IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE	)
	)
v.	)
	)
BRUCE BANTHER	)
	)
Defendant.	)
ID. No. 9705000270	)

Submitted: September 1, 2011
Decided: June 6, 2012

Stephen R. Welch, Jr., Department of Justice, Dover, Delaware. Attorney for the State.

Bruce Banther, *Pro se*.

Upon Consideration of Defendant's
Motion For Postconviction Relief
Pursuant to Superior Court Criminal Rule 61
DENIED

VAUGHN, President Judge

State v. Bruce Banther
ID. No. 9705000270
June 6, 2012

ORDER

The defendant, Bruce Banther ("Banther"), was found guilty following a jury trial on January 31, 2008, of one count of Murder in the First Degree, 11 *Del. C.* § 531 and one count of Possession of a Firearm During the Commission of a Felony ("PFDCF"), 11 *Del. C.* § 1447A. On February 15, 2008, Banther was sentenced to life imprisonment on the charge of Murder in the First Degree and 20 years at Level V on the charge of PFDCF. Banther had had two prior trials in this same case and was convicted of Murder in the First Degree and PFDCF in both. The convictions in both trials were reversed on appeal, leading to his third trial, the one at issue here, in January, 2008.

Banther, through counsel, appealed his conviction to the Delaware Supreme court. The issues raised on appeal were: 1) that the trial judge's failure to properly focus the jury by giving a preliminary limiting instruction was a violation of the Delaware Supreme Court's mandate from previous proceedings and constituted reversible error; 2) that there was no evidence in the record to support the State's theory that the defendant was the accomplice to a co-defendant, John Schmitz; 3) that the trial judge committed error by permitting Schmitz to testify because that testimony was precluded by the doctrine of judicial estoppel; 4) that the State violated Banther's due process rights "under both the Delaware and United States constitutions: by asserting a new theory of criminal responsibility – i.e. that Banther acted as a principal – at Banther's 2008 retrial"; 5) that the trial judge erred by permitting the State to present alternative theories of Banther's criminal as either a principal or an accomplice; 6) that the trial judge erroneously admitted four hearsay

statements that violated Banther's federal Constitutional right to confront the witnesses against him; and 7) that the State made improper closing arguments to the jury. The Supreme Court, on July 29, 2009, affirmed Banther's conviction and sentence.

FACTS

The following are the facts as set forth by the Delaware Supreme Court on appeal in its 2009 opinion:

> In the early morning hours of February 12, 1997, Harrington Police dispatcher Cheryl Knotts (now Cheryl Knotts-Woods) received a number of telephone calls from a person who identified himself as Dennis Ravers. The caller said that he had agreed to meet with Bruce Banther and another person, whom he referred to as "Charles," at the Harrington Moose Lodge, but that he had gotten lost and was looking for a safe, public place to meet them, as the Moose Lodge was closed. Knotts-Woods persuaded the caller, who was calling from a nearby tavern, to meet with her at the Harrington Police Department to discuss his concerns. Knotts-Woods met briefly with the caller outside the Harrington Police Station. After that meeting, the caller again contacted dispatcher Knotts-Woods and informed her that he had agreed to meet with Banther and "Charles" at the Farmington Fire Hall on Route 13.
>
> Between 6:30 a.m. and 7 a.m. on February 12, 1997, as Tom VanVliet was on his way to work, he drove by a garage owned by Frank Kricker on Mesibov Road and noticed two small fires burning on the ground. VanVliet stopped and began to stomp out the fires. While VanVliet was stomping out the fires, Rick Pinckney, an acquaintance of Kricker's, drove by, observed VanVliet stomping out the fires and asked VanVleit if he needed

help. Pinckney then drove to Kricher's home and told Kricker what he had seen.

Frank Kricker drove to his garage to investigate. When he returned after daylight, Kricker inspected the ground where the fires had been located and found a pair of eyeglasses and a set of car keys nearby. Kricker picked up the keys and eyeglasses and returned to his home, where he contacted the Delaware State Fire Marshall's Office to report what he had seen.

Deputy Fire Marshall William Sipple responded to the scene, where he observed what appeared to be blood in the areas where the fires had burned and what appeared to be body tissue on the tire and wheel of a nearby truck. Sipple reported what he had observed to the Criminal Investigation Unit at Delaware State Police Troop No. 3. Detective David Weaver, an evidence technician, was dispatched to the scene. Upon his arrival, Weaver also observed what appeared to be blood in the burned areas and body tissue on the truck's wheel and tire. Samples collected from the scene were sent to a laboratory for analysis and it was determined that they contained blood and human brain tissue.

Although the evidence collected form the crime scene led police to conclude that a homicidal assault had occurred outside Frank Kricker's garage on or about February 12, 1997, they had no leads regarding the identity of the victim or the perpetrators. At a monthly Kent county investigators meeting, a Harrington Police Detective told the other detectives about the strange phone calls dispatcher Knotts-Woods had received on the morning of February 12, 1997. The homicide detectives arranged a meeting with Knotts-Woods. When they showed her the glasses found at the crime scene Knotts-Woods became visibly upset. She identified the glasses as those worn by the caller she met on

February 12, 1997, who had identified himself as Dennis Ravers.

