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

STATE OF DELAWARE	)	
V.	)	I.D. No. 0002006278A
	)	Kent County
ADAM NORCROSS,	)	
Defendant.	)	

OPINION

Submitted: June 12, 2009
Decided: April 8, 2010

Motion for Postconviction Relief.
Motion Denied.

Appearances:

Jennifer-Kate Aaronson, Esquire and Joseph A. Gabay, Esquire, Wilmington, Delaware.
Attorneys for Defendant Adam Norcross.

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 July 2001, Movant Adam Norcross was convicted of murder and related offenses in regard to the shooting death of Kenneth Warren. Norcross was sentenced to death, and his conviction and sentence were affirmed on appeal. Norcross has filed a motion for postconviction relief pursuant to Super. Ct. Crim. R. 61 ("Rule 61") in which he seeks a new penalty phase of his trial. The Court has determined that Norcross is not entitled to relief, and his motion for postconviction relief is denied.

Facts. The facts of this case have been recited several times and may be summarized as follows.[1] Around 8 p.m. on November 4, 1996, two masked men crashed through the glass patio doors of the home of Kenneth and Tina Warren in Kenton, Delaware. Kenneth was sitting at the kitchen counter and his wife and young son were sitting on the couch watching television. The two burglars struggled with Warren and shot him four times in the neck and head, killing him almost instantly. The two men fled the house after one of them grabbed Tina's purse from the counter. Soon afterwards, the police found Tina's purse near a concrete where Norcross and his co-defendant Ralph Swan worked, but no suspects were developed. In December 1999, Norcross's ex-wife Bridgette

[1]*See Norcross v. State*, 816 A.2d 757 (Del. 2003); *Swan v. State*, 820 A.2d 342 (Del. 2003).

Phillips contacted police and told them about a conversation about the shooting that she had overheard between Norcross and his co-defendant. Norcross later told Phillips that he and Swan had planned to rob an empty house, but it turned out to be occupied. Norcross told Phillips that Swan had been shot in the shoulder and so Norcross had to kill the homeowner. Norcross said the men had worn masks and would never be caught.

Phillips' information eventually led to Norcross's arrest on February 9, 2000. Norcross told quite a different story to police than the one he had told Phillips. He acknowledged being present during the crime, but said that Swan started the shooting and that Norcross's gun would not fire so Swan grabbed it, cleared and shot Warren in the head with Norcross's gun. Norcross also stated that Swan wanted to go back in the house and kill the woman so she would not be able to identify them. Norcross shot Swan in the shoulder to prevent him from returning to the house. The men got rid of their guns and Tina's purse at the concrete plant where they both worked.

Norcross told yet another version of the crime to his friend Matthew Howell, who also worked at the concrete plant. Howell testified that Norcross told him that he and Swan had planned to commit a robbery but that it had gone wrong. When

they broke in, a man inside fired at them and they returned fire. Norcross claimed to have shot Warren in the head, and that Swan had been hit in the shoulder either the homeowner or by crossfire. Norcross stated that he did not trust Swan and he threatened to kill Howell if Howell reported the story to the police.

Norcross told his girlfriend, Gina Ruberto, that he and Swan had broken into a house in Kenton, Delaware and that a man inside had a gun. Norcross stated that his own gun jammed and that Swan shot the man, who shot Swan in the shoulder. Norcross said he and Swan burned the fatigues they had been wearing and that he threw his gun in the water. Norcross indicated that he was upset about the incident because no on was supposed to get hurt.

Norcross and Swan were arrested in 2000 for the murder of Kenneth Warren. Norcross's trial began on April 24, 2001, and on May 10, 2001, the jury found him guilty of all charges. He was convicted of three counts of first degree murder, six counts of possession of a firearm during the commission of a felony, first degree robbery, first degree burglary and second degree conspiracy. After a five-day penalty hearing, the jury recommended by a vote of 10 to 2 that the aggravating circumstances outweighed the mitigating circumstances. On October 3, 2001, this

Court sentenced Norcross to death.[2] On direct appeal, the Delaware Supreme Court affirmed Norcross's convictions and sentences.[3] Norcross petitioned the United States Supreme Court for a writ of *certiorari*, which was denied on October 6, 2003. This is the date Norcross's conviction became final for purposes of postconviction proceedings.[4]

Norcross filed a pro se motion for postconviction relief in July 2004. New counsel filed an amended motion for postconviction relief in February 2006. The State filed an answer in response to the amended motion, which raised issues that overlapped with those raised in the initial pro se motion. Affidavits were filed by trial counsel, Paul S. Swierzbinski and Lloyd A. Schmid, Jr., in response to the facts alleged in the amended motion.

