.S. 668 (1984).

[41] *Id.* at 687; *see also Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003); *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

[42] 11 *Del. C.* § 641.

[43] *Id.*

[44] *Id.*

of an extreme emotional distress defense was ineffective assistance of counsel. A defense attorney's strategic decision to advance one theory of a case, however, does not equate to ineffective assistance of counsel.[45] As a very practical matter, a defense attorney cannot effectively argue every possible defense. Some defenses are incompatible and would jeopardize credibility, among other pitfalls. If trial counsel for a defendant was constitutionally mandated to pursue every conceivable defense, "[c]riminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense."[46]

This Court does not determine the effectiveness of a trial strategy based on the case's outcome.[47] This logic would vitiate the well-settled presumption that trial counsel was effective,[48] and make every case excessively vulnerable on appeal.[49] Although defense counsel's strategy, in retrospect, was unsuccessful, it is not proper for this Court to grant relief, under Rule 61(i)(5), based solely on the outcome. Such

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[45] *Strickland*, 466 U.S. at 688-89 ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant.").

[46] *Strickland*, 466 U.S. at 689.

[47] *State v. Wright*, 653 A.2d 288, 297 (Del. 1994); *Lockhart v. Fretwell*, 113 S.Ct. 364, 842 (1993)("An analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.").

[48] *Wright*, 653 A.2d at 297; *see also Strickland*, 466 U.S. at 689 (stating that the moving party failed to "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."); *Michael v. Louisiana*, 350 U.S. 91, 101 (1955)(stating that a court must indulge a strong presumption that trial counsel's conduct falls within the range of prevailing professional norms.").

[49] *Strickland*, 466 U.S. at 689.

an analysis – focusing only on the outcome – without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.[50] Trial counsel should only be evaluated from his perspective at the time he presented the defense.[51] Thus, the decision to forego one possible defense in favor of another is not ineffective assistance of counsel; as long as, the Court finds that defense counsel made a reasonable strategic decision.

In *Strickland*, the United States Supreme Court upheld a defendant's trial counsel's decision not to present evidence concerning defendant's character and emotional state.[52] The standard for each attorney's performance is that of reasonably effective assistance,[53] and all advice should be within the range of prevailing professional norms.[54] Courts should always be highly deferential when assessing a trial counsel's representation, in fact, a court should do everything in its power to eliminate the distorting effects of hindsight.[55] A professionally unreasonable error does not by itself justify setting aside the judgment, but must additionally be prejudicial to the defense.[56] Therefore, the defendant must show that there is a

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[50] *Lockhart*, 113 S.Ct. at 842.

[51] *Strickland*, 466 U.S. at 698.

[52] *Id.* at 689.

[53] *Id.* at 687.

[54] *Cuyler*, 446 U.S. at 344.

[55] *Strickland*, 466 U.S. at 689.

[56] *Id.* at 692.

"reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[57]

If defense counsel had both investigated and presented an "extreme emotional distress" defense at the defendant's trial, it would seem to follow that counsel would either have abandoned the accident defense and, thus, the defendant's explanation of how the shooting occurred, or counsel would have presented both "extreme emotional distress" and accident, which are inconsistent defenses. In either event, there were significant facts which were inconsistent with "extreme emotional distress." Before the shooting, the defendant borrowed a friend's car, apparently to avoid detection by the police. He retrieved and carried with him a loaded .38 caliber handgun. He thus had opportunity to contemplate and reflect upon his conduct. After the shooting he fled the scene and made his way to the bed of another girlfriend, Wanda Scrivens, where he spent the night.

The defendant has not cited any case in which defense counsel were deemed ineffective for pursuing the defense which flowed from a competent defendant's own account of how the event occurred, and not pursuing some other defense. All of the cases which the defendant cites are distinguishable. *Williams v. Taylor*,[58] *Wiggins*

[57] *Id.* at 694.

