IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	Cr. I.D. No. 90004576DI
	)	
ROBERT GATTIS,	)	
Defendant.	)	

Submitted: September 15, 2005
Decided: November 28, 2005

UPON DEFENDANT'S SECOND RULE 61
MOTION FOR POSTCONVICTION RELIEF
DENIED

Loren C. Meyers, Esquire, Deputy Attorney General, Attorney for the State of Delaware

Kevin J. O'Connell, Esquire, Wilmington, Delaware, Attorney for Defendant

ABLEMAN, JUDGE

This is the Court's decision on defendant Robert Gattis' second Motion for Postconviction Relief filed pursuant to Superior Court Criminal Rule 61. In May of 1990, Gattis was charged with one count each of First Degree Murder, First Degree Burglary, Possession of a Deadly Weapon By A Person Prohibited, and two counts of Possession of a Firearm During the Commission of a Felony in connection with the shooting death of his former girlfriend, Shirley Slay. In September 1992, Gattis was convicted by a Superior Court jury of all the charges, and following a penalty hearing, was eventually sentenced to death by now retired Judge Norman Barron.[1] On appeal, the convictions and sentence were affirmed by the Delaware Supreme Court.[2]

Gattis initiated his first round of state postconviction proceedings by the filing of a Rule 61 Motion in November 1994. The Superior Court denied the motion[3], and the decision was affirmed by the Supreme Court.[4] Gattis' subsequent application for federal habeas relief was denied by the United States District Court in March 1999.[5] On appeal, the United States Court of Appeals affirmed.[6]

In April 2002, Gattis filed his second Rule 61 Motion for Postconviction Relief, wherein he argued that his sentence was imposed in violation of the rule set out by the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court stayed the proceedings in anticipation of further

[1] See *State v. Gattis*, 1992 WL 358030 (Del. Super. October 29, 1992)(sentencing decision).
[2] *Gattis v. State*, 637 A.2d 808 (Del.), cert. denied, 513 U.S. 843 (1994).
[3] See *State v. Gattis*, 1995 WL 790961 (Del. Super.).
[4] *Gattis v. State*, 697 A2.d 1174 (Del. 1997), cert. denied, 522 U.S. 1124 (1998).
[5] *Gattis v. Snyder*, 46 F. Supp.2d 344 (D.Del. 1999).
[6] *Gattis v. Snyder*, 278 F.3d 222 (3d Cir.2002) cert. denied, 537 U.S. 1049 (2002).

clarification of *Apprendi* in the then-pending United States Supreme Court case of *Ring v. Arizona*.[7]

In April 2003, Gattis amended his postconviction motion, alleging that, under the intervening decision in *Williams v. State*[8], the evidence was insufficient to establish one of the statutory aggravating circumstances. He also argued that his sentence had been improperly imposed in light of *Ring*, and he continued to argue that his trial attorneys had been ineffective.

Gattis amended this motion yet again in August 2003. This time, he argued that the Trial Judge had had contact with jurors after the trial, but prior to sentencing, and was thereby improperly influenced. Gattis also alleged that the Trial Judge had misapprehended the jury's role in the sentencing process, in light of the amendment to Section 4209 of Title 11[9] of the Delaware Code, which transformed the jury's role at the narrowing phase of the punishment hearing from advisory to determinative as to the existence of any statutory aggravating circumstances.[10]

With respect to the juror contact claim, this Court expanded the record by requesting and receiving the submission of an affidavit from the Trial Judge,

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[7] 536 U.S. 584 (2002).
[8] 818 A.2d 906 (Del. 2003).
[9] The amendment to 11 *Del. C.* § 4209(c)(3)(b.1-2) states in part:

> b.1 The jury shall report to the Court its finding on the question of the existence of statutory aggravating circumstances… In order to find the existence of a statutory aggravating circumstance… beyond a reasonable doubt, the jury must be unanimous as to the existence of that statutory aggravating circumstance…
>
> b.2 The Jury shall report to the Court by the number of the affirmative and negative votes its recommendation on the question as to whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances…, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

who was then retired, and by conducting evidentiary hearings with each of the surviving jurors who were willing to be questioned. Thereafter, Gattis and the State submitted extensive briefs on this issue.

Upon careful consideration of the record in this case, the briefs of the parties, and the case law upon which they rely, the Court concludes that Defendant's Amended Motion for Postconviction Relief must be denied. The reasons for this decision will be more fully set forth hereafter.

Statement of Facts

The single most important, undisputed fact of this case is that, on the night of May 9, 1990, Defendant Robert Gattis, went to Shirley Slay's apartment, and when she refused to allow him to enter, kicked in her door and shot her in the face, ending her life. Slay and Gattis were lovers, and Gattis, in a jealous rage, had assaulted Slay earlier that day. Slay reported this incident to the police, who specifically warned Gattis by phone not to contact Slay or return to her apartment. Gattis responded by borrowing a friend's car (so as to avoid being identified if he drove his own car), driving to Slay's house, and forcing open the door. The fatal bullet struck Slay directly between the eyes.[11] The State's theory of the case, endorsed by the jury's return of a verdict of guilty to the charge of capital murder, was that Gattis intentionally killed Slay because he was still angry about their earlier lover's quarrel.

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[10] See S.B. 449, Synopsis. ("This Act will bar the Court from imposing a death sentence unless a jury… first determines unanimously and beyond a reasonable doubt that at least one statutory aggravating circumstance exists.")
[11] *State v. Gattis*, 1997 WL 127007 (Del. Super.) fn 12 ("It is worth noting that Gattis has an award for expert handling of firearms from the United States Army.").

Gattis' version of events was quite different. Originally, Gattis claimed that he accidentally shot Slay as she tried to prevent him from breaking down her door. Later, seemingly realizing that this defense might be perceived as implausible, Gattis told his trial attorneys that he did not actually shoot Slay, and that the fatal bullet was fired from somewhere inside Slay's apartment, by a second shooter. Gattis even went so far as to tell his trial attorneys and other witnesses that he had seen the back of Slay's head through the door, and heard her speaking after his pistol discharged. Gattis therefore claimed that, even though he may have fired his weapon, he could not possibly have killed Slay, who was shot right between the eyes and almost certainly died instantly.

As the State's witnesses testified, it became clear that the evidence better supported the accident defense than the second shooter defense. Gattis abruptly switched back to the accident defense, which his trial attorneys immediately researched and argued for the remainder of the trial. Gattis also elucidated the accident defense on the witness stand. Basically admitting the facts leading up to Slay's shooting, Gattis claimed that the pistol that he carried accidentally discharged as he kicked open the apartment door. The jury did not believe Gattis, convicted him, and recommended death by a vote of ten to two.

After the jury entered its sentencing recommendation, the trial judge, the Honorable Norman Barron, now retired, went to the jury room and thanked the jury for their service. One juror vaguely remembers Judge Barron remarking that the non-unanimous penalty recommendation would make his sentencing

decision more difficult. Judge Barron also remembers seeing some of the jurors on the street after the penalty recommendation but before the sentencing, saying hello, and at the jurors' request, informing them of the date of the sentencing.

Procedural History

Since Gattis has been on death row for almost thirteen years, there is substantial procedural history to this case. Only a small portion of that history, however, is relevant to this motion. First, the Delaware Supreme Court rejected Gattis' direct appeal in 1994.[12] Second, Judge Barron denied Gattis' First Motion For Post Conviction Relief in 1995 ("First Rule 61 Opinion"),[13] denied Gattis' Motion For Reargument of that decision ("Reargument Opinion"),[14] and, after remand and a hearing, again denied Gattis' Motion For Post Conviction Relief ("Remand Opinion").[15] The Delaware Supreme Court affirmed that decision in 1997.[16] Those opinions ruled on the ineffective assistance of counsel argument that Defendant seeks to reopen here. Subsequently, the District Court of Delaware denied Gattis' *habeas corpus*

[12] *Gattis v. State*, 637 A.2d 808 (Del. 1994).
[13] *State v. Gattis*, 1995 WL 790961 (Del. Super.).
[14] *Id.* The First Rule 61 Opinion and the Reargument Opinion appear one after the other under the same Westlaw citation.
[15] *State v. Gattis*, 1997 WL 127007 (Del. Super.).
[16] *Gattis v. State*, 697 A.2d 1174 (Del. 1997).

petition in 1999,[17] and the Third Circuit Court of Appeals affirmed in 2002.[18] Gattis has therefore been afforded at least one complete opportunity to utilize both the state and federal court systems for challenging his conviction and sentence.