This Court heard eight days of testimony in the postconviction hearing in February 2007. In addition, the deposition testimony of two State's witnesses, Sherri Gigliotti and Linda Zervas, was made part of the record. In his post-hearing brief, Norcross raises ten issues, as discussed below.

Standard of review. The principles that govern claims of ineffective

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[2]*State v. Norcross*, 2001 WL 1223198 (Del. Super.).

[3]*Norcross v. State*, 816 A.2d 757 (Del. 2003).

[4]Rule 61(m)(3).

assistance of counsel were established by the two-pronged test of *Strickland v. Washington*.[5] Under the first prong of *Strickland*, a movant must show that trial counsel's performance was deficient.[6] The proper standard for attorney performance is that of "reasonably effective assistance" as defined by "prevailing professional norms."[7] Counsel's reasonableness must be assessed on the facts of the particular case, viewed as of the time of counsel's conduct.[8]

Strickland's second prong requires a movant to show that the deficient performance prejudiced the defense.[9] The prejudice component requires Norcross to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[10] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[11]

The question is not whether defense counsel should have introduced more

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[5]466 U.S. 668 (1984).

[6]*Id.* at 687.

[7]*Id*. at 687-88.

[8]*Id.* at 689.

[9]*Id.* at 687.

[10]*Id*. at 694.

[11]*Id.*

or different mitigating evidence. The question is whether the investigation supporting counsel's decision not to introduce mitigating evidence of Norcross's background was itself reasonable

Investigation and mitigating evidence. Movant's first argument is that defense counsel was constitutionally ineffective at the penalty phase for inadequate investigation and for failing to present easily accessible mitigating evidence. Movant identifies three categories os such evidence – lay witnesses, records and expert witnesses.

Movant acknowledges that defense counsel's strategy was to "paint Norcross as a human being" by showing him to be a follower with Swan as the leader and by showing that the murder as an aberrant act which would be appropriately punished by life in prison rather than by death.[12] This strategy is consistent with what courts require of defense attorneys at this stage of a capital trial:

> The purpose of investigation is to find witnesses **to help humanize the defendant** given that a jury has found him guilty of a capital offense. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations

[12]Opening Brief at 17-18.

unnecessary.[13]

At the penalty phase of his trial, the defense presented testimony from eight witnesses as well as from Norcross himself. These witnesses included Movant's aunt, sister, cousin, friends, and the mother of one of his children. They testified variously to the fact that Movant was born to an unwed mother, he never knew his biological father, his mother neglected him, one stepfather abandoned him while another abused him and that he had a sexual relationship with a 26-year-old babysitter when he was 15. Norcross himself took the stand and related these events in detail, as well as their effect on him, including feeling that he did not belong anywhere and that he wished he had never been born.

Movant argues that counsel's decision not to present the testimony of four other lay witnesses was not professionally reasonable and that their testimony could have changed the jury's recommendation. Movant's mother, Kathaleen Norcross did not testify at the penalty but did take the stand at the postconviction hearing. Movant asserts that her testimony could have made a difference because it would have corroborated the fact that Norcross had a difficult childhood and youth. The State asserts that her testimony would have been cumulative in

[13] *Marshall v. Hendricks*, 307 F.3d 36, 103 (3rd Cir. 2002) (emphasis added).

addition to the eight other witnesses and that Kathaleen Norcross presented too much risk to call to the stand. In his Affidavit, Public Defender Paul Swierzbinski stated that Mrs. Norcross was generally uncooperative and refused to take responsibility for her son's childhood problems or even admit that he had a hard childhood. Because of her self-serving attitude and because of a concern that she would commit perjury, the defense team decided not to put her on the stand. Lloyd Schmidt's file notes reflect the same concerns and with her general lack of credibility.