The detective learned from the Dover Air Force Base Office of Special Investigations that Banther and Ravers had been seen together previously at the base. Thereafter, officers began to follow Banther's acquaintance, John Schmitz, in hopes that he would lead them to Banther. On February 25, 1997, the officer followed Schmitz to the Dover Downs Casino, where he met with Banther. Banther was driving a tan Mazda.

Detectives then followed Banther and Schmitz into Maryland, where Schmitz retrieved his Dodge Dakota pickup truck, which was parked near a small country store. The Delaware detectives continued to follow Banther and Schmitz as they traveled in separate vehicles in the direction of the Chesapeake Bay Bridge. As they approached the Kent Island area, the Delaware detectives requested assistance from the Maryland State Police.

At approximately 6:30 p.m., Deputy Michael Branham of the Queen Annes' County, Maryland, Sheriff's Department heard a radio broadcast that the Delaware State Police needed assistance in the area of route 650 westbound in Stevensville, Maryland. Branham followed the tan Mazda across the Chesapeake Bay Bridge into Anne Arundel County, Maryland, where he stopped the vehicle for a traffic violation. At the scene of the stop, the driver of the tan Mazda produced no identification and told Branham that his name was Jeffrey Ray Eldridge. Branham searched the interior compartment of the vehicle and found a wallet containing Banther's military identification, which enabled him to identify the driver of the tan Mazda as Banther.

Between February 25, 1997, and July 30, 1997, Banther

participated in seven taped interviews with Delaware State Police detectives and one taped interview with a Maryland State Police officer. Redacted tapes of seven of the interviews were played for the juries in all three of Banther's trials. Initially, two weeks after Ravers was killed, Banther told the police that, as far as he knew, Ravers was still alive and had flown to California. Later, during lengthy taped interviews on March 5 and 6, 1997, Banther admitted that Ravers was dead and said that he had been killed by a drug dealer name "Merlin Oswald."

On March 12, 1997, after leading the detectives and North Caroline authorities to Ravers' body near Godwin, North Carolina, Banther told Special Agent Timothy Thayer of the North Carolina State Bureau of Investigation that "he and a gentleman named John Schmitz had met with Mr. Ravers at a location I think in Harrington, Delaware, and an argument ensured, and that Mr. Schmitz had hit Mr. Ravers in the head with an axe." Special Agent Thayer passed this information along to the Delaware detectives, who conducted additional taped interviews with Banther on March 13 and 14, 1997.

During the March 13, 1997, interview, Banther described meeting with Schmitz and Ravers in the early morning of February 12, 1997, near Williamsville, Delaware, and then traveling with both of them to the scene of the murder on Mesibov Road. He said Schmitz and Ravers got into an argument;

> And then Dennis pushed John, and they started fighting. And then, ah, I think Dennis was gonna go to his car and get his gun or something. John went to his truck and took out an axe. And then they started fighting again. John hit him in the head. And, ad, he started bleeding. And, ah, and he hit him again.

He went on to say that when Schmitz went back to his truck to get the axe, Ravers went to his car to get a pistol, which Banther later threw into the Chesapeake Bay. Banther again stated very clearly that it was Schmitz who had assaulted Ravers and killed him with the axe:

> Detective Evans: Okay, Dennis is assaulted by John.
> Banther: Yes, sir.
> Evans: He's hit a couple of times in the head with the axe?
> Banther: No. First he hits him with his fist.
> Evans: Okay. And then he hits him a couple times with this axe you've just ...
> Banther: Dennis is maybe a little taller than John.
> Evans: Uh-huh.
> Banther: John—, Dennis is pretty strong 'cause he works out a lot and stuff. But John's a lot, I mean, John's just fucking huge. Ah, he hits him and then backs, pops him in the head.
> Evans: With the axe?
> Banther: Yes, sir.

During the March 13, 1997, Interview Banther said that Schmitz and Ravers began to argue because Ravers "had been writing letters to John's work . . . and [John's] captain and his supervisor wanted to know who Dennis was." In subsequent interviews, on March 14, 1997, and July 20, 1997, Banther explained further that Ravers was trying "to put . . . pressure on John" and that Schmitz was angry because Ravers had taken a large quantity of blue jeans purchased with $4,000 that had been loaned to Schmitz by his father.

During the March 14, 1997, interview, Banther again

described the physical confrontation at Mesibov Road and said that Ravers had his gun in his pocket when Schmitz killed him, that Ravers had not pointed the pistol at Schmitz, and that Banther did not believe that Ravers had intended to use it to shoot Schmitz. During the interview, Banther also claimed that he had no motive to kill Ravers. He denied participating in the fight himself, stated that he did nothing to stop what had happened, and admitted that he did not flee after he saw Schmitz kill Ravers with the axe. On March 13, 1997, however, he had described, at considerable length, how he and Schmitz worked together to dispose of Ravers' body immediately after the murder. On March 14, 1997, Banther admitted that he subsequently disposed of the axe by placing it in a locker at the Walter Reed Inn in Washington, D.C., where the police later recovered it.

In his appeal, Banther asserts that his third trial, completed in February 2008, consisted of a circumstantial case with no confession and no forensic evidence tying him to the actual homicidal assault. The parties agree that the State's evidence was virtually identical to the record presented in Banther's first two trials with one exception. The State called Banther's co-defendant John Schmitz to testify. Schmitz testified that Banther killed Ravers.

