IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	:
	: ID No. S0909000858 R-1
	:
vs.	:
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DERRICK POWELL	:
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Decided: May 24, 2016

On Petitioner's Motion for Postconviction Relief: **DENIED**

MEMORANDUM OPINION

Patrick J. Collins, Esquire, Collins & Roop, Wilmington, Delaware, Attorney for Defendant.

Natalie Woloshin, Esquire, Woloshin, Lynch & Natalie, P.A., Wilmington, Delaware, Attorney for Defendant.

John J. Williams, Esquire, Kathryn Garrison , Esquire; Peggy Marshall, Esquire, Martin Cosgrove, Esquire, Department of Justice, Georgetown, Delaware, Attorneys for the State of Delaware.

GRAVES, J.

INTRODUCTION AND PROCEDURAL HISTORY

A jury found Derrick Powell ("Powell") guilty of first degree murder for recklessly causing the death of Officer Chad Spicer while in flight from an attempted robbery, four counts of possession of a firearm during the commission of a felony, resisting arrest with force or violence, attempted robbery in the first degree, and reckless endangerment in the first degree. Following a penalty hearing, the jury unanimously found two statutory aggravators existed and recommended, by a vote of seven to five, that a sentence of death be imposed. This court sentenced Powell to death on May 20, 2011.[1]

The court adopts the findings of fact as set forth in this court's sentencing decision:

> On the night of August 31, 2009, Powell stayed at the house of his friend, Luis Flores ("Flores"). Powell possessed a 9mm semi-automatic pistol. Flores testified that he and Powell shot the gun in some woods approximately a week to a week and a half earlier. Flores also testified that he took the pistol from Powell on August 31, 2009, and hid it in the basement so his children would not find it. Powell was with Flores when the pistol was hidden. Powell retrieved the pistol from the basement the next morning before riding with Flores to Georgetown. Flores worked at the Perdue chicken processing plant ("Perdue") in Georgetown. On the way to work, Flores and Powell picked up Christopher Reeves ("Reeves"), a co-worker of Flores.
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> Powell, Flores and Reeves had a plan to obtain a quantity of marijuana. The plan was to rip off or rob a person. Reeves's thought was that the victim should be a drug dealer. Specifically, that person was Thomas Bundick ("Bundick"). Bundick knew Reeves, but did not know Powell or Flores.
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> The plan was to have Bundick sell Reeves four ounces of marijuana in exchange for $480 or $500. Instead of paying Bundick, they would rob him when they met.
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> Many text messages were exchanged on September 1, 2009, while Flores and Reeves were working at Perdue. Powell remained in the parking lot at Perdue polishing the Sebring's headlights, sleeping in the vehicle, and/or listening to the radio.

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[1] *State v. Powell*, 2011 WL 2041183 (Del. Super. May 20, 2011).

Flores and Reeves left Perdue at approximately 2:00 p.m., while on their lunch break. Flores, Reeves, and Powell planned to meet and rob Bundick at the Kentucky Fried Chicken Restaurant ("KFC"), also located in Georgetown. Powell had his pistol.

The plan was to get Bundick into the car and then rob him, inferentially by strong arm or by the threat of the pistol. The hope was that the dark, tinted windows of the Sebring would prevent others from witnessing the robbery.

The seating arrangement reasonably fit the plan. Reeves drove Flores's Sebring because Bundick only knew Reeves and Bundick would be able to see the driver of the Sebring. Flores sat behind the front right passenger seat. Flores was and is a big person, presumably capable of a strong-arm robbery. Powell sat on the left driver's side rear seat, behind the driver, Reeves. The front right passenger seat was left open for Bundick. Bundick, who would be sitting in the passenger side of the vehicle, clearly would be able to see Powell, and if necessary, the pistol, when he turned his head to his left.

The problem was that Bundick did not have four ounces of marijuana. He was trying to be a broker or middleman by hooking up Darshon Adkins ("Adkins") with Reeves. Bundick hoped that by being the middleman, he would acquire some marijuana or money out of the deal. Powell, Flores, and Reeves believed Bundick had the marijuana and they knew nothing of Adkins.

The lunch break deal/robbery never took place because Bundick was not able to arrange for Adkins to arrive at the meeting place by the time Flores and Reeves had to return to Perdue. The text messages continued throughout the remainder of the afternoon. Flores and Reeves kept trying to get "the deal" done when they got off work. Bundick still was trying to broker the deal by inducing Adkins to bring the marijuana.

After the lunch break, Powell had continued to stay in the car, sleeping and/or listening to the radio while Flores and Reeves worked. After finishing their work day, Flores and Reeves again met Powell in the Perdue parking lot. They drove toward KFC with the same seating arrangement as they had at the lunch break.

After more text messages, Flores, Reeves, and Powell learned that Bundick did not have the marijuana and was brokering the deal with somebody they did not know. The meeting also was moved to McDonald's.

There was much distrust. Flores, Reeves, and Powell arrived at McDonald's and parked in the back parking lot. They backed into a parking spot so that they could

pull straight out. Bundick arrived in a green vehicle driven by his fiancé. A friend drove Adkins to McDonald's in a black BMW. Bundick kept trying to hook Adkins up with Reeves. Adkins would not get into the Sebring. Bundick and his fiancé sensed something was amiss and they left.

At this stage, Flores, Reeves, and Powell knew the guy with the four ounces of marijuana (Adkins) was not going to come to their car. They suspected he came in the black BMW. They saw a person exit the BMW and go into McDonald's.

Flores wanted to abandon the robbery because they could not do it as planned.

Powell told Reeves and Flores to leave and then loop back and get him. Powell got out of the Sebring and walked over to the east side of McDonald's up to the front of the restaurant. Strangely, Powell had unprovoked words with Sammy Smith, a McDonald's employee who had just finished his shift and was "hanging out" outside with two other co-employees. In court, Mr. Smith identified Powell as the person who fired a gun and then ran and got into the driver's side rear seat of the silver Sebring that then sped off.

Adkins was standing in front of McDonald's when Powell approached him from the rear, pulled a gun, and told him to give it up. Words were exchanged for a few seconds. Other witnesses could see something was going on but the distance prohibited them from hearing what was said. Adkins then turned and ran towards the highway. He actually ran right out of his shoes. Powell fired at least one shot in Adkins's direction. Powell then ran, and the remaining witnesses testified he got into the driver's side rear seat of the Sebring. Flores testified that after the shot was fired, Reeves started to drive away without Powell. Flores told Reeves to stop because Powell was his friend. Reeves stopped and Flores opened the driver's side rear door for Powell to get into the car.

Adkins identified Powell in court, in no uncertain terms, as the person who attempted to rob him. A person of Powell's build and wearing the same type of clothes can be seen in the McDonald's security video. Powell's face can be seen in the blowup stills of the video.

The location where Powell entered the vehicle is important because it is from that location that the bullet which killed Spicer was fired. The bullet went through the upper rear portion of the rear window of the Sebring. This took place four (4) minutes after the first "911" call at McDonald's.

After leaving McDonald's, Flores testified he and Powell argued about the stupidity of what Powell had just done.

Reeves testified that when he drove by the school in Georgetown he wanted to stop and bail out but Powell told him to keep going.

By the time they approached The Circle, a police car was behind them with its siren and flashing lights on. Reeves did not stop. He kept going. Reeves testified that Powell said he would shoot at the cops if Reeves stopped. Reeves turned left on North King Street and the police car stayed behind them.

Reeves decided to stop, and did so abruptly. When he opened the driver's door to bail out, the police car, as it was coming to a stop, struck the opening door. The right headlight bumper area of the police car struck the opening door, causing minimal damage. The position of the stopped vehicles prevented Reeves from fully opening his door. The vehicles were just two feet apart.

Nevertheless, Reeves got out, scampered across the hood of the police car, ran north on North King Street towards Rosa Street and then west down Rosa Street. The police car dashboard video captured Reeves going across the hood of the police vehicle. His palm prints also were found on the hood of the police vehicle.

Officer [Shawn] Brittingham, who was driving the police car, exited his vehicle to pursue Reeves. As Officer Brittingham was leaving his vehicle, he heard what he thought was a gunshot and felt a sting on his neck. He reported this on his portable shoulder radio. Reeves also testified it was about this same time he heard the shot.

Flores testified that Powell, still sitting in the driver's side rear seat, pointed his pistol toward the police car, fired one shot, said nothing, opened the door and left through the driver's side rear door where he was sitting. Flores was the only eyewitness as to seeing Powell pull the trigger.

Although they could not see inside the Sebring because of the tinted windows, at least three Georgetown residents observed what happened immediately after the shot was fired.

Each of the residents had their attention drawn to the vehicles because of the chase, the stop, and then the driver running. Each testified that a person fitting Powell's description immediately exited the vehicle after the shot was fired. Their recollections varied as to which door he exited, but all agreed on the description fitting Powell. Two witnesses testified he had a black pistol in his hand and that he was doing something that resembled working the slide on the gun. A third witness testified he saw something black. Again, the witnesses' testimony varied as to which door the person with the gun exited (all doors except the driver's door), but the witnesses all agreed on which direction he ran. He ran across an

empty lot towards the Perdue plant. Savannah Road is directly in line with the path that the person ran. It is between the location of the shooting and the Perdue plant. Powell was arrested minutes later, with a black pistol in hand, at 11 Savannah Road. The arrest was accomplished, but with a significant struggle to handcuff Powell.

The subsequent ballistic investigation positively identified the pistol found on Powell with the shell casing found at the McDonald's crime scene and with the bullet that killed Spicer.

Meanwhile, back at the police car, Flores, whom three local residents identified as "the fat guy", did not run. He stayed. Witnesses heard him say, "Oh, my God!" and yell, "Why did you do that?" or similar words. Flores and Powell were dressed in similar clothing but no doubt exists about the difference in their physical appearances.

The witnesses saw "the fat guy" get out of the Sebring, approach the police car, and attempt to give assistance to Spicer. One witness heard "the fat guy" shouting to Spicer, "Are you ok?" The vehicles were too close together and Flores could not open Spicer's door wide enough to get to him, so he moved the Sebring up a few feet to allow the police car door to be fully opened. He attempted to help Spicer by getting him out of the vehicle. Spicer, mortally wounded, was bleeding heavily from his mouth.

Close in time, Officer Brittingham returned from unsuccessfully chasing Reeves. He also realized he had not heard his partner on the police radio. He returned to find the above. He learned that Flores had been in the Sebring and immediately handcuffed him.

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The Defense argued the scientific evidence showed that Flores was or could have been the shooter. The time line, the above evidence, and common sense point solely to Powell as being the shooter. The evidence also provided an explanation for Flores's DNA being on the gun and the gun shot residue being on Flores.

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The most important evidence was that Powell had the murder weapon in his hand at the McDonald's attempted robbery, four minutes before Spicer was shot, and he had it in his hand *immediately* after the shooting when he fled from the scene. Likewise, he had it when he was arrested 16 minutes later. The uninterested witnesses had Powell exiting the Sebring immediately after the shooting with the gun in his hand.

> Other important evidence concerns flight versus non-flight from the murder scene. Powell fled. He tried to arrange a ride out of town from Savannah Road. He asked to use the phone at 11 Savannah Road and was allowed to do so. He told the occupant at 11 Savannah Road he had to get a ride out of town. The jury was instructed that flight may be evidence of a consciousness of guilt. Flores did not flee. He stayed and tried to assist the wounded officer.
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> The Defense theory would have Powell shooting the gun at McDonald's and then within the next four minutes, Flores getting the pistol from Powell, shooting the gun at Spicer, and getting the gun back to Powell. Not having shot the officer, Powell nevertheless fled with the gun. Flores, whom the Defense argued shot Spicer, immediately went to help the policeman. The Defense's composition of the murder's commission is contrary to human nature and common sense.[2]

This judge determined that the evidence was overwhelming that Powell shot Officer Spicer.[3] The Delaware Supreme Court affirmed Powell's conviction and, in so doing, reached the same conclusion.[4]

Weeks after the Delaware Supreme Court affirmed his conviction, Powell filed, *pro se*, a Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). The court appointed Rule 61 counsel on November 21, 2012, and Powell subsequently filed an amended Motion for Postconviction Relief ("the Motion") on October 1, 2013. Trial and appellate counsel filed their Rule 61(g) affidavits in March of 2014. The State of Delaware ("the State") filed an Answering Brief to the Motion on June 30, 2014. Powell filed a Reply Brief on September 12, 2014, and an evidentiary hearing was held over the course of several days in

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[2] *Id.*, at **3-8 (footnotes omitted).

[3] *Id.*, at *8.

[4] *Powell v. State*, 49 A.3d 1090, 1102 (Del. 2012) ("Powell[] ... also fails to address the overwhelming evidence, at the crime scene, that pointed to Powell having shot Officer Spicer....").

January, February, and March of 2015. The parties filed post evidentiary hearing briefs and the court heard argument from counsel again on December 4, 2015.[5] The Motion attacks Powell's conviction as well as his sentence.

On January 12, 2016, while this matter was pending, the United States Supreme Court held Florida's death penalty statute unconstitutional. Because it was unclear whether the holding of *Florida v. Hurst*[6] would also render the Delaware death penalty statute unconstitutional,[7] the court removed this matter from the 90-day decision list while the Delaware Supreme Court considered the questions certified in *State v. Rauf*.[8]

After further consideration, the court has elected to release its decision in this matter. If the Delaware Supreme Court determines Delaware's death penalty statute is constitutional, the court anticipates the fight to declare it unconstitutional will continue on to the United States Supreme Court. If, on the other hand, the Delaware Supreme Court finds the death penalty statute constitutionally infirm, Powell will obviously benefit from that ruling. Nevertheless, many of the claims raised in these proceedings must be addressed in any event and, for the benefit of all

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[5] These proceedings were initiated when Rule 61 required the appointment of counsel in all postconviction proceedings, regardless of the merits of the claims raised or the age of the case. At the time, there were a limited number of attorneys available for appointment. Rule 61 has since been amended. Also, the courts no longer oversee the budget of appointed or assigned counsel; this change has led to postconviction counsel receiving an abundance of financial resources, thereby providing postconviction counsel greater opportunity to investigate than trial counsel had.

[6] 136 S. Ct. 616 (2016).

[7] Delaware's death penalty statute is patterned upon Florida's death penalty statute. *See State v. Cohen*, 604 A.2d 846, 849 (Del. 1992).

[8] 2016 WL 320094 (Del. Super. Jan. 25, 2016).

parties, the court aspires to keep the wheels of justice turning.

The volume of filings in this case has been extraordinary. The Motion sets forth fourteen grounds for relief. Two of these original claims, Claim IV and Claim V, have been withdrawn.[9] There would seem to be twelve remaining claims pending. However, there are subclaims among subclaims. There are, *at a minimum*, sixty claims of ineffective assistance of counsel, fourteen claims of State error, eleven claims that the Department of Correction committed misconduct, and five claims of court error.

RULE 61 PROCEDURAL BARS

Superior Court Criminal Rule 61 governs Powell's motion for postconviction relief. Postconviction relief is a "collateral remedy which provides an avenue for upsetting judgments that otherwise have become final."[10] To ensure the finality of criminal convictions, the court must consider the procedural requirements for relief set out under Rule 61(i) before addressing the merits of the motion.[11] The version of Rule 61 in effect when the movant files his motion for postconviction relief governs the proceedings.[12]

Rule 61(i)(1) bars a motion for postconviction relief if it is filed more than one year after the conviction becomes final. This bar is not applicable to Powell's timely filed Motion. Rule

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[9] Claim IV alleged trial counsel were ineffective for failing to request an instruction on accomplice liability and Claim V complained trial counsel were ineffective for failing to secure a lesser included offense instruction.

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

[11] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

[12] *See Coble v. State*, 2016 WL 2585796 (Del. Apr. 28, 2016); *Collins v. State*, 2015 WL 4717524 (Del. Aug. 6, 2015).

61(i)(2) bars successive postconviction motions; this bar is also inapplicable to Powell. Rule 61(i)(3) bars relief if the motion includes claims not asserted in prior proceedings leading to the final judgment; this bar will be discussed when applicable. Rule 61(i)(4) bars relief if the motion includes grounds for relief formerly adjudicated in any proceeding leading to the judgment of conviction, in an appeal, or in a postconviction proceeding; this bar will likewise be discussed when applicable to Powell's claims.

Under the version of Rule 61 in effect when Powell filed the Motion, any claim procedurally barred under Rule 61(i)(3) may be considered if the movant can show both cause for relief and prejudice. A claim otherwise procedurally barred under Rule 61(i)(4) may be considered if reconsideration is in the interest of justice. Finally, the procedural bars contained in subsections (1), (2), or (3) will not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice.

Powell's Motion asserts many claims of constitutional violations, including multiple claims of ineffective assistance of counsel. The Delaware Supreme Court does not hear ineffective assistance of counsel claims on direct appeal; therefore, these claims are necessarily being considered for the first time.

INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD OF REVIEW

The standard used to evaluate claims of ineffective assistance of counsel is the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*[13] and adopted in Delaware.[14] Powell must demonstrate (1) trial counsel's representation fell below an objective

[13]466 U.S. 668 (1984).

