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Judges, Attorneys and Experts
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware,
New Castle County.

STATE of Delaware, Plaintiff,
v.
Jermaine WRIGHT, Defendant.

No. 91004136DI.
Submitted: July 20, 2011.
Decided: Jan. 3, 2012.

Gregory E. Smith, Esquire, James T. Wakley, Esquire and Danielle J. Brennan, Esquire, Department of Justice, Wilmington, Delaware—Attorneys for The State.

Herbert W. Mondros, Esquire, Margolis Edelstein, Wilmington, Delaware—Attorney for Defendant.

James Moreno, Esquire and Tracy Ulstad, Esquire, Philadelphia, Pennsylvania—Attorneys for the Defendant.

SUPPLEMENTAL OPINION

PARKINS, J.

Table of Contents

INTRODUCTION	1
A. FACTS	2
1. The Crime	2
2. The Investigation	6
3. Wright's Alibi	12

4. Wright co-perpetrator: Lorinzo Dixon	13
B. PROCEDURAL HISTORY	14
C. THE EVIDENCE AT THE RULE 61 EVIDENTIARY HEARING	19
1. Deborah Mash, PhD—The effects of heroin on Defendant	19
2. Robert Maslansky, M.D. The effects of heroin and other impairments on Defendant	22
3. Daniel Martell, Ph. D.: Defendant's ability to resist suggestion.	24
4. Solomon Fulero, Ph.D., J.D	29
5. Significance of Expert Testimony	33
D. DEFENDANT'S	34

CLAIMS

E. RULE 61 PROCEDURAL BAR ANALYSIS	36
1. The actual innocence exception in the Supreme Court	37
2. The history and purpose of Delaware's post conviction procedural bars	39
3. The actual innocence exception does not defeat the purpose of the procedural bars	46
4. An “actual innocence” exception is embodied in the language of Rule 61(i)(5)	48
5. Wright has adduced sufficient evidence to invoke the exception	49
6. Application of the actual innocence exception to this case	53

F. ANALYSIS OF DEFENDANT'S CLAIMS	54
1. Defendant's claim that the jury was improperly instructed on the felony murder rule	54
2. Defendant is actually innocent	57
3. Defendant's statement was involuntary	63
4. All of Wright's prior post conviction counsel rendered ineffective assistance of counsel	67
5. Counsel was ineffective in Defendant's Second Penalty Hearing	69
6. Wright's claim that the jury should have been instructed that the aggravating factors must outweigh the mitigating factors beyond a reasonable doubt	71

7. Defendant's conviction must be vacated because of a Brady Violation	73
a. Evidence relating to jailhouse informant Gerald Samuels	75
b. Evidence relating to an attempted robbery at Brandywine Village	78
8. Defendant's statement was obtained in violation of *Miranda v. Arizona* because the *Miranda* warnings were defective	84
a. The purpose of the *Miranda* warnings	85
b. The administration of *Miranda* warnings to Wright	86
c. The police were required to re-administer Defendant's *Miranda* rights	91

prior to his videotaped statement	
d. Even if the police were not required to re-administer the warnings, once they did so they could not give misleading warnings	94
e. Detective Mayfield's advisement of Defendant's rights did not comport with *Miranda*	95
9. Defendant's *Miranda* waiver was not made knowingly or intelligently	98
G. CONCLUSION	101

SUPERIOR COURT OF DELAWARE MEMORANDUM

*1 FROM: JUDGE BALICK

September 22, 1987

TO: Superior Court Judges

RE: *Proposed Rule for Postconviction Proceedings*

In accordance with Justice Holland's letter dated September 14, I have inserted language on page 1 making the rule interim for two years.

A copy of the order is attached.

BB: ipm

xc: Justices

Enc.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE ORDER PROMULGATING RULE ON POSTCONVICTION REMEDY, APPENDIX OF FORMS, AND RELATED AMENDMENTS OF THE SUPERIOR COURT CRIMINAL RULES

It is ORDERED that:

1. The annexed Rule 61, entitled "Postconviction Remedy," is hereby promulgated. The rule shall be considered interim for a two year period, at the end of which the court will decide whether to make it permanent.

2. Rule 32(d) is amended to read as follows:

   (d) *Plea Withdrawal*. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had without entry of a judgment of conviction, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only by motion under Rule 61.

3. Rule 35(a) is amended to read as follows:

   (a) *Correction of Sentence*. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

4. Rule 58 is amended to read as follows:

   The forms contained in the Appendix of Forms are mandatory, unless otherwise ordered by a judge.

5. The annexed Appendix of Forms to the Superior Court Criminal Rules, containing the following forms, is hereby promulgated:

   Guilty Plea Form;

   Motion for Postconviction Relief;

   Movant's Response as to Why Motion for Postconviction Relief Should Not Be Dismissed or Ground(s) Barred.

6. The aforementioned Rules and Forms shall take effect January 1, 1988, and shall be applicable to all proceedings then pending except to the extent that in the opinion of the court their application in a particular proceeding would not be feasible or would work injustice. The time limitation in subdivision (i)(1) of Rule 61 shall not apply to any motion for postconviction relief filed before January 1, 1989.

7. An original of this order shall be filed with the Prothonotary for each County.

Dated: *September 17, 1987*

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

STATE OF DELAWARE	)	
	)	
V.	)	
	)	
______________________	)	NO. ______________________
Name of Movant on Indictment	)	(to be supplied by Prothonotary)
	)	
______________________	)	
Correct Full Name of Movant	)	

MOTION FOR POSTCONVICTION RELIEF
INSTRUCTIONS

(1) This motion must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury.
(2) All grounds for relief and supporting facts must be included, and all questions must be answered briefly in the proper' space on the form.

*2 (3) Additional pages are not permitted. If more room is needed, use the reverse side of the sheet.

(4) No citation of authorities is required. If legal arguments are submitted, this should be done in a separate memorandum.

(5) Only convictions that were included in the same plea agreement or were tried together may be challenged in a single motion.

(6) When the motion is completed, the original must be mailed to the Prothonotary in the county in which the judgment of conviction was entered. No fee is required.

(7) The motion will be accepted if it conforms to these instructions. Otherwise, it will be returned with a notation as to the deficiency.

MOTION

1. County in which you were convicted ____

2. Judge who imposed sentence ____

3. Date sentence was imposed ____

4. Offense(s) for which you were sentenced and length of sentence(s): ______________________

5. Do you have any sentence(s) to serve other than the sentence(s) imposed because of the judgment(s) under attack in this motion? Yes ( ) No ( )

If your answer is "yes," give the following information:

Name and location of court(s) which imposed the other sentence(s): ____________________

Date sentence(s) imposed: ____________________

Length of sentence(s) ____________________

6. What was the basis for the judgment(s) of conviction? (Check one)

Plea of guilty ( )

Plea of guilty without admission of guilt ("Robinson plea") ( )

Plea of nolo contendere ( )

Verdict of jury ( )

Finding of judge (nonjury trial) ( )

7. Judge who accepted plea or presided at trial ____________________

8. Did you take the witness stand and testify? (Check one)

No trial ( ) Yes ( ) No ( )

9. Did you appeal from the judgment of conviction? Yes ( ) No ( )

If your answer is "yes," give the following information:

Case number of appeal ____________________

Date of court's final order or opinion ____________________

10. Other than a direct appeal from the judgment(s) of conviction, have you filed any other motion(s) or petition(s) seeking relief from the judgment(s) in state or federal court? Yes ( ) No ( ) How many? ( )

If your answer is "yes," give the following information as to each:

Nature of proceeding(s) ____________________

Grounds raised ____________________

Was there an evidentiary hearing? ____________________

Case number of proceeding(s) ____

Date(s) of court's final order(s) or opinion(s) ____________________________________

Did you appeal the result(s)? ____

11. Give the name of each attorney who represented you at the following stages of the proceedings relating to the judgment(s) under attack in this motion:

At plea of guilty or trial ____

On appeal ____

In any postconviction proceeding ____

12. State every ground on which you claim that your rights were violated. If you fail to set forth all grounds in this motion, you may be barred from raising additional grounds at a later date. You must state facts in support of the ground(s) which you claim. For your information, the following is a list of frequently raised grounds for relief (you may also raise grounds that are not listed here): double jeopardy; illegal detention, arrest, or search and seizure; coerced confession or guilty plea; uninformed waiver of the right to counsel, to remain silent, or to speedy trial; denial of the right to confront witnesses, to subpoena witnesses, to testify, or to effective assistance of counsel; suppression of favorable evidence; unfulfilled plea agreement.

*3 Ground one: ____

Supporting facts (state the facts briefly without citing cases): ________________________

Ground two: ____

Supporting facts (state the facts briefly without citing cases: _________________________

Ground three: ____

Supporting facts (state the facts briefly without citing cases): ________________________

If any of the grounds listed were not previously raised, state briefly what grounds were not raise, and give your reason(s) for not doing so: ______________________________________

Wherefore, movant asks that the court grant him all relief to which he may be entitled in this proceeding.

____

Signature of Attorney (if any)

I declare the truth of the above under penalty of perjury.

_____________________ __________________________

Date Signed Signature of Movant

(Notarization not required)

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

STATE OF DELAWARE	)	
	)	
V.	)	CASE NO. ____________________
	)	
__________________________	)	
Name of Movant	)	

MOVANT'S RESPONSE AS TO WHY MOTION FOR POSTCONVICTION RELIEF SHOULD NOT BE DISMISSED OR GROUND(S) BARRED

INSTRUCTIONS

(1) This form has been sent so that you may explain why your motion for postconviction relief should not be dismissed, or ground(s) alleged therein should not be barred, for the following reason(s): __

(2) Failure to return this form within ____ days may result in dismissal of your motion or bar of ground(s) alleged therein.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your motion is attacking was entered? Yes ( ) No ( ) If your answer is "yes," give the following information:

— Specify as precisely as you can the periods of time you received such assistance, up to and including the present. ____

— Describe the nature of the assistance, including the names of those who rendered it to you. __

2. Explain why your motion for postconviction relief should not be dismissed (use the reverse side of the sheet, if needed): ____

I declare the truth of the above under penalty of perjury.

__________________________ ______________________________

Date Signed Signature of Movant

Superior Court

Notice of Non–Compliance with Rule 61

To: ________________________________ Re: *State v.*

________________________________ CRA. # ________________

________________________________ CRID # ________________

________________________________ Date Received: ___________

This will acknowledge receipt of your request for postconviction remedy. It has been recorded as received on the date indicated above. However, it is being returned to you because it does not comply with Superior Court Criminal Rule 61 which became effective January 1, 1988, for the following reason(s):

[ ] Motions for Postconviction Relief must be filed on the attached form.

[ ] Your Motion for Postconviction Relief is incomplete. Refer to Item(s) # ____________________

[ ] Your motion covers multiple convictions. A separate motion must be filed for each judgment of conviction entered at different times. [Refer to Section b(3)]

*4 [ ] You may not file this motion until the time for filing an appeal of the conviction has expired.

[ ] You may not file this motion until your appeal of the conviction has been decided and the record has been returned to this court.

[ ] Your motion is not signed. Refer to the signature line on page 3.

[ ] Your motion is not legible. Refer to Item(s) _______________.

[ ] Other ____

Please make the corrections indicated above and return the Motion for Postconviction Relief to the Prothonotary.

So Ordered,

Judge Date

Superior Court

Notice of Non–Compliance with Rule 61

To: ______________________________ Re: *State v.*

______________________________ CRA. # _______________

______________________________ CRID # _______________

___ Date Received: __________

This will acknowledge receipt of your request for postconviction remedy. It has been recorded as received on the date indicated above. However, it is being returned to you because it does not comply with Superior Court Criminal Rule 61 which became effective January 1, 1988, for the following reason(s):

[ ] Motions for Postconviction Relief must be filed on the attached form.

[ ] Your Motion for Postconviction Relief is incomplete. Refer to Item(s) # ____________________

[ ] Your motion covers multiple convictions. A separate motion must be filed for each judgment of conviction entered at different times. [Refer to Section b(3)]

[ ] You may not file this motion until the time for filing an appeal of the conviction has expired.

[ ] You may not file this motion until your appeal of the conviction has been decided and the record has been returned to this court.

[ ] Your motion is not signed. Refer to the signature line on page 3.

[ ] Your motion is not legible. Refer to Item(s) _______________.

[ ] Other ____

Please make the corrections indicated above and return the Motion for Postconviction Relief to the Prothonotary.

So Ordered,

Judge Date

INTRODUCTION

On the night of January 14, 1991, Phillip Seifert was helping his brother by filling in as a clerk at the liquor store appended to the HiWay Inn near Wilmington. It was the last night of his life—he was brutally and senselessly murdered during a robbery at the liquor store. Jermaine Wright, Defendant, was convicted of that robbery and murder and sentenced to death. Two decades later he continues to challenge his convictions and sentence in the courts. This case could well serve as a poster child for those who are understandably frustrated at the snail-like pace of death penalty litigation. At the same time, this case underscores the necessity of providing defendants facing the death penalty with a well trained and adequately funded defense team. The Federal Community Defender Office for the Eastern District of Pennsylvania—which now represents Wright—has adduced extensive and convincing expert testimony which, save for cross-examination, was uncontested by the State.

*5 Defendant has presented nine distinct arguments. Certain of them are procedurally barred, one was abandoned, and some are without merit. There are, however, three meritorious arguments, each of which lead this court to conclude that Defendant's convictions and ensuing death penalty are constitutionally infirm. First, the court finds that the chief investigating police officer did not advise the prosecutors of evidence which may have exculpated Defendant. As a result this information was not produced to Wright's counsel, thus depriving Defendant of due process of law. Second, as the court first raised *sua sponte,* the *Miranda* warnings given to Wright prior to his only recorded interrogation not only failed to adequately convey to Defendant his right to counsel, but may have misled him into believing he had a right to appointed counsel only if the state felt he needed one. Because the warnings given to Wright were so defective, his statement to the police should have been excluded from evidence. Third, the court finds that Defendant did not knowingly and intelligently waiver his *Miranda* rights. Therefore, the resulting statement should have been excluded from evidence. These three constitutional errors are far from harmless and therefore Wright's convictions and death sentence must be vacated.

A. FACTS

1. The Crime

The HiWay Inn was a quiet tavern where "everybody knows everybody," the kind of place where a regular could cash a check. At the time of these events, it had been owned by Lawrence Seifert for about 23 years. Located on Governor Printz Boulevard just outside the Wilmington city limits, it consisted of a bar and an attached package store.

Phillip Seifert, the brother of the owner, had previously lost the lower portion of his right leg. He was 66 years old and was mostly retired.[FN1] On occasion, however, he would help out his brother and work as a clerk in the package store. According to Lawrence Seifert, his brother was the type to resist a robbery attempt. "He's just not going to get robbed. That was his attitude. He was just that kind of man." James Mason was scheduled to work the night of January 14, 1991 as the package store clerk, but was unable to do so because he was recovering from eye surgery. Phillip Seifert filled in for him. It would be the last night of his life.

FN1. There is some minor discrepancy about Phillip Seifert's age. According to the Chief Deputy Medical Examiner, he was 65 years old.

January 14 was a slow night in the bar. The barmaid was Debra Milner, and by shortly after nine only one customer, "Jack," was there. Around 9:20 p.m. a stranger, an African American, came in. The stranger made no purchases, nor did he speak to anyone. He just stood at the end of the bar for a few minutes looking around. Ms. Milner remembered that he was wearing a red plaid flannel shirt and had an overly round face.

After the last customer left the bar, Mr. Seifert came into the bar to talk with Ms. Milner. There was a bell which rings when anyone opens the outside door to the package store, so Mr. Seifert would have known if a customer entered the package store while he was chatting with Ms. Milner. Around 10 p.m., the bell rang and Mr. Seifert went to take care of the customer. About the same time, the phone in the tavern rang; it was Ms. Milner's sister calling. While talking with her sister Ms. Milner heard the bell ring again,

indicating to Ms. Milner that the customer had left the package store. Later, as Ms. Milner was hanging up from the call from her sister, she heard the bell to the package store ring yet again. She glanced at the clock in the bar; it was 10:20 p.m.

*6 Shortly after hanging up, Ms. Milner heard what she thought was a fire cracker. She walked to the interior door leading to the package store and saw Mr. Seifert with his head on the counter. From her vantage point, she was unable to see the entire package store and did not see anyone else in there. She next heard what was unmistakably a gun shot, and she saw blood begin to pour from Mr. Seifert. Understandably terrified, she ran and hid in a room in the back of the tavern.

George Hummel was on the 11 p.m. to 7 a.m. shift as a machinist inspector at Amtrak. He planned to stop by the HiWay Inn—where he was known as "Amtrak George"—to cash a check while on his way to work. He approached the HiWay Inn from the southbound lanes of Governor Printz Blvd., which meant he had to turn across traffic to enter the parking lot to the HiWay Inn. There are two cuts in the curb allowing access to the HiWay Inn parking lot from Governor Printz. As Mr. Hummel approached the first cut, he noticed oncoming traffic, so he continued to drift southward in order to make use of the second. According to Mr. Hummel, it was around 10:30 to 10:40 p.m.

While waiting for traffic to clear before turning into the parking lot, Mr. Hummel noticed two black men come out of the package store; the door was just closing behind them when Mr. Hummel first noticed the pair. One of the individuals appeared to be about six feet tall and the other about 5′8″ or 52C9″. Both of the men wore dark clothing and the taller wore what appeared to be a knit ski cap. The two men spoke, and the shorter one went back into the package store. Meanwhile, the other ran across the parking lot. Seconds later the shorter man exited the parking lot and shouted something to the taller one. Mr. Hummel could not hear what was shouted as he was still on Governor Printz, with his windows up and his heater fan running.

At this point, Mr. Hummel turned his attention to oncoming traffic. As that traffic cleared, the shorter individual ran across his headlights. He was not wearing a hat at this time, but appeared to be carrying something in his hand. The shorter man ran toward Governor Printz, jumped back to avoid oncoming traffic, then ran across Governor Printz to a black Volkswagen Rabbit parked in the parking lot of the Pepsi Cola building across the street from the HiWay Inn. The man jumped in the car and took off heading southbound, tires squealing all the way. Meanwhile, the taller man disappeared into the darkness running toward Wilmington along Governor Printz.

Mr. Hummel entered the tavern, but no one was to be found. He called out the names of several HiWay employees, but no one responded. He left the tavern and went next door to the package store. Upon walking through the front door, Mr. Hummel saw Phillip Seifert sitting on the stool with his face on the counter in a pool of blood. Mr. Hummel ran back to the exterior door of the tavern where there is a pay phone, and called 9–1–1.

*7 Ms. Milner ran to the front door while Mr. Hummel was talking with the 9–1–1 operator. Mr. Hummel was trying to calm Ms. Milner down while at the same time conveying information to the operator when he heard a noise from within the package store. It was Mr. Seifert falling off the stool onto the floor.

2. The Investigation

Sgt. Gary Kresge of the Delaware State Police was on patrol in a marked car about four blocks away when he received a dispatch at 10:46 p.m. of unknown trouble at the HiWay Inn. As he arrived at the scene, a white male ran up shouting "get an ambulance." Sgt. Kresge summoned further help and then entered the package store. The first thing he noticed was that the cash register was in disarray, and then he saw an older white male lying on his back on the floor, bleeding profusely. Moments later paramedics arrived and began to render assistance to Mr. Seifert, who was still alive. He was quickly rushed to the hospital where he later died. The autopsy revealed that Mr. Seifert had been shot three times with a .22 caliber weapon.

After talking to Mr. Hummel, Sgt. Kresge put out a radio call for two black males, one driving a black car, perhaps a VW Rabbit. The sergeant then proceeded to secure the scene, making certain that no one

either left or entered. An evidence detection officer from the State Police soon arrived. He was able to lift 15 prints from the scene, but only five of those—all lifted from the cash register—later turned out to be useable. All five belonged to the owner, Lawrence Seifert. No shell casings were found at the scene.

With no real leads, the police went to unusual lengths to develop information. State Police detective Edward Mayfield, the chief investigative officer for this crime, went to the corner of Todds Lane and Claymont Streets in an effort to put word out on the street that he was willing to pay for information about the killing. He next passed out twenty dollar bills at the Kirkwood Community Center looking for informants. Eventually, someone gave a handwritten note to Kenneth Valen, another clerk at the package store at the HiWay Inn. The note suggested that "Mario" was involved in the killing. "Marlow" is the middle name and street name of Defendant. The police never learned the identity of the author of that note.

Two weeks after the murder, Wilmington police obtained an arrest warrant for Defendant and a search warrant for the home in which he was living. Neither warrant mentioned the Seifert killing. Instead they were issued in connection with two separate incidents being investigated by Wilmington police in which children in the Riverside area of Wilmington had been wounded by gunfire. Nonetheless, Detective Mayfield of the state police was present when the warrants were executed the next morning at just after 6 a.m. Nothing uncovered in the search of the home linked Defendant to the HiWay Inn murder.

Defendant was taken to the Wilmington Police Department headquarters and underwent initial processing. During the processing the police failed to discover heroin which Wright had on him. After the processing was completed, Wright was placed in a detective's interrogation room. The interrogation room is a small windowless room, measuring seven feet by seven feet, with a single windowless door. There is a metal seat for the suspect which is affixed to the floor or wall and which has a device that can be used to secure one loop of the handcuffs worn by the suspect. There is a video camera, protected by a metal box, which can be used to transmit video and audio of an interview to detectives' offices located nearby. By design there is no clock in the interrogation room. This is the room in which Jermaine Wright spent most of the next thirteen hours.

*8 Defendant's interrogation and his statement to police are discussed at length later in this opinion.[FN2] Suffice it to say that Detective Merrill of the Wilmington Police Department began the interrogation with questioning about one of the non-fatal Riverside shootings. Detective Merrill was followed by another Wilmington detective, Robert Moser, who questioned him about the other non-fatal shooting. That interrogation drifted to other matters and, according to Detective Moser, Defendant eventually brought up the HiWay Inn murder. Initially, Defendant discussed the HiWay murder as involving someone named "Tee" (later determined to be Lorinzo Dixon) and an unnamed person. Later during the interview, Defendant came around to admitting that he was the unnamed second person and that he was the triggerman at the HiWay Inn. Unfortunately neither the Merrill nor the Moser interrogations were recorded despite the fact that the police had the capability to do so using the equipment mounted in the interrogation room.

FN2. *See infra* Part C, F(iii), (viii).

There is evidence, and the court so finds, that Wright manifested bizarre behavior during the Moser interview. At one point, Wright began speaking very softly, almost inaudibly, because he feared his answers to Detective Moser's were being overheard by Dixon and another individual. Later he curled up in a fetal position under the table in the interview room. At another point, he insisted on writing down his answers on a piece of paper, passing the paper to Detective Moser who in turn handed it back to Wright, whereupon Wright would eat the paper.

State Police Detective Mayfield, who was listening while sitting in a nearby detective's office, conferred from time to time with Detective Moser during the latter's interrogation of Wright. At one time during Detective Moser's interrogation, Detective Mayfield told Moser: "Keep it up. It takes a long time. Do the best you can. We don't have anything now, just try to get what you can." Eventually, Detective Mayfield determined that he had heard enough and that it was time to obtain a videotaped confession from

Defendant. A Wilmington police sergeant was called upon to set up a video camera in a nearby conference room. After the camera was set up, Detective Mayfield and Detective Moser conducted the only recorded interrogation of Defendant. The interrogation began at 7:34 p.m., roughly thirteen hours after Defendant had been taken into custody.

The interrogation began with an attempt [FN3] by Detective Mayfield to advise Defendant of his *Miranda* rights. There followed an interrogation lasting roughly forty minutes in which Defendant told the police he was the triggerman in the HiWay Inn murder. The gist of his story was that "Tee" (Lorinzo Dixon) told Wright that he (Dixon) had scouted the HiWay Inn, that no one was there, and that it would be easy pickings. Defendant asserted that while at the package store Dixon ordered him to shoot the clerk and that if he did not, Dixon would kill Defendant. During his interrogation Wright repeatedly made statements which were contrary to the evidence. As discussed in some detail later, there were also numerous instances during the interrogation when Wright appeared to change what he was saying so as to yield to suggestions from Detective Mayfield.

FN3. As discussed later, the *Miranda* rights given by Det. Mayfield were defective. *See infra* Part F(viii).

*9 The day after Defendant's interrogation the police executed a search warrant on Lorinzo Dixon's apartment. As with the search of Defendant's home, the police failed to uncover any evidence at Dixon's apartment linking Dixon (or Wright) to the crime. Detective Mayfield later showed a photograph of Dixon to Ms. Milner, the barmaid, in an effort to determine whether Dixon was the mysterious man who came into the tavern about an hour before the shooting. She did not recognize Dixon. When shown a photograph of Wright, she did not recognize him either.

Aside from Wright's confession, the case against him was weak to non-existent. The investigation yielded no forensic evidence linking either Wright or Dixon to the crime. The murder weapon was never recovered, no shell casings were found, neither Wright's nor Dixon's fingerprints were found at the scene, no shoeprints matching shoes known to be owned by Wright or Dixon were ever found at the scene, no bloody clothing and no .22 caliber weapon was found at either Wright's or Dixon's home, and no red plaid shirt was found at either home. There were no eyewitnesses to the crime and there was no functioning security camera which recorded images of the robbery and murder. The only evidence linking Wright to this crime, other than his confession, was an alleged jailhouse confession by Wright to another prisoner. The jailhouse informant has since executed an affidavit in which he recanted his testimony about Wright's supposed confession.

3. Wright's Alibi

Leondre Price frequently lived in Wright's home. Indeed he and Wright dropped out of school together. Price executed an affidavit stating that early on the night of the murder he, Wright, and some others got into a friendly argument over who was the best pool player. They decided to settle the issue at Georgie Boy's Pool Hall, arriving there around 7:00 or 7:30 p.m. They shot pool for several hours, and then purchased chicken from Lacy's, which is across the street from Georgie Boy's. They drove back to Wright's home around 11:45 p.m. or midnight.

Willie Allen is Leondre Price's stepfather. He was also at Georgie Boy's on the night of the murder and remembers Price, Wright, and some others arriving around 7:30 to 8:00 p.m. and staying until about midnight. Mr. Price remembers that during the evening they brought in chicken from Lacy's.

At trial Wright was portrayed as a successful drug dealer who had no need to commit a robbery. Kevin McIntosh was one of his valued customers. McIntosh was standing on the sidewalk near Wright's home around 11:30 p.m. on the night of the murder when two cars pulled up and Wright, Price, and some others got out. McIntosh spoke with them for a few minutes and then left.

Wright contends that Kevin Jamison and Jamison's cousin, Norman Custis, committed the murder. His evidence at the Rule 61 hearing consists almost exclusively of rumors on the street and alleged jailhouse

confessions by Jamison. Myron Williams, for example, executed an affidavit in which he asserted that when he was incarcerated at Gander Hill Jamison told him that he (Jamison) "knew 100 percent that Marlow didn't do the murder. * * * That's my work, I did it." Another individual incarcerated with Jamison, Calvin Brooks, executed an affidavit attesting that Jamison told him that "Marlow didn't kill that man. My cousin Norman and I did it." A third fellow prisoner of Jamison's executed an affidavit attesting to the fact that while in jail, Jamison told him: "They got the wrong mother fucker. Marlow didn't kill that man. I know that for a fact. It was me and my cousin."

4. Wright's co-perpetrator—Lorinzo Dixon

*10 Wright's co-perpetrator, Lorinzo Dixon, testified during the Rule 61 evidentiary hearing. Dixon pled guilty to robbery in the first degree and a weapons charge stemming from the HiWay Inn crime. He continues, however, to maintain his innocence. By the time Dixon accepted the State's plea offer, Wright had been convicted of capital murder and sentenced to death. Facing charges of murder in the first degree, conspiracy, robbery in the first degree, and possession of a deadly weapon with intent to commit a felony, Dixon agreed to plead guilty to robbery in the first degree and possession of a deadly weapon with intent to commit a felony in exchange for the other charges being dismissed and a recommendation of the State for a five year sentence which he believed would result in his release after six months.

Dixon explained his rationale for pleading guilty to a crime he still contends he did not commit. "I just seen friends of mines get the death penalty for a crime he didn't commit. I was scared. I didn't want to get the death penalty. So I accepted the plea." Dixon recounted his lawyer's advice: "I was told was [sic] Marlow spent $60,000 on a lawyer. I am a public defender. You are going to die, Mr. Dixon. I took the plea."

B. PROCEDURAL HISTORY

It would be an understatement to say that this case has a long and convoluted history. Defendant Wright was represented at trial and his first penalty hearing by John M. Willard, Esquire, who at that time had been a member of the Bar for approximately sixteen years. Mr. Willard had previously been involved in a capital murder case as co-counsel with other attorneys, but this was his first time as lead counsel. It is somewhat misleading to refer to Mr. Willard as "lead counsel," as he had no lawyer assistance nor did he have the assistance of an investigator. Mr. Wright's family apparently had little money, and the only money available was used to pay Mr. Willard's $10,000 fee. No money was available to hire an investigator. As a result, Mr. Willard, who had no formal training as an investigator, was forced to act as his own. On many nights, he went to the Riverside area of Wilmington looking for possible witnesses. Riverside was an inner-city, predominantly black neighborhood where residents are often reluctant to talk to the police. Mr. Willard, who is white, likewise encountered a great deal of reluctance on the part of the residents to speak to him. On at least one occasion, he was threatened with physical harm by someone in the neighborhood.

Prior to trial, Mr. Willard filed a motion to suppress Defendant's statement to the police. The motion alleged that Defendant was high on heroin at the time of the statement and that he was therefore unable to voluntarily waive his rights under Miranda. This court found that Wright was indeed intoxicated on heroin at the time he gave his statements but denied the motion, holding that the waiver of his Miranda rights was nevertheless knowing, voluntary, and intelligent. Wright then filed a motion for reargument requesting an opportunity to supplement the record with additional information concerning the effects of heroin use. The court denied the motion for reargument, holding that such information would not have affected its decision.

*11 Wright then filed a second motion in which he claimed that his statement should be suppressed because his detention from the time of his arrest until the time he made the statement was unreasonable. The Court denied the motion holding that there was "no evidence in this case of unreasonable delay." [FN4]

FN4. *State v. Wright,* 1992 WL 207255, at *4 (Del.Super.).

In 1992 after a two week trial, a jury convicted Wright on two counts of First Degree Murder (intentional murder and felony murder), First Degree Robbery, and three counts of Possession of a Deadly

Weapon during the Commission of a Felony. He was acquitted of First Degree Conspiracy. Following a penalty phase hearing, the jury unanimously found the statutory aggravating factor that the victim was over 62 and unanimously recommended death. The court later sentenced Wright to death by lethal injection.

Defendant was represented by Joseph M. Bernstein, Esquire, on his direct appeal. On appeal, Wright contended that: (1) his confession should have been suppressed because it was obtained following an unreasonable delay between arrest and initial presentment; (2) the jury instructions during the penalty phase of the trial were insufficient in defining mitigating circumstances; (3) the trial judge erred in her determination of non-statutory aggravating circumstances and mitigating circumstances; (4) the imposition of the death sentence was disproportionate to the penalty imposed in similar cases; and (5) application of the death penalty statute, as revised after the date of the offenses in this case, violated the Ex Post Facto Clause of the United States Constitution. The Delaware Supreme Court rejected Wright's contentions and affirmed his conviction and sentence.

In 1994, Wright, still represented by Mr. Bernstein, filed his first motion for post conviction relief pursuant to Superior Court Criminal Rule 61. He alleged that his trial counsel was ineffective during both the guilt and penalty phases of trial. After ordering an evidentiary hearing, an expansion of the record, and full briefing on the motion, the trial judge held that Wright's trial counsel was prejudicially ineffective during the penalty phase and vacated Wright's death sentence.

Wright's second penalty hearing was held in 1995. The new jury unanimously found that the evidence showed beyond a reasonable doubt the existence of two statutory aggravating circumstances. By a vote of 9–3 the jury recommended imposition of the death penalty. After considering the jury's recommendation and conducting its own independent analysis, the court again imposed the death penalty. The Delaware Supreme Court affirmed the sentence on appeal. Wright filed a petition for writ of certiorari to the United States Supreme Court, which was denied.