John Schmitz, an active duty member of the United States Air Force, met Bruce Banther in early 1994 at the Dover Air Force Base barracks. After Schmitz moved off base to live with another airman, Michael Hall, in a house on Beebe Road near Farmington, Delaware, Banther would stay at the house from time to time. During his January 28, 2008, testimony at Banther's retrial in the Kent County Superior Court, Schmitz identified an axe as one purchased by Banther in Schmitz's name that had been mailed to the Beebe Road address. Schmitz and

Banther traveled together to Germany on "space available" military flights, an economical way for active and retired military personnel to travel overseas. When Schmitz moved back to the Dover Air Force Base barracks, Banther made copies of both Schmitz's room key and the key to Schmitz's Dodge Dakota truck.

In April 1996, Schmitz received a $4,000 cashier's check from his father to pay to transport Schmitz's property to his new duty assignment in Germany. When Schmitz's Germany orders were rescinded because he was overweight, Banther borrowed the $4000 from Schmitz to invest in "a blue jeans smuggling operation." The plan was for Banther to buy new and used jeans from a used clothing store in the Georgetown area of Washington, D.C., for $10 and $15 per pair and to resell the clothing in Europe for more than $100 a pair. Because the Air Force did not check the bags of military personnel flying "space available", Banther and Schmitz had a way to transport the blue jeans to Germany for resale. At one point, Schmitz had more than 400 pairs of blue jeans in his barracks room and at an off-base storage unit. The blue jeans resale enterprise was not successful. Schmitz testified that he thought Banther had sold no more than six pairs of blue jeans. The bulk of the blue jeans ended up in air base storage lockers in Berlin and Frankfurt, Germany.

In addition to the blue jeans resale venture with Schmitz, Banther had a similar business deal with a retired military man name Dennis Ravers. Although Schmitz had no business dealings with Ravers, Schmitz knew that Banther and Ravers were engaged in a similar plan to transport bike and car parts, as well as blue jeans, on "space available" military flights for resale in Europe. Prior to February 12, 1997, Schmitz had met Ravers on two occasions; initially, when Banther brought Ravers to the

Beebe Road residence, and later, when Ravers came to Schmitz's barracks looking for Banther.

Schmitz knew that Banther and Ravers also traveled to Europe together, but he recalled that Banther complained about Ravers. Schmitz testified that Banther said, "Ravers was sticking his nose into his business too much and that, you know, sometimes he can't shake him." Schmitz stated that sometimes Banther would try to leave Ravers in Washington, D.C., and return alone to Delaware to do things out of Ravers' presence. Banther told Schmitz that Ravers had pawned Banther's ring, which Ravers was holding as collateral for a loan to Banther.

On February 10, 1997, although he was not supposed to be in the area, Banther walked into the Dover Air Base heavy maintenance vehicle unit and asked to borrow Schmitz's truck keys. Schmitz's workplace was located about 100 yards from the Base Security Police office. About an hour after Schmitz gave Banther his truck keys, Schmitz was contacted by the Base Security Police squadron because they were looking for Banther after he had escaped from their custody.

Around noon the following day, February 11, 1997, Schmitz received a telephone call from Banther requesting that Schmitz meet him that evening at a McDonald's restaurant outside the Air Base so that Banther could return Schmitz's truck. Although the McDonald's was closed, Schmitz met Banther at the restaurant shortly before midnight on February 11, 1997. Banther advised Schmitz that he needed to meet Ravers at the Harrington Moose Lodge that evening in order to get money from Ravers to repay the $4000 loan from Schmitz.

According to Banther, he intended to pay Schmitz $5,000 and to return Schmitz's truck following the nighttime meeting

with Ravers. Schmitz borrowed a Volkswagen pickup truck from another airman and followed Banther, who was driving Schmitz's Dodge Dakota pickup truck, to Harrington for the meeting with Ravers. Banther told Schmitz that he and Ravers were going to buy a truck parked at a garage near Farmington for use in their jeans and motor vehicle parts resale business. After several telephone calls, Banther located Ravers at a Harrington bar.

Banther asked Schmitz to wait at a liquor store near the Farmington Firehouse while Banther drove to Harrington to get Ravers. Banther further instructed Schmitz to follow him when he returned and to look for Banther flashing the Dakota's lights when Banther drove by the liquor store. The Farmington liquor store was near Michael Hall's residence on Beebe Road where Schmitz and Banther had lived previously. When Schmitz saw Banther and Ravers drive by in separate vehicles, he followed the two down Beebe Road until they turned onto Mesibov Road and stopped at a garage. Schmitz testified that Ravers was driving a blue Honda or Toyota automobile.

After the three men exited their respective vehicles at the Mesibov Road garage, Ravers told Schmitz that he thought Schmitz was supposed to be an individual named "Charles." When the garage motion sensor light came on, Banther said the truck they were going to purchase was there. Schmitz then asked Ravers if he was really going to buy "this junk." Schmitz testified that Ravers did not have an opportunity to respond to Schmitz's inquiry because: "I saw Bruce walking around the bed of my pickup truck with an axe raised, and he was wearing his rain gear, coming fast at Dennis." Banther was about ten feet away, approaching Ravers with a raised axe, Schmitz testified.

