IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	:	
v.	:	**ID No. 93002189DI**
CEDRIC MCGRIFF,	:	
Defendant.	:	

OPINION AND ORDER

On the Defendant's Motion for Postconviction Relief

Submitted: August 10, 2005
Decided: January 9, 2006

Gregory E. Smith, Esquire, Deputy Attorney General, Department of Justice, 820 North French Street, Wilmington, DE 19801.

Bernard J. O'Donnell, Esquire, Office of the Public Defender, Carvel State Office Building, 820 North French Street, Wilmington, Delaware, 19801.

Cedric K. McGriff, P.O. Box 420, Fairton, New Jersey, 08320, Defendant.

TOLIVER, JUDGE

This matter comes before the Court on the motion of the Defendant, Cedric McGriff, seeking postconviction relief pursuant to Superior Court Criminal Rule 61. Upon reviewing the submissions of the parties and oral argument presented, that which follows is the Court's resolution of the issues so presented.

STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

Trial Proceedings

The Defendant, Cedric McGriff, was charged by indictment with the offenses of Unlawful Sexual Intercourse First Degree and Unlawful Sexual Contact Second Degree on March 1, 1993. The indictment alleged that he had sexual intercourse and contact with his then five-years-old daughter on multiple

occasions in 1992. At the time of the alleged offenses, the Child was enrolled in a special education program for mentally handicapped children. The Defendant was convicted on both counts after a trial by jury which began on January 31, 1994 and ended on February 9, 1994, when the jury returned its verdict.

On March 18, 1994, the Defendant was sentenced to life in prison without the possibility of parole on the Unlawful Sexual Intercourse First Degree conviction. He also received six months of additional imprisonment as a result of his conviction for Unlawful Sexual Contact Second Degree. Those convictions were timely appealed to the Delaware Supreme Court. On February 23, 1996, the Delaware Supreme Court reversed those convictions on the ground that the Defendant had not been permitted to cross-examine the chief complaining

witness against him, i.e., his daughter ("the Child"), in the presence of the jury.

The Defendant was again tried before a jury commencing October 9, 1997 and was subsequently found guilty on both of the above referenced charges. He filed a motion for new trial on October 21, 1997. This Court subsequently denied that motion and sentenced the Defendant for a second time to life in prison without the possibility of parole. The Delaware Supreme Court affirmed those convictions on September 7, 2001.

Defense counsel filed the instant motion for postconviction relief pursuant to Superior Court Criminal Rule 61 on September 7, 2004. The State has opposed that motion. The issues in controversy were briefed by the parties and oral argument presented as well to this Court on August 10, 2005.

The Contested Testimony

During the course of the first trial, it appears that the Child had been presented to the jury, and after responding to peripheral questions during her direct examination, refused to respond to direct inquiries regarding the alleged abuse. She persisted in refusing to answer the questions asked of her, notwithstanding efforts to get her to do so by counsel for the State and by the Court. The Defendant's attorney, however, was not permitted to cross-examine the Child. The State moved the Court to rule that the Child unavailable to testify under 11 *Del. C.* §3513,[1] Delaware's Child Sex Abuse Statue (hereinafter "*the Tender Years Statute*" or by relevant

[1] 11 *Del. C.* §3513 provides generally that an out-of-court statement made by a child victim or witness who is under eleven years of age at the time of the proceeding concerning an act that is a material element of the offense relating to sexual abuse is admissible where certain circumstances are present. However, such statements may be admitted where the child is found unavailable to testify based on i.e., a total failure of memory under §3513(b)(2)(a)(3) or a persistent refusal to testify despite judicial requests to do so under §3513(b)(2)(a)(4).

section), and to declare evidence of the prior out-of-court statements admissible.[2] The Court agreed and declared the Child unavailable to testify due to a total failure of memory, and persistent refusal to testify despite judicial requests to do so.[3] It then found that all but one of the out-of-court statements was reliable since they possessed "particularized guarantees of trustworthiness" as required by §3513(b)(2)(b).[4] The Supreme Court reversed, holding that the fact that Defendant was not permitted to cross-examine the Child after she had testified before the jury, however circumscribed her testimony might have been on direct examination violated the Confrontation Clause of the Sixth Amendment to the United States Constitution.[5]

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[2] *McGriff v. State*, 672 A.2d 1027, 1029 (Del. 1996).