Wright, now represented by Thomas A. Foley, Esquire, and Kevin J. O'Connell, Esquire, filed his second motion for post conviction relief in 1997. In that motion, Wright alleged ineffective assistance of counsel in connection with his 1992 trial and appeal. After an expansion of the record, another evidentiary hearing, and full briefing, the court denied the motion and the Supreme Court affirmed that decision.

*12 Next, Wright turned to the federal courts. In 2000, Messrs. Foley and O'Connell filed a petition for writ of habeas corpus on his behalf in the United States District Court for the District of Delaware. In 2003, while his habeas corpus petition was pending in the federal court, Wright filed a third motion for post conviction relief in this court, which this court stayed pending the outcome of the federal case. It appears from the district court docket that over the span of eight years in federal court, the case went through several evidentiary hearings and several rounds of briefing. In 2008, Wright filed the present motion for post conviction relief. Shortly thereafter, Wright asked the federal court, which had not yet ruled on his petition for habeas corpus, to stay the federal proceedings so that he could exhaust his state law remedies. The district court granted that motion.

Both sides have filed several voluminous and helpful briefs in support of their respective positions. The court conducted oral argument lasting several hours on the legal issues raised by the present motion, after which it concluded it needed an evidentiary hearing to resolve certain predicate factual issues. Pursuant to Superior Court Criminal Rule 61(h), the court ordered an evidentiary hearing, which lasted a week. The hearing reconvened the following month and lasted for two additional days.

Following the hearing the court requested proposed findings of fact and conclusions of law. Following those submissions the court requested additional briefing on several narrow legal issues. This is the court's ruling on Defendant's fourth Rule 61 Motion.

C. THE EVIDENCE AT THE RULE 61 EVIDENTIARY HEARING

Although Wright presented some factual testimony at the Rule 61 hearing, the large bulk of the evidence related to his ability or inability to understand what was happening during his interrogation and

the reliability of his confession. Defendant introduced persuasive expert testimony at the evidentiary hearing concerning his addiction to heroin, the effects of that addiction as manifested during his interrogation, his intellectual status, and his susceptibility to suggestion. The State did not offer contradicting expert testimony. The court will summarize the experts' testimony.

1. Deborah Mash, PhD—The effects of heroin on Defendant

Deborah C. Mash, PhD. is Professor of Neurology and Molecular and Cellular Pharmacology at the University of Miami Miller School of Medicine. She studies the chronic effects of abused substances on the brain for the purpose of finding medication for treatment. Dr. Mash has worked extensively with addicted individuals, including heroin addicts. She is an expert in neuropharmacology, heroin, and brain function.

Dr. Mash testified that defendant was "markedly impaired" at the time of his interrogation. She also testified to a reasonable degree of medical certainty that Defendant's purported waiver of his *Miranda* rights and subsequent confession were not knowing, intelligent, and voluntary. These opinions are based on her belief that Wright did not comprehend the questions he was asked regarding his rights. She described the dissociative, detached, and dream-like state resulting from heroin use and noted that Defendant's behavior during his interrogation indicated that he was in such a dream-like state. She described Defendant's occasional refusal to answer questions orally, writing down answers on paper, and then eating the paper as "bizarre and paranoid." She linked this behavior to the dissociative state of an opiate high.

*13 Dr. Mash observed the initial signs of withdrawal in the video of the Defendant's interrogation. These included violent yawns, chills, restlessness, digging his hands in his pants, and a runny nose. These signs indicated that Wright was in a state of opiate intoxication and was beginning to go into withdrawal, which impacted his cognitive abilities.

Dr. Mash further explained that Defendant's use of heroin early in life led to dependence, so by the time of his interrogation he was severely dependant on and tolerant of heroin. Moreover, she described how an addiction to heroin or opiates is a brain disease that leads to compulsive drug use; problems with memory, attention, motivation, and decision-making; and long-lasting, fundamental brain changes. She also discussed the short half life of heroin in the blood, its conversion to morphine in the body which lasts only two to three hours, and the subsequent anticipation and fear of withdrawal on the part of the addict.

Dr. Mash also reviewed the testimony of the detectives involved in the interrogation, and she noted that they left the room many times leaving Defendant alone. She believes that Defendant used some of the undiscovered heroin while in custody and that he was high when he confessed. Dr. Mash's opinion is that Defendant was "titrating off" during the eleven to twelve hours he was in custody—meaning that he was using just enough heroin to keep himself in an opiate state, but that he was beginning to go through withdrawal.

Dr. Mash opined that during the time Defendant was in custody, a synergism of the following factors exacerbated his state: a lack of sufficient quantity of heroin to last twelve hours, his low verbal IQ (62 on verbal performance and comprehension), his suggestibility, and sleep deprivation. She discussed how stress and the serious fear of withdrawal would have exacerbated Defendant's altered state inducing a fight or flight response because he was not using enough heroin to stave off withdrawal based on his tolerance.

The court asked Dr. Mash about the half life of morphine. Dr. Mash explained that the amount of heroin in Defendant's system after his arrest would continue to decline exponentially and that even though in her opinion he continued to use and was intoxicated during custody he was not using at the level to which he was accustomed.

Dr. Mash concluded that Defendant did not have the capacity to know what he was saying, did not know what rights he was giving up, and did not understand the consequences of waiving *Miranda* when he was questioned.

2. Robert Maslansky, M.D. The effects of heroin and other impairments on Defendant.

Robert A. Maslansky, M.D., graduated from Columbia University School of Medicine, completed post-doctoral training in internal medicine and endocrinology, and taught as a full professor at New York University School of Medicine. He is board certified in addiction medicine, is a member of and has lectured for the American Society of Addiction Medicine, and has worked with drug addicted individuals for thirty years. In preparation for testifying, Dr. Maslansky reviewed a video of Defendant's interrogation, testimony regarding the video, materials on police interrogation, and the reports of the other experts.

*14 Dr. Maslansky testified both at trial and during this proceeding about heroin and the effect it had on Defendant. Heroin addicts often exhibit pupillary constriction, dry mouth, difficulty urinating, and slow motor responses. Dr. Maslansky affirmed Dr. Mash's conclusion that Defendant was under the influence of heroin during his interrogation. Dr. Maslansky further opined that Defendant's staring, slow responses, eyes' dreamy look, and mumbling all indicated that Defendant was at the tail end of intoxication. Dr. Maslansky also referred to Defendant's “hippopotamus yawn,” sniffling and shuffling, irritability, and ticks as non-verbal manifestations of being high on heroin. He concluded that Defendant did not knowingly, intelligently, and voluntarily waive his rights.

Dr. Maslansky also agreed with Dr. Mash's testimony that Defendant would not have been able to give informed consent due to his verbal comprehension problems. Furthermore, he agreed that Dr. Martell's opinion (discussed below) that Defendant was more suggestible than ninety-seven percent of the normal subjects would have been immensely helpful to him in making his own report prior to trial. According to Dr. Maslansky there is a disconnect between the more primitive parts of Defendant's brain affecting his executive functions such as making judgments about the significance of what is presently happening and projections regarding the future. Therefore, Dr. Maslansky believes Defendant was seriously impaired and the reports of Dr. Martell, Dr. Cooke, and Dr. Mash reinforce his belief. According to Dr. Maslansky, the fact that Defendant was suggestible, had cognitive impairment, and had verbal difficulties all compound the effects of the heroin intoxication, thus, affecting his capacity to make informed decisions.

3. Daniel Martell, Ph.D.: Defendant's ability to resist suggestion.

Daniel Martell, Ph.D., received his degree in psychology from the University of Virginia and completed both his clinical internship and his post-doctoral fellowship in forensic neuropsychology at New York University Medical Center and Bellevue Hospital. He also did clinical work at Kirby Forensic Psychiatric Center, a maximum security hospital for the criminally insane. Dr. Martell has been practicing in forensic neuro-psychology for about twenty five years and is board certified in forensic psychology. He is a fellow of the American Academy of Forensic Psychology, a former member of the Board of Directors of the American Academy of Forensic Sciences (“AAFS”), and received AAFS's Meyer Turkler award for distinguished contributions to behavioral science and the law.

A neuropsychologist studies how brain damage affects human behavior. Dr. Martell has lectured and published on this, and is on the faculty at the University of California Los Angeles School of Medicine. He has testified several hundred times as an expert witness in state and federal courts for both the prosecution and defense, about 85% of the time for the prosecution. Dr. Martell has opined in previous cases about suggestibility assessments, voluntariness of confessions, and comprehension of *Miranda* warnings.

*15 In this case, Dr. Martell was asked to evaluate Defendant's vulnerability to change his answers, his suggestibility, and malleability as applied to a police interrogation. Dr. Martell testified that he evaluated Defendant for about three hours focusing on the Gudjonsson Suggestibility Scale (“GSS”), memory testing, tests for malingering, and a neuropsychological interview. After evaluating Defendant, Dr. Martell opined that Defendant had difficulties in school, a verbal comprehension deficiency, and likely has a learning disability in reading and math.

Dr. Martell described the GSS suggestibility scale as a test of the degree of vulnerability a person has to suggestions that may contaminate or influence that person's ability to recall an event. According to his testimony, a person's degree of suggestibility is permanent, but being high on heroin or other factors could

temporarily make someone more suggestible. The test is administered by telling the subject a story, asking the subject to recall the story from memory, asking the subject to recall it again after thirty minutes, and then asking the subject a series of suggestive questions that may or may not be answerable from the story. After the questions, the test administrator determines a score based on how many mistakes the subject made and then asks the subject to answer the questions again and to try to be more accurate. The administrator uses this process to develop a yield score, i.e. a measure of how much the subject yields to suggestion. For example, after initially being asked "Did the assailant in the story use knives or guns?" and answering "guns," the subject is again asked the same question. If the subject responds by saying "knives" the second time, then the yield score is greater, showing an increased propensity to yield to suggestion. The GSS provides, among other things, a "shift score" which measures the subject's susceptibility to change (shift) his answers after being admonished by the test administrator.

Dr. Martell opined that Defendant is "extremely suggestible" and "that he is more likely to adopt an interrogative suggestion than 94 percent of normal people." Wright's shift score shows that he is more likely to change his answers in response to suggestion or pressure than 998 people out of 1000. Dr. Martell labeled this a "profound impairment" "akin to mental retardation." He also stated that Defendant has a significant tendency to confabulate; that is, after being told a story and asked to repeat it, Wright would add details not in the original. He testified that this tendency is significant because there are many factual inaccuracies in Defendant's video-taped statement, which may reflect a similar psychological process.

Dr. Martell noticed that Defendant exhibited little emotion during his interrogation and answered questions in a monotone voice indicating heroin intoxication. Dr. Martell also testified that situational factors, specifically the heroin intoxication and sleep deprivation, exacerbated Defendant's underlying trait of suggestibility at the time of his interrogation. These situational factors likewise exacerbated Defendant's ability to understand the *Miranda* warning. Dr. Martell's testing suggests that Defendant has trouble understanding information presented verbally.

*16 Dr. Martell also testified regarding the risk factors for false confessions that were present during Defendant's interrogation. Defendant's young age, learning disability, intellectual deficiencies, cognitive deficiencies, tendency to confabulate, and extreme suggestibility all put him at high risk for making false statements. Dr. Martell further opined that Defendant's suggestibility was apparent from the number of wrong statements that he made during his interview including being wrong about the weapon, the number of shots, and the manner of escape. He also testified that Defendant demonstrated his suggestibility several times during the interrogation.

The transcript of Wright's interrogation abounds with examples of shifting and yielding. Some examples follow. One notable example relates to information contained in the Homicide Pass On [FN5] prepared by Detective Mayfield. In the Pass On Detective Mayfield noted that the taller suspect was wearing a black knit hat and the shorter was wearing a "baseball type cap." During the interrogation [FN6] Wright first denied he was wearing a hat, but quickly yielded to the detective's suggestion he was wearing a hat:

FN5. This is a document containing information about a crime being investigated and which is distributed to other police officers and agencies.

FN6. In the quoted transcripts of Defendant's interrogation, "E.M." is Detective Mayfield, and "W" is Wright.

EM: Did, were you wearing a hat that night?
W: No. Not that I know of.

EM: Do you usually wear a hat?

W: Yeah.

EM: So you usually wear a hat but you don't know if you're wearing a hat this night?

W: Yeah.

EM: Okay. What about Lorenzo, was he wearing a hat?

W: I believe so. Maybe we both was wearing a hat.

The Pass On also reported that the crime took place "between 2230 and 2245 hours." However, Wright during his interrogation told police the crime happened later. Once again Wright yielded to suggestion:
EM: Okay. What time did this happen, approximately, as far as you know?

W: What time did, ah ...

EM: All of this happen.

W: It's about, came and got me about ll, I'd say about 11:30, 12 o'clock.

EM: Uh huh. Could it have been earlier?

W: Could have been.

The Pass On also described the suspects as wearing dark clothing, but during the interrogation Wright told the police he did not remember what pants he was wearing. The transcript shows that Detective Mayfield steered him into stating he was probably wearing jeans:
EM: What about yourself, what were you wearing?

W: I can't really say. I forgot. It's been, I can't really say.

EM: You have no idea at all?

W: No, sir.

EM: Do you usually wear jeans?

W: Yeah.

EM: Well, do you think you had jeans on that night?

W: Yeah. I probably had jeans on

In summary, Dr. Martell opined that Defendant was a vulnerable individual who was high risk for providing unreliable information and that Defendant's statement "may not be the most reliable confession ever provided."

4. Solomon Fulero, Ph.D., J.D.

Solomon Fulero, Ph.D., J.D., is Professor of Psychology at Sinclair College, Clinical Professor of Psychiatry at Wright State University School of Medicine, and adjunct Professor of Law at the University of Cincinnati School of Law. Dr. Fulero has a forensic psychology practice in Ohio where he is also a licensed attorney. He received his doctorate in psychology and his law degree from the University of Oregon in 1979. He is a fellow of the American Psychological Association and a member of the Ohio State Bar Association.

*17 During the 1990s, Dr. Fulero was appointed by the United States Attorney General to the Technical Working Group on Eyewitness Evidence that was composed of prosecutors, defense attorneys, law enforcement officers, and scientists. The Group compiled a report entitled *Eyewitness Evidence, a Guide for Law Enforcement* that the Department of Justice published. Dr. Fulero has also published peer-reviewed works on the topic of the psychology of interrogations and confessions. His work was cited by the Supreme Court of the United States for the proposition that those with cognitive limitations are more suggestible and, thus, more likely to confess falsely.[FN7] The Court also cited the article for its argument that people with low IQs are more likely to act as followers, and the article goes on to discuss competency to waive *Miranda* rights.[FN8]

FN7. *See* *Atkins v. Virginia,* 536 U.S. 304, 321 n.25 (2002).

FN8. *Id.* at 318, n.24.

Dr. Fulero has spoken extensively about of the psychology of interrogations and confessions at national and international scientific meetings. He also teaches a course in psychology and law and has co-authored a textbook containing a chapter on interrogations and confessions. Moreover, he has testified at hearings in state, federal, and military courts regarding the psychology of interrogations and confessions on behalf of the prosecution and defense.

Dr. Fulero testified regarding the Reid technique—a police interrogation method used to elicit confessions by making suspects believe that confessing is in their best interest. According to Dr. Fulero, the Reid technique usually involves the use of a bare interrogation room, containing only a desk and chairs, located within a maze of hallways at a police station. The technique requires an officer to attempt to establish a rapport with the suspect so that the suspect will be more likely to talk and believe that the officer is on his or her side. The first step in such an interrogation is direct positive confrontation—for example, "We already know you're guilty, we're not here to talk about whether you're guilty, we're here to talk about what happened." At this point a suspect is put in a hopeless position and is, therefore, more likely to accept what the officer suggests as a face-saving way out or an "incentive." Incentives can include confessing to end the interrogation and escape the room, avoiding the consequences of threats, or accepting the ploy by the police that they believed what happened may have been an accident.

Dr. Fulero further testified that an incentive could also be the presentation of an alternative question to the suspect. For example, "We already know that you did this, but the real question is whether or not this was planned or whether it was accidental." Other alternative include suggesting that someone else was at fault, that the suspect was under the influence of drugs, or that the suspect was coerced.

Dr. Fulero saw evidence of the Reid technique during Wright's interrogation. He described the Reid technique as psychologically coercive. Specifically, he referred to Defendant being asked if the crime was planned or accidental and whether he was on drugs. He pointed to questions relating to the co-perpetrator taking advantage of and threatening Defendant, thus inviting Wright to attempt to minimize his culpability by blaming Dixon. These questions, according to Dr. Fulero, demonstrate that the officers were attempting to use the Reid technique to allow Defendant to save face and minimize his involvement in the crime by admitting to accident, drug use, or threats.

*18 Dr. Fulero also testified about the risks of false confessions. He stated that false confessions increase significantly after six hours of interrogation. Defendant was in custody for nearly thirteen hours, when the interrogation ended. According to the testimony, sleep deprivation is also a contributing factor to false confessions and Defendant had not slept the night before he was interrogated. Other factors that increase the possibility of false confessions are cognitive limitations, drug use, suggestibility, and personality type. Evidence of all of these was presented in the instant case.

According to Dr. Fulero, Wright likely had difficulty understanding the *Miranda* warnings given to him. Dr. Fulero stated that the Wright's verbal IQ of 62 would affect his ability to understand his rights and

his ability to decide whether to make a statement. Someone with Defendant's degree of deficit can learn to mask his disability by either nodding or saying "yes" a lot. When presented with the litany of his *Miranda* warnings, this "yeah-saying" could have occurred, even if Defendant did not comprehend the warning. In fact, Dr. Fulero testified that he saw no verbal indication that Defendant understood his rights.

Finally, from his review of Defendant's confession, Dr. Fulero testified that some of the information provided by Defendant was not correct, for example the caliber of the gun used in the crime and the number of shots fired. Moreover, he stated that Defendant provided no information that was new to the police. When a statement occurs in such a manner, Dr. Fulero opined, contamination of the confession can occur calling into question its reliability. As Dr. Fulero put it, the inaccurate statements "raise red flags about the reliability of the confession ... [and Defendant's] ability to knowingly and intelligently waive his Miranda rights."

4. Significance of Expert Testimony

The expert testimony does not necessarily mean that Wright's interrogation was unconstitutional. For example, there is nothing illegal about a police officer's use of the Reid technique during interrogations of suspects. Indeed, that technique has frequently been accepted as a legitimate investigative tool. Moreover, the court notes that the experts were not criticizing the police. None of them suggested, for example, that police officers must administer a GSS or IQ test before questioning a suspect.

Nonetheless, the expert testimony enables the court to assess the reliability of Wright's confession. In this regard, the court finds that Wright's confession was almost entirely lacking in reliability. In particular, the court finds that (1) Wright likely did not understand his rights when given the *Miranda* warnings; (2) Wright was predisposed to being easily persuaded; (3) Wright's lack of sleep, the length of his interrogation, his heroin intoxication, and the early withdrawal stages all exacerbated his predisposition to suggestion; and (4) the interrogation was designed in part to suggest the "correct" answers to Wright. Confirming the lack of reliability of Wright's statement is the undisputed conclusion that many of the key "facts" recited by Wright in his statement are demonstrably wrong. As discussed below, these factual findings take on considerable importance in determining whether Wright can invoke the actual innocence exception to the procedural bars contained in Rule 61. These factual finds are also important to the court's findings regarding whether Defendant knowingly and intelligently waived his *Miranda* rights.

D. DEFENDANT'S CLAIMS

*19 Defendant, who twice amended his present Rule 61 motion occasions, presents multiple arguments which he contends require vacation of his death penalty or his conviction or both. His claims can be summarized as follows:

1. Defendant's felony murder conviction must be vacated because the felony murder conviction was used as a statutory aggravating circumstance, and his death penalty must also be vacated.

2. Defendant is actually innocent.

3. Defendant's statement to the police was involuntary.

4. All of Defendant's prior counsel rendered ineffective assistance of counsel.

5. Defendant's previous counsel rendered ineffective assistance to Defendant at his second penalty hearing.

6. This court failed to instruct the jury at Defendant's second penalty hearing that the aggravating factors must outweigh the mitigating factors beyond a reasonable doubt before the jury could recommend the death penalty.

7. Defendant's conviction and sentence must be vacated because the State withheld potentially exculpatory evidence in violation of *Brady v. Maryland.* [FN9]

FN9. 373 U.S. 83 (1963).

8. Defendant's statement was obtained in violation of *Miranda v. Arizona*. [FN10]

FN10. 384 U.S. 436 (1966).

9. Defendant's *Miranda* waiver was not made knowingly or intelligently.

E. RULE 61 PROCEDURAL BAR ANALYSIS

Motions for post conviction relief in this court are governed by Superior Court Criminal Rule 61. The cornerstone of that rule is a series of procedural bars intended lend some finality to criminal convictions. Much of this case turns on those procedural bars. Wright asks this court to apply an “actual innocence” exception to those procedural bars akin to that found in *Schlup v. Deco*.[FN11] Before the court may do so, it must engage in a three-step process: first, it must define the “actual innocence” exception and identify its parameters; second, it must determine whether the exception is consistent with the history or purpose of Rule 61; and, third, because this judge is not free to rewrite Rule 61 on his own, the court must determine whether the actual innocence exception can be found within the existing language of the rule. After this process the court's work is not yet done. It must determine whether Wright has adduced evidence sufficient to invoke the actual innocence exception.

FN11. 513 U.S. 298 (1995).

It is important to note early on that the Supreme Court has never held that the actual innocence exception is mandated by the federal constitution. Rather it arises from the Court's view of the equitable nature of federal *habeas corpus* jurisdiction. Consequently, *Schlup* is not binding on the states. Nonetheless, as discussed below, the court finds that this exception is found within Rule 61(i)(5).

1. The actual innocence exception in the Supreme Court.

The seminal case standing for the actual innocence exception is the United States Supreme Court's decision in *Schlup v. Delo,* wherein the Court held:

However, if a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error, the petitioner should be allowed to pass through the [procedural bar] gateway and argue the merits of his underlying claims. [FN12]

FN12. *Id*. at 316.

*20 In other words, the actual innocence exception does not itself entitle the prisoner to relief; rather the exception merely allows courts to consider constitutional claims which would otherwise be procedurally barred.

In order to invoke the actual innocence exception, the prisoner must show by newly discovered evidence that it is more likely than not that a reasonable juror would not find him guilty beyond a reasonable doubt.[FN13] This does not require the reviewing court to decide whether the prisoner is guilty beyond a reasonable doubt. Rather the court must make “a probabilistic determination about what reasonable, properly instructed jurors would do.” [FN14] This burden is a difficult one for movants to satisfy; it is intended to limit findings of actual innocence to “rare” or “extraordinary” cases.[FN15]

FN13. *Id*. at 299.

FN14. *Id*. at 329.

FN15. *Id*. at 321.

In determining whether a prisoner has made the requisite showing of actual innocence, the court must assess all of the evidence, including that which was excluded and that which was wrongfully admitted:

When presented with an attempt to invoke the actual innocence exception the court is free to evaluate the credibility of the witnesses and weigh the evidence. It may consider evidence which was previously excluded or which should have been excluded, giving proper weight to the reliability of that evidence. In assessing the adequacy of petitioner's showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial.[FN16]

FN16. *Id*. at 327–28.

Unlike a summary judgment ruling, the actual innocence exception often requires the reviewing court to assess the credibility of the witnesses:

Obviously, the Court is not required to test the new evidence by a standard appropriate for deciding a motion for summary judgment. Instead, the court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence.[FN17]

FN17. *Id*. at 331 (internal citations omitted).

There is considerable debate in the lower federal courts whether the motion must be discovered by "newly presented" or "newly discovered" evidence. [FN18] Some, such as the Third Circuit, have refused "to weigh in ... on the 'newly presented' versus 'newly discovered' issue[ ]." [FN19] Fortunately this court need not predict the winner of this debate because it finds that the expert testimony comes within the sort of evidence envisioned in *Schlup*. According to the *Schlup* court "[t]o be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence-whether it be *exculpatory scientific evidence,* trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." [FN20] This court finds that the voluminous expert testimony adduced at the Rule 61 hearing was not reasonably available to Wright at the time of his trial and therefore falls within the category of evidence contemplated in *Schlup*.

FN18. *Wright v. Quarterman,* 470 F.3d 581, 591 (5th Cir.2006).

FN19. *United States v. Davies,* 394 F.3d 182, 191 n. 8 (3rd Cir.2005).

FN20. *Id*. at 324 (emphasis added).

2. The history and purpose of Delaware's post conviction procedural bars.

*21 The development of post conviction remedies in state courts was in large part spurred by the expansion of federal *habeas corpus* jurisdiction. In 1867, Congress extended the reach of the federal writ of habeas corpus to persons convicted of crimes in state courts .[FN21] At common law, the writ of habeas corpus could be used only to test the jurisdiction of the court in which the prisoner was convicted and

sentenced.[FN22] Toward the end of the 19th century, federal courts began to use the fiction that certain constitutional errors deprived the trial court of jurisdiction, thus enabling federal courts to review state criminal convictions for constitutional error under the guise of the writ of habeas corpus. This fiction was abandoned by the Supreme Court in 1942,[FN23] and state criminal convictions became subject to review for constitutional error without regard to whether that error somehow deprived the state trial court of "jurisdiction" to hear the case.[FN24]

FN21. *Habeas Corpus* Act of 1867, 14 Stat. 385–86 (1867).

FN22. *See Ex parte* *Watkins,* 28 U.S. 193, 194 (1830) (refusing to review on petition for writ of habeas corpus an alleged error by trial court where trial court had jurisdiction to hear case).

FN23. *Waley v. Johnson,* 316 U.S. 101,104–05 (1942) ("[T]he use of the writ [of habeas corpus] in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It also extends to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused.") (citations omitted).

FN24. *Brown v. Allen,* 344 U.S. 443, 447,48 (1953) (federal courts could review constitutional claims arising in state criminal prosecution notwithstanding that those claims had been decided by state trial and appellate courts in that prosecution).

Not surprisingly state courts chaffed at the notion that they were unable to protect the constitutional rights of an accused. In 1973, Justice Powell observed that the "present expansive scope of federal habeas corpus review has prompted no small friction between state and federal judiciaries." [FN25] More importantly, federal habeas review deprived the public of any sense of finality to state criminal judgments.

FN25. *Schneckloth v. Bustamonte,* 412 U.S. 218, 263 (1973) (Powell, J., concurring). The Supreme Court later noted that "there is no intrinsic reason why the fact that a man is a federal judge should make him more competent, conscientious or learned with respect to [federal law] than his neighbor in the state courthouse." *Stone v. Powell,* 428 U.S. 465, 494 n.35 (1976).

Finality is essential to both the retributive and deterrent functions of criminal law. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty.[FN26]

FN26. *Calderon v. Thompson,* 523 U.S. 538, 555 (1998) (internal citations and quotation marks omitted).

Central to the development of state post conviction remedies was the judge-made rule that federal courts should ordinarily not entertain a state prisoner's petition for habeas corpus unless the prisoner has first exhausted his state court remedies.[FN27] This exhaustion requirement was codified into federal law in 1948 with the passage of 28 *U.S.C.* § 2254, which provided in part that "[a]n application for a writ of habeas corpus ... shall not be granted unless it appears that the applicant has exhausted the remedies in the courts of the State...." The exhaustion requirement, according to the Supreme Court "is principally designed to protect the state courts' role in the enforcement of federal law and prevent the disruption of state judicial proceedings ." [FN28]

FN27. *In re Hawk* 321 U.S. 114 (1944). The rule was first articulated in *Exparte v. Royall* 117 U.S.241 (1886).

FN28. *Rose v. Lundy,* 455 U.S. 509, 518 (1982).

A prerequisite to the exhaustion requirement is that "prisoners be given some clearly defined methods [in state courts] by which they raise claims of denial of federal rights." [FN29] Unfortunately at the mid-point of the last century, few states had such procedures in place. In 1965 Justice Brennan emphasized the benefits of viable state post conviction procedures:

FN29. *Young v. Ragen,* 337 U.S.235, 239 (1949).

The desirability of minimizing the necessity for resort by state prisoners to federal habeas corpus is not to be denied. Our federal system entrusts the States with primary responsibility for the administration of their criminal laws. The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and state procedures should ideally include adequate administration of these guarantees as well. If, by effective processes the States assumed this burden, the exhaustion requirement ... would clearly promote state primacy in the implementation of these guarantees. Of greater importance, it would assure not only that meritorious claims would generally be vindicated without any need for federal court intervention, but that nonmeritorious claims would be fully ventilated, making easier the task of the federal judge if the state prisoner pursued his cause further.[FN30]
FN30. *Case v. Nebraska,* 381 U.S.336, 344–45 (1965) (Brennan, J., concurring).

*22 He was forced to lament, however, that "adequate state procedures [are] presently all too scarce." [FN31] Most states rapidly responded to this and similar urgings, and developed straight-forward post conviction procedures.[FN32]

FN31. *Id.* at 345.

FN32. D. Wilkes, Federal and State Postconviction Remedies and Relief 216 (1983).

Delaware was among the early states to adopt an uncomplicated post conviction remedy. Until the middle of the twentieth century, Delaware prisoners seeking post conviction relief in the state courts were forced to proceed by petitions for writs of *habeas corpus or coram nobis*. Those petitioners faced difficult procedural hurdles and the relief offered by these writs was limited in scope. Accordingly, they were not the type of procedures which would likely cause federal courts to impose the exhaustion requirement on Delaware defendants seeking federal habeas corpus relief.

In 1953 the Superior Court adopted Criminal Rule 35.[FN33] According to the commentary of the rule's drafters,

FN33. That rule provided:
The court may correct an illegal sentence at any time. A prisoner in custody under sentence and claiming a right to be released on the ground that such sentence was imposed in violation of the Constitution and laws of this State or the United States, or that the court imposing such sentence was without jurisdiction to do so, or that such sentence was in excess of the maximum sentence authorized by law or is otherwise subject to collateral attack, may file a motion at any time in the court which imposed such sentence to vacate, set aside, or correct the same. Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is not entitled to relief, the court shall cause notice thereof to be served on the

Attorney General, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction or that the sentence imposed was illegal or otherwise subject to collateral attack, or that there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner.

Rule 35(a) is a combination of the first sentence of Federal Rule 35 and Uniform Rule 44 and amplifies and enlarges upon the Federal Rule 35. The adoption of the draft will provide for relief now obtainable by writ of Error Coram Nobis or Habeas Corpus. The failure of the Federal Rules to provide for such relief has been criticized.

Although Rule 35(a) may have provided a sufficient post conviction procedure to implicate the exhaustion requirement in federal habeas corpus proceedings, it became apparent that it had its flaws. For example, there were no time limitations placed on defendants to file post conviction motions, nor were defendants penalized for a failure to present their grounds for post conviction relief at their trial and on their appeal. In a thorough and scholarly master's thesis, former Superior Court Judge Bernard Balick [FN34] observed that at that time defendants had greater freedom of argument in post conviction proceedings than they did in their direct appeals.

FN34. Judge Balick served with distinction on this Court from 1973 to 1994. He continued his judicial career serving as a Vice Chancellor of the Court of Chancery until 1998. The court is indebted to Judge Balick, who has kindly given permission to attach a copy of his thesis to this opinion. The court has done so in order that it will be readily available to the criminal bar.

The absence of limitations in Rule 35(a) is likely explained by the then prevailing federal doctrine that a procedural default by a state prisoner did not bar federal habeas corpus review unless the default was a “deliberate by-pass” by the prisoner of a state rule .[FN35] However, in the mid–1970's the rule evolved in federal courts that a prisoner's procedural default in state court would bar later federal habeas corpus review unless the prisoner could show cause for his or her failure to comply with the state procedural requirement and “actual prejudice” resulting therefrom.[FN36] Not long thereafter Delaware courts engrafted the cause and actual prejudice test onto Rule 35 when the defendant had defaulted on a state procedure.[FN37]

FN35. *E.g. Fay v. Noia,* 372 U.S. 391 (1963); *Johnson v. Zerbst,* 304 U.S. 458 (1938).

FN36. *E.g Francis v. Henderson,* 425 U.S. 536 (1976); *Wainwright v. Sykes,* 433 U.S. 72 (1977).