For these reasons, in preparing for the 2001 penalty phase, the attorneys agreed that she would have been an unpredictable witness and that their case was better off without her. The Court finds that at the time, the defense team made a reasonable decision. They had other witnesses to testify as to Norcross's unfortunate childhood, and even new defense counsel refers to Kathaleen Norcross as being able to corroborate what Movant and other witnesses presented. Movant has not shown that his attorneys were unreasonable for not calling Kathaleen Norcross or that her testimony would have changed the outcome of the penalty phase proceedings.

Next, Movant objects to the fact that Ruth Corey, the father of Movant's

oldest child, was never interviewed by the defense team. Again, new defense counsel refers to Corey's potential testimony in terms of corroboration. Corey would have reiterated the fact that when she was 26-years-old she had a brief sexual relationship with 15-year-old Norcross, resulting in the birth of Katie Norcross. The record shows that Movant rarely saw his daughter and made little effort to maintain any contact with her. New defense counsel has not indicated how this information would have affected the proceedings one way or another.

Movant also objects to the fact that Norcross's daughter Katie was not interviewed prior to the penalty phase. At the postconviction hearing in 2007, Katie testified that she loved her father and that she started to visit him in prison when turned 18. While her feelings might have shown that she cared for her father, Movant has not shown that Katie's testimony would have changed the outcome of the penalty phase or that defense counsel was unreasonable for not calling Katie to testify.

Movant also argues that trial counsel should have called Faith Smith, his aunt, in addition to his other aunt, Beverly Scullion. Smith had more contact with Norcross than other family members after his imprisonment, but Movant does not indicate how that fact could have affected the proceedings. In letters to his aunt,

Movant expressed remorse for the crimes, but he did not admit shooting Warren, and he expressed remorse in live testimony to the jury. Further, Smith acknowledged that Norcross has a tendency not to tell the truth. The Court finds that the defense team made a reasonable decision in not calling Faith Smith as a witness and that her testimony would not have affected the outcome of the proceedings.

These four witnesses would have added little to the jury's understanding of Norcross's life, and he has not shown that defense counsel's decision not to utilize them fell outside the wide range of reasonable professional assistance.[14]

Movant argues that trial counsel was ineffective for not introducing Norcross's school records and Ralph Swan's criminal records. When Norcross was 15 he was sent to New Dominion School in Virginia after shoplifting and car theft incidents. After 18 months at New Dominion he was released to his mother, who had relocated to Delaware. Movant now argues that his attorneys were ineffective for not using the New Dominion records to show that he benefitted from a more structured environment than the one his mother provided for him. The records, which date from 1985 to 1986, would shed little light on Movant's

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

conduct or state of mind in 2001. When Movant was 22 he joined the Marine Corps, which provides a highly structured environment, but he was not able to function within its confines. He received an "other than honorable" discharge for theft of supplies despite the structured nature of military life. Movant has not made the requisite showing in regard to the New Dominion records.

Movant argues that trial counsel was ineffective for not obtaining Swan's criminal records from Texas. Trial counsel testified that their investigation into Swan's background included confirmation and partial documentation of a business invasion. Counsel's request for funds to retain a Texas attorney was denied, and counsel were told to seek the records through public sources. The defense team did ask the State for the documents. New counsel has obtained the records and asserts that the documents could have been used to show that Norcross was the follower of Swan. Finally, Norcross testified that Swan was not involved in the crimes, which renders the issue of Swan's records meaningless. The Court's inquiry ends here.

Movant argues that his attorneys were ineffective for failing to call any psychological or psychiatric experts. Prior to trial, the defense team had Movant evaluated by Dr. Stephen Mechanick, a psychiatrist, and Dr. Abraham Mensch, a

neuropsychologist. Neither expert had anything to offer for the guilt phase and both were unsure of what they might have in the way of mitigators.