[3] *Id.* *See also* footnote 1.

[4] *Id.* *See also* §3513 (b)(2)(b).

[5] *Id.* at 1031.

Prior to the second trial, a hearing was held to determine whether the Child was unavailable to testify as required by §3513(b)(2)(a).[6] The Child was generally unresponsive, professing not to remember what happened or what she said regarding the alleged abuse.[7] This Court then determined the Child was unavailable pursuant to §3513(b)(2)(a)(4) because of her persistent refusal to testify despite judicial requests to do so.[8] The Supreme Court affirmed the Defendant's second conviction, finding that the requirements of §3513 satisfied the United States and Delaware State Constitutions, and that the Superior Court's determination of unavailability pursuant to the statute was amply supported by the record.[9]

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[6] *McGriff v. State*, 781 A.2d 534, 536-537 (Del. 2001).

[7] *Id.*

[8] *Id.*

[9] *Id.* at 544.

The Defendant argues that the Delaware Supreme Court incorrectly applied the requirements of the Confrontation Clause to the instant hearsay testimony. Here, the contention is that in affirming the convictions, the Supreme Court relied exclusively on the hearsay statements of the unavailable declarant whom the Defendant was prohibited from confronting at trial by operation of Delaware's Tender Years Statute. A review of the record does bear out that the evidence introduced at trial consisted primarily of hearsay statements that the Child mentioned to the school staff and a child services worker.

Typical of the testimony in this regard was that presented via Rosa Trotter, one of the Child's school teachers. Ms. Trotter testified that in November 1992, there was a play area constructed to replicate an apple orchard.

One of the children was hit by a piece from the scenery or set that had been constructed and screamed "Ouch you hurt me with that stick."[10] The Child was standing nearby and responded, "My daddy hurt me with his stick, he hurt me with his red stick". At the same time she made those statements, she was pointing to her crotch and buttocks.[11] The Child repeated the statement and then added, "He hurt me with his stick here in his pocket, in his pocket here," while continuing to point to her crotch.[12]

Some weeks after that incident, that same play area was converted to portray or resemble a housekeeping theme. It was Ms. Trotter's testimony that observing a mop and broomstick used in the display motivated the Child to again state, "My

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[10] Trial Tr., pp. 10-11 (October 2, 1997).

[11] *Id.*

[12] *Id.* at 14-15.

daddy hurt me, he hurt me with his big red stick."[13] Again, she pointed to her crotch and buttocks while making the statements.

Others testified to similar statements by the Child. Mary Udovich, a speech therapist assigned to the Child's school, testified that in 1992 the Child entered the faculty lunch room and sat on her lap. She then spontaneously stated, "My daddy touched me with a stick."[14] When asked where she had been touched, the Child pointed to her crotch. The school nurse, Carol Shercky, similarly testified that the Child stated, "Daddy has a stick on his body and he pokes me here and here," gesturing to her crotch and buttocks.[15] Finally, Kelly Lord, a social worker employed by the Division of Family

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[13] *Id.*

[14] *Id.* at 56-57.

[15] *Id.* at 77.

Services of the Delaware Department of Services for Children, Youth and Their Families,[16] testified that in December 1992, she showed the Child anatomically correct drawings of a male figure which the Child stated looked like her father, and while pointing at the penis on the drawing, uttered, "He hurts me."[17]

The Defendant did not, following the affirmance of his conviction by the Delaware Supreme Court in 2001, directly challenge or otherwise collaterally attack his convictions. However, on March 8, 2004, the United States Supreme Court rendered its decision in *Crawford v. Washington*.[18] It was based upon that decision that the Defendant filed the instant motion. The essence of the Defendant's motion is that: (1)

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[16] At the time the events relevant to this litigation took place, the agency was known as "Child Protective Services", but was still a part of the Department of Children, Youth and Their Families.

[17] Trial Tr., pp. 82-83 (October 6, 1997).

[18] *Crawford v. Washington*, 541 U.S. 36 (2004).