[14]*See Albury v. State*, 551 A.2d 53 (Del. 1988).

standard of reasonableness; and (2) there is a reasonable probability that, but for trial counsel's professionally unreasonable representation, the result of the proceeding would have been different.[15] The claim fails if Powell is unable to satisfy either prong of the test. Moreover, the court shall dismiss entirely conclusory allegations of ineffective assistance of counsel.[16] The movant must provide concrete allegations of prejudice, specifying the nature of the prejudice and the adverse affects actually suffered.[17]

With respect to the first prong, the movant must overcome the strong presumption that counsel's conduct was professionally reasonable.[18] The court must be highly deferential to trial counsel's decisions and must make "every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."[19] Powell must assert specific allegations that trial counsel acted unreasonably "as viewed against prevailing professional norms" to satisfy the first prong of the *Strickland* analysis.[20] Finally, the court notes:

> Although American Bar Association standards are guides to reasonableness, they are only guides. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on

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[15] *Strickland*, 466 U.S. at 687.

[16] *Younger*, 580 A.2d at 555.

[17] *Strickland*, 466 U.S. at 692; *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

[18] *Strickland*, 466 U.S. at 687-88.

[19] *Id.* at 689.

[20] *State v. Cabrera*, 2015 WL 3878287, at *3 (Del. Super. June 22, 2015) (citation omitted).

investigation."[21]

The second prong requires the court to determine whether there is a reasonable probability that, absent counsel's errors, the jury's verdict would have been different. In a capital case, this means that the trial court "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."[22] Powell has the burden to establish that there was a substantial likelihood, as opposed to a conceivable likelihood, of a different result absent trial counsel's errors.[23] The United States Supreme Court has stated "[i]f it is easier to dispose of an effectiveness claim on the ground of lack of prejudice, ... that course should be followed."[24]

With regard to claims of ineffective assistance of counsel, a court's review of trial counsel's strategy is aided by the court's ability to walk in trial counsel's shoes at the time of trial, as best as it is able. The court appreciates an attorney's continued loyalty to one's prior client, especially in a death penalty case. That said, counsel also has a duty to be candid with the court. Unfortunately for purposes of discerning when tactical and strategic decisions were made in this case, trial counsel's Rule 61(g) affidavits were general in scope and often unresponsive to the Motion's allegations. Even after the court asked counsel to review the Public Defender's Office's ("the PDO") file in preparation for the evidentiary hearing, the court was surprised that their testimony was frequently unresponsive to the present allegations. The court fully acknowledges memories may have faded as the trial took place in January and February of 2011

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[21] *Ploof v. State*, 75 A.3d 811, 821 (Del. 2013) (citation omitted).

[22] *Cabrera*, 2015 WL 3878287, at *4 (citation omitted).

[23] *Strickland*, 466 U.S. at 693; *Ploof*, 75 A.3d at 852.

[24] *Strickland*, 466 U.S. at 697 ("The object of an ineffectiveness claim is not to grade counsel's performance.").

and trial preparation began as far back as September of 2009. Nevertheless, to further complicate the court's investigation and analysis, Rule 61 counsel chose not to question trial counsel on many of the claims raised. As to claims of ineffective assistance of counsel, the court has frequently had to comb the record for evidence of counsel's trial strategy. In doing so, the court has relied heavily upon notes in the defense team's official log made contemporaneously with their representation of Powell (the "PDO Log"). It is unfortunate that the current legal climate - in which counsel must fear disciplinary action for disclosing trial strategy - prevails and counsel are not encouraged to be more candid in postconviction proceedings.

With this background as its guide, the court turns to the merits of Powell's contentions.

CLAIM I - COUNSEL FAILED TO PROVIDE POWELL WITH EFFECTIVE REPRESENTATION IN THE PRETRIAL, TRIAL, AND APPELLATE PHASES OF THE CASE IN VIOLATION OF THE SIXTH AMENDMENT RIGHTS OF THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER ARTICLES 1, 4, 7, 9 AND 13 OF THE DELAWARE CONSTITUTION

Dean Johnson, Esquire, and Stephanie Tsantes, Esquire, represented Powell at trial. Kim Bryant, a mitigation specialist, was also an integral part of the defense team. In Claim 1, Powell cites numerous incidents of allegedly deficient performance on the part of trial counsel.

Trial Counsel's Ineffective Performance Pre-Trial

1. Counsel Failed to Investigate the State's Witnesses

Powell first argues trial counsel were ineffective for failing to investigate the State's witnesses to obtain fodder for impeachment purposes.

a. Christopher Reeves

Reeves, together with Powell and Flores, planned the drug deal/intended robbery at McDonald's. As noted previously, Reeves knew Bundick, the intended target of the robbery. On September 1, 2009, Reeves drove Flores' car to the McDonald's because the car's rear windows were tinted and the trio wanted only Reeves to be visible to Bundick. At trial, Reeves testified as to the events of that day, including the attempted robbery at McDonald's, the trio's flight from McDonald's, and the pursuit of their vehicle by the Georgetown Police Department. After Reeves stopped the car on North King Street, he was the first one to exit and Officer Brittingham immediately pursued him. As Reeves fled the scene, Officer Spicer was shot.

Trial counsel's alleged failures to investigate Reeves are addressed in the order raised in the Motion. Powell posits trial counsel failed to investigate and uncover the following fifteen details.

(i) Trial counsel failed to investigate and learn that, in a previous case, Reeves agreed to testify against his co-defendants in exchange for a more lenient plea.

In his Brief Following Evidentiary Hearing, Powell elaborates on this claim; to wit, "In his own case in 2008 and in the Eric Cooper case in 2009, Reeves either testified or agreed to testify in exchange for a benefit."[25]

Reeves did, in fact, agree to testify against his co-defendants in another case. In August of 2008, Reeves was arrested in Sussex County and charged with a number of offenses. In connection with this arrest, he was questioned. Reeves told the police that Cooper had confessed to a robbery in Kent County. No doubt he did so to curry favor with the police. The police in Sussex County relayed this information to the police in Kent County. The police there interviewed Reeves and Reeves told them about Cooper's alleged involvement. Later, in December of 2008, Reeves pled guilty to four of the charged offenses in Sussex County, all of which were felonies: two counts of receiving stolen property, one count of receiving a stolen firearm, and one count of possession of a deadly weapon by a person prohibited. This plea was entered in Sussex County Superior Court. The plea agreement contained in the Prothonotary's public file lists the following condition: "Testify truthfully at all co-defs [sic] trials." Apparently, the co-defendants' cases were resolved without trials.

The jury did not see Reeves' plea agreement from December of 2008 whereby he agreed to testify against his co-defendants. Powell argues trial counsel's failure to locate this plea agreement and use it to impeach Reeves was ineffective assistance of counsel. Powell complains trial counsel could have easily found the plea agreement in the public record if they had searched the public record. Trial counsel testified at the evidentiary hearing in these proceedings that they

[25] Powell's Brief Following Evidentiary Hearing, at 12.

had not reviewed Reeves' Prothonotary's file.

The defense is, in fact, partially to blame for the fact this plea agreement was not discovered.[26] Trial counsel knew Reeves pled guilty in Sussex County Superior Court and could have reviewed the plea agreement contained in the public file. The record reflects trial counsel investigated Flores' misdemeanor Kent County files but did not examine the Sussex County felony file.

Impeachment evidence is evidence "the defense can use to impeach a prosecution witness by showing bias or interest."[27]

The Delaware Supreme Court has recently underscored the importance of trial counsel's ability to cross-examine a State's witness on any agreement he may have with the State in *Wright v. State*.[28] *Wright* was decided more than three years following the guilty verdict in Powell's case and the court believes *Wright* has raised the bar as to the State's duty to disclose and, likewise, trial counsel's obligation to review, the Prothonotary's public file of a State's witness if counsel knows the witness has a criminal record. Assuming Powell has established trial counsel were objectively unreasonable for failing to review Reeves' Sussex County court file, the analysis turns to whether Powell can establish prejudice.

The court concludes the undiscovered evidence is cumulative: the revelation of Reeves' 2008 plea agreement to the jury would not have affected the outcome of Powell's trial. At Powell's trial, the State introduced Reeves' plea agreement for the charges he faced in

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[26] The State is also at fault, as will be discussed, *infra*, at Claim III.

[27] *Jackson v. State*, 770 A.2d 506, 515 (Del. 2001) (citation omitted).

[28] 91 A.3d 972 (Del. 2014).

connection with his conduct on September 1, 2009. That plea agreement explicitly provides "Defendant Agrees to cooperate and testify truthfully at trial of Derrick Powell."[29] The plea agreement was displayed for the jury and admitted into evidence.

Trial counsel shredded Reeves' credibility on cross-examination. In a rare Perry Mason moment, Reeves was forced to acknowledge previous falsehoods. The jury knew Reeves had received an extremely lenient plea deal, considering the circumstances, and agreed to testify against Powell in exchange therefore. The jury knew Reeves was a convicted felon: on direct examination, Reeves testified he had "two or three" felony convictions. The jury also knew Reeves was on probation on September 1, 2009. The jury knew he was involved in the planning of a robbery of a known drug dealer on September 1, 2009. The jury knew Reeves sought marijuana to sell and smoke as a result of this planned robbery. Reeves' testimony provided background information as to the events that transpired in the car between the McDonald's shooting and during the police chase. However, Reeves' testimony was not the critical evidence that led to Powell's conviction. The testimony of the eye witnesses at both crime scenes, the film and photographic evidence from McDonald's, and the fact that the gun used at McDonald's and the homicide was the one recovered from Powell's possession when he was taken into custody were the essential pieces of evidence that incriminated Powell. The court does not find the omission of Reeves' 2008 plea agreement from the record undermines its confidence in the jury's verdict in Powell's first degree murder trial. Powell fails to establish prejudice as required by the second prong of the *Strickland* analysis.

In addition to Reeves' 2008 plea agreement, Powell argues trial counsel should have

[29] State's Trial Exhibit #111. Reeves pled guilty to failure to obey a police officer and resisting arrest.

discovered Reeves testified against Cooper in Cooper's Kent County case. Reeves was, indeed, called as a State's witness in Cooper's trial in Kent County in June of 2009. This trial is referenced in Reeves's probation officer's notes turned over to Powell in discovery. Due to Rule 61 counsel's representation that Reeves "testified or agreed to testify in exchange for a benefit"[30] in Cooper's trial, the court believed Rule 61 counsel referenced another actual plea deal. Because the court was unclear as to whether Reeves was a co-defendant of Cooper's or whether he received favorable treatment with respect to the resolution of his Sussex County charges in exchange for testifying against Cooper, the court reviewed the Kent County file and trial transcript. Reeves was not a co-defendant in Cooper's robbery case. The Kent County trial transcript reveals Reeves was called as a rebuttal witness. He was subpoenaed, as indicated by the probation officer's notes dated March 27, 2009.[31] Reeves testified that some of his Sussex County charges were dropped but not in exchange for the information he gave the police about Cooper. Reeves was a reluctant State's witness: he testified that he only appeared at Cooper's trial because his probation officer told him he had to appear.

Although it is apparent to the court and any casual bystander that Reeves was trying to further his own interests when he volunteered the information he had concerning Cooper when he was being questioned by the police, the record is devoid of any evidence of a deal or benefit Reeves gained by providing that information. At oral argument on December 4, 2015, Rule 61 counsel backed away from any suggestion that there was an explicit deal between the State and Reeves for Reeves to testify against Cooper. Powell now claims there was an implicit deal for

[30] Powell's Brief Following Evidentiary Hearing, at 12.

[31] The State's Appendix to its Answer to Powell's Amended Motion for Postconviction relief, at 156 (hereinafter, "B___").

Reeves to testify against Cooper under the threat of "bad things happening to him with his probation officer if he didn't show up and testify."[32] This scenario – Reeves feared he would suffer negative repercussions in his probation case if he failed to respond to the subpoena – is very different from the scenario originally alleged whereby Reeves agreed to testify in exchange for a benefit.

In any event, trial counsel could have used the fact that Reeves had offered up evidence against Cooper against him to undermine his credibility. However, Powell has failed to show how trial counsel could have learned this information: Reeves offered up evidence in the course of an investigation into a Sussex County case to implicate someone in a Kent County case. There was no *quid pro quo* for that information when the State disposed of some of his Sussex County charges. It is unreasonable to expect trial counsel to have figured out how Reeves played a role in the arrest of Cooper. Therefore, Powell is unable to establish trial counsel's performance was objectively unreasonable as required by the first prong of the *Strickland* analysis. Nor has Powell been able to satisfy his burden under the second prong of *Strickland*: prejudice has not been shown. The information that Reeves testified against Cooper on its own or taken together with Reeves' 2008 plea agreement to testify against his co-defendants in the Sussex County case would have been merely cumulative. In light of what the jury knew about Reeves' credibility, the court's confidence in the jury's verdict is not undermined.

(ii) Trial counsel failed to investigate and learn Reeves' prior felony convictions were for receiving stolen property and these are crimes of dishonesty admissible under DRE 609.

Delaware Rule of Evidence ("DRE") 609 controls the admission of a witness' prior conviction for impeachment purposes:

[32] December 4, 2015, Transcript, at 62.

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted but only if the crime (1) constituted a felony under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect or (2) involved dishonesty or false statement, regardless of the punishment.

During these postconviction proceedings, the parties learned Reeves had the aforementioned four felony convictions. At the time of trial, Reeves' Delaware State Bureau of Investigation ("SBI") record inaccurately showed the receiving a stolen firearm and possession of a firearm by a person prohibited charges as having been *nolle prosequied*. Also during these proceedings, the parties learned Reeves had a prior conviction for failure to stop at the command of a police officer. At trial, neither the prosecution nor the defense were aware of these convictions.

Reeves testified on direct examination at trial that he had been convicted of "two or three" felonies.[33] Neither the State nor the defense chose to inquire further. The defense knew Reeves had, at a minimum, two felony convictions for receiving stolen property, which is a crime of dishonesty. Had trial counsel reviewed the Prothonotary's public file, they would have also known the SBI record was incorrect and Reeves had also pled guilty to the charges of receiving a stolen firearm and possession of a firearm by a person prohibited.

The court concludes trial counsel was not objectively unreasonable for failing to cross-examine Reeves with regard to the details of his felony convictions. Trial counsel have a great deal of discretion when conducting cross-examination. In light of the very effective cross-examination of Reeves, the court cannot find error on the part of counsel. Nor can Powell establish prejudice. As noted above, Reeves' credibility was effectively destroyed on cross-

[33] Powell's Appendix to his Amended Motion for Postconviction Relief and his Brief Following Evidentiary Hearing, at 2007 (hereinafter, "A___").

examination.

If the court had conducted a DRE 609 inquiry into the admissibility of the Reeves' then-known and now-known felony convictions, the jury would have heard about the two then-known convictions for receiving stolen property and the one now-known conviction for receiving a stolen firearm because these crimes are crimes of dishonesty. The jury would not have heard about Reeves' convictions for possession of a firearm or failure to stop at the command of a police officer as these convictions would not have passed muster under the DRE 609 balancing test. When Reeves testified he had two or three felony convictions, that statement was inaccurate. However, had the court conducted a DRE 609 analysis, the jury would have heard only the details of "two or three" felony convictions. Thus, as far as the jury is concerned, Reeves' statement was an accurate representation of his criminal record. The court also notes the convictions for receiving stolen property, receiving a stolen firearm, and possession of a firearm were all resolved by way of a single guilty plea. Therefore, the court concludes, had the jury heard about the additional felonies, this information would have overlapped with what the jury *did* hear and it constituted cumulative evidence. In light of what the jury already knew - Reeves' credibility was in serious question - the court finds the jury's verdict is not undermined by its lack of knowledge of the additional felony conviction.

(iii) Trial counsel failed to investigate and learn that Reeves had familiarity with firearms, particularly handguns having possessed and used handguns in 2008.

Powell contends trial counsel could have uncovered the information that Reeves used or possessed handguns in 2008. The court agrees that, had counsel investigated the Reeves' Sussex County court file, they would have discovered Reeves was convicted of possessing a gun in

2008. However, the court does not agree that this information was relevant to Powell's defense or that the failure to use this particular piece of evidence in any way undermined the outcome in Powell's case. First of all, at no point did anyone contend Reeves was the one who shot Officer Spicer. Second, trial counsel knew, and exploited for the jury, that DNA consistent with Reeves' DNA profile was found on the gun used in the shootings. Finally, assuming that evidence of Reeves' familiarity with handguns would have been relevant and admissible, Powell has failed to demonstrate how this information would have changed the outcome of Powell's first degree murder trial.

(iv) Trial counsel failed to investigate and learn Reeves was a person prohibited from owning or possessing firearms.

This allegation puzzles the court because trial counsel, aware that Reeves had felony convictions, knew that Reeves was prohibited from owning or possessing firearms. Trial counsel's failure to make this point to the jury was not objectively unreasonable. This information was completely irrelevant to the events of, and theories as to what transpired on, September 1, 2009. To reiterate, Reeves admitted to the jury that he planned a robbery with the others, that he orchestrated the robbery via text with Bundick, that he intended to sell some of the stolen marijuana, that he intended to smoke some of the stolen marijuana, that he drove the vehicle as the trio absconded from law enforcement, that he ran from the scene of Officer Spicer's death, and, to top it all off, that he lied to the police as they attempted to complete their investigation. Neither the State nor the defense argued Reeves shot at Adkins or Officer Spicer as there was no evidence he did so.

(v) Trial counsel failed to investigate and learn Reeves admitted smoking marijuana in June of 2009 and was referred to Kent Sussex Counseling for treatment, but continued to use

marijuana in August of 2009.

