IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
v.	)	ID#: 9604017809
CRAIG ZEBROSKI, Defendant.	)	

ORDER

Upon Remand For Further Consideration of the "Interest of Justice" Exception In Capital Murder Defendant's Latest Rule 61 Motion

Through counsel, Defendant has filed serial motions for postconviction relief. After thoroughly reviewing the latest motion, the court granted partial relief on a legal claim. The court, however, also found Defendant's latest ineffective assistance of counsel claim repetitive and otherwise procedurally barred. The barred claim challenged the effectiveness not only of Defendant's trial counsel, but also of the lawyers who fully litigated his first motion for postconviction relief. The court specifically found that the "interest of justice" exception to Rule 61's procedural bars did not apply. The Supreme Court, however, remanded for further consideration of the interest and miscarriage of justice exceptions in light of specific, recent cases.

I.

Thirteen years ago, in 1997, Craig Zebroski was convicted of intentionally murdering Joseph Hammond, Sr., a defenseless, 59-year-old gas station attendant, during a botched robbery. The murder was committed in 1996, when Zebroski was almost 18 years, 8 months old. Because Zebroski admitted that he shot Hammond between the eyes when Hammond failed to open the cash register, the trial's guilt phase focused on whether the murder was intentional. Now, Zebroski's guilt is not directly in issue. Following the jury's 9-3 recommendation, Zebroski was sentenced to death. The facts were summarized and the sentence's reasoning was presented in a 52-page opinion.[1]

In the ensuing years, Zebroski's conviction and sentence were affirmed unanimously by the Supreme Court of Delaware, *en banc*.[2] Zebroski's amended, first motion for postconviction relief was denied in a 27-page opinion, issued after a full evidentiary hearing and formal briefing.[3] The denial was affirmed unanimously, *en*

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[1] *State v. Zebroski*, 1997 WL 528287 (Del. Super. Aug. 1, 1997) (Silverman, J.); *see also Zebroski v. State*, 715 A.2d 75 (Del. 1998).

[2] *Zebroski v. State*, 715 A.2d 75 (Del. 1998).

[3] *State v. Zebroski*, 2001 WL 1079010 (Del. Super. Aug. 31, 2001) (Silverman, J.).

banc.[4] Certiorari was denied by the United States Supreme Court.[5] And, a Writ of Habeas Corpus, a "mixed petition," was sought from the United States District Court.[6]

While the habeas corpus petition was pending, which it still is, Zebroski, on November 3, 2003, filed a pleading captioned: "Subsequent Motion For Postconviction Relief Pursuant to Superior Court Criminal Rule 61." The "Subsequent Motion" challenged the death sentence, alleging that the court erred by placing "great weight" on the jury's recommendation and for telling the jury that the court would do that. At the court's instruction, the State filed an answering brief. But, on December 8, 2003, the court issued a letter order advising the parties that the case was stayed[7] pending further order of the District Court.

Then, on July 1, 2008, Zebroski filed this, another motion for postconviction relief, which is captioned "Motion to Reopen Postconviction Relief Pursuant to Superior Court Criminal Rule 61." Not counting his original, *pro se* filing, this is Zebroski's third motion for postconviction relief. It was filed by Zebroski's second set of court-appointed, postconviction relief lawyers.

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[4] *Zebroski v. State*, 822 A.2d 1038 (Del. 2003).

[5] *Zebroski v. Delaware*, 540 U.S. 933 (2003).

[6] *Zebroski v. Carroll*, C.A. No. 03CV853JJF (D. Del. Sept. 3, 2003).

[7] *Zebroski v. Carroll*, C.A. No. 03CV853JJF (D. Del. Sept. 27, 2007).

After preliminary review,[8] the court issued a letter order on November 24, 2008, preliminarily denying much of the latest motion. But, the court also allowed Zebroski to make further, written argument. On March 19, 2009, the court issued an 11-page order denying further relief, in part, but also knocking out Zebroski's conviction for felony-murder.[9] Again, as it did in reaching its 1997 and 2001 decisions, in reaching its November 2008 and March 2009 decisions, the court took this capital murder case seriously, especially the interest of justice.

Zebroski filed an appeal from the denial of his latest motion. Calling it "conclusory," the Supreme Court found the 2009 order's "interest of justice" analysis inadequate. The Supreme Court remanded, requiring this court to "address whether the circumstances contemplated by *Weedon*[10] exist in this case."[11] That implicates Rule 61(i)(4)'s interest of justice exception to Rule 61(i)'s bars to relief. The remand also requires the court to "address the additional exception provided by Rule 61(i)(5)[,]" and to consider and address three other recent decisions: *Smith v. Spisak*,[12]

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[8]Super. Ct. Crim. R. 61(d).

