January 30, 2003

Honorable E. Norman Veasey
Chief Justice Supreme Court
State Office Building
820 North French Street
Wilmington, DE 19801

RE: *Chris Crosby v. State of Delaware*
No. 8, 2002
State of Delaware v. Chris Crosby
Cr.A. No. IN01-06-1203 & IN01-06-1206

Dear Chief Justice Veasey:

The Supreme Court has remanded this matter to me for the following purposes:

> This matter should be remanded to the Superior Court for additional proceedings. The Superior Court should consider the potential impact on this case of *Solem* (*Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L.Ed. 2d 637 (1983)) and related cases regarding the Cruel and Unusual Punishments Clause of the Eighth Amendment.
>
> The Superior Court should likewise consider the potential impact of the recent cases of *Andrade v. Attorney General* (270 F.3d 743 (9th Cir. 2001), *cert. granted sub nom. Lockyer v. Andrade*, 122 S. Ct. 1434 (2002)) and *Brown v. Mayle* (283 F.3d 1019 (9th Cir. 2002)) as well as the potential impact of the SENTAC guidelines on the exercise of its discretion.
>
> The Superior Court should conduct further proceedings as appropriate and file a report with this Court with it conclusions and the reasoning

> behind its discretionary decision under Section 4214(a) to sentence Crosby to life imprisonment without possibility of probation or parole and any deviation from SENTAC guidelines. Finally, the Superior Court should specify the documentary basis upon which it relied in coming to its decision.[1]

As directed, this Court has undertaken that review. Starting with "additional proceedings," first, the Court met with counsel on September 5, 2002, shortly after the remand was received. The defendant requested permission to supplement the record and additional time to do so. The State also wanted an opportunity to do so. These requests were granted, but the time necessary for the defense to gather the information was much longer than anticipated. The "additional proceedings" have involved only written submissions by the parties which have now been completed.

The remand was apparently prompted by this Court's imposition on December 1, 2001, of a life sentence on Crosby as an habitual offender for a plea to forgery in the second degree. On September 28, 2001, Judge Gebelein of this Court signed an order upon motion by the State declaring Crosby an habitual offender under the provision of 11 *Del. C.* §4214(a).[2] This, however, was not Crosby's first such declaration as an habitual offender.

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[1] *Crosby v. State,* Del. Supr., No. 8, 2002, Veasey, CJ. (August 26, 2002).

[2] 11 *Del. C.* §4214(a) provides:

> Any person who has been 3 times convicted of a felony, other than those which are specifically mentioned in subsection (b) of this section, under the laws of this State, and/or any other state, United States or any territory of the United States, and who shall thereafter be convicted of a subsequent felony of this State is declared to be an habitual criminal, and the court in which such 4th or subsequent conviction is had, in imposing sentence, may in its discretion, impose a sentence of up to life imprisonment upon the person so convicted. Notwithstanding any provision of this title to the contrary, any person sentenced pursuant to this subsection shall receive a minimum sentence which shall not be less than the statutory maximum penalty provided elsewhere in this title for the 4th subsequent felony which forms the basis of the State's petition to have the person declared to be an habitual criminal except that this minimum provision shall apply only when the 4th or subsequent felony is a Title 11 violent felony, as defined in §4201(c)) of this title. Notwithstanding any

(continued...)

Judge Gebelein signed a similar declaration a mere two and a half years before when he sentenced Crosby as an habitual offender for conviction of burglary in the third degree.

I

The Supreme Court has asked me to examine Crosby's most recent and second habitual sentence in light of several United States Supreme Court cases and several cases from the 9th Circuit. The Court has also asked me to specify the documentary basis upon which I relied in imposing this sentence. While it is a unique request, I am happy to comply.

