

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

STATE OF DELAWARE : CASE NO. 0504005647A(R1)
 :
 v. :
 :
 ALLISON LAMONT NORMAN, :
 :
 Defendant. :
 :

Submitted: February 1, 2013
Decided: March 6, 2013

On Defendant's Motion for Postconviction Relief: **DENIED**

MEMORANDUM OPINION

Peggy J. Marshall, Esquire, and Adam D. Gelof, Esquire, Deputy Attorneys General for the State of Delaware.

J. Brendan O'Neill, Esquire, Stephanie A. Tsantes, Esquire, and Deborah L. Carey, Esquire, trial counsel for the defendant.

Bernard J. O'Donnell, Esquire, and Nicole M. Walker, Esquire, appellate counsel for the defendant.

Michael R. Abram, Esquire, Court-appointed counsel for the defendant in this Motion for Postconviction Relief.

Allison Lamont Norman, defendant.

GRAVES, J.

The Court has before it Lamont Norman's ("Mr. Norman" or "the defendant") Motion for Postconviction Relief filed pursuant to Superior Court Criminal Rule 61 ("Rule 61"). The original motion was filed on June 7, 2010. In great part it was conclusory, which resulted in a conclusory response by his trial and appellate counsel.

At the request of Mr. Norman, the Court then appointed Michael R. Abram, Esquire ("Mr. Abram") and gave Mr. Abram and Mr. Norman the opportunity to fine-tune the allegations and grounds for postconviction relief. Because this case was tried as a capital murder case, the record is huge. Mr. Abram had difficulties in meeting with Mr. Norman and getting the paperwork, transcripts, etc., into the prison for their conferences. Mr. Norman, as a person convicted of first degree murder, is presumably in a very secure part of the James T. Vaughn Correctional Center. After working through the frustration of getting counsel and the defendant together, including bringing the defendant to the courthouse just to meet with his attorney, new problems arose. Mr. Norman did not agree with his attorney's strategies. No agreement could be reached between them as to what to file. Time kept slipping by. Mr. Abram was understandably frustrated.

To move the case off the dime, the Court took the extraordinary step of directing Mr. Abram to file what he thought was appropriate and permitted Mr. Norman also to file what he thought should be filed. On November 17, 2011, Mr. Norman filed his amended Rule 61 motion containing his positions. On November 17, 2011, Mr. Abram filed his amended Rule 61 motion. That started the ball rolling with responses by defense trial and appellate counsel and the State of Delaware ("the State"), followed by Mr. Norman's and Mr. Abram's separate responses. The matter became ripe for decision on February 1, 2013.

BACKGROUND

The defendant is serving a sentence of life without parole for murder in the first degree. Originally he was sentenced to death, but the Supreme Court determined that the statutory aggravators of a second death that occurred in Maryland had to be considered under Maryland, not Delaware, law as to culpability. Upon remand, the State elected not to pursue the death penalty and Mr. Norman received a life sentence. He also was sentenced on two counts of attempted murder in the first degree, possession of a deadly weapon, wearing body armor during the commission of a felony, and theft.

A full narrative of what occurred on April 7, 2005, is contained in the Court's September 28, 2007, sentencing decision.¹

In a nutshell, the defendant shot at several persons, killing one and wounding others. He continued into the state of Maryland where he shot at several persons, killing one and wounding others. At trial, the defense acknowledged Mr. Norman committed the acts charged, but argued that he was legally insane at the time. The evidence of the physical actions of Mr. Norman occurring on

¹ In the Supreme Court's decision it notes that the defendant's acts on the day in question were done while the defendant was delirious. This is a finding of fact by the Supreme Court. While the psychiatrists may have testified as to psychosis and delirium, the jury was free to accept or reject same. Much testimony evidenced that the defendant did appreciate the criminality and wrongfulness of his actions. An interrogatory to the jury would have settled this issue as to whether (i) the defendant was guilty because he appreciated wrongfulness of his actions, or (ii) the defendant was guilty because a psychosis or delirium existed and he did not appreciate wrongfulness of conduct but the psychosis or delirium was proximately caused by voluntary intoxication of drugs. When an interrogatory was suggested by the Court, the defense forcefully objected. In hindsight, it would have been helpful. Nevertheless, this judge specifically reached a finding of fact that the defendant appreciated the wrongfulness of his conduct, based on the evidence of his actions and comments made on the day in question. If this Court had determined he was delirious because of drugs and did not appreciate the wrongfulness of conduct, then the death penalty would not have been imposed.

April 7, 2005, was overwhelming. Witness after witness traced him from Laurel, Delaware, to Salisbury, Maryland, where the police captured him. Therefore, the reasonable and seemingly only defense was that the defendant was not criminally responsible for his actions. To establish this, the defendant had to put his criminal lifestyle before the jury. He agreed, but now he faults that strategy.

DISCUSSION

First, the Court will address the grounds Mr. Abram raised. Then, the Court will address Mr. Norman's grounds. Since the majority of the claims allege ineffective assistance of counsel, it is appropriate to review the applicable law our Supreme Court recently reviewed when it applied the *Strickland* standard² in *Swan v. State*:

Strickland requires Swan [the defendant] to make two showings. First, Swan [the defendant] must show that defense counsel's performance was deficient. *Strickland*, 466 U.S. at 687 ("This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed Mr. Adkins by the Sixth Amendment."). Second, *Swan* must show that his counsel's deficient performance prejudiced the defense. *Id.* at 687 ("This requires showing that counsel's errors were so serious as to deprive Mr. Adkins of a fair trial, a trial whose result is reliable."). In *Strickland*, the United States Supreme Court explained that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed." *Id.* at 697 ("The object of an ineffectiveness claim is not to grade counsel's performance.").

