IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

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| STATE OF DELAWARE | ) | |
| V. | ) | I.D. No. 0002004767 |
| | ) | Kent County |
| RALPH SWAN, | ) | |
| Defendant. | ) | |

# OPINION

***Submitted: June 19, 2009***
***Decided: April 8, 2010***

***Motion for New Trial.***
***Denied.***

***Motion for Postconviction Relief.***
***Denied.***

*Appearances:*

Herbert Mondros, Esquire, Margolis Edelstein, Wilmington, Delaware, and Bryan Bolton, Esquire, Funk and Bolton, Baltimore, Maryland.
Attorneys for Defendant Ralph Swan.

John Williams, Esquire, Robert J. O'Neill, Jr, Esquire, and Martin B. O'Connor, Esquire, Deputys Attorney General, for the State of Delaware.

Judge John E. Babiarz, Jr.

In June 2001, Ralph E. Swan was convicted of the murder of Kenneth Warren and was sentenced to death. The case has a long procedural history, which is described below along with the pertinent facts. Currently pending before the Court are Swan's postconviction motion and a separate motion for a new trial. For the reasons explained below, the Court finds that Swan is not entitled to relief under Super. Ct. Crim. R. 61 or Super. Ct. Crim. R. 33.

**Facts.** On November 4, 1996, Kenneth Warren was at home eating a sandwich while his wife, Tina, and their young son were watching television. Suddenly, two armed, masked men burst through glass patio doors, struggled with Warren and shot him to death. The gunmen grabbed Tina's purse from the kitchen counter and fled. She believed that one of the assailants had been shot in the left shoulder.

Kenneth Warren had been shot four times with two different types of handguns, a semi-automatic and a revolver. He was shot twice in the back and twice in the head. One of the bullets, fired from a gun barrel held tightly against the top of his head, killed him instantly.

Swan and his accomplice Adam Norcross were not identified as the assailants until February 2000 when they were arrested.

Following the jury trial in the Superior Court of Kent County in June 2001, Swan was found guilty of one count degree intentional murder, two counts of first degree

felony murder, one count of first degree burglary, six counts of possession of a firearm during the commission of a felony, and one count of second degree conspiracy.[1] After hearing evidence at the capital penalty phase, the jury voted seven to five that the aggravating factors outweighed the mitigating factors and the Court sentenced him to death.

Swan appealed his convictions and sentences, which were affirmed by the Delaware Supreme Court.[2] In October 2003, the United States Supreme Court denied Movant's petition for a writ of *certiorari*, at which time Swan's convictions became final for purposes of Rule 61.[3]

In 2005, Swan filed a motion for postconviction relief and a motion for a new trial based on a statement of Adam Norcross. This Court held an evidentiary hearing on the new trial motion on February 17, 2006, and October 16, 2006. The Court ruled from the bench denying the motion for a new trial on grounds that Norcross' testimony was not credible. Swan appealed, and the Supreme Court remanded the motion for this Court to

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[1]Swan's co-defendant Adam Norcross, was tried and convicted in a separate trial.

[2]*Swan v. State*, 820 A.2d 342 (Del. 2003), *cert. denied, Swan v. Delaware*, 540 U.S. 896 (2003).

[3]Rule 61(m) provides in part:
"A judgment of conviction is final for the purpose of this rule as follows:
. . .
(3) If the Movant files a petition for certiorari seeking review of the Supreme Court's mandate or order, when the United States Supreme Court issues a mandate or order finally disposing of the case of direct review."

include consideration of the new trial issues along with issues raised in the postconviction motion.[4] Now before the Court are Swan's initial postconviction relief motion, as amended and supplemented as well as the motion for new trial.