Gigliotti reported that Dr. Mensch diagnosed Norcross as having traits of antisocial personality disorder with elements of suggestibility. Mensch found indications of post-traumatic stress disorder (PTDS),but he also questioned whether Norcross was overstating his problems. In summarizing Dr. Mensch's findings, Gigliotti stated that "Dr. Mensch does not feel he would have a lot to use in trial. If mitigation is needed, he will need to see Adam again to further explore some issues." Gigliotti Memo July 24, 2000. Similarly, a memo from Zervas to Schmid stated that the most Dr. Mechanick could say was that Norcross had childhood problems that affected him as an adult and further discussion would be necessary to explore this issue. Dr. Mechanick diagnosed Movant with a personality disorder not otherwise specified (NOS) and found that his conflicting versions of the crime indicated a lack of remorse. Both doctors questioned Movant's credibility.

In light of these facts, Movant cannot meet the high standard of showing that his attorneys made professionally unreasonable decisions in not further exploring the experts' potential testimony or calling these witnesses to testify. The defense

strategy of "paint[ing] Norcross as a human being" could have been undermined by a doctor's opinion or even suggestion that Movant changed his story to suit the circumstances at hand and that he was antisocial. If Movant's own expert, Dr. Mechanick, were to testify that Movant's differing versions of the crime showed a lack of remorse and credibility, his "humanity" would be further undermined. Dr. Mechanick was also concerned about a jury's reaction to the diagnosis of antisocial personality disorder, and defense counsel had reason to share this concern.

Movant's defense counsel, who were experienced trial attorneys, decided not to delve further into Movant's allegedly antisocial mental condition. Instead, they used family and friends to describe the sadness and difficulty of Movant's childhood. Most telling, perhaps, was the testimony of Norcross himself, who recounted neglect from his mother, abandonment by a man he believed to be his father, abuse from a stepfather, problems in school and in the Marine Corps, and failure in his relationships with women. Norcross had few friends and he felt that he never really belonged anywhere. These factors led him into a relationship with Ralph Swan in which he deferred to Swan and feared him.

This is the picture presented by the defense team, a picture of a hurt child

who became a lonely man. This picture is in keeping with the defense objective of portraying Movant as a human being, a strategy which the Court finds to be reasonable. While counsel could have opted to pursue mental impairment issues with Dr. Mechanick and Dr. Mensch, the Court finds that counsel acted reasonably in choosing instead to present Movant as a troubled, unsuccessful individual and to do so through testimony from lay witnesses and Norcross himself.

The State argues that presenting Mensch and Mechanick would have done little to change the outcome of the case, primarily because the experts both expressed concern about Norcross's exaggeration of his problems and symptoms and also because the jury heard evidence of the conflicting stories Norcross had told to different people. The Court agrees. In addition, the Court finds that counsel made a reasonable decision not to pursue further investigation into Norcross's mental condition because there was so much evidence from friends and family of his traumatic childhood. Based on this evidence, counsel made the decision not to pursue the issues of mental impairment. The Court concludes that confidence in the outcome of the penalty phase was not undermined by relying on lay witnesses who were firsthand observers of Norcross's problematic childhood. Norcross himself described the effect of his unfortunate childhood in a different

way than a mental health expert would, but just as effectively. The Court concludes that Movant was not prejudiced by the mitigating evidence as it was planned and presented by his trial attorneys.

At the postconviction hearing, the defense presented the evidence of Dr. Jonathon Mack, who conducted psychological testing on Movant. He determined that Movant suffers from mild brain damage, attention deficit hyperactivity disorder (ADHD), cognitive disorder NOS, PTSD, chronic obsessive compulsive disorder, and dissociative disorder, all consistent with childhood abuse. Movant seems to assume that because a mental impairment diagnosis was available, it was incumbent on trial counsel to present it as mitigating evidence at the penalty phase. As stated previously, defense counsel had Gigliotti's memo which included input from Mensch and Mechanick but chose, reasonably, to present a different picture of Norcross, a picture based on the testimony of his friends, family and himself. Norcross suffered no prejudice as a result.