The documentation of my reasoning will assist in placing this sentence in the context of the opinions to which the Supreme Court has directed my attention. For obvious reasons, that documentation starts with the presentence report which I read prior to sentencing. I have attached the complete report[3] including the normally privileged evaluation of the presentence officer.[4] I have included it for two reasons. First, the inclusion complies with the remand directive to document my reasons. Second, it provides a complete picture in light of the affidavit of one of the defendant's attorneys attached as Exhibit B to the defendant's filing on remand. Counsel did not seek any judge's permission to have this conversation. It is unclear if the defendant is seeking to impugn the officer's integrity or his motives.

That evaluation states:

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[2](...continued)

> provision of this title to the contrary, any sentence so imposed pursuant to this subsection shall not be subject to suspension by the court, and shall be served in its entirety at a full custodial Level V institutional setting without benefit of probation or parole, except that any such sentence shall be subject to the provisions of §§ 4205(h), 4217, 4381 and 4382 of this title.

[3] Since this was Crosby's fifth presentence report, the enclosed contains duplicates of some of the prior reports.

[4] Such recommendations/evaluations are confidential under Superior Court Criminal Rule 32(c))(3).

> The offender is a 46 year old male who has been involved in the criminal justice system since he was 18 years old. He has only an 8th grade education, a lengthy criminal record, and a substance abuse problem. In 1999, Judge Gebelein signed an order declaring the offender a habitual offender. On September 21st of this year, pursuant to the instant offense, D.A.G. Andrew Vella requested Judge Gebelein to sign another order proclaiming the offender a habitual offender. Judge Gebelein signed that order on October 1, 2001. The offender has now been twice declared a habitual offender.
>
> Furthermore, this case marks the offender's fifth presentence report. After 28 years of criminal justice system involvement, five PSI's and two declarations of habitual offender status, it is safe to say that the offender has exhausted all of his options regarding rehabilitation. He's not going to change. We can keep on seeing him in court, writing presentence reports, and declaring him a habitual offender every time gets arrested, but he will still be the same hopeless criminal. It's time to lock him away for the rest of his life and move on to a new offender.[5]

The only information which I had about Crosby prior to sentencing him was the report and remarks made at sentencing. A careful reading of the report reveals a number of salient points:

> 1. First and foremost, Crosby committed the forgery charge, for which he received the life sentence, about 26 months after having been previously declared an habitual offender.
>
> 2. The forgery charge was committed less then two years after his release from his 1999 burglary third degree/habitual offender sentence.
>
> 3. When he committed the forgery offense he was on probation. Though discharged as unimproved, he was on probation when he committed the burglary charge.
> 4. Crosby has numerous proceeding in this Court for violation of probation covering a span in excess of 12 years. Many violation of probation reports are in the Presentence report.

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[5] Presentence evaluation.

5. Those reports manifest a continuing pattern of disregard of the conditions of probation and orders of this Court and a complete lack of amenability to sanctions other than jail.

6. One essential pattern revealed in those reports is Crosby's years-long refusal, despite many opportunities and orders, to engage in substance abuse treatment. For example:

a. A 1988 violation report while serving probation for a sentence for burglary in the second degree; back on drugs, missed evaluation then when evaluated, treatment and was discharged

b. A 1991 emergency capias/warrant lists violations for failed drug tests, missing drug treatment, and drinking.

c. A 1993 violation of probation report which states:

> Mr. Chris A. Crosby has been under my supervision since November 20, 1992. Since that time, Mr. Crosby has missed numerous office visits despite warnings from this officer.
>
> Mr. Crosby has a long history of Violation of Probation. His criminal history dates back to January 3, 1966. Mr. Crosby's convictions include Disorderly Conduct, Resisting Arrest, Criminal Trespass, Forgery, Assault, Theft, Driving Under the Influence, Falsely Reporting an Incident, Burglary, Escape, Unlawful Imprisonment, Offensive Touching, Possession of a Deadly Weapon by a Person Prohibited, Possession With the Intent to Deliver Cocaine and four (4) previous Violation of Probations.
>
> Mr. Crosby is a thirty-seven (37) year old who has no respect for the orders of the Court. Although he has remained arrest free while under supervision on your Honor's probation, Mr. Crosby's previous

history indicates that trouble may be forthcoming.[6]

d. A March, 2000, violation report stating Crosby refuses to attend court-ordered treatment evaluation and "as a result of such refusal poses a substantial threat to the community or himself and Mr. Crosby has demonstrated willful failure to make court-ordered payments."[7] This report was filed in connection with the sentence for burglary third degree imposed when Crosby was first declared an habitual offender.