[17] *Gattis v. Snyder*, 46 F. Supp. 2d 344 (D. Del. 1999).
[18] *Gattis v. Snyder*, 278 F. 3d 222 (3rd Cir. 2002), *cert. denied sub nom*., 537 U.S. 1049 (2002).

Defendant's Claims for Relief

Gattis' latest motion offers three grounds for relief. First, Gattis contends that subsequent case law development demonstrates that the Trial Judge applied an improper standard of review in deciding Gattis' claim of ineffective assistance of counsel in his initial Rule 61 Motion. Secondly, he submits that *Ring v. Arizona*[19] rendered Delaware's hybrid death penalty regime unconstitutional. And, finally, Gattis asserts that the Trial Judge's contact with the jury after their penalty recommendation was an "egregious circumstance" that created an appearance of impropriety necessitating vacation of Gattis' death sentence.

The State counters by challenging Gattis' right to relitigate his claim of ineffective assistance of counsel. It further argues that *Ring* is not retroactively applicable to convictions that were final before June 24, 2002, and that Gattis is precluded from challenging his sentence on the basis of *Ring*. The State also submits that Gattis is procedurally barred from now asserting his claim regarding the trial judge's post-trial contact with the jurors.

Each of these arguments will be addressed separately hereafter.

[19] 536 U.S. 584 (2002).

I. Gattis' Attempt to Relitigate his Ineffective Assistance of Counsel Argument

By this motion, Gattis asks this Court to reconsider anew his claim that his trial counsel provided ineffective representation. He submits that the denial of his first Rule 61 Motion has been invalidated by subsequent United States Supreme Court case law. Specifically, Gattis contends that Judge Barron incorrectly applied *Lockhart*'s fundamental fairness standard to his claim, when the standard should have been *Strickland*'s "reasonable chance of changing the outcome" test. The subsequent case law on which Gattis relies, however, not only establishes that Judge Barron applied the correct standard but that Gattis' conviction would still stand even had an incorrect standard been applied.

The first inquiry in any analysis of a postconviction claim is whether the petition meets the procedural requirements of Rule 61.[20] Rule 61(i) raises numerous procedural bars to postconviction relief, including bars against motions filed more than three years after the date a sentence becomes final,[21] duplicative motions, and motions that bring claims that could have been brought in a prior proceeding, but were not. Courts must consider the applicability of these procedural bars before reaching the merits of a Rule 61 claim.

The State relies emphatically upon the procedural bar of Rule 61(i)(4) in arguing that relitigation of Gattis' claim of ineffective assistance of counsel is

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

foreclosed, notwithstanding the intervening decision in *Williams v. Taylor*.[22] The State argues that, not only did the Delaware Supreme Court rely solely on *Strickland v. Washington*[23] in reviewing the Superior Court's rejection of Gattis' ineffective assistance claim[24], but the Third Circuit, in subsequent federal habeas litigation, expressly held that the State Courts had correctly identified and applied the *Strickland* standard:

> We agree. The state courts correctly identified the relevant Supreme Court precedent -- Strickland -- and accurately described the two familiar tests which the prisoner must pass to obtain relief, i.e., show that counsel's performance was objectively unreasonable and "that there is a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Moreover, the state courts' application of *Strickland* to the facts before them was reasonable.[25]

Thus, the State urges this Court summarily to reject Gattis' attempt to have this Court reconsider his claim of ineffective assistance because it is plainly precluded by Rule 61(i)(4), and the decisions of the Delaware Supreme Court and the Third Circuit Court of Appeals. The State further submits that Gattis has not established under *Flamer v. State*,[26] that "subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him."

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[21] The rule has since been amended, effective July 1, 2005 to expand this procedural bar to preclude motions filed more than one year after the date a sentence becomes final.
[22] 529 U.S. 362 (2000).
[23] 466 U.S. 668 (1984).
[24] 697 A. 2d at 1184, nn. 42-43.
[25] 278 F.3d at 236.

This Court agrees that Gattis' attempt to relitigate his ineffective assistance claim is procedurally barred. Yet, out of an abundance of caution, and because "death is different," the Court will nevertheless reach the merits of this argument. As a practical matter, the result will be the same but it is important for the Court to clarify Judge Barron's earlier rulings. Indeed, because this particular argument depends largely on Judge Barron's opinions regarding Gattis' first Rule 61 Motion, and because that motion took a twisted procedural course, Defendant's argument requires considerable background understanding.

Procedural History

A. The First Rule 61 Opinion

In early 1995, Gattis moved for post-conviction relief on the grounds, *inter alia*, that his trial counsel ineffectively represented him.[27] The motion urged that the trial lawyers were ineffective because they failed to hire a forensic expert to recreate the crime scene to determine whether Gattis' accident defense was probable. Judge Barron first acknowledged that Superior Court Rule 61(i) should have procedurally barred all of Gattis' claims, but, because "death is different," painstakingly considered each and every one in a 24-page opinion.[28] This first opinion relied upon *Strickland v. Washington*[29] and *Flamer v. Delaware*[30] for the standard of review for claims of ineffective assistance of counsel. This opinion did not rely upon or cite *Lockart v.*

[26] 585 A.2d 736, 746 (Del. 1990).
[27] 1995 WL 790961 (Del. Super). This Westlaw citation also includes the Reargument Opinion.
[28] *Id*. at 3.

Fretwell,[31] the case disputed here. Judge Barron found all of Defendant's claims, besides being procedurally barred, to be factually unsupported or legally inadequate, and denied the First Rule 61 Motion.

B. The Motion for Reargument

Defendant moved for reargument on the ineffective assistance of counsel claim, which Judge Barron addressed in a detailed, 13-page opinion. Judge Barron noted that this Motion should also have been procedurally barred, but again, because "death is different," considered the claim on its merits.[32] The judge even conducted a hearing to allow Gattis to present evidence that he had always maintained the accident account as his defense, and that his trial counsel were lying when they submitted sworn affidavits regarding his switch to the second shooter defense.[33] The logic of presenting this evidence was that, if Gattis had consistently relied upon his accident story, then his trial counsel supposedly did not conduct adequate pretrial investigation of this defense.[34]

Judge Barron expressly found that trial counsel's conduct did not fall below the standard of a reasonable attorney, and that Gattis was therefore unable to meet the first prong of the *Strickland* test.[35] The judge also held that the testimony of the forensic expert, based on his review of that expert's report, would not have made any difference to any reasonable juror, and that Gattis

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[29] 466 U.S. 668 (1984).
[30] 68 F.3d 710 (3rd Cir. 1995).
[31] 506 U.S. 364 (1993).
[32] 1995 WL 790961 at 24.
[33] *Id*. at 24-30.
[34] *Id.*
[35] *Id.* at 34. ("Did Gattis' trial counsels' representation fall measurably below the conduct expected of reasonably competent criminal defense counsel? The Court thinks not.").

therefore could not meet the second prong of the *Stickland* test: a showing of prejudice.[36] The judge noted that the expert contradicted both himself and Gattis' testimony on numerous occasions, and that he could not state within a reasonable degree of scientific certainty whether Gattis had shot Slay execution-style while facing her, or accidentally while bashing down her door with the hand he was also using to hold a cocked and loaded .38 caliber handgun.[37] The judge also noted that the story of a defendant, who happens to be a firearms expert, holding a cocked pistol with the safety off, accidentally shooting the woman that he had violently beaten a few hours before, right between the eyes, would not have been believed by any reasonable jury.[38]