[58] 529 U.S. 362 (2000).

v. Smith,[59] *Rompilla v. Beard,*[60] *Outten v. State,*[61] *Outten v. Kearney,*[62] *Flamer v. State,*[63] *Steckel v. State,*[64] *Zebroski v. State*[65] all involve claims of ineffective assistance of counsel in connection with mitigation evidence at penalty hearings or other issues not relevant to this case. In *Jacobs v. Horn* the claim was that defense counsel failed to prepare adequately the defense which was presented to the jury, in that case diminished capacity.[66] *Nealy v. Cabana* was similar to *Jacobs* in that the claim was that defense counsel failed to call witnesses who would have supported the defense which was presented to the jury.[67] In *United States v. Kaufman* the claim was that defense counsel advised his client to take a plea agreement and plead guilty, which he did, without counsel's conducting any investigation into an insanity defense, despite counsel's having a letter from a psychiatrist which stated that the defendant was manic and psychotic at the time of the alleged offenses.[68] The

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[59] 539 U.S. 510 (2003).

[60] 545 U.S. 374 (2004).

[61] 720 A.2d 547 (Del. 1998).

[62] 464 F.3d 401 (3d Cir. 2006).

[63] 585 A.2d 736 (Del. 1990).

[64] 882 A.2d 168 (Del. 2005).

[65] 822 A.2d 1038 (Del. 2003).

[66] 395 F.3d 92, 107 (3d Cir. 2005).

[67] 764 F.2d 1173, 1177 (5th Cir. 1985).

[68] *United States v. Kauffman*, 109 F.3d 186, 190 (3d Cir. 1997).

defendant had been released from a state mental hospital just a few days before committing the alleged offenses. In *Williamson v. Ward* a defendant who had a history of mental problems was charged with capital murder.[69] After initially denying involvement in the murder, he eventually gave a statement to police in which he stated that he had a dream in which he committed the murder. Meanwhile, another person confessed to the crime in a videotaped statement to police. The court held that defense counsel failed to investigate adequately the defendant's competency to stand trial or an insanity defense, and failed to investigate adequately how he might put before the jury that someone else had confessed to the crime.[70] The record contained some statements attributed to defense counsel which give one a sense of the context in which defense decisions were made, such as, "Judge, I've got to make a living. I can't spend all my time on this case."[71] The defense that was presented, if any, is unclear. None of these cases are sufficiently analogous to be of any help to the defendant apart from setting forth general principles.

After considering the evidence presented at trial and the defendant's now proffered evidence of "extreme emotional distress," I conclude that the defendant cannot establish that trial counsel's alleged unprofessional errors affected the outcome of the trial. I therefore conclude that the defendant has not established a miscarriage of justice due to a violation of his constitutional right to counsel under

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[69] 110 F.3d 1508 (10th Cir. 1997).

[70] *Id.* at 1514.

[71] *Id.* at 1512.

Strickland. Nor can he establish any defects in the fundamental legality, reliability, integrity or fairness of the proceedings. Consequently, he has not overcome the time bar of Rule 61(i)(1) because he cannot establish that the bar is inapplicable under Rule 61(i)(5).

Mitigation Evidence

At the penalty phase, the defense offered the following mitigating factors:

1. The defendant's diagnosis of Intermittent Explosive Disorder and Episodic Discontrol Syndrome;

2. The defendant's obsessive and possessive relationship with Shirley Y. Slay;

3. The defendant's early years of neglect and abuse and exposure to domestic violence;

4. The defendant's alcohol abuse;

5. The defendant's prior good deeds and acts; and

6. The defendant's remorse.

The defendant offered evidence in support of his mitigating factors through six witnesses: Dr. Robert L. Sadoff, M.D., a psychiatrist; Barbara Lewis, the defendant's mother; Frances Cockcroft, a Senior Correctional Counselor at the Department of Correction; Virginia Smith, a Mental Health Counselor for Correctional Medical System; Wanda Scrivens, a friend of the defendant with whom he was having an affair at the time of the victim's death; and Roosevelt Wright, a friend of the defendant.