7. The presentence report prepared in 1986 for Crosby's sentencing on the charge of burglary in the second degree states that he lived in California and Oklahoma. While in California, he was sentenced to three years probation for forging a government check. He also incurred several arrests and a one year sentence for DUI.

8. Prior to the forgery conviction for which he received a life sentence, Crosby had been convicted of five felonies. SENTAC classifies two of them, burglary in the second degree and possession with intent to deliver, as violent felonies. Crosby's felony record spanned, as of the date of the current sentence, 16 years. Interspersed with those felony convictions is a persistent pervasive pattern of violation of the probationary portions of his sentences, including misdemeanors (unlawful imprisonment in the second degree and escape in the third degree).

9. In the nearly 14 years on this bench, Crosby is the first repeat habitual offender I have sentenced. That repetition, regrettably, is not surprising in light of the information in the presentence report about the types of crimes he has committed, his repeated use of false or wrong names and birth dates, his non-credible explanations for his own behavior, and the repeated attempts over many years to get him into treatment without success. The most glaring example is his becoming a repeat habitual offender within such a short period of time. Of course, I took into account his extensive misdemeanor record. Crosby has had 5 sentencings for felony convictions preceded by presentence investigations. He had one sentencing for two

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[6] April 1993 violation report to Judge Haile Alford.

[7] Violation report dated March 2, 2000, to Judge Richard Gebelein.

misdemeanors (reduced charges) but without a presentence report in this Court. Comments from prior reports include:

> 1. The offender has been incarcerated since February. He was serving two Municipal Court sentences which expired on September 10, 1986.
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> The offender has been convicted for crimes committed in California and Oklahoma as well as Delaware. He was also charged with theft in Arizona but the disposition of this charge is unknown. The offender's criminal record in Delaware dates back to 1966 when he was not quite eleven years old. The offender is extremely irresponsible and appears to be completely unconcerned for the property of others or the consequences of his actions.
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> The prognosis for future conduct is poor.[8]
>
> 2. In October, 1986, the offender was sentenced to two years of imprisonment to be followed by three years of probation on a burglary second degree charge. In July, 1987, he was sentenced to an additional 90 days of imprisonment for escape third degree to be followed by twenty-one months of probation. He was also sentenced to two years concurrent probation on a charge of unlawful imprisonment second degree. The offender was released from custody in April, 1988 on conditional release. Within one month of his release, John Doherty, his probation/parole officer, became aware that the offender was again abusing narcotic drugs. He was involved in inpatient counseling at SODAT but soon missed so many appointments that he was discharged from the program for non-compliance with their rules. Additionally, the offender, as of May 19, 1989, had made no payments at all toward his financial obligation of over $2,200.00 owed for fines, costs, and restitution. Because of the offender's lack of motivation to correct his substance abuse problem, his failure to pay toward his financial

[8] Presentence report, September 1986.

obligations, and his acquisition of new charges, the prognosis is considered poor.[9]

3. The evaluation contained in the prior presentence report which was prepared in June, 1989 still applies.[10]

Crosby's years-long pattern of crimes and violations are but echos and confirmations of these evaluations.

10. I am fully aware that 11 *Del.C.* §4214(a) provides me with a significant discretion concerning the length of sentence. This sentence was not imposed in haste or lightly. I was also aware there was no direct victim, such as a store or a bank, but I also knew that this was an act against public administration.

