IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	CRIMINAL ACTION NUMBERS
	)	
v.	)	IN-92-01-1144-R1 thru
	)	IN-92-01-1148-R1
JACK OUTTEN	)	
	)	ID NO. 92000786DI

Submitted: November 28, 2007
Decided: January 9, 2008

MEMORANDUM OPINION

Upon Motion of the Defendant to
Vacate Felony Murder Conviction - ***GRANTED***

Appearances:

James B. Ropp, Esquire, and Ipek K. Medford, Esquire, Deputys Attorney General, Department of Justice, Wilmington, Delaware, attorney for State of Delaware

Jennifer-Kate Aaronson, Esquire, and Natalie S. Woloshin, Esquire, of Woloshin Lynch Natalie & Gagne, Wilmington, Delaware, attorney for defendant

HERLIHY, Judge

On February 24, 1993, defendant Jack Outten was convicted of murder first degree for the intentional killing of Wilson Mannon, Jr.[1] He was also convicted of murder first degree felony murder[2] in that, ". . . (he) did in the course of and in furtherance of the commission of a felony cause the death of Wilson Mannon, Jr., to wit: did beat him to death with a blunt object during the course of Robbery First Degree, as set forth in Count IV. . . ."[3] Outten was also convicted of robbery first degree (Count IV) in addition to other offenses. On April 30, 1993, the Court sentenced him to death on each of the murder convictions.

All of the convictions have been upheld.[4] While upholding his convictions, however, the Third Circuit in 2006 determined Outten had received ineffective assistance of counsel in the penalty hearing phase of these proceedings in 1993.[5] It remanded the matter to this Court for a new penalty hearing currently scheduled for May 2008. As originally remanded and scheduled that hearing was to determine the appropriate punishment, life imprisonment or death, for the two murder convictions.

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[1] 11 *Del. C.* § 636(a)(1).

[2] 11 *Del. C.* § 636(a)(2).

[3] Indictment, Cr.A. No. IN-92-01-1145.

[4] *Outten v. State*, 650 A.2d 1291 (Del. 1994); *Outten v. State*, 720 A.2d 547 (Del. 1998); *Outten v. Snyder*, 2004 WL 4858384 (D.Del.); *Outten v. Kearney*, 464 F.3d 401 (3rd. Cir. 2006).

[5] *Outten v. Kearney*, Supra.

Outten now, however, asks this Court to vacate his felony murder conviction and the death sentence imposed for it. The basis of that request is straight forward. The Delaware Supreme Court in *Williams v. State*[6] revisited and reversed its prior interpretation of the "in furtherance of" language in the first degree felony murder statute. The statute under which Outten was prosecuted and convicted and which was re-interpreted in *Williams* read:

> (a) A person is guilty of murder in the first degree when:
> (2) 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.[7]

The Supreme Court in *Chao v. State*[8] held that the "in furtherance of" portion of that statute meant the "killing need only accompany the commission of an underlying felony… (and the language) is solely (meant) to require that the killing be done by the felon, him or herself."[9] In addition to the statutory language itself, that was the operative interpretation when the evidence in this case was submitted to the jury. The statute and

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[6] 818 A.2d 906 (Del. 2002).

[7] *11 Del. C.* § 636(a)(2). As a result of *Williams*, it has been amended to read:
(a) A person is guilty of murder in the first degree when:
(2) While engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any felony, the person recklessly causes the death of another person.

[8] 604 A.2d 1351 (Del. 1972).

[9] *Id.* at 1363.

the interpretation in *Chao* formed the basis for this Court's jury instruction on felony murder; an instruction which was identical to the one used in *Williams*.

When reversing *Chao*, the *Williams* Court held § 636(a)(2) now meant:

> In our view, the statutory language of the Delaware felony murder statute not only requires that the murder occur during the course of the felony but also that the murder occur to facilitate commission of the felony.
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> * * * * *
>
> Accordingly, we adhere to the holding of *Weick* and hold that the felony murder language requires not only that the defendant, or his accomplices, if any, commit the killing but also that the murder helps to move the felony forward.[10]

The Supreme Court in a subsequent *Chao* opinion (*Chao* II) has held that this reinterpretation must be applied retroactively.[11] It is the retroactive application of the *Williams* holding which Outten contends compels this Court to vacate his felony murder conviction. The State argues, on the other hand, that other language in *Williams* means Outten's felony murder conviction remains valid:

> Williams burglarized the Charles home with the intent of murdering Mason. The murder was not committed to carry out the commission of the burglary. Had his purpose been to steal jewelry and Mason was killed to facilitate his thievery, a case for felony murder would exist.[12]

The holding in *Williams* and the door which the Supreme Court left open in the above quoted language require that Outten's motion to vacate receive a factual re-

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[10] *State v. Williams*, 818 A.2d at 913.