C. The Standard of Review on Reargument

The present dispute arises from two lines of the Reargument Opinion. Judge Barron first laid out the *Strickland* test of unreasonable attorney conduct plus prejudice, relying on *Strickland* and *Flamer*.[39] Judge Barron specifically noted that *Strickland* demands a strong presumption that counsel's conduct was reasonable, and precludes courts from creating a "20-20 hindsight" standard for attorney conduct.[40] Judge Barron then addressed the prejudice prong of the *Strickland* test. The judge quoted *Strickland*'s definition

[36] *Id.* at 36 ("This Court is of the firm belief that even had defense counsel done all those things which Gattis claims should have been done, the result would have been the same.").
[37] *Id.* at 19. ("First, his expert, Stuart H. James, had he been called as a witness at trial, would have been unable to give an opinion based upon a reasonable scientific probability that the death of Shirley Slay was accidentally caused.").
[38] *Id.* at 32 ("The court does not believe that there is a 'reasonable probability' under *Strickland,* 466 U.S. at 695, that the jury, had it been presented with more evidence supportive of the accident defense, would have concluded other than that Gattis intentionally murdered his estranged girlfriend. No juror would have had a reasonable doubt as to guilt.").
[39] *Id.* at 30-31.
[40] *Id.* at 31.

of prejudice: that "the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."[41]

The judge then noted that a recent United States Supreme Court case, *Lockhart v. Fretwell*[42], had stated that, "a criminal defendant alleging prejudice must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. . . . Thus, an analysis focusing solely on the mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective."[43] What Gattis misses, however, is that while Judge Barron cites to *Lockhart*, the language in question was taken directly from *Strickland*.[44] Indeed, *Lockhart* cites the language as a direct quote from *Strickland*.[45]

Judge Barron then analyzed trial counsel's performance and what prejudice, if any, Gattis had suffered, reaching the conclusions documented *ante*. This analysis cited *Strickland* five more times, *Flamer* once, and *Lockhart* not at all. Judge Barron concluded as follows:

> This Court is of the firm belief that even had defense counsel done all those things which Gattis claims should have been done, the result would have been the same. Defense counsel fairly and zealously advanced their client's interests. Counsels' representation fell well within the bounds of reasonable professional assistance and, even assuming substandard representation, no prejudice resulted to the defendant. The defendant

[41] *Id.* at 31, *citing Strickland*, 466 U.S. at 695.
[42] 506 U.S. 364 (1993).
[43] 1995 WL 790961 at 31, *citing Lockhart*, 506 U.S. at 364.
[44] 466 U.S. at 687.
[45] *Lockhart*, 506 U.S. at 364 (*citing Strickland*, 466 U.S. at 687).

> received a fair trial and the result which was reached in this case was reliable.[46]

The final sentence, which pointed out that Defendant's claims were transient and that he had received a fair trial, again cited *Lockhart.*[47] This citation occurred after Judge Barron elucidated why Gattis' motion failed both prongs of the *Strickland* test, relying directly upon language from that case.[48]

D. The Remand Hearing

Gattis appealed the decision on his First Rule 61 Motion. The Delaware Supreme Court remanded, ordering Judge Barron to conduct a hearing to hear the crime scene expert's testimony if that expert produced an affidavit claiming that the State's version of events was "physically impossible" or "absolutely unsupportable."[49] The expert, of course, having already submitted a report indicating that he could not determine within a reasonable degree of scientific certainty whether the shooting was accidental or intentional, could not meet this standard.[50] The expert did, however, submit an affidavit opining that the State's version of events was "not plausible to a reasonable degree of scientific certainty." Judge Barron, again giving Gattis the benefit of the doubt, conducted the hearing.[51]

Judge Barron found the expert's oral testimony to be just as unpersuasive as his written report.[52] The expert's testimony contradicted

[46] 1995 WL 790961 at 36.
[47] *Id*., *citing Lockhart,* 506 U.S. at 364.
[48] *Id*.
[49] 1997 WL 127007 (Del. Super.) at 1.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 5-6.

Gattis' trial testimony numerous times, which was not surprising given the frequency with which Gattis contradicted himself each time he offered his story.[53] The expert also testified that blood spatter evidence in an area across the room from the door indicated that Slay could not, as the defense claimed and other evidence indicated, have been shot while standing against the door.[54] Finally, the expert testified that Slay's gunshot wound was equally consistent with Gattis standing in front of Slay and shooting her (the State's version), or with Gattis jamming his body partially into the doorway and shooting her without necessarily facing her.[55] The State therefore presented evidence that, if the door had been open two feet, as Gattis had testified at trial, then Gattis could have stood halfway in the door and looked straight at Slay while murdering her.[56] If the door had been open one foot, as the expert testified at the hearing, Gattis could still have reached his arm and head into the door and looked at Slay while murdering her.[57] Either way, the expert's testimony did nothing to advance Gattis' version of events.[58]

E. The Standard of Review on Remand

The Remand Opinion, like the First Rule 61 Opinion, relied solely upon *Strickland* and *Shockley v. State*[59] for the standard of review for claims of ineffective assistance of counsel.[60] Crucially, the Remand Opinion did not cite

[53] *Id.* at 3.
[54] *Id.* at 4.
[55] *Id.* at 5.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] 565 A.2d 1373 (Del. 1989).
[60] 1997 WL 127007 at 2.

Lockhart nor restate the controversial portion of that case regarding the prejudice element of the *Strickland* test.[61] Instead, Judge Barron cited only the tried and true *Strickland* test: that the "defendant must first establish that counsel's representation fell below an objective standard of reasonableness," and that "the defendant must affirmatively prove actual prejudice … a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[62] Judge Barron again found that Gattis had not met the *Strickland* standard, and denied post-conviction relief.[63]

F. The Supreme Court Affirms Judge Barron's Opinion

Gattis appealed the denial of his First Rule 61 Motion to the Delaware Supreme Court, which addressed his ineffective assistance of counsel claim thusly:

> Reviewing the totality of the evidence offered by the State and the defense, we are satisfied that the Superior Court did not abuse its discretion when it denied Gattis' motions for postconviction relief based on ineffective assistance of counsel. Gattis has not shown what evidence or course of action his attorneys should have presented or undertaken that would have resulted in a different outcome at trial. Nor has he shown that Mr. James would demonstrate that the State's theory of an intentional, face-to-face, execution style slaying was impossible. At trial, Gattis presented his accident defense. The jury did not accept his theory. On appeal, Gattis provides no basis for this Court to find that any lack of preparation by trial counsel caused the jury to reach a verdict it would not otherwise have reached. Accordingly, we find that Gattis' argument that he received ineffective assistance of counsel fails.[64]

[61] *Id.*
[62] *Id.*, *citing Strickland*, 466 U.S. at 687.
[63] *Id.* at 6 ("Where alleged errors of defense counsel do not affect the outcome of the defendant's trial, a defendant's claim of ineffective assistance of counsel must fail.").
[64] *Gattis*, 697 A.2d at 1186.

The Supreme Court took the standard of review for ineffective assistance of counsel claims from *Strickland*, quoting directly from that case.[65] The Supreme Court also cited two Delaware cases, *Shockley*[66] and *Riley v. State*[67] that are based upon *Strickland*.[68] The Delaware Supreme Court did not cite *Lockhart* nor did it discuss the disputed language from that case.

The Prior Rule 61 Ruling Was Legally Valid

Defendant's argument that the prior denial of his claim for ineffective assistance of counsel was constitutionally flawed for application of the incorrect standard fails for the following reasons: (1) Defendant has misconstrued *Lockhart*; (2) even if Defendant was correct about *Lockhart*, the only two opinions relevant to this argument (the Remand Opinion and the Supreme Court Affirmance) neither cited nor relied on that case; (3) even if the Reargument Opinion was relevant, that Opinion firmly established that Defendant's ineffective assistance of counsel claim failed the *Strickland* test for prejudice, in addition to failing the *Lockhart* test; and finally (4) the *Lockhart* argument does not reach the Superior Court finding, affirmed by the Supreme Court, that Gattis' trial counsel met the standard of a reasonable attorney.