Dr. Sadoff testified that he met with the defendant for about two hours in May, 1992. One of the purposes of the meeting, according to his testimony at trial, was to evaluate the defendant and examine him to see whether he had a "mental or emotional condition that may be a mitigating factor in the event that it's necessary, at this stage of the proceedings."[72]

In preparation for his testimony, he reviewed a psychiatric evaluation conducted by Dr. Steven Mechanick in 1991; a report from a neurologist, Dr. Monteleone, dated December, 1990, in which Dr. Monteleone noted an EEG suggestive of a right temporal disturbance, but found no evidence of neurological deficit, just the EEG change in the right temporal area; the police investigative and FBI reports; the autopsy protocol; a report of the Medical Center of Delaware, dated 1989, where the defendant was diagnosed as having Intermittent Explosive Disorder and Antisocial Personality Disorder, with Right Temporal Lobe Seizure. He testified that the defendant gave him a detailed account of what happened on the night of the shooting. In response to a question as to whether Dr. Sadoff felt "confident in your ability to make an evaluation and state an opinion as to whether or not Mr. Gattis suffers or suffered from an emotional psychiatric or psychological disorder," he responded "[y]es I have an opinion and feel confident about it."[73] He testified that in his opinion the defendant had Intermittent Explosive Personality Disorder and Episodic Discontrol Syndrome. He further testified that the defendant's history of anger (including his biting of his hands) and violence supported his diagnosis.

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[72] Tr. Trans. at 102, Sept. 24, 1992.

[73] *Id.* at 103-4.

The defendant's early years of neglect and abuse and exposure to domestic violence was presented through the testimony of his mother, Barbara Lewis.[74] Ms. Lewis' testimony included testimony that she never knew her father, that she was abused by her grandfather and thought he might also be her father; that her husband, the defendant's stepfather, began having sex with Ms. Lewis' sister, who lived with the parties, apparently when the sister was thirteen, with the result that a child was born to the sister when she was sixteen; that the affair continued, all while the parties' lived together, with the result that a second child was born of the sister, about three years later; that the stepfather displayed anger toward Ms. Lewis and beat her; that on at least one occasion the stepfather displayed a gun toward her; that the defendant was aware that the stepfather beat his mother and was emotionally distressed about it; that the defendant's sisters made plans to run away because of the domestic violence and abuse; that the fear of violence became so bad that Ms. Lewis would keep a sharp object in her hand for protection each time her husband came home; that on an occasion the stepfather told the defendant "You're not my son. Your mother is a w—e," which "just destroyed" the defendant; that as a result of the violence and abuse Ms. Lewis finally left her husband, taking her children with her; that they went to Wilmington where her uncle and brother lived; that almost immediately after they moved to Wilmington, Ms. Lewis's uncle was stabbed to death by his wife; that in Wilmington Ms. Lewis and her four children, including the defendant, at first lived in two rooms (not an apartment); that in Wilmington Ms. Lewis saw the defendant's

[74] Ms. Lewis' testimony is at pages 15 through 72 of Transcript of Penalty Phase, September 30, 1992.

father, Allen Gattis, off and on; that sometimes she would ask him to come and discipline the defendant, but when the father did so, "he usually ended up just punching him," to make him "tough;" that the defendant started to have problems in school; that he started not wanting to go to school; that he began showing forth hostility; that he began having disciplinary problems in school; that on an occasion Ms. Lewis and the defendant's father became involved in an incident which involved the police being called; that the defendant realized that he was in the middle of the friction between Ms. Lewis and the defendant's father; that there came a point when custody of the defendant was given to the State or another woman with whom he began to live; that the defendant quit school; and that the defendant bit his hands all the time.

Her testimony is further summarized in the trial judge's Findings After Penalty Hearing.[75] The trial judge concluded that the defendant's early years of neglect and abuse and exposure to domestic violence was a mitigating factor.[76]

I find that the cases cited by the defendant are distinguishable. In *Outten v. Kearney* the defense called four family members, a friend and a former girlfriend as witnesses at the penalty hearing.[77] Unlike here, no expert testimony was presented of the defendant's mental condition, despite the defendant having psychological issues; and although "family status" was presented as a mitigating factor, childhood

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[75] *Gattis*, 1992 WL at 10-11.