Under *Strickland*'s first prong, judicial scrutiny is "highly deferential." *Id.* at 689 ("[T]he defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (citing *Michel v. Louisiana*, 350 U.S. 91, 100-101 (1955))). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from

²*Strickland v. Washington*, 466 U.S. 688 (1984) ("*Strickland*").

counsel's perspective at the time." *Id.* Accordingly, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .". *Id.* The *Strickland* court explained that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. A movant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.*

Under *Strickland*'s second prong, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. In other words, "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* "Some errors will have had a pervasive effect..., and some will have had an isolated, trivial effect." *Id.* at 695-96. Accordingly, "[t]he [movant] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "Reasonable probability" for this purpose means "a probability sufficient to undermine confidence in the outcome." *Id.* In making this determination, the *Strickland* court explained that a court must consider the "totality of the evidence," *id.* at 695, and "must ask if the [movant] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* at 696. "[T]he *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington v. Richter*, 131 S. Ct. 770 (2011) (citing *Strickland*, 466 U.S. at 689-90).³

Repeatedly in the defense postconviction allegations are complaints about the strategy and tactics of both the defense trial counsel and the defense appellate counsel. As noted above, the effectiveness or ineffectiveness of counsel must be considered based upon the unique facts and

³ *Swan v. State*, 28 A.3d 362, 383-384 (Del. 2011).

circumstances of the defendant's case. "Legal judgments [as to strategy and tactics] based on thorough investigation are virtually unassailable on collateral review."⁴

In the same vein, it is appellate counsel who controls the decision-making as to what issues have the most merit and what issues should be discarded.⁵

Counsel's Ground One

The contents of this ground are set forth in its entirety as follows:

The key issue involved in this case is the mental state of the defendant at the time of the incidents involved and whether 11 *Del. C.* [§] 401(c) applied. That the Defendant was not competent at the time of these offenses is undisputed (T-40 State's expert). The issue then becomes whether or not the Defendant is unable to use the defense of Insanity because he was voluntarily intoxicated, and more directly, does the State have the burden to prove that they (*sic*) Defendant was voluntarily intoxicated, or does the Defense have the burden of proving that the Defendant was not intoxicated.

This specifically bore out in this case when the discussion of Jury instructions came up and the Defense argued that the instructions on insanity should read "However, if the State presents evidence to rebut the affirmative defense, then the burden remains upon the State to rebut the affirmative defense beyond a reasonable doubt," (U-45). During argument on this issue the Court noted the case of *Connecticut v. Hanson*, 529 A.2d 720, Conn. App. (1987). (U-78-9). In this decision the Appeals court denies the Appeal based on the fact that the Court did not accept the affirmative defense that the Defendant was Insane[.] *Hanson* at 723. That differs from this case where it is undisputed that the Defendant was legally insane. However[,] the Court in *Hanson* notes that "If the trial court's decision is interpreted to hold that the mental disease or defect was present, but was caused by the voluntary ingestion of alcohol, the state in this case has borne its burden of rebutting the defense," At 724. The importance of this quote being that the Court noted a burden on the State. This quote was actually read into the record by

⁴*Meyer v. Branker*, 506 F. 3d 358, 374 (4th Cir. 2007).

⁵ *Scott v. State*, 7 A. 3d 471 (Del. 2010).

the court (U-79).

Following this discussion about the jury instruction and the burden for proving or disproving voluntary intoxication the Court made its decision regarding this matter 5 days later without further argument. The decision by the Court does not explain why the Court decided that the burden is not on the State to prove voluntary intoxication. By not creating a record on this issue that was paramount to the case, the Court abused its discretion.

The Appeals attorney on this matter was made aware of this issue by the Defendant when she consulted him about the appeal. He demanded that the attorney pursue this action in her appeal, and she refused. It was ineffective to not pursue this issue, a case of first impression in Delaware with extremely limited case law from other jurisdictions, which if reversed, would place the burden on the State to prove that the admitted Insanity was caused by drug usage and require a new trial.

The defense argues that this ground should not be procedurally barred because the defendant's trial team and/or appellate counsel did not raise it on appeal, but should have. Mr. Abram notes this issue was discussed in a prayer conference but not raised on appeal despite the defendant's request that it be included.

Appellate counsel recalls studying the issue but cannot recall why it was not included in the opening brief, therefore they must have dropped the ball. I expect, after a careful reading of *Hanson*, it was determined not to be helpful and a decision was made to put the appellant's eggs in other baskets. That appellate strategy was successful in that the death penalty sentence was reversed.

Nevertheless, the Court will not bar the consideration of this issue under Rule 61(i)(3) and will discuss the merits.

Before doing so, the Court must note that the allegation that "it is undisputed that the defendant was legally 'insane'" is factually incorrect. Whether or not the defendant lacked

substantial capacity to appreciate the wrongfulness of the nature of his criminal conduct was a jury issue. Whether there was a psychosis or delirium proximately caused by voluntary intoxication of drugs was also a jury question. As noted in footnote 1, the trial judge found the defendant did appreciate the wrongfulness of his criminal conduct.

The mental illness instructions given in the case were as follows:

MENTAL ILLNESS

Mental illness is an affirmative defense under Delaware law, which provides as follows:

In any prosecution for an offense, it is an affirmative defense that, at the time of the conduct charged, as a result of mental illness or mental defect, the accused lacked substantial capacity to appreciate the wrongfulness of the accused's conduct. If the defendant prevails in establishing the affirmative defense provided in this subsection, the trier of fact shall return a verdict of "not guilty by reason of insanity."

The defendant has the burden of proving this defense by a preponderance of the evidence.

Now, to establish something by a preponderance of the evidence means to prove that something is more likely so than not so. The phrase, "preponderance of the evidence" does not mean the side with the greater number of witnesses. The side upon which you find the greater strength and the greater weight of the evidence is the side upon which the preponderance of the evidence exists. In order for the defendant to have sustained his burden of proof, the evidence must do more than merely balance the scale; it must tip the scale to some extent, at least in the defendant's favor. You should therefore, understand that if the evidence as to the defendant's mental illness is evenly balanced, the defendant has not proved that defense by a preponderance of the evidence and you should, therefore, conclude that issue against the defendant.

The elements of this defense are that:

1. At the time of the death of Jamell Weston, and at the time of the commission of the other offenses alleged in the indictment, the

defendant was mentally ill or mentally defective. “Mental illness” means any condition of the brain or nervous system recognized as a mental disease by a substantial part of the medical profession. “Mental defect” means any condition of the brain or nervous system recognized as defective, as compared with an average or normal condition, by a substantial part of the medical profession. Under Delaware law, anti-social personality disorder, by itself, does not constitute a psychiatric condition.

2. As a result of such mental illness or mental defect, the defendant lacked substantial capacity to appreciate the wrongfulness of the criminal nature of his conduct. “Not guilty by reason of insanity” requires the mental impairment to be of such severity that the defendant lacked substantial capacity to appreciate the wrongfulness of his criminal conduct. The use of the words “substantial capacity” do [*sic*] not mean that there must be a complete impairment. It is unnecessary to require a showing of total insanity, particularly when such a state may rarely exist. Even one who is very mad will have lucid intervals or may be always lucid with regard to some subjects. Thus, the law requires a showing that the defendant lacked substantial capacity, rather than total capacity, to appreciate the criminal nature of his conduct.