Next, Schmitz told the jury, Banther "struck Dennis in the

head with the axe." Schmitz described the first blow to the much taller Ravers as "glancing." Schmitz further described the first axe blow to Ravers' head: "It hit him, just bounced right off. And that stunned Dennis bad." Banther then hit Ravers on the side of the head with the axe a second time and Ravers began to stagger. When Banther hit Ravers a third time, Schmitz testified, Banther "sunk the axe into his head." Following the third axe blow, Ravers fell to his hands and knees. Schmitz stated; "Bruce looked up at me and said, 'He won't die.' And then he swung the axe down with both hands with a grunt and hit him." This fourth axe blow struck the top of Ravers' head and Ravers fell to the ground. As Banther pulled the axe out of Ravers' head, blood and other material on the axe hit Schmitz in the chest and face.

According to Schmitz, Banther then removed a large green trash bag from the back of Schmitz's pickup truck and began putting the bag on Ravers' head. After Banther told him "to get over here and help," Schmitz assisted Banther in placing Ravers in the trash bag. The two men carried Ravers to the bed of the Dakota pickup truck. Schmitz heard Ravers' "hard, labored, rasping breath." Schmitz said, 'he was struggling to breathe."

When Banther drove away in the Dakota with Ravers in the back, Schmitz followed him in the Volkswagen. Banther stopped near a steel barrel and a stack of boxes on the side of a big drainage ditch past the Farmington railroad tracks. Schmitz estimated that the fifty-five gallon steel drum, which he referred to as a "burn barrel," was located about a quarter of a mile down a dirt road, behind some trees.

Schmitz and Banther removed the still-breathing Ravers from the back of the Dakota and dumped Ravers "head first into

the barrel." Schmitz again described Ravers' breathing as "hard, rasping breath, labored breathing." Initially, Banther was not able to burn Ravers' body in the barrel and Ravers' legs were sticking out of the burn barrel. Schmitz took a claw hammer from Banther to make air holes in the barrel. Thereafter, the fire in the barrel burned better. As the fire continued to burn, Banther told Schmitz to take the borrowed Volkswagen to the Air Base and pack a bag to go to Washington, D.C. Schmitz returned the truck, packed a bag, and walked to the south gate of the Base, where Banther picked him up in Schmitz's Dakota.

Banther and Schmitz retrieved Ravers' car on Mesibov Road, and Schmitz drove Ravers' car back to the burn barrel. At the 2008 trial, when asked why he was still helping Banther, Schmitz replied: "I didn't think I had a choice." At the burn barrel, Schmitz could see two blackened legs sticking out of the barrel. Banther and Schmitz wrapped Ravers' body in a blanket and placed Ravers in the trunk of his car. Banther drove Ravers' car with the body in the trunk and Schmitz followed in his Dakota to a military hotel across the street from the Walter Reed Hospital in Washington, D.C.

Schmitz and Banther checked into the hotel and took some of Ravers' belongings and the axe up to their room. Schmitz parked Ravers' car at the bottom of the hospital underground parking garage next to an exhaust vent. While Banther cleaned the axe, he told Schmitz, "I got medieval on him," referring to Ravers. In Ravers' belongings, Banther found $200 cash, a check, and a mailbox key. At Banther's request, Schmitz forged Ravers' name on the check and gave the endorsed check to Banther. Schmitz stayed at the Washington hotel for three days until he returned to Dover on February 14, 1997, to go to work. Banther drove Schmitz back to Dover in

Schmitz's Dakota pickup truck.

On February 21, 1997, his birthday, Schmitz took a pawn slip for Banther's ring to a Dover pawn shop to try to retrieve Banther's ring. When the Delaware State Police interviewed Schmitz about Banther's whereabouts, Schmitz said he did not know where Banther was. The State Police also asked Schmitz where his truck was, and Schmitz falsely stated that it was parked at a trailer park near the Dover Air Force Base. When asked at trial why he gave false information to the police, Schmitz answered: "I was scared stiff. I had just - I was involved with Mr. Ravers' murder . . . I just wanted my truck and money back at that time."

Banther and Schmitz buried Ravers in a shallow grave near Godwin, North Carolina. Banther purchased a shovel and Schmitz dug the grave. After the two removed the body from the car trunk, Banther started chopping at Ravers' legs with the shovel. On March 4 or 5, 1997, following the burial of Ravers' body, Schmitz turned himself in as AWOL at Andrews Air Force Base in Washington, D.C.

BANTHER'S CONTENTIONS

Next, Banther filed the instant Motion for Postconviction Relief pursuant to Superior Court Rule 61. He has filed a motion, an amended motion, and a second amended motion. In his motion as amended, he raises the following grounds for relief:

Ground one: The defendant's due process rights under the double jeopardy clause's claim preclusion were

violated. Claim preclusion prevents a party from prevailing on issues that they might have but did not assert in their first action. Claim preclusion cannot be evaded simply by allegations of conspiracy or false testimony to the very same activity that was challenged and successfully defeated in a prior proceeding. A final judgment on the merits of an action precludes a party from prevailing on an issue they might have but did not ever assert at the previous proceeding. This violates all known substantive constitutional law. Defendant's due process rights were violated.