[76] *Id.*

[77] 464 F.3d at 416-19, & 423.

abuse was not. In *Wiggins v. Smith,* unlike here, defense counsel presented no evidence of the defendant's life history, after saying in counsel's opening statement that the jury would hear that the defendant had a difficult life; and, unlike here, did not conduct any investigation of the defendant's life history.[78] In *Williams v. Taylor* at the penalty hearing the defense presented testimony of the defendant's mother, two neighbors, and a taped excerpt from a statement by a psychiatrist.[79] One of the neighbors was called as a witness on the spot and had not been previously interviewed by counsel. The three witnesses briefly described the defendant "as a 'nice boy' and not a violent person."[80] The taped excerpt from the psychiatrist "did little more than relate Williams' statement during an examination that in the course of one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone."[81] The investigation done in this case goes far beyond the one done in *Williams*. Unlike here, no evidence of an abused childhood was presented, although such evidence existed. In *Strickland v. Washington* defense counsel spoke to the defendant's wife and mother by telephone, but did not meet with them.[82] Unlike here, defense counsel decided not to present and hence not to look further for evidence concerning the defendant's character and emotional state. Unlike here,

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[78] 539 U.S. at 524-28.

[79] 529 U.S. at 369.

[80] *Id.*

[81] *Id.*

[82] 466 U.S. at 673.

counsel in *Strickland* did not request a psychiatric examination. In *Rompilla v. Beard* the mitigation case consisted of relatively brief testimony of five family members who "argued in effect for residual doubt, and beseeched the jury for mercy, saying that they believed Rompilla was innocent and a good man;"[83] and his 14 year old son "who testified that he loved his father and would visit him in prison."[84] Unlike here, the defense presented no evidence of the defendant's troubled childhood or his mental illness and alcoholism, despite there being "pretty obvious signs" of such evidence. In addition, the Supreme Court found dispositive the fact that defense counsel failed to examine the defendant's prior conviction file despite knowing that his prior conviction history would be asserted by the State as an aggravating factor. In *Porter v. McCollum* defense counsel put on only one witness, the defendant's ex-wife, and an excerpt from a deposition.[85] "The sum total of the mitigating evidence was inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son."[86] Defense counsel told the jury that the defendant had "other handicaps that weren't apparent during the trial;" and that the defendant was not "mentally healthy," but presented no evidence on the defendant's mental health.[87] The investigation and presentation in this case goes far beyond the

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[83] 545 U.S. at 378.

[84] *Id.*

[85] 130 S. Ct. 447 (2009) (per curiam).

[86] *Id.* at 449.

[87] *Id.*

investigation and presentation in *Porter.* In *Kindler v. Horn* the defense attorney presented in mitigation at the penalty hearing only that the defendant was skilled in electronics and could be productive in prison.[88] Unlike here, she apparently did not investigate the defendant's history of abuse as a child or his mental condition. In *Bond v. Beard* defense counsel called seven family members and friends who "testified generally to Bond's good character and willingness to help others."[89] Unlike here, defense counsel did not present testimony of the defendant's extremely troubled and deprived childhood, or expert testimony concerning his mental condition. In *Jermyn v. Horn*, unlike here, defense counsel failed to call an expert who was readily available to testify regarding the defendant's mental condition. In addition, unlike here, "counsel utterly failed to introduce evidence at trial concerning the abuse Jermyn suffered as a child."[90] In *Adams v. Quarterman* defense counsel apparently did not present any mitigation evidence at the penalty phase.[91] In *Walbey v. Quarterman* defense counsel retained a mental health expert only a week before trial, a result of which was that the expert was unable to investigate mitigation issues and was unable to present any testimony on mitigation.[92] Unlike here, defense counsel failed to contact the defendant's mother or any other witnesses with first hand

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[88] 542 F.3d 70, 86 (3d Cir. 2008).

[89] 539 F.3d 256, 262 (3d Cir. 2008).

[90] 266 F.3d 257, 304-05 (3d Cir. 2001).

[91] 324 Fed. App. 340, 345 (5th Cir. 2009).