**Standard of review.** When considering a motion for postconviction relief, the Court must apply the procedural bars of Rule 61(I) before considering the merits of the individual claims.[5] This is because a postconviction motion is a collateral attack on a final conviction, not a substitute for direct appeal, and Rule 61 is designed to eliminate claims that have been or should have been previously raised, as well as claims that lack a sufficient factual or legal foundation.[6]

In this case, the State argues that any claims that were raised more than three years after Movant's judgment of conviction became in October 2003 (when the United States Supreme Court denied Swan's petition for *certiorari*) are time barred unless they "relate back" to the initial motion filed in 2005. However, after new counsel was appointed to represent Movant in the postconviction proceedings, this Court granted Movant's motion to file memoranda and amendments after the three-year deadline had passed. For this reason, the Court will not apply the three-year time bar.

Movant raises claims that he did not raise in earlier stages of the proceedings and

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[4]*Swan v. State*, 2007 WL 1138474 (Del.).

[5]*Bailey v. State*, 588 A.2d 1121,1127 (Del. 1991).

[6]Rule 61(a)(1) and (i).

also raises claims that were previously adjudicated, two classes of claims that are potentially subject to the procedural bars of Rule 61 ( i) (3) and (4), respectively. Movant frames many of these claims as instances of ineffective assistance of counsel, thus avoiding the procedural hurdles but requiring Swan to make the two-part showing of *Strickland v. Washington.*[7] Under *Strickland*, Movant must show that counsel's representation fell below an objective standard of reasonableness [8] and that, but for such errors, the result of the proceedings would have been different.[9]

To prevail on his motion for a new trial on grounds of newly discovered evidence, Movant must show that (1) the evidence will probably change the result if a new trial is granted; (2) it has been discovered since the trial, and could not have been discovered before by the exercise of due diligence; and (3) it is not merely cumulative or impeaching.[10]

The Court will now consider Swan's various claims.

**DNA.** In its Order on Remand, the Delaware Supreme Court instructed this Court to reconsider the motion for a new trial after the parties made a record on the DNA

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[7]466 U.S. 686 (1984).

[8]*Id*. at 688.

[9]*Id.* at 694.

[10]*State v. Hall*, 2008 WL 2582998 (Del. Super.) (citing *State v. Hamilton*, 406 A.2d 879, 880 (Del. Super. Ct.).

issues. The Court held hearings on the DNA issues, and the record is now complete on all postconviction claims.

Swan contends that defense counsel was ineffective in failing to retain a DNA expert, failing to contact the State's expert, failing to ask for any of the raw data supporting the expert's report, and failing to use the DNA evidence to dispute the State's theory that he received a shoulder wound during the assault on Kenneth Warren. The State responds that none of these actions constitute ineffective assistance of counsel.

To the extent that these are ineffectiveness claims against his attorneys, Movant must meet the *Strickland* test. To the extent they are claims against the State not raised on direct appeal, they are barred unless Movant can show cause and prejudice pursuant to Rule 61( i )(3). He can avoid the procedural bar by showing either that this Court lacked jurisdiction or that there was a miscarriage of justice because of a constitutional violation, as set forth in Rule 61(i)(5).[11]

Here are the facts surrounding the DNA evidence. Forensic samples were gathered by police officers and sent by the prosecutors to ReliaGene Technologies for DNA testing. The samples included three pieces of Kenneth Warren's sweat pants and a sample taken from the counter under the kitchen sink where Warren's dead body was

[11]This exception, often referred to as the "fundamental fairness" exception, is narrow and is applied only in limited circumstances, such as when the right relied upon has been recognized for the first time after the direct appeal. *Younger*, 580 A.2d at 555. This exception may also apply when a petitioner makes a colorable claim to a mistaken waiver of important rights.

lying.