II

The Supreme Court has requested that I consider my sentence in light of *Solem v. Helm,*[11] *Harmelin v. Michigan,*[12] *Andrade v. Attorney General,*[13] and *Brown v. Mayle.*[14] I have read those cases and considered them in light of Crosby's life sentence. In sum, they are legally and factually inapposite. None of these cases dealt with a defendant who was having a second habitual offender sentence imposed on him. None involved an habitual offender sentencing system similar to Delaware's:

Solem:

Unlike Crosby, none of Helm's prior felonies were crimes of violence. Unlike Delaware, South Dakota allows a DUI felony conviction to be a predicate felony. Delaware specifically excludes

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[9] Presentence report, June 1989.

[10] Presentence report, November 1989.

[11] 463 U.S. 277, 103 S. Ct. 3001, 77 L.Ed. 2d 637 (1983).

[12] 501 U.S. 957, 111 S. Ct. 2680, 115 L.Ed. 2d 836 (1991).

[13] 270 F.3d 743 (9th Cir. 2001).

[14] 283 F.3d 1019 (2002), *cert. granted sub nom. Lockyer v. Andrade,* 122 S. Ct. 1434 (2002).

felony DUI convictions for such purposes.[15] South Dakota's habitual offender statute under which Helm was sentenced mandates a life sentence, while Delaware's does not. That is not as important as it might otherwise be since a life sentence was imposed here. But South Dakota bars parole or any other sentence reduction or diminution.

South Dakota's statute renders habitual offenders ineligible for parole. Delaware's statute does, too. But, unlike South Dakota's statute, §4214(a) allows for the award of good time on any sentence imposed under that subsection.[16] South Dakota's statute has no equivalent way for an inmate to obtain a sentence reduction.[17] Delaware's statute permitting good time/conditional release was a factor I took into account.

Delaware equates, except for first degree murders,[18] life sentences equivalent to a sentence of 45 years.[19] In that regard, Delaware's statute is similar to the statute and life sentence upheld in *Rummel v. Estelle,* 445 U.S. 263, 100 S. Ct. 1133, 63 L.Ed. 2d 382 (1980). Delaware's habitual sentencing scheme apparently differs in another respect from that in South Dakota. Delaware has a separate provision for specifically designated felonies involving violence.[20]

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[15] 21 *Del. C.* §4177(d)(4).

[16] 11 *Del.C.* §4214(a); 11 *Del.C.* §4381.

[17] The Supreme Court rejected as such a diminution the ability to seek clemency or commutation from the governor as too uncertain.

[18] 11 *Del.C.* §4209.

[19] 11 *Del.C.* §4346(c). Section 4214(a) states that a defendant sentenced pursuant to that provision is ineligible for parole. But it also says any such sentence is eligible for the award of good time under 11 *Del.C.* §4381. This reduction in sentence makes a defendant eligible through the statutory award of good time for conditional release earlier than the maximum sentence. Parole may have been abolished under Truth In Sentencing (11 *Del.C.* §4354), but a defendant on conditional release is subject to the authority of the Parole Board (*Dixon v. Williams,* Del. Super., C.A. No. 00M-08-023, Herlihy, J. (August 31, 2000). In other words, while ineligible for parole under §4214(a), a factor cited in *Solem* and other cases, a defendant is the beneficiary of the functional equivalent now known as conditional release and is subject to the supervision of the Parole Board.

[20] 11 *Del.C.* §4214(b).

A 5 - 4 majority in *Solem,* enunciated a three part test for determining whether sentences pass muster under the Eighth Amendment: 1) compare the gravity of the offense and the harshness of the penalty; 2) compare the sentences imposed on other crimes in the same state; and 3) sentences imposed for the same crime in other states. The Supreme Court noted that the possibility of parole may complicate the comparison.[21] In another part of the opinion, the Supreme Court declared Helm was not a professional criminal.[22] That cannot be said by anyone to true of Crosby.

The first criterion of "harshness" is difficult to apply because of its fundamentally subjective nature. Forgery in the second degree, without any habitual offender intervention, has a maximum of two years imprisonment.[23] In short, Crosby's sentence is 45 years for a crime which carries a maximum normally of only two years. "Harshness," of course, must take into account the entirety of Crosby's record, a record for non-violent, petty crimes, and alcohol problems, which the Supreme Court, nevertheless, repeatedly noted for Helm in finding his sentence harsh.