[92] 309 Fed. Appx. 795, 797 (5th Cir. 2009).

knowledge of the defendant's troubled childhood and his relationship with the victim. In *Williams v. Allen* the defense presented one witness at the penalty phase, the defendant's mother, who gave brief testimony, primarily of abuse which the defendant received at the hands of his father.[93] Significantly, the defense failed to present any psychiatric or psychological expert testimony regarding the defendant's mental condition. In *Gray v. Branker* defense counsel presented six character witnesses at the penalty phase, but presented no mental health evidence either through lay or expert testimony, despite obvious signs that there were mental issues.[94]

After considering the evidence which was presented at the penalty hearing and comparing the evidence now proffered, I find that the defendant's trial attorneys alleged errors at the penalty phase in the presentation of his mental condition were not so grievous that their performance fell below an objective standard of reasonableness. They provided Dr. Sadoff with existing mental condition reports and other records. The record indicates that they asked him to evaluate and examine the defendant for any mental or emotional condition that might have been a mitigating factor at the penalty stage, if necessary. The inference to be drawn from Dr. Sadoff's testimony is that the information he had made him confident in his evaluation of the defendant's mental condition and in his opinion. His opinion was consistent with the conclusions of other medical personnel at the time. If Dr. Sadoff had thought that a deeper inquiry into the defendant's relationship with the victim or the defendant's childhood would be necessary or helpful in his evaluation, I see nothing in this record

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[93] 542 F.3d 1326, 1329-20 (11th Cir. 2008).

[94] 529 F.3d 220, 225-26 (4th Cir. 2008).

that would have prevented him from making that known to defense counsel.

I also find that trial counsel's alleged errors at the penalty phase in the presentation of the defendant's childhood were not so grievous that their performance fell below an objective standard of reasonableness. Trial counsel did present the defendant's early years of neglect and abuse and exposure to domestic violence as a mitigating factor, presented evidence in support thereof, and persuaded the trial judge to recognize that as a mitigating factor.

I also find that the defendant cannot establish that there is a reasonable degree of probability that but for counsel's alleged unprofessional errors the outcome of the proceedings would have been different. I am not persuaded that the presentation of the defendant's mental condition in the manner now offered, or the presentation of the conditions of his childhood in the greater quantity and detail now offered, would have swayed any of the ten jurors who voted for death or the sentencing judge.

I therefore conclude that the defendant has not established a miscarriage of justice due to a violation of his constitutional right to counsel under *Strickland.* Nor can he establish any defects in the fundamental legality, reliability, integrity or fairness of the proceedings. Consequently, he has not overcome the time bar of Rule 61(i)(1) because he cannot establish that the bar is inapplicable under Rule 61(i)(5).

Victim's Statements

Crawford v. Washington is not retroactive in this jurisdiction.[95] Therefore,

[95] *Whorton v. Bockting,* 549 U.S. 406 (2007); *see also McGriff v. State,* 2007 WL 1454883, at *1 (Del.) (Holding Delaware consistently follows federal *habeas corpus* jurisprudence).

arguments which rely on *Crawford* are rejected.

Prior to trial, the trial judge made rulings regarding the victim's statements. He determined that certain ones could be admitted during the State's case in chief on the grounds that they related to her state of mind and her conduct. The trial judge also ruled that they would be admitted as evidence of the general characterization of the parties' relationship. Several such statements were admitted, and the trial judge gave the jury a limiting instruction informing the jury that such statements were admitted for the limited purpose of showing her state of mind and the effect, if any, on her subsequent conduct.

On rebuttal the State offered evidence of additional victim's statements that she was afraid of the defendant because he had previously beaten her, causing scratches to her face on one occasion; that fights were frequent; and that he displayed a gun to her, and threatened her.

During the penalty phase, additional statements were introduced, ones made by the victim that the defendant cut her on the leg during an argument, and that the defendant was hitting her; and an unattributed statement that the defendant had hit the victim in the face.

Hearsay statements were raised in the defendant's direct appeal, and the Delaware Supreme Court stated that "[a]fter a full review of the record, we are satisfied that the State was not permitted to exceed the bounds set by the trial judge in his ruling concerning the introduction of evidence of the prior relationship between the defendant and the victim."[96]

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[96] *Gattis*, 637 A.2d at 819.

I have carefully reviewed each of the statements of which the defendant complains. I find that some of them clearly appear to fall within exceptions to the hearsay rule for present sense impressions, excited utterances, or existing state of mind. To the extent that any of the statements exceed the bounds of the hearsay rule, I find that they fall far short of meeting the demanding standard of Rule 61(i)(5). The contention that there is a reasonable probability that admission of the statements complained of affected the outcome of either the guilt or penalty phase of the trial unpersuasive.