The defendant has asserted the affirmative defense of mental illness. The defendant has the burden of proving this affirmative defense to your satisfaction by a preponderance of the evidence. The State has no burden to present any evidence in this matter.

After considering all of the evidence tending to support or negate the existence of the defense, you should determine whether the evidence as a whole makes it more likely than not that each element of the affirmative defense, as I have defined it for you, existed. If you find that this affirmative defense is established by a preponderance of the evidence, you must return verdicts of “not guilty by reason of insanity.” Even if the defendant has not met his burden of proving this particular affirmative defense, you must acquit him if you find that the State has not met its burden of proving its case beyond a reasonable doubt.

GUILTY, BUT MENTALLY ILL

There is another possible verdict that you may consider, and that verdict is "guilty, but mentally ill." Delaware has a statute which

reads as follows:

Where the trier of fact determines that, at the time of the conduct charged, a defendant suffered from a psychiatric disorder which substantially disturbed such person's thinking, feeling or behavior and/or that such psychiatric disorder left such person with insufficient willpower to choose whether the person would do the act or refrain from doing it, although physically capable, the trier of fact shall return a verdict of "guilty, but mentally ill."

This verdict is permissible should you determine that at the time of the conduct charged, the defendant suffered from a psychiatric disorder which either substantially disturbed his thinking, feeling or behavior and/or left the defendant with insufficient willpower to choose whether he would do the act or refrain from doing the act, although physically capable of refraining from doing it.

The term "psychiatric disorder" means any mental or psychotic disorder recognized within the realm of psychiatry as affecting a person's behavior, thinking, feeling or willpower. Under Delaware law, anti-social personality disorder, by itself, does not constitute a "psychiatric disorder" as that term is defined in the previous sentence.

The distinction between "not guilty by reason of insanity" and "guilty, but mentally ill" lies in the degree of mental illness. A person who is "not guilty by reason of insanity" is so severely mentally impaired that he lacks substantial capacity to appreciate the wrongfulness of his criminal conduct. A person who is "guilty, but mentally ill" is able to appreciate the wrongfulness of his conduct but nevertheless, due to a psychiatric disorder, exhibits thinking, feeling or behavior which is substantially disturbed, and/or who, due to a psychiatric disorder, lacks sufficient willpower to choose whether to do a particular act or refrain from doing it, although physically capable of refraining from doing it.

Under the statute, then, there are three bases for a "guilty, but mentally ill" verdict. The first basis for such a verdict is where a defendant suffered from a psychiatric disorder which substantially disturbed such person's thinking, feeling or behavior. The second basis for a "guilty, but mentally ill" verdict is where a defendant

suffered from a psychiatric disorder which substantially disturbed such person's thinking, feeling or behavior and such psychiatric disorder left such person with insufficient willpower to choose whether the person would do the act or refrain from doing it. The third basis for a "guilty, but mentally ill" verdict is where a psychiatric disorder left such person with insufficient willpower to choose whether the person would do the act or refrain from doing it.

Neither the State nor the defense has the burden of proving that the defendant is guilty but mentally ill. Nevertheless, you, the jury, have the option to return a verdict of "guilty, but mentally ill" if you determine that such a verdict is warranted by the evidence presented during the course of the trial. Such a verdict may only be rendered, however, if you first determine that the State has established the elements of the offense or offenses charged beyond a reasonable doubt.

Further, such a verdict may only be rendered if you have also determined that the defendant has not met his burden of establishing the defense of "not guilty by reason of insanity."

11 DEL.C. §401(c) AND §422

The defendant has raised the affirmative defense of insanity and he contends that he is therefore "not guilty by reason of insanity." This defense is permitted by 11 *Del.C.* §401(a). I have also informed you of the possible verdict of "guilty but mentally ill," which is a verdict permitted by 11 *Del.C.* §401(b).

11 *Del.C.* §401(c) states as follows:

(c) It shall not be a defense under this section if the alleged insanity or mental illness was proximately caused by the voluntary ingestion, inhalation or injection of intoxicating liquor, any drug or other mentally debilitating substance, or any combination thereof, unless such substance was prescribed for the defendant by a licensed health care practitioner and was used in accordance with the directions of the prescription.

There is another Delaware law, 11 *Del.C.* §422, which states as follows:

Evidence of voluntary intoxication shall not be admissible for the purpose of proving the existence of mental illness, mental defect or psychiatric disorder within the meaning of §401 of this title.

Several of these terms will be defined for you now:

“Intoxication” means the inability, resulting from the introduction of substances into the body, to exercise control over one’s mental faculties.

“Voluntary intoxication” means intoxication caused by substances which the actor knowingly introduces into the actor’s body, the tendency of which to cause intoxication the actor knows or should know, unless the actor introduces them pursuant to medical advice. You should also be aware that addiction to an intoxicating substance does not make the consumption of that substance involuntary.

With the above in mind, let me paraphrase 11 *Del.C.* § 401(c):

A defendant may not rely upon the defense of “not guilty by reason of insanity or mental illness,” and the jury may not return a verdict of “guilty but mentally ill” if the alleged insanity, mental illness or psychiatric disorder was proximately caused by the voluntary use of alcohol or any non-prescribed or illegal drug.

I will now define “proximate cause” for you in the context of 11 *Del.C.* § 401(a) and (b). Insanity, mental illness or psychiatric disorder is proximately caused by voluntary alcohol or drug usage when such usage directly produces the insanity, mental illness or psychiatric disorder, and but for which the insanity, mental illness or psychiatric disorder would not have occurred. There may be more than one proximate cause which directly produces insanity, mental illness, or psychotic disorder.

If you find that the defendant is mentally ill, has a mental defect, or has a psychiatric disorder, and you further find that the defendant’s voluntary alcohol or drug usage was the proximate cause of his mental illness, mental defect or psychiatric disorder, then you may not find the defendant to be “not guilty by reason of insanity” or “guilty but mentally ill” as I have defined those possible verdicts for

you. However, you may find the defendant “not guilty by reason of insanity” or “guilty but mentally ill” if you conclude that the defendant’s voluntary use of alcohol or drugs did not constitute the proximate cause of his mental illness, mental defect or psychiatric disorder which you find to exist.

The issue raised in ground one boils down to the following: Did the trial court err when it declined to give the following proposed instruction: “However, if the State presents evidence to rebut the affirmative defense [of insanity], then the burden remains upon the State to rebut the affirmative defense beyond a reasonable doubt.”

What the proposed instruction suggests is that if the defense attempts to establish the affirmative defense of insanity by a preponderance of the evidence, then the State’s rebuttal evidence must be beyond a reasonable doubt. The Court is satisfied this is not a proper statement of Delaware law. The burden of proving all elements of the crimes charged remains on the State throughout the trial, regardless of an insanity defense. The instructions make this clear.