Crawford should be retroactively applied; (2) had that decision been in effect at the time of his second trial, the statements introduced under the auspices of §3515 would have been kept from the jury because they violated the rights under the Confrontation Clause; and (3) given the lack of other corroborating evidence, he would have been exonerated.

The State argues in response that Superior Court Criminal Rule 61(i)(4) precludes the Defendant from presenting a formerly adjudicated issue, the admissibility of the out-of-court testimony. That issue, it contends, was addressed at trial and on appeal by the Delaware Supreme Court. Furthermore, *Crawford* may not be applied retroactively and the bar of Rule 61(i)(4) prevents the issue from being raised again.

DISCUSSION

Rule 61 Procedural Bars

A predicate to addressing the merits of a postconviction relief motion is an examination to determine whether any procedural bars exist. The procedural bars set forth in Rule 61(i)(1)-(4) may only be lifted if there is a mechanism to do so in the pertinent subsection of Rule 61.[19] If no such relief is available, the "catchall" provision of Rule 61(i)(5) is available to provide relief from procedural bars contained in 61(i)(1-3).

To be specific, 61(i)(5) provides that the aforementioned

[19] A motion for postconviction relief filed prior to July 1, 2005, may be filed no more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment is final, no more than three years after the right is first recognized by the Supreme Court of Delaware or by the United State Supreme Court. Super. Ct. Crim. R. 61(i)(1). Grounds not presented in prior postconviction proceedings or formerly adjudicated claims are barred unless consideration of the claim is warranted in the interest of justice. Super. Ct. Crim. R. 61(i)(2) & (4). Likewise, any ground for relief not asserted in the proceedings leading to the judgement of conviction are barred unless the movant shows cause for relief and prejudice. Super. Ct. Crim. R. 61(i)(3).

bars may be raised where the defendant establishes a colorable claim that there has been a "miscarriage of justice" under Rule 61(i)(5). A colorable claim of "miscarriage of justice" occurs when there is a constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.[20] This exception to the procedural bars is very narrow and is only applicable in very limited circumstances.[21] The defendant bears the burden of proving that he has been deprived of a "substantial constitutional right."[22]

Here, the Rule 61(i)(1) procedural bar is inapplicable because defense counsel filed the instant motion on September 7, 2004, within three years after the Supreme Court affirmed

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[20] Super. Ct. Crim. R. 61(i)(5).

[21] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

[22] *Id.*

the Defendant's conviction. Nor can the motion be barred as repetitive under Rule 61(i)(2) since this is the Defendant's first such motion. Nor does Rule 61(i)(3) bar him from reasserting the contentions in question because the Defendant did contest the admission of the Child's out-of-court statements. The issue remaining then for this Court is whether, as the State argues, the Defendant's relief is barred pursuant to Rule 61(i)(4) because his Confrontation Clause claim was formerly adjudicated.

Again, Rule 61(i)(4) bars this Court from considering the Defendant's argument if it was formerly adjudicated in the proceedings leading to the judgement of conviction or during the course of his appeal, unless reconsideration of the claim is warranted in the "interest of justice."[23] The Court is

[23] Super. Ct. Crim. R. 61(i)(4).

satisfied that the Defendant presented his Confrontation Clause argument during his appeals to the Delaware Supreme Court and that his conviction was indeed made final when the Supreme Court affirmed this Court's decisions relative to that issue. The claim having been formerly adjudicated, the Defendant's burden then is to demonstrate that reconsideration of his claim will serve the interest of justice.

"The interest of justice exception has been narrowly defined to require the movant to show that the trial court lacked the authority to convict or punish him."[24] "The term 'authority' includes not only the concept of jurisdiction, but also encompasses violations of rights guaranteed by the United States Constitution.[25] Generally speaking, however, newly

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[24] *State v. Wright*, 653 A.2d 288, 298 (Del. 1994).

