IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	CRIMINAL ACTION NUMBERS
	)	
v.	)	IN-99-01-1103-R1 IN-99-01-1104-R1
	)	IN-99-01-1105-R1 IN-99-01-1108-R1
RICHARD F. ROTH, SR.	)	IN-99-03-2489-R1 IN-99-03-2490-R1
	)	IN-99-03-2535-R1 IN-99-01-1091-R1
Defendant	)	IN-99-01-1092-R1 IN-99-01-1093-R1
	)	IN-99-01-1094-R1 IN-99-01-1098-R1
	)	IN-99-03-0987-R1
	)	
	)	ID No. 9901000322

Submitted: September 26, 2011
Decided: January 6, 2012

MEMORANDUM OPINION

Upon Defendant's Motion for Postconviction Relief - ***DENIED***

Appearances:

Timothy J. Donovan, Jr., Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State of Delaware.

James J. Haley, Jr., Esquire, Wilmington, Delaware, Attorney for Defendant.

HERLIHY, Judge

Richard Roth, Sr. has moved for postconviction relief in connection with his convictions of felony murder in the first degree, robbery first degree, possession of a deadly weapon during the commission of a felony and conspiracy second degree. His convictions were upheld on appeal.[1] The mandate was issued April 10, 2002. Roth, Sr. filed a *pro se* motion on April 7, 2005.

In his *pro se* motion, Roth, Sr. raised fifteen claims. Counsel was appointed for him who filed an amended motion in 2006 clarifying several issues of ineffective assistance of counsel. Regrettably, it has taken a long time to bring this matter to the point where the Court can finally address Roth, Sr.'s claims. One of the original trial counsel, Joseph Bernstein, submitted an affidavit in 2005 to the trial judge (Judge Richard Gebelein). Shortly thereafter, Mr. Bernstein moved to Florida. He was deposed in the defendant's presence, on March 20, 2008.

Co-counsel, Thomas Pedersen was deposed on June 30, 2008. The defendant was present. The lead trial prosecutor, Stephen Walther was examined in a hearing on June 20, 2008 at which Roth, Sr. was also present. Finally, on June 1, 2009, at an evidentiary hearing Roth, Sr. testified and Walther was called by the State for additional testimony. Subsequent to the hearing, Roth, Sr. personally added more claims for postconviction relief and the Court forwarded a copy of the hearing transcript to trial counsel for further comment. Their replies came in 2010. Copies of their replies went to Roth, Sr. One trial counsel replied, "Mr. Roth's assertions can be best described as incomprehensible,

[1] *Roth v. State*, 793 A.2d 311 (Del. 2002).

illogical and in some cases simply false."[2] Roth, Sr.'s response to trial counsel's further response came through briefing only concluding a few months ago.

Claims

In the brief Roth, Sr.'s counsel filed on his behalf, he substantially addresses only three claims for relief: (1) trial counsel's failure to prevent the jury from hearing portions of statements of two witnesses who referred to him as a "safe cracker" and who mentioned him being in jail; (2) trial counsel's failure to object to a claimed erroneous jury instruction on accomplice liability; and (3) counsel error in stipulating to the admissibility of certain DNA evidence. When he originally filed his *pro se* motion for post conviction relief, Roth, Sr. made other claims:

1.) Reclusal [sic]
When Mr. Bernstein and Mr. Pedersen were informed that Judge Gebelein refused to recluse [sic] himself they did not appeal his decision as per the movant's wish.

2.) Sequestering
Lawyers refused to bring to light a sequestering violation allowing testimony that should not have been allowed. State witnesses were allowed by the State to confer prior to testimony.

3.) Juror Removal
Mr. Bernstein and Mr. Pedersen allowed the judge to allow a juror who saw the Movant in handcuffs, fell asleep during trial and had a conflict with the Movant's family in the court room remain on the jury.

4.) Illegal Statement
Mr. Bernstein and Mr. Pedersen allowed the Attorney General to read into record illegally obtain [sic] statement from Mrs. Roth which also mentioned Movant's past criminal history. Lawyers did nothing to correct the problem no objections were made.

5.) Conflict

[2] Letter from Thomas Pedersen, Trial Counsel to Richard Roth, Sr., to The Honorable Jerome O. Herlihy, Judge, Superior Court of Delaware (Sept. 3, 2010) (letter retained in Court file for State v. Richard Roth, Sr., ID # 9901000322).

Lawyers allow [sic] a stipulation which the Movant was against only to save the state money. When Mr. Pedersen got the defendant alone Mr. Pedersen threatened the Movant about speaking out in court again so the defendant allowed stipulation.

6.) Conflict
Mr. Bernstein threatened that if the Movant took the stand he would not help. Forcing the Movant not to take the stand in his defense.

7.) Failure To Obtain Evidence
Lawyers were informed of police perjury but did not get whole transcript to prove perjury. Lawyers were informed of perjury months prior to trial but tried to rush getting evidence at trial and did not get needed transcripts.

8.) Prosecutor Misconduct
Lawyers allowed Mr. Walthers to allow the jury to hear Movant's criminal past by holding back part of a witness statement prior to trial.

9.) Transcript Denial
The court has denied the Movant the transcripts needed to prove his violations.

10.) Prosecutor Misconduct
The court allowed Mr. Walthers to time and time again put into the record facts by reading a witness statement with his inflictions [sic]. The lawyers did not object.