But, if the State pushes back with evidence contrary to the defendant’s affirmative defense evidence, the evidentiary standard applied by the jury remains “by a preponderance of the evidence.” The jury does not receive dueling standards of proof on this defense.

The burden of proving insanity by a preponderance of the evidence is upon the defendant. The Court properly instructed the jury that, in considering all of the evidence supporting or negating the existence of the insanity defense, if the jury found that the evidence as a whole makes it more likely than not that the affirmative defense was established, it must return a verdict of not guilty by reason of insanity.

The weighing of all the evidence and the application of the preponderance standard is what is required. The defendant, in his defense, may choose to present expert testimony to attempt to

prove by a preponderance of the evidence that the defendant was legally insane pursuant to 11 *Del.C.* § 401. The State may push back with rebuttal evidence. Whether or not the defendant can prove his affirmative defense by a preponderance of the evidence is his burden. Whether or not the defendant can prove an insanity defense that is available to him under § 401 is also the defendant's burden. (§ 401(c) "It shall not be a defense . . .") Rebuttal evidence attacking the affirmative defense evidence is not required to be beyond a reasonable doubt.

Having the jury apply two different standards of proof in considering the insanity defense would not only be wrong, it would be confusing.

I believe the defense at trial and the defendant's present argument confuse the concept of an affirmative defense with that of a defense. For example, if, in a trial, a defendant presents evidence of justification or self-defense, then the State does have the burden to rebut same beyond a reasonable doubt. Self-defense is not an affirmative defense that places a burden upon the defendant of proof by a preponderance. Self-defense, if it raises a reasonable doubt, requires a verdict of not guilty. Thus, the State must rebut same beyond a reasonable doubt. For example, our jury instruction on justification is as follows:

JUSTIFICATION/SELF-DEFENSE

If, after considering all of the evidence tending to support the defense of justification, you find that such evidence raised a reasonable doubt in your minds as to the defendant's guilt, you should find him not guilty of the crime charged. Thus, you may find the defendant guilty only if you are satisfied beyond a reasonable doubt that the defendant did not believe that the force he used was immediately necessary to protect himself then and there from unlawful force used by the victim.

As to reasonable doubt and the insanity defense, the last sentence of the insanity instruction is crucial: “Even if the defendant has not met his burden of proving this particular affirmative defense, you must acquit him if you find that the State has not met its burden of proving its case beyond a reasonable doubt.”⁶ This sentence ensures the jury understands that the State’s burden remains to prove its case beyond a reasonable doubt even if the affirmative defense of insanity is not established by a preponderance of the evidence.

The defendant’s Rule 61 counsel cites *Hanson*⁷, which also was cited by trial counsel at the prayer conference for supporting the defense’s position that any rebuttal evidence to an affirmative defense must be proven beyond a reasonable doubt. The case does not support the defendant’s position. The Connecticut appellate court affirmed a conviction arising from a bench trial. Connecticut has a statute similar to our insanity statute, as well as a statute that makes the affirmative defense unavailable where the voluntary ingestion of alcohol or other intoxicating substances caused the defect which rendered the defendant incapable of appreciating the wrongfulness of his conduct. The *Hanson* decision stated the following:

A reading of the plain language of the statute makes it clear that the affirmative defense is unavailable where the voluntary ingestion of intoxicating liquor has caused the disease or defect which has rendered the defendant substantially incapable of appreciating the wrongfulness of his conduct or of conforming his conduct to the law. The state may offer evidence that intoxicating liquor was voluntarily ingested so as to cause the disease or defect, to refute the evidence that insanity absolves the defendant of criminal responsibility.⁸

⁶This cautionary instruction, which keeps the jury focused on the State’s burden of proof, is regularly given in insanity cases. *State v. Sanders*, 585 A. 2d 117 (Del. 1990).

⁷*Connecticut v. Hanson*, 529 A. 2d 720 (Conn. App. 1987) (“*Hanson*”).

⁸*Id.* At 724.

The Connecticut court did not find that if the defendant had provided evidence of his mental illness then the State had the burden to prove beyond a reasonable doubt it was caused by voluntary intoxication.

The Connecticut court interpreted its statute in a manner similar to this Court's interpretation of the Delaware statute. Both mental illness statutes state "it shall not be a defense under this section" if the alleged mental illness or insanity was proximately caused by voluntary use of debilitating substances. To establish a viable insanity defense, both Connecticut and Delaware require that the insanity not to be brought on by alcohol, drugs, or other debilitating substances. Neither statute places the burden on the State to prove beyond a reasonable doubt that any mental illness was proximately caused by voluntary intoxication. The finder of fact will consider the defendant's evidence and State's rebuttal evidence to determine if the defendant has established by a preponderance of the evidence a mental illness defense permitted under 11 *Del.C.* § 401.

Finally, a comment as to the evidence. There was no evidence that the defendant was involuntarily intoxicated. There was overwhelming evidence of the defendant's voluntary use of drugs. He was heavily involved in the drug culture.

The defense's position was that, whatever his drug consumption may have been, he was not in a drug-induced psychosis at the time the physical acts of criminal conduct occurred. He was simply psychotic. The State's position was that whatever psychosis may have existed (if so found by the jury) was a direct result of his long-term usage of drugs.

Hence, the above argument is more theoretical than applicable to the evidence in this case. The defendant's voluntary drug usage was established. His doctors opined that, regardless of his drug usage, those drugs were not the cause of his alleged delusion.

Therefore, I conclude that had appellate counsel raised this issue on direct appeal, it would not have been successful. Ground one is denied.

Counsel's Ground Two

The defense alleges that trial counsel were ineffective for the failure to present evidence that mental illness existed in his family, thereby buttressing his position that he was not guilty by reason of insanity.

Specifically, the defense alleges that a paternal aunt was at the state psychiatric hospital, Delaware Psychiatric Center ("DPC"), and his trial defense team was tardy in learning of this fact and acquiring the necessary releases to obtain her records. As a consequence of providing those records to the State after the trial began, the Court did not allow evidence on this matter to be introduced.

Mr. Norman's trial defense team reported in their Rule 61(g) submission that efforts were made early in this case to explore any mental illness in the defendant's family. But, it was not until shortly before trial that they learned of Yolanda Smack, the defendant's aunt with a history of mental illness. On April 26, 2007, they requested that the prosecutor obtain Ms. Smack's medical file from DPC. The prosecutor declined, reporting that they had no basis to use an Attorney General's subpoena, nor could they because of HIPAA regulations.