I therefore conclude that the defendant has not established a miscarriage of justice due to a violation of his constitutional right to counsel under *Strickland*. Nor can he establish any defects in the fundamental legality, reliability, integrity or fairness of the proceedings. Consequently, he has not overcome the time bar of Rule 61(i)(1) because he cannot establish that the bar is inapplicable under Rule 61(i)(5).

"Remote Causation" Instruction

What the defendant calls a "remote causation" instruction is a causation instruction which has its statutory source in 11 *Del. C.* §§ 262 or 263. Depending upon the state of mind involved for the particular offense, these statutes apply where there is a question of fact as to whether the actual result is outside the result which the defendant intended or contemplated, or outside the risk of which the defendant was aware or should have been aware. These statutes can apply in either of two ways. The first is where the defendant causes injury to a different person or thing than the intended or probable person or thing. Under the second way, causation is not established unless "[t]he actual result involves the same kind of injury or harm as the

probable result and is not too remote or accidental in its occurrence to have a bearing on the actor's liability or on the gravity of his offense."[97] The operation of the statutes is illustrated by the following examples from the Delaware Criminal Code with commentary for § 262:

> *Former Delaware Law*
>
> Former Delaware case law recognized the rule of "transferred malice." A leading case is *State v. Gardner,* (citation omitted) in which the defendant was held guilty of first-degree murder when he killed B, having with express malice aforethought intended to kill A. The mere fact that the defendant had a different victim in mind and had no malice at all toward B was held irrelevant. A similar rule is stated in earlier cases (citations omitted.)
>
> *The Code Provision*
>
> Although the Delaware cases are concerned with a different victim, their rationales are equally applicable to the other situations contemplated by § 262. The section applies, for example, where the actor intends to burn down a certain house and burns down another by mistake, or where he intended to kill his victim but instead only injures him.
>
> Subsection (2) covers the traditional causation cases. For example, A shoots B, intending to kill him; B dies, not as a result of the shot but because he has been left lying in the highway and is run over. The subsection contains a standard of causation which will require an ad hoc

[97] 11 *Del. C.* § 262.

> determination in each case of the question of remoteness. In the hypothetical case, it is clearly not too remote or accidental that B died as a result of being run over. It is the very result which A desired, and he might well be held to have contemplated that it might occur.

The commentary to § 263 reads as follows:

> This section gives a rule of transferred recklessness and negligence. It is an addition to the former law, but consistent with the theory of § 262. The reader is referred to the Commentary on that section for the rationale underlying the rule.

The most authoritative case on these statutes is *Bullock v. State*.[98] In that case, the defendant drove through an intersection under a yellow light at a speed nearly 30 miles an hour over the speed limit. He had consumed alcohol, but was below the legal limit for driving under the influence. Another driver, Ms. Alleger, was stopped at the intersection in a turn lane, facing a red arrow. As the defendant passed through the intersection, Ms. Alleger entered the intersection against the red arrow, and the two vehicles collided. Ms. Alleger was killed and the defendant was charged with manslaughter. He was convicted by a jury.[99]

The defendant contended on appeal that the risk that someone would illegally go through a red signal into the intersection was unexpected and that Ms. Alleger's death in the manner in which it occurred was outside the risk of which he was aware.

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[98] 775 A.2d 1043 (Del. 1999).

[99] *Id.* at 1045.

He contended that the circumstances of the accident entitled him to a § 263 instruction. The Supreme Court agreed and reasoned that he was entitled to a jury instruction which informed the jury that they should consider whether the result was outside the risk of which the defendant was aware, and if so, whether the actual result involved the same kind of injury as the probable result and was not too remote or accidental in its occurrence to have a bearing on the defendant's liability. The Supreme Court further reasoned that § 263 was "designed for difficult cases . . . where a defendant contends that the actual result of his conduct is outside the risk of which he is aware."[100]

I find that the examples in the commentary and *Bullock* are significantly distinguishable from the defendant's case. Here, no conduct of the victim, or other person, or other force of any kind, other than the defendant's conduct, contributed to the result. The chain of events in the moments leading up to the victim's death flow directly from the defendant's conduct in confronting the victim with a gun in his possession, and no other conduct or occurrence. There was nothing remote about the cause of the victim's death. I find that the defendant's trial argument that the shooting occurred unexpectedly or fortuitously and his testimony that the shooting occurred accidentally did not entitle him to a §§ 262 or 263 instruction in the circumstances of this case.