In March 2000, a report was issued by Gina Pineda, a forensic scientist with ReliaGene, stating that Kenneth Warren was the major contributor to the sample and that the results were "consistent with a mixture of [Warren's]. . . and at least one other DNA donor as a minor contributor."[12] After Swan and Norcross were arrested, the State collected blood samples from both of them, and asked ReliaGene to test those blood samples against the samples previously tested. Pineda wrote a second report in June 2000, excluding both Norcross and Swan as the minor contributor referred to in the first report.[13] Prosecutor John Garey testified that, in a phone conversation after the second report was written, Ms. Pineda acknowledged a "slight possibility" that Swan was a minor contributor. Defense Counsel David Jones testified that during the trial Mr. Garey told him that Pineda had said that Swan may have been a contributor, and on June 19, Jones called Pineda, who said that there was a slight possibility that the blood other than Warren's was from multiple sources, and if that were the case, she would have testified that Swan could have contributed to the blood found at the scene.

At the post-trial hearing, Ms. Pineda acknowledged that if it were assumed that the samples contained DNA from a third donor there was a remote possibility that Swan

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[12]Def. App. Ex 4, Pineda Rpt. at 7 (March 17, 2000).

[13]Def. App., Ex. 7, Pineda Rpt. (June 21, 2000).

would not be excluded. When asked to assume there was evidence of three or four different DNA types and determine if it were possible for there to be more than two donors, she replied as follows: "I mean, I can't with 100 percent certainty say that it's impossible, so yes, I would have to allow for the slight possibility, but again, I don't think that it's reasonable to assume that." Tr. 11-5-07, 74-75. However, she also testified that she did not at any time change her opinion that Swan was excluded from the sample and that she did not think there was a third donor to the DNA. She stated that in the unlikely event that there was a third donor, that would have rendered the DNA testing meaningless because the third donor could be Swan or any number of other people. Tr. 11-5-07, 50-51. That is, if it were assumed that there were three donors, Ms. Pineda could not either include or exclude Swan as a possible minor DNA contributor. Tr. 11-5-07, 68.

Pineda testified that she could not recall the conversation Garey and Jones. The Court accepts counsels' testimony as it is corroborated by the record at trial.

At the hearing, the defense called its own forensic DNA analyst to testify. Dr. Robert Shaler gave his expert opinion that both Swan and Norcross were excluded and that there was no scientific basis for the third party theory. Based on this opinion, Movant argues that his trial attorneys were constitutionally ineffective for failing to introduce the DNA evidence. However, as the State points out, the fact that Swan's

DNA is absent from the samples does not prove that he was not one of the murderers. Nor does it mean that Swan's blood was not somewhere else in the Warren home or on Warren's body or clothes. It only means that Swan's blood or DNA was not on the samples tested by ReliaGene.

Mr. Jones testified that the defense team had not retained an additional DNA expert because Ms. Pineda's report exculpated Swan, and because having two DNA experts testify would simply create an additional factual matter for the jury to decide. Things changed for the defense when the possibility arose that Ms. Pineda might concede that Movant could have been present at the crime scene. Mr. Jones spoke with Ms. Pineda on June 19, 2001. The defense conclusion was that it was better to have no DNA evidence than to call Ms. Pineda and invite the possibility that on cross-examination she would acknowledge the slight chance that Swan may have contributed to some of the DNA evidence found at the murder scene.

As the *Strickland* Court put it, the "benchmark for judging a claim of ineffectiveness must be whether counsel's conduct so undermines the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[14] *Strickland* requires a reviewing court to determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of

[14]*Strickland v. Washington*, 466 U.S. 668, 686 (1984).

professionally competent assistance.[15] Further, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."[16] This Court's role is to evaluate the conduct from counsel's perspective at the time.[17] To show prejudice, a Movant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome [of the trial]."[18]

The Court finds that under *Strickland*, Swan's trial attorneys made reasonable strategic decisions. Swan cannot show prejudice from the lack of DNA evidence because Ms. Pineda testified that given certain assumptions she was unable to completely exclude Swan from the samples. Such a concession at trial could have been both confusing to the jury and adverse to Swan's case. Even the absence of Swan's DNA on the samples would not conclusively establish that he was not present at the scene and not one of the shooters. Defense counsel testified that they believed that silence on the issue was better than running the risk of a concession from Pineda that Swan's DNA might have been present, and the defense goal was to have no physical

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[15] *Id.* at 690.