[9]*State v. Zebroski*, 2009 WL 807476 (Del. Super. Mar. 19, 2009) (Silverman, J.).

[10]750 A.2d 521 (Del. 2000).

[11]*Zebroski v. State*, 2010 WL 797013 (Del. Supr. Mar. 9, 2010).

[12]--- U.S. ----, 130 S.Ct. 676, --- L.Ed.2d ---- (2010).

Anker v. Wesley,[13] and *Outten v. Kearney*.[14]

II.

The court will address *Smith v. Spisak*, *Anker v. Wesley*, and *Outten v. Kearney*. Then, it will address *Weedon v. State.* Finally, it will speak to the "interest of justice"and "miscarriage of justice" exceptions to Rule 61(i)'s bars to relief.

A. *Smith v. Spisak, Anker v. Wesley,* and *Outten v. Kearney* Do Not Apply.

As to *Smith v. Spisak*,[15] *Outten v. Kearney*,[16] and *Anker v. Wesley*,[17] the court finds that none of those cases applies or is helpful here. Generally, neither *Spisak*, *Outten*, nor *Anker* involves multiple motions for postconviction relief. *Spisak*, *Outten*, and *Anker* turn on the ineffective assistance of counsel analysis called for by *Strickland v. Washington*.[18] As presented in the original decision on Zebroski's latest motion, federal law is settled that there is no right to effective assistance of counsel at a postconviction relief hearing.[19] The court does not re-reach

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[13]670 F. Supp. 2d 339 (D. Del. 2009).

[14]464 F.3d 401 (3d Cir. 2006).

[15]--- U.S. ----, 130 S.Ct. 676, --- L.Ed.2d ---- (2010).

[16]464 F.3d 401 (3d Cir. 2006).

[17]670 F. Supp. 2d 339 (D. Del. 2009).

[18]466 U.S. 668 (1984).

[19]*Zebroski*, 2009 WL 807476, at *2 (citing *Coleman v. Thompson*, 501 U.S. 722, 755 (1991)); *see also Ross v. Moffitt*, 417 U.S. 600 (1974); *Floyd v. State*, 1992 WL 183086 (Del.

and re-consider *Strickland* here unless reconsideration is warranted in the interest of justice. Other than the constitutional right to counsel claim, which does not, as a matter of law, automatically precipitate re-review under *Strickland*, there is no "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."[20]

So, as a threshold matter, *Spisak*, *Outten*, and *Anker* are not controlling precedents. As discussed later, neither is *Weedon*. Only when *Spisak*, *Outten*, *Anker* and *Weedon* are viewed from a distance as a melange and applied uncritically to Zebroski's latest arguments do those authorities seem to apply here. But, even if re-review under *Strickland* were called for, which it is not, taking this case's facts into account, those cases are still not helpful for that purpose.

1. *Smith v. Spisak*

Less than four months ago, in *Smith v. Spisak*, the Supreme Court of the United States considered two claims, neither of which is presented here. Spisak's

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Supr. July 13, 1992); *Shipley v. State*, 570 A.2d 1159 (Del. 1990).

[20]Super. Ct. Crim. R. 61(i)(5). *See Bailey v. State*, 588 A.2d 1121, 1129-30 (Del. 1991) ("A defendant must prove that his . . . claim shows either that the Court lacked jurisdiction or that the petition raises 'a colorable claim that there was a miscarriage of justice *because of a constitutional violation* . . . .' The defendant bears the burden of proving the existence of a constitutional violation under the Rule.") (emphasis in original) (citation omitted).

first claim concerned "the instructions and verdict forms that the jury received at the sentencing phase of his trial."[21] *Spisak* unanimously agreed with Ohio's courts that "the jury instructions at Spisak's trial were not contrary to 'clearly established Federal law.'"[22] Spisak's second claim was "that his counsel's closing argument at the sentencing phase of his trial was so inadequate as to violate the Sixth Amendment."[23] Zebroski does not challenge jury instructions or closing argument, so far. His latest claim primarily concerns the quantum of mitigation evidence at his penalty hearing.

At most, Zebroksi's trial counsel's closing argument is implicated indirectly and remotely by Zebroski's latest claim of ineffective assistance of counsel. As mentioned, Zebroski's latest attack on trial counsel concerns counsel's alleged failure to present more powerful mitigation evidence. If *Spisak* had a real bearing on this case, which it does not, *Spisak* does not help Zebroski. That is because, as to prejudice *(Strickland*'s second prong), *Spisak* concludes "that there is not a reasonable probability that a more adequate closing argument would have changed the result. . . ."[24] In short, Spisak lost, and anything seeming to favor him is mere

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[21] 130 S.Ct. at 681.