Ground two: The defendant's due process rights under U.S.C.A. 28 § 1291 were violated before his trial began. If a defendant is to avoid exposure to Double Jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs, known as an Abney Appeal through Abney v. U.S., which is substantive U.S. Supreme Court Law. This procedure was created so a defendant could vindicate his Double Jeopardy rights prior to trial. When the defendant makes the requisite showing, defendant is entitled to a pretrial evidentiary hearing his double jeopardy claim. The defendant was not allowed to do so.

Ground three: The defendant's 14th Amendment due process rights were violated by the false testimony and perjury of John Schmitz, who was the lynchpin of the State's presentation. This false testimony corrupted the truth-seeking process. This

violation is so pervasive and fundamental that it undermines the validity of the trial. The use of known lies to get a conviction deprives the defendant of his constitutional right to due process of law. All false testimony pollutes a trial, making it hard for the jurors to see the truth. This is a wrong so fundamental it must make the whole proceeding a mere pretense of a trial that renders the conviction and sentence void and invalid. The use of false testimony and perjury violates all known substantive constitutional law. The use of false testimony resulted in a miscarriage of justice.

Ground four: The defendant's 6th Amendment rights were violated and defendant was prejudiced by his counsel's ineffectiveness under the Strickland interpretation of the 6th Amendment. In this regard, the defendant contends that his counsel failed to investigate and present substantial mitigating and exculpatory evidence during the trial to prevent the State's witness, John Schmitz, from lying to jury with false testimony. Counsel's preparation for trial was constitutionally deficient under Williams v. Taylor standard. Counsel's total failure to secure any of requested witnesses, documents, records or expert witnesses to challenge state witness to prove that state witness was lying in his false testimony to the jury, was clearly deficient performance under Strickland standard, and the 6th Amendment.

Ground five: Prosecutorial misconduct prejudiced the

defendant. The State introduced false testimony and perjury that polluted the entire trial process with false testimony that severely prejudiced the defendant. If not for the prosecutorial misconduct, false testimony, perjury, and disregard for the truth, the trial most probably would have had a different result for the defendant.

Ground six: The defendant's right to testify in his behalf was infringed upon. Only the defendant can waiver this right, and cannot be waived by counsel. This right cannot be waived without the publicly acknowledged consent by the defendant. The decision to waive or to invoke this guaranteed right has to come out of the defendant's mouth. The defendant's preeminent and supreme right must be made by the defendant to the trial judge. The defendant has a right to take the stand in his own defense. The trial judge did not question or engage in any colloquy with the defendant. The defendant had made it very clear that it was his strong desire to testify and was throughly prepared to expose all the false statements and lies in John Schmitz's testimony and other witnesses as well. Therefore, the defendant's rights under the 5th, 6th, and 14th Amendments were violated by ineffective Assistance of Counsel, and denied a fair trial.

Ground seven: The defendant was denied his 6th Amendment right to have his compulsory process for obtaining witnesses which would have been extremely relevant and material to his defense.

The defendant wrote to the trial judge before the trial started about this counsel being negligent and remiss about preparing for trial, and the defendant's counsel cold bloodedly lied to the defendant's face about defending the defendant this time for the 3rd trial. The U.S. Supreme Court has made it plain that the "right to defend" is constitutionally protected. The "right to defend" against the state's accusations is protected by the due process clause of the 5th Amendment. The compulsory process constitutionally guarantees the right to a defense as we know it. The defendant's rights were violated by the counsel's ineffectiveness.

Ground eight: The trial court violated the defendant's due process rights by relieving the state of its burden of proving every element of intent of First Degree Murder beyond a reasonable doubt; the Element of Intent under the accomplice theory was not included in the Judge's instruction. The trial court committed plain and reversable error by failing to instruct the jury on the lesser included offenses of First Degree Murder as mandated by Title 11 § 274. The trial court committed plain and reversible error by failing to instruct the jury as required under Title 11 §274. The trial judge committed plain and reversable error when he failed to give the two-part analysis required under Title 11 § 271 and 274 when the state proceeds on a theory of accomplice liability.

Ground nine: The trial court violated the defendant's due process rights during the jury instructions when

the trial judge committed plain and reversible error when he failed to sua sponte instruct the jury when a co-defendant testifies for the prosecution. The testimony should be viewed with suspicion and great caution because of its questionable source. The trial judge committed plain and reversable error when he instructed the jury "As to Count 1, your verdict may be guilty of the felony charge of Murder in the First Degree or not guilty." Under the State's accomplice theory and 11 § 274, the defendant may be found guilty or not guilty of lesser included offenses or even an entirely distinct and separate offense. Therefore, the defendant's due process rights were violated and the defendant did not receive a fair trial since Title 11 § 271, 272 and 274 were not read to the jury correctly.