[16] *Id.*

[17] *Id.* at 689.

[18] *Id.* at 694.

evidence tying Swan to the murder scene, another acceptable strategic decision. The Court finds that defense counsel acted in an objectively reasonable manner, as required by the Sixth Amendment.

The Court also finds that Movant suffered no prejudice and that in fact he was protected from a potential concession from Ms. Pineda that he could have been one of the minor contributors to the blood samples. Having found that Movant has not carried his burden on either prong of *Strickland*, the Court concludes that this claim has no merit as to defense counsel.

Movant contends that the State mishandled evidence by not turning the raw DNA data over to the defense. The Court finds that this claim is procedurally barred pursuant to Rule 61(I)(3) because Movant did not raise it in his post-trial motion or on direct appeal. Nor has he triggered the fundamental fairness exception of Rule 61(I)(5) because he has not shown either that the Court lacked jurisdiction or that there was a miscarriage of justice because of a constitutional violation.

Movant also argues that under *Harris v. Reed*[19] and *Anderson v. Butler,*[20] defense counsel's decision not to present the DNA evidence constituted a "speaking silence" which prejudiced him with the jury and warrants a new trial. In *Harris*, the defense

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[19]894 F.2d 871 (7th Cir. 1990).

[20]858 F.2d 16 (1st Cir. 1988).

attorney failed to present eyewitnesses in support of a viable theory that another person who was seen running from the crime scene committed the crimes. The defense attorney made this decision without interviewing the witnesses, unlike defense in this case who talked to Ms. Pineda on the phone about her findings and their possible ramifications. In *Anderson*, the defense attorney failed to call doctors whose reports were uncontested, unlike this case where defense counsel made a decision not to call Ms. Pineda based on the possibility of a concession that Swan's blood could have been present the samples. A speaking silence does not arise when lawyers make a conscious choice that is professionally reasonable, such as the one discussed herein.

**The Norcross recantation.** At trial, evidence pertaining to who shot Kenneth Warren was introduced through statements made by Norcross to other people: his co-worker Matthew Howell, his girlfriend Gina Ruberto, his wife Bridget Phillips and the police officer who took his statement. In two of these statements, including the one to police, Norcross said Swan fired the fatal shot. In the other two statements he said he did. Either way, he implicated both himself and Swan in the murder.

Norcross did not testify at either trial, but he did take the stand at Swan's evidentiary hearing. He stated that he committed the crimes with the help of a friend named "Wayne" and that Swan was not involved in the crimes. Norcross stated that he used Swan's car on the evening of the murder, dropping him off at his kick-boxing gym

before leaving for Clayton, Delaware. Norcross said that Wayne was injured during the crimes but was afraid to go to the hospital. Wayne appeared to be dying so Norcross alleged to have pulled the car over to the side of the road and shot and killed Wayne to stop his pain. Norcross denied ever having attributed the crime to Swan and stated that Howell and Phillips either lied or combined Norcross's statements with newspaper stories to come up with the testimony they provided at trial. Norcross testified that he feared that Swan would turn him in for the crime.

As the fact finder at the October 16, 2006 hearing, the Court stated first that the evidence was neither cumulative nor impeachment evidence. The Court went on to analyze the nature of the evidence, finding that the story was not credible and that a jury would not accept it. The Court found that Norcross's statement would not have been believed by a jury or raised a reasonable doubt as to Swan's guilt.[21] The Court found that there was no corroboration for any portion of the story and that it was so vague as to be probably impossible to corroborate. There was nothing specific about Wayne, who he was, what he did, or who his friends were. The Court also noted that Norcross had no explanation for blaming Swan in his statements to family and friends and not Wayne, a drug buddy, as he called him. For these reasons, the Court ruled that the motion for a new trial was denied.