FN37. *Conyers v. State,* 422 A.2d 343 (Del.1980) (holding that defendant in Rule 35 proceeding who failed to move to suppress evidence must show cause for his failure to do so and actual prejudice as a result); *Johnson v. State,* 460 A.2d 539 (Del.1983) (applying same rule in Rule 35 proceeding to defendant who objected to introduction of confession at trial but failed to challenge it on direct appeal).

Aside from the judicial gloss of the cause and prejudice rule, Rule 35 remained largely unchanged until 1987, when this Court promulgated the “new and expansive Rule 61” [FN38] which rule largely resulted from Judge Balick's masters thesis. In his thesis, Judge Balick expressed concern that the largely unfettered ability of convicted defendants to file petitions for post conviction relief was having a deleterious effect on the administration of justice. The broad scope of the then existing rule was rapidly eroding the common law rule that an application for post conviction relief is not a substitute for an appeal; it resulted in the

inundation of this court with petitions the vast majority of which were meritless; [FN39] and it greatly diminished, if not extinguished, any sense of finality to criminal judgments.

FN38. *Jackson v. State,* 654 A.2d 829, 831 (1995).

FN39. Current Rule 61 has not completely stemmed the tide of repetitive meritless actions. In recent years one convicted felon has filed sixteen Rule 61 motions. *See* *Epperson v. State,* 2010 WL 4009197 (Del.).

*23 As a remedy Judge Balick proposed that (with certain limited exceptions) a post conviction claim should be barred if (1) it was formerly adjudicated; (2) it was not raised in the proceeding leading to conviction; (3) it was presented in an earlier post conviction motion; or (4) it was filed more than two years after the conviction became final. Not long after Judge Balick's proposal, the United States Supreme Court acknowledged the importance of such bars: “We now recognize the important interest in finality served by state procedural rules, and the significant harm to the states that results from the failure of federal courts to respect them.” [FN40]

FN40. *Coleman v. Thompson,* 501 U.S. 772, 750 (1991).

Judge Balick's recommendations (with some minor modifications) were incorporated in Rule 61, which was enacted by this court effective January 1, 1988. The importance of the bars found in Rule 61 has been underscored by rulings of the Delaware Supreme Court. Our Supreme Court apparently sensed that the expedient of denying a meritless claim on its merits—rather than engaging in the sometimes more difficult task of determining whether the claim is procedurally barred—could lead to a drift away from those procedural bars and ultimately undermine the purpose of Rule 61. In order to avoid such an erosion, the Supreme Court has firmly and repeatedly held that trial courts are required to first determine if the post conviction claim is barred and if, and only if, it is not barred are they permitted to reach the merits of the claim. [FN41]

FN41. *Wood v. State,* 2011 WL 4396996, at *1 (Del.2011) (Order) (‘it is well-settled that the Superior Court must determine whether a defendant has met the procedural requirements of Rule 61 before considering the merits of his postconviction claims.”) (citing *Younger v. State,* 580 A.2d 55, 554 (Del.1990)); *Richardson v. State,* 3. A.3d 233, 237 (Del.2010) (“Before considering a motion for postconviction relief on the merits, the application of any procedural bar under Rule 61(i) must be addressed.”); *Norcross v. State,* 2011 WL 6425669, at *12 (Del.2011) (“The threshold issue is whether these claims are procedurally barred under Rule 61(i)).

In sum, at least three general principles can be gleaned from the history of Rule 61. First Delaware's framework for post conviction relief was created, at least in part, to limit the role of the federal courts in resolving state criminal matters. Second, the rule is intended to preserve to the greatest extent possible the concept of finality of criminal judgments. Third, the rule is designed to reduce the burden of applications for post conviction relief on limited and scarce judicial resources. The court finds that the gateway innocence claim is consistent with those purposes.

3. The actual innocence exception does not defeat the purpose of the procedural bars,

As noted above, the creation of modern state post-conviction remedies was in large part a response to the development and enlargement of federal habeas corpus jurisdiction. The idea was that states could preserve much of their sovereignty over state criminal matters if it provided adequate opportunities for post conviction remedies. Adoption of an actual innocence exception furthers this purpose. If Delaware courts were to refuse to consider such an exception, Delaware prisoners would still be entitled to raise it in federal

courts. It goes without saying that it is more consistent with the purpose of Rule 61 if Delaware courts have the first opportunity to pass upon actual innocence claims.

On the surface it might appear that allowance of actual innocence claims is antithetical to the concept of finality of judgments. Experience in the federal courts, however, has taught that legitimate claims of actual innocence are exceedingly rare and therefore the actual innocence exception does not threaten the state's interest in finality.[FN42] "Explicitly tying the miscarriage of justice exception to innocence thus accommodates both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case." ' [FN43]

FN42. *Doe v. Menefee,* 391 F.3d 147, 161 (2nd Cir.2004).

FN43. *Schlup v. Delo,* 513 U.S. 298, 313–14 (1995) (quoting *Murray v. Carrier,* 411 U.S. 478, 496 (1986)).

*24 One might argue that adoption of the actual innocence exception will inundate courts with petitions from prisoners arguing they are actually innocent. This threat is not as ominous as it might sound because the standards are high and petitions not meeting that standard are subject to summary denial. First, the petitioner must demonstrate actual innocence on the basis of new evidence. A mere rehash of the evidence presented at trial will not suffice. Second, the petition must allege a colorable constitutional error. Merely presenting the argument "I am innocent" will not do the trick. Rather the petitioner must show newly presented evidence that "I am innocent and there was a constitutional error in my trial which must be considered because of my innocence." Given these high hurdles the court will be able to quickly dismiss any meritless claims. As the Supreme Court put it "[g]iven the rarity of such evidence, in virtually every case, the allegation of actual innocence has been summarily rejected." [FN44]

FN44. *Calderon v. Thompson,* 523 U.S. 538, 559 (1998).

The court concludes, therefore, that the adoption of an actual innocence exception to the procedural bars in Rule 61 does no injury to the purpose and intent of those bars.

4. An "actual innocence" exception is embodied in the language of Rule 61(i)(5).

A single judge is not free to rewrite the court's procedural rules. Therefore, having concluded that an actual innocence exception is consistent with the purpose of Rule 61, the court must determine whether the exception can fairly be found within the language of Rule 61. The court finds that this is, in fact, the case.

Rule 61(i)(5) provides that three of the procedural bars in that rule shall not apply 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." [FN45] The cases applying subsection five have never turned on the probable guilt or innocence of the petitioner. Rather they turn on the nature of the alleged constitutional violation. But this does not mean that the probable guilt or innocence of the defendant is not a legitimate consideration under the rule. Rule 61 speaks in terms of the "reliability" and "fairness" of the proceedings. No one can reasonably argue (and the parties in this case do not) that the conviction of an innocent person because of a constitutional error does not call into question the fairness and reliability of the result. Finally, by its terms the touchstone of Rule 61(i)(5) is the prevention of a "miscarriage of justice." The execution of an innocent man is the paradigm of a miscarriage of justice.

FN45. Superior Court Criminal Rule 61(i)(5).

5. Wright has adduced sufficient evidence to invoke the exception.

The final inquiry is whether Defendant has made a showing that it is probable that a reasonable juror would not find him guilty beyond a reasonable doubt. The court find he has done so. As noted earlier, there is no forensic evidence linking Wright to the murder of Philip Seifert. No foot prints matching shoes known to be owned by Wright were found at the scene, no fingerprints were recovered, no blood was found on any of Wright's clothing, no shell casings were recovered, there was no working surveillance camera in the store, and there were no eyewitnesses. In short, the only evidence against Wright is his confession, the statement of jail house informant Samuels, and the admission of Lorinzo Dixon during his plea colloquy that he participated in the crime.

*25 Later the court will discuss why Wright's confession should not have been admitted. But even assuming it was properly admitted, the newly presented expert testimony makes it probable that a reasonable juror would not find much of the confession reliable. The expert testimony was discussed at some length earlier in this opinion and need not be repeated here. Suffice it to say that their testimony, coupled with the fact that Wright's confession was often factually wrong, raises grave concerns about its reliability.

It should be stressed that this is not a case in which Defendant has presented testimony from itinerant snake oil salesmen who have opinions for hire. In *Harris v. Vasquez* [FN46] the Ninth Circuit Court of Appeals expressed concern over the prospect of claims of actual innocence being based upon the testimony of experts who were hired for the sole reason that they were willing to present favorable testimony.

FN46. 949 F.2d 1497 (9th Cir.1990).

Because psychiatrists disagree widely and frequently on what constitutes mental illness and defendant could, if Harris's argument were adopted, always provide a showing of factual innocence by hiring psychiatric experts who would read a favorable conclusion.[FN47]
FN47. *Id.* at 1515.

That concern is not present here. The experts who testified on behalf of Defendant are nationally recognized with impeccable credentials. Perhaps most importantly, the State did not offer any evidence disputing their conclusions. Thus the concerns expressed in *Harris* are not present here.

The only other evidence at trial linking Wright to the crime was the testimony of jailhouse informant, Gerald Samuels. Later in this opinion the court opines that the State made no offer of leniency or promise of special favors to Samuels in exchange for his testimony. The court is convinced, however, that Samuels had a unilateral expectation of some benefit to be derived from his testimony. This casts Samuels' testimony in a harsh light. Forty years ago the Delaware Supreme Court quoted "with approval" [FN48] the Illinois Supreme Court in *People v. Hermens* [FN49] in which the latter court wrote:

FN48. *Bland v. State,* 263 A.2d 287 (Del.1970).

FN49. 125 N.E.2d 500 (Ill.1955).

It is, however, universally recognized that such testimony has inherent weaknesses, being testimony of a confessed criminal and fraught with dangers of motives such as malice toward the accused, fear, threats, promises or hopes of leniency, or benefits from the prosecution, which must always be taken into consideration. Some jurisdictions attach such weight to these weaknesses that the rule has been abrogated by statute, while those jurisdictions which follow the rule, recognizing the questionable character of such testimony, attempt to restrict the weight to be given to it by statements that it is not regarded with favor, is discredited by the law, should be weighed with care, is subject to grave suspicion, should be viewed with

distrust, and that it should be scrutinized carefully and acted upon with caution. * * * This court has also said that where it appears that the witness has hopes of reward from the prosecution, his testimony should not be accepted unless it carries with it absolute conviction of its truth.[FN50]
FN50. *Id*. at 504–05 (internal citations omitted) (emphasis added).

*26 The *Hermens* court was writing about testimony from a co-conspirator, but its observations apply with equal force to a jailhouse informant who expects to gain something from his testimony. The court's assessment of Samuels' trial testimony falls far short of "absolute conviction of its truth," and therefore it concludes that the testimony would not have persuaded a reasonable juror that Wright was guilty beyond a reasonable doubt.

Finally the State did not have Dixon's plea colloquy available to it at the time of Wright's trial. The court must consider it, however, in determining if Wright is actually innocent for purpose of the exception to the procedural bars. Dixon's explanation for his plea—that he saw an innocent friend sentenced to death and he could avoid the possibility of a similar fate simply by serving an additional six months in prison—is plausible, if not compelling. The court finds therefore that, even taken in conjunction with the other testimony, Dixon's plea would likely not persuade a reasonable jury to conclude Wright is guilty beyond a reasonable doubt.

In sum, the court projects that in light of the new evidence a reasonable juror would not find Wright guilty beyond a reasonable doubt. The court emphasizes that it is not saying that Wright did not murder Phillip Seifert. It is simply saying that in light of the new evidence it is likely a reasonable jury would not find beyond a reasonable doubt that he did.

6. Application of the actual innocence exception to this case.

In light of the above, the court concludes that Rule 61(i)(5) embodies an actual innocence exception and that Wright has met the high evidentiary burden in order to avail himself of it. This does not mean that all of Wright's arguments are not subject to procedural bars. Rather his claim that his statement was involuntary remains barred by Rule 61(i)(4) because the exception in Rule 61(i)(5) by its terms does not apply to claims barred by subpart (i)(4). Nor does the actual innocence exception save Wright's claim that the jury was improperly instructed on felony murder. That is an issue of state law, and Rule 61(i)(5) applies only to alleged constitutional errors. Finally the court's adoption of an actual innocence exception to the procedural bars does not mean that Wright's arguments do not fall within other exceptions to those bars. Indeed, the court would have entertained Wright's two critical arguments—the *Brady* violation and the *Miranda* violation even if the court had not adopted the actual innocence exception to the procedural bars in Rule 61.

F. ANALYSIS OF DEFENDANT'S CLAIMS

1. Defendant's claim that the jury was improperly instructed on the felony murder rule.

Defendant argues that his conviction for felony murder must be vacated because the court's instruction did not comport with *Williams v. State*.[FN51] He further contends that because the felony murder was one of the statutory aggravating circumstances relied upon by the jury during both of his penalty hearings, his death penalty must also be vacated. These arguments are barred by Rule 61.

FN51. 818 A.2d 906 (Del.2002).

27 In order to understand the application of the procedural bar here, it is necessary to briefly examine the history of the substantive law giving rise to Defendant's argument.[FN52] Felony murder, like all crimes, is defined by statute.[FN53] At the time of Phillip Seifert's murder the crime of "felony murder" was defined as follows: "A person is guilty of murder in the first degree when: * * In the course of and *in furtherance of* the commission or attempted commission of a felony or immediate flight therefrom, the person recklessly

causes the death of another person." [FN54] The statutory phrase "in furtherance of" has received a good deal of judicial attention. In *Weick v. State,*[FN55] the Delaware Supreme Court opined that "in furtherance of" required that "[d]eath must be a consequence of the felony ... and not merely coincidence." [FN56] Twelve years later the Court seemed to depart from the idea that there must be some sort of causal link between the death and the underlying felony. In *Chao v. State* [FN57] (" *Chao I* "), it held that: "[F]or felony murder liability to attach, a killing need only accompany the commission of an underlying felony. Thus, if the "in furtherance" language has any limiting effect, it is solely to require that the killing be done by the felon, him or herself." [FN58] The *Chao I* court did not expressly overrule its earlier decision in *Weick* in reaching its decision, however. The suggestion in *Weick* that there must be a causal connection between the killing and the underlying felony reached full bloom a few years after *Chao I*.

FN52. It should be emphasized that the Court is not examining the merits of Wright's argument, but is only reviewing the substantive law to determine when the three year time limitation in Rule 61 began to run.

FN53. 11 *Del. C.* § 202(a) ("No conduct constitutes a criminal offense unless it is made a criminal offense by this Criminal Code or by another law.").

FN54. Former 11 *Del C.* § 636(a)(2) (emphasis added). Section 636 was later amended to delete the phrase "in furtherance of." 74 Del. Laws c. 246 §§ 2, 3.

FN55. 420 A.2d 159 (Del.1980).

FN56. *Id.* at 163.

FN57. 604 A.2d 1351 (Del.1992).

FN58. *Id.* at 1363.

In 2002, the Supreme Court again had occasion to revisit the "in furtherance" language found in the statute. In *Williams v. State,*[FN59] the Court sought to give effect to that phrase, and held that it required that the murder be committed to facilitate the underlying felony or the escape therefrom. [FN60] The *Williams* court expressly overruled that portion of *Chao I* which was inconsistent with its holding. Five years after *Williams,* the Supreme Court held in *Chao II* [FN61] that *Williams* must be retroactively applied.

FN59. 818 A.2d 906 (Del.2002).

FN60. *Id.* at 912–13.

FN61. *Chao v. State,* 931 A.2d 1000 (Del.2007).

Wright argues that in light of *Chao II* his felony murder conviction and the resultant statutory aggravating circumstance cannot stand. The State contends, however, that Wright's argument is barred by the time limitation found in Rule 61(i)(1) which provides that a motion for post conviction relief must be filed within one year after a conviction becomes final or, in the case of newly recognized rights, within one

year of when the "right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court." FN62 The court agrees with the State.

FN62. Superior Court Criminal Rule 61(i)(1) (emphasis added). Rule 61 was later amended to reduce the three year limitation to one year.

The issue here is when was the interpretation of former section 636(a)(2) "first recognized" for purposes of Rule 61. Defendant argues that it this occurred in *Chao II,* which made the holding in *Williams* retroactive, whereas the State contends it was first recognized in *Williams*. After Wright filed his motion the Delaware Supreme Court resolved the issue, holding that the time for filing Rule 61 motions began when *Williams*—not *Chao II*—was decided. FN63 Because the instant motion was filed more than a year after *Williams* was decided, this aspect of the motion is procedurally barred.

FN63. *Massey v. State,* 2009 WL 2415294 (Del. Aug. 7, 2009).

*28 Defendant argues, in the alternative, that his claim should be heard under the "miscarriage of justice" exception in Rule 61(i)(5). The short answer to that contention is that Rule 61(i)(5) applies only to a "miscarriage of justice because of a *constitutional* violation." FN64 Here there is no constitutional violation alleged; the purported error turns upon the interpretation of a state statute.FN65 Consequently, on its face Rule 61(i)(5) is inapplicable.FN66 By the same token, the actual innocence exception, which the court held is embodied in Rule 61(i)(5) is inapplicable to this claim.

FN64. Superior Court Criminal Rule 61(i)(5) (emphasis added).

FN65. *Ibrahim v. United States,* 661 F.3d 1141, 1143–44 (D.C.Cir.2011) ("any denial of non-constitutional claims (such as statutory protections ...) cannot amount to a 'substantial showing of the denial of a constitutional right." ') (citations omitted).

FN66. In *Claudio v. State,* 958 A.2d 846 (Del.2008) and in *Massey,* the Supreme Court did not consider whether Rule 61(i)(5) could apply to the state law issues raised in *Williams* and *Chao II*. Instead, in both cases it found that there was no "miscarriage of justice" because the instruction actually given in the cases before it comported with the later holding in *Williams*. The same is true here. As discussed in the text, *Williams* held that the murder must facilitate or further the underlying crime or escape therefrom. The instructions given by this Court at the conclusion of the guilt phase portion of Defendant's trial adequately conveyed the concept later adopted in *Williams:* "[T]he murder occurred during the commission of another felony, in this case, that the felony charged is Robbery First Degree. [And] ... the murder was in furtherance of or was intended to assist in the commission of the felony." At oral argument, Defendant argued that the instruction given in his case was deficient because it did not match the language later used in Williams. But a criminal defendant is not entitled to an instruction worded in a particular manner so long as it the instruction adequately conveys the law. *Allen v. State,* 953 A.2d 699, 701 (Del.2008). The instruction given at Wright's trial adequately conveyed the law as later interpreted in *Williams*.

2. Defendant is Actually Innocent

In *Herrara v. Collins* FN67 the United States Supreme Court assumed, but did not decide, that even if no error occurred at trial, the federal constitution requires courts to vacate a conviction if the defendant could show he was actually innocent. Because they are not linked to constitutional errors, such claims are sometimes referred to as "stand alone actual innocence" claims. The stand alone innocence claim in *Herrera* is different to the previously discussed actual innocence exception to procedural bars. In *Schlup v. Delo* FN68 United States Supreme Court explained the difference this way:

FN67. 506 U.S. 390, 417 (1992) ("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.").

FN68. 513 U.S. 298 (1995).

As a preliminary matter, it is important to explain the difference between [the procedural] claim of actual innocence and the [stand alone] claim of actual innocence asserted in *Herrera v. Collins*. In *Herrera,* the petitioner advanced his claim of innocence to support a novel substantive constitutional claim, namely, that the execution of an innocent person would violate the Eighth Amendment. Under petitioner's theory in *Herrera,* even if the proceedings that had resulted in his conviction and sentence were entirely fair and error free, his innocence would render his execution a constitutionally intolerable event.
Schlup's claim of innocence, on the other hand, is procedural, rather than substantive. His constitutional claims are based not on his innocence, but rather on his contention that [constitutional errors occurred at his trial.] [FN69]

FN69. *Id*. at 313–14 (1995) (internal citations omitted) (internal quotations omitted).

Defendant now asks this court to embrace the concept of stand alone actual innocence claims.

The decision to allow prisoners to present stand alone innocence claims is not as easy as it might seem, as there are competing constitutional and public policy questions.[FN70] Indeed the *Herrara* court skirted the issue by simply assuming that such claims can be presented and then finding that the petitioner did not present adequate evidence of his actual innocence. The Chief Justice explained the theory behind the claim in *Herrera:*

FN70. This court does not have to struggle with the additional public policy issue of federalism as it pertains to this issue. *See Herrera,* 506 U.S. at 401 ("Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.").

This proposition has an elemental appeal, as would the similar proposition that the Constitution prohibits the imprisonment of one who is innocent of the crime for which he was convicted. After all, the central purpose of any system of criminal justice is to convict the guilty and free the innocent.[FN71]
FN71. *Id*. at 398 (citing *United States v. Nobles,* 442 U.S. 225, 230 (1975)).

*29 Put another way, "it is crystal clear that the execution of an innocent person is 'at odds with contemporary standards of fairness and decency." ' [FN72]

FN72. *Schlup,* 513 U.S. at 431 (Blackmun, J., dissenting) (citing *Spaziano v. Florida,* 468 U.S. 447, 465 (1984)).

In contrast to the possibility of executing an innocent person, some public policy ground disfavor the actual innocence exception. As discussed earlier, finality is important in our criminal justice system.[FN73] Moreover, "there is no guarantee that the guilt or innocence determination would be any more exact. To the contrary, the passage of time only diminishes the reliability of criminal adjudications." [FN74] It would put the court in the "difficult position of having to weigh the probative value of 'hot' and 'cold' evidence on [defendants'] guilt or innocence." [FN75] Thus this exception should not be taken lightly and if ever embraced by the Delaware Supreme Court, it should only be done so in exceptional cases.

FN73. *See supra* Part E.

FN74. *Herrara,* 506 U.S. at 403 (citations omitted).

FN75. *Id.* at 404.

The court believes that if the Delaware Supreme Court finds a stand alone actual innocence exception, the burden on the defendant would necessarily be very high. The *Herrera* Court observed:

But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.[FN76]

FN76. *Id.* at 417.

A prisoner must show, *by clear and convincing evidence,* that no reasonable juror could find him guilty beyond a reasonable doubt. A reviewing court must make this determination "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial." [FN77] In *In re Davis,*[FN78] the Supreme Court remanded a claim of actual innocence to the District Court for a determination of whether the evidence "clearly establishes petitioner's innocence." Further guidance can be found in Delaware's post conviction remedy statute relating to newly discovered DNA evidence. That statute provides that the court "may grant a new trial if the person establishes *by clear or convincing evidence* that no reasonable trier of fact ... would have convicted that person." [FN79] In light of this guidance, the court finds that for present purposes Wright must establish his actual innocence by showing through clear and convincing evidence that no reasonable juror could find him guilty beyond a reasonable doubt.

FN77. *Sawyer v. Whitley,* 505 U.S. 333, 339, n.5 (1992) (quoting *Kuhlmann v. Wilson,* 477 U.S. 436, 455, n.17 (1986); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142, 160 (1970)) (internal quotations omitted) (noting the Court was considering actual innocence in the bypass provision context).

FN78. 130 S.Ct. 1 (2009) (Mem).

FN79. 11 *Del.C.* § 4504 (emphasis added).

Assuming, but not deciding, that a stand alone actual innocence claim is cognizable in this court, Wright has not satisfied the high evidentiary bar for such a claim. Although the court finds from the record and newly presented evidence that it is more likely than not that a reasonable juror would not find Wright guilty beyond a reasonable doubt, Wright has not proven this point by clear and convincing evidence. The new expert evidence proffered by Wright raises serious doubts about the reliability of his confession, but the court cannot say that Wright has proven by clear and convincing evidence that his statement is entirely lacking in reliability. It is true that Wright was highly suggestible, but the evidence does not show that every statement contained in his confession is the product of suggestion. It is also true that Wright was intoxicated and going through the early stages of withdrawal, but that does not translate to the conclusion that every statement in his confession was untrue. And even though there are inconsistencies between

Wright's confession and the tangible evidence (such as the caliber of the gun and the number of gun shots), other portions of his statement are consistent with the evidence (such as the make and color of the getaway car). In short the court cannot discard Wright's confession entirely.

*30 In addition to Wright's confession, the State proffered the testimony of Gerald Samuels to the effect that Wright admitted to the murder when they were in jail together. The court views this testimony with considerable skepticism, but it cannot say that Wright has shown by clear and convincing evidence that it is false. The State would now have available to it the transcript of Dixon's plea colloquy in which he admitted participating in the crime. Even though Dixon's explanation that he entered the plea because he was offered a sweetheart deal is plausible, it cannot be said that Wright has negated the significance of that plea with clear and convincing evidence. Finally the evidence that Kevin Jamison and Norman Curtis were the actual perpetrators of this crime consists largely of purported admissions to Wright's friends. This falls far short of clear and convincing evidence.

At first blush it may seem anomalous to find that Wright is "actually innocent" for purposes of an exception to the procedural bars of Rule 61 but that he is not "actually innocent" for purposes of a stand alone actual innocence claim. The explanation of course is that different standards of proof are involved. The procedural exception requires proof only to the level of "more likely than not" whereas the stand alone claim requires proof that rises to the level of clear and convincing. Indeed, in *Hose v. Bell,*[FN80] the Supreme Court found that the prisoner had provided sufficient proof to avail himself of the actual innocence procedural bypass but did not provide sufficient proof to establish a stand alone actual innocence claim.[FN81]

FN80. 547 U.S. 518 (2006).

FN81. *See id.* at 555.

3. Defendant's statement was involuntary.

Wright claims that his confession was involuntary. A necessary element of Wright's involuntariness claim is that the police were guilty of coercion or other overreaching when they obtained his confession. The trial judge previously ruled that there was no evidence that the police coerced Wright into making a confession. Therefore, his current claim is procedurally barred.

Wright's argument largely focuses on his mental status and heroin intoxication, and at one time Defendant's state of mind was indeed the focus of a voluntariness determination. In *Townsend v. Sain* [FN82] a defendant who was ill was given a drug which, unknown to the questioning police, contained the properties of truth serum. The Supreme Court found that the defendant's ensuing confession should have been suppressed, holding that "[a]ny questioning by police officers which in fact produces a confession which is not the product of free intellect renders that question inadmissible." [FN83] In the current iteration of this argument, Defendant relies extensively on the impressive array of evidence he has developed concerning his intellectual capacity, his susceptibility to suggestion, the effects of long-term heroin use on his brain, the likelihood he was going through withdrawal while making the statement and the effects of withdrawal on a heroin addict. If *Townsend* were still the standard, the court would have little trouble in finding that Wright's confession was not voluntary. Twenty-three years after *Townsend,* however, the standard changed.

FN82. 372 U.S. 293 (1963).

FN83. *Id.* at 308.

*31 In 1986 the Supreme Court again addressed the voluntariness issue in *Colorado v. Connelly,*[FN84] a case in which a defendant, who suffered from psychosis which interfered with his ability to make free and rational decisions, volunteered a statement. The *Connolly* court held that the constitution did not require the

exclusion of that statement. It reasoned that the voluntariness requirement in state criminal proceedings is rooted in the Due Process clause of the Fourteenth Amendment, which applies only when state action is involved. The Court held that the state action requirement is satisfied in this context only by a showing of police overreaching during the interrogation. According to the *Connelley* Court, absent "the crucial element of police overreaching ... there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process." [FN85] Wright must therefore not only show that he lacked the mental capacity to make a voluntary statement, but also that his statement was the product of police coercion.

FN84. 479 U.S. 157 (1986).

FN85. *Id*. at 163–64.

The police-overreaching issue has already been decided adversely to Wright. In an October 31, 1991, order denying a motion to suppress, the trial judge found that there was no evidence of coercion during Wright's interrogation.

There is no evidence of police coercion related to the Defendant's confession. At the suppression hearing, the officers involved testified that they were unaware of the Defendant's intoxicated state. * * * Although the Defendant was 18 years old at the time of his arrest and had an eighth grade education, there was testimony in the suppression hearing that the Defendant had been arrested previously and had been informed of his rights on those occasions. The fact that the Defendant had barely slept the night before his arrest does not indicate police coercion, as the police had not forced him to stay up all night, and there is no evidence that the Defendant asked to be allowed to sleep before resuming questioning. The Defendant's assertions that the lengthy interrogation caused his will to be overborne are likewise without merit. The facts of this case do not approach the extreme circumstances in which statements have been held inadmissible due to the overbearing influence of a lengthy interrogation.... Although the interrogation was lengthy, there were intermittent breaks and the Defendant was brought a submarine sandwich and two sodas during questioning.

Rule 61(i)(4) provides that "any ground for relief that was formerly adjudicated ... is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice ." In the present application Wright argues that there is evidence of police overreaching. In an appropriate case, an intervening change in the law may warrant reconsideration under the "interest of justice" standard,[FN86] but here Wright's argument is largely a rehash of evidence known to him at the time of his suppression motion. Given the purpose of the procedural bars as discussed earlier in this opinion, the court is unwilling to stretch that exception to include arguments based upon evidence previously available to Defendant. The court therefore finds that the interests of justice do not require it to reconsider Wright's claim. Nor does the "miscarriage of justice" exception found in Rule 61(i)(5) save Wright's argument from the procedural bar because that exception is expressly limited to the bars found in Rule 61(i)(1)-(3) and therefore does not extend to claims such as this which are barred by Rule 61(i)(4).

FN86. *Flamer v. State*, 585 A.2d 736, 746 (1990) ("In order to invoke the 'interest of justice' provision of Rule 61(i)(4) to obtain relitigation of a previously resolved claim a movant must show that subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him.") (citing *Davis v. United States*, 417 U.S. 333, 342 (1974)).

*32 Wright's attempt to re-litigate this court's earlier finding that there was no police overreaching is procedurally barred. As a result, he cannot establish a necessary element to his voluntariness argument and that argument must therefore be rejected.

4. All of Wright's prior post conviction counsel rendered ineffective assistance of counsel.

Wright contends that the counsel who represented him in previous Rule 61 motions were ineffective. In support of his argument, Wright submitted affidavits of Thomas Foley, Esquire and Kevin O'Connell, Esquire, his prison Rule 61 counsel. Mr. Foley concedes in his affidavit that:

- In preparation for filing their 1997 Rule 61, they did not conduct any extra record investigation;
- they made no effort to interview prosecution witnesses;
- they did not attempt to investigate Mr. Wright's claim of innocence;
- they were lacking in the resources, expertise and time to interview witnesses who testified at trial and develop new leads;
- they failed to review the court files of Mr. Jamison and Mr. Curtis;
- when counsel waived the issue of ineffective assistance at the 1995 penalty phase, they did so without first conducting any investigation whatsoever into potential penalty phase witnesses;
- counsel presumed, based upon reputation, that prior counsel had provided adequate representation;
- they failed to gather any records whatsoever pertaining to Petitioner.

Mr. O'Connell states that his relationship with Wright's counsel at his second penalty hearing (Joseph Bernstein, Esquire) deterred him from arguing that Mr. Bernstein was ineffective:

All the lawyers in the conflict program relied on one another for assistance. This fostered an atmosphere where we were hesitant to challenge the effectiveness of our colleagues. Oftentimes, we were called upon to bring claims of ineffective assistance of counsel against lawyers who, at the same time, served as our co-counsel in other capital trials, appeals, and post-conviction proceedings. This made it awkward for me to investigate and present claims that my colleagues at the bar were constitutionally deficient. In this case in particular, I did not research of investigate any claims with regard to Mr. Bernstein's handling of the case because I looked to him regularly for advice. I was uncomfortable second-guessing his performance in this case.

Although the court would have considered the factual averments in the Foley and O'Connell affidavits, it would attach no weight whatever to their contention that they did not provide effective assistance to Wright. Whether they provided effective assistance is a legal conclusion which is to be drawn by the court, not Messrs. Foley and O'Connell.

It is unnecessary for the court to determine whether these lawyers provided effective assistance to Wright because he had no underlying constitutional right to counsel in his motions for post conviction relief. In *Pennsylvania v. Finley* [FN87] the United States Supreme Court quickly disposed of the argument that the constitution provided a right to counsel beyond a direct appeal from the defendant's conviction.

FN87. 481 U.S. 551 (1987).

*33 We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori,* he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.[FN88]

FN88. *Id*. at 553 (citations omitted).

Because he had no right to counsel in his post conviction applications, Wright's ineffective assistance claim, even if true, does not entitle him to any relief.[FN89]

FN89. *Watson v. State,* 2009 WL 2006883, at *2 (Del. July 13, 2009) ("Because there is no constitutional right to counsel in postconviction proceedings, Watson's claim of ineffective assistance of counsel is not viable"). Wright also implicitly suggests that the court should be lenient when applying procedural bars because he was relying on counsel to timely raise claims in his previous applications for post conviction relief. The court declines to do so because it is unwilling to differentiate between defendants who could afford counsel (or had counsel appointed for them) and those who had no post conviction counsel.