[22] *Id.* at 684.

[23] *Id.* at 684-85.

[24] *Id.* at 688.

dicta.

Spisak is vaguely similar to this case because Spisak's lawyers called three expert witnesses, all of whom testified that Spisak had mental issues, including "schizotypal and borderline personality disorders[.]"[25] That superficially seems to help Zebroski because his presentation of expert opinions on his mental condition was less elaborate, as to the number of experts, than Spisak's was. Spisak's numerically superior presentation, nonetheless, did not inform the Supreme Court's decision as much as did "Spisak's boastful and unrepentant confessions and his threats to commit further acts of violence."[26] Because of Spisak's boasts, unrepentant confessions and threats, the Supreme Court "[did] not see how a less descriptive closing argument with fewer disparaging comments about Spisak could have made a significant difference."[27]

Spisak actually brings the State's position, not Zebroski's, into better perspective. Zebroski's jury and the sentencing court saw the boastful and unremorseful photograph showing Zebroski posing with the murder weapon after the killing. Zebroski's jury and the sentencing court also heard about Zebroski's

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[25] *Id.* at 687.

[26] *Id.*

[27] *Id.*

unrepentent threats to commit more violence against a witness, and his intent to escape from prison using violence against law enforcement personnel.[28]

The penalty hearing featured powerful, aggravating evidence that Zebroski went to a party after the cold-blooded murder where he posed for photographs while brandishing the murder weapon. Later, while in prison awaiting trial and after ample opportunity for sober reflection, Zebroski: threatened to "fuck up [his accuser] real bad," as retaliation and to prevent the accuser's testifying at trial; encouraged his co-defendant to "stick with the first alibi that [Zebroski] and him came up with," hoping "to beat everything"; and expressed interest in "beatin' the shit out of a few guards in here just to get out of this fuckin' jail."

If *Spisak* had a real bearing on this case, which it does not, *Spisak* would not help Zebroski. That is because *Spisak* concludes "that there is not a reasonable probability that a more adequate closing argument would have changed the result. . . ."[29] Thus, despite his lawyer's shortcomings, Spisak failed to meet *Strickland*'s standards. Spisak lost, and anything seeming to favor him is mere *dicta*. Again, a new *Strickland* analysis is barred here unless it is warranted under the narrower "interest of justice" exception to Rule 61's procedural bars.

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[28] *See Zebroski*, 1997 WL 528287, at *4.

[29] 130 S.Ct. at 688.

2. *Outten v. Kearney*

In contrast to *Spisak*, *Anker* and *Weedon*, *Outten* has the singular virtue of having been mentioned by Zebroski in his latest motion. Nevertheless, *Outten* is also not helpful here. While Outten and Zebroski are superficially similar in that both defendants challenged their trial counsel's effectiveness based on inadequate investigation and presentation of mitigators, in sharp contrast to Zebroski's trial counsel:

> [Outten's] [c]ounsel conceded that their investigation was cursory, as it consisted simply of a letter to Outten asking him to provide 'the names of potential penalty phase witnesses.' Nothing else was done by way of investigation except for the conduct of limited discussions with Outten and his mother.[30]

As the Third Circuit put it: "Simply stated, defense counsel's penalty-phase strategy was to argue to the jury . . . that he was a good guy and that his life should be spared because he was actually innocent."[31] The problem was not that Outten's counsel failed to meet specific norms, such as ABA standards; Outten's counsel did almost nothing.

Outten only establishes a floor. Specifically, *Outten* holds "that the limited scope of trial counsel's investigation was [in]adequate under the prevailing

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[30] 464 F.3d at 415 (citation omitted).

[31] *Id.*

norms of professional conduct at the time of Outten's trial."[32] Accordingly, the Third Circuit found that Outten's trial counsel failed the first prong of the *Strickland* inquiry.[33] As to *Strickland*'s second prong, *Outten* focused on the fact that "the jury recommended death by the narrow margin of 7 to 5[.]"[34] The fact that "persuading even one juror to vote for life imprisonment could have made all the difference . . . without doubt satisfies *Strickland*'s prejudice prong."[35]

Here, the court is not automatically performing a second *Strickland* analysis. Again, Zebroski has no right to postconviction relief counsel and no right to file multiple motions under Rule 61. Here, the court is first considering Zebroski's latest motion under the "interest of justice" exception to Rule 61's bars to relief. Only if Zebroski has shown that further consideration is warranted in the interest of justice can the court re-consider his *Strickland* claims. But, as just explained, if the court were re-visiting *Strickland*, and if it accepted Zebroski's latest factual claims, it would not find a violation of the *Strickland* standards for ineffectiveness of counsel.

