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

STATE OF DELAWARE,	:	
	:	**ID NO. 1002011017**
v.	:	
	:	
JUAN RESTREPO-DUQUE,	:	
	:	
Defendant.	:	

Submitted: December 10, 2012
Decided: February 20, 2013

Upon Defendant's Motion to Prohibit Death Penalty
DENIED

ORDER

Jason C. Cohee, Esq., and Nicole S. Hartman, Esq., Deputy Attorneys General, Department of Justice, Dover, Delaware for the State of Delaware.

Alexander W. Funk, Esq., Curley, Rodriguez & Benton, LLC, Dover, Delaware, and James M. Stiller, Jr., Esq., Schwartz & Schwartz, Dover, Delaware for Defendant.

Young, J.

SUMMARY

Juan Restrepo-Duque ("Defendant" or "Restrepo") is charged with several crimes, including Murder in the First Degree. These criminal charges pertain to the homicide of Kenton Wesley Wolf. The State is seeking the death penalty. Restrepo was born in Colombia. He lived there until he was twelve, at which time he came to the United States with his family. Defendant has filed a Motion to Prohibit the Death Penalty. This Motion is based on the Defense Team's inability to travel to Colombia as part of the mitigation investigation. Defendant contends that allowing the State to proceed with a capital case against him, though he cannot present evidence from Colombia, is a violation of his constitutional rights. Defendant's inability to present his mitigation evidence in the manner he would like does not rise to the level of a due process violation. In addition, the Defendant has many other available witnesses and information from his time living in the United States, that can be used to develop a significant mitigation case. For those reasons, Defendant's Motion to Prohibit the Death Penalty is **DENIED**.

FACTS

Juan Restrepo-Duque is charged with Murder in the First Degree, Possession of a Deadly Weapon During the Commission of a Felony, Theft of a Motor Vehicle, Forgery in the Second Degree, and Carrying a Concealed Deadly Weapon. These charges all stem from the death of Kenton Wesley Wolf, occurring on or about February 14, 2010. The State is seeking the death penalty. At the time of the alleged crime, the Defendant was 18 years old.

The Defendant was born in Medellin, Columbia on March 6, 1991. He and

his family came to the United States in May 2003 under a grant of political asylum. They became permanent residents in May 2007. Restrepo attended some middle school in Delaware. He also graduated from high school in New Castle County.

Attorneys for the Defendant have filed this Motion to Prohibit the Death Penalty based on their inability to conduct a thorough and complete mitigation investigation. The Defense Team contends that a constitutionally adequate investigation would require meaningful contact with people involved in and familiar with Defendant's first 12 years of life in Medellin, Columbia, an extraordinarily dangerous area, to collect evidence. Since the evidence presented has established that those contacts cannot be made, Defendant asks this Court to prohibit the State from seeking the death penalty.

DISCUSSION

The Defense Team claims that it is unable to obtain potential mitigation evidence due to the security situation in Medellin, Colombia, where the Defendant resided until age twelve. Defendant contends that this inability to present mitigation evidence, in a capital case, constitutes a violation of his rights under the 8th and 14th Amendments to the United States Constitution. The proposed remedy for the alleged violation would be preclusion of the death penalty.

The State's Response advances several arguments in opposition to both the merits of the Motion and the suggested remedy. First, the State argues that, once a proof positive determination has been made, there exists no process by which the Superior Court can convert a capital case into a non-capital case. This assertion is

based upon the Attorney General's prosecutorial discretion. It is the State's position that this Court does not have the authority to make a pretrial decision to preclude the death penalty, even if the presentation of mitigation evidence were an issue.

The State also contends that this Motion has not been filed at the proper time, alleging that such an issue is not ripe for consideration as the guilt phase has not been completed or, for that matter, even begun.

Finally, the State argues that the fact the Defense team is unable to gather additional evidence from Columbia, by sending a mitigation specialist to the area or any other reasonable means, should not serve as a compelling basis for a finding that the State cannot prosecute the Defendant for capital murder. The State believes that the Defense has already demonstrated a great deal of knowledge regarding the Defendant's early life in Colombia. His parents and siblings, potential sources of his history, are available and have allegedly provided significant information with regard to the Defendant's background. During the oral argument on this matter, the State also suggested that the Defense Team attempt to gain mitigation evidence from Columbia using alternative means, such as a local investigator or telephone/internet contact.