A. *Williams v. Taylor*[69] Did Not Overrule *Lockhart* or Affect This Case

Lockhart, decided in 1993, interprets language in *Strickland* that "[a] defendant has no entitlement to the luck of a lawless decisionmaker."[70]

[65] *Id.* at 1183.
[66] 565 A.2d 1373 (Del. 1989).
[67] 585 A.2d 719 (Del 1990).
[68] *Gattis*, 697 A.2d at 1178, 1184.
[69] 529 U.S. 362 (2000).

Lockhart holds that prejudice resulting from some types of attorney conduct is examined under the Sixth Amendment requirement of "fundamental fairness."[71] For example, in *Nix v. Whiteside*,[72] the Supreme Court held that a defendant does not suffer "prejudice" when his attorney prevents him from perjuring himself, even if such conduct falls below the standard of a reasonable attorney. Similarly, in *Lockhart*, the Supreme Court found that a defendant suffers no prejudice if an attorney's unreasonable conduct causes him to miss a chance to file an objection based on an erroneously decided case, and then that case is subsequently reversed. The reason, later clarified in *Williams*, is that, in certain very limited contexts, an attorney's misfeasance does not deprive the defendant of a constitutional right, but rather constitutes a "windfall" that he does not constitutionally deserve.[73] When examining such "windfalls," a fundamental fairness standard of review governs the question of prejudice.[74]

The Third Circuit applied this reasoning in *Flamer*. Among Mr. Flamer's many claims was that his attorney was ineffective for failing to file a spurious motion to suppress his murder confession, because the trial judge may have erroneously granted it, changing the outcome of the trial.[75] The Third Circuit held that failure of an attorney to seek out an erroneous evidentiary holding, in

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[70] *Strickland*, 466 U.S. at 495.
[71] *Lockhart*, 506 U.S. at 366 ("Because the result of the sentencing proceeding in this case was rendered neither unreliable nor fundamentally unfair as a result of counsel's failure to make the objection, we answer the question in the negative. To hold otherwise would grant criminal defendants a windfall to which they are not entitled.").
[72] 475 U.S. 157 (1986).
[73] *Williams*, 529 U.S. at 391; *Lockhart*, 506 U.S. at 366.
[74] *Williams*, 529 U.S. at 391.
[75] *Flamer*, 68 F.3d at 728.

the hope that he may get lucky, is akin to failure to capitalize on an erroneously decided case, *a la Lockhart*, and is not governed by the *Strickland* "change the outcome" test for prejudice, but rather by the fundamental fairness test.[76]

Contrary to what Defendant's argument suggests, *Williams* did not overrule *Lockhart*, *Nix*, or *Flamer*. Instead, it simply clarified that the fundamental fairness test for prejudice applies only to windfalls, while the "reasonable chance of changing the outcome" test applies to constitutional deprivations.[77] *Lockhart*, *Nix*, and *Flamer* all properly applied the fundamental fairness test to windfalls, while the Virginia Supreme Court in *Williams* improperly applied that test to a constitutional right: the right to have counsel adequately present mitigating evidence in a capital sentencing hearing.

Assuming *arguendo* that Judge Barron considered the First Rule 61 Motion's allegation of prejudice from ineffective assistance of counsel solely under the fundamental fairness test (he did not, as will be shown *post*), the relevant question is whether counsel's conduct affected Gattis' constitutional rights, or was merely a windfall of which he would have liked to have taken advantage. The record clearly indicates the latter.

Gattis had occasion to tell the story of the murder on numerous occasions before his trial counsel took over representation.[78] Contrary to his assertions on this motion, those accounts varied wildly, although an accidental

[76] *Id.*
[77] *Williams*, 529 U.S. at 391.
[78] *Gattis*, 1995 WL 790961 at 25-27.

shooting was a prevalent theme among them.[79] By the time that Gattis first spoke to his trial counsel, however, he had obviously realized how implausible the accident defense sounded, and decided to try out a different story: the second shooter defense.[80] Gattis restated this story, which he now acknowledges was a lie, in six pretrial conferences with his trial counsel.[81]

It is absolutely vital to understand that these two defenses were mutually exclusive. The second shooter defense required Gattis to testify that he had seen the back of Slay's head at eye level through the door and heard her speaking after his accidental shot. Only that testimony could rule out Gattis' pistol as the murder weapon, because Slay was shot between the eyes, not the back of the head, and almost certainly fell dead instantly. The accident defense, however, required Gattis to testify either that he could not see Slay or that she was facing him as he tried to break down the door, and that she fell dead immediately after he shot her.

Trial counsel, unaware that Gattis had originally preferred an accident defense, spent fruitless time preparing the second shooter defense.[82] Only after one of the State's witnesses testified did Gattis choose to revert to his accident story, telling trial counsel that perhaps his bullet killed Slay after all.[83] Trial counsel immediately responded by viewing the crime scene,

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[79] Sometimes Gattis claimed that he saw the back of Slay's head and heard her talking after his gun fired. *Id.* at 25. At other times he claimed that he never saw Slay at all. *Id.* at 27. Still other times he stated that he could see enough into the apartment to know that someone else was inside. *Id.*
[80] *Id.* at 26.
[81] *Id.* at 27.
[82] *Id.* at 28.
[83] *Id.* Trial counsel commenced representation on August 5, 1992. Both trial attorneys agree that Gattis did not switch back to the accident defense until September 12, 1992.

procuring witnesses, adjusting their trial strategy and cross-examination to hammer on the possibility of an accident, having Gattis testify to that defense, asking for and procuring jury instructions on Accident and Criminally Negligent Homicide, and making a strong closing argument based on accident.[84]

The instant motion alleges that this late switch to the accident defense deprived Gattis of his right to effective assistance of counsel, and that the result could have been different had counsel pursued an accident defense throughout. The prejudice suffered, however, is that trial counsel did not immediately divine that Gattis had lied to them about a second shooter, and therefore did not pursue a defense that Gattis, at that time, was representing as false. In other words, the prejudice that Gattis suffered was that his attorneys tried the first few days of the case based on what Gattis told them had happened, and did not invent a more probable defense based on what they wished the facts to be.

Gattis had no constitutional right to have his attorneys invent a version of events for trial that Gattis did not endorse. Just as a "defendant has no entitlement to the luck of a lawless decisionmaker,"[85] the Constitution does not require the State to provide Gattis an attorney so lawlessly unscrupulous as to consciously disregard the facts of a murder, as the defendant reports them, in favor of inventing facts to form a more plausible defense. Such conduct on the part of Gattis' trial attorneys would have been the lawyerly equivalent of

[84] *Id.* at 31-37.

perjury. The case is therefore akin to *Nix*, in which the fundamental fairness test for prejudice applied to a defendant's claim that his attorney was ineffective by failing to afford him the opportunity to perjure himself. As already shown, *Williams* left *Nix* and its sister cases intact.

Judge Barron's use of the fundamental fairness test in weighing the First Rule 61 Motion's claim for ineffective assistance of counsel was therefore a correct basis for that decision, even standing alone. Fortunately, however, Judge Barron was far more thorough, and provided substantial alternative support for that finding.

B. Defendant's Argument Also Fails Due to Subsequent Procedural History

After Judge Barron issued the Reargument Opinion, the Delaware Supreme Court remanded the case, ordering Judge Barron to conduct a hearing to take the testimony of Gattis' crime scene expert. Judge Barron then issued the Remand Opinon, which does not use the disputed language from *Lockhart*, instead relying only upon *Strickland*.[86] Defendant then appealed that decision to the Delaware Supreme Court, which also relied only upon *Strickland*, and not on *Lockhart*.[87]

These two latter opinions, which rely only upon law that Defendant admits is unassailable and applicable, have supplanted the intermediate Reargument Opinion and have become the law of this case. The Remand Opinion specifically addresses the prejudice portion of the *Strickland* test in a

[85] *Strickland*, 466 U.S. at 695.
[86] *Gattis*, 1997 WL 127007 at 2.

more direct fashion than the Reargument Opinion. While in the Reargument Opinion Judge Barron examined only the expert's report, in the Remand Opinion, Judge Barron ruled on both the report and the expert's oral testimony.[88] Judge Barron's opinion on remand is therefore, in essence, a "do-over" of the portion of the First Rule 61 Opinion regarding the prejudice element of the *Strickland* test. Defendant's argument that Judge Barron used an incorrect definition of "prejudice" therefore depends entirely upon that opinion. Because the Remand Opinion and the Supreme Court Affirmance do not use or depend on the disputed language, Defendant's *Lockhart* claim fails.