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[21]Hrg. Tr. New Trial at 102-104.

On appeal of that ruling, the Delaware Supreme Court directed this Court to consider the recantation issues along with the DNA issues, which were then being developed for the Rule 61 hearing. The Court has now had the chance to hear testimony and read briefs on the DNA issues and has concluded, as explained above, that trial counsel for Swan were not ineffective for not introducing the DNA evidence. As to the motion for a new trial, the Court reiterates its earlier conclusion that Norcross's testimony about "Wayne" was completely lacking in credibility and would not have made a difference if it had been introduced at trial. Even in conjunction with the DNA evidence, which was inconclusive, the Court finds that Norcross's testimony would not help to exonerate Swan. Despite Movant's contention that the DNA evidence in conjunction with Norcross's testimony warrant a new trial, the Court concludes that Norcross concocted the Wayne story long after the murder was committed. The DNA evidence put forth at the evidentiary hearing does not change this outcome. The motion for a new trial on grounds of Norcross's testimony about Wayne is **denied.**

Swan claims that both the defense and the State mishandled the information regarding a $10,000 reward which was available for information leading to the resolution of the murder case. At trial, Bridget Phillips, Adam Norcross' ex-wife, was asked by defense counsel if she saw the information posted on the State Police website and she answered "No." James Givens, Kenneth Warren's wife's uncle, testified that he had put

up the money but that no one had come forward to claim it. Movant argues that the State's failure to tell the jury that Phillips expected to receive the money was a *Brady* violation.

The State contends that this claim is procedurally barred under Rule 61(I)(3). In *Dawson v. State*, the Court, facing a similar issue, reasoned that if there is no *Brady* violation, counsel was not ineffective for failing to make the claim and the claim is procedurally barred.[22] The same reasoning governs here, which means that the first determination is whether there was a *Brady* violation. Under *Brady*, there is a due process violation if (1) the evidence is requested but production is withheld; (2) the evidence is favorable to the state's case, and (3) is material either to the determination of guilt or to the determination of the appropriate sentence.[23]

In this case, Movant does not get past the first hurdle. The *Brady* Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[24] In this case, the defense asked Bridget Phillips a question about the reward and thus cannot assert that it did not know about the reward. The defense makes no claim that trial counsel was denied any

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[22]673 A.2d 1186, 1192-93.

[23]*Id.* at 1193.

[24]*Brady v. Maryland*, 373 U.S. 83, 87 (1963).

requested information. The Court finds no merit to the assertion of a *Brady* violation and therefore defense counsel was not ineffective for failing to raise this claim either post-trial or on appeal.

**Felony murder convictions.** Swan argues that his two felony murder convictions based on the home invasion and the murder of Kenneth Warren are improper under *Williams v. State*[25] and *Chao v. State.*[26] In *Chao*, the Delaware Supreme Court allowed the retroactive application of the interpretation of the felony murder rule as clarified in *Williams*. Although not so stated in the motion, the Court presumes that Movant seeks to have his felony murder convictions based on the underlying felonies of first degree burglary and first degree robbery vacated because the killing of Kenneth Warren was not "in furtherance of" either the burglary or the robbery. The evidence introduced at trial showed that Swan and Norcross intended to commit a burglary and a robbery. Unlike *Williams,* where the Movant wanted to kill his girlfriend, there is no evidence that Swan and Norcross entered the home in order to kill Kenneth Warren. They burst into the home and assaulted Kenneth Warren. Two against one, they held him down and shot him until he collapsed. Only then did they grab Tina Warren's purse and flee from the house. The Court finds that the fatal shooting was committed in furtherance of both the

[25]818 A.2d 906 (Del. 2003) (holding that the statutory language of the felony murder statute not only requires that the murder occur during the course of the felony but also that the murder occur to facilitate commission of the felony).