This allegation is also mystifying. The PDO file contains discovery the State provided to trial counsel; this discovery included evidence of Reeves' history of substance abuse. The file contains Reeves' probation officer's notes. Reeves' probation officer, Melissa Harris, documented Reeves' positive tests for marijuana on June 23, 2009, and August 31, 2009. In addition, in her August 31st entry, Ms. Harris noted Reeves "states dirty for marijuana, also admitted to taking a pill last night, doesn't know what kind...."[34] Ms. Harris also indicated Reeves was still attending night group at Kent Sussex Counseling Services ("KSCS"). Finally, on September 2, 2009, Ms. Harris spoke with someone from KSCS and noted in her file that Reeves had last attended a group session there on August 19, 2009. When Rule 61 counsel drafted and filed this Motion, they had access to the PDO file and, therefore, knew the State had provided this information to trial counsel.

Trial counsel did not fail to investigate Reeves' marijuana use but chose not to highlight it at trial. Generally speaking, evidence of drug use is relevant only when it goes to a witness' ability to recollect events. Ms. Tsantes, who cross-examined Reeves at trial, testified at the evidentiary hearing that her strategy had been twofold: (a) to discredit Reeves' account that he had been hiding in the bushes for three days before turning himself in, and (b) to highlight Reeves' agreement to testify against Powell in exchange for leniency in his case. These were reasonable tactics to deploy. One might also reasonably conclude that dwelling on the other participants' illegal drug use would highlight Powell's own illegal drug use. The court will not second-guess trial counsel's reasonable trial strategy.

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[34] B154.

Powell is also unable to show how evidence of Reeves' prior drug use undermines the court's confidence in the jury's verdict.

(vi) Trial counsel failed to investigate and learn Reeves failed to report to court-ordered substance abuse treatment in August of 2009.

This allegation has been addressed substantively, *supra*. Assuming, without deciding, this evidence was admissible as it relates to Reeves' ability to recollect events, trial counsel possessed this information and chose not to highlight Reeves' substance abuse issues. Moreover, Powell has not shown how trial counsel's cross-examination of Reeves as to his drug use would have altered the result of Powell's first degree murder trial.

(vii) Trial counsel failed to investigate and learn that, during an office visit with his probation officer on August 31, 2009, Reeves admitted to smoking marijuana and taking a pill of unknown content.

Again, the court is baffled by this allegation. As noted above, this information was in the PDO file that Rule 61 counsel had for reference when they drafted the Motion. Moreover, Powell is unable to show how trial counsel's failure to use Reeves' admission undermines the court's confidence in the outcome of Powell's trial.

(viii) Trial counsel failed to investigate and learn that, on August 31, 2009, Reeves tested positive for Cannabinoids and Benzodiazepines.

As the late, great Yogi Berra would say, "Deja vu all over again." This information was in the PDO file that Rule 61 counsel had when they filed this Motion. Powell is unable to show how trial counsel's failure to use this fact undermines the confidence in the outcome of Powell's trial.

(ix) Trial counsel failed to investigate and learn the recommendation of the probation officer for Reeves' Violation of Probation case was nine years at level five, with credit for 103 days previously served but the State agreed to recommend Boot Camp after Reeves cooperated with the State in testifying against Powell.

The probation officer's recommendation is contained in the court's public file and available for viewing by defense counsel. The Violation Report was filed on September 2, 2009, the day after the shooting. At that time, Reeves was still in hiding and was accused of being directly involved in the death of a police officer.

Powell fails to allege how this specific information would be admissible. The judge determines the appropriate sentence, not the probation officer. A probation officer's opinion would not be admissible. The alleged failure to investigate the probation officer's recommendation was not objectively unreasonable and no prejudice has been alleged with specificity. Also, the court is comfortable with making the reasonable observation the jury knew Reeves faced significant prison time if he did not cooperate with the State's prosecution of Powell.

(x) Trial counsel failed to investigate and learn that a condition of Reeves' sentence was that he undergo a substance abuse evaluation and follow treatment recommendations.

It is unclear if Powell references Reeves' sentence for the 2008 charges or his sentence arising from his conduct on September 1, 2009. Nevertheless, the result is the same: the information was readily available to the defense and Powell has not shown how court-ordered treatment would be relevant to the matter at hand. The information does not shed light on either Reeves' credibility or his ability to recollect the events of September 1, 2009. Moreover, Powell has not shown how the introduction of this evidence would have resulted in a different outcome in his trial.

(xi) Trial counsel failed to investigate and learn that a condition of Reeves' sentence was that he cooperate and testify truthfully at Powell's trial.

The court is truly baffled Powell makes this claim. The plea agreement was entered into

evidence. The court, itself, does not bless any deal to cooperate made between the State and a defendant. Indeed, neither Reeves' Violation of Probation ("VOP") sentencing order nor his sentencing order on the charges in this case reflect any agreement to testify against Powell.

That said, trial counsel clearly knew Reeves had agreed to testify against Powell. As noted previously, the plea agreement pursuant to which Reeves agreed to testify against Powell was admitted into evidence. Trial counsel took every opportunity available to highlight the lenient nature of Reeves' sentence during cross-examination. They hammered home Reeves' "sweet" plea deal and the fact that Flores faced no charges at all. This claim is completely without merit.

(xii) Trial counsel failed to investigate and learn Reeves admitted to his probation officer to being an "avid" user of marijuana.

Reeves' admission that he was an avid user of marijuana was contained in the March 1, 2010, Treatment Access Center ("TASC") report completed in connection with his VOP sentence. This report was provided to trial counsel in discovery; trial counsel did not fail to discover it. To beat an already dead horse, trial counsel chose not to emphasize Reeves' illegal drug use. The court will not criticize reasonable tactical decisions made at trial. Finally, the court repeats the observation that Rule 61 counsel had the PDO file containing this information when drafting this claim.

(xiii) Trial counsel failed to investigate and learn that, in the months leading up to September of 2009, Reeves' use of marijuana had developed into a psychological dependence.

This claim is likewise based upon information contained in Reeves' TASC report. Indeed, it is information contained in the same paragraph of the TASC report referenced above. In any event, trial counsel and the jury were aware Reeves partook in the illegal use of drugs at

the time of the offense. Any "failure to investigate" claim should rest upon Rule 61 counsel as they possessed this information prior to making this accusation.

(xiv) Trial counsel failed to investigate and learn Reeves admitted that his marijuana use was out of control.

This claim is likewise based upon information contained in Reeves' TASC report. Indeed, it is information contained in the same paragraph of the TASC report as the information trial counsel allegedly failed to discover in the two preceding claims. Again, the jury was aware all of the participants in the failed robbery were users of illegal drugs. Trial counsel declined to highlight the parties' illegal drug use. The court will not second guess this reasonable strategic decision.

(xv) Trial counsel failed to investigate and learn Reeves admitted to his probation officer that on September 1, 2009, he and his friends were looking to steal marijuana from a local dealer.

As the court has observed previously, the State turned over Reeves' probation officer's notes during discovery. Moreover, during the police investigation into Officer Spicer's murder, Reeves admitted to Detective Robert Hudson he knew someone was going to be robbed at McDonald's. Ms. Tsantes questioned Reeves on this point at trial. Reeves denied that he knew there was going to be a robbery. After Ms. Tsantes refreshed Reeves' recollection by permitting him to review the transcript of his interview with Detective Hudson, Reeves reversed course and admitted to the jury he knew there was going to be a robbery at the McDonald's. This claim is *completely without* merit. Trial counsel not only knew this information, she used it to impeach Reeves in a very effective manner.

In summary, of the fifteen alleged failures of trial counsel to discover information about

Reeves, only the first and second claims have any merit, whatsoever.[35] Rule 61 counsel had the PDO file when they drafted and filed the Motion. Therefore, Rule 61 counsel knew trial counsel had Reeves' drug history before them when they prepped for trial. The court is puzzled as to why these claims were made at all.

Finally, Powell alleges trial counsel failed to use Reeves' juvenile adjudications against him for impeachment purposes. This court recognizes delinquency adjudications are disfavored as grounds for attacking an adult witness' credibility. In *Harris v. State*, the Delaware Supreme Court provided the following guidance: "DRE 609(d) generally prohibits evidence of juvenile adjudications for impeachment purposes unless the Superior Court is 'satisfied that the admission in evidence is necessary for a fair determination of the issue of guilt or innocence.'"[36] Powell's position is akin to the theory of *res ipsa loquitor*: because Reeves had juvenile adjudications, trial counsel were ineffective for failing to use them to impeach Reeves. However, Powell has not argued a theory by which the juvenile adjudications could be introduced. Powell has not shown that evidence of Reeves' juvenile adjudications was necessary for a fair determination of Powell's guilt or innocence. Therefore, he has not demonstrated trial counsel were objectively unreasonable for failing to use these adjudications. Nor has Powell shown prejudice. The simple

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[35] At the December 4, 2015, hearing, the court expressed its concern about the validity of many of these claims. Rule 61 counsel told this court the term "failure to investigate" is a "term of art" that, apparently, means counsel should have exploited the information that was, in fact, disclosed to the defense. The court is not in the business of interpreting "terms of art" and will address only the allegations as they are presented to the court; that is, literally.

[36] 695 A.2d 34, 43 (Del. 1997) (citing DRE 609(d), which reads: "Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.").

fact of the matter is that trial counsel had many avenues from which to choose to attack Reeves' credibility. The jury knew of Reeves' "two or three" felony convictions, his participation in the attempted robbery of Adkins, his subsequent flight from law enforcement, and the lies he told the police during the course of their investigation.

Powell argues, "Reeves was a self-interested witness who took a plea deal to testify and even then minimized his involvement by lying on the witness stand."[37] Exactly. This statement is true and, in fact, trial counsel underscored this point on numerous occasions: during opening argument, during cross-examination, and finally during closing argument. The jury knew Reeves received an extremely favorable disposition of his charges in exchange for his testimony against Powell. The court instructed the jury with the required accomplice instruction, which admonishes the jury to treat a co-defendant's testimony with suspicion and great caution. Trial counsel were not ineffective for failing to investigate Reeves' background.

b. Luis Flores

Powell alleges that there was a failure on the part of trial counsel to conduct even a "minimum investigation" into Flores. Powell theorizes that, if trial counsel had investigated, they would have learned that on September 12, 2010, Flores was arrested on charges of offensive touching and disorderly conduct in Kent County. Also, they would have learned that Flores did not appear in Kent County Court of Common Pleas ("CCP") and a capias was issued. In fact, two outstanding capiases for Flores were not resolved until February 4, 2011, the day after Flores testified in Powell's trial. At that time, Flores pled guilty to offensive touching and received a fine when, Powell maintains, the presumptive sentence for offensive touching is jail.

[37] Powell's Brief Following Evidentiary Hearing, at 13.

Powell makes these accusations knowing that the PDO Log notes indicate that, on November 8, 2010, Ms. Tsantes emailed William Deely, head of the Kent County PDO office, and asked him to obtain copies of Flores' Kent County CCP file. Ms. Tsantes indicated to Mr. Deely that she was interested in the probable cause affidavits and any plea agreements in regard to (i) the disorderly conduct and offensive touching charges; and (ii) charges for driving while suspended and charges related to a hit-and-run incident. Because trial counsel did investigate, contrary to the present allegations, there is no merit to this claim. At the time, there was no evidence of any deal between the State and Flores as to the Kent County charges. After days of testimony at the evidentiary hearings on the present Motion, there remains no evidence of any deal with the State or help given to Flores with respect to the Kent County charges.

The Motion infers there must have been a deal because Flores pled to offensive touching in Kent County and only received a fine. Powell alleges that the offensive touching charge was the result of a domestic violence matter and, therefore, Flores should have received jail time. The Motion states, "[T]he presumptive sentence on a domestic violence offense involves jail time" and, accordingly, it is "interesting" that Flores was sentenced to only a fine.[38] However, Powell offers no evidence that the offensive touching charge was a domestic violence offense. Of its own accord, the court has reviewed the CCP file and can find no evidence Flores' offensive touching charge involved domestic violence or that the presumptive sentence was jail.

Trial counsel are also faulted for not investigating, learning about, and using Flores' arrest for leaving the scene of an accident. This arrest occurred in October of 2009, after the events of September 1, 2009. Ultimately, Flores was placed on probation and it is alleged he

[38] Powell's Amended Motion for Postconviction Relief, at 13-14 (hereinafter, "the Motion at ___").

violated the terms of his probation. Trial counsel were aware of the same as noted by Ms. Tsantes' email summarized above and to which Rule 61 counsel had access in preparing the present Motion. Moreover, Powell has not provided the court with any basis to conclude the motor vehicle charges would have been admissible. Absent evidence of a deal between Flores and the State, this allegation does not satisfy either prong of *Strickland*: counsel did not fail to investigate these charges and Powell is unable to show prejudice.

Powell also contends trial counsel were ineffective for failing to discover Flores had a conviction for assault in the second degree in Maryland from 2008. At the time of trial, Flores' National Crime Information Center ("NCIC") record showed no prior arrests. The State turned over Flores' NCIC record in the course of discovery. It is now known that record did not accurately reflect Flores' Maryland criminal history but neither defense counsel nor the State could have known this fact at the time of trial. An error in the NCIC records as to Flores' Maryland criminal record cannot be attributed to the State of Delaware.

Rule 61 counsel told this court they learned Flores had been convicted of assault "from speaking with the victim of that assault."[39] Powell does not indicate trial counsel should have spoken with this victim or how they could have identified this person. Regardless, assault in the second degree is a misdemeanor in Maryland unless the victim is a police officer. Flores' victim was not a police officer. The court asked Rule 61 counsel to check the Maryland Code after the State argued the assault charge was a misdemeanor. Powell has not submitted anything further to the court and the court, therefore, takes judicial notice of the Maryland Code.[40] Even if trial

[39] December 4, 2015, Transcript, at 4-5.

[40] Md. Code Ann. § 3-203.

counsel had known of Flores' misdemeanor assault second conviction, it could not have been used for impeachment purposes under DRE 609.

Finally, Powell complains trial counsel were ineffective for failing to uncover and use Flores' juvenile adjudication of delinquency. The court incorporates the comments made, *supra*, with regard to Reeves. The record does not indicate whether or not trial counsel knew of Flores' juvenile adjudication in light of the inaccurate NCIC report. Nevertheless, Powell has not attempted to, and therefore has failed to, convince this court that this juvenile adjudication would have been admitted into evidence under DRE 609(d).

The State, not Powell, raised the next issue concerning Flores and the court appreciates the State's candor in doing so. In the course of preparing a response to Powell's Motion, the State learned through the State of Maryland judiciary website that Flores has a felony drug conviction for possession with intent to distribute from 2007. Neither the State nor the defense knew of this conviction at the time of trial. Powell now alleges trial counsel were ineffective for not searching the Maryland judiciary website. Trial counsel had Flores' NCIC report, which showed no prior arrests. Neither the defense nor the State can be held accountable for errors in reporting by the State of Maryland or NCIC. The court will not rule defense counsel has to search the internet for public records in the nation's forty-nine other states for possible criminal records of the State's witnesses. Even assuming trial counsel had such a duty, however, Powell has not shown prejudice. First, Powell assumes this prior conviction would have been admissible under DRE 609. Under DRE 609, the trial court must make a determination that the probative value of admitting the prior conviction of possession with intent outweighs its prejudicial effect.[41]

[41] *See Gregory v. State*, 616 A.2d 1198, 1204 (Del. 1992) (holding drug-related offenses are not inherently crimes of dishonesty and noting, "[D]rug-related offenses generally do not fall

Because Flores was not a defendant but only a witness, the probative value of the conviction would likely have outweighed the potential for prejudice. But the impeachment value of a drug conviction is low. The undisputed testimony of the parties was that the trio was engaged in a drug deal as a ruse for a robbery of a drug dealer on September 1, 2009. Therefore, the probative value of this prior conviction would be minimal: the jury already knew Flores was a drug dealer and used illegal drugs. For that reason, Powell has not shown how its omission undermines the court's confidence in the outcome of Powell's first degree murder case. In summary, this conviction was unknown through no fault of the State or defense counsel. Had the prior felony drug conviction been known and used to impeach Flores, Powell has not shown a reasonable probability that the outcome of Powell's first degree murder trial would have been different as a result.

In his Post-Evidentiary Hearing Brief, Powell makes much of a sidebar discussion that took place during Flores' testimony. At that sidebar, the State indicated Flores "may have a failure to pay capias, failure to appear for traffic-type issues in Kent County."[42] Flores testified he had a charge pending for failure to pay a traffic ticket.[43] Powell now argues that the State did nothing to correct the record. The PDO Log is evidence of the fact that trial counsel knew Flores had offensive touching and disorderly conduct charges pending and, for whatever reason, chose not to raise the issue. At the evidentiary hearing, trial counsel were not asked and therefore did not testify as to why they chose not to question Flores on his other pending charges. The court

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within the rubric of DRE 609(a)(2).").

[42] A2814.

[43] A2708.

will not speculate as to what trial counsel's testimony might have been. However, trial counsel emphasized to the jury that Flores had lied to the police during his initial interview to cover up the fact that he had participated in planning a robbery. Trial counsel painted Flores as a drug-dealing thug and the "heavy" in the planned robbery. In addition to the trial testimony of Flores' history of drug dealing, Flores' ledger in which he recorded his drug deals was admitted into evidence. The jury knew enough about Flores to make a credibility determination. Finally, as with Reeves, the court instructed the jury to regard Flores' testimony with great caution given his status as an accomplice.[44]

Powell alleges trial counsel failed to expose Flores' interest in testifying in exchange for a hoped-for benefit. It is true the State never charged Flores with any offense, at all, for his criminal conduct on September 1, 2009. Whether or not that decision was made because Flores stopped and assisted Officer Spicer instead of fleeing the scene is unknown. No one was asked about or testified to the reason that decision was made at the evidentiary hearing. Nevertheless, trial counsel made clear to the jury that Flores could have been charged, but was not, for the attempted robbery, the shooting at McDonald's, and the murder of Officer Spicer. Trial counsel referenced this fact in their opening statement,[45] cross-examination of Flores, and closing statement.[46] Trial counsel were not ineffective for failing to investigate Flores' background.

c. Thomas Bundick

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[44] *See Brooks v. State*, 40 A.3d 346 (Del. 2012); *Bland v. State*, 263 A.2d 286 (Del. 1970).