11.) Lying
Lawyers lied to Movant to make him sign a waiver to wave [sic] his right to a speedy trial.

12.) Conflict
The Movant from the first day was in conflict with lawyers. The lawyers did not conduct the case as requested by Movant.

13.) Ineffective Appeal
Lawyers failed to appeal the grounds Movant wanted and argued and did not allow the defendant to help with the appeal.

14.) Reasonable Requests
Lawyers did not do as the Lawyers Code of Ethics demands. By not doing the lawful things the Movant requested of them.

15.) Jury Instructions
Jury was given improper instructions.

At the evidentiary hearing in June 2009, he personally added to these claims.[3] He testified about them. Current counsel merely referred to them in the

[3] Def.'s Ex. 1 admitted during hearing in June 2009:
Points Richard Roth, Sr.:
1. Judge should have stepped down after remarks at Jr.'s sentencing
2. Judge allowed state to force Patty to testify knowing where she was and what her state of mind was
3. Not attacking sequester violation when they had knowledge of the violation
4. Allowing jury to hear of my criminal past by not listening to tapes
5. Not fighting felony murder
6. Not attacking Ayallas story [sic] Why did he not tell victim's wife he was at the store when the robbery happened. The next day when he was at the hospital [sic]. His story of the night at the scene [sic]
7. Not attacking the victim's testimony about different statements the night of the crime
8. Not attacking false testimony by state police a number of times (pictures, Mrs. Anderson, Richie)
9. Allowing stipulation on DNA. It shows that mine and Jr.'s blood [sic] was not at the scene or Anderson's house. Yet 3 types were found at the scene Anderson, Victim and 3rd person??
10. The illegal procedure used to take Patty's statement
11. Walther's misconduct
12. Conflict/// Pedersen told me that he knew Bramble and he was an honest man.
13. Both attorneys refused to listen to me about anything…I was not allowed to participate in my defense
14. Both attorneys told everyone except my daughter Wendy that I should take a plea…it showed no desire to represent me
15. My attorney allowed jurors to see me in cuffs, he fell asleep at trial (Wendy can tell you about it) Had a problem with family to stay on jury??? Not sure about what he was saying
16. Argued no valid points on appeal poor representation
17. Bernstein lied to me to me [sic] to get me to sign a waiver for a speedy trial (court docket)
18. At Jr.'s trial Walthers entered into a conspiracy with Gabay and Decker [sic] to violate the sequester order
19. Walther has the police threaten Mrs. Anderson she and her son would be charged with murder if she did not testify
20. Jr.'s head wound never mentioned (I'll explain later);
21. The lease receipt for storage unit forged
22. Bth [sic] transcripts were incomplete at trial
23. Jury was never poled [sic] for bias as the victim was Spanish
24. Why wasn't a 380 ever entered into evidence

(continued…)

reply brief that Roth, Sr. was still advancing the thirty claims raised at his evidentiary hearing. Counsel offered no substantive argument.

The State's response addresses only the three claims made in Roth, Sr.'s opening brief.

Factual Background

To understand, at least, the three primary claims for relief that Roth, Sr. advances, a recitation of the facts is needed surrounding the crimes for which he was convicted. The factual recitation below is taken from the Supreme Court opinion addressing Richard Roth, Jr.'s appeal:

> Roth, Jr. and three codefendants were charged in connection with a series of robberies occurring in the Newport and Stanton area in December 1998. The codefendants were Richard Roth, Sr., James Anderson and Moises Ordorica. (Ordorica identified J & R Grocery Store as a good prospect for a robbery and told his codefendants how to say, in Spanish, the words that would convey that they were conducting a robbery. He did not participate in the actual robbery). The first robbery occurred on December 22, 1998 at the Newport Family Restaurant. The owner of the restaurant, Maria Perdikis, was robbed as she closed the business and walked to her car with the night deposit bag. An armed robber, wearing a mask and gloves, grabbed her from behind and threatened to kill her if she did not give him the deposit bag. The robber discharged pepper spray into Perdikis' face, and she fell to the ground. The robber then discharged pepper spray into Perdikis' face again. She heard a second man say, "What are you doing?"

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[3](continued…)
25. Talked about a new shotgun but never entered as evidence
26. Victim said taller man had a shotgun. So did Ayalla [sic] everyone else says the opposite5/23/2000 [sic]
27. Did not fight Anderson's statement (I will explain)
28. Mrs. Anderson states Richie came to her house that next afternoon and took a gun. Richie was in southern Delaware
29. Ficella [sic] stated he did not know Mrs. Anderson was there [sic] Sgt Mebahoy stated he informed them when they got them
30. Evidence shows no money was taken after the shooting because no blood on rags (7-22-99 Transcripts) (12-28-99)

The robbers fled with the night deposit bag containing approximately $3,000. Perdikis later told the investigating police officer that she had seen three men in the bushes that night but did not remember that statement at trial.

The second robbery occurred on December 26, 1998 at Bob's Adult Bookstore on Route 13. At about 10:00 p.m., the manager of the bookstore, Mitchell Watson, stepped outside to investigate the possibility of a break in the cable line since the television had gone blank and the credit card machine stopped functioning. When Watson opened the door, a man entered the store and said, "Hi Mitch." When Watson turned around, the man was wearing a mask and pointed a gun at Watson's face. The gunman ordered Watson to step away from the door. A second masked robber entered holding a shotgun. The two gunmen in the store communicated with a third person outside by using a walkie-talkie. The robbers fled with approximately $3,000 and several coffee cans that each contained approximately $100 in quarters or tokens. Mitchell provided a description of the two gunmen to the police. That description, and the descriptions given by other witnesses, was consistent with Roth, Jr. and James Anderson.