[26]931 A.2d 1000 (Del. 2007) (holding that *Williams* is retroactive).

burglary and the robbery. A jury could rationally find that the physical force used against Warren prevented him from protecting his home and family and facilitated the felonies of burglary and robbery.[27] Thus, there is a valid factual and legal basis for Swan's two felony murder convictions, and the Court find no merit to this contention.

**Failure to investigate Norcross's background.** Swan argues that his attorneys were ineffective for failing to investigate Adam Norcross's background of criminal activity and mental instability. Swan asserts that Norcross's background information would have provided impeachment material that could have been introduced by state officials, court documents and criminal records pursuant to D.R.E. 806.[28] Movant must make the two-part *Strickland* showing of attorney error[29] and actual prejudice[30] to prevail on this claim. In light of other evidence about Norcross that came out at trial, Movant cannot make either part of the *Strickland* showing. The jury heard the conflicting stories that Norcross told about the crime and its aftermath, so his unreliability and

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[27] *Hassan-Eli v. State*, 911 A.2d 385, 392 (Del. 2006).

[28] D.R.E. 806 provides in part as follows:
When a hearsay statement. . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would e admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain.

[29] *Strickland* at 688.

[30] *Id.* at 694.

untruthfulness were clear. It was also clear that in each version that he placed both himself and Swan at the scene of the crime and implicated them both, albeit to differing degrees. In talking to Howell and Phillips, he identified himself as the shooter, whereas in speaking to police, he stated that Swan was the shooter.

Evidence from his background might have confirmed that Norcross had a history of criminal behavior or mental instability. Because his own statements showed him to be a criminal and showed that he gave different stories to different people, the potential background evidence would have confirmed his unreliability but would not have changed the outcome of the proceedings. The Court concludes that trial counsel was not ineffective for not introducing additional evidence of the unreliability of Adam Norcross because there is not a reasonable probability that such evidence would have changed the result of the proceedings.

**Admissibility of note from Ronald Proctor**. Movant argues that defense counsel failed to make proper objections to the admission of a note written by an inmate named Ronald Proctor and that counsel caused prejudice to Movant by not calling Proctor to testify. The State responds that trial counsel did object to the note and that there was good reason not to call Proctor as a witness.

On the day of Swan's preliminary hearing, a Department of Corrections officer intercepted a note that an inmate had attempted to pass to Norcross. Although the note

was written by Proctor, it had been dictated by Swan, as testified to by another inmate. The note warned Norcross not to trust his attorney, not to talk to his attorney, and to ask for a conflict attorney. The note provided a telephone number which the two men could use to communicate with each other. The record shows that during an office conference held specifically on this topic defense counsel objected on grounds of relevance and that there was considerable argument before the Court overruled the objection. The Court ruled that the note was relevant because Swan and Norcross were co-conspirators and the note raised an inference that Norcross could make statements detrimental to Swan's defense. At trial, the note was authenticated by Sergeant Charles Curtis Brown, who was involved in intercepting it.

To prevail on this claim, Movant must show both that counsel's conduct fell below an objective standard of reasonableness and that this conduct caused prejudice.[31] He has not made either showing. Defense counsel strenuously objected to admission of the note on grounds of relevance and was overruled by this Court. Officer Brown laid the proper foundation and there was no viable objection to be made. Even if counsel's conduct had been professionally unreasonable, Movant cannot show prejudice, that is, he cannot show a reasonable probability that the outcome of the trial would have been different without the admission of the note or, in the alternative, with the testimony of

[31] *Strickland*, 466 U.S. at 688, 694.

Proctor. Movant argues that the note demonstrates a connection between Norcross and Swan and that the jury could have relied on this to find Swan guilty. The State's case included other, more convincing evidence of the connection between the two men, such as the fact that they were acknowledged friends, lived and worked together for periods of time, moved to Canada together and had mutual friends. The Court finds that this argument has no merit and does not meet the *Strickland* standard.