C. The Reargument Opinion Established the *Strickland* Test for Prejudice

Even assuming *arguendo* that the Reargument Opinion was relevant, and that its reliance on *Lockhart* was improper, that opinion would still be valid and legally correct. Contrary to what the present motion implies, the Reargument Opinion does not ignore the *Strickland* standard in favor of total reliance on *Lockhart*. Instead, the Reargument Opinion carefully sets out the *Strickland* standard, and provides thirteen pages of detail showing why Gattis cannot meet its requirements. Then, in three sentences, the Reargument Opinion shows that Gattis' ineffective assistance of counsel claim also cannot meet *Lockhart*'s fundamental fairness test for prejudice.

Judge Barron outlined his test for the "attorney unreasonableness" element as follows:

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[87] *Gattis*, 697 A.2d at 1174.
[88] *Gattis*, 1997 WL 127007 at 6.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. …[t]his showing requires proof that "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms.[89]

This definition is quoted word for word from *Strickland*.[90]

> Judge Barron then established his test for the prejudice element:
>
> Second, the defendant must show that counsel's ineffectiveness was prejudicial. In *Strickland,* the Court wrote that "when a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. The Court added that "when a defendant challenges a death sentence . . ., the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death"[91].

Again, this definition is quoted directly from *Strickland*, and is the precise standard that Defendant argues Judge Barron should have applied.

> Finally, Judge Barron set out the *Lockhart* standard:
>
> More recently, in [*Lockhart*], the Court clarified the meaning of "prejudice" under the *Strickland* test, explaining: Under our decisions, a criminal defendant alleging prejudice must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." . . . Thus, an analysis focusing solely on the mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.[92]

Judge Barron then applied the tests, focusing especially on the inadequacy of the testimony of Gattis' expert. On that point, Judge Barron reached the following conclusion:

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[89] *Gattis*, 1995 WL 790961 at 30, *citing Strickland,* 466 U.S. at 687.
[90] *Id.*
[91] *Id.* at 31, *citing Strickland*, 466 U.S. at 695.
[92] *Id.*, *citing Lockhart*, 506 U.S. at 364.

> Even assuming, *arguendo,* that counsels' trial preparation was less than acceptable in that they should have done some or all of those things on which Gattis bases his claim of ineffective assistance, the outcome would have been no different. In other words, even conceding the truth of Gattis' allegations regarding counsels' representation, no prejudice has been shown.[93]

This finding, that "the outcome would have been no different," is not the *Lockhart* test for prejudice, but rather that required by *Strickland.* Judge Barron acknowledged the controlling force of *Strickland* by citing it immediately after this conclusion.[94]

Judge Barron later reapplied the *Strickland* test for prejudice:

> The court does not believe that there is a "reasonable probability" under *Strickland,* that the jury, had it been presented with more evidence supportive of the accident defense, would have concluded other than that Gattis intentionally murdered his estranged girlfriend. No juror would have had a reasonable doubt as to guilt.[95]

Again, this statement is a flat application of the *Strickland* prejudice standard, a "reasonable probability" of a different outcome, and does not depend on *Lockhart* in any way.

Judge Barron also restated the controlling power of the *Strickland* test at the end of the Reargument Opinion, stating that,

> When the allegation of the ineffectiveness of counsel centers on a supposed failure to investigate, we cannot see how … the petitioner's obligation can be met without a comprehensive showing as to what the investigation would have produced. The focus of the inquiry must be on what information would have been obtained from such an investigation and whether such information, assuming its admissibility in court, would have produced a different result. This Court is of the firm belief

[93] *Id.* at 33, *citing Strickland,* 466 U.S. at 694.
[94] *Id.*
[95] *Id.* at 32, *citing Strickland,* 466 U.S. at 695.

> that even had defense counsel done all those things which Gattis claims should have been done, the result would have been the same.[96]

Again, the test Judge Barron stated, that "the result would have been the same," is thoroughly *Strickland*.[97] For this restatement of the *Strickland* prejudice test Judge Barron chose to quote the Seventh Circuit case of *United States ex rel. Cross v. DeRobertis*.[98] Significantly, that case relies solely on *Strickland*, and the test is the same.

Finally, Judge Barron noted that,

> Counsels' representation fell well within the bounds of reasonable professional assistance and, even assuming substandard representation, no prejudice resulted to the defendant. The defendant received a fair trial and the result which was reached in this case was reliable.[99]

This final sentence again cites *Lockhart*. It is exceedingly important to note, however, that Judge Barron's finding of lack of prejudice is stated *before* the elucidation of the *Lockhart* standard, with the *Strickland* element of unreasonable attorney conduct, and in a separate sentence.[100]

Defendant argues that Judge Barron abandoned the *Strickland* standard in favor of a softer fundamental fairness analysis. This is a misreading of the Reargument Opinion. Instead, as shown by the excerpts cited *ante*, Judge Barron acknowledged that *Strickland* controlled this type of inquiry, carefully quoted the standard established by the case, and applied that test to Gattis' claim. The Court reads the Reargument Opinion to hold that *Lockhart* clarified the reason for the *Strickland* test, i.e. representation that fails the *Strickland*

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[96] *Id.* at 32, *citing United States ex rel. Cross v. DeRobertis,* 811 F.2d 1008, 1016 (7th Cir.1987).
[97] *Strickland*, 466 U.S. at 695.
[98] 811 F.2d at 1016.

test means that a defendant's trial was fundamentally unfair. This "clarification," as Judge Barron termed it, did not affect the analysis used in examining Gattis' claim, was not necessary to the opinion, and was nothing more than *dicta*. It therefore can procure Defendant no relief here.

D. Regardless Of Prejudice, the Attorneys' Conduct Was Reasonable

Finally, Gattis' *Lockhart* claim must fail because, even if everything heretofore stated about it were wrong, the argument does not acknowledge that all the opinions regarding the prior Rule 61 Motion held that the trial counsel's conduct met the standard of a reasonable attorney, and *Lockhart* relates only to the question of prejudice.

Strickland is a two-part test. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."[101] The use of the word "first" in this test has been held to mean that, if a criminal

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[99] *Gattis*, 1995 WL 790961 at 36.
[100] *Id*.
[101] *Strickland*, 466 U.S. at 687.

defendant cannot show that his attorney's conduct was unreasonable, the Court need not even reach the prejudice element.[102]

Contrary to Defendant's assessment in his motion, Judge Barron did not overlook the two-part aspect of the *Strickland* model. Instead, the Reargument Opinion (the only one complained of in this Motion) carefully details the many reasons that Gattis' trial counsel's conduct was well within the standard of a reasonable attorney.

The Reargument Opinion notes that trial counsel gave a generic opening without specifically indicating an accident defense.[103] Judge Barron found that such openings are common, and in this case represented a strategic choice to surprise the State with Gattis' actual defense by bringing it out through witnesses.[104] The generic opening was also extremely fortuitous, as it allowed Gattis to change his version of events halfway through the trial without losing credibility.[105]

Judge Barron then noted that, once Gattis changed his story back to the accident defense, trial counsel immediately visited the crime scene, by obtaining a warrant to do so, and secured a witness to support this theory.[106] Trial counsel also expertly cross-examined all of the State's witnesses to "hammer[] away at the State's contention that Shirley Slay's death was intentional."[107] Trial counsel argued for and received jury instructions on

[102] *See, e.g., Flamer*, 68 F.3d at 748.
[103] *Gattis*, 1995 WL 790961 at 31.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id*.