Ground ten: The defendant's due process rights were violated when the trial judge's instructions to the jury that "your verdict need not be unanimous as to a specific theory of liability as a principal or as an accomplice, as long as you are in unanimous agreement as to the defendant's guilt" was plain error. When a defendant is found guilty as an accomplice, the court is required to give the jury instructions as required under § 271 and 274. The statutes must be construed in pari materia, § 271, § 274 and § 275 require the jury to bring back a verdict either as a principal or a distinct and separate verdict as an accomplice or not guilty. The jury is required to make an individualized determination regarding both the defendant's mental state and his culpability for

any aggravating fact or circumstance. Therefore, the trial judge violated the defendant's due process right and defendant did not receive a fair trial.

Ground eleven: The defendant's 6th Amendment right to effective assistance of counsel was violated by one of his counsel attempting to withdraw 5 times from representing the defendant. He even went so far as saying "He had no desire to continue as counsel, and when the defendant filed reargument on the last appeal in 2009, he attempted to withdraw again, just as he did during the direct appeal, at the bail hearing, the death penalty recertification in 2003, and other times. It was so obvious that this counsel had no intention at all to represent the defendant, who suffered the catastrophic consequences of being represented by such a negligent and lazy attorney . . .These problems left the other counsel to do all the work. These distractions left the defendant in a perilous situation. The defendant is attached a list of specific allegation with this motion.

Ground twelve: The defendant's due process rights of "actual innocense" were violated. The defendant was acquitted of being a conspirator at the first trial. At the defendant's death penalty hearing, the defendant was found not guilty of being an accomplice. The state used the accomplice liability elements as an statutory aggravating circumstance, which was illegal but they did it anyway. This effectively eliminated the defendant as a supposed co-defendant or a

cohort, which the defendant was mistakenly labeled as in his third appeal decision. The actual perpetrator, John Schmitz, pleaded guilty to murdering the victim on February 23, 1999. Despite these acquittals and Schmitz's guilty plea, the State violated the defendant's Double Jeopardy rights and completely trounced the defendant's actual innocence' standards that are clearly dictated by the U.S. Supreme Court, which is substantial law.

Ground thirteen: The defendant's due process rights under the 5th Amendment and 6th Amendment rights to be given accurate and correct jury instructions is fundamental to the criminal justice system in America, and was clearly erroneous. The judge's instructions to the jury that they must find that all three of the following elements have been proven beyond a reasonable doubt: "One, another person committed the offenses charged; namely Murder in the First Degree and Possession of a deadly weapon during the commission of a felony, as I have explained those offenses for you." The law of the case bars relitigation of and by facts that remain constant throughout: Schmitz pled guilty to 2nd Degree Murder and did not plead guilty to PDWDCF or was not guilty of PDWDCF since he did plead guilty to murdering Ravers. The Judge tried to change the legal landscape and change the law of the case. This is prohibited and illegally unconstitutional.

Ground fourteen: On the following pages attached, the following faulty jury instructions are listed in order. All of

these combined jury instructions prejudiced the defendant's trial and confused the jury, which damaged the defendant's rights, his due process rights, his 6th Amendment rights to accurate and unconfusing jury instructions to the defendant could have a fair trial. The defendant's constitutional rights to a fair trial were violated and the defendant's conviction must be overturned and reversed due to these errors.

Ground fifteen: The defendant's right to a fair trial under the 6th Amendment's right to a effective counsel. The defendants counsel made a series of blunders due to erroneous stipulations concerning the murder scene, the nonexistence of the defendant's footprints, which are not at the crime scene, the truck, tire prints, the ordering of Schmitz's battle axe from Arkansas; the defendant was not even in the U.S.A. when Schmitz ordered the axe, took delivery of the axe by signing for the axe and ultimately used it to kill Ravers with his axe. Schmitz's phone records bear this out clearly. But the defendant's lawyers were ineffective by not even presenting a defense and interfering with the defendant testifying to get these facts before the jury to prove his innocence and to prove Schmitz was lying to the jury under Steve Welch's direction to make the trial a sham. The defendant's attorneys just went through the motions to make a nominal effort of defense. If the defendant had been allowed to testify and the judge had asked the defendant if he wanted to testify, the defendant had expert witnesses to prove Schmitz was lying, the defendant would

> have been acquitted. The trial judge did not ask the defendant if he wanted to testify, as the Judge is required to do as a basic constitutional right, as the defendant and judge did in the first two trials.

The defendant also contends that he could not argue ineffective assistance of counsel on direct appeal and defendant wanted previous issues raised but counsel would not raise them on direct appeal, even though these issues were substantive law.

DISCUSSION

Under Delaware law, the court must first determine whether Banther has met the procedural requirements of Superior Court Criminal Rule 61(i) before it may consider the merits of the postconviction relief claims. Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final. Banther's motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the motion. As this is Banther's initial motion for postconviction relief, the bar of Rule 61(i)(2), which prevents consideration of any claim not previously asserted in a postconviction motion, does not apply either.

Grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred under Rule 61(i)(3) unless the movant demonstrates: (1) cause for relief from the procedural default; and (2) prejudice from a violation of the movant's rights.

Any grounds for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction or in an appeal are barred under Rule 61(i)(4), unless reconsideration of the claim is warranted in the interest of

justice.

The bars to relief are inapplicable to a jurisdictional challenge or "to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."

Grounds One and Twelve, double jeopardy, claim preclusion, "actual innocense": Grounds One and Twelve were fully litigated in the trial court proceedings and in the defendant's direct appeal. I find that Grounds One and Twelve are barred by Rule 61(i)(4). I also find that Reconsideration of the claims are not warranted in the interest of justice.