[25] *Bailey v. State*, 588 A.2d 1121, 1126, n. 5 (Del. 1991)(citing *Teague v. Lane*, 489 U.S. 288 (1989)); *Flamer v. State*, 585 A.2d 749 (Del. 1990).

announced rules of criminal procedure will not govern postconviction relief applications where the underlying conviction was "final" prior to their formulation.[26] As will be noted *infra*, the United States Supreme Court in *Teague*, after establishing certain threshold criteria to be met in order to reach the issue, set out a two part test to determine whether a decision involving a newly promulgated rule of criminal procedure of a constitutional dimension, should be retroactively applied. The Delaware Supreme Court, in discussing the impact of *Teague* on Rule 61 postconviction relief motions held:

> Based upon this standard [as set forth in *Teague*], we adopt a general rule of non-retroactivity for cases on collateral review. A postconviction relief court need apply only the constitutional standards that prevailed at the time the original proceedings took place. The application of a constitutional rule not in existence at the time a conviction became final

[26] *Flamer*, 585 A.2d at 749.

> seriously undermines the principle of finality which is essential to the operation of our criminal justice system. . . . Therefore, we hold that new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced unless the rules fall within one of [*Teague's*] two exceptions.[27]

Similarly, in *Bailey*, the Delaware Supreme Court, commenting on its holding in *Flamer*, reiterated that a Rule 61 petitioner who was able to establish that the new rule of criminal procedure should be applied retroactively in light of *Teague*, could satisfy as well the "in the interest of justice" exception contained in Rule 61(i)(4).[28]

The Retroactive Application of *Crawford*

The Sixth Amendment Confrontation Clause made applicable to the states through the Fourteenth Amendment, provides, that "[i]n all criminal prosecutions, the accused

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[27] *Flamer*, 585 A.2d at 749.

[28] *Bailey*, *supra* note 25 at 1126, n. 5.

shall enjoy the right . . . to be confronted with the witnesses against him." The Defendant claims that the admission of the Child's statements was a violation of that right. Both the trial court and the Delaware Supreme Court analyzed the Child's statements in light of *Roberts*,[29] the governing standard at all times relevant to the Defendant's trials and appeals.

Under *Roberts*, the reliability of out-of-court statements could either be established through "a showing of particularized guarantees of trustworthiness," or be inferred from the fact that the evidence fell "within a firmly rooted hearsay exception".[30] Consistent with *Roberts*, both trial courts declared the Child unavailable to testify and found her out-of-court statements to possess particularized guarantees

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[29] *Ohio v. Roberts*, 448 U.S. 56 (1980).

[30] *Id.* at 66.

of trustworthiness, pursuant to Delaware's Tender Years Statute. The Delaware Supreme Court, on the appeal of the Defendant's second conviction, found that the admission of the Child's statements was proper under the "indicia of reliability" approach of *Roberts*.

If the admissibility of the Child's statements were an issue today, *Crawford* unquestionably would be the controlling standard. The United States Supreme Court held in *Crawford*, that "testimonial[31] statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine the declarant."[32] Stated differently, "judicial

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[31] The United States Supreme Court expressly refrained from defining "testimonial." *Mungo v. Duncan*, 393 F.3d 327, 333 (2nd Cir. 2004) (citing *Crawford*, 541 U.S. at 68)). The Court's brief discussion suggested, however, that the term was intended to include sworn evidentiary statements, such as affidavits, depositions, grand jury testimony, and trial testimony, as well as unsworn declarations given to the police. *Id.*

[32] *Crawford*, 541 U.S. at 59.

assessments of reliability will never suffice and an opportunity to cross-examine the declarant is essential" under *Crawford*.[33]

The Defendant contends that the rule pronounced in *Crawford* regarding the right to confrontation must be retroactively applied by virtue of meeting the *Teague* standard. The retroactive application of *Crawford* would undoubtedly afford the Defendant a new trial notwithstanding prior findings that the Child was unavailable and that the admitted evidence possessed particularized guarantees of trustworthiness.

Under the framework established by *Teague*, a specific rule may be applied retroactively following a three-step process:

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[33] *Murillo v. Frank*, 420 F.3rd 786, 788 (7th Cir. 2005).

> First, the court must determine when the defendant's conviction became final. Second, it must ascertain the legal landscape as it then existed, and ask whether the constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is actually 'new'. Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.[34]

This Court is satisfied, and the parties agree, that the Defendant's conviction is indeed final. The next inquiry must be whether the rule announced in *Crawford* is a new rule.