Due process issues. Movant raises a number of issues that pertain to due process. He argues first that his due process rights were violated when the prosecutor concluded his cross-examination by asking whether Movant had ever seen The Jerry Springer Show. Movant argues that this comment inflamed the jury

to reach a conclusion not based on the evidence and the law. Because Movant did not raise this issue on direct appeal, it is barred under Rule 61(I)(3) unless he can show cause for failing to raise it and actual prejudice. He has done neither. Under the "fundamental fairness" exception of Rule 61(I)(5), Movant also fails. The argument also fails as an assertion of ineffectiveness of counsel, which Movant makes by contending that counsel should have objected to this question. While the prosecutor's remark may not have been the most seemly way to end his cross-examination, it did not rise to the level of a due process violation because of the wide discretion that is permitted on cross-examination.[15] No hostile or offensive exchange took place between Movant and the prosecutor, and the Court finds that the isolated question did not have any impact on the outcome of either the jury's recommendation or the Court's final sentence.

Movant argues that defense counsel was ineffective for not objecting to the prosecutor's comparison of Movant and the victim. Movant claims that such argument inflamed the jury and violated his right to due process of law. The State argues that the claim is procedurally barred under Rule 61(I)(3) and that the fundamental fairness exception of Rule 61(I)(5) does not apply because the

[15] *Snowden v. State*, 672 A.2d 1017, 1025 (Del. 1996).

prosecutor's remarks were accurate and not objectionable.

In his closing argument, the prosecutor went to great lengths to portray the victim as an upstanding person who would be missed by friends and family alike. Movant objects to the following two statements, asserting that they improperly evoked the jury's sympathy and prejudice:

> "The victim was pure and he was totally innocent. The defendant is an experienced criminal and now convicted murder."
>
> "The picture the defendant paints would have you think of him as the victim."

Movant has not raised this argument at any earlier stage of the proceedings and it is therefore subject to procedural default under Rule 61(I)(3) unless Movant can show cause and prejudice. He has not attempted to make this showing or to meet the fundamental fairness exception of Rule 61(I)(5). To the extent that this is a claim that counsel was ineffective for not objecting to these comments, the Court must apply the three-pronged first stated in *Hughes v. State.*[16] First, the centrality of the issue affected by the alleged error; second, the closeness of the case; and, third, the steps taken to mitigate the effects of the alleged error. Although appeals

[16]437 A.2d 559, 571 (Del. 1981); *see also Hunter v. State*, 815 A.2d 730, 733 (Del. 2002) (adding a fourth prong that questions whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process).

to sympathy are objectionable,[17] there was a great deal of evidence presented by both parties in the penalty phase, and the Court finds that the prosecutor's remarks did not have a central place in the proceedings and were not so prejudicial as to violate Movant's right to due process.

Movant argues that his due process rights were violated by the impermissible opinion testimony offered by retired Marine Sergeant Paul Booker. The State offered Sgt. Booker as an expert, who had had contact with thousands of marines over the course of his 21-year career. Booker's duties included evaluating the marines under his supervision. Sgt. Booker had supervised Movant at Camp Lejeune and had daily contact with him for approximately three months. He testified that Movant generally lacked remorse for his actions and did not consider the consequences of his behavior. Movant makes a conclusory assertion that there was no foundation for Booker's testimony as an expert witness, but conclusory assertions are subject to summary dismissal.[18] The Court finds that Movant has not made a viable challenge to the admission of Sgt. Booker's testimony.

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[17] *Id.*

[18] *Jordan v. State*, 648 A.2d 424 (Del. 1994); *State v. Childress*, 2000 WL 1610766 (Del. Super. 2000).

Movant argues that defense counsel was ineffective for failing to object to Tanya Bennett's testimony, which was allegedly inflammatory and prejudicial. Ms. Bennett testified that while she and Movant were watching an episode of *NYPD Blue*, Movant stated that "the first time you kill someone, it's hard, but the second time it gets easier." Defense counsel objected, and the Court ruled that the defense could cross-examine Bennett to determine whether she thought Movant's remark was a joke. Bennett acknowledged that Movant made the comment in a joking manner. Despite this concession, Movant argues that Bennett's testimony was inadmissible under DRE 403 and DRE 404(b) because the State could not prove a prior or subsequent murder by plain, clear and conclusive evidence. The testimony of Tanya Bennett presents no viable challenge to the fairness or legality of the proceedings.