Apparently, simultaneously, the defense team pursued obtaining releases and were successful in obtaining Ms. Smack's medical records. On May 17, 2007, copies of these records were provided to the State with a letter advising that those records also had been provided to Dr. Brandt, the defense psychiatrist expert, and that she may use them in her testimony.

The above information was given to the State after the jury selection *voir dire* had begun.

Earlier in the preparation for trial and in discovery of the expert witnesses' testimony and records, the State was concerned that the defense may have been "holding back." The defense denied any such tactic. To ensure a level playing field as to discovery, the Court ordered that all raw data, file data, etc., be exchanged by May 4, 2007.

Ultimately, when Dr. Brandt testified, she was not asked about mental illness in the defendant's family. Nor was it raised in the testimony of the other defense mental illness expert, Dr. Alizai-Cowan.

After the defense experts testified as to the defendant's mental status on the day of the shooting, the State, on June 14, 2007, presented the testimony of its psychiatric expert witness, Dr. Mechanik. In his direct examination nothing was raised about the lack of any family mental illness as a reason to undermine the defense's position.

Then, on cross-examination, Dr. Mechanik was asked by the defense, "Do you know if there is any increased risk of mental illness because there is evidence of mental illness in other family members?" He answered that, to some degree, a family history can increase risk for another family member to develop the same or similar mental illness.

After all of the experts had testified, nothing was raised about any mental illness history as to the defendant's family. In a *de facto* motion *in limine*, the State raised its concerns that the defense was going to attempt to inject family mental illness into the case by recalling their experts to opine about Ms. Smack.

The State's objections were that (i) the "history" was a discovery violation and that the "history" was not provided until trial had begun; (ii) by not raising the issue until after the State's doctor had testified, the defense was trying to box the State out of having its doctor being able to

rebut any defense testimony, and finally, (iii) Ms. Smack's mental illness issues were related to her own consumption of cocaine and other drugs.

The Court ruled that the defense would not be permitted to present testimony following the State's expert and raise the new matter of Ms. Smack's history. The timing of presenting this evidence did put the State at a disadvantage, but more importantly, it was a Delaware Rules of Evidence ("DRE") 403 issue. Whether Ms. Smack's mental illness history was drug-induced or not was going to require a trial within a trial. There would have been a "*deja vu* all over again" about mental illness and drugs as to Ms. Smack.

The defense, having whatever they had in regard to Ms. Smack, made the decision not to bring it up in the testimony of their defense doctors.

It was up to trial counsel to consider how problematic Ms. Smack's history might be. Also, the defense had to consider the prejudicial impact if the jury heard her mental illness history was influenced by her drug use.

The Court has nothing before it in this postconviction proceeding that suggests the decision of trial counsel was objectively wrong.

The ruling on this issue came more as a postscript to the State's concern that the defense would attempt to raise the issue in an untimely manner.

Whether Ms. Smack's mental illness would be presented to the jury was an appealable ruling by the trial court. On appeal, this issue was not raised. In the present motion, there is no attempt to comply with the procedural bar contained in Rule 61(i)(3). Therefore, it is procedurally barred. Alternatively, it is denied on the merits.

Based on the merits in the above history, I do not find trial counsel to have been ineffective. Having seen first-hand their zealous representation, I do not find they failed to learn of the defendant's aunt in a timely fashion. When they heard of her, they attempted to obtain her records. The problem was the potential difficulty in dealing with Ms. Smack's history, including her alleged drug usage. The defense would not have been able only to argue that, because Ms. Smack was mentally ill, Mr. Norman's risks for mental illness increased; instead, the experts would have had to opine on the nature and cause of her mental illness. Therefore, defense counsel had to have known this was problematic, especially since any attempt to get into this area would have led to evidence of Ms. Smack's lengthy relationship with the criminal justice system. I expect this is why it was not raised earlier in the trial. With what they had when they had it, I cannot find trial counsel was deficient.

First, nothing has been offered to establish the trial ruling was incorrect. In hindsight, with the benefit of more information provided in the present filings of the parties, the Court remains of the opinion that a trial within a trial, as well as the concern for the potential of confusion, were legitimate reasons for the Court's ruling.

Finally, no *Strickland* prejudice has been established. There is nothing concrete in the present motion other than speculation and unsubstantiated conclusions that Ms. Smack's records, whatever they may be, would have helped the defendant or changed the outcome of the trial. This claim is denied.

Counsel's Ground Three

The defense argues that Mr. Norman's trial attorneys were ineffective by not calling as a witness a forensic toxicologist who "would have been better suited to deny the State's claim that this

psychosis was not drug-induced.”

Trial defense counsel report that they in fact retained and conferred with a forensic toxicologist, Dr. Lappas of George Washington University. They determined it was unwise to call him as a witness because his opinions would pose a significant risk as to the effects of chronic MDMA abuse. In other words, his cross-examination might have provided significant support for the State’s position that any psychosis could be tied to the defendant’s drug usage.

This tactical decision has not been shown to be a mistake. It was done as a part of overall trial strategy. Tactical decisions are not to be “second guessed.” Trial counsel committed no error. Ground three is denied.

Counsel’s Ground Four

In this ground, trial counsel are attacked as being ineffective for not objecting to the opinions of the State’s psychiatrist, Dr. Mechanik. It is now argued that Dr. Mechanik’s opinions were outside his field of expertise.

Mr. Norman’s attorneys, with his agreement, pursued the affirmative defense of insanity. The defense called two doctors who opined that the defendant was psychotic on the day in question and further that the psychosis was not related to the defendant’s use of drugs. The State was entitled to rebut this defense and the State did so by calling Dr. Mechanik, who opined that any mental illness was a delirium caused by Mr. Norman’s long-term consumption of drugs. Thus, the three experts had varying opinions on whether any delirium was drug-induced. There is nothing in the record of the trial or the Rule 61 materials to suggest that the defense experts could testify on this subject but the State’s expert could not. This is a bold and conclusory position.

Trial counsel did attack Dr. Mechanik's opinions through vigorous cross-examination. Trial counsel were not ineffective for failing to object to the psychiatrist's testimony about how drugs may affect mental illness.

Finally, the argument that, had trial counsel made an objection, it would have been sustained is likewise conclusory. To the contrary, any objection would have been overruled. Therefore, the defendant establishes no prejudice. Ground four is denied.

This concludes that portion of the Rule 61 postconviction motion filed by appointed counsel. The Court now will discuss the claims and grounds raised by Mr. Norman.