Delaware utilizes a bifurcated trial process for capital cases.[1] The purpose of such a process is to provide the constitutional protections required for Capital

[1] 11 *Del. C*. §4209.

defendants.[2] Delaware's Death Penalty Statute is modeled after Georgia's law, which had been upheld by the United States Supreme Court in the 1975 case of *Gregg v. Georgia*.[3] Statutes such as this one were developed in response to the United States Supreme Court's holding in *Furman v. Georgia* and *Woodson v. North Carolina*.[4] The Court held that the uniqueness of the death penalty dictated "that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner."[5] A few years later, in 1976, the United States Supreme Court held that the mandatory death statutes used in North Carolina and Louisiana violated *Furman*, in that they failed to replace "arbitrary and wanton jury discretion with objective standards to guide...and make rationally reviewable" the process of sentencing.[6] The bifurcated process, such as the one used in Delaware is designed to address these concerns.[7] In fact, the *Gregg* holding states: that "a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in

---

[2] Joseph M. Bernstein, *Keeping The Death Penalty Alive*, 21 WTR Del. Law. 9 (Winter 2003-2004).

[3] *Id.*

[4] *Furman v. Georgia*, 408 U.S. 238 (1972); *Woodson v. North Carolina*, 428 U.S.280 (1976).

[5] *Gregg v. Georgia*, 428 U.S. 153, 188 (1976)(discussing the holding in *Furman*)).

[6] *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).

[7] *See, State v. White*, 395 A.2d 1082, 1084-85 (Del.1978) (discussing responsive legislative action taken post-*Furman*)); *State v. Spence*, 367 A.2d 983, 986-87 (Del. 1976).

Furman" than a unitary proceeding .[8]

Restrepo argues that the constitutional rights this system is designed to protect will be violated if he is unable to present potential mitigation evidence for consideration in the penalty phase, due to its location in the Medellin area of Colombia. As far as the Court and the parties could find, there is no Delaware case law directly on point. Therefore, the Court will look elsewhere for guidance on the issue. Even in looking outside Delaware, this is a subject that has been given little coverage. However, the Court has found several cases regarding the impact of a capital defendant's inability to present mitigation evidence due to some extra-judicial factor.

In *State v. Azania*, a criminal defendant, whose two death sentences for felony murder were vacated on separate petitions for post-conviction relief, appealed the subsequent death sentence based on the thirteen year delay in the penalty phase of his trial.[9] One of Defendant's arguments was that he was unable to present some of the mitigation evidence that had been present when he was initially tried.[10] He alleged that several of his key witnesses, including his mother and aunt, had passed away or otherwise become unavailable in the thirteen years that had passed.[11] The Indiana Supreme Court held that any prejudice resulting

---

[8] *Gregg,* 428 U.S. at 191-92l.

[9] *State v. Azania*, 865 N.E. 2d 994 (Sup. Ct. Ind. 2007).

[10] *Azania,* 865 N.E.2d at 1006-07.

[11] *Id.*

from the unavailability of defendant's mitigation witnesses does not rise "to the level of depriving Azania of his due process rights.[12] This decision was based on defendant's own appellate actions causing the prolonged delay, his ability to muster other mitigation witnesses and to present evidence of remorse, and the prejudice the delay had also caused for the State.[13]

State ex rel. Watkins v. Creuzot, provides several relevant points for consideration.[14] In this case, a capital murder defendant filed a motion to preclude the State from seeking the death penalty on retrial.[15] The Motion was partially based on defendant's claims that his inability to present some possibly mitigating evidence that is no longer available violates the Sixth and Eighth Amendments, and the federal constitution.[16] Relying on *Azania*, the court held that the capital murder defendant's inability to present his mitigation case on retrial, in the precise form he desired, as a result of the unavailability of some mitigating evidence due to the 30-year delay, did not violate his rights under the Eight Amendment, Sixth Amendment or Due Process Clause.[17] Thus, the unavailability of the mitigating

---

[12] *Id.* at 1009.

[13] *Id.* at 1008-09.

[14] *State ex rel. Watkins v. Creuzot*, 352 S.W.3d 493 (Crim. App. Tex. 2011).

[15] *Creuzot*, 352 S.W.3d at 494-95.

[16] *Id.* at 502.

[17] *Id.* at 504-07.

evidence did not preclude the State from seeking the death penalty in the retrial.[18] The court also held that this was not the appropriate time to decide such a motion, stating that "the adequacy and efficacy of Reed's mitigation case cannot be judged unless he has actually been convicted of capital murder and sentenced to death."[19] Any pretrial determination of that mitigation case is necessarily hypothetical, the Court held, and unlikely to reflect reality as it plays out in an actual trial."[20]

In *Hodge v. Commonwealth*, the Supreme Court of Kentucky upheld the trial court's decision to overrule a continuance that would have potentially allowed the defendant's mitigation specialist to attend the penalty phase of trial.[21] The defendant, Hodge, was convicted of capital murder and appealed.[22] The Supreme Court of Kentucky reversed and remanded for a new trial.[23] After retrial, the defendant was again convicted of capital murder.[24] He appealed this conviction to the state supreme court.[25] The Defendant's second appeal was based partially on

---

[18] *Id.* at 506

[19] *Id.* at 505.