Movant argues that trial counsel was ineffective for failing to object to a statement made by the prosecutor in his rebuttal closing statement to the jury:

> [Norcross's] background and childhood does not justify and does not excuse and is not in mitigation for the senseless, cruel, unwarranted murder of Kenneth Warren. . . . (Tr. 5/17/01 at 193.)

While Movant is correct that anything relevant to the penalty is mitigating

evidence, the prosecutor's statement is at most harmless[19] beyond a reasonable doubt because this Court instructed the jury as to how to consider the mitigation evidence and the limited scope of the lawyers' input on this issue. Not every improper remark made by a prosecutor requires reversal, but only that which prejudicially affects substantial rights of the accused.[20] The Court finds that Movant's rights were not affected by Bennett's testimony and that he suffered no prejudice from counsel's failure to object.

Movant argues that this Court erred in instructing the jury that it must find the existence of mitigating factors by a preponderance of the evidence. While acknowledging that this instruction is not in violation of the Eighth Amendment,[21] Movant argues that it violates his rights under Delaware's death penalty statute, which does not assign a burden of proof to the jury's finding of mitigating factors.[22] This argument was not raised on direct appeal or in prior postconviction motions, and is therefore procedurally barred unless Movant shows both cause and

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[19]Super. Ct. Crim. R. 52.

[20]*Sexton v. State*, 397 A.2d 540 (Del. 1979), overruled on other grounds, *Hughes v. State*, 437 A.2d 559(Del. 1981).

[21]*Walton v. Arizona*, 497 U.S. 639 (1990) (holding that Eighth Amendment is not violated when state assigns to defendant burden of establishing existence of mitigating circumstance).

[22]DEL. CODE ANN. tit. 11, § 4209 (2007).

prejudice. He has done neither. He offers no reason for not having raised the issue previously, and he deems it a constitutional error without explanation. The Court concludes that Movant has not met his burden under Rule 61(I)(3) nor triggered the exception set forth in Rule 61(I)(5). This claim is procedurally barred.

Movant argues that defense counsel was ineffective for not arguing at trial and on appeal that Delaware's death penalty statute contains an unconstitutionally broad list of statutory aggravating factors, is unconstitutionally vague as to both non-statutory aggravating factors and mitigating factors, is generally over-inclusive and is therefore arbitrary and capricious. In this vein, the United States Supreme Court has stated that "what is important is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.[23] Movant offers no case law or authority to show that Delaware's death penalty statute does not meet this standard. Nor does he identify any way in which these alleged defects affected him. Movant merely asserts that there is a reasonable probability of a different outcome if trial counsel had raised this issue at trial or on appeal, but he stops short of stating how or why. He has not raised a viable issue as to aggravating factors.

[23] *Zant v. Stephen*, 402 U.S. 862, 879 (1983)(emphasis in the original).

[[[The Court finds that Movant has not met either prong of the *Strickland* test. He has not shown that counsel's conduct in not raising these issues was professionally unreasonable because he has not presented any authority or support that counsel could have used to support the arguments. For the same reason, he cannot show that there is a reasonable probability of a different outcome.]]]

Movant argues that appellate counsel was ineffective for failing to raise the properly preserved objection to this Court's instruction regarding the weight to be given to the jury's recommendation regarding Movant's penalty. The Court substituted the phrase "substantial consideration" for the phrase "great weight" and struck the phrase "conscience of the community" altogether. As the State notes, a defendant is not entitled to a particular instruction, but he does have the unqualified right to a correct statement of the substance of the law.[24] While Movant refers to both state and federal cases that use the older language, he offers no authority to show that either phrase is a constitutionally required part of jury instructions in a penalty phase of a capital case. In fact, the statute provides that the Court shall give the jury's recommendation the consideration it finds to be appropriate:

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[24]*Carbrera v. State*, 747 A.2d 543, 544 (Del. 2000).