5. Counsel was ineffective in Defendant's Second Penalty Hearing.

In his Rule 61 motion Wright argues that his counsel at his second penalty hearing rendered ineffective assistance. He contends that his counsel failed to interview certain family members and failed to discover information about his childhood which might have persuaded the court to spare his life. In support of his contention he cites certain A.B.A. Guidelines, but provides no information as to when those guidelines were promulgated or whether they were in existence at the time of his second hearing. At the outset the court notes that the A.B.A. Guidelines are not the Holy Grail of effective assistance claims. As Justice Alito has observed:

I join the Court's *per curiam* opinion but emphasize my understanding that the opinion in no way suggests that the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment. The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.[FN90]

FN90. *Bobby v. Van Hook,* ___ U.S. ___, 130 S.Ct. 13, 20 (2009)(Alito, J. concurring).

Further, the record is devoid of any evidence showing when the A.B .A. Guidelines relied upon by Wright were promulgated. "Restatements of professional standards, we have recognized, can be useful as 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." [FN91]

FN91. *Bobby v. Van Hook,* ___ U.S. ___, 130 S.Ct. 13, 16 (2009).

*34 Defendant failed to develop any factual basis upon which the court could decide whether his counsel's assistance was ineffective. He submitted an affidavit from one of his previous counsel, Joseph Bernstein, Esquire, but that affidavit dealt exclusively with issues arising during the guilt phase. At the instant Rule 61 hearing Defendant did not question Mr. Bernstein about his preparation for the penalty hearing. Indeed, when the State cross-examined Mr. Bernstein about the penalty hearing, Defendant objected on the basis of relevance and it exceeded the scope of direct. Wright did not present any affidavit from his other counsel at the second penalty hearing, Cheryl Rush–Milstead, nor did she testify at the Rule 61 hearing. Finally, Defendant provided no evidence as to what was the standard expected of attorneys conducting a penalty hearing in 1995.

In short, the court is left without a record as to what Wright's attorneys did, or did not, do in preparation for the penalty hearing. Likewise Defendant did not present any evidence which the court could use to measure the performance of those attorneys. The court therefore finds that this argument has been abandoned.

6. Wright's claim that the jury should have been instructed that the aggravating factors must outweigh the mitigating factors beyond a reasonable doubt.

Citing the United States Supreme Court's decision in *Ring v. Arizona,* [FN92] Wright contends that the jury should have been instructed that it must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before it can recommend the death penalty. Wright reads Ring much too broadly. In that case the Supreme Court held that the reasonable doubt standard applied to the jury's finding of aggravating circumstances—nothing was said about weighing of aggravating and mitigating circumstances.[FN93] In his concurring opinion Justice Scalia described the limited nature of *Ring*' s holding: “today's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.” [FN94] Decisions after *Ring* have repeatedly rejected Wright's interpretation of it and have held that the Constitution does not require a jury to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors.[FN95]

FN92. 536 U.S. 584 (2002).

FN93. *Id*. at 609.

FN94. 536 U.S. at 612 (emphasis in original).

FN95. *People v. Gonzales,* 256 P.3d 543 (Cal.2011); *People v. Banks,* 934 N.E.2d 435 (Ill.2010); *Commonwealth v. Rooney,* 866 A.2d 351, 360 (Pa.2005); *Grandison v. State,* 889 A.2d 366, 383 (Md.2005) (referring to “our repeated determinations that ... *Ring* [does] not require that a jury must find that aggravating factors must outweigh mitigating factors beyond a reasonable doubt.”).

All of the above being said, even if *Ring* required that a jury find beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors, it would be of no help to Wright. *Ring* was decided in 2002, some 20 years after Wright's trial. The United States Supreme Court has held that *Ring* is not retroactive,[FN96] and thus has no applicability to Wright's case, whatever that applicability might otherwise have been.

FN96. *Schiro v. Summerlin,* 542 U.S. 348 (2004).

7. Defendant's conviction must be vacated because of a *Brady* violation.

The court first looks to whether Defendant's argument is procedurally barred. The court has previously held that Wright may present this claim because of the actual innocence exception adopted by the court. Because of the significance of this claim, the court will also consider whether Rule 61(i)(5), without the actual innocence exception, would permit Wright to present this argument.

*35 Defendant's argument is nominally barred because it was not presented within three years [FN97] after his conviction became final and because it was not presented at trial or during his direct appeal.[FN98] However, Rule 61 provides an exception to its procedural bars for “a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality,

reliability, integrity of the proceeding leading to the judgment of conviction." [FN99] Wright has alleged a colorable claim that the State committed a *Brady* violation. The question then becomes whether the evidence suppressed by the State undermined the fundamental legality, reliability, or integrity of the proceedings leading to his conviction. The constitutional due process rights protected under *Brady* are in place to ensure fairness. A *Brady* violation undermines the fundamental legality, reliability, and integrity of the underlying proceeding because in order to find a violation the court must find the suppressed evidence was material to the outcome.[FN100] As such, even if this court had not adopted the actual innocence procedural bypass, Defendant's *Brady* violation claims are not procedurally barred.

FN97. The rule in effect at the time Wright's conviction became final allowed three years for the filing of motions for post conviction relief. The rule was later changed and now allows one year.

FN98. Superior Court Civil Rule 61(i)(1), (2).

FN99. Rule 61(i)(5).

FN100. *See Kyles v. Whitley,* 514 U.S. 419, 454 (1995); *United States v. Bagley,* 473 U.S. 667, 678 (1985) ("[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.").

The United States Supreme Court has explained the obligation for the government to turn over favorable evidence to the defense in *Brady v. Maryland* [FN101] and its progeny. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." [FN102] *Brady* evidence levels the playing field and helps to ensure fair trials in our justice system. Suppression of favorable evidence by the State violates the due process clause of the Fourteenth Amendment to the United States Constitution where the evidence is material to guilt.[FN103]

FN101. 373 U.S. 83 (1963).

FN102. *Brady,* 373 U.S. at 87.

FN103. *See id.*

The court performs a three prong analysis for purposes of the *Brady* violation. A *Brady* violation requires: 1. exculpatory or impeaching evidence exists that is favorable to Defendant; 2. "that evidence is suppressed by the State;" and 3. Defendant is prejudiced by the suppression.[FN104] If each of these prongs is met, a *Brady* violation has occurred and the verdict must be vacated.

FN104. *Starling v. State,* 882 A.2d 747, 756 (Del.2005) (citations omitted).

a. Evidence relating to jailhouse informant Gerald Samuels

Gerald Samuels, one of Wright's fellow prisoners, was a surprise witness at the guilt phase of Wright's trial. During the course of the trial, the State's investigators learned that Samuels would be willing to incriminate Wright. Without prior notice to Defendant, Samuels was brought to the trial and testified that Wright admitted to him in jail that he (Wright) murdered Mr. Seifert. The cross-examination of Samuels was largely an effort to adduce evidence that Samuels expected or was promised lenient treatment in his

own criminal matters in exchange for his testimony. Samuels denied before the jury that there was any promise made to him in exchange for his testimony.

*36 Before considering the evidence relating to Mr. Samuels' trial testimony, the court will address an issue which arose during the evidentiary hearing on this motion. During that hearing the State advised the court it would prosecute Mr. Samuels for perjury if he testified at the hearing and recanted his trial testimony. The State urged the court to appoint counsel for Mr. Samuels before he testified. It was no mystery to the court or anyone else at the hearing that the end result of appointment of counsel for Mr. Samuels would be his assertion of his Fifth Amendment right not to incriminate himself. Nonetheless, the court appointed counsel for Mr. Samuels thinking it did not want to sacrifice his constitutional rights to protect those of Mr. Wright. As expected, the now represented Mr. Samuels exercised his Fifth Amendment right to remain silent. In retrospect, the court believes it should not have appointed counsel for Mr. Samuels because it did not have the power to do so. As a general rule, this court may appoint criminal defense counsel only for those indigents who have been charged with a crime. That was not the case here. Even though Samuels declined to testify, however, the court will consider his affidavit.[FN105]

FN105. Crim. Rule 61(g)(2) ("Affidavits may be submitted and considered as part of the record.").

In March 2009, Wright's counsel obtained an affidavit from Samuels in which he recanted in part his testimony that he had not been promised anything before he testified. In that affidavit, Samuels affirmed:

It was my understanding, after talking with my attorney and Mr. Ferris Wharton, that I would be getting a sentence reduction or be sent to work release in exchange for my testimony. While there were no concrete, written promises—it was clearly implied I would be getting these benefits. The U.S. Attorney General and Mr. Favata kept telling me that there were no guarantees, but there [sic] were clearly making an unspoken promise ... My attorney, Mr. Favatta [sic], specifically and repeatedly advised me not to make reference to any deals while on the stand. That is why I repeatedly denied that I had been offered anything in exchange for my testimony.[FN106]

FN106. Docket Item 367, Ex. 15.

Wright seeks to buttress his argument by pointing to a *pro se* motion for reduction of sentence filed by Samuels after Wright's trial in which Samuels alleges that "an agreement was made with the prosecutor ... my attorney ... and myself." [FN107] Wright now argues that the State failed to provide him with *Brady* material in connection with Samuels' testimony because it failed to disclose the alleged agreement between Samuels and the State.[FN108]

FN107. *Id*. at Ex. 16.

FN108. The State did not provide Wright with Samuels' criminal record. It argued that it was not required to do so because that information was available to Wright's counsel through the Prothonotary's Office. Under the circumstances of this trial, that argument is disingenuous. Wright was represented by a single attorney, Mr. Willard, who had no assistance at trial. It is unreasonable to expect that during the course of trial Mr. Willard could have obtained Mr. Samuels' criminal record from the clerk's office. Similarly, the State did not turn over evidence that on other occasions Mr. Samuels co-operated with a prosecutor. Again it is not reasonable to believe Mr. Willard could have ferreted out this information in time for effective cross examination of Samuels.

The State's failure to voluntarily provide this information in a timely fashion to Wright is regrettable, if not an outright *Brady* violation. But even though Mr. Willard could not have been expected to find this information during the course of trial, the information was available to him through public sources immediately after trial. It is far too late to raise these issues now, and they are procedurally barred. The

miscarriage of justice exception to the procedural bars does not help Wright. The court does not believe that the fundamental fairness of the trial was drawn into question by the absence of information about Samuels' conviction. The jury was well ware from the testimony that Samuels was serving a prison sentence.

The court heard from the prosecutor, Ferris Wharton, Esquire, and Samuels' attorney, David Favata, Esquire, both of whom testified forcefully that there were never any promises of favors to Samuels. Samuels' affidavit submitted by Defendant confirms this. In that affidavit, Mr. Samuels stated "there were no concrete, written promises" and that the "Attorney General and Mr. Favata kept telling me that there was no guarantees." [FN109]

FN109. D.I. 367, Ex. 15.

*37 It is settled that the federal constitution requires the State to turn over to the defendant evidence which can be used to impeach the State's witnesses. The failure to do so can call into question the very fairness of the defendant's trial.

Because the right to cross-examination is fundamental to a fair trial, a new trial will be ordered when the State fails to provide the defendant with material evidence that is favorable to the accused. Impeachment evidence ... falls within the *Brady* rule. Such evidence is evidence favorable to an accused, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.[FN110]

FN110. *Atkinson v. State,* 778 A.2d 1058, 1062 (Del.2001) (internal quotation marks omitted).

The court would have little or no difficulty in ordering a new trial for Defendant if there was an agreement between the State and Samuels. The court finds as fact, however, that there was no express agreement nor was there a "wink and a nod" agreement, therefore a *Brady* violation did not occur here. Samuels likely had a unilateral expectation of receiving some benefit from his testimony. But whatever hopes he may have harbored, those hopes were not evidence within the possession of the State and thus could not have been suppressed by the State.

b. Evidence relating to an attempted robbery at Brandywine Village

Brandywine Village Liquors is located in the City of Wilmington roughly a mile and a half from the HiWay Inn. Approximately 30 to 40 minutes before Philip Seifert was murdered, two young black males unsuccessfully attempted to rob the Brandywine Village store. The police ruled out the possibility that Wright and Dixon were involved in the attempted hold-up at Brandywine Village. There is, however, a plausible argument that the unsuccessful perpetrators at Brandywine Village struck at a second target not long thereafter—the HiWay Inn. Information relating to the Brandywine Village crime therefore raises a question whether the Brandywine Village perpetrators—not Wright and Dixon—were the perpetrators at the HiWay Inn. Yet the State never turned this information over to Wright's counsel.

It is important to note at the outset that the police ruled out Wright as a perpetrator of the Brandywine Village crime. Detective (now Captain) William Browne headed the Wilmington Police Department's investigation into the Brandywine Village incident. Detective Browne interviewed Edward Baxter, the clerk at Brandywine Village. Unlike George Hummel and Debra Milner at the HiWay Inn, Mr. Baxter had an opportunity to observe the perpetrators' faces, and Detective Brown obtained a description from Mr. Baxter. Detective Browne later observed Wright during his interrogation and quickly concluded he did not match the description of the Brandywine Village perpetrators given to him by Mr. Baxter. This alone would have allowed the jury in Wright's trial to conclude he was not involved at Brandywine Village. But there is additional evidence which supports this notion. Mr. Baxter was shown a photo array, and identified one of the persons in that array as resembling the man with the gun at Brandywine Village. Understandably, most of the records of the Wilmington Police Department's investigation, including the photographs shown to Mr. Baxter, are no longer available. Nonetheless, the court can surmise that the photograph picked out by

Mr. Baxter was not that of Wright or Dixon. Otherwise it is virtually certain the State would have sought to introduce that evidence in Wright's trial.

*38 The evidence that Wright and Dixon were not the perpetrators at Brandywine Village is made relevant by evidence suggesting that the Brandywine Village perpetrators could have also committed the crimes at the HiWay Inn. As noted, Brandywine Village and the HiWay Inn are relatively close to one another and could have easily been reached in the 30 to 40 minutes between the crimes. The height differential of the suspects as described by Mr. Baxter is virtually the same as that described by Mr. Hummel at the HiWay Inn. According to Mr. Baxter, the perpetrators at Brandywine Village were two black males, one approximately 23 years old, 5′10″ tall weighing 170 pounds, the other approximately 22 years old, 5′8″ tall weighing 160 pounds. According to the HiWay Inn Pass On, which was developed from Mr. Hummel's statement, one of the suspects was described as a black male in his mid-twenties, approximately 6 feet tall and weighing 170 pounds. The other was a black male, also in his mid-twenties, approximately 5′8″ to 5′10″ and weighing 160 pounds.

There is at least one other similarity which might link the Brandywine Village perpetrators to the HiWay Inn crimes. It should be recalled that Debra Milner (the barmaid at the HiWay Inn) told police that prior to the crime a black man wearing a red plaid flannel shirt came into the tavern and apparently surveyed the scene. (After viewing photos Ms. Milner denied that either Wright or Dixon resembled that man.) No red shirt was ever found at Wright's or Dixon's home. But according to a report prepared by the Wilmington Police Department, Mr. Baxter described one of the Brandywine Village perpetrators as wearing a “red coat”, suggesting of course that it was one of the Brandywine Village perpetrators, not Wright or Dixon, who cased the HiWay Inn. Taken as a whole evidence of the Brandywine Village robbery would have allowed Wright to argue that the two perpetrators of the Brandywine Village crime, which did not involve him, also committed the murder-robbery at the HiWay Inn. This evidence is therefore exculpatory.

The next prong is whether the evidence was suppressed by the State. The State argues that the defense had to make a specific request for this information and that it is unreasonable to expect prosecutors to search unrelated case files for *Brady* evidence.[FN111] The State's assertion that the defense had to making a specific request to the State for this evidence is incorrect. The *Agurs* [FN112] factors upon which the State appears to rely differentiate standards based on the type of evidence requested by the defense, but that distinction is no longer good law .[FN113] The Court “relied on and reformulated the *Agurs* standard for the materiality of undisclosed evidence” in two subsequent cases out of the *Brady* context.[FN114] Finally, in *Kyles* the court clarified that the “reasonable probability” standard applied in each situation under *Brady* analysis.[FN115]

FN111. *See* State's Answering Brief In Opposition To Defendant's Motion For Post–Conviction Relief, 27 (citing *United States v. Joseph,* 996 F.2d 36 (3rd Cir.1993)).

FN112. *See* *United States v. Augrs,* 427 U.S. 97 (1976).

FN113. *See* *Bagley,* 473 U.S. at 682 (opinion of Blackmum, J. embracing the *Strickland* “reasonable probability” standard for all situations); *Kyles,* 514 U.S. at 433 (embracing the *Bagley* rule in the majority opinion).

FN114. *Bagley,* 473 U.S. at 681; *see* *United States v. Valenzuela–Bernal,* 458 U.S. 858, 874 (1982); *Strickland v. Washington,* 466 U.S. 668, 694 (1984).

FN115. *Kyles,* 514 U.S. at 433.

*39 The State further contends that the prosecutors in Wright's trial did not know about the Brandywine Village incident and, according to the State, the prosecutors could not have been expected to comb files of other investigations looking for evidence to exculpate Wright. The court agrees that the prosecutors were unaware of the Brandywine Village investigation and of the meeting between Detective Browne and Detective Mayfield because Detective Mayfield did not tell them.[FN116] But that does not end the inquiry. The State is not free of its obligation to turn over exculpatory evidence simply because it is known only to an investigating police officer. According to the United States Supreme Court, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." [FN117] The court finds, therefore, that the State was obligated to turn over evidence of the Brandywine Village crime to Wright's counsel.

FN116. Detective Browne had no obligation to tell the prosecutors because the Wilmington Police were not working on the Seifert murder.

FN117. *Kyles,* 514 U.S. at 437; *see also* *Youngblood v. West Virginia,* 547 U.S. 867, 869 (2006).

Having found that the evidence was exculpatory and was suppressed, the court must next determine whether Wright was prejudiced by its suppression. Suppression of material evidence requires vacation of a conviction when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ' [FN118] A " 'reasonable probability" ' of a different result is shown "when the government's evidentiary suppression Undermines confidence in the outcome of the trial." ' [FN119] In other words, the constitution cannot tolerate a conviction obtained by the state when the evidence suppressed "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." [FN120] The question does not depend on the sufficiency of the evidence.[FN121]

FN118. *Kyles,* 514 U.S. at 433 (quoting *Bagley,* 473 U.S. at 682 (opinion of Blackmun, J.); 473 U.S. at 685 (White, J., concurring in part and concurring in judgment)).

FN119. *Kyles,* 514 U.S. at 434 (quoting *Bagley,* 473 U.S. at 678).

FN120. *Kyles,* 514 U.S. at 435.

FN121. *See* *id.* at 435 n. 8.

The court has no difficulty in finding that the State's suppression of the Brandywine Village evidence prejudiced Wright. As discussed elsewhere, despite the presence of a confession, the case against Wright was not a particularly strong one. There are serious questions about the reliability of his confession. Aside from that confession and the dubious testimony of Mr. Samuels about Mr. Wright's purported jailhouse confession, there is absolutely no evidence linking Wright to this horrific crime. There was no forensic evidence—no fingerprints, no shoe prints, no fibers—placing Wright at the scene. The murder weapon, shell casings and the get-away car were never recovered and there are no eyewitnesses able to identify Wright. Taken altogether the court has no confidence in the outcome of the trial. The court finds, therefore, that the State's suppression of the Brandywine Village evidence is of such constitutional magnitude that Wright's convictions and ensuing death penalty must be vacated.

8. Defendant's statement was obtained in violation of *Miranda v. Arizona* because the *Miranda* warnings were defective.

*40 Defendant contends that the *Miranda* warnings given to him were defective because they misled him about his right to assistance of counsel. This argument has never been previously presented in the long history of this case. Indeed the court itself raised the issue for the first time during the Rule 61 hearing. The court has previously held that Wright may present this claim because of the actual innocence exception adopted by the court. As with the *Brady* violation, the court will consider whether Rule 61(i)(5), without the actual innocence exception, would permit Wright to present this argument. The answer here is not difficult. Wright has alleged a colorable claim that the *Miranda* warnings given to him were defective. The question then becomes whether the allegedly defective warnings undermined the fundamental legality, reliability, or integrity of the proceedings leading to his conviction.

Both the 5th Amendment right against self-incrimination and the 6th Amendment right to counsel give rise to the warnings required by *Miranda*. A failure to adequately advise a suspect of his right to counsel undermines the fundamental legality, reliability, and integrity of the underlying proceeding. “The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process.” [FN122] The court finds therefore that Wright's argument, if valid, raises serious questions about the fairness and integrity of his conviction.[FN123] Consequently his argument is not procedurally barred.

FN122. *Kimmelman v. Morrison,* 471 U.S. 365, 374 (1986).

FN123. *See* *Johnson v. Zerbst,* 304 U.S. 458, 463 (1938) (The assistance of counsel “is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. * * * The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.” ’) (citing *Palko v, Connecticut,* 203 U.S. 319, 325 (1937)).

a. The purpose of the *Miranda* warnings

What are commonly referred to as the *Miranda* rights are actually three distinct rights. Suspects have the right to remain silent, the right to an attorney, and the right to an appointed attorney if they can not afford an attorney.[FN124] The *Miranda* Court held “that an individual held for interrogation must be *clearly* informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.” [FN125] The individual's financial situation does not affect the person's rights . [FN126] The Court took special care to emphasize the importance of ensuring indigents understood that they have a right to counsel:

FN124. *See* *Miranda v. Arizona,* 384 U.S. 436, 444 (1966).

FN125. *Id*. at 471 (emphasis added).

FN126. *Id*. at 472.

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer *will be* appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has right to have counsel present. [FN127]
FN127. *Id*. at 473 (citations omitted) (emphasis added).

*41 This right to appointed counsel that the Supreme Court explains is essential and it was not adequately explained to Defendant.

b. The administration of *Miranda* warnings to Wright

The State argues that Wright was administered his *Miranda* warnings on three separate occasions during his interrogation: first by Wilmington Police Detective Merrill; later by Wilmington Police Detective Moser; and finally by State Police Detective Mayfield, the CIO. The court, however, finds as fact that Detective Moser did not administer *Miranda* rights to Wright.

Detective Merrill began his interrogation of Wright at roughly 9 a.m. and questioned him about the Emil Watson shooting. At no time during the Merrill interrogation was any mention made of the HiWay Inn murder. Detective Merrill testified that he administered the *Miranda* warnings to Wright before the interrogation began. Unfortunately, even though Wright was being interrogated about a shooting (albeit a non-fatal one) no recording of any sort was made of the interrogation. The absence of any recording is made even more peculiar by the fact that from the outset of the interrogation this was a murder investigation. As noted previously, Detective Mayfield was present when Wright was arrested and his home searched even though neither warrant mentioned the HiWay Inn killing. Additionally Detective Mayfield listened to Detective Moser's of Wright and conferred with Detective Moser during that interview. The court is further puzzled by the fact that, even though the interrogation was being conducted in a controlled environment, Detective Mayfield did not obtain a written waiver of the *Miranda* rights in this murder case, even though it was apparently the practice at the time to do so.[FN128] More than ten years before Detective Mayfield's interrogation of Wright the Delaware State Police were obtaining written acknowledgements of the *Miranda* warnings signed by the suspect.[FN129] In short, there is no record as to the precise nature of the warnings given to Wright, nor is there any basis upon which to determine whether those warnings complied with *Miranda*. That determination, however, is not essential to the ultimate resolution of this case.[FN130]

FN128. Detective Moser testified at the Rule 61 hearing that he thought he obtained a signed waiver from Wright. None was ever produced.

FN129. *See* *Deputy v. State,* 500 A.2d 581, 586 (Del.1985) (State Police obtained written waiver of murder suspect in 1979.).

FN130. The absence of a written waiver of the suspect's Miranda rights does not necessarily mean that the warnings given to the suspect were insufficient. *North Carolina v. Butler,* 441 U.S. 369 (1979).

The next police officer to examine Wright was Wilmington Detective Robert Moser. At the hearing before the court on the instant Rule 61 motion, Detective Moser testified that he administered the *Miranda* warnings and obtained a signed waiver from Wright. He also testified at a suppression hearing prior to trial that he administered *Miranda* warnings to Wright.

Detective Moser's testimony at trial, however, was quite different. During his direct examination, the State did not question him about any *Miranda* warnings. The absence of any such questioning is peculiar, because the Trial Judge had previously advised the parties that the jury would be allowed to consider the warnings given to Wright. On cross-examination, Wright's counsel asked Detective Moser about *Miranda* warnings and the detective denied administering those warnings to him. Detective Moser testified, "He had already been Mirandized." During a colloquy at sidebar, the court denied Wright's request to be allowed to emphasize the absence of *Miranda* warnings with additional follow-up questions: "You have asked him, he s answered, and so I would suggest there's no appropriate further questioning." Notably on its redirect examination of Detective Moser, the State did not ask a single question relating to the presence or absence of *Miranda* warnings.[FN131] The court believes that his testimony at Wright's trial is likely to be the most accurate rendition of what actually occurred during Wright's interrogation. The obvious point is that his

testimony at trial was far closer in time than his testimony at the instant Rule 61 hearing. Indeed, the police report he prepared at the time summarizing the interrogation contains no reference to *Miranda* warnings. Moreover, Detective Moser's current recollection that he obtained a signed written waiver from Wright is belied by the fact that the State never introduced it at trial nor did it produce the ostensibly signed waiver in conjunction with this motion.[FN132]

FN131. In its proposed finding of facts, the State refers the court to an opinion by the trial judge in this matter that Wright had received *Miranda* warnings on three occasions. *State v. Wright,* 1992 WL 207255 (Del.Super.). This opinion was issued prior to trial and, therefore, prior to Detective Moser's denial that he administered *Miranda* warnings to Wright.

FN132. The court's findings are not an attack on Detective Moser's credibility. To the contrary, the court believes he was honest in his efforts to recall the events of March 14, 1991. It is no criticism of him that time may have eroded his memory of those long-ago events.

*42 Detective Mayfield administered the *Miranda* warnings to Wright at 7:40 p.m., approximately ten hours after they were administered by Detective Merrill. The warnings given by Detective Mayfield went as follows:

And a Mr. Jermaine Wright. What I'll first do is I'll read your rights to you, okay? Basically, you have the right to remain silent. Anything that you say can and will be used against you in a court of law. You have the right, right now, at any time, to have an attorney present with you, if you so desire. Can't afford to hire one, if the state feels that you're diligent and needs one, they'll appoint one for you. You also have the right at any time while we're talking not to answer. Okay? And at the same time during the interview here, I will advise you, I am a, ah, member of the Delaware State Police. And I am investigating the Highway Inn, the robbery/homicide there. Okay? Do you understand what I've asked you today? Okay. Do you also understand that what we're going to be taking is a formal statement and that this statement's going to be video taped? Okay. Are you willing to give a statement in regards to this incident? Say yes or no.[FN133]

FN133. Transcribed Statement, 1/30/91 at 1 (emphasis added).

In sum, Detective Mayfield told Wright he could have a court appointed lawyer only "if the State feels you ... needs one." [FN134]

FN134. *Id*.

There was considerable discussion in the parties' submissions about whether Detective Mayfield used the word "diligent" or "indigent." It makes little difference. In its post-hearing submission, the State argues that Detective Mayfield used the work "indigent" where the transcript contains the word "diligent." But at Wright's 1992 trial, the Detective Mayfield testified that the transcript (including the word "diligent") was accurate and at the Rule 61 hearing the State stipulated to the accuracy of the transcript. The court has also listened to the recording of the interrogation more than a dozen times and believes that the detective indeed used the word "diligent" when attempting to administer the *Miranda* warnings. Be that as it may, however, it does not matter which word the Detective Mayfield used—"diligent" or "indigent"—the warnings he administered were still defective.

The court notes in passing that this is not the only time Detective Mayfield had difficulty correctly reciting the substance of the *Miranda* warnings. Before interrogating Lorinzo Dixon, again in a controlled setting, the detective gave the following warning:

What I'm gonna do first is read your rights to you. Okay? You have the right to remain silent. If you give up your right to remain silent, anything you say can and will be used against you in a court of law. You have the right at any time to request a lawyer, if, ah, if you can afford it. Or if you're, or if the court finds out that you're negligent for it. Okay? You also at any time have the right to answer any and all questions. Do you understand those rights?

When these defective warnings were given is a mystery. Detective Mayfield was not an inexperienced rookie and was in a controlled atmosphere in which the *Miranda* warnings could have been read and a written copy given to the suspect to read.

c. The police were required to re-administer Defendant's *Miranda* rights prior to his videotaped statement.

*43 The first issue to consider here is whether the Detective Mayfield was obligated to repeat (or "refresh") the *Miranda* warning when he began his interrogation of Wright at roughly 7:40 that evening. The proverbial seminal case in Delaware for determining whether *Miranda* warnings must be re administered is *Ledda v. State,*[FN135] wherein the Court held that the certain factors must be considered. "Several factors must be considered when determining whether *Miranda* warnings, once given, must be readministered, including the time lapse since prior warnings, change of location, interruptions in interrogation, whether the same officer who gave the warning also interrogated, and significant differences of statements." [FN136] The court does not believe that the *Ledda* court intended any single factor to be more important than the others or that the issue was to be decided merely by a tally of the factors pro and con. Rather the court is obliged to consider the totality of the circumstances with these factors as a guideline.

FN135. 564 A.2d 1125 (Del.1989).

FN136. *Id*. at 1130.

The totality of the factors here compel this court to find that the Detective Mayfield was obligated to administer the *Miranda* warnings to Wright before he began his interrogation. The time lapse between the first administration of the warnings and Detective Mayfield's attempt to administer the warnings was ten hours. During most of that period, Wright was kept in a harshly lit interrogation room with one arm handcuffed to fixture protruding from his seat (which was in turn affixed to the floor). There was no window nor was there a clock in the room, and thus Wright was deprived of any sense of the passage of time. There were some interruptions in the interrogation and, as the trial judge noted, Detective Moser brought Wright a couple of sodas and a submarine sandwich.[FN137] The *Miranda* warnings were given by a different officer and, over the course of the day, Wright was examined by three different officers about three different crimes. The fact that the focus of the interrogations changed dramatically after Wright was first given his warnings is significant, but not dispositive, to the court. It was one thing for Wright to waive his *Miranda* rights when being questioned about a non-fatal shooting; it is quite another to waive them ten hours later when being questioned about a murder-robbery. Finally, although the court does not ascribe much significance to this, it notes that there was a change in venue from the interrogation room to the next door conference room.

FN137. Given that the police did not detect that Wright had heroin in his possession when he was booked, there is at least the possibility, if not a likelihood that he consumed some of the drug during the interruptions in the interrogation. There is no evidence to suggest that any of the police officers knew that Wright had heroin available to him and thus the court has not taken this circumstance into account in determining whether the police should have re-administered his *Miranda* rights.

The foregoing *Ledda* factors suggest that the *Miranda* warnings should have been re-administered. There are additional reasons contributing to the conclusion that the *Miranda* warnings should have been refreshed before the video-taped interrogation. By all appearances Wright was intoxicated during Detective

Mayfield's interrogation. The court does not expect police officers to be experts on drug intoxication nor did these officers have access to the information relied upon by Wright's experts in the Rule 61 hearing. But it would have been apparent to a layman, much less a trained police officer, that Wright was intoxicated. He appeared to be nodding off and yawning at various times during Detective Mayfield's interrogation. An incident during Detective Moser's interview should have set off alarm bells about Wright's mental state. As mentioned before, at one time during that interview Wright curled in a fetal position under the table, insisted on giving only written answers and then ate the pieces of paper on which his answers appeared after Detective Moser read them.

*44 Perhaps no single factor discussed above would have required re-administration of the *Miranda* warnings, but after considering the circumstances in their totality of the circumstances, including the *Ledda* factors and Wright's obviously impaired condition, the court finds that Detective Mayfield was obligated to re-administer the warnings to Wright before he began his interrogation.

d. Even if the police were not required to re-administer the warnings, once they did so they could not give misleading warnings.