Specifically, Zebroski's trial counsel called eleven witnesses, including

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[32] *Id.* at 419.

[33] *Id.*

[34] *Id.* at 422.

[35] *Id.* at 422-23.

friends, family, and family friends. While their testimony focused on Zebroski's positive character traits, they also painted a graphic picture of the devastating circumstances surrounding Zebroski's childhood, including physical and mental abuse at the hands of his father and stepfather, both of whom were mean drunks. Those witnesses' testimony may not have included every horrific detail, but their testimony was consistent and shocking. Jurors sobbed when a witness described Zebroski, as a young child, trying to stand up for his mother against his mean and intoxicated stepfather. The court recalls its initial lament: "If only [he] had not imposed his troubles so horribly on an innocent victim, [Zebroski] would be the fitting object for sympathy and compassion."[36]

Significantly for present purposes, and in sharp contrast to *Outten*, one of Zebroski's eleven witnesses was a highly qualified psychologist, Mantel Much, Ph.D. Dr. Much testified for two-and-a-half hours. His testimony reflected his review of Family Court records, a clinical interview and psychological testing. The Family Court records included an evaluation by a child psychologist in 1991, and another evaluation done in 1994. Dr. Much also referred to consistent reports from several other psychologists and psychiatrists over the years.

As he explained to the jury, Dr. Much diagnosed Zebroski with a

[36]*Zebroski*, 1997 WL 528287, at *6.

conduct disorder. A conduct disorder, as Dr. Much put it, "is basically given to young people . . . who have problems . . . in terms of behavior and adhering to the rules and regulations of society. Typically, these young folks come in contact with the criminal justice system."

Dr. Much also found "long term and chronic addictions to alcohol and drugs." In part, Dr. Much testified that Zebroski abused PCP, and "PCP is a very, very powerful mind and behavior altering substance. It . . . commonly induces periods or fits of rage and depression." Zebroski also abused LSD. That "created very, very severe perceptual distortions. . . ." Zebroski's cocaine abuse created "profound feelings of paranoia, suspiciousness." Summing up Zebroski's substance abuse, Dr. Much explained that Zebroski's "long-standing, multiple addictions" caused "very serious consequences to his brain function, to his ability to really perceive things accurately . . . and also to be able to excercise good judgment and control[,] . . . whether or not he was actually under the influence[.]"

Dr. Much further opined that "as a result of [Zebroski's] long-term and severe exposure to physical violence in the home, both towards himself and towards other family members," Zebroski suffered from posttraumatic stress disorder. That meant, among other things, Zebroski "on a most basic level," was "paranoid most of the time." Dr. Much explained to the jury how that had a constant bearing on the way

Zebroski perceived things and how he acted. Dr. Much also outlined other problems and disorders bearing on Zebroski's behavior, including attention deficit hyperactivity disorder (ADHD), hearing loss, and asthma. Dr. Much concluded that all these things caused Zebroski to turn to drugs for self-medication.

Dr. Much explained that Zebroski responded well to "longer term placements that he remained in. . . . [H]e ultimately settled in and worked with treatment staff and did not create significant problems." Dr. Much believed that Zebroski would adapt in prison because "a lot of these behaviors that have been problematic on the street for him will go away. . . . [P]articularly with young people who tend to be more resilient than adults, that abstinence . . . and being in a structured and contained environment that's safe, he will adjust and he will improve considerably."

Zebroski's original amended motion for postconviction relief was, itself, cursory. But, it precipitated an evidentiary hearing and full briefing. Significantly for present purposes, during the hearing, Zebroski's legal expert criticized Zebroski's trial counsel for not retaining a medical doctor "to testify as to the profound impact the consumption of PCP would have had upon Mr. Zebroski." To support that opinion, Zebroski's original postconviction relief counsel submitted an affidavit from a board-certified neurologist, Thomas M. Hyde, M.D., Ph.D. In summary, Dr. Hyde

focused on the lethal effects of Zebroski's voluntary consumption of alcohol, marijuana and PCP. Although its finding was imprecise, the court originally discounted Dr. Hyde's proffered testimony, correctly, as being cumulative.