The most serious offense occurred during the third armed robbery on New Year's Eve 1998 at the J & R Grocery Store on East Newport Pike. The owner of the store, Jaime Antunez, was working inside the shop with his sister, Marisela Rodriguez. Two gunmen wearing ski masks entered the store. One was armed with a .38 caliber revolver. The other was armed with a sawed-off shotgun and a semiautomatic handgun. (In Roth, Sr.'s trial, Allison Hollingsworth testified she saw Roth, Sr. and Roth, Jr. in possession of the sawed off shotgun in late 1998, once in Roth, Sr.'s Isuzu). As Antunez struggled with one of the robbers, that gunman's weapon discharged twice. One shot struck that gunman in the hand and the other shot grazed his head. The second robber returned from a back room and fired several shots at Antunez with the semiautomatic handgun. The robbers took money from the cash register, exited the grocery store and entered a getaway car driven by a third person. Antunez survived for fifty-five days before dying from an infection and pneumonia caused by the gunshot wounds that were inflicted during the armed robbery.

A customer arrived at the J & R Grocery Store during the course of the robbery. He could see the masked gunmen inside and did not enter. He provided a description of the gunmen to police. The police found a sawed-off shotgun at the crime scene with a white wood stock and tape on the handle.

State's Trial Evidence

The State's evidence at trial established that the three men who robbed the J & R Grocery Store had come from and returned to James Anderson's

residence in Newport where he lived with his wife, Theresa Anderson. Roth, Jr. went to the Andersons' residence, on New Year's Eve with his mother, Patricia Roth, and his father, Roth, Sr. Several other social guests came and went to the Andersons' home throughout the course of the evening.

In a taped statement to the police, Theresa Anderson said that, on New Year's Eve, she saw her husband depart together with Roth, Sr. and Roth, Jr. and return together with them that evening. When they returned, her husband was staggering and bleeding profusely from his head and hand. Roth, Sr. told Theresa Anderson to have her daughter Brittany removed from the house. Theresa Anderson said that Roth, Jr. was "flipping out." Roth, Jr. said " 'The mother f...er wouldn't drop.' He said he shot him like four or five times and he finally had to kick him over." Theresa Anderson stated that when the three men returned to her house, her husband, James Anderson, did not have a gun; Roth, Sr. had a revolver; and Roth, Jr. had a semiautomatic handgun. Theresa Anderson helped care for her husband's wounds and also cleaned blood off of Roth, Jr.'s gun and money stolen in the robbery. Roth, Jr. hid his gun under the Andersons' couch that evening. He retrieved the gun on the following day.

Theresa Anderson's tape-recorded account to the police was corroborated by other guests at the Andersons' residence, including Patricia Roth's initial statement to police. (Patricia Roth, however, later changed her account of the events. In fact, at trial, Patricia Roth testified that her son, Roth, Jr. was not present at the Andersons' residence on New Year's Eve 1998). Paul Ciccaglione was present at the Andersons' residence on New Year's Eve waiting for his girlfriend, Lisa Laskowski, to pick him up. They left briefly to visit Ciccaglione's cousin and returned. According to Ciccaglione, when they left, the three Roths, including Roth, Jr., were at the Andersons' residence.

Ciccaglione and Laskowski returned to the Andersons' house a short time later. When they returned, Roth, Sr., Roth, Jr. and James Anderson were absent. Following a knock on the door, Ciccaglione was asked to take Brittany away from the house. (Laskowski also heard the knock on the door and accompanied Brittany and Ciccaglione back to his cousin's house. Laskowski, however, did not return to the Andersons' residence). As he left to take Brittany to his cousin's house, Ciccaglione saw one of the Roths standing by a car.

Ciccaglione testified that when he returned to the Andersons' residence after leaving Brittany at his cousin's house, he saw clothes, ski masks and blood everywhere. Roth, Jr. was acting nervous, taking off his clothes and throwing things in a bag. He noticed that Roth, Jr. had a head injury and that James Anderson had an injury to his hand. Theresa Anderson told