Even if Detective Mayfield were not required to re-administer the *Miranda* warnings, once he decided to do so he was obligated to give them in a form which would not deceive Wright. "Once the detectives decided to readminister the *Miranda* warnings they were obliged not to deceive the Defendant." [FN138] Here Detective Mayfield told Wright that he was entitled to representation by counsel "if the state feels you're diligent and needs one." As discussed below, this warning would have deceived Wright, if not most defendants, into believing that his right to counsel during questioning was dependent upon the state determining he "needs one."

FN138. *United States v. Hicks,* 631 F.Supp.2d 725, 742 (E.D.N.C.2009).

e. Detective Mayfield's advisement of Defendant's rights did not comport with *Miranda*.

It was not necessary for Detective Mayfield to administer the *Miranda* warnings exactly as they were written by the Supreme Court. From their very formulation courts have never required a recitation of the *Miranda* warnings which precisely tracks the Supreme Court's language in *Miranda*. The *Miranda* Court itself recognized that other formulations of the warnings can suffice. "The warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent,* prerequisites to the admissibility of any statement made by a defendant." [FN139] A decade and a half after *Miranda* the Supreme Court observed that "no talismanic incantation [is] required to satisfy [*Miranda* 's] strictures." [FN140] Still later the Court noted that "[w]e have never insisted that *Miranda* warnings be given in the exact form described in that decision." [FN141]

FN139. 384 U.S. at 476 (emphasis added).

FN140. *California v. Prysock,* 453 U.S. 355, 359 (1981) (per curiam).

FN141. *Duckworth v. Eagen,* 492 U.S. 195, 202 (1989).

Although an exact form of *Miranda* rights is not necessary, a confusing or equivocal explanation of the rights can be constitutionally inadequate. In *Connell v. United States,*[FN142] the defendant received conflicting oral and written explanations of his *Miranda* rights. Police told the defendant, "[i]f you cannot afford to pay for a lawyer, one *may* be appointed to represent you." [FN143] The "may" language "did not clearly inform Connell that if he could not afford an attorney one would be appointed for him prior to questioning, if he so desired." [FN144] It gave the impression the appointment of a lawyer was left to the

government's discretion. The conditional language was "fatally flawed" due to its misleading nature resulting in the reversal of Connell's conviction.[FN145]

FN142. 869 F.2d 1349, 1351 (9th cir.1989).

FN143. *Id.* at 1350 (emphasis in original).

FN144. *Id.* at 1353.

FN145. *Id.* at 1352–53.

*45 A conviction was reversed for similar reasons in *United States v. Garcia*.[FN146] Garcia received several versions of her *Miranda* rights that considered together were inconsistent.[FN147] At different points, she was told she had a right to counsel for questioning and that she had a right to appointed counsel at her first court appearance.[FN148] "The warnings failed adequately to inform Garcia of her right to counsel before she said a word. The offer of counsel must be clarion and firm, not one of mere impressionism." ' [FN149]

FN146. *United States v. Garcia,* 431 F.2d 134 (9th Cir.1970) (per curiam).

FN147. *Id.* at 134.

FN148. *Id.*

FN149. *Id.* (quoting *Lathers v. United States,* 396 F.2d 524, 535 (5th Cir.1968) (citations omitted)).

The Delaware Supreme Court has also reversed a conviction based in part on an inadequate recitation of the *Miranda* rights.[FN150] The police officer explained to the defendant: "If you wish one (an attorney) we've already talked to your mom about that and that's fine." [FN151] The Court explained that the simplest meaning of that was "Your mother took care of that for you." [FN152] The explanation of his rights suggested that his right to counsel was in his mother's hands, not his. Similarly, Wright was given the impression by Detective Mayfield that his right to counsel was in someone else's hands—the State. Where as here the warnings mislead the defendant or detract from the rights provided by the constitution they cannot be excused on the theory, relied upon by the State, that *Miranda* does not require a verbatim recitation of the required warnings.

FN150. *See* *Smith v. State,* 918 A.2d 1144 (Del.2007) (noting that the Court also relied on the juvenile status and mental capacity of the defendant as part of a totality of the circumstances analysis).

FN151. *Id.* at 1150.

FN152. *Id.*

Detective Mayfield did not adequately explain to Wright his rights. The most troubling part of the explanation of his rights is when the detective told Wright that he was entitled to representation by counsel,

"if you so desire. Can't afford to hire one, if the state feels you're diligent and needs one they'll appoint one for you." [FN153] This does not adequately explain to Defendant that he has a right to appointed counsel and that the decision is his alone. As the court explained earlier, it concluded from the audio recording that Detective Mayfield said "diligent", but even if he said "indigent" as the State asserts, the right was not properly conveyed to Defendant. In addition to the statement being inherently confusing, it suggested the State is the decision maker in the appointment of counsel. This confusing and inaccurate statement did not convey the right to appointed counsel to Defendant. Defendant could not have knowingly waived a right he did not understand that he had. [FN154] Accordingly, the statement should not have been admitted.

FN153. January 30, 1991 statement transcript.

FN154. *Miranda,* 384 U.S. at 470–71 ("No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request may be the person who must needs counsel.").

9. Defendant's *Miranda* waiver was not made knowingly or intelligently.

On the basis of new evidence Defendant claims that he did not knowingly and intelligently.[FN155] Again, the court has previously held that Wright may present this claim because of the actual innocence exception adopted by the court. As with the *Brady* violation and the defective *Miranda* warnings, the court will consider whether Rule 61(i)(5), without the actual innocence exception, would permit Wright to present this argument. The analysis here is similar to the analysis of the defective *Miranda* warnings. Wright has alleged a colorable claim that his waiver was not made knowingly and intelligently. The question then becomes whether admitting the statement given unknowingly and unintelligently undermined the fundamental legality, reliability, or integrity of the proceedings leading to his conviction. The decision to waive Defendant's *Miranda* rights here was a decision to incriminate himself, something the 5th Amendment gives him a right not to do. The 5th Amendment is "fundamental" to our criminal justice system and the legality of proceedings in it.[FN156] Consequently his argument is not procedurally barred.

FN155. To the extend that Defendant's claims are rehash of old evidence previously available to Defense, those claims are procedurally barred as explained in Part F(3). The court looks to the new evidence presented in evaluating this claim.

FN156. *See* *Davis v. State,* 809 A.2d 565, 572 (Del.2002); *Jackson v. State,* 643 A.2d 1360, 1378–79 (Del.1994).

*46 In order to knowingly and intelligently waive one's rights, a suspect must understand those rights. The United States Supreme Court has explained:

[T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.[FN157]

FN157. *Moran v. Burbine,* 475 U.S. 412, 421 (1986) (citations omitted) (internal quotations omitted).

The Delaware Supreme Court has set forth factors for the court to consider when examining the totality of the circumstances. They include "the behavior of the interrogators, the conduct of the defendant, his age, his intellect, his experience, and all other pertinent factors." [FN158]

FN158. *Traylor v. State,* 458 A.2d 1170, 1176 (1983) (quoting *Howard v. State,* 458 A.2d 1180, 1183 (1983); *Whalen v. State,* 434 A.2d 1346, 1351 (Del.1981)).

Defendant offers expert testimony, described more fully above, to support his claim that his statement was given unintelligently and unknowingly. The state offered no evidence to rebut Defendant's experts and its cross examination of those experts does not cause the court to question their methodology or conclusions. Accordingly, the court accepts their testimony without reservation. The expert testimony surrounding Defendant's heroin addiction and the presence of withdrawal symptoms during the interrogation supports a finding that Defendant did not intelligently and knowingly waiving his *Miranda* rights. Dr. Mash discussed how stress and the serious fear of withdrawal would have exacerbated Defendant's altered state inducing a fight or flight response because he was not using enough heroin to stave off withdrawal based on his tolerance. She concluded that Defendant did not have the capacity to know what he was saying, did not know what rights he was giving up, and did not understand the consequences of waiving *Miranda* when he was questioned. Dr. Maslansky agreed with Dr. Mash's testimony that Defendant would not have been able to give informed consent due to his verbal comprehension problems. He also concluded that Defendant did not knowingly, intelligently, and voluntarily waive his rights.

Dr. Fulero further supports the claim. He opined that Wright likely had difficulty understanding the *Miranda* warnings given to him. He reasoned that Wright's verbal IQ of 62 would affect his ability to understand his rights and his ability to decide whether to make a statement. This IQ testing was performed in February 1994 and was not available for the suppression hearing. Dr. Fulero further opined that Defendant was susceptible to the "yeah-saying" and could have agreed to waiver his rights without understanding them. Indeed Dr. Fulero testified that he saw no verbal indication that Defendant understood his rights.

The totality of the circumstances indicate that Defendant did not knowingly and intelligently waive his rights. The use of the Reid technique and the thirteen hours of interrogation [FN159] coupled with Defendant's sleep deprivation reduced his ability to understand his rights. Defendant's intoxication and withdrawal, while not determinative,[FN160] further supports that the rights were not properly waived. As the expert testimony demonstrates, Defendant's lack of intellect supports that he did not understand his rights. Defendant was eighteen at the time of the interrogation, barely an adult. In considering the totality of the circumstances, Defendant was not in a condition to understand his rights and, therefore could not waive them knowingly and intelligently.[FN161] This violation also requires the vacation of Defendant's conviction.

FN159. The court is left to wonder what behavior occurred during the first ten hours of interrogation which were not recorded even though the capability existed.

FN160. *Traylor,* 458 A.2d at 1176 (Intoxication "does not *per se* invalidate an otherwise proper waiver of rights.") (citations omitted).

FN161. *See* *Moran,* 475 U.S. at 421.

G. CONCLUSION

*47 It is not a coincidence that the very first sentence of this opinion was about the victim, Phillip Seifert. The court purposely concludes its opinion with another reference to him. Throughout these proceedings the court has not lost sight of the fact that an innocent man needlessly died on January 14, 1991 at the hands of another human being. The court realizes, and much regrets, that its ruling today will cause anguish and frustration to Mr. Seifert's friends and loved ones. Nonetheless, the court stands as a guardian of the constitutional rights of every citizen, including those of the defendant. It may never shirk that duty no matter how much it may otherwise desire to avoid inflicting emotional pain on a victim's

family. In the end, our courts must act to protect the constitutional rights of the citizens of this State, and that is what this court has done today.

Appendix
PROPOSED RULE FOR POSTCONVICTION PROCEEDINGS IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

BY

BERNARD BALICK

April 1, 1986

CONTENT

Introduction	1
Proposed Rule 35.1	38
Rule 35.1. Postconviction Remedy	
(a) Scope of Rule	38
(1) Nature of Proceeding	
(2) Exclusiveness of Remedy	
(b) Motion for Postconviction Relief	38
(1) Form of Motion	
(2) Content of Motion	

(3) Multiple Convictions

(4) Time of Filing

(5) Place of Filing

(6) Amendment of Motion

(c) Duties of Prothoootary 40

(1) Return of Noncomplying Motion

(2) Entry on Docket

(3) Assignment of Number

(4) Service of Motion

(d) Preliminary Consideration by Judge 41

(1) Reference to Judge

(2) Stay of Proceedings

(3) Preparation of Transcript

(4) Appointment of Counsel

(5) Summary Dismissal

(e) Response to Motion 43

(1) Order to Respond

(2) Content of Response

(f) Discovery 44

(1) Leave of Court Required

(2) Requests for Discovery

(3) Expenses of Deposition

(g) Expansion of Record 44

(1) Direction for Expansion

(2) Materials to be Added

(3) Submission to Opponent

(4) Authentication

(h) Evidentiary Hearing 45

(1) Determination by Court

(2) Time for Hearing

(3) Summary Disposition

(i) Bars to Relief	46
(1) Former Adjudication	
(2) Procedural Default	
(3) Repetitive Motions	
(4) time Limitation	
(5) Bars Inapplicable	
(6) Movant's Response	
(j) Reimbursement of Expenses	48
(k) Time for Appeal	49
(l) Applicability	49
Other Necessary Amendments	50
Comments	51
Appendix of Forms	62
Guilty Plea Form	

Motion for
Postconviction
Relief

Movant's
Response

Footnotes 68

PROPOSED ROLE FOR POSTCONVICTION PROCEEDINGS IN THE SUPERIOR COURT OF THE STATE OF DELAWARE BY

BERNARD BALICK [FN*]

FN* Associate Judge, Superior Court of the State of Delaware

INTRODUCTION

*48 The modern pastconviction remedy is a product of federalism. It evolved from the transformation of the common law writ of habeas corpus into a means for collaterally attacking state criminal convictions in federal district courts.[FN1] At common law, the inquiry on a petition for habeas corpus filed by a person committed by a court of general jurisdiction was restricted to whether the court had jurisdiction, as determined by an examination of the warrant of commitment.[FN2] In one series of cases, the United States Supreme Court broadened the scope of inquiry to include whether any federal constitutional right was violated in the proceedings leading to the conviction, as may be determined by an examination of new evidence.[FN3] In another series of cases, the court applied an increasing number of new or broadened federal constitutional rights and related procedural requirements to the states through the equal protection and due process clauses of the Fourteenth Amendment.[FN4] These developments profoundly affected the relative roles of the state and federal courts and the finality of criminal cqnvictions. [FN5]

FN1. D. Meador, *Habeas Corpus and Magna Carta—Dualism of Power and Liberty* (1966) [hereinafter cited as Meador].

FN2. Ex parte Watkins, 28 U.S. (3 Pet.) (1830); Curran v. Woolley, Del.Supr., 104 A.2d 771 (1954). Review of state convictions in federal habeas corpus proceedings is an exception to the practice in the states and other common law countries, where courts of general jurisdiction use habeas corpus to review detentions by private persons, non-judicial authorities, committing magistrates, and lower courts, especially for contempt, but themselves remain almost immune from review by the writ. D. Oaks, Habeas Corpus in the States—1776–1865, 32 U. Chi. L. Rev, 243 (1965); A. Rubinstein, Jurisdiction and Illegality 110 (1965). See also, H. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L.Rev. 142 (1970) [hereinafter cited as Frlendly] at 145: "... collateral attack on a criminal conviction by a court of general jurisdiction is almost unknown in the country that gave us the writ of habeas corpus and has been long admired for its fair treatment of accused persons."

FN3. This development is described in Fay v. Noia, 372 U.S. 391, 445 (1963) (Harlan, J., dissenting), the highwater mark of federal habeas corpus, from which there was some ebb in Wainwright v. Sykes, 433 U.S. 72 (1977). See D. Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L, Rev. 451, 459 (1966): "Legal historians—even those cited in the opinion—hold a view that is at odds with the historical analysis in the *Fay* case." See also, Developments in the Law—Federal Habeas Corpus, 83 Harv. L.Rev.

1038, at 1045–1055 (1970) where the changing concept of jurisdiction is described, including such cases as Johnson v. Zerbst, 304 U.S. 458 (1938), in which "the Court carried the traditional notion to a meaningless extreme," and Waley v. Johnson, 316 U.S. 101 (1942), in which "the court abandoned the fiction of jurisdiction;" and which says at 1056–1057:

In 1952, with the state of the law uncertain, the Supreme Court delivered the landmark decision of Brown v. Allen [344 U.S. 443 (1953)] ... No prior decision of the Court had unequivocally established so broad a role for the federal habeas jurisdiction.... *Brown,* on the other hand, made it clear that all constitutional claims could be relitigated on habeas, regardless of the adequacy of the state process or the fact that the state had fully and fairly considered the claim.

Brown v. Allen is powerfully criticized in P. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L.Rev. 441, 499–523 (1963) [hereinafter cited as Bator].

FN4. The selective incorporation doctrine is criticized in H. Friendly, *Benchmarks,* Chapter 11, "The Bill of Rights as a Code of Criminal Procedure" (1967) [hereinafter cited as Friendly, *Benchmarks*].

FN5. Bator, supra n 3, Meador, supra n 1, and Friendly, supra n 2, are the outstanding articles on the causes, consequences, and cures for the problems of federalism and lack of finality in criminal law resulting from these developments. Anyone interested in the subject should read these articles.

The federal courts have taken over control of state criminal proceedings and undermined the authority of the state judiciary by this use of the writ, in spite of the effort of state courts to avoid federal intervention by providing the same broad collateral review in state court.[FN6] Although federal power to review state judgments is limited to federal constitutional questions, there are now so many federal requirements applicable at ail stages of state criminal proceedings that this limitation has little significance.[FN7] Almost any claim of error can be made in terms of a federal constitutional violation.[FN8] If a single federal trial judge disagrees with the rulings of the state judges, he may order the release of a person whose conviction was affirmed by the highest appellate court of the state.[FN9]

FN6. This development was predicted by Justice Jackson in his great concurring opinion in Brown v. Allen, supra n 3, at 487.

FN7. Losh v. McKenzie, V. Va.Supr., 277 S.E.2nd 606, 611 (1981) lists 53 "prominent grounds which ... are the most frequently raised" in postconviction proceedings.

FN8. Friendly, *Benchmarks,* supra n 4, at 155; National Advisory Commission on Criminal Justice Standards and Coals, Courts 130 (1973) [hereinafter cited as NAC]: "Almost any procedural point arising in a criminal case now can be cast arguably into constitutional terms."

FN9. Schneckloth v. Bustamonte, 412 U.S. 218, 250, at 263 (1973) (Powell, J., concurring): "To the extent that every state criminal judgment is to be subject indefinitely to broad and repetitive federal oversight, we render the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems."

The common law doctrine that collateral attack is not a substitute for appeal has lost much of its meaning.[FN10] This doctrine followed from the restrictions on the writ. Without those restrictions, collateral review has become broader than direct review in significant ways, as shown by the following comparison: the time for appeal is strictly limited and the review is restricted to issues raised and evidence presented in the proceedings leading to the conviction; there is no time limit for collateral attack and new issues or

evidence may be considered.[FN11] Since the common law rule that neither res judicata nor statute of limitation apply to habeas corpus has been maintainedt judgments may be reviewed repeatedly as long as the defendant is in custody serving the sentence imposed as a result of the conviction.[FN12] The only sense in which the doctrine remains true is that the failure to appeal could be considered a procedural default that will bar collateral attack. [FN13] If an appeal is taken, any issue of importance may be reviewed further in federal habeas corpus proceedings.[FN14] For practical purposes, criminal convictions are never final.[FN15]

FN10. R. Sokol, *A Handbook of Federal Habeas Corpus* (1965) § 2; Eagles v. Samuels, 329 U.S. 304 (1946); Brown v. Alien, supra n 3, at 485, 541, 558, where Justice Frankfurter called the doctrine a "jejune abstraction."

FN11. Plain error will be reviewed on appeal even though it was not raised below. Superior Court Criminal Rule 54(b). The doctrine of plain error does not apply in habeas or postconviction proceedings. Engle v. Isaac, 456 U.S. 107 (1982); US v. Frady, 456 U.S. 152 (1982). See L. Yackle, *Postconvict ion Remedies* § 87.1 (Cum. Supp, issued Feb. 1986) [hereinafter cited as Yackle Supp.]. Failure to raise an issue in the proceedings leading to the conviction may be a procedural default that will bar collateral relief. Wainwright v. Sykes, supra n 4. On the power of federal courts to consider new evidence, see Townsend v. Sain, 372 U.S. 293 (1963).

FN12. Heflin v. United States, 358 U.S. 415, 420 (1959) (Stewart, J., concurring): "... as in habeas corpus, there is no statute of limitations, nor res judicata...."

FN13. In Federal habeas proceedings, the deliberate-bypass test of Fay v. Noia, supra n 3, rather than the causa-and-prejudi c e test of Wainwright v. Sykes, supra n 3, probably applies to the failure to take a direct appeal. U.S. ex rel. Caruso v. Zelinski, 689 F.2d 435, 442 (3rd Cir.1982). Compare infra n 72.

FN14. There is a very high rate of appeal in criminal cases, many "hopeless." P. Carrington, D. Meador, M. Rosenberg, *Justice on Appeal* v, 75 (1976) [hereinafter cited as Justice on Appeal] discusses the causes and adverse consequences of this phenomenon on appellate courts.

FN15. NAC, supra n 8, at 113 discusses eleven possible steps in the review process, some of which may be repeated, and explains how the "drawaout, sometimes never-ending review cycle ... brings the criminal process into public disrepute and leaves convicted defendants with feelings of injustice mixed with illusory hopes that another round of review will overturn the conviction." See also Evicts v. Lucey, 469 U.S. 387, 83 L.Ed.2d 821, 836 (1985) (Burger, C. J., dissenting): "Few things have so plagued the administration of criminal justice, or contributed more to Lowered public confidence in the courts, than the interminable appeals, the retrials, and the lack of finality."

*49 These developments led to a sudden increase of collateral attacks on criminal convictions. It was hoped that the rate would drop as police, lawyers, and judges learned the new procedural rules required by the United States Supreme Court in the "criminal law revolution," but it has remained high and continues to cause widespread dissatisfaction among the state and federal judiciary.[FN16]

FN16. Report of the Committee on the Judiciary, United States Senate on S. 1763, Reform of Federal Intervention in State Proceedings Act of 1983, which is now pending before Congress as S. 238 and H. 275, S.Rep. No. 226, 98th Cong,, 1st Seas. (1983) 2 [hereinafter cited as S.Rep. No. 226]:

The writ of habeas corpus ad subjiciendum, sometimes referred to as the "Great Writ," has been regarded in the common law tradition as an important bulwark of personal liberty, assuring an individual subject to detention or confinement of a means by which judicial review of its legality can be obtained. The

importance of the writ in this character was recognized by the Framers of the Constitution, who included in the Constitution the provision that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." At the time of the Constitution's enactment, however, it was universally understood that an application for habeas corpus could not be employed to secure additional review of the legality of detention imposed pursuant to the order or judgment of a court of competent jurisdiction. Its function, rather, was essentially that of ensuring that an initial judicial determination could be obtained of the legality of detention pursuant to executive authority.

S. 1763 is not addressed to the historical function of the Great Writ, but to the results of much later developments. Following the creation of the United States, the availability of habeas corpus in the Federal courts was initially restricted to Federal prisoners, and the common law limitations on the scope of the writ were observed. The habeas corpus jurisdiction of the Federal courts was extended by statute in 1867, however, and the traditional restrictions on the scope of the writ were gradually eroded therafter through caselaw development. The end result of this development was that Federal habeas corpus became routinely available about thirty years ago as a means for review in the lower Federal courts of State criminal judgments on grounds of alleged deprivations of Federal rights.

It is the present character of Federal habeas corpus, as a quasi-appellate jurisdiction of the lower Federal courts over State judgments, that has given rise to the problems with which S. 1763 is concerned. The shortcomings of the present system are aptly summarized in a passage from the leading treatise on Federal Procedure:

The most controversial and friction-producing issue in the relation between the federal courts and the states is federal habeas corpus for state prisoners. Commentators are critical of its present scope, federal judges are unhappy at the burden of thousands of mostly frivolous petitions, state courts resent having their decisions reexamined by a single federal district judge, and the Supreme Court in recent tens has shown a strong inclination to limit its availability. Meanwhile, prisoners thrive on it as a form of occupational therapy and for a few it serves as a means of redressing constitutional violations.

The disaffection of State officials, including State judges and State attorneys general, with the present system of Federal habeas corpus was amply confirmed in the course of the Committee' s consideration of S. 1763 and its predecessors. Moreover, Federal judges have been equally emphatic in their calls for reform. Judge Henry Friendly of the Second Circuit Court of Appeals, for example, has characterized the present system of collateral attack as "a gigantic waste of effort." Judge Carl McGowan of the D.C. Circuit has stated similarly:

A matter that has rankled relations between state and federal courts for some years now is the collateral attack on final state criminal convictions provided by Congress in the federal courts. A state prisoner who has unsuccessfully exhausted his avenues of state trial and appeallate relief can, even many years later when retrial is not practically feasible, attack that conviction in the federal district court as violative of federal law, and procure his release if such a violation is established. Since the same claim of federal law violation can [be], and often is, made in the trial and appellate courts of the state, with certiorari review available in the Supreme Court, the state judges understandably have some difficulty in seeing why their work should be reexamined in the federal courts whenever a colorable claim of violation is alleged....

The early finality of criminal convictions is generally desirable, and especially so when that can be assured without duplication of judicial effort. The resources of the federal courts at the present time are strained by their own criminal caseloads. They should not have to exercise a supervisory authority over the administration of state criminal laws unless that is plainly necessary in the interest of justice.

Substantially the same sentiment have been expressed at the highest level of the judiciary. A majority of the Justices of the Supreme Court have strongly criticized the current system of Federal habeas corpus and have called for basic limitations on its scope and availability. Chief Justice Burger, for example, has urged Congress to consider restricting narrowly the availability of Federal habeas corpus for State prisoners, stating that "[t]he administration of justice in this country is plagued and bogged down with lack of reasonable finality of judgments in criminal cases." Justice Stevens has also asserted that "[i]n recent years Federal judges at times have lost sight of the true office of the great writ of habeas corpus," and Justice Powell has observed "[t]he present scope of habeas corpus tends to undermine the values inherent in our federal system of government...."

The overall picture presented by the assessments of State judges and attorneys general, Federal judges, and leading commentators, is that of widespread dissatisfaction with the present system of Federal

collateral review an grounds of federalism, proper regard for the independent stature of the State courts, the need for finality in criminal adjudication, and conservation of limited criminal justice resources.

As a result of major effort by the federal judiciary to reform habeas corpus, the Revised Judicial Code of 1948 amended the federal habeas corpus act and established a postconviction remedy for persons convicted in federal court. [FN17] The purpose of the amendment was stated by the chairman of the drafting committee thus: "In the case of state prisoners, resort to the lower federal courts is practically eliminated where adequate remedy is provided by state law." [FN18] The purpose of the postconviction remedy was to provide a more convenient modern substitute for the common law writs of habeas corpus and coram nobis.[FN19]

FN17. J. Hinkle, *Judges as lobbyists: Habeas corpus reform in the 1940s,* Judicature, Vol. 68, Numbers 7–8 (February–March, 1985) [hereinafter cited as Winkle].

FN18. J. Parker, *Limiting the Abuse of Habeas Corpus,* 8 F.R.D. 171, 174 (1948). Judge Parker quotes the amendment of the habeas corpus act at 175, and further explains the intent behind it at 176:

It will be noted that this section does not prevent application for habeas corpus to the federal courts, if the state has failed to provide corrective process available to the applicant, or if there are circumstances which render the state process ineffective to protect his rights. If the State has provided adequate process, however, and no such circumstances appear, the application may not be granted unless Lt appears that applicant has exhausted his remedies under state law; and an applicant is not deemed to have exhausted such remedies "if he has the right under the law of the State to raise, by any available procedure, the question presented". The effect of this last provision is to eliminate, for all practical purposes, the right to apply to the lower federal courts for habeas corpus in all states in which successive applications may be made for habeas corpus to the state courts; for, in all such states, the applicant has the right, notwithstanding the denial of prior application, to apply again to the state courts for habeas corpus and to have action upon such later application reviewed by the Supreme Court of the United States on application for certiorari.

It may be argued that once a petitioner has applied for habeas corpus to the courts of the state and has been denied relief, he may proceed with his federal remedy without more ado, since further application to the state courts might well be presumed to be futile. The answer to this is that such further application to the state courts is not futile because it lays the foundation upon which application can be made to the Supreme Court of the United States for certiorari. This touches the heart of the question. The thing in mind in the drafting of this section was to provide that review of state court action be had so far as possible only by the Supreme Court of the United States, whose review of such action has historical basis, and that review not be had by the lower federal courts, whose exercise of such power is unseemly and likely to breed dangerous conflicts of jurisdiction.

FN19. US v. Hayman, 342 U.S. 205 (1952) (the act is quoted at 266, n 1); I. Robbins, *The Law and Processes of Post–Conviction Remedies* (1982) 113, note b, explains coram nobis thus:

The writ of error coram nobis, which can be traced to 16th century England, is a remedy of last resort that can be used to vacate a conviction because of an error of fact or a valid defense resting in fact. The writ traditionally was available only if the error complained of did not appear on the face of the record leading to the judgment, the failure of the defendant and counsel to call the error to the attention of the trial court was excused by duress, fraud, or excusable mistake, and the error complained of was a constitutional error of sufficient magnitude to undermine the judgment. Where the writ is directed by the reviewing court to another arm of the same court, the remedy is called coram nobis; if it is directed by the reviewing court to the trial court, it is called coram vobis.

Delaware's postconviction remedy is found in Superior Court Criminal Rule 35(a).[FN20] It was one of the completely new set of criminal rules based on the Federal Rules of Criminal Procedure that were adopted in 1953.[FN21] In response to criticism of the omission of a rule for postconviction proceedings from the Federal Rules, the drafters based Superior Court Rule 35(a) on the federal postconviction remedy,[FN22] It was not until 1976 that federal rules for postconviction proceedings vere adopted.[FN23] They will hereinafter be referred to as "the federal rules."

FN20. Rule 35(a) says:

Postconviction Remedy. Any person who has been sentenced by the Court may apply by motion for postconviction relief for any meritorious claim challenging the judgment of conviction including claims: (i) that the conviction was obtained or sentence imposed in violation of the Constitution and laws of this State or the United States; (ii) that the Court imposing the sentence was without jurisdiction to do so; or (iii) that the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law. An application may be filed at any time, provided, however, that postconviction relief shall not be available so long as there is a possibility of taking a timely appeal from the judgment of conviction. Unless the motion and the files and records of the case show to the satisfaction of the Court that the applicant is not entitled to relief, the Court shall cause notice thereof to be served on the Attorney General, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the Court finds the applicant is entitled to relief, the Court may set aside the judgment, release the applicant from custody, resentence the applicant, grant the applicant a new trial, or otherwise correct the judgment of conviction as may appear appropriate. The Court need not entertain a second motion or successive motions for similar relief on behalf of the same applicant.

FN21. D. Herrmann, *The Hew Rules of Procedure in Delaware,* 18 F.R.D. 327 (1956) (hereinafter cited as Herrmann].

FN22. Curran v. Wooley, Del.Super., 101 A.2d 303 (1953), *aff'd* 104 A.2d 771 (1954) says:

The comments by the draftsmen of the Rule 35 are significant.

"Rule 35. Correction of Reduction of Sentence

"(a) *Correction of Sentence"*

"Rule 35(a) is a combination of the first sentence of Federal Rule 35 and Uniform Rule 44 and amplifies and enlarges upon the Federal Rule 35. *The adoption of the draft will provide for relief now obtainable by Writ of Error, [sic] Coram Nobis or Habeas Corpus*. The failure of the Federal Rules to provide for such relief has been criticized, 56 Yale Law Journal, 233."

Decidedly material to this discussion is the striking similarity between our Rule 35 and § 2255 of Title 28 U.S.C.A....

The comma after "Writ of Error," which led Judge Layton to say "I do not understand how the remedies provided can serve as a substitute for Writ of Error," is probably a mistake. 101 A.2d 305, 305, n 2. Coram Nobis is called "writ of error coram nobis." See n 19, supra.

After checking with all surviving members of the committee that drafted the rule, I have been unable to locate a copy of the committee's comments. The committee was H. Albert Young, Chairman, S. Samuel Arsht, James B. Carey, Andrew D. Christie, Joseph H. Flanzer, Daniel L. Herrmann, James Hughes, Clair J. Killoran, James L. Latchum, Caleb R. Layton, 3rd., Daniel J. Layton, Jr., John J. McNeilly, James R. Morford, Henry J. Ridgely, William J. Storey, Charles L. Terry, Jr., and Henry A. Wise.

FN23. The Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code are published at 3A Wright, Federal Practice and Procedure: Criminal 2d, 582 [hereinafter cited as Wright].

Rule 35(a) provides a postconviction remedy aa unlimited as federal habeas corpus.[FN24] "Unlimited" here means with little finality, that is, res judicata for decided issues, preclusion of issues that were not raised, or enforceable procedural requirements for asserting rights, including time limitations. The intent when Rule 35(a) was adopted was doubtless to foreclose collateral attack in federal district court by providing an adequate state remedy. This purpose was frustrated by an opinion announced by the United States Supreme Court three days before Rule 35(a) went into effect. [FN25] The Court interpreted the 1948 amendment of the habeas corpus act to mean that a federal district court may redecide the merits of a federal constitutional claim that was fully and fairly litigated in the state court system. As a result of that

ruling, an adequate state remedy does not foreclose but will only forestall collateral attack on state judgments of conviction in federal district court.[FN26]

FN24. Curran v. State, Del.Supr., 122 A.2d 126 (1956).