Zebroski's original postconviction relief counsel also submitted an affidavit from Caroline Burry, Ph.D., a social worker and mitigation expert. Dr. Burry opined that trial counsel should have retained a social work mitigation expert to develop a psychosocial history or evaluation. Dr. Burry highlighted the testimony of Zebroski's mother that, according to Dr. Burry, minimized Zebroski's "dysfunctional background replete with domestic violence, child abuse, internal chaos, isolation, substance abuse, multiple stepfathers and paramours of his mother, and mental illness." Dr. Burry claimed that the mother's testimony "did not include detailed information about the multiple times she and her various spouses and paramours were reported to child protective services agencies for the abuse of Mr. Zebroski and his siblings." Be that as it may, the original sentencing decision reflects the jury's and the court's awareness of the things that allegedly were minimized. Thus, as with Dr. Hyde's affidavit, the court stands by its original assessment of Dr. Burry's proffered testimony as being merely cumulative.

Now, his second set of postconviction relief counsel has found even more of the same. And, they conflate Outten's trial counsel's failure to do almost

anything with Zebroski's trial counsel's alleged failure to do more. There is no principled way to compare Outten's and Zebroski's trial and postconviction relief counsel's efforts and call them similar.

3. *Anker v. Wesley*

Like *Spisak* and *Outten*, *Anker* also is not helpful here. First, *Anker*'s only holding is that the federal courts have jurisdiction to consider Anker's claims. *Anker*, by its terms, was stayed to await *Spisak*.[37] Accordingly, *Anker* does not touch the merits. Presumably, *Anker* is now in supplemental briefing. But, even if Anker ultimately prevails, *Anker* is not factually or legally on point.

The core claim in *Anker* flows from the allegation that Anker's trial attorney was impaired by mental illness during Anker's trial. Despite a psychologist's opinion that the attorney "was depressed to the point of nonfunctionality [sic][,]"[38] Anker alleged that his representation was so lacking that his claim fits under *United States v. Cronic*.[39] *Cronic* holds that in extreme circumstances, not even alleged in this case, so far, the usual presumption of

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[37] *Anker*, 670 F. Supp. 2d at 341.

[38] *Id.* at 346.

[39] 466 U.S. 648, 659 n.25 (1984).

counsel's effectiveness is reversed. Anker's first motion for postconviction relief was summarily dismissed because Anker had not shown prejudice caused by the attorney's health. Accordingly, *Anker* centers on whether the federal courts can now consider Anker's *Cronic* claim.

Anker summarizes the "very limited exception to *Strickland*'s prejudice requirement" created in *Cronic*:

> [T]here are three situations in which prejudice . . . will be presumed: where the defendant is completely denied counsel at a critical stage, where 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing,' or where . . . there is an extremely small likelihood that even a competent attorney could provide effective assistance, such as when the opportunity for cross-examination has been eliminated. The *Cronic* presumption of prejudice only applies when counsel has completely failed to test the prosecution's case throughout the entire trial.[40]

Here, Zebroski's first motion for postconviction relief precipitated a full evidentiary hearing and full briefing. Zebroski has never been "completely" denied counsel at a critical stage; nor did counsel "entirely" fail to test the State's case; nor did the court "eliminate" trial or postconviction relief counsel's opportunity to be effective. Whatever *Anker* has held, or will hold, it will not speak to this case's issues, which do not involve anything remotely approaching a *Cronic* claim.

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[40] *Anker*, 670 F. Supp. 2d at 345 (citation omitted).

B. *Weedon v. State* Does Not Apply.

As presented above, the remand charges the court to "address whether the circumstances contemplated by *Weedon*[41] exist in this case."[42] They do not. *Weedon* concerns applying the interest of justice exception where a defendant was denied an evidentiary hearing on his first ineffective assistance of counsel claim. On several axes, the circumstances contemplated by *Weedon* differ dramatically from the ones here.

After Weedon's direct appeal failed, Weedon filed his first motion for postconviction relief, including two requests for an evidentiary hearing. Weedon supported his requests with five affidavits alleging new facts bearing on his trial's fairness and his guilt. The court expanded the record to consider the affidavits, but it denied a hearing. Again, unlike Weedon, Zebroski got a full hearing on his first postconviction relief motion.

Weedon's circumstances only seem similar to the ones here because his request for a hearing was denied, in part, because Weedon's postconviction challenge to the admissibility of his wife's incriminating testimony had been adjudicated before

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[41] 750 A.2d 521 (Del. 2000).

[42] *Zebroski*, 2010 WL 797013, at *4.