[45] "Flores was charged with nothing. He's not charged with a drug deal. He's not charged with anything at all. And he's certainly not charged in this case." A1033.

[46] "Flores, the drug dealer who didn't get charged with anything in connection with this case, is the one setting up the entire scheme of things." A3191.

Powell complains trial counsel did not conduct any investigation into Bundick's background and this failure was objectively unreasonable and prejudiced him. Powell alleges the following specific facts, if uncovered and used, would have undermined the outcome in Powell's case.

(i) Trial counsel failed to investigate and learn that Bundick had prior convictions for possession with intent to deliver, disregarding a police officer's signal, shoplifting, and theft as well as juvenile adjudications for theft and burglary.

At the time of trial, Bundick had a felony conviction for possession with intent to distribute and a felony conviction for disregarding a police officer's signal. Bundick also had pending charges for felony theft, possession of a firearm by a person prohibited, possession of a destructive weapon and driving while suspended. There is no evidence that defense counsel did not know of Bundick's prior convictions. Indeed, Mr. Johnson's Rule 61(g) affidavit avers trial counsel knew of Bundick's criminal background. At trial, Bundick admitted he had a "criminal history." He admitted to having felony convictions and testified he had pending charges for possession of a deadly weapon by a person prohibited and identity theft. He told the jury he had been granted immunity with respect to the events of August 31 and September 1, 2009, but the State had not promised him anything in return for his testimony with respect to his pending charges. The court admitted the immunity agreement into evidence.[47]

On both direct and cross-examination, Bundick testified he had been interviewed by the police three times about the events of August 31 and September 1, 2009. He admitted he lied to the police in his first two interviews. On cross-examination, trial counsel reviewed Bundick's initial interview with the police and Bundick admitted all of the information he provided at that

[47] State's Trial Exhibit #120.

time was a lie. He confessed that, the second time the police interviewed him, he repeated not what he had seen but what he had been told by others. Specifically, Bundick testified he told the police what Adkins had told him: that Reeves had held a gun to Adkins' back and shot at him twice as Adkins fled. Bundick stated he believed Adkins' version of events.[48] Trial counsel went over Bundick's different versions of events thoroughly.

It seems Powell now complains trial counsel did not ask questions regarding Bundick's specific convictions. The court finds no error and no prejudice. As noted previously, the court gives defense counsel great deference to the manner in which counsel chooses to cross-examine a witness. Bundick admitted to having a history of felony convictions. He admitted to lying several times to the police as they investigated and, at one point, identifying Reeves as the shooter at McDonald's. No doubt trial counsel found their ability to exploit these conflicting statements far more relevant for purposes of impeaching Bundick than their ability to delve into the details of Bundick's prior criminal history. Because Bundick was a witness and not the defendant, his drug conviction would likely have been admitted, as in Flores' case. However, it would have minimal impeachment value as the jury was already well acquainted with Bundick's involvement with the illegal drug trade. The conviction for disregarding the command of a police officer would not have passed the DRE 609 balancing test. Although the misdemeanor crimes of dishonesty would have been admissible, again, Bundick himself testified that he was a liar.

As far as this claim relates to Bundick's delinquency adjudications, the court refers to its earlier discussion on juvenile adjudications. Powell does not cite a reason for probing into

[48] Bundick was brokering the deal between Reeves and Adkins. Adkins did not know Powell or Reeves. Adkins made the *assumption* the person he encountered at McDonald's must have been Reeves because Bundick's texts setting up the deal referenced only one person: his "boy." State's Trial Exhibit #145.

Bundick's juvenile record. Bundick was the "broker" of the arranged drug transaction between Reeves and Adkins. Bundick did not know Powell. When Adkins and Reeves failed to meet as planned, Bundick testified he sensed trouble and he left the scene. Bundick did not know Reeves was accompanied by others or of their intent to rob Adkins. He witnessed nothing that undermined Powell's theory of the case.

Powell is unable to show prejudice because Bundick's lack of credibility was fully developed for the jury and, further, because his testimony did not implicate Powell.

(ii) Trial counsel failed to investigate and learn Bundick had been ordered by the court to participate in substance abuse treatment, and continued to use drugs.

Evidence of Bundick's drug use would not have been admissible at trial unless there was a question as to Bundick's ability to recollect the events due to alleged drug use, as noted in the previous discussion concerning Reeves and evidence of his prior drug use. Nevertheless, the jury was well-aware Bundick used and sold drugs. Trial counsel were not ineffective for failing to investigate Bundick's court-ordered substance abuse treatment.

(iii) Trial counsel failed to investigate and learn that, between July and August of 2009, Bundick tested positive for drugs four times including less than a week before September 1, 2009.

As noted above, evidence of Bundick's drug use would not have been admissible at trial unless there was a question as to Bundick's ability to recollect the events due to alleged drug use. The jury was well-aware Bundick used and sold drugs. Trial counsel were not ineffective for failing to investigate Bundick's history of testing positive for drug use.

(iv) Trial counsel failed to investigate and learn that, on September 2, 2009, Bundick submitted a urine screen to probation that was determined to be "diluted."

Evidence that Bundick turned in a diluted urine sample to probation would not have been

admissible. Powell fails to explain in any way, shape, or form how this evidence would be relevant and admissible at Powell's first degree murder trial. Trial counsel were not ineffective for failing to investigate Bundick's diluted urine screen.

(v) Trial counsel failed to investigate and learn that, in September of 2009, Bundick violated probation and was sentenced to Level 4 home confinement, a sentence that was later modified to work release.

Unless the sentence modification cited by Powell was connected to an agreement on Bundick's part to cooperate with the State, it is irrelevant and inadmissible. There is no evidence in the record of such a deal. As an aside, the court notes the modification of the sentence from home confinement to work release did not benefit Bundick. The court regularly makes such modifications when a defendant does not have a Level 4 home confinement host. The court cannot imagine anyone would rather sleep in a work release bunk at SCI than in his own bed while on home confinement.

(vi) Trial counsel failed to investigate and learn that, while on probation and after being interviewed by the police on Powell's case, Bundick was arrested for charges involving a firearm and was represented by the PDO on June 10, 2010, for his preliminary hearing.

Powell does not clarify this claim in his briefs and, absent additional information, the court assumes these charges are the same charges Bundick testified were pending at trial. The court recognizes that the PDO screens all cases at preliminary hearing when private counsel have not been retained. The PDO determines whether the defendant is indigent. If he is, the PDO determines if he receives the services of the PDO or, when the PDO has a conflict, that of appointed conflict counsel. Therefore, it is not surprising that the PDO was involved at Bundick's preliminary hearing. While this representation should not have occurred in an ideal world, there has been no showing of any prejudice, whatsoever. Bundick waived his preliminary

hearing and, after the case was transferred to Superior Court, the PDO declared a conflict. As a legal matter, Powell must demonstrate prejudice as explained by the Delaware Supreme Court:

> When it is alleged that the ineffective assistance of trial counsel was the result of a conflict of interest, prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance. In defining what constitutes a "conflict of interests," the United States Supreme Court [has held] that an actual, relevant conflict of interests exits if, during the course of the representation, the defendants' interests do diverge with respect to a material factual or legal issue or to a course of action.[49]

Powell has an obligation to "specifically identify the nature of the alleged conflict and make a concrete showing of actual prejudice."[50] He does not.

The above six claims that trial counsel failed to investigate Bundick's background do not satisfy either the objectively unreasonable representation prong or the prejudice prong of the *Strickland* analysis.

d. Darshon Adkins

Powell alleges trial counsel failed to investigate and learn the following information about Adkins that he claims would have aided his defense.

(i) Trial counsel failed to investigate and learn Adkins had prior convictions for possession with intent to deliver, promoting prison contraband as well as juvenile adjudications for shoplifting and theft.

As previously discussed, Bundick tried to connect Adkins, the drug dealer, with Reeves, the purported purchaser, for the marijuana sale transaction. Powell was convicted of shooting at Adkins in an attempt to rob him of the marijuana. At trial, Adkins took the stand in prison attire.

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[49] *Lewis v. State*, 757 A.2d 709, 718 (Del. 2000) (internal quotation marks and citations omitted).

[50] *Allen v. State*, 2010 WL 3184441 (Del. Aug. 12, 2010), at *2.

The jury learned Adkins was incarcerated for violating the terms of his probation he received on a drug conviction. The jury learned his felony conviction was for possession with intent to deliver. Knowing this, the court is flummoxed as to why Powell argues trial counsel were ineffective for failing to investigate this prior conviction. Far too many claims have been made in this Motion that have no factual basis in the record.

Powell asserts Adkins had another conviction for promoting prison contraband. The parties do not elaborate but it would appear that this conviction was a misdemeanor conviction.[51] In any event, Powell does not make an argument for the admissibility of a conviction for promoting prison contraband under DRE 609. With regard to Adkins' juvenile adjudications, Powell does not address why the general rule prohibiting the admissibility of juvenile adjudications contained in DRE 609(d) does not apply here. However, any additional information regarding Adkins' illegal drug activity would be cumulative. The jury had before it information sufficient to judge Adkins' credibility. Adkins informed the jury he was a convicted felon. The jury knew Adkins was a drug dealer and, on September 1, 2009, he had a large amount of marijuana and $800.00 in cash on his person. He admitted he twice lied to the police because he did not want to disclose that he was involved in a drug transaction. At trial, Adkins admitted he was trying to sell marijuana on September 1, 2009. He candidly told the jury he had sold marijuana to Bundick before and that he had a separate phone "[f]or dealing purposes."[52] On cross-examination, he again admitted he was a convicted felon. He told the jury that, after speaking with police, he went on the run. Additional questioning about his criminal history

[51] Promoting prison contraband is a misdemeanor unless the prison contraband is either a deadly weapon or a prohibited electronic device. 11 *Del. C.* § 1256.

[52] A2491.

would have added little, if anything, to trial counsel's attack on Adkins' credibility. Even assuming the conviction for promoting prison contraband and juvenile adjudications were admissible, trial counsel were not ineffective for failing to question Adkins with regard to them.

Moreover, Powell has not demonstrated prejudice or how the failure of the jury to learn of Adkins' misdemeanor conviction and juvenile adjudications undermines the court's confidence in the jury's verdict.

In addition, the court notes that, out of all of the Adkins' testimony about the planned drug sale turned attempted robbery, the critical part of his testimony was his in-court identification of Powell. The issue before the jury was not whether a drug deal had been planned. The crucial question concerned the identity of the person who shot at Adkins. Adkins was emphatic in his identification of Powell: "I will never forget his face."[53] That said, Adkins was not the only person to identify Powell as the shooter. McDonald's employees verified that Powell was the person who exited the parked car and walked to the front of the store. Moreover, video and the still photographs admitted into evidence showed Powell loitering outside McDonald's. At oral argument, Rule 61 counsel acknowledged there was no evidence that anyone other than Powell exited Flores' vehicle or returned to Flores' vehicle at the McDonald's.[54] Powell cannot show prejudice in trial counsel's alleged failure to investigate Adkins's prior criminal history.

(ii) Trial counsel failed to investigate and learn Adkins was court ordered to participate in substance abuse treatment and failed to comply.

As discussed, *supra*, the witness' failure to comply with a court-ordered treatment program is not grounds for impeachment.

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[53] A2541.

[54] December 4, 2015, Transcript, at 71-73.

(iii) Trial counsel failed to investigate and learn Adkins absconded from probation in June of 2009 for several months.

The fact that Adkins did not report to his probation officer is not impeachment evidence. Powell has not demonstrated to the court that this information would be admissible.

(iv) Trial counsel failed to investigate and learn that, while this case was pending, Adkins tested positive for the use of drugs on three occasions.

The witness' failure to comply with a court-ordered treatment program is not grounds for impeachment. Moreover, trial counsel ensured the jury was aware Adkins is a drug user and dealer.

(v) Trial counsel failed to investigate and learn that, while this case was pending, Adkins pled guilty to resisting arrest and possession of drugs.

The charges Powell alleges trial counsel failed to discover and use to undermine Adkins' credibility are misdemeanors and, on their face, are not grounds for impeachment. Powell has not made a showing as to how they would have been admissible. This claim is without merit.

(vi) Trial counsel failed to investigate and learn that, during a violation of probation hearing in September, 2010, the PDO represented Adkins.

Powell does not allege how, specifically, trial counsel's failure to discover this information could have been used to undermine Adkins' credibility. Nevertheless, the court is compelled to take note of the process by which an Assistant Public Defender covers a violation of probation calendar: similar to a preliminary hearing calendar, an Assistant Public Defender is assigned to a violation of probation calendar. The attorney usually meets with the alleged violator the morning of the calendar. The fact that the PDO represented Adkins is not surprising: most violators are represented by the PDO. Powell does not allege that either Ms. Tstanes or Mr. Johnson personally represented Adkins during the pendency of Powell's case. Nor does Powell

allege any other form of specific prejudice. As discussed in more detail, *supra*, Powell must make a concrete showing of actual prejudice to prevail on a conflict of interest claim in the *Strickland* context.[55] He does not.

In conclusion, the court finds trial counsel was not ineffective for failing to discover these six pieces of information about Adkins. Moreover, the court finds Powell has failed to show any prejudice resulted from trial counsel's allegedly objectively unreasonable performance in cross-examining Adkins.

Conclusion as to Claims of Trial Counsel's Failure to Investigate

With regard to all of Powell's claims that trial counsel were ineffective in failing to cross-examine the State's witnesses, Powell argues that the acquittal of Powell on the Count 1 murder charge "shows the jury had some significant doubts as to the credibility of witnesses."[56] The court finds this to be a conclusory statement. Setting aside the fact that one can never know what a jury was "thinking," if there had been true credibility issues, Powell would not have been convicted of the felony murder *and* resisting arrest with intentional force by shooting at the police with a handgun. To reiterate, the evidence against Powell was overwhelming. The testimony of other independent witnesses with no axe to grind, as well as the physical evidence, established his guilt beyond a reasonable doubt. It bears repeating that Powell's trial centered primarily on the question of which individual shot Officer Spicer. The circumstances surrounding the drug deal set-up, the botched robbery and the shooting at McDonald's provided important details and background but the trial revolved around the murder.

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[55] *Lewis*, 757 A.2d at 718.

[56] Powell's Reply Brief, at 4.

2. Failure to Make a *Giglio* Request

Powell faults trial counsel for not making a *Giglio* request. In *Giglio v. United States*, the United States Supreme Court held, "evidence of any understanding or agreement as to a future prosecution [of a key witness is] relevant to his credibility and the jury [is] entitled to know of it."[57]

In this case, on January 6, 2010, the defense sent a discovery request to the State. In that request, the following materials were specifically requested:

> Any materials in the possession of the State which tend to exculpate the Defendant or which would serve to mitigate punishment of the Defendant if Defendant were to be convicted of any charged offenses, including but not limited to:
>
> a. Any conflicting or contradictory statement made by any potential State witness, whether such statement or statements are internally conflicting or contradictory or conflict or contradict statements made by other State witnesses. *See Giglio v. U.S.*, 405 U.S. 150, 154 (1972); *Boyer v. State*, 436 A.2d 1118, 1126-27 (Del. Supr. 1981).
>
> ...
>
> c. The substance of any promise, inducement or other consideration offered by the State of Delaware, Federal Government or any other governmental agency to any State witness, whether or not said promise, inducement or other consideration was offered as a specific *quid pro quo* in return for the witness cooperation with the State in this particular case or in any related prosecution[.][58]

Powell did not address this issue further in his Reply Brief and, at argument on December 4, 2015, conceded the State had rebutted this claim successfully.[59] This claim never had a basis in fact and is denied.

3. Conflict of Interest

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[57] 405 U.S. 150, 154-55 (1972).

[58] B103.

[59] December 4, 2015, Transcript, at 60.

While Powell's case was pending, the PDO represented Adkins in VOP hearings in Superior Court on April 20, 2010, and September 21, 2010. The PDO also represented Adkins when he pled to misdemeanor charges in the Court of Common Pleas ("CCP") in August of 20210. The PDO represented Bundick at a VOP hearing in Superior Court on September 24, 2009, and at a preliminary hearing in CCP in June of 2010.

Powell is correct that the PDO's representation of Bundick and Adkins while Powell's case was pending was a conflict of interest. It is unknown if Bundick's role in the events of September 1, 2009, were known at the time of his VOP hearing on September 24, 2009. Bundick waived his preliminary hearing in June of 2010 and the case was conflicted out of the PDO's office after it was transferred to Superior Court. The handling of cases by the PDO at VOP hearings has been previously reviewed, *supra*. Although the PDO represented Bundick and Adkins in fairly routine matters, as a practical matter, Powell is correct that the PDO should not have represented them after accepting Powell as a client. As a legal matter, however, Powell must demonstrate prejudice as explained by the Delaware Supreme Court in *Lewis v. State*,[60] discussed, *supra*. Powell has an obligation to "specifically identify the nature of the alleged conflict and make a concrete showing of actual prejudice."[61] Powell has made no such showing. This claim is conclusory and is denied.

Trial Counsel Failures at Trial

1. Trial Counsel Failed to Effectively Cross-Examine the State's Witnesses

Powell next contends trial counsel failed to cross-examine the State's witnesses in an

[60] *Lewis*, 757 A.2d at 718.