FN25. Brown v. Allen, supra a 3, was decided on February 9, 1953. Rule 35(a) was adopted on November 6, 1952 and became effective upon enactment of the Revised Code of 1953 on February 12, 1953. See note on effective date under Rule 59 in the Delaware Criminal Code (1953).

FN26. Winkle, supra n 17, at 272:

On the whole, federal and state judges were Optimistic that the codification would resolve most exigencies of habeas corpus without abridging fundamental rights. On paper, the revisions restored a sense of finality and dignity to state court judgments. And they spelled out administrative relief for federal tribunals. For almost five years the issue enjoyed a respite from controversy. Then, in *Brown v. Allen,* the Supreme Court reopened the wounds by interpreting § 2254 to bestow plenary power upon lower federal courts to review state proceedings. The ruling, John J. Parker complained, had "nullified" his original intentions and frustrated a decade-long reform effort. To reestablish those basic purposes, he suggested, judges must once again petition Congress.

The rationale for an unlimited postconviction remedy seems sensible in theory. It is difficult to avoid occasional deprivation of a criminal defendant's rights, especially when the right was not asserted at trial or recognized until later.[FN27] A person who suffers a continuing loss of freedom because of a criminal conviction should have a continuing judicial remedy for deprivation of his rights. In other words, the interest in freedom outweighs the interest in finality.

FN27. Of course, it does not necessarily follow that the wrong person was convicted. It is often clear that the jury would have reached the same result without the deprivation of rights. According a defendant all rights might reduce the risk of convicting the wrong person, but cannot eliminate it. According to E. Borchard, *Convicting the Innocent* (1932), which analyses 65 known cases of error, "There is not much that the prosecuting or judicial machinery can do to prevent some of these particular miscarriages of justice." One of Borchard's suggestions is that our appellate courts should have the power that exists in England to quash a conviction without ordering a new trial if the court concludes that there was a miscarriage of justice. In England, an appellate court may reverse a conviction even though no error was committed, if it is deemed "unsafe or unsatisfactory." On the other hand, it may affirm notwithstanding substantial error, if there was no miscarriage of justice. D. Meador, *Criminal Appeals—English Practices and American Reforms,* Chapter VI (1973). NAC standard 6.3, supra n 8, at 122 recommends that reviewing courts in the United States should also have this authority.

*50 However good in purpose, an unlimited postconviction remedy does not work well in practice.[FN28] Prisoners are prolific litigators.[FN29] It is natural for them to use any means available to seek release, especially when it costs nothing to do so.[FN30] It is also natural for them to brood about the way the case was handled and conclude that it should have been done differently.[FN31] Prisoners often reargue contentions that were unsucessfully made by their lawyers or base them on other cases without regard to whether the claim has any foundation in fact or application to their case. Some who are particularly adept at stating claims do so for others as jailhouse lawyers. Prisoner litigation has been called a form of occupational therapy.[FN32] Since the court does not enforce the rules of procedure because the movants are unrepresented, much time is wasted simply trying to clarify the resulting confusion.[FN33] More time is spent screening the many meritless claims in search of the few with merit.[FN34] Moreover, after this effort is made by the state court system, it is in large part duplicated by the federal courts.[FN35]

FN28. The adverse consequences of the current use of federal habeas corpus are well summarized at Friendly, supra n 2, at 146–151.

FN29. Cleavinger v. Saxner, 474 U.S. 193, 88 L.Ed.2d 507, 520 (1985) (Rehnquist, J., dissenting): "With less to profitably occupy their time than potential litigants on the outside, and with a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population."

FN30. Justice on Appeal, supra n 14, at 92.

FN31. Justice on Appeal, supra n 14, at 110.

FN32. Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 54261, at 588 (1978). Compare Sanders v. United States, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting):

Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community. It is with this interest in mind, as well as the desire to avoid confinements contrary to fundamental justice, that courts and legislatures have developed rules governing the availability of collateral relief.

FN33. Subdivision (b)(1) of the proposed rule follows the ABA standards and the federal rules by requiring the use of a standardized form for a motion for postconviction relief in the hope of mitigating some of the problems associated with pro se litigation. ABA standard 22–3.2, supra n 39, at 22–33; appendix of forms, supra at p. 64.

FN34. For years judges have repeatedly complained about this burden. See, for example, Curran v. Wooley, 101 A.2d at 306 (1953):

The number of applications for habeas corpus has been increasing to a point which is causing grave concern in the Federal and State Courts. It is estimated that literally hundreds, if not thousands, of such petitions are without real substance, if in fact they are actually filed in good faith. Mot the last of the causes leading to this annual mass of applications is the unsettled state of the law itself in the Supreme Court of the United States.

FN35. For a more recent expression of similar concern by a federal judge, see Sallie v. North Carolina, 587 F.2d 636, 641 (4th Cir.1978) (Chapman, J., concurring):

For the past decade Federal Courts have been inundated by an ever increasing stream of habeas corpus petitions from state prisoners. This flood of petitions, the vast majority of which are frivolous, has overwhelmed the federal judiciary and delayed the work of the courts at a coat of billions of dollars in fees, cost and court time....

The judges of Superior Court have long felt the need for reform, although they perhaps doubted whether a revision of Rule 35(a) could do much to lighten the burden. State judicial resources are finite. Whatever time is spent on repeated review of criminal convictions is unavailable elsewhere. Scheduled criminal and civil trials must be "bumped" with unhappy regularity in Superior Court because all of the judges are in trial or other proceedings.[FN36] As a result of the increasing criminal caseload, which must be given priority in order to meet speedy trial requirements, Superior Court has a growing civil backlog.[FN37] The recent long-sought two additional judges will help but will not solve the problem.

FN36. In Hew Castle County, 104 criminal trials were rescheduled in fiscal year 1985 and 19 civil trials were rescheduled in calendar year 1985 for lack of judges. These numbers do not show the cases that were rescheduled at the request of the attorneys to avoid the expense and inconvenience of being bumped on the day of trial, because it looked like a judge would not be available; nor do they show cases that were rescheduled by the court on applications that would have been denied if a judge had been available to try

the case. There were 287 criminal trials (270 jury, 17 nonjury) and 79 civil trials (60 jury, 19 nonjury) in New Castle County in fiscal year 1985.

FN37. On December 31, 1985, 2499 complaints for damages were pending in New Castle County. This does not include 1200 other kinds of civil proceedings, such as appeals de novo and on the record, and various petitions seeking relief other than damages. There were also 172 cases with issues that were briefed and ready for decision, not including specially assigned complex cases.

There was one previous attempt to revise Rule 35(a) in 1977.[FN38] It was a part of a nationwide program to implement the American Bar Association Standards for Criminal Justice.[FN39] The ABA standards advocate an unlimited postconviction remedy, with discretionary power to dismiss claims for abuse of process. A study comparing Delaware law with the ABA standards found that many of the standards are not stated in Rule 35(a), but Delaware practice nevertheless conforms to the standards in many respects.[FN40] The judges of Superior Court opposed the proposal to implement the ABA standards because they were "already inundated" with motions for postconviction relief and the proposal would substitute "time-consuming complexities" for the "fair but efficient remedy" provided by Rule 35(a).[FN41]

FN38. Final Report of Supreme Court Advisory Commit tee on Court Ruled to Implement A.B.A. Standards of Criminal Justice (December 7, 1977).

FN39. American Bar Association Standards for Criminal Justice, Introduction, p. xxiv (Little, Brown and Company 2d ed.1980) [hereinafter cited as ABA Standards]. The standards on postconviction remedies are in Volume IV, Chapter 22.

FN40. A Comparative Study of the American Bar Association's Standards for Criminal Justice with Present Delaware Law (1976) [hereinafter cited as Comparative Study].

FN41. The court's comments are here quoted in full:

The suggested revision of Rule 35 is one of the most sweeping and far-reaching proposals of the Weiner Committee. It seeks to provide a comprehensive remedy for post-trial review, not only of the validity of the trial process, but of the legality of all features of the judgment of conviction, including the conditions of parole, probation and incarceration. It would thus supersede the writ of habeas corpus and involve the Court in many factual proceedings in contradistinction to the present practice of testing for legal sufficiency.

The proposed remedy would be Open-ended in time as well as scope, with no limitations as to when a petition might be filed so long as the matter is not "stale", in the language of proposed Rule 35(d). The proceedings become quasi-civil through the availability of discovery and the requirement of Rule 35(g)(4) that the "rules of evidence applicable in civil cases shall be followed". The Court is required to make written "findings of fact and conclusions of law".

It is the unanimous belief of the Superior Court Judges that the post-conviction procedure contemplated by the proposed rule will seriously impede the ability of the Court to dispose of trial responsibilities by diverting judicial manpower into lengthy omnibus evidential hearings which are better resolved at the appellate level through traditional avenues of appeal. The Judges are already inundated with post-trial motions in criminal cases, many filed *pro se,* which require examination and reply. Many of these motions are deficient on their face and subject to summary disposition. The proposed Rule would require more formalized treatment of matters now subject to summary disposition. One of the oft-stated criticisms of the criminal justice system is its inability to achieve finality and the prolongation of the post-trial adjudication. The proposed rule encourages post-trial delay by transforming the adjudication process into a new proceeding complete with all the time-consuming accouterments of a civil case.

In the view of the Judges, Rule 35(a) as presently employed, coupled with the use of *habeas corpus,* provides a fair but efficient remedy to defendants seeking post-conviction relief at the trial level. The proposed rule engrafts a maze of time-consuming complexities which will further delay the criminal justice process. We recommend against its adoption.

The present proposal is based on the federal rules.[FN42] This is consistent with the derivation of Rule 35(a) and will maintain the benefits of using the federal rules of civil and criminal procedure as a model.[FN43] In this introduction, I will compare the proposed rule with the federal rules and the ABA standards.[FN44] I will explain and attempt to justify the more significant differences. Otherwise, substantive modifications of the federal rules are briefly explained in the comments on each subdivision of the proposed rule.[FN45]

FN42. The enabling statute, 11 *Del. C* . $5121, says as follows:

(a) The Superior Court may, from time to time, adopt and promulgate general rules which prescribe and regulate the form and manner of process, pleading, practice and procedure governing criminal proceedings in the Superior Court from their inception to their termination, including such proceedings before inferior courts and justices of the peace as are preliminary to indictment or information filed in the Superior Court.

(b) Such rules shall not abridge, enlarge or modify the substantive rights of any person, and shall preserve the right of trial by jury as at common law and as declared by the statutes and Constitution of this State.

(c) The Rules of Criminal Procedure for the Superior Court adopted and promulgated by the Supreme Court prior to the enactment of this Code shall take effect upon the enactment of this Code. Any amendments of or supplements to such Rules which the Superior Court may hereafter adopt and promulgate shall take effect upon such date as the Superior Court shall fix in its order adopting and promulgating such amendments or supplements. After the effective date of any rule adopted and promulgated under this section, all laws inconsistent or in conflict therewith shall be of no further force or effect.

(d) Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede or repeal any such rules heretofore prescribed under authority of law.

FN43. See Herrmann, supra n 21, at 346.

FN44. I have also considered the national Advisory Commission on Criminal Justice Standards and Goals, Courts, Chapter 6 (1973), the Uniform Post–Conviction Procedure Act (1980), and the rules for postconviction proceedings of Maryland, New Jersey, and Pennsylvania.

FN45. See comments, supra at pp. 51–61. The following federal rules are omitted: Rules 8(b) and 10 on the function and powers of federal magistrates; Rule 9 on delayed or successive motions; and Rule 12 on the applicability of the Federal Rules of Criminal and Civil Procedure. Rules S(b) and 10 are inapplicable in Superior Court. Rule 9 is replaced by an entirely new provision, called "bars to relief." Rule 12 is unnecessary because of Superior Court Criminal Rule 57(b), which says:

Procedure Hot Otherwise Specified. If no procedure is specifically prescribed by rule, the Court may proceed in accordance with the corresponding Superior Court Civil Rule or in any lawful manner not inconsistent with these Rules, with the Rules of the Supreme Court, or with any applicable statute.

*51 The proposed rule permits as much flexibility as possible in the handling of postconviction proceedings. Flexibility remains possible because the United States Supreme Court has held that there is no federal constitutional right to counsel or to an evidentiary hearing in postconviction proceedings.[FN46] The federal rules allow more flexibility than the ABA standards. The ABA standards discourage summary dismissal.[FN47] The proposed rule follows the federal rules in providing for summary dismissal and enlarges the court's discretion under the federal rules to summarily dispose of a motion without an evidentiary hearing.[FN48] It is believed that the kind of flexibility allowed by the proposed rule is consistent with the practice under the present rule.

FN46. Ross v. Moffitt, 417 U.S. 600 (1974) (no right to counsel beyond first appeal); US v. MacCollum, 426 U.S. 317, 323 (1976) (no right to transcript on claims without prima facie merit) says: "The Due

Process Clause ... certaialy does not establish any right to collaterally attack a final judgment of conviction." Townsend v. Sain, supra n 11, says at 313, n 9: "In announcing this [full-and-fair-hearing] test we do not mean to imply that the state courts are required to hold hearings and make findings which satisfy this standard, because such hearings are governed to a large extent by state law." But see Long v. Iowa, 385 U.S. 192 (1966) (right to transcript on appeal from denial of state habeas corpus); and Smith v. Bennett, 365 U.S. 708 (1961) (an indigent person may not be required to pay a filing fee to seek state habeas corpus).

FN47. Standard 22–4.2, supra n 39, at 22–40.

FN48. Subdivisions (d)(5) and (h)(3).

The proposed rule permits the court to appoint counsel at any stage of the proceedings.[FN49] Thus, if the judge has concern about the effectiveness of counsel in the proceedings leading to the conviction, he may appoint new counsel to determine whether any arguable ground for relief was not asserted, even though the movant's pro se motion could be dismissed summarily because it does not state, and the judge's examination of the record does not disclose, any ground for relief. Counsel is expected to act as an advocate in the movant's behalf in accordance with The Delaware Lawyers' Rules of Professional Conduct, but he may move t,o withdraw if he finds no arguable ground for relief.[FN50] It would nevertheless be helpful to have counsel's explanation for why the movant's contentions are without merit and it would be reassuring to know that new counsel has found no arguable claim that was missed by former counsel.

FN49. Subdivision (d)(4).

FN50. Compare Supreme Court of Delaware Rule 26(c); Anders v. California, 386 U.S. 738, 744 (1967); Evitts v. Lucey, supra n 15.

Unlike the ABA standards, the proposed rule does not require the appointment of counsel whenever a motion for postconviction relief is filed.[FN51] It is not feasible to appoint another lawyer at public expense whenever a convicted person wants one, which would be the effect of the ABA standard. [FN52] On the other hand, it is expected that counsel will usually be appointed when a motion survives summary dismissal, especially if discovery or an evidentiary hearing is ordered, although this is not required by the proposed rule.

FN51. Standard 22–4.3, supra n 39, at 22–41.

FN52. Postconviction proceedings constitute a substantial part of the caseload of the state's contract attorneys, who represent clients when the Office of the Public Defender is barred because of a conflict of interest, as it often is in postconviction proceedings, which usually involve a claim that a public defender's assistance was ineffective. These cases take a disproportionate amount of time because the new attorney must review the entire record of the proceedings leading to the conviction. The recent announcement of a clinical program at Delaware Law School to assist inmates might help find meritorious claims, but is unlikely to reduce insubstantial claims filed by prisoners pro se. See the interesting comment of the Comparative Study, supra n 40, at 246, opposing visits by lawyers and law students, as recommended in ABA Standard 22–3.1, on the ground that "the suggested visits would likely result in ethical problems and would only stir up frivolous applications."

The fact that a motion survives summary dismissal does not necessarily mean that there will be an evidentiary heariag.[FN53] Unlike the ABA standard or the federal rule, the proposed rule does not require an evidentiary hearing whenever there are material issues of fact.[FN54] This requirement ignores the extraordinary nature of postconviction proceedings. The motion will usually be decided by the judge who presided at the proceeding lead ing to the conviction. There is no jury. If we look for an analogous civil proceeding, it is a motion for relief from judgment, not a motion for summary judgment. Both the civil and criminal rules give the court discretion as to how it will decide issues of fact in proceedings on motioas.[FN55]

FN53. Subdivision (h)(1).

FN54. ABA Standard 22–4.6, supra n 39, at 22–49.

FN55. Civil Rule 43(b), Criminal Rule 12(b)(4).

There is especially good reason to preserve flexibility in proceedings on motions for postconviction relief. The proposed rule expressly provides for the preparation of a transcript of any part of the proceedings that might be needed to evaluate a claim.[FN56] The provisions on discovery and expansion of the record provide new alternatives to an evidentiary hearing for presenting facts to the court, such as interrogatories propounded by the judge.[FN57] In order to prevent abuse, discovery may be allowed only in the discretion of the judge for good cause shown.[FN58] Although holding a searching plenary hearing is doubtless the best way to bring earlier finality to a case, it is often necessary to decide motions without an evidentiary hearing to conserve court time for pending trials and other proceedings.[FN59] por example, examination of the file, which will contain the court's guilty plea form, and of the transcript of the colloquy between the court and the defendant before a guilty plea is accepted, may enable the judge to summarily dispose of a request to withdraw the plea.[FN60] The judge may schedule an evidentiary hearing if it is desirable to observe the demeanor of the witnesses or he is not satisfied that the facts have been fully developed. If other means fail, scheduling a hearing is sometimes the best way to bring about a resolution of a pending motion for postconviction relief. The judge should be aware of the standard applied in federal court to determine whether state findings of fact will be presumed correct, but the proposed rule makes it clear that he need not follow the federal standard for determining when a hearing should be held. [FN61]

FN56. Subdivision (d)(5).

FN57. Subdivision (g)(2).

FN58. Subdivision (f)(1).

FN59. The decision not to grant a hearing would be reviewable for abuse of discretion.

FN60. Subdivision (d)(3); but see Note, Rule 11 and Collateral Attack on Guilty Pleas, 86 Yale L.J. 1394 (1977). Superior Court's guilty plea form, which must be filed whenever a judgment of conviction on a guilty plea is entered, is in the appendix of forms, supra at p. 63.

FN61. The full-and-fair-hearing. test of Townsend v. Sain, supra n 11, is codified at 28 U.S.C. § 2254(d) (1976). The presumption does not apply to mixed questions of law and fact. Miller v. Fenton, 474 U.S. 104, 88 L.Ed.2d 405 (1985)

*52 The proposed rule introduces a greater degree of finality by barring the following frequent abuses of the postconviction remedy: rearguing contentions that were already decided, raising contentions that should have been made in the proceedings leading to the conviction, repetitive motions for postconviction relief, and delay.[FN62] A claim that the court lacked jurisdiction to enter the judgment is the one ground that is not subject to bar, unless the jurisdiction of the court was litigated and reconsideration is not warranted in the interest of justice.[FN63] This is consistent with the scope of common law habeas corpus as it remains in Del aware.[FN64]

FN62. Subdivision (i).

FN63. Subdivision (i)(5).

FN64. See 10 *Del. C.* c 69 and supra n 2.

It is essential to have some principle of res judicata for issues that were previously decided.[FN65] The ABA standards provide that any issue that has been fully and finally litigated in the proceedings leading to the judgment of conviction should not be relitigated in postconviction proceedings.[FN66] There is no such provision in the federal rules.[FN67]

FN65. The policy reasons for res judicata are well stated at Restatement, Second, Judgments, Introduction, esp. pp. 10–13.

FN66. Standard 22–6.1(a), supra n 39, at 22–62.

FN67. Compare standard 6.6, commentary, NAC, supra n 8, at 132:

The repetitious and protracted nature of current postconviction litigation stems in large part from failure to apply the doctrine of res judicata. Under this doctrine, the parties to litigation are given only one opportunity to have a matter decided. Once a given matter has been resolved in litigation between two parties, it may not be reopened in subsequent litigation between the same two parties. This practice probably derived historically from English habeas corpus, where one seeking the writ could go from judge to judge, and no judge was foreclosed by another's denial. That practice originated at a time when habeas corpus was a remedy for illegal detention not pursuant to a conviction for crime by a competent court. Bizarre results have been created by carrying forward that practice into the current context, where the writ and similar postconviction procedures are used as a means of reviewing completed trials and appeals.

Although the language of the proposed rule differs from the ABA standard, they have a similar purpose.[FN68] The language of the ABA standard seems to restrict reconsideration to cases where the state court did not meet the federal standard of a full-and-fair-hearing. This suggests that reconsideration should be permitted only if there was a deficiency in the fact-finding process. But the commentary shows that the intent is to allow reconsideration when there has been a significant development in the applicable law.[FN69] The interest-of-justice standard of the proposed rule would permit a judge to reconsider a ruling when the earlier proceedings were inadequate or there is reason to believe that the former adjudication might have been erroneous.

FN68. Subdivision i(1).

FN69. Commentary, ABA standard 22–6.1, supra n 39, at 22–63.

The proposed rule doe s not require that a ground for relief must have been decided on appeal for the bar Co apply.[FN70] The ABA standard would permit Superior Court to redecide issues that were fully litigated in the proceedings leading to the conviction so that a movant who failed to file a timely appeal may have another opportunity to do so.[FN71] Under the proposed rule, the decision on whether to allow a late appeal will be made by the Supreme Court, which may remand the case if it considers an evidentiary hearing and findings of fact by Superior Court desirable.[FN72]

FN70. Compare ABA standard 22–6.1(a)(i), supra n 39, at 22–62.

FN71. Commentary, ABA standards 22–6.1, 22–6.2, supra a 39, at 22–64–22–65, 22–68, n 3; Friendly, supra n 2, at 157–159 criticizes the ABA standards.

FN72. The Supreme Court applies the cause-and-prejudice test when a defendant has failed to take a timely appeal. Johnson v. State, Del.Supr., 460 A.2d 539 (1983).

Although there is no provision on procedural default in the federal rules, the United States Supreme Court has held that a claim that should have been raised in the proceedings leading to the judgment may not be made in federal postconviction proceedings, unless the movant shows cause for failing to comply with a procedural requirement Co raise it earlier, and also shows prejudice from any deprivation of his rights.[FN73] The ABA standard uses an abuse-of-process test.[FN74] It is similar to the deliberate-bypass test which the United States Supreme Court has replaced with the cause-and-prejudice test because the deliberate-bypass test undermines procedural rules and finality. [FN75] The Supreme Court of Delaware has also applied the cause-and-prejudice test in state postconviction proceedings.[FN76]

FN73. US v. Frady, supra n 11.

FN74. Standard 22–6.1(c), supra n 39, at 22–62.

FN75. Wainwright v. Sykes, supra n 3.

FN76. Conyers v. State, Del.Supr., 422 A.2d 345 (1980).

*53 The cause-and-prejudice test is therefore included in the proposed rule. The United States Supreme Court has framed the test in terms of showing “cause for the noncompliance.” [FN77] The Supreme Court of Delaware has spoken in terms of showing “cause for relief from [the movant's] failure to enter a proper objection.” [FN78] Since the test is analogous to the provision that “the Court for cause shown may grant relief from the waiver” in Criminal Rule 12(b)(2), the proposed rule uses “cause for relief” as the preferable formulation.[FN79] In the interest of clarity, the term “procedural default” is used instead of “waiver.” [FN80] Although the meaning of “cause” and of “prejudice” must await development in future cases, one can say that the cause-and-prejudice test will bar contentions that would not be barred under the abuse-of-process test.[FN81]

FN77. Wainwright v. Sykes, supra n 3, at 84.

FN78. Conyers v. State, supra n 76, at 346.

FN79. Davis v. US, 411 U.S. 233 (1973); Francis v. Henderson, 425 U.S. 536 (1976).

FN80. Commentary, ABA standard 22–6.1, supra n 39, at 22. 65–22–66, explains the ambiguity of "waiver."

FN81. Wainwright v. Sykes, supra n 3, at 87; Reed v. Ross, 468 U.S. 1, 82 L.Ed.2d 1 (1984). See Yackle Supp, supra n 11, at 190:
The departure from Noia accomplished in Sykes is limited to the personal participation prong of the "deliberate bypass" rule. Petitioners may now be bound by the intentional, tactical maneuvers of defense counsel even though they themselves did not participate in the strategic decision to forego state process.

Although an omission by counsel does not necessarily establish ineffective assistance, every omission creates the possibility of such a claim. It might therefore be wise to find or assume cause, and consider whether there was prejudice. See State v. Conyers, Del.Super., 413 A.2d 1264 (1979); Note, Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims, 130 U. Pa. L.Rev. 981 (1982) (recommends defining "cause" to include all unintentional defaults). Compare Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 698 (1984) (To warrant upsetting a conviction for ineffective assistance of counsel, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."). The term "prejudice" may have differing meanings in various contexts. See Yackle Supp., supra n 11, at 226:

To begin, it may be fruitful to distinguish the several ways in which the term "prejudice" may be used. First, it can figure in the articulation of substantive federal claims....

Next, "prejudice" can describe an effect upon the outcome of a criminal prosecution. Assuming the existence of a violation of federal law, courts contend with this second kind of "prejudice" when they appraise the weight of the evidence against the prisoner and judge the likelihood that, but for the federal error, he or she might have been acquitted. "Prejudice" in this sense blurs very quickly with the concept of nonharmless error....

Finally, "prejudice" may refer only to some disadvantageous effect upon the course of the proceedings—the strategies of the contending parties, the presentation of evidence, and the like. "Prejudice" in this third sense is not simply a code word for a constitutional violation. Nor does it (necessarily) signal the presence of nonharmless error. A prisoner can be disadvantaged, even seriously, and still it may be possible to demonstrate, beyond a reasonable doubt, that the result would have been the same anyway....

The great difficulty is, of course, that it is impossible (no matter which sense of "prejudice" is chosen) to distinguish clearly between and among closely related notions—the threshold measure of harm or disadvantage (going to outcome or the course of state proceedings) necessary to win a federal forum after procedural default, the harm (going apparently to outcome) essential to the establishment of a violation of federal law, and the harm (again going to outcome) necessary to rebut any attempt to demonstrate harmless error.

Repetitive motions for postconviction relief by a small number of litigious inmates is a serious abuse.[FN82] The federal rule's discretionary power to dismiss successive petitions for abuse has not proven to be an effective curb. [FN83] Nor would the similar ABA standard.[FN84] Abuse is difficult to prove and the proceedings necessary to determine whether it is present would usually take as much time as disposing of a claim on its merits.[FN85] Moreover, judges are reluctant to exercise discretion to bar claims of unrepresented movants.

FN82. Y. Avichai, *Collateral Attacks on Convictions (I): The Probability and Intensity of Filing,* American Bar Foundation Research Journal 319 (1977). Each judge of Superior Court has "regulars."

FN83. Federal Rule 9(b) says:

Successive motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

See the interpretation of this rule in Sanders v. United States, supra n 32, one of the 1963 trilogy of major federal habeas corpus cases with Townsend v. Sain, supra a 11, and Fay v. Noia, supra n 3. I am not aware of a Superior Court judge ever exercising the discretionary power not to entertain a successive motion in Rule 35(a), supra a 20.

FN84. Standard 22–6.2(b), supra n 39, at 22–67,

FN85. Friendly, supra n 2, at 158–159.

The proposed rule contemplates only one postconviction proceeding beyond summary dismissal, unless a ground could not have been known by the exercise of reasonable diligence when the earlier motion was filed.[FN86] It does not seem wise to bar future motions because of an earlier motion that was summarily dismissed, since the movant will rarely be represented by a lawyer at that stage.[FN87] The distinction between summary dismissal and summary disposition without an evidentiary hearing is important in this regard, because the latter may bar a subsequent motion for postconviction relief. This is one reason why the court should ordinarily appoint counsel when a motion survives summary dismissal.

FN86. Subdivision (i)(3)

FN87. Compare standard 22–6.2(a), supra n 39, at 22*67.

The proposed rule includes a two-year time limitation which begins to run when the judgment of conviction is final, that is, when the time for appeal has expired or an appeal is finally determined and a mandate issues from the Supreme Court of Delaware or the United States Supreme Court.[FN88] The only exception would give the movant an opportunity to assert a retroactively applicable right that was first recognized after the judgment is final. There is no time Limitation on a federal motion for postconviction relief, but a motion may be dismissed if delay by reason of the movant's Lack of reasonable diligence has prejudiced the government's ability to respond to the motion. [FN89] The ABA standard provides that relief may be denied for del ay upon a showing of abuse of process.[FN90] Neither provision would effectively prevent delay.[FN91] Some states have a statute of limitation.[FN92] The proposed time Limitation is consistent with the limitation in Rule 33 on motions for a new trial on the ground of newly discovered evidence.[FN93]

FN88. Subdivision (i)(4).

FN89. Federal Rule 9(a) says;

Delayed motions. A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

When the rule was promulgated, there was a rebuttable presumption of prejudice after 5 years, but this was deleted by Congress. Pub.L. No. 94–426, 90 Stat. 1334, 1335 (1976); H.R.Rep. No. 94–1471, 94th Cong., 2d Sess. 5 (1976). On September 6, 1984, the advisory committee proposed for public comment an amendment to allow the court to consider prejudice to the government's ability to retry the defendant.

FN90. Standard 22–2.4(b), supra n 39, at 22–25. The commentary says at 22–26 that a specific time limitation is unsound because it would prevent state courts from adjudicating federal constitutional issues and precipitate invocation of federal habeas corpus jurisdiction.

FN91. S.Rep. No. 226, supra n 16, at 16, n 60:

There is currently no time limit on applications for Federal habeas corpus. Rule 9(a) of the habeas corpus procedural rules—a "laches" provision—provides that a petition may be dismissed if the State has been prejudiced in its ability to respond to the petition by delay in filing, unless the petition is based on grounds which could not reasonably have been discovered prior to the prejudicial occurrence. See 28 U.S.C. foll. § 2254. On account of its discretionary character and other limitations, Rule 9(a) has not been an effective check on belated petitions. See, e.g., *Spalding v. Aiken,* 103 S.Ct. 1795 (1983) (district judge attempting to dismiss petition under Rule 9(a) twice reversed on appeal, where triple-murderer filed petition fourteen years after conviction asserting claims previously raised and rejected in state appeal); Letter of Attorney General Frank J. Kelley of Michigan to Attorney General William French Smith (July 28, 1982): "The State of Michigan currently has the dubious distinction of housing the nation's third largest incarcerated inmate population. One result of this phenomenon is a corresponding large volume of ... federal habeas corpus ... [litigation including] ... twelve hundred applications filed in Michigan since 1977.... It is noteworthy that despite the existence of Rule 9(a) I am unaware of any district court dismissal of a habeas petition based on laches."

FN92. For example, New Jersey Rule 3:22–12 says:

A petition to correct an illegal sentence may be filed at any time. No other petition shall be filed pursuant to this rule more than 5 years after rendition of the judgment or sentence sought to be attacked unless it alleges facts showing that the delay beyond said time was due to defendant's excusable neglect,

FN93. Friendly, supra n 2, at 159, n 87 points out the anomaly of having a time limit for newly discovered evidence which could cast doubt on the defendant's guilt but having no time limit on constitutional violations that have no bearing on guilt. Contra, Commentary, ABA standard 22–6.1, supra n 39, at 22–64.

*54 The proposed rule includes the following optional provision; failure to include a ground in a prior motion for postconviction relief or to raise it within two years of when the judgment of conviction is final would not bar a colorable claim of miscarriage of justice.[FN94] This provision will be explained after the effect of the proposed rule without the optional provision is discussed.

FN94. Subdivision (i)(5).

The proposed rule without the optional provision puts some restrictions on the availability of collateral review in the state system, but does not change the federal standard for determining when relief will be granted. Reasonable opportunity is given for at least one collateral review in the state system, but a movant whose claim is barred under the proposed rule will have to pursue it in federal court. If this happens, it is likely that the federal court will view the movant's conduct as a procedural default, and apply the cause-and-prejudice test.[FN95] The time bar should reduce the delay and irritation caused by the federal exhaustion requirement that a federal district court must dismiss a petition for habeas corpus, however lacking in merit, until all of the petitioner's contentions have been considered by the state court system. [FN96] Since a state remedy will no longer be available, the federal district court may decide the claims.

FN95. U.S. ex rel. Caruso v. Zelinski, supra n 13.