Grounds Two through Eleven and Thirteen through Fifteen: These grounds raise issues concerning double jeopardy, alleged false testimony of John Schmitz, prosecutorial misconduct, the defendant's right to testify, calling of witnesses, errors in jury instructions, violations of due process rights, and claims of ineffective assistance of counsel. I have concluded that all of the issues raised by these grounds are ones which could have been raised in the trial proceedings or in the direct appeal, except for claims of ineffective assistance of counsel which are either expressly made or attendant to the other issues raised. I therefore conclude that the only cause for relief from the procedural bar of Rule 61(i)(3) is alleged ineffective assistance of counsel.

Ineffective Assistance of Counsel

The defendant's ineffective assistance of counsel claims are not subject to the procedural default rule, in part, because the Delaware Supreme Court will not

generally hear such claims for the first time on direct appeal. For this reason, many defendants allege ineffective assistance of counsel in order to overcome the procedural default. "However, this path creates confusion if the defendant does not understand that the test for ineffective assistance of counsel and the test for cause and prejudice are distinct, albeit similar, standards."[1] The United States Supreme Court has held that:

> [i]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that the responsibility for the default be imputed to the State, which may not 'conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance;' [i]neffective assistance of counsel then is cause for a procedural default.[2]

A movant who interprets the final sentence of the quoted passage to mean that he can simply assert ineffectiveness and thereby meet the cause requirement will miss the mark. Rather, to succeed on a claim of ineffective assistance of counsel, a movant must engage in the two part analysis enunciated in *Strickland v. Washington*[3] and adopted by the Delaware Supreme Court in *Albury v. State*[4].

The *Strickland* test requires that the movant show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.

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[1] *State v. Gattis*, 1995 WL 790961, *3 (Del. Super. Dec. 28, 1995).

[2] *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

[3] 466 U.S. 668 (1984).

[4] 551 A.2d 53 (Del. 1988).

Second, under *Strickland* the movant must show there is a reasonable degree of probability that but for counsel's unprofessional error the outcome of the proceedings would have been different, that is, actual prejudice. In setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.

Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established. However, the showing of prejudice is so central to this claim that the *Strickland* court stated "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."[5] In other words, if the court finds that there is no possibility of prejudice even if a defendant's allegations regarding counsel's representation were true, the court may dispose of the claim on this basis alone.[6] Furthermore, the defendant must rebut a "strong presumption" that trial counsel's representation fell within the "wide range of reasonable professional assistance," and this court must eliminate from its consideration the "distorting effects of hindsight when viewing that representation."[7]

Ground Two, double jeopardy, Abney appeal: This doctrine deals with some types of Federal District Court decisions which are considered final decisions for purposes of appeal to a United States Court of Appeals under 28 *U.S.C.A.* § 1291.

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[5] *Strickland*, 466 U.S. at 670 (1984).

[6] *Id.*

[7] *Id.*

It has no bearing on this state court proceeding. The defendant's double jeopardy rights have not been violated. The defendant has failed to show actual prejudice under the second prong of the *Strickland* test.

Ground Three, John Schmitz: Mr. Schmitz did not give a statement describing the crime after his arrest. He is not known to have given an account of the crime to anyone until he spoke with prosecutors in the lead-up to the defendant's third trial. The credibility of his testimony was a matter for the jury to decide. Defense counsel attempted to undermine his credibility as vigorously as anyone could reasonably expect. The defendant has failed to show prejudice under the second prong of the *Strickland* test.

Ground Four, Seven and Fifteen, ineffectiveness of counsel: In his submissions the defendant has identified a number of persons and various documents which he claims his attorneys should have investigated and secured for presentation at trial through compulsory process. He also contends that his attorneys committed a series of blunders as set forth in Ground Fifteen. He claims that the witnesses and documents were especially relevant to attacking the credibility of Mr. Schmitz. He claims to have given lists of witnesses and documents to one of his attorneys. Trial counsel in their affidavits have stated that they diligently investigated the case and that they are not aware of any witnesses or other evidence which should have been presented on the defendant's behalf but were not. I find counsels' affidavits more credible than the defendant's self serving claims of additional evidence. Additionally, the defendant has failed to give any concrete evidence that could lead the Court to conclude that he has been prejudiced by any alleged deficiency on the

part of counsel.

After considering the defendant's submissions, the responses of counsel, and comparing the information which the defendant has provided in his submissions with the evidence of the defendant's guilt introduced at the trial, I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test.

Ground Five, prosecutorial misconduct: The defendant's contention of prosecutorial has no merit. The prosecutors acted professionally in all aspects of the trial. The defendant has failed to show prejudice under the second prong of the *Strickland* test.

Ground Six, the right to testify:

The defendant contends that he was denied his right to testify. He contends that he had made it clear to his attorneys that he wished to testify, but that they improperly waived his right to testify by resting after the State rested without calling him to the stand. In their affidavits, both of his trial attorneys state that the decision whether to testify or not was discussed among the defendant and the two defense attorneys and that the defendant elected not to testify. The two defense attorneys are both experienced attorneys who are well aware that the election to testify or not testify is a decision for the defendant. The contention that defense counsel infringed on the defendant's right to testify simply lacks credibility. The contention that defense counsel were ineffective in this regard is rejected.