Ciccaglione that there had been a robbery, James Anderson had been shot and Roth, Jr. may have killed a man.
(At Roth, Sr.'s trial, Ciccaglione testified Roth, Sr. asked to meet with him at a restaurant. He did and while there, Roth, Sr. said the police have nothing on him and Ciccaglione should say nothing to the police).
On the day after the robbery of the J & R Grocery Store, Holly Schmitt received a telephone call from her long time friends, the Andersons. At Theresa Anderson's request, Schmitt proceeded immediately to the Andersons' residence. They told her there had been a robbery and that someone had been shot. Schmitt could not recall the names of James Anderson's accomplices, only that they were a father and son. The older man had driven the car and the younger man had gone inside. When Schmitt saw the mess at the Andersons' residence, she cleaned up some of the bloody materials and threw them in a bag. She also picked up and discarded some of the other items. Schmitt then took James and Theresa Anderson to Massachusetts.
On January 1, 1999, the police received an anonymous tip that James Anderson had been involved in the J & R Grocery Store robbery, during which he had been injured, and that he had fled to Massachusetts. The police obtained and executed a search warrant on the Andersons' residence. They found numerous items related to the robberies, including two empty Wilmington Trust deposit bags, nineteen coffee cans some of which contained tokens from Bob's Adult Bookstore, a pair of Motorola two-way radios, boxes containing .38 caliber ammunition, an empty box of Remington shotgun shells, ski masks, camouflage pants and a bloody washcloth.
On January 3, 1999, James Anderson was apprehended in East Hampton, Massachusetts while he sat drinking in a bar with his wife, Theresa. He had a .38 caliber revolver in his possession. Delaware State Police dispatched two detectives, Detectives Dan Bramble and Vincent Fiscella, to East Hampton to interview James Anderson. He gave them a statement confessing to the three robberies in question. He implicated Roth, Sr. and Roth, Jr. as his accomplices. He stated that Roth, Jr. was the person who shot Antunez. Theresa Anderson was also questioned and made a statement, which corroborated her husband's statement in many respects.
After James Anderson implicated Roth, Sr. and Roth, Jr. in the robberies, the police executed search warrants on several motel rooms and a storage locker located in Stanton, Delaware. In the storage locker, which was leased in the name of Roth, Jr. and his girlfriend, the police discovered a shotgun similar to the one observed at the J & R Grocery Store, a box of .38 caliber ammunition and a gun cleaning kit. An Isuzu Rodeo automobile owned by Roth, Sr. was also searched. DNA analysis revealed that the blood of both James Anderson and the victim, Antunez, was inside the

> vehicle. DNA analysis also identified blood samples recovered from the grocery store with both the victim, Antunez, and James Anderson.
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> At the J & R Grocery Store, police recovered five .38 caliber shell casings, all of which came from the same semiautomatic handgun. The police did not recover the semiautomatic handgun but confirmed that the shell casings did not come from James Anderson's .38 caliber handgun. The police also recovered five bullets or bullet fragments during the course of the investigation. Two of the fragments were recovered from the crime scene and three others were removed from the victim, Antunez.
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> Pursuant to a plea bargain with the State, James Anderson testified at Roth, Jr.'s trial (and at Roth, Sr.'s trial). According to James Anderson, he and three accomplices planned to rob the J & R Grocery Store. Moises Ordorica, the fourth codefendant, taught them certain Spanish phrases for use in the robbery, provided information about the store and received a share of the robbery proceeds. James Anderson's testimony provided a detailed account of the armed robbery and murder at the J & R Grocery Store.
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> According to James Anderson, Roth, Sr. and Roth, Jr. left his residence together. Roth, Sr. remained in the getaway car and drove back to the residence afterward. James Anderson, armed with a .38 caliber handgun, and Roth, Jr., armed with a shotgun and a semiautomatic handgun, put on masks and entered the grocery store. James Anderson focused on Antunez while Roth, Jr. focused on Rodriguez and went to the back of the store searching for a safe. When he and Antunez struggled, James Anderson's gun discharged twice, hitting Anderson. James Anderson saw Antunez collapse after Roth, Jr. shot him several times. James Anderson also implicated Roth, Sr. and Roth, Jr. in the other robberies.
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> The jury convicted Roth, Jr. of the charges associated with the armed robbery, the murder at the J & R Grocery Store and the robbery of Bob's Adult Bookstore.[4]

Discussion

Before the Court can undertake consideration of Roth, Sr.'s motion, it must determine if there are any procedural impediments to doing so.[5] Roth, Sr.'s motion was filed within the then three year deadline from the mandate's issuance and is, therefore,

[4] *Roth v. State*, 788 A.2d 101, 103-06 (Del. 2001).

[5] *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

timely.[6] However, the claims he makes were all knowable on direct appeal and are barred unless he can show (1) cause for relief and (2) prejudice from a violation of his rights.[7] Roth, Sr. can show "cause" if he establishes ineffective assistance of counsel.[8] To establish ineffective assistance of counsel, either trial counsel or appellate counsel, Roth, Sr. must show: (1) counsel's conduct fell below an objective standard of reasonableness and (2) counsel's deficient performance caused the defendant actual prejudice.[9] Appellate counsel have a duty to winnow out weaker arguments and advance those more likely to prevail.[10]

As Roth, Sr.'s current counsel has focused on three arguments, this Court will address them first.

I. Jury Instructions

Roth, Sr. now claims that the Court's instruction on accomplice liability was insufficient as it did not address his own mental culpability. The instruction read:

> Now, in weighing the evidence as to each offense, I will explain the elements of the crimes charged and the fact the State has the burden of proving those elements to you to your satisfaction beyond a reasonable doubt. However, there's a further provision in the law which I would call to your attention having to do with the aiding and abetting the defense, and that reads as follows: A person is guilty of an offense committed by another person when intending to promote or facilitate the commission of the

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[6] Super. Ct. Crim. R. 61(i)(1) (Since amended to one year from the mandate date).

[7] Super. Ct. Crim. R. 61(i)(3).

[8] *Cobb v. State*, 676 A.2d 901, 1996 WL 145793, at *1 (Del. 1996) (TABLE).

[9] *Scott v. State*, 7 A.3d 471 (Del. 2010).

[10] *Smith v. Murray*, 477 U.S. 527, 106 S. Ct. 2661 (1986).

offense he or she aids, counsels, agrees or attempts to aid the other person in planning or committing it.

Where there is a crime committed and there are two, three or more people present, though one may take no active part in the crime yet present at or near the scene of the crime, aiding or counseling the other or others, then, under the law of this state, that person is equally guilty with person or persons who actually commit the crime.