I therefore conclude that the defendant has not established a miscarriage of justice due to a violation of his constitutional right to counsel under *Strickland.* Nor can he establish any defects in the fundamental legality, reliability, integrity or

[100] *Id.* at 1049.

fairness of the proceedings. Consequently, he has not overcome the time bar of Rule 61(i)(1) because he cannot establish that the bar is inapplicable under Rule 61(i)(5).[101]

Williams / Chao

The defendant's fifth contention relates to jury instructions regarding a statutory aggravating factor. This contention is based on the aforementioned *Williams*[102] and *Chao*[103] decisions. *Williams* was decided in 2003. However, its retroactivity was not decided until *Chao* in 2007. *Williams* was decided more than three years prior to the filing of the defendant's motion. *Chao* was decided within three years prior to the filing of the motion. However, I elect not to analyze the timeliness of the *Williams-Chao* claim, because I find that the claim has no merit in the defendant's case.

In its decision to impose the death penalty, the Superior Court found that two statutory aggravators had been proven beyond a reasonable doubt. The first was that

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[101] The State contends that the defendant's third contention regarding the victim's statements is barred, at least in part, by the former adjudication bar. It also contends that the defendant's contentions one through four are all barred by the repetitive motion bar and the procedural default bar. Since I ultimately conclude, after considering Rule 61(i)(1) and Rule 61(i)(5) that the time bar is applicable to contentions one through four, and that they must, therefore, be rejected, I find it unnecessary to address the repetitive motion bar, the procedural default bar, or the former adjudication bar.

The defendant contends that alleged ineffective assistance of counsel in his first two postconviction motions should excuse him from the time bar (and all other procedural bars). However, Rule 61(i)(1) contains no exception for alleged ineffectiveness of counsel in a prior postconviction motion. Nor can the time bar be enlarged. Superior Court Criminal Rule 45(b). The contention that alleged ineffective assistance of counsel in a prior postconviction motion should excuse the time bar of Rule 61(i)(1) is unpersuasive, and I reject it.

[102] *Williams v. State*, 818 A.2d 906 (Del. 2003).

[103] *Chao v. State*, 931 A.2d 1000 (Del. 2007).

"[t]he murder was committed while the defendant was engaged in the commission of . . . any degree of . . . burglary."[104] The second was that "[t]he defendant was previously convicted of . . . a felony involving the use of, or threat of, force or violence upon another person."[105] The defendant's contention goes to the first factor. In his direct appeal, the defendant did not contest the finding of the statutory aggravator now complained of. However, in the course of the review required by 11 Del. Code § 4209(g), the Delaware Supreme Court quoted that portion of the Superior Court's decision which included the just mentioned finding and concluded that the Superior Court had "fully complied with the statutory standards for the imposition of the death penalty."[106]

In *Williams* the Delaware Supreme Court held that the phrase "in furtherance of," which appeared in Delaware's felony murder statute at 11 *Del. C*. § 636(a)(2), required that the underlying felony must have an independent objective which the murder facilitates.[107] At the time of *Williams*, 11 *Del. C*. § 636(a)(2) read as follows:

> A person is guilty of murder in the first degree when: . . .[i]n the course of and in furtherance of the comission or attempted commission of a felony or immediate flight therefrom, the person recklessly causes the death of another person.

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[104] *Gattis*, 1992 WL at *1.

[105] *Id.*

[106] *Gattis*, 697 A.2d at 1187.

[107] *Williams*, 818 A.2d at 909.

In this case, the defendant was not charged with felony murder. He was charged with intentional murder under 11 *Del. C*. § 636(a)(1). It is readily apparent that the "in furtherance of" language of 11 *Del. C.* § 636(a)(2) is not contained in the statutory aggravating factor, which is in a completely different statute,[108] and was not in issue in his case in any way. It follows that *Williams-Chao* is not applicable to the defendant's case, and the defendant's fifth contention must be rejected.

CONCLUSION

For the foregoing reasons, the defendant's motion for postconviction relief is ***denied***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary (NCC)
cc: Counsel
File

[108] 11 *Del. C.* § 4209.