Weedon's direct appeal.[43] Perhaps the most significant procedural twist came the day before oral argument, when the Supreme Court received a letter from the wife, recanting her testimony.[44] As mentioned, that letter, which was not considered by this court, was potentially corroborated by other affidavits. Under those extraordinary circumstances, *Weedon* held that "reconsideration of [the wife's testimony was] warranted in the interest of justice."[45] So, the case was remanded for its first postconviction evidentiary hearing.

When the court rejected Zebroski's latest motion, the court found that Zebroski had not presented anything "striking." Compared to this case procedurally and factually, what happened in *Weedon* was striking. Presumably, if Mrs. Weedon and the corroborating witnesses had testified during a Rule 61 hearing and her recantation had then been rejected, the interest of justice would not have justified a second hearing simply because new lawyers found better ways, in their estimation, to undermine her testimony. Anyway, this case does not approach the circumstances contemplated by *Weedon*.

C. Another Evidentiary Hearing Is Not Justified By The Interests Of Justice.

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[43] *Weedon*, 750 A.2d at 527.

[44] *Id.* at 526.

[45] *Id.* at 527.

In his latest motion, Zebroski asks for a hearing where he would attempt to call fifteen witnesses. They include Drs. Much, Hyde, Baylin and Luger. The latter two are former counselors. The list also includes other former therapists, counselors or teachers, three police officers who responded to Zebroski's home on domestic violence and abuse complaints, a prison records custodian, and both Zebroski's father and stepfather. It is unclear that anyone has interviewed all of the proposed witnesses and that they are available. In any event, Zebroski now concludes that the proposed witnesses would not be cumulative.

In the final analysis, Zebroski's latest motion can be summarized as more of the same. That is neither dismissive nor harsh. From the beginning, the most troubling thing about this case has been Zebroski's youth, coupled with his harsh upbringing. Everyone struggled with it. But now, Zebroski baldly claims:

> At Zebroksi's penalty phase, trial counsel presented Zebroski's age only as a number, i.e. that Zebroski was eighteen (18) at the time of the offense. Trial counsel did not tell the jury that age could be considered as a mitigating factor.[46]

Although Zebroski repeats it ("If the sentencing jury heard that age may be considered as a mitigating circumstance . . . there is a reasonable probability that the

[46]Mot. to Reopen Postconviction Relief Pursuant to Super. Ct. Crim. R. 61, at 20.

jury would have . . . recommended a sentence of life without parole."),[47] the allegation is simply untrue.

In reality, Zebroski's youth was the first mitigator Zebroski's trial counsel mentioned to the jury at the penalty hearing. Specifically, in contrast to Zebroski's current claims, in his penalty hearing's opening statement, trial counsel told the jury:

> There are compelling mitigating circumstances with respect to Mr. Zebroski, an 18-year-old kid, a young adult, at the time this thing happened, 19 now. His age is a mitigating factor.

Not only that, Zebroski's youth was a *leitmotif* running throughout the penalty hearing. For example, as presented above, Dr. Much testified about the resilience of young people. In his closing argument, Zebroski's trial counsel referred to Zebroski's age in his third sentence, and he came back to it:

> Mr. Zebroski is only 19. This happened when he was 18, and I respectfully submit that's something you should consider. People who are younger, as we see all the time, do things out of impulse or because they don't have proper parental guidance, or for other reasons, and we give them a little bit of understanding for their mistakes and we give them a little forgiveness for their mistakes.

Finally, the first mitigating circumstance that the court charged the jury with was:

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[47] *Id.* at 22.

"His youth, age 19."

Now, there is no principled way to argue that the jury and sentencing court were not vividly aware of Zebroski's youth and his harsh upbringing, including its violence, abuse, chaos, isolation, substance abuse, multiple stepfathers and paramours of his mother, and mental illness. The jury and court also heard about the destructive effect that stress can have on someone as young as Zebroski, as recapitulated above.

Zebroski can argue fairly, albeit incorrectly, that: "Trial counsel and PCR counsel were constitutionally ineffective for failing to develop and present Zebroski's age as it relates to neuro-developmental immaturity as a mitigating circumstance. . . ." But, Zebroski crosses the line when he tries to advance that argument by claiming that the jury and the sentencing court were not keenly aware of Zebroski's youth and abusive upbringing. That sort of exaggeration runs throughout Zebroski's latest motion.

By the same token, if trial and postconviction counsel did not pursue these issues as exhaustively or the way current counsel prefers, the jury nonetheless knew a great deal about Zebroski's long and short-term drug use, including its profound, long-lasting effects. The evidence presented at the penalty hearing created almost exactly the same impression of Craig Zebroski as his latest motion does. That

is so, even if the jury was not educated about the neuro-developmental underpinnings for that impression.

