IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	ID No. 9601010152
	)	Cr. A. No. IN96-02-0924R2,
DWAYNE CROPPER,	)	IN96-02-0925R2,
Defendant.	)	
	)	
	)	

ORDER

On this 16th day of August 2004, upon consideration of Defendant's Motion For Post Conviction Relief pursuant to Delaware Superior Court Rule 61, the Court finds the following:

1. In February of 1999, a Superior Court jury convicted Defendant Dwayne Cropper of the Attempted First Degree Murder of his wife Erika and of Possession Of A Deadly Weapon During The Commission Of A Felony, that being the knife that he used to stab Erika in the back 20 times as she cooked him breakfast, severing her spinal cord and partially paralyzing her. In March 1999, the Court sentenced Cropper as a habitual offender pursuant to 11 Del. C. § 4214 ("Habitual Offender statute") to 45 years

imprisonment, suspended after 20 years. Cropper has since exhausted all state and federal avenues for appeal and collateral attack of this conviction, including a prior failed Rule 61 claim based, *inter alia*, on an allegation of ineffective assistance of counsel.

2. Cropper now brings a new Rule 61 Motion for Post Conviction Relief, this time claiming that the Delaware Habitual Offenders statute is cruel and unusual punishment under the Eighth Amendment of the federal Constitution, and that his previous counsel was incompetent in failing to make this argument during Cropper's numerous appeals. These claims are frivolous and warrant summary denial.

3. Defendant bases his Eighth Amendment claim on the 2003 case of *Crosby v. State*.[1] There, the Delaware Supreme Court analyzed recent Supreme Court Eighth Amendment decisions and determined that the federal Constitution contains a proportionality requirement that invalidates excessively harsh sentences. The Court further found that a life sentence issued under the Habitual Offender statute is unconstitutionally excessive for a triggering offense of Second Degree Forgery, a non-violent class G felony, which, in normal contexts, carries a maximum sentence of two years

[1] 824 A.2d 894 (Del. 2003).

imprisonment.[2] The Court contrasted this finding with *Ewing v. California*, a 2003 case in which the United States Supreme Court held that the theft of $1200 worth of golf clubs was a triggering offense substantial enough to warrant a life sentence under California's habitual offender statute.[3]

4. Even the most cursory glance at *Crosby* belies Defendant's motion. The Delaware Supreme Court explained the rationale for its decision thusly:

> Following the principles announced by the Supreme Court, Crosby's sentence is so disproportionate that it must be set aside. Forgery in the Second Degree, the crime that subjected Crosby to this 45 year sentence, is the *least serious type of felony* and, in this case, it *caused no harm to anyone* but Crosby. His prior history, although hardly commendable, does not include the kind of *repeated, violent crimes* common to many habitual offenders.[4]

The Delaware Supreme Court conducted an Eighth Amendment analysis in *Crosby* because a life sentence for Forgery Second gave rise to an inference of gross disproportionality.[5] A 45 year sentence, suspended after 20 years, for horrifically stabbing and maiming one's wife, while attempting to kill her, does not create such an inference. It can hardly be said that such a crime is the "least serious type of felony" or "caused no harm to anyone" or is not "the kind of repeated violent crime[] common to many habitual offenders," the language specifically justifying the *Crosby* decision. Instead,

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[2] *Id*.
[3] *Ewing v. California*, 123 S. Ct. 1179 (2003).
[4] *Crosby*, 824 A.2d at 912 (emphasis added).
[5] *Crosby*, 824 A.2d at 906 ("The 'rule of *Harmelin*' therefore, restricts proportionality review to the 'rare case in which a *threshold comparison* of the crime committed and the

the instant offense is far graver than the stealing of golf clubs found to be a triggering offense adequate to support a life sentence in *Ewing*.[6]

5. Because Defendant's Habitual Offender sentence was based on one of the most serious crimes that Delaware law recognizes, his argument necessarily implies that a Habitual Offender sentence is unconstitutional no matter how bad the triggering offense. That is to say, his contention is that the statute is unconstitutional on its face. Defendant's claim is utterly devoid of support. Nothing in *Crosby* suggests that the Delaware Supreme Court would find the Habitual Offender statute unconstitutional when applied to violent felonies such as this one, and the United States Supreme Court found in *Ewing* that recidivism laws even more severe than Delaware's statute are valid exercises of legislative power to protect society from dangerous incorrigibles.[7]

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sentence imposed leads to an *inference of gross disproportionality."*")(emphasis in original).

[6] Assuming *arguendo* that Defendant's sentence gave rise to an inference of disproportionality, it would then be necessary to consider whether his other crimes support his sentence. Defendant has prior convictions for Receiving Stolen Property, Possession With Intent To Distribute, and Escape Second Degree. There are also 7 separate documented incidents of Defendant assaulting his wife, including ramming her car off the road and then attacking her in the presence of a police officer, choking her until she blacked out and bled from the mouth, and numerous instances of punching and kicking while threatening to kill her. Defendant simply is not a *Crosby*-type non-violent criminal unlikely to pose a continued danger. Indeed, the record indicates that he attempted to murder Erika about two hours after she picked him up from prison, where he was serving time on another charge.

[7] Defense counsel's apparent lack of understanding of *Crosby* is alarming. He argues that, "Consider, both Crosby and [Cropper] were sentenced as habitual offenders, based

6. Since Defendant's proffered Eighth Amendment claim is frivolous, his prior counsel was in no way ineffective for failing to raise it. Indeed, Defendant's prior counsel is to be commended for refraining from raising and billing his client for arguments having not even the slightest chance of success. No evidentiary hearing is necessary to decide this matter.

7. For the foregoing reasons, Defendant's Motion For Post Conviction Relief is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary – Criminal
cc: Leo John Ramunno, Esq.
Dwayne Cropper

upon the committing of the crime against an identifiable victim. Despite this fact, [Cropper] is serving a life sentence, while Mr. Crosby is at home with his family." Defendant's Memorandum of Law in Support of Motion for Post Conviction Relief (Def. Op. Br.) at *5. Perhaps Defense counsel did not grasp that the rationale for the *Crosby* decision was *lack* of an identifiable victim. *Crosby*, 824 A.2d at 912 ("caused no harm to anyone"). He goes on the say that, "Obviously, the Court did not draw a distinction between violent and non-violent offenders" and that the Court "merely noted that the repeat offender composed a class of criminals, who should be treated alike." Def. Op. Br. at *6. Far from being "obvious," this is the exact opposite of what *Crosby* says. *Id*.