[20] *State ex rel. Watkins v. Creuzot*, 352 S.W.3d 493, 505 (Crim. App. Tex. 2011).

[21] *Hodge v. Commonwealth*, 17 S.W.3d 824 (Sup. Ct. Ky. 2000).

[22] *Hodge*, 17 S.W.3d at 834.

[23] *Id.*

[24] *Id*. at 835.

[25] *Id.* at 834-35.

the inability of his mitigation specialist to attend and testify.[26] The mitigation specialist was unable to attend the penalty phase, as scheduled, because she had recently given birth.[27] As a result, Defendant filed a motion for continuance to enable his mitigation specialist to attend the trial and to be available to testify.[28]

According to Defendant's renewed motion, the mitigation specialist would testify that Hodge was raised in a physically abusive environment, adversely affecting the development of his "bonds of attachment."[29] She would also testify that frequently changing schools adversely affected his ability to develop "bonds of commitment."[30] Finally, the mitigation specialist would testify that the various inconsistencies in his life had adversely affected the defendant's ability to have conventional norms and values. When looked at all together, these facts led her to conclude that it was unlikely that he had intentionally committed the murders in question.[31] The trial judge denied the motions, stating that the mitigation specialist was not an essential witness, nor qualified to render an expert opinion.[32] In terms of being essential, it appears the trial judge's decision was based upon the

---

[26] *Id.* at 850-51.

[27] *Hodge v. Commonwealth*, 17 S.W.3d 824, 851 (Sup. Ct. Ky. 2000).

[28] *Hodge*, 17 S.W.3d at 851.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Hodge v. Commonwealth*, 17 S.W.3d 824, 851 (Sup. Ct. Ky. 2000).

availability of other witnesses who could testify about Hodge's childhood experiences as well as the defendant's ability to introduce the evidence that the mitigation specialist had gathered on his behalf.[33]

The next relevant case law comes from the Northern District of California.[34] In this case, a capital defendant filed a Motion to compel immunity or to preclude the death penalty. Joseph Ortiz, the defendant, was charged with twenty-five counts ranging from racketeering to murder.[35] At the time of his motion, the government had not yet decided whether to seek the death penalty.[36] The United States Attorney's Office had an internal procedure used to determine whether to seek the death penalty for death-eligible defendants.[37] The procedure provided defense counsel the opportunity to present mitigating evidence to the government before a decision was made.[38] The defendant argued that he was unable to gather and present mitigation evidence to present to the government, because five members of his family, including both his mother and father, are co-defendants in his case.[39] Each of these family members has the Fifth Amendment right to remain

---

[33] *Hodge*, 17 S.W.3d at 851.

[34] *U.S. v. Ortiz*, 2012 WL 4364697 (N.D. Cal. 2012).

[35] *Ortiz,* 2012 WL 4364697, at *1.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *U. S. v. Ortiz*, 2012 WL 4364697, at *1 (N.D. Cal. 2012).

silent. It had become clear that none of them was willing to serve as a potential witness, even for the penalty authorization process.[40] Therefore, the defendant requested the court to compel the government either to give immunity to his family members or else to preclude the government's seeking the death penalty against him.[41]

The court believed that this type of request presented a conflict between separation of powers and due process concerns.[42] The court determined that the government had broad discretion to make both charging and penalty decisions. Specifically, the court cited the Supreme Court's holding that the importance of prosecutorial discretion demands "exceptionally clear proof before we would infer that the discretion has been abused."[43] The court noted the absence of any evidence that the government acted improperly. Indeed, the defendant did not even allege any due process concern that would overcome the proscription against the court's interfering with internal government enforcement processes.[44]

Finally, in *Valle v. State*, the Criminal Court of Appeals of Texas was faced

---

[40] *Ortiz*, 2012 WL 4364697, at *1.

[41] *Id.*

[42] *Id.*

[43] *U.S. v. Ortiz*, 2012 WL 4364697, at *3 (N.D.Cal. 2012) (quoting *McCleskey v. Kemp,* 481 U.S. 279, 297 (1987)).