A new rule is one which was not dictated by then existing precedent.[35] The *Crawford* majority conclusively states that "the logic of *Roberts* was inconsistent with the Court's conclusion in *Crawford*."[36] *Roberts* rests on evidentiary principles of reliability and trustworthiness rather than on the constitutional principle of confrontation, the focus of

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[34] *Beard v. Banks*, 542 U.S. 406, 411 (2004.

[35] *Id.*

[36] *Crawford*, 541 U.S. at 59.

Crawford.[37] This Court agrees that *Roberts* and its progeny did not dictate the result in *Crawford*, instead *Crawford* announced a new rule of constitutional law.[38]

Assuming that Crawford announced a new rule, the question remaining is whether the rule falls into one of the two *Teague* exceptions to nonretroactivity. Under the first *Teague* exception, "a new rule should be applied retroactively if it placed 'certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe.'"[39] Stated differently, new laws are to be retroactively applied where the formerly proscribed conduct

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[37] *Bockting v. Bayer*, 399 F.2d 1010, 1015 (9th Cir. 2005).

[38] *Brown v. Uphoff, et al.*, 381 F.3d 1219, 1226 (10th Cir. 2004). *See also Bockting* at 1015 (finding that *Crawford* deviates from the test announced in *Roberts*); *Mungo v. Duncan*, 393 F.3d 327, 335 (2nd Cir. 2004) (citing *Crawford*, 541 U.S. at 50)) (finding that *Crawford* departed from *Roberts* in that the Court divided out-of-court statements into two categories, those that are testimonial in nature and those that are not, asserting that testimonial hearsay is the primary, if not the only, object of the Confrontation clause); *Murillo*, 402 F.3rd at 791 (finding that *Crawford* was not dictated by *Roberts*, rather it broke from it).

[39] *Id.*

is now constitutionally protected. *Crawford* neither decriminalized the conduct in question in this case nor did it place such conduct beyond the scope of the state's authority to proscribe. The first exception is therefore not applicable here.

Under the second *Teague* exception, a new rule may apply retroactively if it "requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'"[40] Restated, this exception allows courts to apply certain "watershed rules of criminal procedure" retroactively.[41] These rules "must be applied retroactively if a failure to adopt them will result in an impermissibly large risk that the innocent will be convicted and if the

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[40] *Id.*

[41] *Teague*, 489 U.S. at 312. Since the United States Supreme Court did not set forth in *Teague* a definition of the term "watershed", this Court will assume that the term has its ordinary meaning, to wit: a crucial turning point affecting action, opinion. *Webster's New World Dictionary*, 1607 (2nd College ed. 1984).

procedure at issue implicates the fundamental fairness of the trial."[42] The United States Supreme Court has stated that to qualify under *Teague*, these rules must not only improve the accuracy of the trial, but also alter our understanding of the "bedrock procedural elements essential to the fairness of a proceeding."[43]

Although courts throughout the country have applied this standard to *Crawford* with differing results, the distinction, with one exception, are of form, rather than substance. To be specific, the Second, Sixth, Seventh, and Tenth Circuits have all determined that *Crawford*, albeit a new rule, is not a watershed decision which is retroactively applicable . . . ."[44]

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[42] *Id.*

[43] *Sawyer v. Smith*, 497 U.S. 227, 242 (1990). Again, as is the case with the term "watershed", since the United States Supreme Court did not define the term "bedrock", this Court will ascribe the commonly accepted dictionary meaning, i.e., basic principles or facts. *Webster's New World Dictionary* 126 (2nd College ed. 1984).

[44] *Brown*, 381 F.3d at 1227; *Mungo*, 393 F.3d at 336; *Murillo*, 402 F.3d at 789-91; *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005).

Conversely, the Ninth Circuit found the decision was retroactive because "the *Crawford* rule is one without which the likelihood of an accurate conviction is seriously diminished."[45] Finally, several federal district and state courts have concluded that *Crawford* should not be retroactively applied, focusing on the threshold requirements and concluding that either the underlying conviction was not "final" or that *Crawford* did not announce a new rule of criminal procedure.[46] In short, all but the Ninth Circuit Court of Appeals have declined to apply *Crawford* retroactively.