FN96. See S.Rep. No. 226, supra n 16, at 21:

[The] approach [of Rose v. Lundy, 455 U.S. 509 (1982)] carries substantial costs. It is generally recognized that a large proportion of habeas corpus applications by State prisoners are frivolous. If a frivolous petition is dismissed on the procedural ground that State remedies were not exhausted, the prisoner is, in effect, being told to re-petition the Federal court after he has run through the State judicial

process. After presenting his frivolous claims to two or three State courts, he may return to the Federal court only to be informed that his claims are without merit. The Federal court has had to consider his petition twice, first on the exhaustion issue and then an the merits; State courts at several levels have had to consider his claims; and the petitioner himself discovers that years of waiting have been for naught when an adverse decision on the merits is finally obtained from the Federal court. Had the Federal court denied his petition on the merits when it was first presented, this needless expenditure of time and effort would have been avoided.

Permitting denial of relief on the merits in such cases, as the bill would allow, would neither frustrate nor undermine the policies supporting the exhaustion requirement. These policies—comity, deference to State processes, and the desirability of allowing State courts to correct errors in state proceedings—are not offended by the denial of frivolous petitions prior to exhaustion. No incentive would be created for a petitioner to by-pass available State remedies and go directly to Federal court, since only an unfavorable result would be possible if State remedies were not exhausted. The desirability of affording State courts an opportunity to correct errors in State proceedings would also not he significantly impaired when the lack of merit in the petitioner's claims is apparent and the Federal court's options are limited to finding that no State-court error occurred.

Hence, denial on the merits, notwithstanding a petitioner's failure to exhaust State remedies, can avoid substantial delays and litigational burdens at the Federal and State levels without impairment of the interests protected by the requirement of prior recourse to State processes. What is called for on the part of the district judge in deciding whether to dismiss a petition for non-exhaustion or consider a denial on the merits under amended $2254 (b) is a pragmatic judgment, taking account of judicial economy at the State and Federal levels and the policies underlying the exhaustion requirement.

The Judicial Confereace of the United States has endorsed the proposed amendment of 28 U.S.C. § 2254(b) to allow a district court to deny habeas corpus notwithstanding the failure to exhaust the remedies available in state court. See Report of the Proceedings of the Judicial Conference (1985).

State judges can avoid unnecessary dismissals for failure to exhaust by stating that they find no federal constitutional violation when denying any contention that might be included in a petition for federal habeas corpus as a federal constitutional claim even though it was not presented as such in state court. Picard v. Connor, 404 U.S. 270 (1971).

Although the proposed rule should ease the criminal caseload pressure on the state judiciary, it might increase the burden of the federal court. Since the practice of Superior Court judges in scheduling evidentiary hearings is not expected to change under the proposed rule, it is not likely that the federal district court will find it necessary to schedule more hearings because state proceedings did not meet the federal full-and-fair-hearing standard. On the other hand, it is possible that some cases that would otherwise end in the state system, either because the motion is granted or because the movant does not pursue his claim after denial in state court, will now be filed in federal court. The extent of any resulting increase in the work of the federal district court can only be determined after the proposed rule goes into effect.

It is submitted that a change in the division of labor between the state and federal systems is justified. Although the federal courts have some especially complex cases, they do not have the heavy caseload borne by the state courts. [FN97] They have greater access to the resources needed to screen postconviction motions, such as magistrates, law clerks, and funds for lawyers to represent petitioners, and they have more time available to conduct postconviction hearings.[FN98] To the extent that more resources are needed, federal courts can claim them from Congress, which has the ultimate power to regulate, and therefore the responsibility to fund, federal habeas corpus proceedings. Any increase in the federal caseload is expected to be more than offset by the reduction of the overall inefficiency, cost, and delay resulting from the present duplication of effort by two court systems providing the same unlimited postconviction remedy.

FN97. According to Federal Judicial Workload Statistics, in the twelve month period ending September 30, 1985, 807 civil cases and 61 criminal cases involving 81 defendants were commenced in the U.S. District Court of the District of Delaware, which was recently enlarged from 3 to 4 active judges, and has the

assistance of senior judges. According to the 1985 Annual Report of the Delaware Judiciary, in the twelve month period ending June 30, 1985, 3,745 civil cases and criminal cases involving 4,396 defendants were commenced in the Superior Court of the State of Delaware, which was recently enlarged from 11 to 13 judges. The federal statistics include 44 petitions for habeas corpus by state prisoners. Applications for postconviction relief are not included in Superior Court statistics, but they are far in excess of 44 per year.

FN98. Superior Court judges share law clerks and have no magistrate. Federal district judges each have two law clerks and the court has a magistrate who writes a report and recommendation for the disposition of most petitions for habeas corpus by state prisoners and handles many other matters.

*55 A disadvantage of the proposal without the optional provision is that it might bar relief for a meritorious claim in the state courts. This is likely to happen very rarely. When it does, the federal courts can be expected to apply the cause-and-prejudice test in a manner that will allow correction of any miscarriage of justice.[FN99] it would nevertheless be highly desirable that such a remedy be available in the state courts.

FN99. Wainwright v. Sykes, supra n 3, at 91; Engle v. Isaac, supra n 11, at 135. It seems likely that the cause-and-prejudice standard will be similar in practice to the miscarriage-of-justice standard of the optional provision.

The optional provision is intended to provide such a state remedy. Under the optional provision, the federal standard for collateral review would govern for a limited period of time, but thereafter a state standard would apply. The movant would be required to show that there was a constitutional violation of a fundamental nature. The violation must have undermined the legality, reliability, integrity, or fairness of the proceedings leading to the judgment. “Legality” is intended to refer to the legal basis for a prosecution, “reliability” to the accuracy of the fact-finding process, “integrity” to the proper performance of their duty by the various participants in a criminal prosecution, and “fairness” to procedural regularity. There will be no attempt to give examples of violations that might fit in each category. The kinds of violations that would constitute a miscarriage of justica must be determined in the common law tradition as particular cases are presented for decision.[FN100]

FN100. The proposed state standard recognizes that the means by which a criminal conviction is obtained may be crucial. Although the movant would not be required to show that the result was probably wrong in order to obtain relief, the kinds of violations that would qualify are like those for which Judge Friendly would not require a colorable claim of innocence. Friendly, supra n 2, at 151–154; compare NAC standard 6.5, supra n 8, at 130–131.

Modern postconviction proceedings have been described as a dialogue between the utopianism of the federal courts and the pragmatism of the state courts. [FN101] From the perspective of a state trial judge, the United States Supreme Court has imposed impractical and unrealistic requirements on the state system.[FN102] As much as one may agree with the result in particular cases, one may nevertheless have serious concerns about some of the consequences of the opinions announcing those decisions.[FN103]

FN101. R. Cover and T. Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035 (1977).

FN102. J. Grant, Felix Frankfurter: A Dissenting Opinion, 12 UCLA L.Rev. 1013, 1038 (1965):
If the Court will not reduce the requirements of the fourteenth amendment below the federal gloss that now overlays the Bill of Rights, then it will have to reduce that gloss to the point where the states can live with it.

FN103. Friendly, *Benchmarks,* supra n 4, at 287.

Few would disagree with the requirement that counsel must be provided at public expense in serious cases. The result is that most criminal defendants are represented by a lawyer who they neither choose nor pay. The distrust occasioned by the nature of the relationship between the attorney and "client" is doubtless the primary cause of the explosion of claims of ineffective counsel.[FN104] Another cause is caseload.[FN105] Public defenders who have several trials scheduled on the same day are not likely to be veil prepared for any of them. In an effort to appease hostile defendants and avoid claims that they were ineffective, public defenders raise insubstantial contentions and request federally-required hearings that are not likely to benefit the defendant, and might even weaken his presentation to the jury. This is simpler than attempting to obtain an intelligent waiver from the defendant, which is particularly impractical during trial.[FN106]

FN104. Justice on Appeal, supra n 14, at 78,

FN105. Justice on Appeal, supra n 14, at 75 points out that understaffing plagues both prosecution and defense.

FN106. A public defender who suggests waiving a right risks alienating a suspicious defendant. Special care must be taken in communicating a plea offer to a defendant, or he might think that the lawyer is not zealous enough. Friendly, supra n 2, at 159–160 explains why it is "a serious confusion of thought to transpose this doctrine of subtantive law [waiver] into the courtroom." See Wainwright v. Sykes, supra n 3, at 91 (Burger, C.J., concurring).

Nor are the problems with the federal requirement of an intelligent waiver of rights confined to trial. Most would agree that the accused should understand the consequences of his actions, but there are practical limitations on the realization of this ideal. It would probably take as much as an hour to make a record that would satisfy the federal standard for showing an intelligent and voluntary waiver of rights when a guilty plea is entered. State trial judges who must accept many guilty pleas cannot afford the time to do this in all cases. In Superior Court, the criminal office judge in New Castle County must often accept more than 25 guilty pleas in one day, immediately sentencing as many as possible to ease the backlog in the Presentence Office.[FN107] He must do this in addition to his other duties, such as handling long arraignment and motion lists, and generally supervising the daily criminal calendar which often consists of more than 50 cases.

FN107. In 1985, 2,762 defendants were sentenced on 4,631 charges in Hew Castle County.

*56 Another factor Limiting the ability to satisfy the federal standard of an intelligent and voluntary guilty plea is the capacity of defendants. For example, it has been held that the failure to obtain an admission to an element of an offense invalidates a guilty plea.[FN108] The case so holding involved an intellectually-limited defendant who pled guilty to a reduced charge of murder second degree in a state court 11 years earlier. At arraignment, the indictment charging the defendant with murder first degree by "wilfully" stabbing the victim was read in open court, but when the plea was entered the court did not explain that the state of mind required for murder second degree was "a design to effect the death ... but without deliberation and premeditation." There was no coercion or misinformation, and the court assumed that overwhelming evidence of guilt was available, that competent counsel wisely advised the defendant to enter the plea, and that he probably would have done so anyway if the requisite intent had been explained. In Delaware, the state of mind required for murder in the second degree and many other offenses is

recklessness.[FN109] This is a complex legal concept which is beyond the understanding of many criminal defendants who are nevertheless competent to stand trial under the common law test.[FN110] Must one deprive such a defendant of a favorable plea offer and force him to go to trial? Does a judge satisfy the federal standard by attempting to explain the concept, even though the defendant cannot fully understand the explanation? If a defendant would not have understood or would have pled guilty anyway, does the failure to explain all elements of the charge or consequences of the plea justify upsetting a criminal conviction on collateral attack? [FN111]

FN108. Henderson v. Morgan, 426 U.S. 637 (1976); compare North Carolina v. Alford, 400 U.S. 25 (1970) and Robinson v. State, Del.Supr., 291 A.2d 279 (1972).

FN109. 11 *Del. C.* § 231 defines "recklessly" thus:

A person acts recklessly with respect to an element of an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the element exists or will result from his conduct. The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

FN110. 11 *Del. C.* § 404(a) says:

Whenever the court is satisfied, after hearing, that an accused person, because of mental illness or mental defect, is unable to understand the nature of the proceedings against him, or to give evidence in his own defense or to instruct counsel on his behalf, the court may order the accused person to be confined and treated in the Delaware State Hospital until he is capable of standing trial.

FN111. A state might want to adopt a per se rule of reversal on direct appeal, but the interests of federalism and finality come into play on collateral attack. For example, the passage of time makes it hard to know what the defendant understood when the plea was entered.

An example of a situation where it is particularly difficult to meet the federal standard for showing an intelligent and voluntary waiver of rights exists when the defendant wants to represent himself. Although there is a right to represent oneself, the court is required to advise a defendant who wants to do so of "the dangers and disadvantages of self-representation." [FN112] When a defendant expresses dissatisfaction with his lawyer, the court must conduct "a penetrating and comprehensive examination of all the circumstances," avoiding violation of the attorney-client privilege. The fact that the defendant was an experienced litigant who was attempting to disrupt or delay the trial, or otherwise gain some improper advantage by firing his lawyer, does not mean that he "realized and had knowledge of all the implications and possible pitfalls of self-representation," The court must determine that he "truly" understands the implications of proceeding pro se, and must "make certain" that the defendant is waiving his right to counsel "understandingly and wisely." [FN113] Appointing stand-by counsel and advising a defendant to accept representation is not sufficient.[FN114] If the court goes too far in persuading a defendant to accept counsel, his waiver of the right to represent himself would be involuntary. If the court does not go far enough, the waiver of the right to counsel will be held invalid, without regard to whether further advice would have made any difference. This standard permits the kind of second-guessing that undermines the authority of state judges. [FN115]

FN112. Faretta v. California, 422 U.S. 806, 835 (1975).

FN113. United States v. Welty, 674 F.2d 185 (3rd Cir.1982).

FN114. United States, ex rel. Jerry Lee Axselle v. Walter W. Redman, et al, D. Del., ___ F.Supp. ___ (1985).

FN115. Bator, supra n 3, at 451.

*57 The intent of these examples is not to suggest disagreement with the ideal of an intelligent and voluntary waiver. State trial judges should strive to make sure that defendants are fully informed of their rights. The point is that procedural requirements that are intended to protect *rights* are not *rites* from which any departure should necessarily require upsetting a criminal conviction on collateral attack.

The whole nature of criminal trials has been changed by the need to make a record that will pass federal review. Trial judges must actively interject themselves into the trial in an effort to make sure that federal requirements are not being overlooked.[FN116] Inquiring too searchingly into complaints by the defendant about his lawyer, which are occurring more often at all stages, including trial, can cause violation of the attorney-client privilege and prejudice to the defendant. Much time is spent reviewing the conduct of the police, the prosecutor, and the defender.[FN117] But however hard the court and counsel try to meet federal standards, there are so many that it is not unusual that review afterward will reveal some rights that were not asserted or intelligently waived.[FN118] Usually they are the ones that were least likely to benefit the defendant.[FN119]

FN116. D. Meador, The Impact of Federal Habeas Corpus on State Trial Procedures, 52 Va. L.Rev. 286 (1966).

FN117. M. Fleming, *The Price of Perfect Justice—The Adverse Consequences of Current Legal Doctrine on the American Courtroom* (1974) [hereinafter cited as Fleming].

FN118. Supra n 7.

FN119. This is why most omissions by counsel will neither be unreasonable under prevailing professional norms nor prejudicial to the defendant, and will not undermine the fundamental fairnesss of the trial. Strickland v. Washington, supra n 81.

Overelaboration of procedural requirements that are intended co protect some fundamental rights can endanger others. There is widespread apprehension about jury service in serious criminal cases. The right to public trial has been held to include the requirement of questioning prospective jurors publicly during the selection process except in rare cases.[FN120] Trial courts must not be unduly restricted from attempting to protect the privacy and security of jurors. The requirements for impanelling a jury in capital cases could become so burdensome that it would be simpler to dispense with a jury decision on whether the death penalty should be imposed.[FN121] Trials have became longer and less meaningful for jurors who must wait in the jury room during the frequent interruptions for federally-required hearings. As the burdens of serving as a juror in criminal trials become greater and the satisfactions become Less, support will grow for restriction of the right to jury trial.

FN120. Press–Enterprise Company v. Superior Court of California, 464 U.S. 501 (1984).

FN121. Rector v. State, Ark.Supr., 659 S.W.2d 168 (1983).

The unfortunate fact is that state courts could not handle their criminal caseload without violating federal procedural requirements. Standards that work well in the federal system which handles such a small part of the criminal caseload of the country should serve as an ideal model for the state system, but should

be imposed as an essential minimum requirement only if necessary to protect fundamental rights. Standards by which prosecutors, defenders, and judges must frequently fall short condemn themselves as utopian.

The miscarriage-of-justice standard is an attempt to provide a pragmatic state alternative to the Utopian federal standard for collateral attack.[FN122] A functioning legal system cannot be Utopian. Pragmatism is part of the strength and spirit of the common law tradition.[FN123] Our constitutional rights are pragmatic responses to specific abuses of power during the political and religious struggles of our history.[FN124] United States Supreme Court decisions have also responded to perceived injustices. Far example, radical remedies were doubtless required to remove racial discrimination from the administration of justice.[FN125] But even if a strict standard of review for constitutional error is proper on appeal, the interests of finality and federalism justify a different standard for upsetting a conviction on collateral attack.

FN122. Contrast P. Wangerin, "Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default, 29 DePaul L. Rev, 753, 790 (1980) ("[T]hose judges who ... conclude that new trials need not be granted even in the face of very serious unpreserved error if the evidence in the trial was not closely balanced ... seek to protect the integrity and reputation of the judicial system ... by attempting to eliminate pointless relitigation and by re-emphasizing the adversary nature of the Amer lean judicial system.") and L. Ainbinder, Comment, "Fundamental Miscarriage of Justice": The Supreme Court's Vers ion of the "Truly Needy" in Section 2254 Habeas Corpus Proceedings, 20 San Diego L.Rev. 371, 397 (1983) ("[C]ontinued reliance on such factors as finality, judicial efficiency, federalism, and comity will ultimately undermine the significance of the Constitution as a symbol for the embodiment of the ideal society.")

FN123. Judicial empiricism and the doctriae of precedent distinguish the common law tradition from the civil law tradition. J. Dawson, Oracles of the Law (1968); J. Craven, Paen to Pragmatism, 50 N.C.L.Rev. 977 (1972).

FN124. B. Schwartz, *The Roots of Freedom—A Constitutional History of England* (1967); L. Levy, *Origins of the Fifth Amendment* (1968); C. Rembar, *The Law of the Land—The Evolution of Our Legal System* (1980). The Fourteenth Amendment and civil rights Legislation were adopted after the Civil War to eliminate racial discrimination. Scholars differ on the intent of the Habeas Corpus Act of 1967, which for the first time authorized federal judges to issue writs of habeas corpus for the release of state prisoners. Compare L. Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi, L.Rev. 31 (1965) and S. Saltzburg, Habeas Corpus: The Supreme Court and the Congress, 44 Ohio St. L.J, 367 (1983).

FN125. See, for example, Vasquez v. Hillary, 474 U.S. 254, 88 L.Ed.2d 598 (1986).

*58 The common law concept of due process of law has been described as a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." [FN126] The United States Supreme Court has given the concept new meaning by incorporating various federal procedural requirements in the due process clause of the Fourteenth Amendment. The sense of justice of a conscience nurtured in the common law tradition would be offended by a criminal conviction obtained in violation of due process in its core sense, but this is not necessarily true of a conviction obtained in violation of its modern meaning. Upsetting a criminal conviction on collateral attack when this is not justified by the need to protect fundamental constitutional rights weakens the confidence of the people in the courts. Since there is no due process right to collateral review at all, it is consistent with the common law tradition to restrict the right to collaterally attack a conviction to cases where there was a miscarriage of justice.[FN127]

FN126. Quoted by Justice Cardozo in Palko v. Connecticut, 302 U.S. 319, 325 (1937), overruled by Benton v. Maryland, 395 U.S. 784 (1969).

FN127. Ross v. Moffitt, supra n 46; Friendly, supra n 2, at 170–172.

The optional provision has some practical disadvantages when compared with the proposal without the option. As long as the door to the state court remains open, there will continue to be many claims without merit that must be considered. On the other hand, the court should be able to quickly identify a Colorable claim of miscarriage of justice. The introduction of the new state standard would substitute diversity for the present uniformity. It is not known how the federal courts would respond. Since they would treat the failure to comply with a state time limitation as a procedural default that could bar federal collateral attack entirely, perhaps they would also respect a state standard for collateral review when the federal standard is barred because of a procedural default. We may hope that petitioners will not be required to exhaust their state remedy when they are not making a colorable claim of miscarriage of justice. Even if they apply a federal standard, the judgments of state judges as to what kinds of violations justify setting criminal convictions aside on collateral attack might lead to a more pragmatic approach in the federal courts.

One of the benefits of federalism is that it allows experimentation by the states in seeking solutions to governmental problems.[FN128] The states can start seeking ways to strike a balance between the interest in protecting the rights of persons charged with crime and the interest in finality only when they stop the useless effort to foreclose federal intervention. State courts should instead take advantage of their opportunity to experiment with knowledge that the federal courts exist as a backup fail-safe system.

FN128. New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting),

A state court rule of procedure can ease the burden that an unlimited postconviction remedy puts on the state courts, but it cannot accomplish the kind of reform that is needed to address the complex interrelated problems of federalism and finality. There have been several proposals for reform, For example, the National Advisory Commission on Criminal Justice Standards and Goals proposes one full and fair judicial review of a conviction and sentence extending to the entire case, including the legality of all proceedings leading to the conviction, the legality and appropriateness of the sentence, matters that have heretofore been asserted in motions for new trial, and errors not apparent in the trial record that heretofore might have been asserted in collateral attacks on a conviction or sentence.[FN129] The Commission would limit further review to exceptional circumstances, one of which is similar to the miscarriage-of-justice standard proposed in the optional provision. [FN130] The Commission's proposal envisions a fundamental change in the nature of direct appellate review.[FN131] But even major change in the way criminal proceedings are reviewed in the state court system would not address the problem of federalism without compensating changes in federal habeas corpus.

FN129. NAC standard 6.1, supra n 8, at 116. Compare similar proposals cited in commentary, ABA standard 22–1.1, supra n 39, at 22–8 and 22–9.

FN130. NAC standard 6.5, supra n 8, at 128.

FN131. NAC standards 6.2, 6.3, supra n 8, at 119, 122.

*59 One may agree that the high value of freedom justifies the cost of a continuing judicial remedy for persons who are in custody serving a sentence for a criminal conviction. It does not follow that there should not be reasonable restrictions on the availability of the remedy or that the same remedy should be provided

by both the state and the federal courts. One may also agree that interpretations of federal law must be reviewable in a federal court. It does not follow that broad collateral attack of state judgments of conviction in federal district courts is justified, even if one accepts that the function of reviewing state courts' interpretations of federal law cannot be adequately performed by the United States Supreme Court.

One of the arguments in favor of broad federal habeas corpus is that the state judiciary has an institutional bias against enforcing federal rights. [FN132] Shortening the time when a state defendant may seek relief in federal district court should please anyone holding this view.[FN133] Such a charge is easy to make and hard to disprove.[FN134] No one is free of the bias of his position.[FN135] This applies equally to prosecutors, defenders, and state and federal judges.[FN136] It also applies to professors, who seem to be the strongest proponents of unlimited federal habeas corpus.[FN137] Without in any way meaning to deny the value and importance of their contributions, it is nonetheless true that the nature of their profession naturally inclines professors to be more Utopian than the judges who are responsible for the administration of criminal justice.[FN138] There has been a chorus of complaint from judges about the consequences of an unlimited postconviction remedy. One could also argue that federal judges have a bias in favor of federal rights because their focus on protecting federal rights is not balanced by the responsibility for the overall administration of criminal justice borne by state judges.[FN139] Nor are federal courts immune from the well-known institutional bias toward increasing their own power.[FN140] The real issue is not bias, but the proper distribution of power under the constitution.[FN141] One's answer to this question should not depend on one's position on the propriety of particular procedural requirements.[FN142] The point is that all perspectives must participate in formulating the constitutional principles of our federalism and that the state judges who preside over most of the country's criminal cases should play a prominent part.[FN143]

FN132. The arguments for a federal forum are summarized in P. Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L.Rev. 605, 623 (1981), which is one of the articles discussing the relative competence of state and federal courts to enforce federal constitutional rights in the symposium on “State Courts and Federalism in the 1980's,” 22 Wm. & Mary L.Rev. No. 4 (Summer 1981) [hereinafter cited as Symposium].

FN133. D. Shapiro, Federal Habeas Corpus: A study in Massachusetts, 87 Harv. L.Rev. 321, 355–361 (1973) [hereinafter cited as Shapiro] proposes a state statute of limitations of six months or one year to prevent the prisoner from becoming “the shuttlecock in a frustrating game of judicial badminton that increases the total burden on the courts and does no one any real service.”

FN134. But see, Solmine & Walker, Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity, 10 Hastings Const. L.Q. 213 (1983) (finds “parity” between state and federal courts in protecting federal rights).

FN135. For an interesting example of the effect of one's role, compare the view of Judge Sandra D. O'Connor of the Arizona Court of Appeals, Comment, Symposium, supra n 132, at 814 (“It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a *full* and *fair* adjudication has been given in the state court .”) with the view of Justice Sandra D. O'Connor of the United States Supreme Court, Miller v. Fenton, 88 L.Ed.2d 405 at 412 (1985) (“But, as we now reaffirm, the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination.”).

FN136. The author of this proposed rule had a different view when he was a criminal defense lawyer in both private and public practice. He even viewed things somewhat differently after six wonderful weeks away from the grind at the University of Virginia Law School's Graduate Program for Judges.

FN137. On the relationship between academia and the federal bench, see Fleming, Chapter 16, supra n 118; Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 Law & Soc.Ord. 557, 559:

There are significant reasons for the present infatuation with federal courts as the preferred forum for litigation. First, there is the influence of academia, exercised by the law professors and their captive audiences, the law students. A basic notion of modern legal academia is that the federal judiciary is a unique institution: That somehow the law is different there, or the proceedings more conducive to reasoned disposition; that there is no politics in the appointment of federal judges; that federal judges come into their robes by a process akin to immaculate conception; that ail federal judges are meritorious fountainheads of wisdom, whereas their state court counterparts are political hacks who happened to stump for a gubernatorial winner.

FN138. Like all generalizations, this has noteworthy exceptions, such as Professor Paul M. Bator, who is a brilliant proponent of greater finality in criminal law, and Professor Daniel J. Meador, who chaired the Task Force on Courts of the National Advisory Commission on Criminal Justice Standards and Goals.

FN139. Fleming, supra n 117, at 151.

FN140. Meador, supra n 1, at 74:

The pulling of state criminal business more and more into the federal courts through habeas corpus is reminiscent of the royal courts' use of the writ in medieval England to draw unto themselves much business from the inferior and local courts. The writ then was a powerful centralizing force in government. It redistributed power as between local and national authorities. And that is what it is tending to do now in the field of criminal administration in the United States. The writ is making the local prosecution of crime increasingly the business of the national judiciary. The writ gives a federal district court an instrument for reviewing on fresh evidence controlling issues in a state prosecution and releasing from state custody any person the federal court holds to be detained contrary to federal law. Backed up as it is by the obviously superior national force, this can be a powerful weapon. The Lord Chancellor discovered a similar effect of the writ four centuries ago when he saw his authority undercut by the common law courts' use of habeas corpus to release persons he committed for violation of his decrees. Many state judges and officials in America today, and students of the problem as well, are apprehensive that state authority, like that of the inferior courts and the Chancellors of old, will ultimately be sapped by the federal writ. While the centralizing effect of medieval habeas corpus seems to have been salutary for Britain, the apprehensions in some quarters today are that this may be unhealthy for American constitutionalism and hence, in the long run, for liberty under law.

FN141. W. Duker, A Constitutional History of Habeas Corpus (1980) at 155:

The thesis herein argued is that the habeas clause was meant to restrict Congress from suspending state habeas for federal prisoners except in certain cases where essential for public safety. This thesis is in direct discord with ... the notion that state courts are without authority to issue the writ to question the custody of federal prisoners, and if improperly held, to release them. [See Table's Case 13 Wall (US) 397]....

The framers of the Constitution did not intend to guarantee a right to a federal writ. Under the intent of the framers any right to federal habeas would be purely statutory. An argument that certain congressional measures restrict or even deny the writ would, accordingly, be without substance.... That [the] design [of the framers] has not been followed can be explained by the propensity of habeas corpus to find itself as the context id which a more general dialogue takes place, that is, a dialogue of political power. In early England, as shown above, habeas corpus was the ground upon which the battle between the local and superior courts was fought; followed by the battle among the superior courts; followed by the battle between the legislative and executive departments of government. These battles transformed habeas corpus from a writ compelling appearance to the “Great Writ” of liberty it is today. Throughout this century in the United States, habeas corpus has been the medium of the dialogue of federalism between the federal and state courts. So a history of the transformation of the Constitution from a document that provided for a restriction on the power of Congress from interfering with state habeas for federal prisoners to one that prohibits a state court from issuing habeas corpus for federal prisoners is not anomalous. One of the most important factors in the interpretation of habeas corpus then, has been the distribution of political power.

FN142. R. Aldisert, Comment, Symposium, supra n 132, at 832: "There is a basic difference between the competence to interpret and articulate constitutional principles and blatant advocacy of particular points of view." Compare Sumner v. Mata, 449 U.S. 539, 549 (1981):
State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted that all are not doing their mortal best to discharge their oath of office.

FN143. P. Bator, The State Courts and Federal Constitutional Litigation, Symposium, supra n 132, at 629–635 explains why channeling cases to the federal courts "may embody a narrow and partisian vision of what constitutional values are," saying at 633:
Note that I am not making an argument against the centrality of the supremacy clause. But it is worth reminding ourselves that the supremacy clause does not say that the federal government shall be supreme. It doesn't even say that the federal courts shall be supreme. It says, fundamentally, that the Constitution shall be supreme. And the Constitution itself contains a multiplicity of various sorts of values, many in tension with each other: process values as well as substantive values, structural and institutional values as well as those embodying individual rights.

State trial courts are necessarily the primary protectors of federal constitutional rights.[FN144] Whatever reason there might have been to doubt the willingness of some state courts to perform this duty in past generations no longer exists today.[FN145] remains true that the grind of the heavy criminal caseload in state courts limits their ability to meet federal standards. State trial judges have been aptly likened to the children of Israel who were required to make bricks without straw.[FN146] The remedy is to strengthen state courts. This is not accomplished by preventing them from developing workable rules.[FN147] The decision of the United States Supreme Court to give state procedural rules greater deference was an important step in the right direction.[FN148] So was the decision to foreclose reconsideration of Fourth Amendment claims in federal habeas corpus proceedings when there was a full and fair opportunity to litigate them in state court.[FN149] This rule should apply generally.[FN150]

FN144. P. Bator, supra n 143, at 629: "The state courts ... constitute an ultimate protection against tyrannous government."

FN145. R. Sheran, Comment, Symposium, supra n 132, at 790–792; NAC, supra n 8, at 136:
In short, the conditions that earlier might have justified a lack of confidence in the State bench and bar have changed substantially. There is no longer justification for basing the whole system of review of criminal convictions upon the assumption that lawyers and judges are not doing their jobs, especially when such a review system erodes finality so extensively and introduces as much fragmentation, delay, and uncertainty into criminal proceedings as the present system does.
These standards, therefore, rest on the opposite premise that in general lawyers and judges are competent and will assure that defendants' rights are fairly litigated and protected. Only where the facts show that this premise is incorrect—where the prior litigation does not comply with constitutional requirements or where a claim was not raised for a justifiable reason—would the burdensome procedure of further review become available.

FN146. Fleming, supra n 117, at 138.

FN147. Friendly, *Benchmarks,* supra n 4, at 263.

FN148. Wainwright v. Sykes, supra n 3.

FN149. Stone v. Powell, 428 U.S. 465 (1976).

FN150. According to C. Whitebread, The Counterrevolution in Criminal Procedure, The Judges' Journal, Vol. 24, No. 4, 41, 54 (Fall 1985):

There is a counterrevolution in criminal procedure, and especially constitutional criminal procedure, underway at the United States Supreme Court today.

Of the five major themes active before this Court: the crime-control model, the hierarchy among the Bill of Rights, the preference for case-by-case adjudication, and the importance of being guilty, the fifth theme is the most important of all, and that is the New Federalism in this country.

From 1976 to 1985 this Supreme Court has closed the door to state criminal defendants pursuing habeas corpus in federal courts, and prefers instead to rely on direct review of state court decisions to enforce federally protected constitutional rights. What does that mean? It means the greatest single power transfer in the country's history from federal courts to state courts. It is a challenge the Supreme Court has forced upon state courts.

It is misleading to suggest that state courts object to this "challege." It is also important to understand that Wainwright v. Sykes, supra n 3, at 87, the main case in the "counterrevolution," reaffirms Brown v. Allen, supra n 3, the case which set the stage for the far greater power transfer from state courts to federal courts. The statement in the introduction of the second edition of the ABA standards, supra n 39, at 22.4 that "tension has greatly subsided during a period of growth and maturation of state postconviction procedures" is also somewhat misleading. Compare supra n 16 and the recent statement of Chief Justice Sheran of the Supreme Court of Minnesota, supra n 132, at 791: "[The view that challenged state criminal convictions which have been approved by the final court of appeals of a state should not, in effect, be reversed by a judge of the federal district court persists—nost emphatically."