The mitigating evidence presented at the penalty hearing was impressive. Through direct and cross-examination of a juvenile probation officer supervisor, the State and the defense showed how Zebroski's family and the juvenile justice system, itself, impeded several efforts to provide "a lot of" social services to Zebroski through inpatient and outpatient programs. The jury also heard briefly about two psychiatric hospital admissions. Cross-examination also revealed many things about Zebroski's dysfunctional family, including domestic violence, alcoholism and psychiatric problems. Then came the eleven witnesses called by the defense, including Dr. Much. Last, but far from least, Zebroski was in the courtroom throughout his trial, and he offered allocation directly to the jury.

In his latest motion, Zebroski presents nine grounds, which taken collectively, allegedly justify a second evidentiary hearing and further relief. Those claims are:

- Diagnosis and effect of ADHD;
- Neurodevelopmental immaturity of adolescent brain;
- Alcohol and drug abuse, including PCP;
- Abuse, and the effect of violence and abuse on personality development

and institutional failure;

- Father's absence and neglect;
- Character and propensities of co-defendant;
- Zebroski's prior delinquent and criminal record;
- Rehabilitative efforts in prison;
- Mercy.

Zebroski submitted nine mitigating circumstances at trial. Although they may be phrased a little differently, they nearly overlap Zebroski's current claims:

- His youth, age 19;
- Family who loves him;
- Comes from a dysfunctional family:

    a. mother's alcoholism and family problems

    b. adverse conditions of childhood development

    c. numerous stepfathers with substance abuse problems

    d. physically abused as a child

    e. mentally abused as a child

    f. observed physical and mental abuse of mother and siblings

    g. desertion by natural father

    h. lack of appropriate male role models

- Friends who continue to support him;
- History of psychological problems/disorders as a child and adolescent;
- History of substance abuse/addiction;
- Debilitating effects of alcohol and drugs on decision making;
- Favorable prognosis for positive adjustment to prison;
- Punishment relative to co-defendant.

Trial counsel did not attempt to present mercy as a mitigator, *per se.* But, trial counsel repeatedly inveighed upon the jury to "choose life." Yet again, Zebroski's current claim simply concerns the way trial counsel tried to make the point that current counsel wishes to pursue.

Several of the mitigating circumstances were re-presented during the postconviction relief hearing. As presented above, to support that opinion, Zebroski's original postconviction relief counsel submitted an affidavit from a board-certified neurologist, Thomas M. Hyde, M.D., Ph.D.

Dr. Hyde opined, in part, that "Zebroski was intoxicated with alcohol, marijuana and phencyclidine (PCP) on . . . the date of the murder." Zebroski's "sustained ingestion of those intoxicants had marked effects on his behavior and actions." Dr. Hyde discussed, in some detail, the "profound" effects of alcohol, marijuana and PCP, especially how PCP impairs judgment and lowers inhibition. Dr.

Hyde concluded that the shooting was a product of Zebroski's (voluntary) intoxication.

Zebroski's latest motion rests on the undated, thirty-two page "mitigation report" provided by Melissa Lang, LMSW, a forensic social worker. Ms. Lang's report includes 800-900 pages of supporting documents. They include: "voluminous" reports prepared by Department of Services for Children, Youth and Their Families, Division of Child Protective Services, and its predecessor agency, and reports and evaluations by various public and private treatment programs, e.g., Pace, Delaware Bay Marine Institute, Daylight Community Program, MeadowWood Hospital, Greenwood, Rockford Center, and St. Francis Hospital.

Ms. Lang explains how, in her opinion, trial counsel and postconviction relief counsel failed to: obtain complete records, interview potential witnesses, and present a wider and stronger mitigation case. The thrust of Lang's opinion is that prior counsel should have done more of what prior counsel actually did, and prior counsel should have organized their presentations more effectively. Lang acknowledges Dr. Much's "efforts to explain Craig's delinquent behaviors and the impact of his upbringing." Nevertheless, she faults Dr. Much for failing "to present information related to the imperative importance of Craig's age, and the influence of years of substance abuse on the brain function of a teenager."

Assuming for present purposes that prior counsel did not marshal all the available evidence and that they did not use the evidence to Ms. Lang's satisfaction, that does not, by itself, justify postconviction relief, even under *Strickland*. The court does not find that a more elaborate presentation, including more background reports, and new information about "the stages of adolescent development and adolescent brain functioning," and so on, would necessarily have been a more effective approach than the one taken by prior counsel.