So, in order to find the defendant guilty of an offense committed by another person, you must find that all three of the following elements have been proven to your satisfaction beyond a reasonable doubt:

First, that another person committed the offense charged as I will explain those offenses for you; and secondly, the defendant intended to promote or facilitate the commission of the offense. In other words, it was the person's conscious object or purpose to further or assist in the commission of the offense.

Now, the relevant inquiry here is not whether the defendant, as an accomplice, had the specific intent to commit the underlying charge, but whether that person intended to promote or facilitate the principal's conduct constituting the offense. An accomplice does not have to specifically intend that the underlying offense should occur. As long as the result was a foreseeable consequence of the underlying felonious conduct, his intent as accomplice includes the intent to facilitate the happening of the result. And third, the defendant aided, counseled or agreed or attempted to aid another person in planning or committing the offense.

Mere presence at the scene of a crime, without proof of those three elements that I've outlined for you, does not support a finding of guilt under this section.

You may find the defendant guilty of an offense committed by another person only if you are satisfied, beyond a reasonable doubt, that the offenses were within the scope of the agreed activity or were reasonably to be expected as incidental to that activity.

If you determine, after considering the evidence, that the defendant was merely present at or near the scene of the crime without aiding, abetting, counseling or participating in the crime, then it's your duty to find the defendant not guilty.

You should also be aware that any prosecution for an offense which criminal liability of the accused is based upon the conduct of another person, it is no defense that the other person has not been prosecuted for or convicted of any offense based upon the conduct in question.

Furthermore, aiding in the statute refers to assisting and helping in the actual commission of the crime. It does not refer to participating after the offense has actually been completed.

> Four purposes of determining accomplice liability, the commission of a particular crime continues until all acts constituting the offense have ceased.
>
> Finally, the law provides that a person indicted for committing an offense may be convicted as an accomplice to another person guilty of committing the offense. Likewise, a person indicted as an accomplice to an offense committed by another person may be convicted as a principal.
>
> In considering whether this defendant is guilty of an offense based on accomplice liability, you must weight the evidence separately as to each of the individual charges. In other words, even if you find that the defendant is guilty as an accomplice to one of the charges, that does not mean that you must find the defendant was an accomplice as to all of the charges.[11]

Roth, Sr. was convicted of first degree felony murder in recklessly causing another's death. His claim now is that this instruction did not include an instruction under 11 *Del. C.* § 274. If given, he contends that he could have been convicted of murder in the second degree where, during the commission of a felony, someone with criminal negligence, causes death.[12]

Roth, Sr. points to the trial testimony of his co-defendant, Anderson, who said no one was to get hurt during the robbery of the food store where Antunez was killed. That evidence, of course, was known to counsel and the Court at trial. Yet, trial counsel did not ask for a "§ 274" instruction.

On direct appeal, Roth, Sr. raised only one issue.

> (1)…Richard Roth, Sr. ("Roth"), raises a single issue on appeal: that the trial judge erred in instructing the jury that Roth could be found guilty of felony murder if the jury concluded that Roth intended to commit the

[11] Trial Tr. 77-81, Feb. 9, 2001.

[12] 11 *Del. C.* § 635(2).

> underlying robbery, and if the death that occurred during the robbery was a foreseeable consequence of the robbery.
> (2) We conclude that, as Roth tacitly concedes, this issue is controlled by our holding in *Claudio v. State,* 585 A.2d 1278, 1282 (Del.1991). We find no reason to revisit our holding in *Claudio.* Accordingly, we find no error in the trial judge's instruction in this case.[13]

This holding suggests several things. One, Roth, Sr.'s current claim about the need in the 2001 trial to include a "§ 274" instruction is without merit. This Court's 2001 instruction passed muster under then Delaware law.[14]

Another conclusion one can draw from the holding is that Roth, Sr.'s current claim has already been adjudicated and is barred.[15] The available record is insufficient to definitively make that finding. The strong inference remains, however, that it is.

Yet another suggestion occurs. It is that if appellate counsel had raised the "§ 274" issue, under the decisional law existent in 2001, the argument would not have succeeded. Though they arguably could be faulted for their failure to raise it, Roth, Sr. cannot meet the prejudice test under ineffective assistance of counsel or Rule 61(i)(3)(B).

Rule 61(i)(5) provides another means of relief from the procedural bar of Rule 61(i)(3). It is where there has been a miscarriage of justice because of a constitutional violation which undermined the fundamental reliability, legality or fairness of the

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[13] *Roth v. State*, 793 A.2d 311, 2002 WL 432021, at *1 (2002) (TABLE).

[14] Curiously, *Claudio* and *Allen v. State*, 970 A.2d 203 (Del. 2009), seem to conflict. In *Allen*, the Supreme Court held where an offense is divided into degrees, a § 274 instruction must be given. Again, murder is divided into degrees. Interestingly, while addressing prior inconsistent decisions in *Allen*, *Claudio* is not cited at all. In any event, *Allen* is not a retroactive decision. *Richardson v. State*, 3 A.3d 233 (Del. 2010). *Compare Guy v. State*, 999 A.2d 863 (Del. 2010).

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

trial/guilty verdict. This means of relief from the bar of Rule 61(i)(3) is a narrow one, such as when a new right has been recognized on appeal.[16] That is not the case here, nor does Roth, Sr.'s argument rise to the level of meeting this relief to the procedural bar.