[11] *Chao v. State*, 931 A.2d 1000 (Del. 2007).

[12] *Williams*, 818 A.2d at 913.

examination. Despite all of the intervening opinions reciting some of the factual record, this Court believes the most instructive is its 1993 sentencing decision. The portion pertinent to the current motion is below:

> When Mr. Mannon, Gibbons and the defendants left the Green Door, a friend of Mr. Mannon's saw them standing in a small circle around the red Camaro. Defendant Nelson Shelton drove and Gibbons was in the front passenger seat. Mr. Mannon was in the back seat between defendants Jack Outten and Steven Shelton.
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> Mr. Mannon commented about partying and Gibbons reminded him he had no money. Nelson Shelton drove directly to Plant Street. The area is some distance away from a bar known as the Boat Yard which the defendants Steven Shelton and Nelson Shelton, at least, are familiar.
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> Once there, defendant Nelson Shelton got out of the car. Defendant Jack Outten pulled Mr. Mannon from the car after he got out. Mr. Mannon's hat was found in the back seat floor. Defendant Steven Shelton got out, too.
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> All three defendants started punching Mr. Mannon. Gibbons yelled for them to stop. Nelson Shelton told her to shut up. Defendant Nelson Shelton retrieved the hammer from the front seat console area. Gibbons saw it in defendant Steven Shelton's hands but testified she never saw him strike Mr. Mannon with it. The brothers passed it back and forth. She saw defendant Nelson Shelton strike Mr. Mannon with the hammer in the back of the head causing him to fall to the ground on his back. This is consistent with the medical examiner's finding of the semicircular wound to the back of the head.
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> Gibbons saw defendant Steven Shelton punch and kick Mr. Mannon after he had fallen. She saw his foot strike Mr. Mannon's face. All three defendants beat him while he was on the ground.
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> Gibbons saw defendant Jack Outten repeatedly strike, perhaps in excess of ten times, Mr. Mannon's head while he was on the ground. She graphically described the pulp that was left. One of the defendants yelled, "Finish it. Finish it." (Gibbons' testimony varied as to which Shelton said

> this but her ultimate testimony to the jury was that it was defendant Steven Shelton.) After Mr. Mannon was murdered, his rings and wallet were removed. All three went through his pockets. The wallet may have been passed around among the three of them.[13]

The evidence also showed that Mr. Mannon, the victim, was wearing a gold colored chain around his neck the night he was murdered. It was not recovered and it was not on his body.

An examination of the evidence set out above in the light of *Williams*' interpretation of "in furtherance of" tells this Court Outten's felony murder conviction cannot be sustained. Gibbons announced in the confined circumstance of the car interior that Mr. Mannon had no money. Based on Nelson Shelton's rebuke to her when she said it, he heard it; it is likely Outten heard it, too. Such evidence would militate against the murder facilitating the robbery, or "moved it forward (whatever that means)." Further, it is far from clear, as described above, that the murder was a necessary part of or a step needed by the three young men to rob an older, intoxicated person.

The State asserts, on the other hand, that the Supreme Court's opinion in *Hassan-El v. State*,[14] results in Outten's felony murder conviction remaining valid. A comparison of the record in the two cases does not support the State's argument. In *Hassan-El*, the defendant and his co-defendant approached an ice cream truck with their faces covered by

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[13] *State v. Outten*, Cr.A. Nos. IN92-01-1144-1158, Herlihy, J., (April 30, 1993, pp 11-13).

[14] 911 A.2d 385 (Del. 2006).

shirts and carrying guns. Hassan-El and his co-defendant shot their weapons as soon as they got up to the truck. The Supreme Court held that Hassan-El was "clearly engaged in an attempted robbery" and "had taken [a] substantial step[ ] toward the robbery when the homicide occurred."[15]

There is no evidence here, on the other hand, that when the three defendants, Gibbons and Mr. Mannon got in the car at the Green Door, there existed an intent or an agreement to rob. In fact, the defendants were never indicted for conspiracy to commit robbery. Further, the fatal pummeling began as soon as Mr. Mannon was pulled from the car. Unlike *Hassan-El*, there were no substantial steps taken to unambiguously manifest an intention to rob. The only evidence is the pocket rifling after he was bashed to death.