[44] *Ortiz*, 2012 WL 4364697, at *3.

with a situation factually similar to the one at hand.[45] The defendant, Valle ,was convicted of capital murder and sentenced to death.[46] He appealed citing several alleged issues with both his trial and the Texas death penalty scheme in general.[47] One of defendant's claims was that the trial court erred in failing to preclude the State from seeking the death penalty as a violation of his constitutional rights, based on his inability to obtain and present known mitigation evidence.[48] This inability was caused by the travel restrictions to Cuba and the lack of subpoena power over Cuban citizens and authorities.[49] The defendant claimed that his mother, who resided in Cuba could have testified about his childhood, which could have been cardinal to the mitigation phase.[50] The Court of Criminal Appeals affirmed the decision of the trial court, holding that the defendant's constitutional rights were not violated by his inability to obtain and present mitigation evidence, even that from his mother, who lived in Cuba.[51]

This case law supports the position that, while a capital defendant is entitled to present his mitigation evidence, he is not entitled to do so in precisely the way

---

[45] *Valle v. State*, 109 S.W.3d 500 (Crim. App. Tex. 2003).

[46] *Valle*, 109 S.W.3d at 502.

[47] *Id.* at 502-03

[48] *Id.* at 507.

[49] *Id.*

[50] *Id.*

[51] *Valle v. State*, 109 S.W.3d 500, 507 (Crim. App. Tex. 2003).

he would prefer.[52] Courts have found that the availability of other witnesses, or ability to muster other significant mitigation evidence is enough to meet the applicable constitutional standards.[53] These cases demonstrate that courts have been unwilling to find the unavailability of mitigation evidence to be a sufficiently significant due process violation to require judicial interference. Though these cases provide only instructive guidance, this Court finds their reasoning persuasive.

While sympathetic to the difficulties facing the Defendant, the Court agrees with the State on several points. First, it is likely that there are other measures the Defense Team could take, if the potential evidence in Colombia is desired. It is certainly problematic that the mitigation expert cannot travel to the area personally to interview potential witnesses. However, telephone discussions or other

---

[52] *See, State ex rel. Watkins v. Creuzot*, 352 S.W.3d 493, 503 (Crim. App. Tex. 2011).

[53] *See, e.g., State v. Azania*, 865 N.E. 994, 1009 (Sup. Ct. Ind. 2007).
In *Azania,* the Supreme Court of Indiana stated:

> At a new penalty phase trial, we are confident, Azania will be able to assemble a highly credible presentation of those aspects of his upbringing and community involvement that are entitled to mitigating weight. If he elects to present this evidence, we believe that the jury will make an appropriate allowance for the fact that his mother, aunt, and prior spiritual advisor are no longer living. And, of course, Azania will have the opportunity of presenting evidence of remorse, and the testimony of any current spiritual advisor and others as to his accomplishments and contributions while incarcerated.

Id.; see also State ex rel. Watkins v. Creuzot, 352 S.W.3d 493, 503 (Crim. App. Tex. 2011) (discussing the other significant mitigation evidence offered at defendant's previous trial that can be introduced through use of prior witness testimony)).

electronic methods of communication, particularly to the kinds of establishments discussed in the hearings, would seem to be worth trying. In addition, while this may not be feasible, it may be possible for the Defense Team to find a local investigator who is willing to do some of the interviewing or document recovery on behalf of the Defendant. It should be noted that information obtained by such methods could give rise to hearsay objections at trial. If Defendant demonstrated apparent trust worthiness of the information gathered, it would be this same Court who would be considering the objections.

Second, the Defendant is not a newcomer to the United States. He had lived here for approximately seven years before being arrested in connection with this crime. In those years, he had attended both middle school and high school. Outside of the school environment, he had formed additional connections to the community, examples of which have emerged in his statements to the police. Those connections and his education are all available to the Defense Team for interview and exploration. In addition, the Defendant's family, including parents and siblings, are presently living in the United States. This provides the Defense Team access to a wealth of information, including some of the areas any Colombia investigation might cover. The Defendant's parents can certainly provide information regarding his family history, education, life experiences in Colombia, and other possible mitigation evidence. They may also be able to provide leads that the Defense Team could pursue even in Colombia over the telephone or internet or through other suggested means.

Hence, on the bases raised and argued, Defendant has not demonstrated

deprivation or sufficient limitation of his trial preparation ability to arise to a due process interference on the bases.

There remains an issue which could raise a concern relative to the State's going forward with a death penalty claim. Though Defendant, at the time of this incident, was not under 18 years of age, he was merely 18. Given the philosophy of *Miller v. Alabama*[54] regarding "a child's" being "constitutionally different from adults for purposes of sentencing"; and having diminished culpability, and greater prospects for reform; and being compounded by this Defendant's apparent background; a question might exist as to the propriety of the pursuit of the death penalty. At this juncture, however, that remains as something for a later day, if ever.

CONCLUSION

Therefore, for the foregoing reasons, Defendant's Motion to Prohibit the State's pursuing the Death Penalty against Defendant is **DENIED**.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

RBY/lmc
oc: Prothonotary
cc: Opinion Distribution
File

[54] 132 S.Ct. 2455 (2012); 183 L.Ed.2d 407.