[61] *Allen*, 2010 WL 3184441, at *2.

effective manner. In support of this contention, he cites to trial counsel's (a) failure to investigate and discredit the witnesses; (b) failure to question the witnesses about agreements with the State about their pending charges; and (c) failure to request *voir dire* of the Hispanic witnesses to the shooting of Officer Spicer as to the circumstances surrounding their illegal entry into the country.

The first two of these claims have been discussed, *supra*, and have no factual basis in the record. The majority of the information cited by Powell was, in fact, known by the defense. Information concerning the witnesses' illegal drug use is of questionable relevance. To reiterate, an illegal drug deal served as a backdrop for the events of September 1, 2009. The jury was well aware that all of the parties involved used drugs and, in most cases, sold drugs. Trial counsel examined Reeves about his lenient plea deal and examined Flores and Bundick about the fact that they did not face charges for their roles in the events of September 1st. It was evident to the jury that the witnesses received favorable treatment from the State in exchange for their testimony.

Trial counsel is afforded wide latitude in making strategic trial decisions, and this deference extends to trial counsel's decisions made with respect to tactics used when cross-examining witnesses.

> Whether to call a witness, and how to cross-examine those who are called are tactical decisions. A defendant challenging such decisions has the burden of supplying *precisely* what information "would have been obtained had [counsel] undertaken the desired investigation" and how this information would have changed the result. The defendant must "substantiate his concrete allegations of actual prejudice or else risk summary dismissal."[62]

Trial counsel's performance fell within "the zone of reasonableness" to which the

[62] *Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (emphasis added and citations omitted).

defendant is entitled.[63] Moreover, Powell has not substantiated his allegations of actual prejudice. For example, even if, as Powell now posits, trial counsel had elicited testimony from Reeves that he had smoked marijuana recently prior to the shooting and, therefore, was unable to recall the events as they unfolded, Powell is unable to demonstrate how this testimony would have changed the trial's outcome. Reeves' credibility was undermined. He admitted to lying repeatedly. Other independent fact witnesses placed Powell at McDonald's and firing shots at Adkins. Still other independent fact witnesses placed a man matching Powell's physical description with a gun in his hand exiting the getaway car after the shooting of Officer Spicer and running toward the Perdue plant where Powell was apprehended minutes later. In other words, as the Delaware Supreme Court acknowledged on appeal, the evidence of Powell's guilt was overwhelming.

Powell also contends trial counsel were ineffective for failing to request *voir dire* when, at sidebar, the prosecutor informed the court the Hispanic witnesses were "probably all illegal."[64] The record reflects the prosecutor inquired about the witnesses' legal status in preparation for trial.

This claim is set forth in the Motion but not substantively argued. A related *Brady* claim is discussed, *infra*, at Claim III.

Trial counsel were not ineffective for failing to request *voir dire* of these witnesses "to determine if their illegal entry into the country or their continual residence in the country was procured through illegal means such as forgery or criminal impersonation."[65] This claim is purely

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[63] *See Monroe v. State*, 2015 WL 1407856, at *4 (Del. Mar. 25, 2015).

[64] A1128.

[65] Motion, at 22.

speculative. Powell puts forth no information to indicate that these witnesses were, actually, in the county illegally, or, if they were, that they committed a crime of dishonesty to gain entry into the United States. Nor can Powell show that, had their alleged dishonestly-procured illegal entry been disclosed to the jury, the outcome in Powell's first degree murder trial would have been different.

2. Failure to Object to Irrelevant and Inflammatory Testimony

Powell next complains trial counsel failed to object to the testimony of several police officers with regard to the police department's response to the crime scene, a police officer's emotional state at the crime scene, and the condition of Officer Spicer's clothing when it was taken into evidence.

In their Rule 61(g) affidavits, trial counsel candidly admit some of the admitted testimony may have been irrelevant. However, as Ms. Tsantes noted,

> My recollection is that the failure to object in the specific incidents listed [in the Motion] is that there was always a delicate balance in the courtroom with the jury or paying due respect to the officer's death while fighting the fight that it was not Derrick Powell that shot [Officer Spicer]. It was impossible to remove all references to people being upset or distraught without running the risk of offending the jury.[66]

Ms. Tsantes comments clearly indicate trial counsel made a strategic decision as to these matters. In every capital case involving tragic events, defense counsel must make decisions as to whether or not to object to emotional testimony and they must do so with an eye on the end goal to save their client's life if he is convicted. This is precisely the type of trial tactic chosen by counsel to which the court must give great deference.

Moreover, as the State notes, trial counsel did argue for the exclusion of other evidence

[66] A5509.

that may have been irrelevant. Trial counsel raised a DRE 403 objection to the introduction of Officer Spicer's body armor and were successful. They were likewise successful in their efforts to exclude Officer Spicer's bloodied pants. The court is satisfied trial counsel were zealous in their strategic efforts to minimize inflammatory or irrelevant testimony and evidence. This claim is denied.

Ineffectiveness at the Appellate Phase

1. The Admission of Chief Topping's Testimony

Under Delaware law, the State may present victim impact evidence during the penalty phase of a capital murder trial. In Powell's case, the court permitted Chief William Topping to read to the jury a statement the court required he prepare in advance. Powell objects that the testimony exceeded that which is permissible under *Payne v. Tennessee*.[67] In *Payne*, the United States Supreme Court held:

> [A] State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. The State has a legitimate interest in ... reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.[68]

Subsequent to *Payne*, the Delaware Supreme Court held that the Delaware death penalty statute gives the State the right to present "victim impact" evidence unless "a witness's testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair."[69]

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[67] 501 U.S. 808 (1991).

[68] *Id.* at 825 (citation and internal quotation marks omitted).

[69] *In re State*, 597 A.2d 1, 3 (Del. 1991).

The statement at issue focused on the effect Officer Spicer's murder had on the Georgetown police community and on Chief Topping, himself. The trial court, prosecution, and defense all reviewed the statement and changes were made in accordance with defense counsel's requests. The court, by requiring this witness to prepare a written statement, allowed a thorough review of what the jury would hear and kept the witness "on script."

Trial counsel objected to the introduction of admission of testimony regarding the impact of Officer Spicer's death on the law enforcement community. The trial judge overruled the objection. Powell contends appellate counsel were ineffective for failing to appeal the trial court's admission of Chief Topping's statement. In support of a finding of prejudice, Powell states, "The vote in the penalty phase was 7-5 [in favor of death], and therefore, this evidence, which should not have been admitted, could have swayed one juror's vote. One vote would have made all the difference between a life or death sentence."[70] Powell here appears to reference the United States Third Circuit's decision in *Outten v. Kearney*.[71] In *Outten*, the Third Circuit held, "Because the jury recommended death by the narrow margin of 7 to 5, persuading even one juror to vote for life imprisonment could have made all the difference. This without doubt satisfies *Strickland*'s prejudice prong."[72] However, the Delaware Supreme Court has expressly disavowed the Third Circuit's rationale:

> Under one reasonable interpretation of this passage [in *Outten*], prejudice is established when there is a reasonable probability of showing that the new evidence would have changed the mind of a single juror. But that reading would be wrong, at least in Delaware. The critical language "at least one juror" was

[70] Motion, at 24.

[71] 464 F.3d 401 (3d Cir. 2006).

[72] *Id.* at 422-23.

> taken from *Wiggins v. Smith*, a case that originated in Maryland, whose law requires a unanimous jury vote to impose a death sentence. Therefore, a defendant convicted of capital murder in Maryland can be spared a death sentence by a single juror's vote.
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> Delaware's scheme is quite different. In Delaware, a single juror vote in favor of life will not automatically preclude a death sentence. Under the Delaware death penalty statute, a jury must first determine and unanimously vote on the presence of at least one statutory aggravating factor, and only then will the jury determine whether aggravating factors outweigh mitigating circumstances. The jury's vote, furthermore, is a *non-binding recommendation* that by statute is given "such consideration as deemed appropriate by the Court in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found to exist by the Court." In Delaware, the trial judge has the sole discretion to determine whether to impose a death sentence, and will give appropriate weight to the jury's recommendation depending on the facts of the particular case. If that is an accurate interpretation of *Outten*, then we must conclude that, given the citation to *Wiggins*, the *Outten* court confused Maryland's sentencing scheme with that of Delaware's.
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> Alternatively, *Outten* might possibly be read to mean that a change of one juror constitutes prejudice, because that single change may influence the trial judge to render a different sentence. This reasoning is logical in theory, but a change in one juror's vote is unlikely to create a reasonable probability that the trial judge's sentence would have been different. *Outten*'s facts presented perhaps the strongest case, because in Delaware a one vote change to a 7–5 jury to vote for death would no longer result in a death sentence recommendation, but that now neutral recommendation would not relieve the trial judge of the duty to independently weigh the mitigating and aggravating factors before imposing an appropriate sentence. In a Delaware judge's weighing process, the jury's recommendation receives "appropriate" weight, not determinative weight, as is the case in Maryland. Therefore, we find that "the one juror" rationale applied in *Outten* does not satisfy the *Strickland* prejudice requirement as it applies to the Delaware statutory scheme.[73]

Quite clearly, Powell's reliance on *Outten* is remiss. Regardless, the court finds appellate counsel were not ineffective for failing to raise the issue of improper victim impact evidence on direct appeal. As is well known, appellate counsel must review the record in search of the

[73] *Norcross v. State*, 36 A.3d 756, 770-71 (Del. 2011) (emphasis in original, citations omitted).

strongest issues to raise on appeal. Appellate counsel is not required to raise every possible argument available on appeal.[74] Appellate counsel testified she did not recall the appellate team identifying a *Payne* issue as a possible argument for appeal. The court concludes it was objectively reasonable for appellate counsel not to raise this issue on appeal. Chief Topping's statement was very limited in scope and, therefore, quite clearly falls into the category of permissible victim impact testimony. Had appellate counsel challenged its admission on direct appeal, they would have been unsuccessful.

2. The Sentencing Judge's Dismissal of Mitigators Because They Had No Nexus to the Crime

Powell asserts appellate counsel had an "absolute obligation" to appeal the sentencing judge's decision to discount the mitigators of mental health issues, cognitive disorders, and diagnoses of Attention-Deficit/Hyperactivity Disorder ("ADHD"), Bipolar II, Panic Disorder, Post-Traumatic Stress Disorder ("PTSD"), and Cannabis Abuse Disorder because they were not tied to the events of September 1, 2009. This claim must fail.

The sentencing reads as follows as it pertains to the trial judge's conclusions regarding mental health and brain disorders:

> While there were substantial disagreements between the experts, the Court is satisfied that the mental health and/or brain disorder evidence does establish mitigation. The weight given to this mitigator is a different question. One of defendant's alleged mitigators was "the defendant's substantial impairment at the time of the offense as a result of brain damage." The next mitigator alleges the same thing; i.e., "the defendant's diagnosis of Cognitive Disorder, NOS, Severe w/ Global Deterioration and Further Differential Deficits in Reading, Writing, Attention, Inhibition, Some Executive Skills (Planning) and Fine-Motor Skills." There is nothing to suggest any substantial impairment at the time of the offense as being the cause for, or explanation of, Powell's criminal behavior.

[74] *Scott v. State*, 7 A.3d 471, 480 (Del. 2010).

The Antisocial Personality Disorder is a diagnosis that cuts both ways. It is not as much a mental illness as it is a recognition of the individual's personality of being antisocial; i.e., defiant, law-breaking, disrespectful of others, and violent towards people and animals. This evidence cuts both ways.

Finally, it is necessary to comment on the testimony of the experts' opinions that persons diagnosed with Cognitive Disorders and ADHD might be impulsive and/or have a diminished capacity as to appropriately recognizing "fight or flight" circumstances. To the degree Powell has these disorders, it is important to note in these findings of fact that these diagnoses were not a factor in his conduct on September 1, 2009. He knew what he was planning on doing and did it. Telling Adkins to "give it up" and shooting at him was not an impulsive, uncontrollable act. There was no "fight or flight" misinterpretation by Powell. Adkins made the "fight or flight" decision.

Nor did Powell misinterpret the subsequent events. He did not make a mistake in interpreting what was going on when the police tried to pull them over. Chad Spicer did not die because of any impulse problems. He died because Powell wanted to avoid arrest and get away. Literally minutes after the shooting, Powell was able to turn on superficial charm and persuade a stranger to let him use her phone and bathroom. Powell's behavior evidences he can be cold-blooded and then use his cognitive function to assist him in his attempt to escape capture.

The bottom line as to all of the brain disorder evidence is that it is not very helpful. The brain disorder testimony did not help in understanding the "why" as to September 1, 2009. There was no direct "cause and effect" opinions offered as to the diagnoses and why a person was killed.

Perhaps in seeking answers, the Court expects too much. The evidence of the disorders of ADHD, Bipolar II Disorder, Panic/Anxiety Disorder, Cannabis Abuse, and [PTSD], neither individually nor cumulatively, establish substantial mitigators. Are they mitigating circumstances? Yes. But they are not weighed heavily. These are disorders or problems that are widespread in our society. It is not my intent to make light of these diagnoses, but they represent ailments or problems with which individuals deal daily.

The Cognitive Disorder diagnosis was hotly contested, with reasonable explanations coming from both sides. I have found the Cognitive Disorder evidence to be a more significant mitigator than the other diagnoses and have given it greater weight. However, there was no testimony that Powell did not understand and appreciate his chosen life of crime. Regardless of any reasons for the declining IQ test results, any declining IQ did not impact the events of

September 1, 2009.[75]

As is readily apparent from reading the above findings of the court, the court carefully considered all of the mental health/brain disorder testimony and gave it appropriate weight. The court did not dismiss these mitigators. The court's *responsibility* is to weigh "all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender."[76] Although Powell may not agree with the weight the trial court gave certain mitigators, the trial court fulfilled its statutory responsibilities and appellate counsel was not ineffective for failing to challenge the court's decision as to the weight given the mitigators on appeal. This claim is without merit.

[75] *Powell*, 2011 WL 2041183, at **27-28.

[76] 11 *Del. C.* § 4209(d).

CLAIM II - TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO DEVELOP A CONSISTENT DEFENSE THEORY: THEIR OPENING AND CLOSING STATEMENTS CONTRADICTED EACH OTHER, RESULTING IN CONSTITUTIONAL PREJUDICE TO POWELL

Powell argues trial counsel were ineffective for failing to present a consistent theory of defense to the jury. Specifically, he asserts trial counsel were ineffective because their opening and closing statements contradicted each other with regard to the seating arrangement in the car when the fatal shot was fired. In his opening statement, Mr. Johnson argued the scientific evidence and the eye witness testimony called into doubt the State's theory that Powell shot Officer Spicer. In his statement, he referred to Flores as "the man that was in the backseat on the passenger's side" in the car.[77] In her closing statement, Ms. Tsantes argued the evidence failed to prove Powell was the shooter beyond a reasonable doubt. A portion of her argument focused on the testimony of the eye witnesses who testified as to which car door Powell exited following the shooting of Officer Spicer. She argued Flores was the person seated in the left rear passenger seat at that time.

Context and Analysis of Trial Counsel's Opening Statement

Leading up to trial, the prosecution turned over a slew of discovery to defense counsel. The State provided the statements given to the police by the eye witnesses to both shootings. All of the witnesses to the shooting at McDonald's placed the fleeing shooter getting into the backseat on the driver's side of the car (via a door that had been opened for him from inside) as the car sped away from McDonald's. The witnesses' statements and video stills identified Powell as that shooter. Reeves and Flores also placed Powell in the backseat on the driver's side. At oral argument on December 4, 2015, Rule 61 counsel conceded that there is no evidence that

[77] A1024.

anyone other than Powell left the vehicle or returned to the vehicle at McDonald's.[78]

Pretrial, the physical description given by the witnesses to the shooting of Officer Spicer of the second person to exit the vehicle matched that of Powell.[79] The witnesses described this person as a light skinned black man who ran in the direction of the Perdue plant. Several of the witnesses told the police this man was holding a gun. Powell was apprehended in a house located between the crime scene and the Perdue plant with the gun used to shoot Officer Spicer and also linked to the shell casing found at McDonald's. The witnesses described Flores, in general terms, as the heavy-set or "fat" guy who exited the car last and went to the aid of the fallen police officer. The four witnesses described from their vantage point variously as to which door Powell, the second man, exited:

(i) Juan Gonzalez stated the man exited the rear passenger door, holding a handgun, and ran in an easterly direction through a vacant lot;

(ii) Ricardo Ventura-Sanchez stated a tall, thin man exited from the front passenger side, fiddling with a gun and running off in an easterly direction;

(iii) Ubidel Ventura-Sanchez told the police the suspect with the gun exited either the front or rear passenger door, but he believed it was the rear passenger door; and

(iv) Jacquelyn Laforge-Sanders stated that the passenger ran off toward the Perdue plant.

The two witnesses who believed Powell exited the rear passenger-side door also told the police the heavy-set guy came out the front passenger door. If these two witnesses were correct, then Powell sat alone in the back seat when the fatal shot was fired from the back seat. Asking

[78] December 4, 2015, Transcript, at 73.

[79] Everyone agrees Reeves was the first to exit the vehicle and did not shoot Officer Spicer.

the jurors to rely on this testimony at the outset would have left them with little option other than to conclude Powell fired the fatal shot.

Finally, as learned later during the penalty phase, Mr. Johnson knew that Powell had told his psychiatrist he was sitting in the rear, behind the driver.[80]

With this information and a desire to paint Flores as a strong-arm man, a drug-dealing and drug-stealing thug, Mr. Johnson's opening statement put Flores in the rear seat on the right, in position to facilitate the robbery at McDonald's. The court cannot find fault in that tactical decision made in light of the information Mr. Johnson knew leading up to trial.