While the voluminous reports recapitulate and expand on the hardships Zebroski faced, they also recapitulate and expand upon his delinquent, antisocial behavior. For example, the jury and the court were left with the impression that, if anything, Zebroski and his mother were co-dependent. The records highlighted by Ms. Lang reveal abusive behavior by Zebroski towards his mother. And, again, Zebroski's implusive, explosive, violent, oppositional behavior is repeatedly mentioned. Thus, it is far from given that the mitigation case envisioned by Ms. Lang would have changed the jury's recommendation in Zebroski's favor, as Zebroski now insists.

But, even assuming Ms. Lang's criticisms are valid, they stand for the proposition that prior counsel could have done a better job on Zebroski's behalf. Perhaps, a different presentation might have changed the jury's vote in Zebroski's

favor. That mere possibility, however, has never been enough to clear *Strickland*'s standards, much less to invoke the interest or miscarriage of justice exceptions.[48]

Zebroski also repeatedly ridicules trial counsel for unsuccessfully trying to portray the shooting as an accident and for not using Zebroski's voluntary substance abuse "to put into context the inexplicable nature of the shooting." It is not given, however, that explaining the shooting as the understandable product of a teenager's long-standing drug abuse and delinquency would have been a better strategy than trial counsel's. In any event, the existence of other explanations trial counsel could have advanced also does not make a *Strickland* violation, much less does it invoke the interest or miscarriage of justice exceptions.

Finally, it seems that Zebroski's current argument draws most of its currency from *Roper v. Simmons,*[49] which holds that no one under 18 years of age may be executed. *Roper*, however, does not hold that a young adult capital murder defendant's youth must, as a matter of law, be given special weight as a mitigating factor. *Roper* does not find an age-based cline in the Constitution. Instead, *Roper*, while acknowledging "the objections always raised against categorical rules," draws

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[48] *Strickland v. Washington*, 466 U.S. 668, 693 (1984) ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.")

[49] 543 U.S. 551 (2005).

a line at the age of 18.[50]

Furthermore, *Roper*'s absolute bar on capital punishment for juvenile offenders is a function of actual age, not developmental age determined by the court. *Roper*'s absolute prohibition cannot, as a matter of law, be triggered by expert testimony that an adult defendant has developmental deficits, even if the deficits make the adult defendant child-like.

Also, along the same line, the harshness of a defendant's childhood does not have special weight as a matter of law. All of these things–actual age, developmental age and upbringing–are potentially powerful mitigators, but they are not legally dispositive. Taken together, these things stand for the proposition that a defendant whose harsh upbringing contributed to developmental deficits, but who nevertheless was an adult when he committed murder, is subject to the sentencing procedure called for by 11 *Del. C.* § 4209, as an adult.

In other words, an adult capital murder defendant's youth, upbringing and developmental deficits must be weighed like all the other mitigating and aggravating factors that are present. Defendant's youth, harsh upbringing and developmental deficits, while potentially decisive as a matter of fact, do not have

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[50] *Id.* at 574 ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is . . . the age at which the line for death eligibility ought to rest.").

special weight as a matter of law.

As mentioned above, from the beginning, everyone has been aware of Zebroski's youth and the fact that he grew up in a chaotic and horribly abusive environment that had a devastating impact on him. Zebroski's current assertions to the contrary notwithstanding, the court states that conclusively. If they cannot be counted on to understand the physiological underpinnings for it, typical adults can be counted on to understand that young people make ill-considered and bad judgments, and drug use only makes that worse. Even without Dr. Much's testimony, the jury and the court knew that. But, the jury and the court also had to consider the crime, the crime's impact, the victim and Zebroski's post-crime conduct.

In 1997, the court tried to summarize in detail the sentence's reasoning, including its repeated concern about Zebroski's youth and horrendous childhood. While the court appreciates that Zebroski now wants another chance to reemphasize his original points and change the decision, Zebroski has not shown that further review is justified under the interest and miscarriage of justice exceptions to Rule 61's bars to postconviction relief.

III.

For the foregoing reasons, the court will not hold another postconviction relief hearing and the court will not otherwise provide postconviction relief on

Zebroski's pending motion, except upon further order from the Supreme Court of Delaware. The Prothonotary **SHALL** return the file to Supreme Court.

IT IS SO ORDERED.

Date: May 14, 2010 /s/ Fred S. Silverman
Judge

cc: Prothonotary (Criminal)
Loren Meyers, Deputy Attorney General
Jennifer-Kate Aaronson, Esquire