*60 Most state judges would agree that state courts should provide a postconviction remedy for state prisoners. The great effort required to do so would be worth the high cost if state decisions after full and fair hearings were final, subject to review only by the United States Supreme Court, or by a new court created to take over some of the Supreme Court's jurisdiction, or possibly by the existing courts of appeal.[FN151] Collateral attack should be reserved for cases where state courts do not afford an adequate opportunity to protect federal rights. As long as there is a broad right to collaterally attack state judgments in federal district courts, why should state courts compound the cost by providing the same remedy?

FN151. Friendly, supra n 2, at 166; NAC standard 6.5, supra n 8, at 128; Justice on Appeal, supra n 14, at 114–118. Compare H. Friendly, Averting the Flood by Lessening the Flow, 59 Cornell L.Rev. 634, 636–640 (1974); L. Mayers, Federal Review of State Convictions: The Need for Procedural Reappraisal, 34 Geo. Wash. L.Rev. 615 (1965).

State judges understand the burden that federal habeas corpus imposes on federal judges, but we cannot willingly "shoulder this burden" for the mere purpose of "making easier the task of the federal judge if the state prisoner pursue[s] his cause further." [FN152] This puts state courts in the position of a preliminary screening agency for federal constitutional claims before they are redecided by federal district judges, usually upon report and recommendation of a federal magistrate.[FN153]

FN152. W. Brennan, Some Aspects of Federalism, 39 N.Y.U. L.Rev. 945, 959 (1964); Case v. Nebraska, 381 U.S. 336, 345 (1965).

FN153. Shapiro, supra n 133, at 361–367 asks whether the use of federal magistrates for this function is not "delegation run riot?"

The remedy must be legislative. The General Assembly should provide the resources necessary for state courts to properly perform their function and Congress should put reasonable restrictions on the use of federal habeas corpus.[FN154] It is recognized that there are political obstacles to reform.[FN155] Perhaps shifting more of the burden of unlimited collateral review to the federal courts will prompt Congress to act.[FN156]

FN154. Note, Relieving the Habeas Corpus Burden: A Jurisdictional Remedy, 63 Iowa L.Rev. 392 (1977), recommends legislatively restricting federal habeas corpus to cases where state procedures were inadequate or ineffective to test the legality of the detention.

FN155. Justice on Appeal, supra n 14, at 222–224.

FN156. Friendly, supra n 2, at 167:

Assuming that nothing happens on the federal scene, whether through congressional inertia or otherwise, what should the states do with respect to their own systems for collateral attack on convictions? In my view, if a state considers that its system of post-conviction remedies should take the lines X have proposed, it should feel no obligation to go further simply because this will leave some cases where the only post-conviction review will be in a federal court.

I realize this may seem to run counter to what has become the received wisdom, even among many state judges and prosecutors. One part of the angry reaction of the Conference of State Chief Justices to *Brown v. Allen* was the recommendation that:

State statutes should provide a postconviction process at least as broad in scope as existing Federal statutes under which claims of violation of constitutional right asserted by State prisoners are determined in Federal courts under Federal habeas corpus statutes.

The recommendation for broadening state post-conviction remedies was doubtless salutary in 1954 when many states had few or none. As my remarks have made evident, I recognize a considerable area for collateral attack; indeed, I think there are circumstances, such as post-trial discovery of the knowing use of material perjured evidence by the prosecutor or claims of coercion to plead guilty, where failure to provide this would deny due process of law. My submission here is simply that when a state has done what it considers right and has met due process standards, it should not feel obliged to do more *merely* because federal habeas may be available in some cases where it declines to allow state collateral attack.

The argument against this is that making the state post-conviction remedy fully congruent with federal habeas for state prisoners (1) will economise judicial time, (2) will reduce state-federal conflict, and (3) will provide a record on which the federal judge can act. Except for the few cases where pursuit of the state remedy will result in a release, absolute or conditional, the first argument rests on the premise that many state prisoners will accept the state's adverse judgment. X know of no solid evidence to support this; my impression is that prisoners unsuccessful in their post-conviction applications through the state hierarchy almost inevitably have a go at federal habeas, save when their sentences have expired. In the great majority of cases the job simply has to be done twice. Pleasant though it is for federal judges to have the task initially performed by their state brethren, the over-all result is to increase the claims on judicial and prosecutorial time. The conflict that would otherwise exist is avoided only in the rare instances where the state itself grants release and, more Important, in cases where it finds the facts more favorably to the prosecution than a federal judge would do independently, but the latter respects the state determination. This last is also the real bite in the point about record making. It is, of course, somewhat ironic that after federal habeas has been justified in part on the basis of the superiority of fact determinations by the federal judge, the states should be urged to elaborate their post-conviction remedies so as to enable him to avoid the task. Moreover, conflict is even more acrid when a federal judge rejects not simply a state determination after trial and appeal but also its denial of post-conviction relief. It should be remembered also that my proposal contemplates state post-conviction record making when there is new evidence that was not available at trial, and that the state trial or pre-trial proceedings will contain a record whenever the point was then raised. The problem areas would thus largely be cases where the point could have been but was not raised at the state trial. Be all this as it may, such considerations are for the state to weigh against what it may well consider an excessive expenditure of effort in dealing with collateral attack. While the immediate result of a state's failure to provide the full panoply of post-conviction remedies now available in federal habeas would be an increase in the burdens on the federal courts, this might afford the impetus necessary to prod Congress into action.

Although the proposed rule would add a greater degree of finality to state judgments of conviction, whether or not the optional provision is adopted, it would not do so by completely foreclosing a judicial remedy. If the proposal is adopted without the optional provision, a federal remedy would remain available when a state remedy is barred.[FN157] If the Optional provision is adopted, a state remedy for miscarriage of justice would also remain available. The primary advantage of the proposal without the option is that it would ease the pressure on the overburdened state courts and reduce the overall waste and delay that is apparent when the state and federal courts are viewed as one system. The benefit of the optional provision is less certain, but possibly greater. It is hoped that a state remedy for miscarriage of justice will strengthen judicial federalism and liberty under Law.

FN157. Nor should the existence of the non-judicial remedy of executive clemency be ignored. Fay v. Noia, supra n 3, at 476, n 28; Friendly, supra n 2, at 151, n 35. The Governor of Delaware granted an average of 28 pardons a year between 1977 and 1985.

PROPOSED RULE 35–1
RULE 35.1. POSTCONVICTION REMEDY

(a) *Scope of Rule*.

(1) *Nature of Proceeding*. This rule governs the procedure on an application for relief by a person in custody or subject to future custody under a sentence of this court on the ground that the judgment of conviction is invalid because the court tacked jurisdiction to enter it or because it was obtained in violation of the Constitution or laws of the United States or of the State of Delaware, or is otherwise subject to collateral attack. A proceeding under this rule shall be known as a postconviction proceeding.

*61 (2) *Exclusiveness of Remedy*. The remedy available under this rule may not be sought by a petition for a writ of habeas corpus or coram nobis, but only in the manner provided herein.

(b) *Motion for Postconviction Relief*.

(1) *Form of Motion*. The application for relief shall be made by a motion for postconviction relief. The movant must use the prescribed form which shall be made available without charge by the Prothonotary. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the movant.

(2) *Content of Motion*. The motion shall specify all the grounds for relief which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge, and shall set forth in summary form the facts supporting each of the grounds thus specified.

(3) *Multiple Convictions*. If a movant desires to attack judgments of conviction of more than one offense, he shall file one motion attacking all judgments that were entered at the same time, whether because they were included in one plea agreement or because they were tried together, but shall file separate motions attacking judgments that were entered at different times.

(4) *Time of Filing*. A motion may not be filed until the time for taking an appeal from the judgment of conviction has expired or, if an appeal is taken, until the record has been returned to this court upon completion of the appeal or upon remand with direction to conduct a postconviction proceeding.

(5) *Place of Filing*. A motion shall be filed in the office of the Prothonotary in the county in which the judgment of conviction was entered.

(6) *Amendment of Motion*. A motion may be amended as of course at any time before a response is filed or thereafter by leave of court, which shall be freely given when justice so requires.

(c) *Duties of Prothonotary*.

(1) *Return of noncomplying Motion*. If a motion does not substantially comply with the requirements of subdivision (b), the Prothonotary may return it to the movant, if a judge of the court so directs, together with a statement of the reason for its return. The Prothonotary shall retain a copy of the motion.

(2) *Entry on Docket*. Upon receipt of a motion that appears on its face to comply with subdivision (b), the Prothonotary shall accept the motion and enter it on the docket in the proceeding in which the judgment under attack was entered. If the motion attacks judgments entered in separate criminal action files, the Prothonotary shall place copies of the motion in each file and make the appropriate docket entries,

(3) *Assignment of Number*. The Prothonotary shall assign each motion for postconviction relief a separate criminal action number, which must appear on ail filings in the postconviction proceedings.

(4) *Service of Motion*. The Prothonotary shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the Attorney General. The filing of the motion shall not require the Attorney General to respond to the motion unless ordered by the court.

*62 (d) *Preliminary Consideration by Judge*.

(1) *Reference to Judge*. The original motion shall be presented promptly to the judge who accepted a plea of guilty or nolo contendere or presided at trial in the proceedings leading to the judgment under attack. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge in accordance with the procedure of the court for assignment of its work. The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack shall be examined promptly by the judge to whom it is assigned.

(2) *Stay of Proceedings*. If contents of the file have been removed in connection with federal habeas corpus proceedings, the judge may stay proceedings in this court until they have been returned.

(3) *Preparation of Transcript*. The judge may order the preparation of a transcript of any part of the proceedings leading to the judgment under attack needed to determine whether the movant may be entitled to relief.

(4) *Appointment of Counsel*. The judge may appoint counsel for a movant who is financially unable to obtain representation at any stage of the proceedings when appropriate in the interest of justice. It shall he the duty of counsel to assist the movant in presenting his claim and to review the record of the proceedings leading to the judgment of conviction to determine whether the movant has omitted any arguable ground for relief from the motion for postconviction relief. If counsel determines that the movant's claim is wholly without merit and that there is no other arguable ground for relief, counsel may file a motion to withdraw, which shall explain why the movant's claim is without merit and state that counsel has found no other arguable ground for relief.

(5) *Summary Dismissal*. If it plainly appears from the face of the motion and the proceedings in the case that the movant is not entitled to relief, the judge may eater an order for its summary dismissal and cause the movant to be notified.

(e) *Response to Motion*.

(1) *Order to Respond*. If the motion is not summarily dismissed, the judge shall order the Attorney General to file a response to the motion within the period of time fixed by the court or to take such other action as the judge deems appropriate.

(2) *Content of Response*. the response shall admit or deny the grounds for relief alleged in the motion and shall state whether it is contended that any ground is barred under subdivision (i) of this rule. If the motion contains inaccurate or incomplete information about prior proceedings, the response shall supply the correct information.

(f) *Discovery*.

(1) *Leave of Court Required*. A party may use the processes of discovery available under the Superior Court Rules of Criminal or Civil Procedure to the extent that the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

*63 (2) *Requests for Discovery*. Requests for discovery shall be accompanied by a statement of the proposed interrogatories or requests for admission and a list of the documents, if any, sought to be produced.

(3) *Expenses of Deposition*. If the State is granted leave to take the deposition of the movant or any other person, the judge may as a condition of taking it direct that the State pay the expenses of travel and subsistence and fees of counsel for the movant to attend the taking of the deposition.

(g) *Expansion of Record*.

(1) *Direction for Expansion*. The judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(2) *Materials to be Added*. The expanded record may include, without limitation, letters predating the filing of the motion, documents, exhibits, contents of the file of an appeal or federal habeas corpus proceeding, and answers under oath, if so directed, to written interrogatories propounded by the judge. If the motion alleges ineffective assistance of counsel, the court may direct the lawyer who represented the movant to respond to the allegations. Affidavits may be submitted and considered as a part of the record.

(3) *Submission to Opponent*. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the opposing party, who shall be afforded an opportunity to admit or deny their correctness.

(4) *Authentication*. The court may require the authentication of any material filed under this subdivision.

(h) *Evidentiary Hearing*.

(1) *Determination by Court*. After considering the motion and the response, and the prior proceedings, together with any discovery or added material, the judge shall determine whether an evidentiary hearing is desirable,

(2) *Time for Hearing*. If an evidentiary hearing is ordered, it shall be conducted as promptly as practicable, having regard for the need of both parties for adequate time for investigation and preparation.

(3) *Summary Disposition*. If it appears that an evidentiary hearing is not desirable, the judge shall make such disposition of the motion as justice dictates.

(i) *Bars to Relief*.

(1) *Former Adjudication*. Any ground far relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in a postconviction proceeding, or in an appeal, is thereafter barred, unless reconsideration is warranted in the interest of justice.

(2) *Procedural Default*. Any ground for relief that was not raised in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

(A) cause for relief from the procedural default and

(B) prejudice from violation of the movant's rights.

(3) *Repetitive Motions*. Any ground for relief that was not raised in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless the prior motion for postconviction relief was dismissed summarily under subdivision (d)(5) of this rule.

*64 (4) *Time Limitation*. Any ground for relief that is not raised within two years of when the judgment of conviction is final is thereafter barred, except that a motion asserting a right that is newly recognized after the judgment of conviction is final may be filed within two years of when the right is first recognized by the United States Supreme Court or by the Supreme Court of Delaware.

(5) *Bars Inapplicable*. The bars to relief in paragraphs (2), (3), and (4) of this subdivision shall not apply to a claim that the court lacked jurisdiction. (The bars to relief in paragraphs (3) and (4) of this subsdivision shall not apply 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.]

(6) *Movant's Response*. If ordered to do so, the movant shall explain on the form prescribed by the court why the motion for postconviction relief should not be dismissed or grounds alleged therein should not be barred.

(j) *Reimbursement of Expenses*. If a motion is denied, the State may move for an order requiring the movant to reimburse the State for costs and expenses paid for him from public funds. The court may grant the motion if it finds that the movant's claim is so completely lacking in factual support or legal basis as to be insubstantial or that the movant has otherwise abused this rule. The court may require reimbursement of costs and expenses only to the extent reasonable in Light of the movant's present and probable future financial resources.

(k) *Time for Appeal*. The time for appeal from an order entered on a motion for relief under this rule is as provided in Rule 6 of the Rules of the Supreme Court. Nothing in these rules shall be construed as extending the time for appeal from the original judgment of conviction.

(l) *Applicability*. This rule shall govern all applications for postconviction relief that are filed after the rule becomes effective, except that a motion filed before the rule becomes effective will not be considered in determining whether the bar in subdivision (i)(3) applies and the time limitation in subdivision (i)(4) shall not apply to any motion filed within one year of the effective date of this rule.

OTHER NECESSARY AMENDMENTS
PROPOSED RULE 32(d)

(d) *Plea Withdrawal*. If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had without entry of a judgment of conviction, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only by motion under Rule 35.1.

PROPOSED ROLE 35(a)

(a) *Correction of Sentence*. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

COMMENTS
PROPOSED RULE 35.1. POSTCONVICTION REMEDY

*65 (a) *Scope of Rule*. See advisory committee note to federal rule 1.

(1) *Nature of Proceeding*. This paragraph is similar to federal rule I, except the following ground for relief is omitted; “that the sentence was in excess of the maximum authorized by law,” This provision has caused confusion. See advisory committee note to federal rule 2, A person attacking an illegal sentence

imposed on a valid judgment should use Rule 35(a). Wright, Federal Practice and Procedure: Criminal 2d § 583.

(2) *Exclusiveness of Remedy*. This paragraph is added. It codifies *Curran v. Wooley*, Del.Super., 101 A.2d 303 (1953), *aff'd, Curran v. Woolley,* Del.Supr., 104 A.2d 771 (1954). See *Swain v. Pressley,* 430 U.S. 372 (1977). Compare 28 U.S.C. § 2255 and federal rule 11.

(b) *Motion for Postconviction Relief*. See advisory committee notes to federal rules 2 and 3.

(1) *Form of Motion*. This paragraph provides that an application shall be made by a motion for postconviction relief instead of by a motion to vacate, set aside, or correct the sentence. Compare federal rule 2(a) and (b).

(2) *Content of Motion*. Compare federal rule 2(b). Sanders v. US, 373 VS 1, 16 (1963) defines "ground" as "a sufficient Legal basis for granting the relief sought by the appellant."

(3) *Multiple Coevictions*. This paragraph is tailored to the filing practice of the Prothonotary. The purpose is to have one motion for each criminal action file. It attempts to state a rule that will be easy for a movant to understand. When judgments are entered at the same time, they are usually included in the same criminal action file. When they are not, the Prothonotary must place copies of the motion in each criminal action file and make the appropriate docket entries. See subdivision (c)(2). This will occur when charges in separate criminal action files are included in the same plea agreement and judgments on the guilty pleas are entered at the same time. Compare federal rule 2(c).

(4) *Time of Filing*. This paragraph is similar to present Rule 35(a).

(5) *Place of Filing*. Compare federal rule 3(a).

(6) *Amendment of Motion*. This paragraph is added. Compare Civil Rule 15(a).

(c) *Duties of Prothonotary*. See advisory committee note to federal rule 3.

(1) Return of Noncomplying Motion. Compare federal rule 2(d).

(2) *Entry on Docket*. This paragraph is added. It provides for the proper filing and docketing of motions for postconviction relief. Compare federal rule 3(b).

(3) *Assignment of Number*. This paragraph is added. Assigning each motion for postconviction relief a separate criminal action number will facilitate the keeping of statistics of postconviction proceedings. Such statistics have heretofore been unavailable because postconviction proceedings have not been differentiated from the original criminal action.

(4) *Service of Motion*. Compare federal rule 3(b).

*66 (d) *Preliminary Consideration by Judge*. See advisory committee note to federal rule 4.

(1) *Reference to Judge*. This paragraph is similar to federal rule 4(a) and (b), except that it includes a reference to entry of a guilty plea. See Rule 32(d).

(2) *Stay of Proceedings*. This paragraph is added.

(3) *Preparation of Tranacript*. This paragraph is added. Although there is no federal constitutional right to the preparation of transcript at public expense for postconviction proceedings, at least when the motion does not state a claim upon which relief can be granted, transcript should be ordered if needed to decide the motion for postconviction relief. *United States v. MacCollom,* 426 U.S. 317 (1976). Th is is similar to the federal statutory standard. See Wright, Federal Practice and Procedure: Criminal 2d § 600.

(4) *Appointment of Counsel*. This paragraph is added. It renders the references to appointment of counsel in federal rules 6 and 8 unnecessary. The court has authority to appoint counsel under 29 *Del. C.* c.46 and Rule 44. Since there is no federal constitutional right to counsel in postconviction proceedings, the federal standard is not controlling. *Ross v. Moffitt*, 417 U.S. 600 (1974).

(5) *Summary Dismissal*. Compare federal rule 4(b).

(e) *Response to Motion*. See advisory committee note to federal rule 5.

(1) *Order to Respond*. Compare federal rule 4(b).

(2) *Content of Response*. Compare federal rule 5(a).

(f) *Discovery*. See advisory committee note to federal rule 6.

(1) *Leave of Court Required*. Compare federal rule 6(a).

(2) *Requests for Discovery*. Compare federal rule 6(b).

(3) *Expenses of Deposition*. Compare federal rule 6(c).

(g) *Expansion of Record*. See advisory committee note to federal rule 7.

(1) *Direction for Expansion*. Compare federal rule 7(a). This provision makes federal rule 5(b) unnecessary.

(2) *Materials to be Added*. This paragraph is modified to include reference to the content of the file of an appeal or federal postconviction proceeding and the response of a lawyer whose assistance the movant alleges to have been ineffective as materials that may be added to the record.

(3) *Submission to Opponent*. Compare federal rule 7(c).

(4) *Authentication*. Compare federal rule 7(d).

(h) *Evidentiary Hearing*. See advisory committee note to federal rule 8.

(1) *Determination by Court*. This paragraph is modified to say that the judge will determine whether an evidentiary hearing is "desirable," not whether it is "required." This highlights that the federal standard for when an evidentiary hearing is required in federal postconviction proceedings is not controlling. See Wright, Federal Practice and Procedure: Criminal 2d § 599. For the federal Standard for when findings of fact by a state court will be presumed correct in federal habeas corpus proceedings, see 28 U.S.C. § 2254 (1976) and *Townsend v. Sain*, 372 U.S. 293 (1963).

*67 (2) *Time for Hearing*. Compare federal rule 8(c).

(3) *Summary Disposition*. This paragraph is added. It is desirable to distinguish summary disposition without an evidentiary hearing from summary dismissal under subdivision (d)(5), because summary disposition without an evidentiary hearing may bar a later motion for postconviction relief but summary dismissal will not. See subdivision (i)(3).

(i) *Bars to Relief*. This paragraph is added. It replaces federal rule 9.

(1) *Former Adjudication*. This paragraph applies to grounds for relief that were previously litigated. Reconsideration is barred, unless justified in the interest of justice. This is analogous to the rule of issue preclusion in civil cases. Compare Restatement, Second, Judgments, Chapter 1, p.2, §§ 27, 28.

(2) *Procedural Default*. This paragraph applies when the movant has failed to comply with a procedural requirement that he present a defense or objection at a specified stage of a criminal prosecution. For example, Rule 51 requires "that a party, at the time the ruling or order of the Court is made or sought, makes known to the Court the action which he desires the Court to take or his objection to the action of the Court and the grounds therefor." The paragraph states the cause-and-prejudice test adopted by the United States Supreme Court in *Wainwright v. Sykes,* 433 U.S. 72 (1977) and by the Supreme Court of Delaware in *Conyers v. State,* Del.Supr., 422 A.2d 345 (1980). See Wright, Federal Practice and Procedure: Criminal 2d § 596.1.

(3) *Repetitive Motions*. This paragraph applies when the movant has failed to include a ground for relief of which he had knowledge or, by the exercise of reasonable diligence, should have had knowledge, in a previous motion for postconviction relief that survived summary dismissal, as required by subdivision (b)(2).

(4) *Time Limitation*. This paragraph states a two-year period of limitation on motions for postconviction relief. The time begins to run when the judgment of conviction becomes final or, in other words, when any direct appeal has been completed, or when a retroactively applicable right is first recognized by the United States Supreme Court or by the Supreme Court of Delaware.

(5) *Bars Inapplicable*. This paragraph states that the bars to relief in paragraphs (2), (3), and (4) do not apply to a claim that the court lacked jurisdiction. This is consistent with habeas corpus, as it existed at common law and remains in Delaware. 10 *Del. C.* c. 69; *Curran v. Woolley,* Del.Supr., 104 A.2d 771 (1954). [This paragraph also states that the bars to relief in paragraphs (3) and (4) do not apply to a. colorable claim of miscarriage of justice.]

(6) *Movant's Response*. This paragraph provides for movant's response to a possible bar. See the annexed form far that purpose.

(j) *Reimbursement of Expenses*. This subdivision is derived from the Uniform Post–Conviction Procedure Act (1980) 113. The term "insubstantial" is used instead of "frivolous." See National Advisory Commission on Criminal Justice Standards and Goals, Courts 114 (1973).

*68 (k) *Time for Appeal*. See advisory committee note to federal rule ll. Although a postconviction proceeding is a continuation of the criminal case, the filing of a motion for postconviction relief does not extend the time for taking an appeal from the judgment of conviction. A motion for postconviction relief may not be filed while the taking of an appeal is possible. See subdivision (b)(4).

(l) *Applicability*. The rule will apply to all motione for postconviction relief that are filed after the rule becomes effective, with two exceptions which will give persons who would otherwise be barred an opportunity to file a motion under the amended rule.

PROPOSED RULE 32(d). PLEA WITHDRAWAL

This is similar to Rule 32(d) of the Federal Rules of Criminal Procedure, as amended in 1983. See the advisory committee note on the fair-and-just standard applicable before sentencing and on the standard after sentencing: "a fundamental defect which inherently results in a complete miscarriage of justice." Hill v. United States, 368 U.S. 424 (1962).

PROPOSED RULE 35(a). CORRECTION OF SENTENCE

This is similar to Rule 35(a) of the Federal Rules of Criminal Procedure.

APPENDIX OF FORMS

IN THE SUPERIOR COURT OF THE STATE
OF DELAWARE

IN AND FOR
____________________________ COUNTY

STATE OF DELAWARE	)	
	)	
V.	)	CrA No.
	)	
______________________________	)	
(Defendant's name—please print)	)	

GUILTY PLEA FORM

The defendant must answer the following questions in his own handwriting.

Date of birth: ___________________________ Last grade in school completed: __________________

Have you ever been a patient in a mental hospital? _____________

Are you under the influence of alcohol or drugs? _____________

Have you freely and voluntarily decided to plead guilty to the charges listed in your written plea agreement? _____________

Have you been promised anything that is not stated in your written plea agreement? ______

Do you understand that because you are pleading guilty you will not have a trial and you therefore waive (give up) your constitutional right:

to be presumed innocent until the State can prove each and every part of the charges against you beyond a reasonable doubt,

to a speedy and public trial,

to trial by Jury.

to hear and question the witnesses against you.

to present evidence in your defense,

to testify or not testify yourself, and

to appeal to a higher court? ____________

What is the total consecutive maximum possible penalty provided by law for the charges to which your guilty plea is offered? ___________________________________

Is there a mandatory minimum penalty? _____________ If so, what is it? ____________________

Has anyone promised you what your sentence will be? _____________

Do you understand that a guilty plea is a violation of probation and parole? _____________

Do you understand that a guilty plea to a felony will cause you to lose your right to vote, to be a juror, to hold public office, to own or possess a deadly weapon, and other civil rights? ____________

*69 Are you satisfied that your lawyer has fully advised you of your rights and of the result of your guilty plea? _____________

WITNESSED BY:

____   ____

Signature of Defendant

Date:
____

IN THE SUPERIOR COURT OF THE STATE OP DELAWARE IN AND FOR ____________ COUNTY

STATE OF DELAWARE	)	
	)	
V.	)	
	)	
________________________________	)	NO. ______________________________
Name of Movant on Indictment	)	(to be supplied by Prothonotary)
	)	
________________________________	)	
Correct Fall Name of Movant	)	

MOTION FOR POSTCONVICTION RELIEF INSTRUCTIONS

(1) This motion must be legibly handwritten or typewritten, and signed by the movant under penalty of perjury.

(2) All grounds for relief and supporting facts must be included, and all questions must be answered briefly in the proper space on the form.

(3) Additional pages are not permitted. If more room is needed, use the reverse side of the sheet.

(4) No citation of authorities is required. If legal arguments are submitted, this should be done in a separate memorandum.

(5) Only convictions that were included in the sane plea agreement or were tried together may be challenged in a single motion.

(6) When the motion is completed, the original must be mailed to the Prothonotary in the county in which the judgment of conviction was entered. No fee is required.

(7) The motion will be accepted if it conforms to these instructions. Otherwise, it will be returned with a notation as to the deficiency.

MOTION

1. County in which you were convicted ____

2. Judge who imposed sentence ____

3. Date sentence was imposed ____

4. Offense(s) for which you were sentenced and length of sentence(s): ______________________

5. Do you have any sentence(s) to serve other than the sentence(s) imposed because of the judgment(s) under attack in this motion? Yes ( ) No( )

    If your anawer is “yes,” give the following information:

    Name and location of court(s) which imposed the other sentence(s): _________________________

    Date senteuce(s) imposed: ____

    Length of sentence(s) ____

6. What was the basis for the judgment(a) of conviction? (Check one)

    Plea of guilty ( )

    Plea of guilty without admission of guilt (“Robinson plea”) ( )

    Plea of nolo contendere ( )

    Verdict of jury ( )

Finding of judge (nonjury trial) ( )

7. Judge who accepted plea or presided at trial ____

8. Did you take the witness stand and testify? (Check one) Mo trial ( ) Yes ( ) No ( )

9. Did you appeal from the judgment of conviction? Yes ( ) No ( )

If your answer is "yes," give the following information:

Case number of appeal ____

Date of court's final order or opinion ____

10. Other than a direct appeal from the judgment(s) of conviction, have you filed any other motion(s) or petition(s) seeking relief from the judgment(s) in state or federal court? Yea ( ) No ( ) How many? ( )

If your answer is "yea," give the following information as to each:

*70 Nature of proceeding(s) ____

Grounds raised ____

Was there an evidentiary hearing? ____

Case number of proceeding (a) ____

Date(s) of court's final order(a) or opinion(s) ____

Did you appeal the resuit(s)? ____

11. Give the name of each attorney who represented you at the following stages of the proceedings relating to the judgment(s) under attack In this mot ion:

At plea of guilty or trial ____

On appeal ____

In any postconviction proceeding ____

12. State every ground on which you claim that your rights were violated. If you fail to set forth all grounds in this motion, you may be barred from raising additional grounds at a later date. You must state facts in support of the ground(s) which you claim. For your information, the following is a list of frequently raised

grounds for relief (you may also raise grounds that are not listed here): unlawful arrest, detention, or search and seizure; denial of counsel; violation of the privilege against double jeopardy; guilty plea without understanding charge(s) or consequences; unfulfilled plea agreement; unintelligent waiver of right to trial; prejudicial joinder of defendants; suppression of evidence favorable to defendant; violation of the right to confront witnesses against you; denial of right to testify; ineffective assistance of counsel.

Ground one: ____

Supporting facts (state the facts briefly without citing cases): ____________________________

Ground two: ____

Supporting facts (state the facts briefly without citing cases): ____________________________

Ground three: ____

Supporting facts (state the facts briefly without citing cases): ____________________________

If any of the grounds listed were not previously raised, state briefly what grounds were not raise, and give your reason(s) for not doing so: ____

Wherefore, movant asks that the court grant him all relief to which he may be entitled in this proceeding.

____

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct.

_______________________________________ ____

Date Signed

Signature of Movant

(Notarization not required)

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

STATE OF DELAWARE)

)

V.) CASE NO. _________________________

)

____)

Name of Movant)

MOVANT'S RESPONSE AS TO WHY MOTION FOR POSTCONVICTION RELIEF SHOULD NOT BE DISMISSED OR GROUND(S) BARRED

INSTRUCTIONS

(1) This form has been sent so that you may explain why your motion for postconviction relief should not foe dismissed, or ground(s) alleged therein should not be barred, for the following reason(s): _

(2) Failure to return this form within _____ days may result in dismissal of your motion or bar of ground(s) alleged therein.

RESPONSE

1. Have you had the assistance of an attorney, other law-trained personnel, or writ writers since the conviction your motion is attacking was entered? Yes ( ) No ( ) If your answer is "yes," give the following information:

*71 — Specify as precisely as you can the periods of time you received such assistance, up to and including the present. ____

— Describe the nature of the assistance, including the names of those who rendered it to you. __

2. Explain why your motion for postconviction relief should not be dismissed : _______________

I declare under penalty of perjury that the foregoing is true and correct.

_________________________________ ______________________________________

Date Signed Signature of Movant

* * *

Not Reported in A.3d, 2012 WL 1400932 (Del.Super.)

Judges, Attorneys and Experts (Back to top)
Judges | Attorneys | Experts
Judges
• Parkins, Hon. John A. Jr.
State of Delaware Superior Court
Wilmington, Delaware 19801
Litigation History Report | Profiler

Attorneys
Attorneys for Defendant
• Mondros, Herbert Weiswasser
Wilmington, Delaware 19801
Litigation History Report | Profiler

• Moreno, James
Philadelphia, Pennsylvania 19102

Litigation History Report | Profiler

Experts

- Fulero, Solomon M., PH.D.

HEALTH CARE-PHYSICIANS & HEALTH PROFESSIONALS PSYCHOLOGIST
Dayton, UT 45435
Expert Evaluator Report | Expert Challenge Report | Expert Testimony | Resume | Profiler

- Martell, Daniel A.

PSYCHIATRY & PSYCHOLOGY / PSYCHOLOGY/COUNSELING
Newport Beach, CA 92660
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- Mash, Deborah C., PH.D.

PROFESSOR OF NEUROLOGY AND MOLECULAR AND CELLULAR PHARMACOLOGY
Miami, FL
Expert Evaluator Report | Expert Challenge Report | Expert Testimony | Resume | Profiler

- Maslansky, Robert A.

MEDICAL & HEALTH / MEDICAL & HEALTH
New York, NY 10021
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