Crosby's life sentence compares to life sentences imposed for murder in the first degree, 15 years to life for such crimes as murder by abuse or neglect, rape in the first degree and death of a patient by abuse. Crimes such as robbery in the first degree, rape in the second degree, and car jacking in the first degree carry penalty ranges of two to twenty years. Manslaughter, rape in the fourth degrees and arson in the first degree, for example carry penalty ranges of up to ten years. Forgery in the second degree, carries the same zero to two year imprisonment range as theft, issuing a bad check, shoplifting, insurance fraud, criminal mischief over $1500, assault in the third degree, etc.

None of these individual sentences necessarily involve a sentence of a person found to be an habitual offender. Admittedly, the sentence for serious crimes of violence are greater than the one for forgery in the second degree. The legislature, however, has said that even four

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[21] 463 U.S. at 294, 103 S. Ct. at 3012, 77 L.Ed. 2d at 652, n. 19.

[22] 463 U.S. at 297, 103 S. Ct. at 3013, 77 L.Ed. 2d at 654, n. 22.

[23] 11 *Del.C.* §861(b)(2); 11 *Del.C.* §4205(b)(7).

non-violent felonies qualify one for habitual offender status and can mean a life sentence. That, of course is not Crosby's situation as he has two violent felonies in his list of felonies.

Appellate courts seem to be the vehicles for comparing sentences between states. The *Solem* opinion and others refer to other states, but it has never been the practice in this Court during the 14 years I have been a member of the bench or at any other time in my 36 years working in this Court to compare sentences from other states to ours. The difficulty Crosby's counsel had in even getting information on Delaware sentences for purposes of this remand says it enough. But more important than that is the potential for vast differences in sentencing policies between the states which the United States Supreme Court (per Justice Kennedy) recognized is a necessary and beneficial part of our federal system.[24]

Harmelin:

It's perhaps those comments and others which compelled the United States Supreme Court to reorder the analysis. Justice Kennedy and two other justices (O'Connor and Souter) concurred in Part IV of the Court's opinion written by Justice Scalia and joined by Chief Justice Rehnquist.[25] In Part IV, the Court refused to extend individualized capital sentencing proportionality to mandatory life without parole.[26] Justice Kennedy, however, says intra and interstate comparison of sentences is appropriate only after a comparison of the crime committed to the sentence creates an inference of gross disproportionality.[27] In *Harlemin,* however, unlike *Solem*, the Court was dealing with a life sentence for one crime, not an habitual offender sentence.

Andrade:

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[24] *Harmelin v. Michigan*, 501 U.S. at 998, 111 S. Ct. at 2703, 115 L. Ed 2d at 867.

[25] *Harmelin v. Michigan,* 501 U.S. at 996, 111 S. Ct. at 2702, 115 L. Ed. 2d at 866.

[26] 501 U.S. at 995, 111 S. Ct. at 2702, 115 S. Ct. at 865.

[27] 501 U.S. at 1005, 111 S. Ct. at 2707, 115 L.Ed. 2d at 872.

It is difficult to consider the implications of the 9th Circuit's holding and reasoning in this case since *certiorari* has been granted. This judge does not possess Delphic powers of prediction. That lack plus the murky nature of the case law in this area make further prediction even less certain, if not unwise.

Not knowing its future in the Supreme Court, however, does not mean that the 9th Circuit's opinion cannot be considered in light of Crosby's sentence. As noted earlier, *Andrade* is factually and legally inapposite to Crosby's sentence.

Factually, Andrade had five felonies, but all were non-violent. Crosby has two violent felonies among his five. Andrade's, sentence of 50 years to life without parole for the first 50 years was triggered by two misdemeanor thefts. Crosby's classification on each occasion was a felony. Andrade had never been declared an habitual offender under California law, whereas Crosby has now been twice declared an habitual offender. Nor does Andrade's criminal record match the length and seriousness of Crosby's.