> The jury's recommendation concerning whether the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist shall be given **such consideration as deemed appropriate by the Court** in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the Court.[25]

Based on the clear language of the statute, Movant cannot show either attorney error or prejudice and therefore his claim of ineffective assistance of counsel fails.

Movant argues that the State violated Norcross's right to due process when it withheld *Brady* evidence about the State's witness Bridget Phillips prior to the April 2001 trial.[26] Movant asserts that the State was obligated to inform the defense of the possibility that Phillips, Movant's former wife, could collect a $10,000 reward for supplying information that would break the case. At trial, the following exchange took place between defense counsel and Phillips:

> Q: Now, you're aware that there have been rewards offered from time to time by certain organizations;
> A: Correct.
> Q: Have you put in any application for any of those awards?
> A: I have not.

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[25]DEL. CODE ANN. tit. 11, § 4209(d) (2007) (emphasis added).

[26]The elements of a violation of *Brady v. Maryland* are that the evidence at issue must be favorable to the accused either because it is exculpatory or impeaching; that the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. 373 U.S. 83 (1963).

Q: Anyone talked to about them?
A: One was mentioned, but I was given no promise and nothing was ever said, simply the fact that there was a reward for it, and this was after all of my interviews.
Q: Well, the fact remains that the discussion was had, right?
A. Certainly.

Despite this line of questioning, Movant now makes a *Brady* argument, asserting that the reward information could have been used to impeach Phillips as to her bias or interest. Because Movant did not raise this issue earlier in the proceedings, it is procedurally barred under Rule 61(I)(3) unless Movant can show cause and prejudice. Based on the above-quoted excerpt, Movant cannot show that he was prejudiced by his attorney's lack of knowledge of a specific reward. His attorney was aware of the possibility of a reward and questioned Phillips about it in the presence of the jury. Thus he planted the seed of bias or interest and Movant cannot show that he was prejudiced for lack of it. This claim is procedurally barred.

Movant argues that trial counsel was ineffective for failing to object to the Court's instruction not to be swayed by "mere sympathy" in considering the mitigating evidence. The Court instructed the jury as follows:

> You are reminded that you must base your answers to the questions set forth in the special interrogatory sheet solely upon the evidence and the instructions as to the applicable law; you must not be swayed

> by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. While evidence about the victim and about the impact of the murder on the victim's family is relevant to your decision, you must remember not to allow sympathy to influence your sentencing recommendation in any way. The Court does not charge you to sympathize with the victim or his family or the Defendant or his family because it is only natural and human to sympathize. But the Court does charge you not to allow sympathy to influence your sentencing recommendation.

In *California v. Brown*, the United States Supreme Court held that the a capital defendant's constitutional rights were not violated by a penalty phase jury instruction that informed jurors that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."[27] This language is similar in form and meaning to the Delaware pattern instruction used in Movant's trial, and he cannot therefore show either attorney error or prejudice.[28] Movant quotes a passage regarding the role of mercy in determining an appropriate sentence, but the quoted section is presented in response to a prosecutor's improper

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[27]479 U.S. 538 539 (1987).

[28]*See also Lesko v. Lehman*, 925 U.S. 1527, 1548-49 (1991)(approving anti-sympathy instruction which stated as follows:

> Your decision should not be based on sympathy, because sympathy could improperly sway you into one decision–into a decision imposing the death sentence, or could improperly sway you against the decision of imposing the death sentence. There is sypathy on both sides of that issue. Sympathy is not an aggravating circumstance; it is not a mitigating circumstance.)

appeal vengeance in his closing statement.[29] Furthermore, the terms "mercy" and "sympathy" are not synonymous, although the Court need not explain the differences because the parties have not raised the issue other than Movant's quotation referencing mercy. This claim has no merit.

For these reasons, Movant's motion for postconviction relief is ***Denied.***

It Is So ORDERED.

Judge John E. Babiarz, Jr.

JEB,jr/rmc/bjw
Original to Prothonotary

[29]*See Lesko v. Lehman*, 925 U.S. at 1545.