Mr. Norman's Ground One

In this ground, the defendant makes a series of conclusory complaints that his trial attorneys did not object enough or request a mistrial. He complains that trial counsel:

- (a) failed to file motions and object to the prosecution presenting prejudicial, inaccurate, and unsubstantiated evidence that assisted the State in rebutting the affirmative defense asserted by the defendant (insanity);
- (b) failed to object to the use of the word "warrant";
- (c) failed to object to the introduction of a .45 caliber handgun, .38 caliber handgun, cocaine, marijuana, and two boxes of ammunition because they were not listed in the defendant's charging documents nor proven they were in the defendant's belongings;
- (d) failed to "aggressively object" to evidence that undermined the defendant's case;
- (e) failed to object to references of the defendant being a drug dealer;

- (f) failed to meaningfully put the State's rebuttal case to adversarial testing (i.e., mental illness issues) in view of the fact that it was conceded that the defendant committed the acts charged.

In the trial counsel's Rule 61(g) response, they note that insanity was basically the only viable defense. The defendant agreed. Therefore, trial counsel and the defendant agreed that there was little, if anything, to be gained in contesting the evidence seized in regard to the charges brought against the defendant. Having had the benefit of hearing all of the evidence, I find this was a reasonable trial strategy. The defendant has offered nothing to show that any objection to the items seized during the investigation being moved into evidence would have been successful.

Trial counsel also reports that in order to pursue the insanity defense, their doctors were going to have to be able to provide a full picture of the defendant's life. This included the defendant's involvement in using drugs, selling drugs, and being involved in a criminal lifestyle. The defense's evidence painted a picture that the problems and pressures of Mr. Norman's chosen lifestyle were contributing factors as to the defense expert opinions that the defendant was suffering from a psychosis not otherwise specified ("NOS").

Defense counsel notes they were careful to use the least damaging witnesses as to the defendant's lifestyle and did not call certain witnesses based on their more graphic descriptions of drug usage.

In summary, defense counsel knew they had to expose and address the defendant's criminal lifestyle, including drug usage. Their approach was to deal with it at a necessary, but minimal, level. This strategy was reasonable and appropriate. The Rule 61 submissions offer nothing to show that there was any lost opportunity to cherry-pick better the evidence supporting an insanity defense.

Therefore, this ground is denied because it is conclusory. It is denied, also, because the conclusions do not establish his attorneys were ineffective. They had to present the defendant's life in pursuit of the insanity defense, warts and all.

Finally, an aside as to the defense strategy of informing the jury of the defendant's past criminal conduct: It was noted that when the defendant shot and killed people he was wearing body armor. The inference was that he was "dressed to kill," a strong indicator of appreciation of the wrongfulness of his intentions. By having the full background of the defendant's violent drug-dealing lifestyle, the jury became aware that he did not choose to wear the armor just for the day in question, but wore it every day because his lifestyle had resulted in him being shot and hospitalized. Therefore, the jury heard that on the day of the killings he wore body armor because he did so every day, not just for his shooting spree.

Mr. Norman's ground one is denied.

Mr. Norman's Ground Two

In this ground, the defendant faults trial counsel for stipulating to a toxicology report, thereby violating his confrontation rights. Furthermore the defendant alleges that, by stipulating to the toxicology report, his attorneys opened the door for the State to argue his drug usage caused his mental illness. Finally, he argues that his attorneys were ineffective for failing to provide a toxicologist.

In their Rule 61(g) response, trial counsel again revisited the fact that the defendant's drug usage was inescapable if they were going to pursue an insanity defense. Both defense doctors opined that the defendant was legally insane on the day of the shootings but that his psychosis was not drug-induced.

The drug usage was in play as the defense team was fully aware that the State's psychiatrist was of the opinion that the defendant's drug history caused any mental illness or delirium. When given the opportunity to cross-examine Dr. Mechanik, the defense vigorously attacked his opinions.

It is again clear that in the defendant's argument, he thinks his attorneys could cherry pick what the evidence should be. His personal opinions are conclusory and without basis.

Finally, the defense team acknowledges they stipulated to the State's toxicology report. There is nothing to suggest that, had there been no stipulation, the State could not have called the witness. Nor is the stipulated toxicology report as damning as the defendant now alleges. It showed the presence of drugs, not that the defendant was intoxicated or under the influence. This evidence inevitably would have gotten before the jury when any one of the psychiatrists testified.

The trial defense team notes that, had they called their own toxicologist, there would have been significant risks he could have undermined their non-drug related insanity defense; i.e., that the long-term usage of the defendant's drugs of choice can induce mental illness.

The stipulation as to the toxicology report did not sabotage the defense doctors' positions. The defense doctors explained why Mr. Norman's mental state was not a drug-related psychosis. By entering into the stipulation, the defense kept this drug testimony limited to the contents of the stipulation as opposed to the testimony of a live witness, who might have ventured into the same area of concern that was the reason the defense did not call their own toxicologist (to wit, that long-term drug usage could induce mental illness).

Trial counsel notes that to attempt to ignore the drug usage problem instead of addressing it head-on would have weakened the insanity defense. The defendant's present Rule 61 position that

he could have proven he did not voluntarily consume cocaine would have undermined the opinions of his own experts who diagnosed him with cocaine abuse.

The defendant has not established that his attorneys were wrong in their decision as to how to deal with the issue of the defendant's drug history and usage. Even with the hindsight of Monday morning quarterbacking, the defendant has not established their strategy was objectively erroneous under the guidelines of *Strickland* and *Swan*. Faced with the fact that drug usage had to come into the case in order to present the chosen defense, the defendant's trial counsel attempted to (i) minimize the damage by way of stipulation, and (ii) vigorously attack the State's expert doctor on cross-examination. A failed effort does not mean it was not a good effort. Mr. Norman's ground two is denied.

Mr. Norman's Ground Three

This ground is the same as counsel's ground two, which is discussed above. The defendant makes some additional allegations.

The defendant alleges his attorneys and their staff were ineffective for failing to provide the jury evidence about his paternal aunt. He also alleges they should have found out about a maternal cousin whom he claims had a history or diagnosis of mental illness. In addition, the defendant faults his attorneys for not calling family members to testify about the mental illness of family members.

This ground is denied for the same reasons as Mr. Abram's ground two was denied.

The defendant has not established that there is any relevant connection between the diagnosis by his doctors and any mental illness of an aunt and a cousin. These allegations are based on his assumptions and are therefore conclusory.

Finally, it would be beyond the scope of a lay witness (i.e., a family member) to testify about other family members' mental illness, and then somehow tie it back to the mental state of the defendant on the day in question. Mr. Norman's ground three is denied.