**Admissibility of Norcross's statement to police**. Movant argues that this Court erred in admitting the confession made by Norcross during a police interrogation. The statement was admitted at Swan's trial as a statement against penal interest under D.R.E. 804(b)(3) and *Ohio v. Roberts*.[32] The Delaware Supreme Court affirmed on the same basis. Movant asserts that even though this issue has been adjudicated, reconsideration is warranted in the interest of justice based on *Crawford v. Washington*, which held that the Confrontation Clause bars admission of testimonial hearsay statements unless the declarant is unavailable to testify and the Movant had a prior opportunity to cross-examine the declarant about the statement.[33]

However, in *Whorton v. Bockting*, the United States Supreme Court held that *Crawford* is not retroactive to cases already final on direct review because it did not

[32]448 U.S. 56 (1980).

[33]541 U.S. 36 (2004).

announce a "'watershed rule' of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[34] Swan's judgment of conviction was final in October 2003, and this postconviction proceeding is a collateral attack to which *Crawford* therefore does not apply. The admission of Norcross's confession does not fall within the reach of *Crawford* and does not present a viable claim of either judicial error or ineffective assistance of counsel. The issue was resolved on direct appeal and is barred as having previously adjudicated under Rule 61(i)(4).

**Norcross statements introduced through other witnesses.** Movant argues that Norcross's inculpatory statements introduced through Matt Howell, Gina Ruberto and Bridget Phillips were inadmissible under *Lilly v. Virginia.*[35] This issue was thoroughly addressed and resolved against Swan on direct appeal. Movant has not triggered the interest of justice exception by showing that the Court lacked jurisdiction or that any new rule prescribes a different result. The Court does not find that reconsideration is warranted in the interest of justice, and this claim is barred under Rule 61(i)(4).

**Jury selection.** Movant argues that defense counsel was ineffective for failing to object when this Court excluded eight potential jurors solely because of their general concerns regarding the death penalty. Five of the eight jurors stated that they did not

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[34]Crawford 1180 quoting Teague at 311.

[35]527 U.S. 116, 137 (1999) (plurality opinion).

"believe" in, were "opposed" to, did not "agree" with, or could not "vote for" the death penalty. As follow-up, the Court asked the five jurors if they could impose the death penalty under "any circumstances," and they all remained uncertain. Two other jurors stated more than once that they were "not sure" whether they could recommend a sentence of death. The eighth juror stated as follows, "I don't think anyone's life should be taken, even though they might have taken somebody else's, you know. I don't believe in that." After hearing this categorical statement, this Court excused the woman without further questioning.

The exclusion of these eight veniremen was in keeping with both *Witherspoon v. Illinois*,[36] and 11 *Del. C.* § 3301.[37] The judge first asked each juror if he or s he had "any religious, conscientious or other opposition to the death penalty." The Court then

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[36]391 U.S. 510 (1968). *See also Adams v. Texas* (holding that a state has legitimate interest in obtaining jurors able to follow instructions and obey their oaths and that juror may be challenged for cause based on his view of capital punishment if it would prevent or substantially impair the performance of his duties in accordance with his duties and his oath).

[37]Section 3301 provides in pertinent part as follows:

> When a juror is called in a capital case, the juror shall be first sworn or affirmed upon the voir dire and then asked, under the direction of the court, if the juror has formed or expressed any opinion in regard to the guilt or innocence of the prisoner at the bar. If the answer is in the negative, the juror shall be sworn as a juror in the case, unless the juror has conscientious scruples against finding a verdict of guilty in a case where the punishment is death, even if the evidence should so warrant, or unless the juror shall be peremptorily challenged, challenged for cause or excused by consent of counsel on both sides.