Legally, too, *Andrade* is inapposite to this case. Under California law, Andrade is not eligible for parole or the earning of good time during the first 50 years of his sentence.[28] While, as noted, Crosby is not eligible for parole, he is nonetheless eligible for significant sentence diminution by earning good time. In holding Andrade's life sentence as a violation of the Eighth Amendment, the 9th Circuit has distinguished and reaffirmed the efficacy of *Rummel v. Estelle*.[29] There were several reasons, both applicable to this case and illustrative of its lack of pertinency to the analysis of Crosby's sentence.

One is that, like Delaware, Texas (the state from which the sentence in *Rummel* was being reviewed and which was affirmed) provided for sentence diminution, albeit through parole rather than the conditional release used in Delaware. Second, Texas' recidivist statute requires that the convictions be separate, and segmented, in

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[28] *Andrade,* 270 F. 3d at 758.

[29] *Andrade,* 270 F. 3d at 754 - 756.

other words, with separate sentences for each prior felony.[30] Delaware, like Texas, requires that there be a succession of separate felony convictions and sentences for each one. In short, Delaware, like Texas, requires an interval between each felony sentence to provide, it is hoped, for some chance of rehabilitation when sentencing an offender under §4214(a).[31]

California, on the other hand, has no such requirement. Felonies committed on different occasions but sentenced on the same date are counted as separate convictions and act to qualify a person for habitual offender status.[32] In addition, each new qualifying last-in-line conviction is required to receive an habitual offender sentence.[33] Delaware has no such requirement, and even when multiple qualifying felonies are committed on one occasion or on different occasions but sentenced on the same date, this Court's practice is not to impose an habitual offender sentence on each felony sentence.

California's law only requires two prior felonies (that is why it is colloquially known as "three strikes"), but Delaware requires three separate priors before one qualifies as an habitual offender under §4214(a).

But there is an additional significant difference between Andrade's situation and Crosby's. The sentence under review in *Andrade* involved two misdemeanor (under California law) theft convictions. Because of his prior felony record, however, the prosecutor had the discretion of charging Andrade with two felonies or two misdemeanors.[34] Andrade was, of course, charged with felonies, but

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[30] *Andrade,* 270 F. 3d at 755.

[31] *Buckingham v. State,* 482 A.2d 327 (Del. 1984).

[32] *Andrade,* 270 F. 3d at 748.

[33] *Id.*

[34] *Andrade,* 270 F. 3d at 760.

only because of his prior felony record.[35] This "quirk" in California law is known as the "wobble."

No misdemeanor under Delaware law can be "wobbled" into a felony. No misdemeanor can be used as the fourth, or habitual-offender-qualifying-offense, under 4214(a). Since the State must ask this Court to declare a defendant an habitual offender, Prosecutors do have some discretion in seeking habitual offender sentencing, but it does not permit Delaware prosecutors to make misdemeanors into felonies.

Brown:

This case, too, is of no or limited value to the analysis of Crosby's sentence. The case involved two defendants on a consolidated appeal. Each defendant had prior felonies, but like Andrade, the newest and triggering offenses were misdemeanors but for those priors. In short, California's unique "wobble" provision was used again.[36] One defendant had 4 prior robbery felonies, which under Delaware law would be counted only as two separate ones. His "qualifying" offense, theft, normally a misdemeanor, would not even qualify him as an habitual offender under §4214(a), where the sentence is discretionary. Nor would it qualify him for the mandatory life sentence under §4214(b). The other defendant had five prior felonies but two pairs were sentenced on the same date and the fifth felony on a separate date. In short, while that defendant may have had five felonies under California's three strikes law, he would have had only three under Delaware's law.

As in *Andrade*, the *Brown* court noted the ineligibility of an habitual offender in California for parole or the award of good time. That distinction from Delaware has been discussed. The minimum sentence each defendant in *Brown* received was 25 years. But the fact that misdemeanor offenses got wobbled into 25 year sentences with no

[35] The misdemeanor sentence for each misdemeanor was no more than a six month jail sentence and fine.