Context and Analysis of Trial Counsel's Closing Statement

At trial, the witnesses testified in a manner consistent with their pretrial statements. The witnesses from McDonald's testified Powell jumped into the rear driver's side seat of the fleeing car. Video and photographic evidence corroborated the identification of Powell.

With regard to the homicide, the witnesses who heard the gun shot and saw the people exit the vehicle afterward testified as follows:

(i) Mr. Gonzalez stated the second person exiting the vehicle "got out of the back seat" holding something black in his hand.[81] That person fled in the direction where Powell was captured moments later. The heavy-set man exited third, out of the front passenger side door. This man stayed and assisted the fallen officer.

(ii) Mr. Ricardo Ventura-Sanchez testified the second person exited the front passenger door

[80] Although trial counsel did not intend to call Powell's psychiatrist during the guilt phase of the trial, every death penalty case must be tried with an eye to the possibility of a penalty phase. If, as did eventually happen, Powell was found guilty of first degree murder and the trial proceeded to a penalty phase, Powell's psychiatrist would be a crucial witness for the defense.

[81] A1196.

holding a gun and ran off, turning to look behind him. When this man, "lighter skinned" than the driver turned, he "pulled on the gun... like he was going to fire again."[82] The third guy, a short heavy-set man, exited the rear passenger side.

(iii) Mr. Udibel Ventura-Sanchez told the jury the second man to exit the car "got out running, and he had a gun in his hand, a pistol."[83] This person exited the rear right-hand side door. The heavy-set man who tried to help the police officer came out right front passenger door.

(iv) Ms. Laforge-Sanders described Reeves exiting the vehicle and then testified, "[S]omebody on the other side of the silver car, that door opened. Somebody got out of that side of the car. He got out. He turned, but only for a second, and started to run that through the woods. I guess toward the Perdue Plant it would be."[84] Elaborating, Ms. Laforge-Sanders stated in response to whether she saw someone exit after Reeves: "Yes. On the passenger's side, somebody else got out. He appeared to be also dark skinned. But, to me, he appeared to be lighter than the driver.... Also, probably about the same age and the same size.... He turned for a second, and then he ran towards the Perdue Plant."[85] Laforge-Sanders immediately pulled away from the scene and did not see anyone else exit the vehicle.

Ms. Tsantes' theorized in her closing statement that, in order for Powell to have shot Officer Spicer from the rear driver's seat and then left the car by way of the rear passenger door, Powell would have had to climb over or around Flores in the rear passenger seat and to do so

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[82] A1156-58.

[83] A1221.

[84] A1120.

[85] A1122.

would have been impossible due to Flores' large stature.

Ms. Tsantes' closing argument and Powell's current argument that the defense's theory of the case was inconsistent both ignore the complete testimony of the two witnesses who testified Powell exited the rear passenger side seat. These two witnesses also testified Flores came out the front passenger side door; in that case, Powell would not have had to climb over Flores *because Flores was seated in the front*. Ms. Tsantes "cut and pasted" the witnesses' testimony to poke holes in the State's case. This observation is not a criticism. Jurors are, of course, free to accept that portion of the testimony they believe worthy of credit and may reject that which they do not believe worthy of credit. Trial counsel must always do the best they can with the cards they are dealt.

Conclusion

Although the opening and closing statements did not align with respect to the seating arrangements in the car, trial counsel did have an overriding consistent theory of defense: namely, that the scientific evidence, comprised of the DNA and gunshot residue collected from the participants and the gun used to kill officer Spicer, was consistent with their theory that Flores shot Officer Spicer. This argument was made in both opening and closing statements and fleshed out by expert and lay witness testimony. Finally, the court observes the jury was instructed that opening and closing arguments are not evidence: the evidence consists of the testimony of the witnesses and the admitted exhibits.

The court concludes the defense's theory of the case was not inconsistent as is presently argued. Mr. Johnson set the table one way in an attempt to paint Flores as a strong-arm drug dealer and knowing what the eye witnesses had told the police during their investigation.

Although her argument was inconsistent with the complete evidence picture, Ms. Tsantes set the table another way in an attempt to cast Flores as the triggerman. Defense counsel did not present their case to the jury in an objectively unreasonable manner.

Ineffective counsel has not been established based on the above analysis, nor has prejudice been established because, regardless of which door Powell exited, all evidence supports the conclusion he was the second person out of the car who fled in the direction of the Perdue Plant with the gun used to kill Officer Spicer in his hand. Powell was apprehended near the Perdue Plant with this gun minutes later. Those facts, taken together with the fact the witnesses to the shooting at McDonald's placed Powell in the rear driver's side of the car, overwhelmingly point to Powell as the shooter.

CLAIM III - PROSECUTORIAL MISCONDUCT IN THE FORM OF *BRADY* VIOLATIONS UNDERMINED POWELL'S CONSTITUTIONAL RIGHTS; TRIAL COUNSEL WERE INEFFECTIVE FOR FAILURE TO SEEK DISCLOSURE AND FAILURE TO ASSERT *BRADY* VIOLATIONS ON APPEAL

Powell alleges the State violated its obligation under *Brady v. Maryland*[86] to disclose to trial counsel evidence favorable to the defense and the case must be reversed as a result. They also contend trial counsel were ineffective for not seeking the disclosure of impeachment evidence and that appellate counsel were ineffective for failing to raise *Brady* violations on appeal. I will first address the alleged *Brady* violations and then turn to the claims of ineffective assistance of counsel.

In *Michael v. State*, the Delaware Supreme Court summarized the rationale behind the *Brady* decision:

> The United States Supreme Court has long held that the prosecution's failure to disclose evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution. The *Brady* rule was not designed to displace the adversary system as the primary means by which truth is uncovered but was designed to insure that a miscarriage of justice does not occur. The prosecutor is not required to deliver his entire file to defense counsel but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. The *Brady* rule is based on the requirement of due process. In reviewing an alleged violation of the *Brady* rule, [the court] must resolve two questions. First, was the non-disclosure at issue a violation of *Brady*? Second, if the non-disclosure was contrary to the dictates of *Brady*, what was the nature of the error?[87]

Brady evidence includes not only exculpatory evidence but also evidence that would be useful for the defense in cross-examining a State's witness; that is, impeachment evidence.[88] A

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[86] 373 U.S. 83 (1963).

[87] 529 A.2d 752, 755 (Del. 1987) (citing *Brady*, 373 U.S. 83).

[88] *Michael*, 529 A.2d at 756.

discovery violation does not automatically result in a reversal of the defendant's conviction; the court must assess the nature of the violation.

After finding the State has committed a discovery violation, the court must then examine the "materiality" of the undisclosed evidence to determine if there is a reasonable probability that disclosure would have changed the outcome of the proceeding.[89]

In *Michael*, the Delaware Supreme Court noted that, when the court weighs the question of "materiality," the State's failure to disclose impeachment evidence that "cannot be said to be entirely without significance, may be harmless if it occurs in a trial in which the prosecution presented 'overwhelming' untainted evidence of guilt."[90] If the jury had the benefit of "direct evidence from witnesses who saw the crime take place or other unusually strong evidence," then the discovery violation may be harmless.[91]

> [T]he term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory [or impeachment] evidence - that is, to any suppression of so-called "*Brady* material" - although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.[92]

The Delaware Supreme Court addressed *Brady* recently in *Wright v. State*.[93] The synopsis of *Brady* case law is worth repeating here.

> Under *Brady* and its progeny, the State's failure to disclose exculpatory

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[89] *Id.*

[90] *Id.* at 757.

[91] *Id.*

[92] *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (footnote omitted).

[93] 91 A.3d 972 (Del. 2014).

and impeachment evidence that is material to the case violates a defendant's due process rights. The reviewing court may also consider any adverse effect from nondisclosure "on the preparation or presentation of the defendant's case." "There are three components of a *Brady* violation: (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State; and (3) its suppression prejudices the defendant." In order for the State to discharge its responsibility under *Brady*, the prosecutor must disclose all relevant information obtained by the police or others in the Attorney General's Office to the defense. That entails a duty on the part of the individual prosecutor "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."

Whether a "*Brady* violation" has occurred often turns on the third component - materiality. Materiality does not require the defendant to show that the disclosure of the suppressed evidence would have resulted in an acquittal. Nor is a reviewing court required to order "a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict.'" Rather, the defendant must show that the State's evidence creates "a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." A reasonable probability of a different result occurs where the government's evidentiary suppression "undermines confidence in the outcome of the trial." Materiality is not limited to the individual effect of each piece of exculpatory or impeachment evidence. Instead, materiality is determined "in the context of the entire record." A reviewing court first evaluates "the tendency and force of the undisclosed evidence item by item." The court then evaluates the "cumulative effect" of the suppressed evidence separately. "Individual items of suppressed evidence may not be material on their own, but may, in the aggregate, 'undermine [] confidence in the outcome of the trial.'" The State's obligation under *Brady* to disclose evidence favorable to the defense "turns on the *cumulative effect* of all such evidence suppressed by the government."[94]

Helpful factors to help the court to determine the materiality of the withheld evidence include: favorability; admissibility at trial; extent of probative value; cumulative nature of the evidence; weight of other evidence presented; and deference to the opinion of the trial court.[95]

The *Wright* decision held that evidence of a witness' prior agreement to cooperate with

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[94] *Id.* at 988 (all internal citations omitted; emphases added by the *Wright* Court).

[95] *Stokes v. State*, 402 A.2d 376, 380 (Del. 1979).

the State is useful impeachment evidence and is clearly *Brady* material: "Even though [the witness] ultimately did not testify against his co-defendant in a different trial, his repeated willingness to testify in order to advance his own legal interests, given his criminal record, would have been helpful to the jury in weighing the credibility of [his] testimony."[96]

In *Jackson v. State*, the Delaware Supreme Court found a discovery violation when the State failed to disclose that it had made an implicit promise of leniency to a State's witness facing other charges.[97] The Supreme Court's discussion of the importance of effective cross-examination is instructive:

> Effective cross-examination is essential to a defendant's right to a fair trial. It is the "principal means by which the believability of a witness and the truth of his testimony are tested." Under Delaware law, "the jury is the sole trier of fact, responsible for determining witness credibility and resolving conflicts in testimony." Jurors should have every opportunity to hear impeachment evidence that may undermine a witness' credibility.
>
> An important form of impeachment during cross-examination is to expose a witness' bias, prejudices or motives. "Cross examination on bias is an essential element of the right of an accused under the Delaware constitution to meet the witnesses in their examination," which makes it "an essential element of the constitutional right of confrontation." Moreover, "[e]vidence of bias is always admissible to impeach a witness."
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> "Evidence [that] the defense can use to impeach a prosecution witness by showing bias or interest ... falls within the *Brady* rule." It falls within the *Brady* rule because "such evidence is 'evidence favorable to an accused' so that, if disclosed and used effectively, it might make the difference between conviction and acquittal." This is because "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. Indeed, it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

[96] *Wright*, 91 A.3d at 990.

[97] 770 A.2d 506 at 517 (finding withheld impeachment evidence may have been helpful to the defendant's case but ultimately affirming the defendant's conviction due to overwhelming evidence of guilt).

...

> The suppression of material evidence violates *Brady*. In *United States v. Bagley*, the United States Supreme Court expanded *Brady*'s "materiality" test, holding that "favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"
>
> In *Kyles v. Whitley*, the United States Supreme Court further expanded *Bagley*'s definition of materiality. The *Kyles* Court held that while a *Brady* violation is "triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal," but rather whether in the absence of the undisclosed evidence the defendant received a fair trial, "understood as a trial resulting in a verdict worthy of confidence." Thus, according to the *Kyles* Court, a "'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial."
>
> The *Kyles* Court also held that materiality is not a "sufficiency of the evidence test." In order to reverse a conviction based upon a *Brady* violation, one must "show that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[98]

Therefore, this court will look to determine if a discovery violation occurred and, if so, the court will look to see if it was a true *Brady* violation; that is, if the material had been disclosed, there is a reasonable probability of a different result. In other words, the court will determine whether the State's failure to provide the undisclosed material undermines confidence in the outcome of Powell's trial.

In his Motion, Powell argues the State committed several *Brady* violations with regard to the State's witnesses Reeves, Adkins, and Bundick. During the course of these proceedings, potential *Brady* issues have arisen with regard to the State's witness Flores and these allegations

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[98] *Id.* at 515-16 (citations omitted).

will be addressed as well.

The Specific *Brady* Allegations

1. Christopher Reeves

Powell alleges *Brady* violations related to a key State's witness, Reeves, who was a major participant in the events leading to the shooting of Officer Spicer. During the guilt phase of Powell's trial, Reeves testified as to the trio's plans to rob Adkins, the seating arrangement in the car designed to help accomplish this robbery, Adkins' failure to get into Flores' car at McDonald's, Powell's subsequent exit from the car, Powell's shooting at Adkins, Powell's return to the car, and the events inside the car up until Reeves abruptly stopped the car and fled.

Powell specifically complains the State did not disclose the following information in violation of *Brady*: (a) Reeves' significant history of drug use; (b) Reeves' probation reports containing an admission that Reeves is an "avid marijuana user;" (c) statements made by Reeves wherein he admitted that on September 1, 2009, he was "looking to steal;" (d) documentation that a urinalysis conducted on August 31, 2009, tested positive; (e) Reeves' admission that he smoked marijuana and took an unidentified pill on August 31, 2009; and (f) evidence that in previous "cases" Reeves had agreed to testify against co-defendants.

Many of these allegations are easily disposed of because the State did, in fact, turn over the referenced information. As part of the discovery process in this case, the State turned over the following documents on the dates identified: Reeves' sentencing order and TASC report (March 19, 2010); Reeves' violation of probation sentencing order, the transcript from his plea and VOP hearings, and the transcript from his VOP sentencing (March 26, 2010); Reeves' criminal records and NCIC report (November 18, 2010); updated criminal records and NCIC reports for the

State's witnesses (December 6, 2010); Reeves' probation officer's case notes (January 11, 2011); and a certified copy of Reeves' sentencing order, a certified copy of his VOP sentencing order, and his signed plea agreement in this case (January 19, 2011). Powell's claims will be discussed in turn.

(a) Reeves' significant history of drug use.

The TASC report, disclosed to trial counsel on March 19, 2010, included Reeves' admission that he was an "avid" user of marijuana and Reeves' admission he was "looking to steal marijuana" on September 1, 2009. The report also notes Reeves' acknowledgment that his marijuana usage was "out of control." Reeves' probation officer's notes (disclosed to the defense on January 1, 2011), revealed the fact that he tested positive for marijuana on August 31, 2009, as well as Reeves' admission that he used marijuana and ingested an unidentified pill on August 31, 2009.

Moreover, Reeves testified on direct examination that he wanted to purchase marijuana from Bundick. In arranging this deal, he referred to it as a "transaction" and wanted to make sure Bundick had weighing scales on him so they could "make sure it was the proper weight."[99] Reeves testified to his personal drug use, his attempt to buy drugs and his intention to "smoke some, sell some" of the drugs the trio planned to "purchase" from Bundick.[100] He left no doubt that he was comfortable and familiar with purchasing of marijuana: the State, trial counsel, and the jury were all aware of this fact.

There is no merit to the allegation the prosecution withheld any information regarding

[99] A1979.

[100] A2233. Upon further questioning, Reeves admitted the trio planned to rob Bundick.

Reeves' history of drug use from the defense.

(b) Reeves' probation reports containing an admission that Reeves is an "avid marijuana user."

As noted above, Reeves' probation reports were, in fact, turned over to trial counsel. They were not withheld and there is no *Brady* violation with respect to them.

(c) Statements made by Reeves wherein he admitted that on September 1, 2009, he was "looking to steal."

Reeves admission that he was "looking to steal" on September 1, 2009, was contained in the aforementioned disclosed TASC report. Any accusation of a *Brady* violation with regard to the TASC report has no basis in fact.

(d) Documentation that Reeves tested positive for marijuana the day before the events of September 1, 2009.

The information that Reeves tested positive for marijuana on August 31, 2009, is contained in Reeves' probation officer's notes. These notes were turned over to trial counsel on January 11, 2011. Although jury selection had begun at that time, the guilt phase of the trial did not commence until several weeks later. There is no indication that the prosecutors failed to turn over evidence as soon as they acquired it.

(e) Documentation that Reeves admitted to smoking marijuana and taking an unidentified pill on August 31, 2009.

As above, this allegation is without merit. Reeves' probation officer made a note of Reeves' admission that he smoked marijuana and took an unidentified pill in her records. These records were disclosed to the defense on January 11, 2011.

(f) Evidence that, in previous cases, Reeves had agreed to testify against co-defendants.

Reeves had a criminal record. The State turned over Reeves' record of felony convictions

in 2008 in Sussex County. However, the State did not turn over the physical plea agreement as to that conviction. As detailed in Claim I, *supra*, that document contained a notation that indicated Reeves had, as a condition of the plea, agreed to "testify truthfully at all co-defs [sic] trials."

The State noted that Reeves testified for the State in another criminal case in Kent County in 2009. As it did in Claim I, the court will discuss both the Sussex County 2008 plea agreement and the 2009 trial testimony. This time, the court will examine the State's responsibility to disclose the evidence.