Mr. Norman's Ground Four

In this ground, the defendant faults his attorneys as to their performance during the jury selection process.

First, he complains that his attorneys were ineffective when they declined additional *voir dire* of Juror #2 as to a potential arrest not discussed in the initial *voir dire*. During the initial *voir dire* the juror admitted to a driving under the influence conviction. Then, when he left the courtroom to allow for a discussion on cause and/or peremptory strikes, the State reported other information involving an arrest but no conviction. The juror was brought back and this was reviewed. The juror was not challenged and became juror #2.

The State later learned that there was a potential of an additional charge in the State Bureau of Identification ("SBI") records as to the arrest discussed above. The State and the defense had the Police Report and it appeared the Police Report contradicted the SBI record. All of this new information was made available to the defense. It was discussed. Both the State and the defense chose not to *voir dire* juror #2 again. Being aware of this new information, I asked, "What you are telling me is, with your eyes wide open, both of you are accepting the juror?" The defense responded, "The defense does."

In their Rule 61(g) response, the trial team reports that they wanted Juror #2 and thought he was a favorable juror. They were aware of the new information but did not want the Court to bring him back for fear of losing him.

This was a strategic decision on the part of the defense team. They considered the information and made their decision. They cannot be faulted as to this decision. There is nothing in the present allegation to establish that their decision was wrong or to establish prejudice.

The second *voir dire* complaint involves Juror #8. The transcript evidences that the Court missed Question #22(c) during the *voir dire*. That question is: “If you learn that the alleged crimes were committed in the presence of school children, would this affect your ability to be a fair and impartial juror?” The Court missed the question and no one noticed the mistake. Neither the State nor the defense noticed the Court’s omission.

The defendant faults his attorneys for failing to catch the mistake by the Court. The defense trial team acknowledges they did not catch the Court’s omission. They deny this was evidence of ineffectiveness of counsel in light of the extensive *voir dire* of each juror. There were 39 questions, some with sub-parts and then additional questioning done as follow-up, depending on the answer. The trial defense team reports that with the entire package of questioning, the Court and counsel were in a position to judge the suitability of the juror for jury service in this case. After reviewing the transcript of the *voir dire* of Juror #8 (E-94 to 109), I agree with counsel. Much information was covered with the prospective jurors and the omission of this question does not mean error was injected into the jury selection process. Nor has the defendant established any prejudice from the Court’s omission and counsel’s failure to catch it. The defendant is entitled to a fair trial, not a perfect trial.

Finally, the defendant faults his attorneys for not requesting that the entire jury panel be questioned on a matter raised by a juror who was excused. That juror had concerns about being able to care for his pit bull dogs if he was a juror. Questions evolved to the juror’s knowledge about dog

fighting, which then evolved to the Court asking the juror whether it would affect his ability to be fair and impartial if the defendant shot at a pit bull dog. He reported that it would and he was excused. The defendant now alleges his attorneys were ineffective for not requesting that all the jurors be similarly questioned.

In their Rule 61(g) affidavit, the defense team reports that the jury *voir dire* was comprehensive and appropriate to determine the suitability of jurors for the trial. Defense counsel stated that the fact that a single juror *sua sponte* alerted the Court to his personal concern should not trigger an obligation for defense counsel to then ask every other juror the same line of questions. I agree. The jury *voir dire* process is fluid and depending on answers, *sua sponte* remarks, or concerns of jurors, the Court may go down an unexpected path to address a particular issue. To now argue that the Court has to revisit with the entire panel the *sua sponte* remarks of each individual juror is unreasonable. Counsel were not ineffective and no prejudice has been shown.

Mr. Norman's ground four is denied.

Mr. Norman's Ground Five

The defendant claims his trial counsel were ineffective for not seeking the lesser-included offenses of murder in the second degree and manslaughter arising from extreme emotional stress. The defendant claims his childhood sexual abuse would have been a basis for his claim he suffered from extreme emotional stress.

The defendant also complains his attorneys declined the offer by the Court to provide a lesser-included offense of theft misdemeanor as to the theft felony offenses. The issue was the value of the vehicle stolen.

Trial counsel report that the defense's expert witnesses' opinions as to his mental condition supported a "not guilty by reason of insanity" defense. Defense counsel made the strategic decision not to pursue the lessers because the evidence did not support a claim for lessers. The defense was mental illness per their doctors, not that the defendant shot all of the victims recklessly. The defendant has not shown that his attorneys' decisions were wrong. He has not presented any evidence that shooting people was related to his sexual abuse when he was a child. This is a conclusory claim.

Counsel were not ineffective for making the strategical decision based on the evidence they had and not on the evidence they did not have.

Finally, trial counsel candidly admit that whether the Ford Focus was worth over or under the felony/misdemeanor line was inconsequential to the issues and obstacles faced by the defense team. I do not find that they committed error for not requesting a lesser-included offense of theft misdemeanor, nor has the defendant established any prejudice.

The defendant's ground five is denied.

Mr. Norman's Ground Six

In ground six, the defendant makes a cluster attack as to his appellate counsels' performance on direct appeal. Ground six has four sub-parts.

The defendant faults his appellate attorneys for not arguing the trial court committed plain error when prior uncharged conduct was admitted. This claim piggybacks off of the claim in the defendant's ground one. The short answer to this allegation is that this evidence was relevant and necessary for the defense in the development of the only viable defense available, i.e., insanity. The defendant's prior conduct as well as other events in his life were critical in the defendant's doctors'

opinions. It was necessary for the experts to provide to the jury the defendant's life's journey in order to lay the foundation for their insanity opinions. A "snapshot" limited to just the events of April 7, 2005, was not possible. This claim is considered frivolous and it is denied.

In his second complaint against appellate counsel, he claims that his attorneys should have raised the Court's violation of the "defendant's compulsory due process." The defendant references defendant's ground three, which piggybacks counsel's ground two. To the extent Mr. Norman attacks appellate counsel for not raising the Court's ruling concerning the mental illness of his relatives as an appeal issue, I find no error by appellate counsel not raising it. A review of the trial court's ruling by the Supreme Court would have been on an abuse-of-discretion standard. Issues creating a trial within a trial are not favored. Decisions on what to appeal and what not to appeal must take into consideration what issues are the strongest and most important. Collateral or weak issues can be perceived by counsel to dilute the stronger issues.⁹ Finally, there is no prejudice as has been explained above in this decision's ruling on counsel's ground two and the defendant's ground three.