Murder Second Degree, Manslaughter, Criminally Negligent Homicide, and Accident, all of which would have allowed the jury to endorse the accident defense if they believed Gattis' version of events.[108] Judge Barron also found trial counsel's closing argument to be especially strong.[109] Finally, Judge Barron noted that trial counsel, two highly experienced Delaware litigators, had devoted over 338 hours to Gattis' case from the start of their representation through the end of the penalty phase.[110] Judge Barron expressly found this level of advocacy to be reasonable, stating,

> Defense counsel fairly and zealously advanced their client's interests. Counsels' representation fell well within the bounds of reasonable professional assistance and, even assuming substandard representation, no prejudice resulted to the defendant.[111]

The Delaware Supreme Court endorsed Judge Barron's finding that the trial attorneys' conduct was reasonable, stating that,

> [W]e conclude that Gattis' counsel's trial preparation did not fall below standard and did not cause Gattis to suffer actual prejudice."[112]

Thus, contrary to Defendant's argument here, neither the Superior Court nor the Supreme Court "completely ignore[d] counsel's duty to investigate."[113] Instead, both courts carefully considered the reasonableness of Gattis' trial attorneys' conduct, and found that it met the *Strickland* standard. Again, if a defendant cannot show that his attorneys' conduct was unreasonable, courts

[108] *Id.* at 31-32.
[109] *Id.* at 31.
[110] *Id.* at 34.
[111] *Id.* at 36.
[112] *Gattis*, 697 A.2d at 1184.
[113] Def. Op. Br. at 20.

need not even reach the question of whether that conduct prejudiced the defendant.[114]

II. Gattis' *Ring* Based Claim

Defendant's next argument is based upon the constitutionality of Delaware's hybrid death penalty statutes in the wake of *Ring v. Arizona*. The State argues that Gattis' *Ring* based argument is foreclosed by the retroactivity doctrine set forth in *Teague v. Lane*.[115]

At the time of Gattis' First Degree Murder trial and conviction, the 1990 decision of *Walton v. Arizona*[116], applied, making it constitutionally permissible for the States to allocate to the sentencing judge the responsibility for the finding of an aggravating circumstance. In *Ring v. Arizona*, however, the Court "overrule[d] *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."[117] *Ring* interpreted the Sixth Amendment to require that a jury find the aggravating circumstance.

Walton was the prevailing precedent at the time when the Gattis jury unanimously decided, after the penalty phase of the trial, that the evidence showed beyond a reasonable doubt the existence of two statutory aggravating circumstances: 1) that the murder was committed during a burglary; and 2) that the defendant had previously been convicted of a violent felony.[118] The

[114] *See e.g. Flamer*, 68 F.3d at 748.
[115] 489 U.S. 288 (1989).
[116] 497 U.S. 639 (1990).
[117] 536 U.S. at 609 (citation omitted).
[118] See *Gattis v. State*, 637 A.2d 808, 821 (Del. 1994).

jury further found, by a vote of 10 to 2, by a preponderance of the evidence, that the aggravating circumstances outweighed the mitigating circumstances.

The Trial Judge, after considering the jury's recommendation, also held that the State had established these two statutory aggravating circumstances beyond a reasonable doubt. Judge Barron then concluded that the aggravating factors outweighed the mitigating factors, resulting in his decision to impose the death penalty.

In this, his second amendment to his second postconviction motion, Gattis now submits that the determination of whether the aggravating factors outweigh the mitigators must be subject to the reasonable doubt standard, rather than the preponderance of the evidence standard allowed by Section 4209(c)(3)(b.1) of Title 11. This argument is advanced despite the fact that House Bill 287 amending Section 4209 in response to *Ring*, specifically provides that the jury's determination of whether the aggravating circumstances outweigh the mitigating be determined by a preponderance of the evidence and was held to pass constitutional muster by the Delaware Supreme Court in *Brice v. State*.[119]

This controlling Delaware Supreme Court precedent should be sufficient to end the inquiry here, as the Trial Court is duty bound to apply that holding. In *Brice*, the Delaware Supreme Court examined *Ring*, *Apprendi* and Delaware's death penalty system in great detail. There, the Court determined that the only fact that increases a defendant's punishment exposure under Section 4209 is

[119]815 A.2d 314 (Del. Supr. 2003).

the existence of an aggravating factor, determined unanimously and beyond a reasonable doubt in the Death Eligibility Phase.[120] This makes sense, in that the remaining phases do not determine the maximum penalty available, but only whether that maximum penalty should be imposed.[121] This type of a decision is part of a trial judge's traditional contemplative sentencing authority. Indeed, when the Delaware Supreme Court relied on Florida law in an attempt to place that sentencing authority with the jury, as Gattis would like this Court to do, the Delaware General Assembly forcefully rejected the change.[122]

Aside from the fact that this Court has no power to overrule *Brice*, which was correctly decided in any event, an examination of Gattis' claim under federal constitutional jurisprudence leads to the same result.

Since *Ring* involves a question of federal constitutional law, the question of its retroactivity is also governed by federal law.[123] "The Supremacy Clause [citation omitted] does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law."[124]

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[120] 11 *Del. C.* § 4209(c)(3)(b.1). ("In order to find the existence of a statutory aggravating circumstance as enumerated in subsection (e) of this section beyond a reasonable doubt, the jury must be unanimous as to the existence of that statutory aggravating circumstance.")

[121] *Id.* § 4209(d)(1):

> A sentence of death shall not be imposed unless the jury, if a jury is impaneled, first finds unanimously and beyond a reasonable doubt the existence of at least 1 statutory aggravating circumstance… If a jury has been empaneled and if the existence of at least 1 statutory aggravating circumstance as enumerated in subsection (e) of this section has been found beyond a reasonable doubt by the jury, the Court, after considering the findings and recommendations of the jury and without hearing or reviewing any additional evidence, shall impose a sentence of death if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist.

[122] *Garden v. State*, 815 A.2d 327 (Del. Supr. 2003).

[123] *Harper v. Virginia Dept of Taxation*, 509 U.S. 86, (1993).

[124] *Harper* at 100; *American Trucking Association, Inc. v. Smith*, 496 U.S. 167, 177-78 (1990).

The determination of whether a constitutional rule of criminal procedure applies to a case on collateral review is governed by the analysis set forth in *Teague v. Lane*[125],:

> Under *Teague*, the determination whether a constitutional rule of criminal procedure applies to a case on collateral review involves a three-step process. See, e.g., *Lambrix v. Singletary*, 520 U.S. 518, 527, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997). First, the court must determine when the defendant's conviction became final. Second, it must ascertain the "legal landscape as it then existed," *Graham v. Collins*, 506 U.S. 461, 468, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993), and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. *Saffle*, *supra*, at 488, 110 S.Ct. 1257. That is, the court must decide whether the rule is actually "new." Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.[126]

The United States Supreme Court has already decided that *Ring* is not to be applied retroactively[127], and the Third Circuit has ruled that *Apprendi v. New Jersey,*[128] is not to be retroactively applied.[129] Dismissing these precedents, Gattis asserts that his claim is different because *Apprendi* and *Ring* focused on the decision maker (judge v. jury) and not the standard of proof. Gattis contends that this Court should find the burden of proof requirement of *Ring* to be retroactively applied since *In Re Winship*, 397 U.S. 358 (1970) and

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[125] 489 U.S. 288 (1989).
[126] *Beard v. Banks*, 524 U.S. 406, 411 (2004).
[127] *Schiro v. Summerlin*, 124 S.Ct. 2519 (2004). Most recently, the Delaware Supreme Court has followed *Schiro* in *Steckel v. State*, 882 A.2d 168, 171 (Del. 2005).
[128] 530 U.S. 466 (2000).
[129] *United States v. Swinton*, 333 F.3d 481, 487-91 (3d Cir. 2003).

Mullaney v. Wilbur have been held to be retroactive. Those decisions involved respectively, retroactive application of the beyond a reasonable doubt standard of proof to every element of a criminal offense, and proof of absence of provocation in a homicide. Gattis' argument, which amounts to an assertion that the burden of proof provisions are necessarily "watershed rules of criminal procedure"[130] has been expressly rejected by three federal courts of appeal. Respecting these federal court precedents, this Court does not venture to second guess the wisdom of the federal bench. Rather, it endorses their reasoning in holding that *Ring's* burden of proof standard does not fall within either of the exceptions in *Teague* and is not to be retroactively applied.