Whether the rule announced in *Crawford* is a bedrock

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[45] *Bockting*, 399 F.2d at 1021.

[46] *See Corey v. U.S.*, 2000 U.S. Dist. Lexis 19845. *See also Coleman v. U.S.*, 2005 U.S. Dist. Lexis 13517; *Guitierrez v. U.S.*, 2005 U.S. Dist. Lexis 12351; *Jennings v. U.S.* 2005 U.S. Dist. Lexis 10967; *Sanchez v. U.S.*, 2005 U.S. Dist. Lexis 7555; *Garcia v. U.S.*, 2004 U.S. Dist. Lexis 14984; *Chandler v. Crosley*, 2005 Fla. Lexis 1988; *Danforth v. Minnesota*, 2005 Minn. App. Lexis 716; *Bynum v. Mississippi*, 2005 Miss. App. Lexis 590; *People v. Ayrhart*, 2005 N.Y. Misc. Lexis 1447.

procedural element which directly impacts upon the fundamental fairness and accuracy of the trial process, is what the Court must come to grips with and resolve. Like the federal circuit, district and state courts referenced above, with the exception of the Ninth Circuit, this Court must respond in the negative. While the *Crawford* decision deemed the Confrontation Clause a bedrock procedural guarantee,[47] that language was at best dicta.[48] It does not suggest *Crawford* is of the magnitude of *Gideon v. Wainwright,*[49] as it must be to meet the second exception of *Teague*. That class of rules is extremely narrow, and "it is unlikely that any . . . 'has yet

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[47] *Crawford*, 541 U.S. at 42.

[48] *See e.g., Brown*, 381 F.3d at 1226.

[49] 372 U.S. 335 (1963) (holding that the Sixth Amendment guarantees the accused the right of the assistance of counsel in all criminal prosecutions). Significantly, the Defendant has failed to direct the Court's attention to any decision other than *Gideon* and *Bruton*, 391 U.S. 123 (1968), which have been found to meet Teague's second exception.

to emerge.'"[50] In fact, the United States Supreme Court has expressly declined requests to treat the decisions in *Banks* and *Summerlin*[51] as "watershed" rules. That a new procedural rule is "fundamental in some abstract sense is not enough;" the rule must be one "without which the likelihood of an accurate conviction is 'seriously' diminished."[52]

Whether *Crawford* helps or hinders accurate decision making is a close question. That being said, this Court does not believe *Crawford* necessarily improves the overall accuracy of the criminal process. The common-law tradition is indeed

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[50] *Schriro v. Summerlin*, 542 U.S. 348, 358 (2005)(citing *Tyler v. Cain*, 533 U.S. 656, 667, n.7 (2001)) (quoting *Sawyer v. Smith*, 497 U.S. 227, 243 (1990)).

[51] *Murillo*, 420 F.3rd at 790. In *Banks*, the Supreme Court did not retroactively apply *Mills v. Maryland*, 486 U.S. 367 (1988), in which it held invalid capital sentencing schemes requiring juries to disregard mitigating factors not found unanimously. *Banks*, 542 U.S. at 420 (2004). The Supreme Court did likewise in *Summerlin*, rejecting the retroactive application of *Ring v. Arizona*, 536 U.S. 584 603-609(2002), which required the existence of an aggravating factor in a capital case to be proved to a jury rather than a judge in accord with *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Summerlin*, 542 U.S. at 358.