Finally, the evidence does not support this claim. The robbery resulting in the fatal shooting was the third armed robbery and in one case the victim was "pepper sprayed." In each case, Roth, Sr. was an accomplice, but in each case, he knew his son and Anderson were armed. The risk of an untoward event such as Antunez's murder rose with each passing event. There has to be or had to have been an evidentiary basis for the lesser murder instruction.[17] That was not the case.

Roth, Sr.'s claim concerning the jury charge on accomplice liability is procedurally barred and no means of relief exists from the bar. Further, as part of the procedural bar or independently, Roth, Sr. has failed to make the showing he must concerning ineffective assistance of counsel.[18]

II. Taped Statements

The next claim of ineffective assistance arises from the playing of taped statements given by Anderson and Patricia Roth, Roth, Sr.'s wife. In each taped statement there was a reference to Roth, Sr. being a "safecracker" and being in jail with Anderson. When Mrs. Roth's statement was played, trial counsel did not object. While

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

[17] Bernstein has stated there was no reasonable basis for a state of mind below reckless.

[18] *Scott v. State*, 7 A.3d 471, 477 (Del. 2010).

Anderson's taped statement (recorded on two tapes) was being played, there was no contemporaneous objection.

But after it was played, trial counsel moved for a mistrial. That motion was denied. Roth, Sr.'s counsel affirmatively informed the trial judge they did not want him to give a curative instruction because that would only draw attention to the objectionable part of the tape. Prior to trial the State had provided transcripts to counsel of Anderson's taped statement but counsel never listened to the tape. Prior to trial there was an agreement, perhaps some trial court rulings, to redact portions of Anderson's taped statement, including with these references. Some redactions were made.

The issue arose at trial because page 77 of the transcript provided to counsel was blank, indicating to them that tape one had ended and that page 78 was the beginning of the second tape. Unfortunately, there was more as there were references to "safe cracking" and jail which should have been on the actual copy of page 77. Page 77 had not been presented by trial counsel to the trial judge; so he had no chance to order a redaction in the tape.

Prior to Anderson's tape being played, it had been admitted into evidence.[19] After it was played and this controversial part came out, the trial judge ordered the offending portion removed from the tape. The jury, therefore, would hear all the rest of the tape during its deliberations.

[19] Roth, Sr.'s trial preceded by five years *Flonnory v. State*, 893 A.2d 507, 527 (Del. 2006), which held the taped statements of non-defendants were not to be placed into evidence.

It is clear that trial counsel, in all due respect to two fine attorneys, were ineffective when they did not listen to the tapes but relied on the transcriptions. If they had, of course, this issue would not have arisen. The Court finds, however, that they were not ineffective in asking the trial judge to not give a curative instruction. They said at the time, and have repeated since, to do so lends potentially undue weight to the objectionable evidence.[20]

Whether to seek a curative instruction or not, a decision which often has to be made in a flash, is a long-standing conundrum faced by counsel. It is one of those decisions, here affirmatively made to not have one (as contrasted to counsel not appreciating a decision needs to be made at all), which implicates two other principles applicable to claims of ineffective assistance of counsel. One is that Roth, Sr. has to overcome the strong presumption that trial counsel's representation is reasonable. The other is that this Court should strive to eliminate the distorting effects of hindsight from trial counsel's perspective at the time.[21]

As Roth, Sr. has made a claim of ineffectiveness relating to counsel's failure to listen to the tapes, the Court must then examine the prejudice test as to that part of his claim. Once "the cat was out of the bag," trial counsel acted reasonably and met objective standards by seeking a mistrial. To establish prejudice, Roth, Sr. must show that, but for this error of counsel, there is a reasonable probability that there would not have been a

[20] A prompt curative instruction also is presumed to cure error. *Revel v. State*, 856 A.2d 23, 27 (Del. 2008).

[21] *Gattis v. State*, 697 A.2d 1174, 1178 (Del. 1997).

guilty verdict.[22] The evidence against Roth, Sr. was overwhelming. The trial judge who heard all of the evidence in the case and the objectionable part of Andersons' taped statement believed a mistrial was unwarranted. The jury may have heard the statement but the tape made available to the jury during deliberations was devoid of it. Of course, no one knows if they listened to it. This Court finds Roth, Sr. has not met and cannot meet his burden of showing prejudice. Failure to establish prejudice arising from counsel's error means he has not established his claim of ineffectiveness.[23]

While Roth, Sr., does not raise this issue, arguably trial counsel, who were also appellate counsel, might or should have raised on appeal the trial court's denial of their mistrial motion. Accepting this argument, as appellate counsel, they were ineffective. Roth, Sr., however, in this Court's view, cannot establish prejudice. Under the standards for granting a mistrial, it is unlikely the trial judge's discretionary decision would have been reversed. There was no manifest necessity to declare one.[24] The case against Roth, Sr., was strong not weak. There was nothing in the statements of Anderson or Patricia Roth relating to or affecting credibility.[25]

III. DNA Stipulation

Roth, Sr. complains trial counsel were ineffective when they stipulated to the admissibility of DNA evidence without the foundational expert testimony he wanted. The

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[22] *Capano v. State*, 889 A.2d 968, 975 (Del. 2006).

[23] *Holland v. State*, 31 A.3d 76, 2011 WL 5352960, at *2 (Del. 2011) (TABLE).

[24] *Banther v. State*, 977 A.2d 870, 890 (Del. 2009).