This finding of non-retroactivity is fatal to Gattis' postconviction claims because he is thereby unable to meet the procedural requirements of Rule 61. As stated, an analysis of any postconviction relief claim must first address whether any of the procedural bars enumerated in the Rule preclude the relief sought. This preliminary analysis is particularly important in this case because this motion is not Gattis' first Rule 61 Motion, and is actually the net result of two separate amendments to his second postconviction application. Pursuant to Administrative Directive 131, "if the defendant was represented by counsel in a prior postconviction proceeding under Rule 61 the bars enumerated in Rule 61 shall be strictly enforced."[131]

[130]489 U.S. at 311.
[131]Admin. Dir. No. 131, Par. C8 (Del. July 11, 2001)(previously Directive 88 (Del. Feb. 5, 1992).

Under both Rule 61(i)(1) and 61(b)(2), Gattis' claim is barred. First, under the former Rule 61(i)(1)[132] a postconviction motion must be filed within three years after the conviction is final. The sole exception to Rule 61(i)(1)'s three year limitation period is if the claim "asserts a so-called new 'retroactively applicable right.'"[133] Since *Ring* is not retroactively applicable, Gattis' April 2002 motion and amendments thereto are untimely and barred by Rule 61(i)(1). Indeed, as noted above, three federal courts of appeals have rejected, on retroactivity grounds, the precise argument advanced by Gattis here.

An additional bar to Gattis' application is contained in Rule 61(i)(2). That section precludes a defendant from seeking relief based on any ground that could have been, but was not, asserted in a prior postconviction motion. Gattis did not assert this basis for relief (however futile it may have been in light of *Walton*) in his first motion, and he is restricted from doing so now unless he can establish that "consideration of the claim is warranted in the interest of justice."[134] Secondly, although Rules 61(i)(1) and (2) generally preclude relief, if Gattis can establish the existence of a fundamental error in the conviction or sentence, the provisions of Criminal Rule 61(i)(5) may allow review of the claim. Gattis, however, cannot make out a case under either of these two bases for possible relief. As indicated, *Ring* does not apply retroactively to this case, nor did Gattis advance this claim in his first Rule 61 motion filed in 1995, although there was then a basis for it. Moreover, as will be discussed hereafter, Gattis

[132] Since Gattis' claim was filed after July 1, 2005, the Rule has actually been amended to preclude postconviction motions filed within one year after the conviction is final. In this instance, the distinction is immaterial.
[133] *Bailey*, 588 A.2d at 1127.

has simply failed to demonstrate a "colorable claim" that a miscarriage of justice occurred because of a constitutional violation, as that concept has been applied in connection with Rule 61(i)(5).[135]

Under Delaware law, a jury must first find that the State has established at least one statutory aggravating factor unanimously and beyond a reasonable doubt. Once this finding is made, the death penalty becomes the maximum penalty allowable. The sentencer (the jury, and then the judge) is then charged with conducting a weighing process, by considering all mitigating circumstances as well as aggravating ones, with the ultimate determination being two potential choices: a punishment of life without the possibility of parole or a sentence of death.

According to Gattis' reading of *Ring*, Delaware's death penalty statute is unconstitutional because that law allows the death penalty to be imposed after a finding that the aggravating factors outweigh the mitigating factors by a preponderance of the evidence, rather than by the more exacting beyond a reasonable doubt standard. Gattis claims that this selection decision is actually a finding of fact, and under *Ring*, must be determined beyond a reasonable doubt under the Sixth Amendment. Gattis submits that this amounts to a miscarriage of justice because of a constitutional violation, thereby bringing his claim within the precise terms of Rule 61(i)(5).

The State counters that Gattis' argument misunderstands the nature of the weighing process under the death penalty statute, and would impose far

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[134]See *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996).

greater demands upon the sentencing authority than are required either under federal constitutional law or under Delaware's death penalty scheme. This Court agrees.

Analysis of this question begins with an acknowledgement that there is no uniformity among the states on this issue. Statutes in some states provide no guidance as to what standard governs the weighing process. Some, like Delaware, require only a preponderance of the evidence standard, while a few states do impose the reasonable doubt standard.[136] All capital punishment systems in the United States require two separate and distinct decisions, "the eligibility decision and the selection decision."[137] "To render a defendant eligible for the death penalty in a homicide case, the United States Supreme Court has indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."[138] The eligibility determination "fits the crime within a defined classification."[139] "Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant…"[140]

While the eligibility factors must genuinely narrow the class and are scrutinized for vagueness[141], the selection decision has a far broader focus. In contrast to the objective fact-finding required to determine a defendant's

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[135] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).
[136] *Ritchie v. State*, 809 N.E.2d 258, 265 n.2 (Ind. 2004) (citing statutes).
[137] *Tuilaepa v. California*, 512 U.S. 967, 971 (1994).
[138] *Tuilaepa*, 512 U.S. at 971-72. See *Ring v. Arizona*, 536 U.S. 584, 612-13 (2002) (Scalia, J., concurring); *Flamer v. State*, 490 A.2d 104, 135 (Del. 1983).
[139] Id. at 973.
[140] *Tuilaepa*, 512 U.S. at 973.
[141] *Tuilaepa*, 512 U.S. at 972.

eligibility for the death penalty, the selection decision is not a factual determination susceptible to any quantum of proof.[142] Instead, the analysis involved in whether a defendant who is death eligible should in fact be sentenced to death must necessarily take into account a seemingly endless amount of personal and historical information that is not subject to any precise test or scientific formula. The weighing process validated in both *Ring* and *Brice* was never intended to vitiate longstanding concepts of individualized sentencing. The appropriateness of imposing the death penalty upon a death-eligible defendant involves a moral inquiry that can conceivably include a myriad of facts and circumstances specific to that individual defendant. Indeed, it is required that the sentencing decision "must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's relative culpability."[143] Simply stated, the weighing process does not involve fact-finding and the decision is purely a discretionary one.[144]

In reliance upon the distinction between the fact-finding eligibility decision and the discretionary selection decision, the Delaware Supreme Court has specifically rejected the argument made here by Gattis.[145] Eight other state courts have similarly decided that the sentencing decision of a death-eligible defendant is not a finding of fact subject to the Sixth Amendment. Thus, consistent with the *Brice* decision of the Delaware Supreme Court, as well as other state court decisions that concur, this Court concludes that the

[142] *Ford v. Strickland*, 696 P2d 804, 818 (11th Cir.); *People v. Hayes*, 802 P.2d 376, 418 (Cal. 1990); *People v. Rodriguez*, 726 P.2d 113, 144 (Cal. 1986).
[143] *Tuilaepa*, 512 U.S. at 973.

only finding of fact that must be proved beyond a reasonable doubt is the existence of at least one statutory aggravating circumstance.[146] Gattis' effort to impose this standard on the ultimate sentencing decision must therefore fail.

III. Gattis' Claim Regarding the Trial Judge's Post-Trial Contact With Jurors

As a third and final basis for relief in his second Rule 61 Motion for Postconviction Relief, Gattis alleges that the Sentencing Judge was in contact with members of the jury after the penalty phase but before his decision on the sentencing, and that this conduct was not only improper, but that it unfairly tainted his sentencing decision. The motion states:

> Gattis produced for counsel a newspaper article written shortly after sentence was imposed wherein the prosecutors indicate that such contact had occurred. [Quotation omitted]. This is the first time counsel for Gattis was ever made aware of the fact that the Sentencing Judge had *ex parte* contact with members of the sentencing jury prior to sentencing in this case. Paragraph 12. Amended Motion for Postconviction Relief (Aug. 13, 2003).

As a result of this allegation this Court conducted two hearings in which those jurors who were alive, could be reached, and who responded, were questioned regarding the nature, if any, of their post-trial contact with the Trial Judge.

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[144] *Flamer*, 490 A.2d at 135.
[145] *Brice v. State*, 815 A.2d 314, 322 (Del. 2003).
[146] *Flamer*, 490 A.2d at 135; *Brice*, 815 A.2d at 322.