[36] It should be noted that when Crosby was sentenced in 1996 for the misdemeanor of possession of cocaine, he already had three felony convictions. Under California law, but not Delaware's, the State could have charged him with a felony and subjected him to its three strikes law.

> eligibility for parole or good time is a significant difference from Delaware's law and Crosby's sentence.[37]

In sum, this Court has carefully weighed all four named decisions to which it was referred in the remand. It has also considered *Rummel v. Estelle,* not cited in the remand, because it is discussed in all four cases and distinguished in three. It, however, has language, facts, and a holding most helpful to these considerations and it is still constitutional law. This Court's review of all five cases, Delaware's law and Crosby's sentence does not prompt this Court to change its sentence but only to reaffirm it. That analysis also reconfirms the language of §4214(a) and the General Assembly's intent in enacting it.

The remand also requested that I consider SENTAC guidelines for a defendant who has been twice declared to be an habitual-offender. As for a defendant who is declared an habitual under §4214(a) the SENTAC Benchbook states:

> Habitual Criminal status, is not, per se, a class A offense, but is declared on petition from the Attorney General. If declared under Section 4214(a) the offender may receive a sentence of **UP TO LIFE** imprisonment at Level V, such sentence being subject to "good time credit" but no other form of diminution or suspension. If declared under section 4214(b), the sentence is **LIFE** without suspension, probation or any other form of diminution.
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> **STATUTORY HABITUAL OFFENDER:** The Court, on motion, determined the defendant to be an habitual offender under the provisions of 11 *Del.C.* §4214, thus calling for a sentence of incarceration which exceeds the sentencing guidelines.

Other than these statements, there are no SENTAC guidelines or policies applicable to habitual offenders, especially, two-time habitual offenders such as Crosby. There are, of course, a number of policies regarding sentencing for forgery in the second degree as a first time offender and again as a repeat forgery/theft offender.[38] SENTAC obviously recognizes several things in not having such guidelines. The first is the legislature's intent in §4214(a). The second is the virtual impossibility of coming up with a guideline for §4214(a) because of the myriad of combinations of felonies that can qualify a person for habitual offender status. Three, the standard SENTAC guideline or policy is to discount or disregard as an aggravating factor a felony conviction/sentence more than 10 years prior

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[37] *Brown,* 283 F. 3d at 1036.

[38] See SENTAC Benchbook, pp 34 - 5, and 52.

to the latest felony being convicted. SENTAC does not make this forgiveness applicable to habitual offender sentences. It obviously recognizes the first two points just made. It also recognizes that there is no formula which can account for the myriad of prior potential felonies and/or sentences, and, of course also take into account the need for a period of rehabilitation between each prior qualifying sentence. Section 4214(a) makes no such 10 year distinction or disqualification. All of the above apply even if a person is declared on one occasion to be an habitual offender, let alone on two such occasions.

Conclusion

The Court having considered the various cases cited above and the SENTAC Benchbook, finds no basis to change its life sentence for Crosby.

Respectfully submitted,

JOH/krn
Enclosure
cc Honorable Joseph T. Walsh
Honorable Randy J. Holland
Honorable Carolyn Berger
Honorable Myron T. Steele
Andrew J. Vella, Esquire
Todd E. Conner, Esquire
James D. Nutter, Esquire
Cathy L. Howard
Prothonotary

January 30, 2003

Honorable E. Norman Veasey
Chief Justice Supreme Court
State Office Building
820 North French Street
Wilmington, DE 19801

RE: *Chris Crosby v. State of Delaware*
No. 8, 2002
State of Delaware v. Chris Crosby
Cr.A. Nos. IN01-06-1203 & IN01-06-1206

Dear Chief Justice Veasey:

This remand report is late. It was due back to the Supreme Court on January 24th. I apologize for the delay. When I asked for additional time to respond (until January 24th) I did not know that I would be continuing with my full civil caseload (7 consecutive trial days) and be reassigned to Criminal Administrative Judge which is a full time job in its own right. Thank you.

Sincerely,

JOH/krn