[25] *See Hughes v. State*, 437 A.2d 559, 572 (Del. 1981).

stipulation was this:

> 1. Blood evidence (hereinafter "blood evidence") was recovered by the police from the following locations, more particularly as set forth in Exhibits A, B and C attached hereto: (1) 1600 E. Newport Pike; (2) a white 1991 Isuzu Rodeo; and (3) 503 S. Maryland Avenue.
> 2. Known samples of blood were obtained from the following persons: (1) Jaime Antunnez; and (2) James Anderson.
> 3. The "blood evidence" and the known samples of blood were then subjected to DNA analysis, which was conducted in accordance with scientifically acceptable procedures and protocols, by Reliagene Technologies, Inc., under the direct supervision of Dr. Joseph Warren, Ph.D. Dr. Warren has testified as an expert in DNA analysis in the Superior Court of the State of Delaware, in and for New Castle County.
> 4. Based upon the DNA analysis conducted in this case, it is the opinion of Dr. Warren, to a reasonable degree of scientific certainty, that the DNA extracted from the "blood evidence" matches the DNA extracted from the known blood samples of Jamie Antunnez and James Anderson, as summarized in Exhibits A, B and C attached hereto.[26]

First, there is a serious question of whether Roth, Sr. can complain. Tactical decisions of this kind are usually for counsel to make.[27] The vehicle in which the blood match was made was Roth, Sr.'s but that does not alter the ability of trial counsel to make that decision on his behalf.[28]

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[26] State's Ex. 67; trial in *State v. Roth, Sr.*, Crim. Action No. 9901000322.

[27] *See Zimmerman v. State*, 991 A.2d 19, 2010 WL 546971, at *2 (Del. 2010) (TABLE) ("defense counsel's duty to consult with the defendant regarding 'important decisions' does not require counsel to obtain the defendant's consent to 'every tactical decision.'")

[28] Pre-trial, the trial judge had excluded another DNA sample taken from Roth, Sr.'s vehicle. *State v. Roth*, 2000 WL 970673 (Del. Super. May, 12, 2000) (Trial counsel explained Roth, Sr. wanted the evidence the trial judge excluded to be admitted at his trial, nevertheless. As trial counsel said the excluded DNA sample contained, to a degree, some of Roth, Jr.'s blood. To admit it in Roth, Sr.'s trial would, counsel said, have provided an unwanted evidentiary link between father and son Roth.) (Bernstein Dep. 52-53, Mar. 20, 2008).

When this stipulation proposal first arose and his trial counsel agreed to it, Roth, Sr. became upset in court. The trial was recessed for the day and Tom Pedersen, one of his trial counsel, met with him. When Pedersen was deposed about this issue he said:

> Pedersen: I do remember there being – Richard, Sr. having a problem. As I recall it – and if I'm mistaken, maybe the transcript will correct me. I haven't seen it. The Judge asked the question and Mr. Bernstein stood up, kind of without consulting with Richard, and said, We have no objection, and that angered Richard. It surprised me that it angered him because letting that DNA evidence in the suggested that it was somebody else's blood on somebody else was consistent with our argument that there was no physical evidence linking him to the crime.
>
> I know that he was – even before his trial, his primary concern was more about his son than himself. And I don't know whether some of that lingered into his trial and he felt like maybe his son might win on an appeal and he didn't want us stipulating or admitting to anything that might hurt his son's case on appeal. But I remember going downstairs and talking about it. If you've had any dealings with him, you can't – "him" being Mr. Roth, Sr. He's not somebody you push around in terms of telling him what to say and he says it. He thinks his own things and says his own things.
>
> I remember we had a conversation, he was on board, came back upstairs, we went over it, everything seemed to be fine. The next day we came in and he had changed his mind again. That's the best recollection I have.
>
> Haley: And the last thing he changed his mind to being that he had no problem with the evidence coming in without a foundational witness by stipulation, he seemed –
>
> Pedersen: I think ultimately he was on board, but there was some back-and-forth again the following day, if I recall, if I'm not mistaken.
>
> Haley: I'll represent to you that he advised me at one point – I don't know if it was to you or Mr. Bernstein pretrial. He says that he ordered his counsel that there be no stipulations between defense and the State; that the State be put to jump through every hoop they had to be put through to get evidence in in the trial. Do you recall any conversation like that?

Pedersen: It sounds like something he would say. But he would contradict himself all the time. I wouldn't be surprised if Richard said that to us, but I wouldn't be surprised if he changed his mind. It was an interesting experience representing him because you never quite knew what you were going to hear from him the next day you talked to him.

Haley: Ultimately you think he had no problem with DNA coming in through – with no witness to offer it by way of foundation?

Pedersen: Honestly, I can't say for sure. I can't imagine that if he had still had a problem, that it would have come in. So I think ultimately he understood what we were saying and why we were saying it.[29]

Joseph Bernstein, Roth, Sr.'s other trial counsel, acknowledged that Roth, Sr. had some objections to the DNA evidence coming in without foundational expert testimony. He also acknowledged Roth, Sr. was both ways on this issue. Counsel's approach, especially since the blood sample would come into evidence any way and did not link him to the *murder scene*, was to minimize the "aura" or impact of DNA expert testimony by having the evidence be a piece of paper and not a live witness.