[52] *Summerlin*, 542 U.S. at 352 (citing *Teague*, 489 U.S. at 313) (emphasis added).

one of live testimony in courts subject to adversarial testing[53] and is preferable to affidavits and transcribed confessions.[54] But, as the Seventh Circuit stated:

> Recorded testimony may be better than silence, when death or incapacity or threats or loyalty to one's confederates keep witnesses off the stand. The point of *Crawford* is not that only live testimony is reliable, but that the Sixth Amendment gives the accused a right to insist on live testimony, whether that demand promotes or frustrates accuracy. Like the self-incrimination clause and other provisions of the Bill or Rights, the Confrontation Clause can be invoked to prevent the conviction of persons who are guilty in fact. What *Crawford* holds is that defendants enjoy this right even when the hearsay is trustworthy.[55]

Undoubtedly, *Crawford* "precludes the admission of highly reliable testimonial out-of court statements that would have been admissible under the old rules [*Roberts*]", and in such instances, "cases that otherwise would have resulted in well-

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[53] *Crawford*, 541 U.S. at 42 (citing W. Blackstone, 3 Commentaries *373-374 (1768)).

[54] *Murillo*, 402 F.3d at 790.

[55] *Id.*

deserved convictions will now result in acquittals or hung juries."[56] In this regard, *Crawford* cannot be viewed as a decision imperative to the furthering of fundamental fairness and accuracy in criminal proceedings which requires retroactive application here.[57]

In support of his argument that the *Crawford* decision should be retroactively applied, the Defendant cites *Roberts v. Russell*.[58] In *Russell*, the United States Supreme retroactively applied the decision in *Bruton* interpreting the Confrontation Clause guarantee relative to statements by on codefendant implicating another. Unfortunately for the Defendant, that authority is not helpful for at least two

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[56] *Mungo*, 393 F.3d at 335.

[57] To the extent the Ninth Circuit Court of Appeals would have reached a different result based upon its analysis of *Crawford*, this Court simply is not simply persuaded to follow it. Moreover, the concern to be addressed is systemic, i.e., whether the new rule would improve the fundamental fairness and/or accuracy of the process in general, not simply the trial proceedings under then under review, as the Defendant implicitly asserts. *See* Def. Reply Mem., at 1.

[58] 392 U.S. 293 (1968).

reasons.

First, the high Court spoke in *Russell* and definitively settled the question of the retroactive application of *Bruton*. There has been no such proclamation by the Court following *Crawford*. And, as noted above, all the courts which have considered the question save the Ninth Circuit, have declined to do so for one reason or another. Second, the while the Defendant highlights the comments concerning the Confrontation Clause made in *Russell*, he ignores the later and more detailed pronouncements in that regard made by that Court in *Roberts* some twelve years later allowing consideration of statements taken contrary to the constitutional guarantee in question. He also fails to acknowledge the extremely limited discussion of the issue of retroactivity in *Russell*, particularly in light of the extensive pronouncements made in that regard in

Teague some twenty-one years later.

The Seventh Circuit makes the previous point another way. Running afoul of a truly paramount rule of criminal procedure, such as entitlement to counsel (the holding of *Gideon*), leads to reversal without inquiry into harmless error.[59] To the contrary, violations of other, less fundamental rules are subject to harmless-error analysis. Delaware case law holds that the Confrontation Clause is in the latter category.[60] This again supports the proposition that *Crawford* cannot have established the sort of "indispensable doctrine that applies retroactively . . . ."[61]

Having considered the dictates of *Crawford* in light of *Teague* and its progeny, this Court has no option other than to

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[59] *Murillo*, 402 F.3d at 791.

[60] *Capano v. State*, 781 A.2d 556 (Del. 2001); *Van Asdall v. State*, 542 A.2d 3 (Del. Super. Ct. 1987).

[61] *Id.*

find that *Crawford* cannot be retroactively applied. The Defendant is not, as a consequence, entitled to the benefit of any rule announced in *Crawford*. Given that view, and since the Delaware Supreme Court previously settled the question as to whether the Child's statements were properly admitted under *Roberts*, there was a prior adjudication and Rule 61(i)(4) operates as a bar to any further consideration of the Defendant's petition.

CONCLUSION

For the reasons stated above, the Court must conclude that further consideration of the Defendant's motion for postconviction relief is barred by Rule 61(i)(4). Nor should that bar be lifted in the interest of justice. The decision rendered by the U. S. Supreme Court in *Crawford v. Washington* cannot be retroactively applied to the trial and the convictions of the Defendant in this case. As a result, Defendants' motion must be, hereby is, **denied.**

IT IS SO ORDERED.

Charles H. Toliver, IV, Judge