Section 3301 has been found to follow closely the rule set down in *Witherspoon v. Illinois. Hobbs v. State*, 538 A.2d 723 (Del. 1988).

followed up with other questions and excused the juror because of consistent uncertainty or reluctance about recommending death. The trial court informed the excluded jurors that what was needed was "an open mind and an ability to either recommend death or recommend life if we get to that stage of the proceedings." *See, e.g.,* Jury Tr. D. at 39. This procedure protected Movant's rights under *Witherspoon*, and there was no basis for an objection from defense counsel.

**Coercion of witnesses.** Movant argues that the State may have coerced Tina Holotanko and Michael Stewart into testifying at the guilt phase of Swan's trial. Ms. Holotanko testified about Swan's shoulder injury and Mr. Stewart was an alibi witness who changed his story on cross-examination. Movant states that a "preliminary investigation" indicates that the State provided some sort of incentive to these witnesses, but does not provide any specifics. Mere speculation does not provide a basis for a claim for postconviction relief and the claim is dispensed with for that reason. To the extent that the claim is not speculative, it is procedurally barred under Rule 61 ( i ) (3) because it was not raised in the proceedings leading to the judgment of conviction.

**Penalty phase**. Finally, Swan contends first that his trial attorneys failed to present certain mitigating evidence which would show that he was subjected to considerable abuse during his childhood by his mother, Patty Swan, and her husband Charles Griffith.

At the postconviction hearing a boyhood friend from the third grade testified that he saw bruises on Swan that Swan said were inflicted by his mother. Swan's younger half-brother testified about constant beatings and other abuse that the got from Patty Swan and Charles Griffith. Griffith's sister also testified that Swan was abused by them.

Each of these witnesses said that he or she would have been willing to testify at Swan's penalty hearing. However, Swan offered no evidence that these persons or their potential testimony were known to his counsel. He also cannot point to anything in the record which would have led to counsel to this evidence. The conclusion seems inescapable that Swan himself was the source of information to his present counsel and provided the leads to locating these witnesses, assistance he did not give to trial counsel. Trial counsel testified that Swan did not disclose any history of significant childhood abuse and that testimony stands uncontradicted.

Second, Swan complains that trial counsel failed to have him examined psychologically to determine whether he suffered from any mental disorders. Trial counsel responded that Swan exhibited no evidence of mental disorder or retardation. The Court notes that its observation of Swan during pre-trial and trial phase of the case is consistent with counsel's observation.

One of the first matters that the Court had to take up in the case was a pro se motion to disqualify Court appointed counsel. This motion was ultimately ruled

unmeritorious which ruling was affirmed by the Supreme Court. But it was solidly based on fact and cogently supported by argument. It could not have been the product of a disordered or intellectually compromised mind. During the course of the trial, the Court observed no questionable behavior by Swan and on the occasions when the Court was required to question him directly he responded appropriately with obvious understanding.

Trial counsel also had Swan's Texas prison records and some educational records. There is nothing in these records showing any mental disorder or deficit. In fact Swan was described as a model prisoner and was paroled early.

Swan was tested and examined by a psychiatrist and a psychologist in 2006 almost 10 years after the murder. They concluded that he was borderline mentally retarded and suffered from post-traumatic stress disorder at the time of the murder. The Court views this testimony with extreme skepticism on several levels. First, it clashes with the Court's observation of defendant during trial and several pre-trial hearings. Second, the testing occurred approximately ten years after the crime and after Swan had been found guilty of murder, sentenced to death and spent six years in maximum security. The Court is not satisfied that the same results would have been obtained if the testing had been conducted pre-trial. Third, and perhaps most important, defendant was co-operative with these experts, and their opinions were heavily dependent on information supplied by

Swan. Given his lack of co-operation with the trial counsel the Court finds that it would be unlikely that he would have been forthcoming to these experts or any others retained by trial counsel.

The Court finds that trial counsel were not deficient in preparing for Swan's penalty hearing.

For these reasons, defendant's motions are ***Denied*** in all aspects.

***It Is So ORDERED.***

Judge John E. Babiarz, Jr.

JEB,jr/ram/bjw
Original to Prothonotary