That kind of trial tactic underscores why a decision such as this is best left to trial counsel. Assuming arguendo it is not their final choice, there is no doubt that evidence is relevant and would have come in through an expert. Roth, Sr. would have gained nothing and would likely have suffered the "impact" prejudice trial counsel sought to avoid.[30]

Accordingly, this Court can see no basis for ineffective assistance of counsel concerning the DNA stipulation.

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[29] Pedersen Dep. 11-14, June 30, 2008.

[30] Bernstein Dep. 40, Mar. 20, 2008.

IV. Roth, Sr.'s Additional Claims

On his own, Roth, Sr. has made a number of additional claims.[31] Without further briefing or argument, current counsel merely adopts them. Perhaps this approach reflects appropriate advocacy: winnowing out arguably meritorious arguments from those not so. This Court, however, will not deem them waived, as tempting as that may be. Some deserve a little attention while others do not.

A. Failure to appeal trial judge's denial of recusal

That trial judge had presided over Roth, Jr.'s trial which had preceded Roth, Sr.'s. His recusal was sought because of presiding over the prior trial but was denied. The denial was not part of the appeal. It is an issue which could have been raised on direct appeal and is barred.[32] Trial counsel, in responding to the claim, considered raising it but found no substantial basis to argue for it.[33] The Court concurs with trial/appellate counsel's assessment and finds appellate counsel were not ineffective by not raising the issue on appeal. No means of relief from the procedural bar is available.[34]

B. Juror

Roth, Sr. says a juror saw him in handcuffs, was asleep at times during the trial and "had problems with his family." The latter claim apparently resulted from Roth, Sr.'s wife's actions while seated in the courtroom, a complaint made about it to the Court and

[31] *See supra* pp. 2-3 and note 3.

[32] Super. Ct. Crim. R. 61(i)(3).

[33] Bernstein Dep. 35-36 Mar. 20, 2008.

[34] Super. Ct. Crim. R. 61(i)(3).

the family's exclusion from the courtroom. The Court finds this claim fanciful and meritless. This trial was in the "old" courthouse where, unfortunately, jurors and incarcerated defendants had to use the same hallways to get either to the courtroom or the jury room. Roth, Sr. says this same juror saw him in handcuffs in that hallway. Of course, the State cannot compel a defendant to appear in court in prison clothing.[35] Roth, Sr. was not in a courtroom when this happened. It was inadvertent, not compelled and Roth, Sr. fails to show any prejudice. Trial counsel may have mentioned to the judge who found it unnecessary to excuse the juror. As to the allegation of a sleeping juror, this Court adopts the comment from the United States Supreme Court:

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process.[36]

The Court finds no merit to this complaint, either.

C. Sequestration

Roth, Sr.'s complaint is about an alleged violation of a sequestration order in Roth, Jr.'s trial. There is no connection to his trial and this claim is devoid of merit.

D. Decision not to testify

Roth, Sr. contends he was threatened not to take the stand in his own defense. Mr.

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[35] *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1961 (1976).

[36] *Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739 (1987).

Bernstein responds that it was Roth, Sr.'s decision not to testify after many consultations about it. He also notes that the trial judge questioned Roth, Sr. about it who stated it was his voluntary decision.[37] Roth, Sr. has presented no credible evidence to refute trial counsel's statement or his own one made 10 years ago.

E. Trial Transcripts

Roth, Sr. claims he does or did not have the trial transcripts to help him prepare his motion. Yet: (1) Mr. Bernstein testified he turned all transcripts over to his family, and (2) current counsel attached portions of the trial transcript to his brief. No more need be said.

F. Prosecutor Misconduct

The complaint here is that the prosecutor was allowed to read in witness statements (with his "inflictions" [sic]). But as trial counsel note, the prosecutor was properly using prior statements to impeach. This claim lacks merit.

G. Voir Dire about Racial Bias

The victim was Latino. Roth, Sr. is a caucasian. Trial counsel were, of course, aware of that but did not believe the issue was important enough to warrant any special *voir dire*. While it might have been "nice" to have had such *voir dire*, Roth, Sr. has not shown any prejudice to him or any potential Latino juror by failure to have it.

H. Additional Claims

The above listed claims primarily came from Roth, Sr.'s initial *pro se* motion for postconviction relief. The balance of them the Court reviews as rehash of some of the

[37] Bernstein Aff. ¶ 6, July 25, 2005.

claims covered in this opinion or of insufficient merit to discuss. This may also explain current counsel's statement that he is adopting Roth, Sr.'s remaining claims but for which he presented no argument.

After both trial counsel had been deposed, Roth, Sr. presented a new list of 30 claims for relief at his evidentiary hearing.[38] During the hearing Roth, Sr. also addressed his initial list of 15 claims discussed above. Most of his latest iterations of grounds for relief are repeats of his first set, but doubled. There are no new substantive claims, and Roth, Sr. offers no justification for adding these claims or offering the list years after the mandate was issued and over a year after his trial counsel had been deposed. They are not really responsive to what trial counsel covered in their testimony, which otherwise he would be entitled to do.[39] Some of the claims even relate to his son's trial, not his!

This Court has carefully reviewed each of the 30 claims he presented at his evidentiary hearing. Other than the grounds reviewed in this opinion, the Court sees no merit in discussing them and no merit in them.

Conclusion

For the reasons stated herein, defendant Richard Roth, Sr.'s motion for postconviction relief is **DENIED.**

IT IS SO ORDERED.

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J.

[38] *See* note 3.

[39] Super. Ct. Crim. R. 61(g)(3).