Hassan-El provides another benchmark from which it can be determined that, under *Williams*, Outten's felony murder conviction cannot be sustained. As just noted, the Supreme Court found unambiguous steps taken towards a robbery. Further, as noted, this Court sees in this record no such unambiguous steps leading up to Mr. Mannon's murder. That can be contrasted to events earlier in the day when the three men and Gibbons were at (the former) Clemente's Bus Stop. At that time there was a conversation about robbing someone, potentially and using Gibbons as a "lure." As it turned out, a victim was picked and robbed or "ripped off." But he was not beaten and certainly not murdered.

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[15] *Id.* at 392.

Candidly, the facts of this case fall between *Williams*/*Chao* and *Hassan-El*, but not close enough to allow Outten's felony murder conviction to stand. In sum, this Court finds that the evidence in this case places Outten's felony murder conviction within the re-interpretation of § 636(a)(2) as proclaimed in *Williams*. That conviction must be vacated.

Vacating Outten's felony murder conviction means the death sentence imposed for it must also be vacated. The retroactive application of the *Williams* holding, as dictated by *Chao* II, leads to that result.

In this case, as a result of the felony murder conviction and the conviction for robbery first degree, the jury was instructed it had already found two statutory aggravating circumstances beyond a reasonable doubt:

> The murder was committed while the defendant was engaged in the commission of robbery,[16]
>
> and
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> The murder was committed for pecuniary gain.[17]

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[16] 11 *Del. C.* § 4209(e)(1)j. The language of this aggravator is now also the new language of 11 *Del. C.* § 636(a)(2).

[17] 11 *Del. C.* § 4209(e)(1)o. Candor compels the Court to say that in its Sentencing Decision, it said, "The evidence established beyond a reasonable doubt that the murder was committed by each defendant for pecuniary gain." *State v. Jack Outten*, Cr.A. No. IN92-01-1144-58, Herlihy, J. (April 30, 1993) at p. 16. At first blush, that statement would seem to contradict the holding above that the felony murder conviction has to be vacated. When the Court said this in 1993, it was operating under the law in *Chao* I.

The jury was further instructed in accordance with Delaware law[18] that its felony murder and robbery verdicts meant that it had to vote "Yes" 12 - 0 as to these two circumstances. The jury in *Williams* was given a similar instruction, namely its conviction of felony murder (burglary) meant that it had already unanimously found the existence of the statutory aggravating circumstance of murder while engaged in a burglary. This statutory aggravating circumstance - murder while engaged in committing specified other felonies - is the same one applied to Outten.

The Court in *Williams* held the invalidation of the murder conviction meant the mandatory aggravator was also invalid.[19] This Court views that part of the *Williams* holding leads to the same result here: the mandatory instruction is invalid as it related to the felony murder conviction.

Nevertheless, there is a potential and important distinction between *Williams* and this case. According to the Supreme Court opinion, the mandatory instruction given tied the statutory aggravator of engaged in a felony only to the felony murder conviction. There is no mention that the mandatory instruction also recited the jury's burglary conviction. Here, however, as to the two statutory aggravators cited above, the jury was told its felony murder conviction and its robbery conviction meant that the two statutory aggravators had already been established beyond a reasonable doubt.

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[18] *Dawson v. State*, 581 A.2d 1078, 1107 (Del. 1990).

[19] *Williams*, 818 A.2d at 914.

The potential distinction from *Williams* is that the statutory aggravator uses the language "while engaged in . . ." which is broader than "in furtherance of." The issue raised, but not briefed, is whether the new jury, when it is instructed on the penalty recommendation on the intentional murder, should or has to be told that the conviction for robbery means it has to vote "Yes" 12 - 0 on the "while engaged in" statutory aggravator. It is far less clear that this issue relates also the pecuniary gain aggravator.

Conclusion

For the reasons stated herein, defendant Jack Outten's felony murder conviction, Count II of the indictment, Cr.A. No. IN92-01-1145, is vacated and the sentence of death imposed on that is also vacated. The defendant's motion to vacate is **GRANTED**.

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J.