Next, the defendant claims appellate counsel should have attacked the trial court for not *sua sponte* intervening in order to make sure a fair and impartial jury was obtained. This relates back to defendant's ground four concerning the *voir dire* of prospective jurors. Since I have determined in defendant's ground four that trial counsel were not ineffective and that the defendant has not established any prejudice as to his *voir dire* complaints, no further discussion is necessary.

Finally, the defendant alleges appellate counsel should have attacked the trial court's failure to instruct *sua sponte* the jury on the lesser-included offenses of murder in the second degree and

⁹*Scott v. State*, 7 A. 3d 471 (Del. 2010).

manslaughter. (See Mr. Norman’s ground five).

To the extent this issue has not been resolved clearly in the ruling on Mr. Norman’s ground five, it is clear that the Court should not give, *sua sponte*, lesser-included offenses.¹⁰

All of the claims in Mr. Norman’s ground six are denied.

Mr. Norman’s Ground Seven

The defendant attacks appellate counsel for not attacking the trial court’s rulings that Keisha DeShields’ out-of-court statement was voluntary.

Appellate counsel reports that the determination by the Court that a statement is voluntary is a fact-intensive inquiry, thus very difficult to successfully appeal. Appellate counsel has considerable discretion to appeal potentially winnable issues and is not required to appeal every possible issue.¹¹ Appellate counsel notes that Mr. Norman’s argument in ground seven is conclusory and that the jury had the opportunity to hear Ms. DeShields’ in-court testimony explaining her out-of-court statement.

Appellate counsel does note that, since Mr. Norman’s appeal, the Delaware Supreme Court has held that a statement by a witness is presumptively involuntary when the witness is handcuffed and/or told he was being arrested.¹² The evidence in the present case does not give rise to the compulsion discussed in *Taylor*. The Court has reviewed the transcripts in Volumes M and O concerning the issue. Although the defendant’s girlfriend testified she was threatened with arrest if she did not talk with the police, the State disputed that allegation. The Court considered the

¹⁰*State v. Brower*, 971 A.2d 102 (Del. 2009).

¹¹*Scott v. State*, Supra.

¹²*Taylor v. State*, 23 A.3d 851 (Del. 2010) (“Taylor”).

testimony of all the witnesses and the Court heard the tape recording of her statement. The Court heard both sides of the coin on this factual issue. It was apparent that Ms. DeShields would fall into the turncoat witness category. Voluntariness was the primary obstacle raised by the defense. I remain of the opinion that the voluntariness ruling by the Court was correct, even with the guidance of *Taylor*.

The jury heard much from this witness, including her report that what she told the police was untrue.

In the present attack by the defendant, he complains that there should have been an appeal of the voluntariness decision, but in light of her in-court testimony he offers no argument as to how the evidence admitted under 11 *Del.C.* § 3507 evidence prejudiced him.

Therefore, I am satisfied that the decision not to appeal this issue was within the reasonable and professional discretion of appellate counsel. I also am satisfied that had appellate counsel raised the voluntariness issue on appeal, the trial court's ruling would have been affirmed; hence no prejudice has been established. Mr. Norman's ground seven is denied.

Mr. Norman's Ground Eight

The defendant attacks appellate counsel for not raising on appeal the trial court's decision preventing the jury from learning that the Maryland prosecutors had dropped the Maryland charges. He then attempts to tie in the dropping of the Maryland charges to establish bias and prejudice on the part of the State's psychiatrist who gave his opinion to the Maryland prosecutor under applicable Maryland law and to the Delaware prosecutor under applicable Delaware law.

As appellate counsel noted in their Rule 61(g) affidavit, the *nolle prosequi* in Maryland was irrelevant to the guilt phase in Delaware. Dr. Mechanik did not change his opinion as to his findings

between his opinion as to what occurred in Maryland and his opinion as to what occurred in Delaware. He just applied the different states' laws to the same factual findings he made. The bottom line was he opined that any delirium the defendant suffered was due to his marijuana and ecstasy consumption.

The Court's ruling was not erroneous and therefore there was nothing to appeal.

Next, the defendant contests the Court's allowance into evidence of the prior Maryland offenses involving the incident where he was shot (i.e., he was a victim) but also arrested for having a firearm in his possession. Again, this allegation makes no sense, as it was part of the background information upon which the defendant's experts relied in reaching their opinion that the defendant was legally insane on the day he shot and killed people. This incident, and the failure of the defendant to attend court in Maryland on this firearm charge, were part of the mix that his doctors testified created the critical mass of his psychosis on April 7, 2005. This argument is frivolous.

Finally, in ground eight the defendant attacks the trial court for allowing the jury to hear the defendant's statements made to the Maryland authorities post-arrest and the recording of what was going on in the holding cell. Once again, the appellate counsels' comments in their Rule 61(g) affidavit are correct. This was a part of the evidence the defense wanted and needed the jury to hear as to their strategy that the defendant's state of mind on April 7, 2005, supported the insanity defense. This also is a frivolous argument.

Mr. Norman's ground eight is denied.

Mr. Norman's Ground Nine

In ground nine, the defendant repeats the grounds raised in counsel's ground four and Mr. Norman's ground two. The Court has ruled that Dr. Mechanik could opine as to the defendant's

mental state and whether or not the ingestion of drugs caused any delirium. Likewise, it was admissible for the defense psychiatrists to opine that their findings of a psychosis that was unrelated to drugs. A forensic toxicologist was not required for these doctors to give an opinion as to whether or not drugs did or did not cause any mental illness.

Finally, the Court has noted that the defense chose not to call their expert toxicologist, recognizing the significant downside risk as to their insanity defense if the toxicologist was asked about the use of ecstasy or chronic MDMA abuse. Appellate counsel committed no error as to the allegations contained in ground nine. Mr. Norman's ground nine is denied.

Mr. Norman's Ground Ten

In ground ten, the defendant repeats counsel's ground one concerning whether the State had to rebut the defendant's preponderance of the evidence by a "beyond a reasonable doubt" standard. The Court has ruled on this issue already.

The defendant's final complaint is found in Part 2 of ground ten. The defendant alleges his attorney should have appealed the prosecutor's closing argument that the jury should not find the defendant not guilty by reason of insanity because he knew right from wrong.

As defendant's appellant counsel notes, the knowing of right from wrong argument is just another way of saying or arguing that the defendant appreciated the wrongfulness of his conduct. The prosecutor did not err in making the argument that the evidence established that the defendant knew right from wrong in addressing the insanity defense.

Mr. Norman's ground ten is denied.

SUMMARY

For all of the above reasons, the arguments as presented in both Mr. Abram's and Mr. Norman's postconviction motions are rejected. The postconviction motion in its entirety is denied.

IT IS SO ORDERED.