2008 Plea Agreement

In August of 2008, Reeves was arrested for several felony charges, including receiving stolen property, receiving a stolen firearm, conspiracy, and possession of a firearm by a person prohibited. In December of 2008, Reeves pled guilty to four felony offenses. As noted above, a condition of his plea is handwritten on the plea agreement form: "testify truthfully at all co-defs [sic] trials." As far as the court can determine, the co-defendants' cases resolved without trials. Nevertheless, the jury did not hear that Reeves had agreed to testify against his co-defendants in the 2008 Sussex County case. Powell argues the State should have provided this agreement per *Brady* and *Wright*. As discussed in Claim I, he also asserts counsel were ineffective for not finding this public record.

The court notes that a plea agreement is a public record and it is difficult to conclude the evidence was "suppressed" by the State. The plea agreement was available to defense counsel and, obviously, was located by Rule 61 counsel. If the State did not suppress the evidence, there is no *Brady* violation. Nonetheless, out of an abundance of caution, the court will proceed with

the materiality analysis.

An examination of the facts in *Wright* is in order. In that case, the prosecution called a surprise rebuttal witness, without prior notice to the defense. The witness was a fellow prisoner who testified that Wright confessed to the murder. This testimony was powerful rebuttal evidence. The prosecutor's examination disclosed the witness' four prior felony convictions but defense counsel were not provided a copy of the witness' criminal record. "Wright's counsel never learned the facts of those convictions in time to adequately cross-examine [the witness] at trial."[101] Counsel therefore was not aware of the agreement of the witness to testify against a co-defendant in one of his prior convictions. The *Wright* Court concluded the failure to disclose the criminal record was a *Brady* violation.

In *Wright*, the defense was blind-sided: trial counsel was ignorant of the fact that the State intended to call the witness in rebuttal. That fact, coupled with the State's failure to turn over the impeachment evidence, created an unfair playing field for the defense. In finding a *Brady* violation on the above facts, the Supreme Court conducted a fact-intensive analysis. The materiality of a *Brady* violation depends not only on what was not disclosed, but also what defense counsel and the jury already knew, as well as the overall strength of the State's case.

In Powell's case, the defense was not blind-sided or ambushed with regard to Reeves' testimony. Trial counsel knew of Reeves' felony convictions and could have reviewed the public file concerning these convictions. Trial counsel and the jury knew Reeves was a marijuana user, was on probation at the time of the offense, had two to three prior felony convictions, and, on September 1, 2009, was intimately involved in the robbery plan to steal drugs forcefully from a

[101] *Wright*, 91 A.3d at 989.

known drug dealer. Reeves testified he initially lied to the police. The jury knew he testified he never ever touched the firearm used in the murder, yet there was evidence linking his DNA to the firearm. Reeves testified originally that the plan was to buy marijuana and only reluctantly, when confronted with his prior statement to Detective Hudson on cross-examination, admitted to the jury the trio planned to rob Bundick. He received a plea deal to very minor offenses in connection with the events of September 1, 2009, in exchange for his willingness to testify against Powell. The extremely favorable plea agreement was introduced into evidence. To reiterate, trial counsel and the jury knew all of this information regarding Reeves' credibility.

Furthermore, as opposed to the situation in *Wright*, where the prosecution did not present any evidence tying the defendant to the crime scene - that is, the State did not rely upon forensic evidence, the actual murder weapon, recovered shell casings, the getaway car, or eyewitness testimony to secure the defendant's conviction - in this case, the physical evidence and eyewitness testimony tying Powell to Officer Spicer's murder was overwhelming.

The court concludes the State had an obligation under *Brady* and its progeny to disclose Reeves' 2008 plea agreement. However, as noted above, the plea agreement was in the public record and, therefore, not suppressed. Moreover, the court concludes the State's failure to turn over the plea agreement was not material; that is, there is not a reasonable probability that disclosure of this cumulative impeachment evidence would have changed the jury's perception of Reeves' credibility, much less the outcome of the proceeding. Thus, there is no true *Brady* violation for the State's inadvertent failure to turn over this plea agreement.[102]

[102] The State noted in its Answering Brief that the failure to turn over the agreement was "inadvertent." The court trusts it was inadvertent; it should go without saying that the State may not intentionally withhold impeachment evidence.

2009 Kent County Trial Testimony

Reeves' 2008 Sussex County charges are also linked to his testimony in Cooper's robbery case in Kent County. The State brought this issue to the court's attention in its Answering Brief but the matter is also referenced in Reeves' probation officer's case notes. Again, as noted in Claim I, the court has reviewed the Cooper's Kent County public case file and ascertained the following.

When Reeves was arrested in August 2008 for the aforementioned Sussex County charges, he was questioned by the police. At that time, Reeves told the police in Sussex County that Cooper had admitted to committing a robbery in Kent County. It is easy to infer Reeves was willing to throw Cooper under the bus in exchange for leniency in Sussex County. The police in Sussex County referred the information Reeves provided them to the police in Kent County.

In June 2009, the State called Reeves as a witness in Cooper's trial in Kent County. This trial and Reeves' need to appear for it are referenced in Reeves' probation officer's notes. Again, these notes were provided to trial counsel on January 11, 2011. The transcript of Cooper's trial reveals the State called Reeves as a rebuttal witness. He was subpoenaed for the trial, as indicated in the probation officer's notes dated March 27, 2009. Reeves testified that some of his Sussex County charges had been dropped but not in exchange for the information he had provided the detectives about Cooper's involvement in the Kent County robbery.

While it is apparent to the Court that Reeves was trying to further his own interest when he volunteered incriminating information about Cooper, there is no evidence of any deal or favorable treatment Reeves received as a result of his disclosure. He responded reluctantly to a subpoena.

If trial counsel had known Reeves willingly incriminated Cooper to the authorities, they could have used that information for impeachment purposes. However, the court is reluctant to hold that the State committed a discovery violation because it did not inform the defense that Reeves, when being interrogated by the police about his own criminal conduct, "ratted out" Cooper, albeit inferentially to help himself. The Powell prosecutors would not know about the information Reeves provided unless it was incorporated into a plea deal. There is no evidence Reeves received any benefit from "giving up" Cooper.

Even assuming the State should have searched for and found this information, there is no *Brady* violation because the State did not suppress the information. The State gave trial counsel the same information it had. Reeves' probation officer's notes contained the information that could have led to, and presumably did lead to, the discovery that Reeves was willing to testify against Cooper: the fact that Reeves had been subpoenaed for the Cooper trial. Because there was no suppression of evidence, Powell is unable to demonstrate the State committed a *Brady* violation.

Finally, Powell has not suffered prejudice in that the allegedly undisclosed information would not create a probability of a different outcome. The inference that Reeves was willing to testify against Cooper arose out of the same arrest of Reeves that gave rise to Reeves' plea in December of 2008 when he agreed to testify against his co-defendants in his Sussex case. Reeves did not make two separate bargains with the State. Accordingly, the prejudice analysis mirrors that of the 2008 plea agreement to testify against others. It is simply cumulative impeachment evidence that does not undermine the court's confidence in the outcome of Powell's first degree capital murder trial. Overwhelming evidence, excluding Reeves' trial

testimony, tied Powell to the crime.

2. Luis Flores

During the course of these proceedings, the State discovered that Flores had a 2007 conviction in Maryland for possession with intent to distribute. Also, at the time Flores testified for the State, he had pending charges for offensive touching and disorderly conduct that the State did not disclose to trial counsel. Powell now argues the State's failure to disclose this information violated *Brady*.

At the December 4, 2015, hearing on this matter, the State's appellate counsel testified she discovered Flores' Maryland conviction by checking the Maryland judiciary website.[103] As discussed earlier, Flores' NCIC record was inaccurate. Neither the State nor trial counsel were aware of Flores' Maryland conviction. This mistake is attributable to the State of Maryland and/or NCIC, not the State of Delaware.

Powell argues evidence of a prior felony drug conviction for Flores is a game-changer because it could have been used by trial counsel to impeach this critical prosecution witness. The State concedes that the prosecutors were not aware of this conviction or of the fact that Flores was on probation in Maryland on September 1, 2009. The court agrees the State had an obligation to produce Flores' Maryland criminal record to trial counsel. The State provided the NCIC record it had. The State is privy to the ability to rely on a nationally-maintained database for obtaining criminal records from other states. As a result, the jury did not learn about Flores' Maryland conviction but this fact is immaterial and was not prejudicial to Powell. The jury knew Flores was a major player in the illegal drug trade business. It knew Flores helped plan the

[103] December 4, 2015, Transcript, at 4-5.

ultimately unsuccessful robbery of Adkins. It knew another robbery was planned for later in the day in Laurel. Flores testified he was not sure if he would have been the "heavy" in that robbery but he was clearly amenable to the idea. As has been reiterated and will continue to be reiterated throughout this opinion, trial counsel made sure the jury knew Flores could have been but was not charged with any crimes arising out of the events of September 1, 2009. Moreover, it is not clear that Flores' prior felony drug conviction would have been admitted under DRE 609. Drug offenses have arguable impeachment value and are not generally treated as crimes of dishonesty.[104] However, in weighing the admissibility of these types of convictions, there is less potential prejudice when the witness is not the defendant and trial counsel probably would have been permitted to ask Flores about this prior conviction. But, in light of the information about Flores the jury already knew and the marginal impeachment value this prior conviction would have had – considering Flores testified candidly about his involvement and use of illegal drugs -- any benefit to trial counsel would have been minimal.

Finally, with respect to Flores' pending criminal charges, the PDO Log shows trial counsel were well aware of these charges. As discussed in Claim I, Ms. Tsantes emailed the head of the Kent County Public Defender's Office to inquire about the status of these charges. Any claim that the State failed to disclose this information is not based in fact.

3. Darshon Adkins

Powell complains the State should have revealed to trial counsel that Adkins had not been checking in with his probation officer at the time these events took place; that he had failed to comply with court-ordered drug treatment programs; he used marijuana; and he cut off his court-

[104] *Gregory*, 616 A.2d at 1204.

ordered Global Positioning System ("GPS") transmitter. None of this information appears to be admissible and Powell does not provide the court with an argument as to how this information would have been deemed admissible. Nevertheless, the court will conduct a *Brady* analysis.

These claims must fail on the basis of materiality. To reiterate, Powell must prove that the failure to disclose the allegedly suppressed information undermines the confidence in the trial's outcome. Here, Adkins admitted at trial he was a drug dealer. He also admitted he had a prior conviction for possession with intent to deliver. Adkins testified that, on September 1, 2009, he had half a pound of marijuana strapped to his waist, half of which he intended to sell. On cross-examination, Adkins admitted he absconded from probation after the events of September 1, 2009. Powell cannot claim prejudice for an alleged *Brady* violation when trial counsel had the opportunity to cross-examine Adkins about the very same information at trial.[105]

Again, the court is moved to point out that the physical and eyewitness testimony clearly tied Powell to the shooting of Officer Spicer. The information Powell asserts should have been disclosed is of questionable admissibility at trial. Even if ruled admissible, these few relatively minor facts would serve only to bolster Adkins' known status as a police-dodging drug dealer; thus, they constitute cumulative impeachment evidence that does not serve to undermine the court's confidence in the jury's verdict.

4. Thomas Bundick

Powell asserts the State's failure to disclose Bundick's history of drug use, failure to comply with court-ordered substance abuse programs, and his positive urine tests near the time of

[105] *Rose v. State*, 542 A.2d 1196, 1199 (Del. 1988) ("When a defendant is confronted with delayed disclosure of *Brady* material, reversal will be granted only if the defendant was denied the opportunity to use the material effectively.").

the shooting were *Brady* violations. Again the court notes this information would not be admissible, standing alone. Nevertheless, the court will conduct a *Brady* analysis.

As with all of its witnesses, the State provided trial counsel with Bundick's criminal record in advance of trial. Bundick's history included multiple arrests and convictions for drug and substance abuse related crimes. Bundick testified at trial that he smoked marijuana. He admitted he was hoping to buy some of Adkins' marijuana for himself on September 1, 2009.

Assuming any of this cumulative impeachment evidence was not disclosed, Powell cannot establish materiality. The fact remains that Bundick was known by both trial counsel and the jury to be a drug user and a criminal. Although Bundick's testimony was helpful in that it established a time line for the attempted robbery, it was not necessary to incriminate Powell in the murder of Officer Spicer. His testimony as to how the events at McDonald's unfolded was corroborated by numerous other eye witnesses as well as the video and photographic evidence. The jury's verdict is not undermined by the alleged failure of the State to turn over information regarding Bundick's history of drug abuse.

5. Immigration Status of Eye Witnesses

Powell also argues the failure of the State to disclose the immigration status of the eye witnesses to Officer Spicer's shooting constituted a *Brady* violation.

Prior to these witnesses' testimony, the State informed the court it would need an interpreter. The court inquired at sidebar as to the witnesses' immigration status. The prosecutor candidly told the court the witnesses were probably all in the country illegally. Accordingly, the defense was aware of this information but, as noted by trial counsel's Rule 61(g) affidavit, Mr. Johnson did not *voir dire* on this issue, nor in hindsight would he do so, because the defense

thought the witnesses' testimony would be beneficial to the defense. The court will not second-guess trial counsel's strategic decision.

The court also notes that there are many, many people who have come to this country illegally. Many have found their way to Sussex County. If a witness enters the United States illegally, that fact, in and of itself, does not constitute impeachment evidence. Powell argues that, if trial counsel had known these witnesses were illegal immigrants, they could have investigated whether any of these witnesses' entry into the county was facilitated by a crime of dishonesty. However, Rule 61 counsel have known the identity of these witnesses for over two years and, presumably, had they found any "dirt" on these witnesses, they would have presented it to the court in these proceedings. Therefore, this claim remains only speculative and conclusory. The court finds no *Brady* violation.

6. The late witness

Finally, Powell argues the State's failure to disclose the identity of a last minute potential witness, Damian Coleman, was a *Brady* violation.

The State's last minute disclosure was not technically a *Brady* violation because, although the information was provided late, it was not suppressed. That said, the record reflects that the court was extremely upset with the State with regard to the timing of this late disclosure.[106] The defense team was given, and took, the chance to interview Mr. Coleman. Mr. Coleman would have testified that a person on the passenger side of the car had a gun. Further, he would have testified that a light-skinned black male "got out and pointed a handgun over the car at the police

[106] At the office conference wherein trial counsel alerted the court to this late disclosure, the court admonished the prosecutors: "I don't know what you all are thinking. I don't know what you all are thinking. I am disappointed that they get this after the evidence and after they closed." A3094.

car" and then ran behind a blue house, in the direction of where Powell was found minutes later.[107] Mr. Coleman's statement did not impeach evidence favorable to the State.[108] After trial counsel interviewed him, trial counsel indicated to the court they were not interested in re-opening their case, despite the trial court's clear indication that it was willing to do so.[109] It must be concluded that the information Mr. Coleman would have provided was not favorable to the defense. As noted, *supra* at Claim II, the eye witnesses' testimony varied as to from which door the man with the gun exited. Muddying the waters further on the door issue, together with additional testimony indicating the shooter ran in the direction where Powell was captured, would not have advanced Powell's case. Mr. Johnson testified at the evidentiary hearing that trial counsel "felt that he was going to identify [Powell] if he was going to identify anybody at all; that it sounded more like Derrick than Flores...."[110]

Nevertheless, the Court will conduct a *Brady* analysis. First, the potential testimony was not exculpatory. Defense counsel was in the best position to determine whether the information would have advanced Powell's case at the time they interviewed Mr. Coleman. A reasonable person would have determined the testimony was not only not helpful but potentially harmful. Mr. Coleman's testimony was not valuable impeachment evidence, given the conflicting

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[107] A5894 (Det. Hudson report, dated 2/2/11).

[108] *See Cabrera v. State*, 840 A.2d 1256, 1269 (Del. 2004) ("T]he State must disclose impeachment material only if it impeaches evidence that is favorable to the State.") (death sentence subsequently set aside in *State v. Cabrera*, 2015 WL 3878287 (Del. Super. June 22, 2015), cross-appeals currently pending before the Delaware Supreme Court).

[109] Trial court to defense counsel: "You've had the opportunity, and you don't want to reopen. You have had the opportunity to reopen if you want to." Defense counsel: "We choose not to." A3096.

[110] A6283.

statements already in the record as to which door the shooter exited.

Second, the evidence was not suppressed. The State knew of the witness a full five days prior to revealing his existence to defense counsel and did not reveal his identity until after the close of evidence. The court did not condone this procedure. The court did not find the State's excuse that it was waiting for a final report from the detective who conducted Mr. Coleman's interview acceptable.[111] When the prosecution received its report, it provided trial counsel of a copy. Despite the delay, the evidence was not technically suppressed. Moreover, the trial court demanded that the witness be located and defense counsel given an opportunity to interview him and decide whether they wished to reopen evidence. They declined to do so.

Third, the evidence was not material in the sense that its inclusion would have undermined confidence in the jury's verdict. Powell has not shown prejudice. The court notes Mr. Coleman was not called as a witness in these proceedings, despite an original indication that he would be. Only Rule 61 counsel knows why he was ultimately not called but, regardless, the only evidence addressing prejudice is that contained in the record. Trial counsel feared Mr. Coleman would identify Powell, if he identified anyone. The witness' testimony may have served to bolster the State's case, not undermine it. Moreover, the defense was given the opportunity to interview the witness and to call him if they so chose. In light of those facts, the court cannot find prejudice and the *Brady* claim as to the disclosure of Mr. Coleman's statement must fail.