A. Procedural Bars

As a preliminary matter, the Court must first determine if this claim meets the procedural requirements of Rule 61.[147] This is a particularly important inquiry in the context of successive postconviction motions filed in capital cases. As stated earlier, under Administrative Directive 131 "if the defendant was represented by counsel in a prior postconviction proceeding under Rule 61, the bars enumerated in Rule 61 shall be strictly enforced."[148]

Gattis' claim alleging judicial impropriety is, on the surface, pitifully out of time. By the terms of Rule 61(i)(1) (which has since been amended to reduce the period from three years to one year), a postconviction motion must be filed within three years after the conviction is final. The only exception is if the claim "asserts a so called new retroactively applicable right, which is obviously not applicable in this instance. Defense counsel's claim that Gattis had the 1992 article in his possession for over twelve years, but only alerted him to the existence of it in 2004, is hardly justification for this late argument.

The claim is also barred by Rule 61(i)(2). Criminal Rule 61(b)(2) mandates that Gattis advance all grounds for relief that were available to him in his first postconviction motion. Gattis' reliance upon a 1992 News Journal article written shortly after his conviction as the factual predicate for this argument demonstrates that the claim was undoubtedly available to him when he filed the 1994 motion. Moreover, the rule provides that the motion must

[147] *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).
[148] Admin. Dir. No. 88 (Del. Feb. 5, 1992); Admin. Dir. No. 131 (Del. July 11, 2001).

"specify all grounds for relief which are available to the movant and of which the movant has or, by the exercise of reasonable diligence, should have knowledge …"[149] In essence, the fact that the article, and the argument now generated by it, were available at the time Gattis filed his first Rule 61 motion clearly forecloses consideration of this claim at this late juncture. Criminal Rule 61(i)(2).

B. Judge – Juror Contact Was Inconsequential

Notwithstanding the preclusive terms of Rule 61(i)(1) and (2), review of Gattis' final claim is allowed only if Gattis can demonstrate a fundamental error in the conviction or sentence that would trigger the provisions of Criminal Rule 61(i)(5). In order to do so, however, Gattis must establish "a colorable claim" that a miscarriage of justice occurred because of a constitutional violation.[150] Under the facts and circumstances of this case, I conclude that Gattis has fallen far short of meeting that burden.

Even accepting every fact outlined in Defendant's brief as true, it appears that, *after the jury had entirely completed its duty and had been dismissed*, Judge Barron thanked the jurors for their service, stated that their non-unanimous sentencing recommendation "did not make it easy" on him, and, at a later chance encounter on the street, told a juror the date of the sentencing

[149] Super. Ct. Crim.R. 61(b)(2) (emphasis added). See also, *United States v. Zorilla*, 924 F.Supp. 560, 562 (S.D.N.Y. 1996) (failure to raise claim in first petition bars claim as defendant's reliance on newspaper stories to support his postconviction motion "were actually printed ten days before his first … petition was filed". See generally *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (counsel's lack of knowledge is not sufficient to excuse procedural default); *Younger v. State*, 580 A.2d 552, 556 (Del. 1990) (attorney's error does not excuse failure to raise issue on appeal).

[150] See *Younger*, 580 A.2d at 555.

because that juror, having participated in a lengthy, arduous trial, was interested in its conclusion.

Two of the jurors questioned by the Court testified that the Judge went back to the jury room after the penalty verdict to thank the jurors for their service. One juror recalls the Judge commenting that they were "making it more difficult for him." That juror testified that she asked "in what way…?" There was no testimony concerning the Judge's response, if any.

Despite Gattis' attempt to paint Judge Barron's benign comments as improper, there is no evidence that any of these conversations were in any way substantive, or that they even slightly influenced Judge Barron's sentencing decision. It is utterly illogical to posit that saying "thank you" to a jury, a practice of many trial court judges, including this one, somehow made it more likely that the defendant would receive the death penalty. Similarly, responding to a chance encounter by giving a juror the time of a sentencing, like giving him the time of day, is in no way an "egregious circumstance." It is purely common courtesy. Finally, stating that the non-unanimous jury recommendation did not make Judge Barron's sentencing decision an easy one only shows that the judge was giving the case the agonizingly careful consideration that it warranted.

The principle problem with this argument is that the defense does not seem to understand that judges, experts in the law honed by years of experience, do not operate under the same strict sequestration "blinders" that are meant to protect lay jurors. The cases that the defense cites all relate to

improper jury contact that may have influenced a juror.[151] This is because lay jurors, unfamiliar with the rules of evidence and court procedure, may be unable to determine whether an influence is improper and to detach it from their fact-finding. Our system therefore assumes that jurors need to be protected from improper influences by sequestration rules, suppression hearings, hearsay exclusions, D.R.E. 404(b), and the like.

Mercifully, our justice system credits judges with a substantially greater degree of legal acumen. For example, the same judge may hear a defendant confess to murder in open court, then later grant that defendant's Motion to Withdraw Guilty Plea and preside over his murder trial.[152] A judge may suppress evidence clearly showing the defendant's guilt, and then direct a verdict of acquittal when the State cannot otherwise prove a *prima facie* case. Judges routinely hear arguments regarding the admissibility of evidence with which the system would never trust a lay juror – hence, the necessity of sidebar conferences and pretrial motions. The list could go on and on.

Judge Barron was not a juror. Nor was he inappropriate, insensitive, or subject to improper influence, as this motion implies. Instead, Judge Barron was an accomplished professional jurist with an impeccable reputation for

[151]Defendant's argument rests almost entirely on *State v. Deshields*, 1996 WL 659490 (Del. Super.). During deliberations in that case, a juror had a 20-minute, one-on-one lunch with the chief investigating officer. The Court found a presumption of prejudice, even though the case was not discussed and the lunch was entirely innocent. The Court was swayed by the fact that the contact was not incidental, allowed the juror to get to know the officer on a personal level and therefore presumably made him more believable to that juror than he would otherwise have been, and occurred at a stage of the proceedings where the trial judge was unable to intervene or offer a curative instruction. This case is nothing like *Deshields*. The juror contact here was incidental, fleeting, and impersonal in every respect. While the Court supposes that Judge Barron could have issued a curative instruction to himself aloud and on the record, it seems rather ridiculous to demand that he have done so. Thus, even if Judge Barron had been a juror, this case would not fit the *Deshields* standard for presumption of prejudice, and instead is governed by incidental contact cases such as *Bailey v. State*, 363 A.2d 312 (Del. 1976).

integrity. There is not a shred of evidence that saying "thank you" or "1:00 p.m. next Monday" caused Judge Barron to order an execution, and there is also a total absence of case law that would require this Court to reach such a conclusion. Moreover, having presided over the evidentiary hearings on this matter, the Court does not for one second believe that Judge Barron was improperly influenced in his sentencing decision, and will not invent new law to endorse such a specious accusation. In other words, even if the presumption of juror prejudice from out-of-court contact for some reason applied to judges, the evidence produced at three hearings on this matter has rebutted that presumption beyond a reasonable doubt.[153]

Unfortunately, this defense attorney has begun to develop a disturbing pattern of personally attacking the trial judge whenever he finds himself on the losing end of a capital case.[154] The Court appreciates that defense counsel has very strong feelings against the death penalty. The Court also respects that defense counsel is particularly expert in the field of federal death penalty law. Neither of those facts, however, excuses persistent, personal attacks on members of the Delaware judiciary. Such conduct drags the entire justice system into disrepute, erodes public confidence in the rule of law, and discourages qualified candidates from choosing careers in public service.

It thus follows that Gattis has failed to establish a colorable claim that a miscarriage of justice occurred in this case because of a constitutional

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[152]*See e.g. State v. Phillips*, 2003 WL 21517888 (Del. Super.).
[153]*Remmer v. United States*, 347 U.S. 227, 229 (1954).
[154]*State v. Jones*, 2005 WL 950122 (Del. Super.).

violation. Therefore, under Rule 65(i)(5) Gattis' claim regarding the Trial Judge's comments is procedurally barred.

Conclusion

For all of the foregoing reasons, Gattis' Motion for Postconviction Relief is **denied.**

IT IS SO ORDERED.

PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary – Criminal
cc: Loren C. Meyers, Esquire
Kevin J. O'Connell, Esquire