Grounds Eight, Nine, Ten, Thirteen and Fourteen, jury instructions: The defendant contends there were errors in the jury instruction as follows: that the defendant could not have been found guilty as an accomplice to Schmitz to Murder

in the First Degree and Possession of a Deadly Weapon During the Commission of a Felony because Schmitz pled guilty to Murder in the Second Degree, not Murder in the First Degree, and did not plead guilty to Possession of a Deadly Weapon During the Commission of a Felony; that the jury should have been given lesser-included offenses to Murder in the First Degree and an accompanying section 274[8] instruction; that giving an accomplice liability instruction was error because the defendant was acquitted of accomplice liability at the penalty hearing in his first trial; that the trial court violated the defendant's due process rights by relieving the State of its burden of proving every element of first degree murder beyond a reasonable doubt in that the element of intent under the accomplice theory was not included; that the Court failed to give an accomplice testimony instruction; the Court failed to perform the two part analysis under criminal code sections 271 and 274; that the Court committed plain error by instructing the jury in the accomplice liability instruction that "your verdict need not be unanimous as to a specific theory of liability as a principal or as an accomplice, as long as you are in unanimous agreement as to the defendant's guilt"; that the Court committed plain error in failing to instruct the jury that facts establishing jurisdiction and venue and establishing that the offense was committed within the applicable statute of limitations must be proved as elements of the offense and jurisdiction and venue must be proved beyond a reasonable doubt; that being charged as a principal and charged as an accomplice are distinct and

[8] 11 *Del. C.* § 274.

separate crimes; that section 275[9] is unconstitutional because it allows the defendant to be convicted of a crime (accomplice) for which he was not indicted; that the trial court committed reversible error by instructing the jury on self-defense; that the defendant's acquittal on the charge of conspiracy at his first trial barred the State from trying the defendant on a distinct and separate theory of accomplice liability; that the defendant's acquittal of conspiracy at his first trial barred the State from trying the defendant for first degree murder as the principal under double jeopardy; that the trial court committed plain error when it failed to *sua sponte* give a more specific unanimity instruction concerning the jurors duty to return a verdict of guilty or not guilty as the principle or guilty or not guilty as an accomplice; and that trial counsel were ineffective for failing to object to the trial court's erroneous instruction permitting the jury to convict the defendant of Murder in the First Degree as an accomplice without finding that the defendant possessed the specific intent to kill.

In his affidavit, one of the defendant's trial counsel states that the two trial counsel and the defendant discussed whether to request instructions on lesser-included offenses and that the defendant agreed strategically that lesser-included offenses would not be requested. I find that the defendant cannot show actual prejudice from the failure to request lesser-included offenses or a section 274 instruction under the second prong of the *Strickland* test. The nature of the wounds to the body clearly show that the homicide was an intentional murder.

At trial defense counsel did request an accomplice testimony instruction, and

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[9] 11 *Del. C.* § 275

there was much discussion about how it might be worded. When the Court indicated what form of an accomplice testimony instruction it would give, defense counsel withdrew the request for an accomplice testimony instruction. Mr. Schmitz did not testify at the first or second trials. The evidence at all three trials was essentially the same except that Mr. Schmitz's testimony was additional evidence at the third trial. All twenty-four jurors at the first and second trial found the defendant guilty beyond a reasonable doubt without hearing Mr. Schmitz's testimony. There was substantial evidence of guilt without Schmitz's testimony, and there was evidence which provided corroboration for Schmitz's testimony. I find that the defendant has failed to establish actual prejudice under the second prong of the *Strickland* test regarding defense counsel's decision to withdraw their request for an accomplice testimony instruction.

The self-defense instruction was requested by defense counsel. I find that the defendant cannot show actual prejudice from the giving of the self-defense instruction.

A specific unanimity instruction was requested by the defense counsel at the first trial and rejected by the Court. I find that a specific unanimity instruction was not required under the evidence in this case and that the defendant cannot show actual prejudice by counsel's failure to request one at the third trial.[10]

The defendant's remaining contentions regarding jury instructions are without merit.

<u>Ground Eleven, attorney's attempt to withdraw</u>: In this ground the defendant

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[10] *Probst v. State*, 547 A.2d 114 (Del. 1988)

contends that his right to effective assistance of counsel was denied by one of his attorneys attempting to withdraw from his case five times. He makes a general attack upon this attorney. He also contends that there was a major conflict between his two attorneys. I find that these arguments are unpersuasive and simply lack merit. The record shows that his attorneys represented him diligently over a number of years, including securing two reversals of convictions. At the trial at which I presided, both counsel represented the defendant vigorously. I observed nothing to suggest that there was any conflict between counsel. I find that the defendant's arguments on this issue are unpersuasive and that he has shown no actual prejudice from counsel's conduct.

I further find as to all grounds that there is no jurisdictional claim and no colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

CONCLUSION

I find that the defendant has failed to avoid the procedural bars of Rule 61(i). Therefore, his Motion for Postconviction Relief is ***denied***.

IT IS SO ORDERED.

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President Judge

oc: Prothonotary
cc: File