7. Cumulative effect

Under certain circumstances, because a materiality analysis is dependent upon the record

[111] After trial counsel interviewed Mr. Coleman, the parties reconvened in chambers. The court further admonished the prosecution, "This should have all been done last week. ... I don't understand it." A3096.

as a whole, a single discovery violation may not be a true *Brady* violation but multiple failures to disclose may, as in the *Wright* case, result in a cumulative *Brady* violation. Such is not the case here. The court has found the State had an obligation to turn over Reeves' 2008 plea agreement. Had the State known of Flores' Maryland felony drug conviction, it would have been obligated to disclose it. However, neither document, nor the two documents taken together, satisfies the materiality requirement. The fact remains that there was a great deal of physical evidence and other eye witness testimony tying Powell to the shooting of Officer Spicer. This case is also distinguishable from the Delaware Supreme Court's recent decision in *Starling v. State.*[112] In that case, the Delaware Supreme Court held the cumulative effect of the State's failure to disclose *Brady* information, combined with trial counsel's ineffective representation, required the reversal of the defendant's conviction. However, in so doing, Delaware Supreme Court repeatedly cited the lack of physical evidence tying the defendant to the murders. Reeves and Flores, while certainly key witnesses, were not the only State's witnesses linking Powell to the shooting of Officer Spicer. Video and photographs place Powell outside the car at McDonald's. Numerous unbiased witnesses testified a man matching Powell's description exited the car after Officer Spicer was shot and fled in the direction of the Perdue plant holding a gun. Powell was apprehended shortly thereafter near the Perdue plant possessing the gun used to shoot at Adkins and to shoot Officer Spicer. Moreover, the undisclosed evidence was impeachment evidence of minimal value. Both Reeves and Flores admitted to their drug use, their plan to rob Adkins, their prior history of dishonesty with police, and their willingness to testify against Powell in exchange for leniency. There is no cumulative *Brady* violation.

[112] 130 A.3d 316 (Del. 2015).

Trial counsel's failure to seek disclosure of the favorable evidence

The court is somewhat puzzled by Powell's claim that trial counsel were ineffective for failing to seek disclosure of evidence that Powell also alleges was withheld. It seems to this court that the very nature of a *Brady* violation is that trial counsel is unaware of the same. In any event, the court concludes trial counsel zealously and effectively sought to undermine the credibility of the State's witnesses. Very early on in the proceedings, trial counsel filed a comprehensive discovery request. There is no evidence in the record to support a claim that they knew, or suspected, the State was not complying with that discovery request. In sum, trial counsel were not ineffective for failing to seek disclosure of evidence.

Appellate counsel's failure to raise *Brady* violations on appeal

With respect to appellate counsel, there is no evidence appellate counsel knew anything more than trial counsel knew about the criminal records that are at the center of these *Brady* allegations. Appellate counsel, as has been noted previously, must cull through the record to find the strongest issues to present on appeal. Not knowing that any information had been withheld, appellate counsel cannot be faulted for failing to raise alleged *Brady* violations on appeal.

CLAIM VI[113] - TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO PREPARE FOR AND CONDUCT AN EFFECTIVE CROSS EXAMINATION OF THE STATE'S DNA EXPERT RESULTING IN CONSTITUTIONAL PREJUDICE TO POWELL

The State sent the gun recovered from Powell to the Office of the Chief Medical Examiner ("OCME") for DNA testing. Powell now alleges trial counsel ineffectively failed to cross examine the State's DNA expert Paul Gilbert, a senior forensic analyst at OCME, on three points.

1. Communications from the State to OCME allegedly implicated Powell.

Powell contends the "initial assignment memorandum from the State to [OCME] directly implicated Powell. Obviously, Powell was the only individual the State chose to charge with murder, and the memo reflects that."[114] Powell claims that, because Powell was identified as the defendant in the assignment memorandum, it follows the person reviewing the evidence would be biased against Powell. A later communication accompanies a vial of Powell's blood and asks the OCME if the gun swabbings can be compared to Powell's blood sample.

The memorandum the Delaware State Police Homicide Unit sent to OCME to which Powell cites does not indicate that Powell was the "only individual" charged with capital murder. While the heading identifies Powell as the "suspect" and the crime as "murder in the first degree," an examination of the letter's text is useful:

> On 9/1/09, at approximately 1842 hrs, there was a robbery attempt at a McDonald's fast food restaurant in Georgetown, Delaware. During the incident a shot was fired and (3) suspects fled the scene in a vehicle. A general broadcast was dispatched of the vehicle resulting in Georgetown Police Officers Chad Spicer and Shawn Brittingham spotting the vehicle. A short pursuit ensued and

[113] The numbers used to identify claims in this opinion track those used in the Motion. As a reminder, Claims IV and V were withdrawn.

[114] Motion, at 61.

subsequently ended on a side street in Georgetown. A shot was fired from the suspect vehicle resulting in Officer Chad Spicer being shot in the face. A fragment from the projectile struck Officer Shawn Brittingham as well. Officer Chad Spicer died as a result of the injury. The Delaware State Police Homicide Unit was contacted and took over the investigation.

Investigation revealed that the defendant Derrick Powell and passenger Christopher Reeves fled the scene on foot. Passenger Luis Alonzo Flores remained at the scene.

Defendant Derrick Powell was apprehended a short time later and Christopher Reeves turned himself in several days after the incident. It was determined that Christopher Reeves was the driver, Derrick Powell was the rear seat passenger behind the driver and Luis Alonzo Flores was a rear seat passenger on the right side of the vehicle.

[The memorandum goes on to describe the material submitted for analysis and the testing requested.][115]

Trial counsel acknowledged in her Rule 61(g) affidavit she did not question Mr. Gilbert about the wording of this memorandum or about any other communication from the State to the OCME. The court notes the fact that Powell's DNA was found on the gun was not the keystone of the State's case. Two witnesses testified that Powell had the gun in his possession when he was arrested. No one was surprised when Powell's DNA was found on the gun. Trial counsel did, however, explore on cross-examination the "expectation" that Powell's DNA would be found on the gun.

Q: Okay. Is it fair to say, Mr. Gilbert, if, at the time Mr. Powell was taken into custody, he had possession of the gun that the three swabbing[s] were taken from, that you would expect to find his DNA left on the gun; correct?

A: I wouldn't say "expect." I can only take the samples that are given to me and report the profiles that I get. I don't make any expectations on the evidence that I'm given.[116]

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[115] A4670-71.

[116] A2929.

The court finds trial counsel's performance was not objectively unreasonable.

Nevertheless, even assuming that trial counsel's failure to question the State's witness directly on any potential bias was objectively unreasonable, Powell is unable to demonstrate prejudice. The simple fact is that Powell's DNA was found on the gun. The defense expert also testified to this fact. Therefore, cross-examination on the issue of any predisposed bias the State's expert held against Powell would not serve to undermine the confidence in the jury's verdict.

2. OCME tested the gun five times to obtain its test result.

Powell argues trial counsel was ineffective for failing to cross-examine Mr. Gilbert on the fact that, although he ran five tests on the gun, Mr. Gilbert never attempted a DNA match with any of the individual runs. Rather, Mr. Gilbert tested the combined results. Powell has a problem, however; he offers no theory to contradict the methodology Mr. Gilbert used.[117] In complaining that trial counsel's cross-examination failed to "expose [OCME's] testing methods,"[118] Powell does not offer any expert evidence to challenge OCME's testing methods as scientifically unreliable. His argument is conclusory; Powell merely opines that each of the five individual tests did not yield the results of the five tests combined. An argument is not a substitute for expert testimony.

Finally, to the extent the defense complains the DNA match led to identifying and implicating Powell in the homicide, the jury knew the gun used in the homicide was taken from Powell when he was captured and arrested. Mr. Gilbert testified he found DNA matching Powell's profile and that of at least two other individuals on the gun. He admitted it was possible

[117] *See Flamer*, 585 A.2d at 755.

[118] Motion, at 65.

that Reeves and Flores could have been those other contributors. Finally, Mr. Gilbert told the jury that the results of his testing could not be used to determine who last held the gun. The court notes Powell's own expert testified DNA consistent with Powell's DNA profile was found on the gun. Once again, Powell is unable to demonstrate prejudice.

3. The mixed profile on the gun was interpreted in a manner contrary to nationally established standards promulgated by SWGDAM.

Powell observes OCME policy requires the examiner to ignore alleles that fall below a certain level; *i.e.*, the reporting threshold. Mr. Gilbert complied with this practice in reporting his findings but Powell now complains Mr. Gilbert *subsequently* included the excluded alleles and loci in his probability calculations. The defense claims this inclusion was erroneous and contrary to the standards of the Strategic Working Group on DNA Analysis Methods (SWGDAM). At the outset, the court again notes that the defense offers no expert testimony to refute the State's witness' interpretation methods. One facet of this complaint is that Mr. Gilbert's estimation that the statistical application of the testing results excluded 114.1 trillion individuals other than Powell from having DNA on the gun was inflated. This conclusory opinion, however, is meaningless unless Rule 61 counsel can demonstrate to the court their proposed probability calculation method would have resulted in a statistical calculation helpful to Powell. And, finally, the defense ignores the fact that Powell was captured with the gun in his possession. He is unable to show prejudice.

Conclusion as to the DNA Evidence

In her Rule 61(g) affidavit, trial counsel reported she made a strategic decision with regard to the tactics used to cross examine Mr. Gilbert. Specifically, trial counsel's focus was to

attack the State's expert's decision to combine the three samples taken from the gun to obtain one sample for testing. Trial counsel believed this "mushing,"[119] or "pooling,"[120] of the State's samples would weaken the impact of the State's results when the jury heard the defense DNA expert's testimony. Specifically, trial counsel explained the defense expert would testify that he analyzed the evidence separately and concluded that Flores was the primary contributor of the DNA on the gun's trigger.

As has been noted earlier, strategic decisions are entitled to a strong presumption of reasonableness. "[T]he defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."[121] Powell has failed to show trial counsel's strategy was objectively unreasonable. Powell's assertion now, on Monday morning, that another approach should have been taken does not undermine trial counsel's decision at the time.[122]

In fact, trial counsel's approach made good sense. Trial counsel had no reason to worry about Powell's DNA being found on the gun when (i) Powell was captured with the gun and (ii) the defense's DNA expert was going to present evidence to argue the defense's theory that Flores was the triggerman.

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[119] "Mushing" was the term used at trial by counsel to describe the combining of the three samples.

[120] "Pooling" was the term used by Mr. Gilbert to describe this technique.

[121] *Strickland*, 466 U.S. at 689 (citation and quotation marks omitted); *Burns v. State*, 76 A.3d 780, 788 (Del. 2013) (noting that even evidence of "poor strategy, inexperience or bad tactics" do not necessarily rise to the level of ineffective assistance) (citation omitted).

[122] *Strickland*, 466 U.S. at 690 ("[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.").

Trial counsel were able to contrast the State's pooling approach to the defense expert's approach and make a strong closing argument highlighting those discrepancies. However, the reality was that, at best, the DNA of several people, including Powell, Flores and potentially Reeves, was found on the gun. Unfortunately for Powell, the inference that Flores was the killer was overwhelmed by the very strong evidence linking Powell to the shooting. Finally, the court notes the jury could have made a "common sense" inference: Of the two men in the car who could have fired the shot that killed Officer Spicer, was it the one who immediately fled with the gun in his hand or the one who stayed on the scene and went to the aid of the fallen officer?

Powell's allegations do not satisfy either prong of the *Strickland* analysis. There has been no evidence presented, scientific or otherwise, to support a finding that (i) trial counsel made objective mistakes or omissions in cross-examining the State's DNA expert or (ii) that anything trial counsel did or did not do would have further damaged the credibility of the DNA evidence presented by the State. Trial counsel effectively challenged the DNA evidence in this case. Moreover, Powell is unable to show prejudice resulting from trial counsel's allegedly ineffective cross-examination of Mr. Gilbert.

CLAIM VII: THE DEPARTMENT OF CORRECTIONS INTERFERED WITH POWELL'S RIGHT TO COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 4, 5, 6, 7, 9, 11, AND 12 OF THE DELAWARE CONSTITUTION AND TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO PROTECT POWELL'S RIGHT TO COUNSEL

Powell claims he was continuously harassed by Department of Correction ("DOC") officials and this harassment substantially interfered with his right to counsel. Powell argues that, because he was not able to participate in an active way with the preparation of his case, trial counsel were unable to develop his case fully and he was prejudiced as a result. Powell asserts he would refuse to talk to his defense team out of fear of retaliation. Powell claims he was worried and distracted when meeting with counsel and unable to focus on developing his case. Trial counsel were forced to spend much of their time trying to protect and safeguard Powell from DOC staff instead of preparing for trial. Powell did not testify at the evidentiary hearing; these claims are all based on Rule 61's assertions.

Powell cites the following specific actions, or inactions, in support of his claim of arbitrary and capricious treatment by DOC staff: (1) DOC failed to provide Powell with medical attention when he arrived at the James T. Vaughn Correctional Center ("JTVCC") on September 1, 2009; (2) Powell was forced to wear the same uniform for several weeks; (3) DOC guards generally harassed him and tampered with his food; (4) DOC officials deprived Powell of access to pen and paper when he met with his lawyers and frequently denied Powell face-to-face visits with trial counsel; (5) DOC staff seized Powell's legal documents; (6) DOC officials forced Powell to wear a shock device to and from court; (7) a DOC lieutenant pulled a gun on Powell at the courthouse; (8) the defense team was "routinely" denied access to Powell while he was held in the courthouse; and (9) DOC officials often delayed bringing Powell to the attorney interview

room or returning him to his cell.

In this claim, Powell also alleges trial counsel were ineffective for failing to ask the court to intervene to protect Powell's right to counsel.

Harassment/Maltreatment at the Hands of DOC Staff

At the outset, the court notes Powell's claims that DOC's treatment interfered with his constitutional right to counsel is procedurally barred pursuant to Rule 61(i)(3). Nevertheless, the court will address the merits of Powell's serious allegations.

Judge Robert Young recently summarized the relationship between the court system and DOC's internal operating procedures in *State v. Sells*:

> Case law and statutes make clear that courts should generally defer to the expert judgment of corrections officials, according them "wide-ranging deference in the adoption and execution of policies and practices." The supervisory powers of [Superior Court] with regard to the administration of Delaware correctional facilities have been specifically discussed by the Superior Court in *State ex rel. Tate v. Cubbage*. In that case the [Superior Court] held that "the judiciary is loathe to interfere with" the decisions of other branches of government. However, the [Superior Court] will be warranted to act when a strong showing is made that prison authorities have acted in a manner involving "an arbitrary and capricious abuse of discretion ... or where it is clearly shown there has been a deprivation or infringement of constitutional rights of inmates."[123]

The court ultimately concluded the policies of the Secure Housing Unit ("SHU") infringed upon the defendant's constitutional rights. The *Sells* case relies upon the Delaware Supreme Court case *Bailey v. State*.[124] In *Bailey*, the Supreme Court held that any interference with a defendant's right to counsel should be assessed independently and a remedy proportionate

[123] 2013 WL 1143614 (Del. Super. Mar. 20, 2013) (internal citations omitted).

[124] 521 A.2d 1069 (Del. 1987).

to the interference fashioned.[125] Powell argues the *Smalls* decision stands for the proposition that SHU's policies as they pertain to attorney-client contact violate the constitutional rights of any defendant charged with a capital crime. The court does not agree. The court has reviewed the record, including trial counsel's Rule 61 affidavits, their testimony at the evidentiary hearing, and the PDO Log. The court does not have any records or testimony from DOC representatives to which it can refer. Again, the court emphasizes the fact that Powell did not testify as to these complaints. As evidenced by the contents of trial counsel's Rule 61 affidavits and their testimony at the evidentiary hearing, trial counsel's recollection of events that took place years prior to these proceedings is often clouded by the passage of time. Therefore, the court relied heavily on the PDO Log, which was maintained concurrently with trial counsel's representation of Powell. The court concludes DOC's policies and treatment of Powell did not deprive him of his constitutionally protected right to counsel.

The specific alleged violations will be addressed in turn.

1. DOC failed to provide medical treatment to Powell following his arrest.

The PDO Log reveals Ms. Tsantes met with Powell via video phone the same day she was assigned to his case: September 3, 2009. At that time, she documented her opinion that Powell "was clearly beat-up by the cops when he was taken into custody."[126] Ms. Tsantes also recorded that Powell appeared uncomfortable talking and would look off in the direction of where guards were presumably positioned. She made plans to see Powell the following day. On

[125] *See Bailey*, 521 A.2d at 1086 ("In the absence of demonstrable irreparable prejudice, dismissal of an indictment is inappropriate, even though there has been interference with the right to be assisted by counsel.").

[126] Defense Exhibit, admitted at the evidentiary hearing, #13 (hereinafter "Defense Exhibit #___"), at PCR315 (referencing a numbering system used by Rule 61 counsel).

September 4, 2009, several members of the defense team met with Powell at JTVCC. At that time, DOC took Powell for a physical examination and documented his injuries. An investigator for the PDO also took photographs of Powell's injuries. Trial counsel advised Powell to put in so-called "sick slips" until he was seen in the infirmary. On September 10, counsel met with Powell at the courthouse prior to his preliminary hearing. Although Powell now asserts he suffered broken bones, on September 10, 2009, he told trial counsel DOC officials had taken him for x-rays and reported to him that he did not have any broken bones. There is no evidence this diagnosis, or absence thereof, was incorrect. The PDO Log does not detail any further concerns regarding DOC's failure to provide medical treatment to Powell nor any disinclination on Powell's part to engage with trial counsel as a result of his alleged failure to receive medical treatment. In these proceedings, Powell does not offer any additional evidence to support his allegation that he did not receive medical treatment after he was taken into custody. Although the alleged police brutality, if true, is not to be tolerated, in Powell's case there is no evidence that the medical treatment, or lack thereof, Powell received for injuries sustained during his arrest interfered with his right to counsel.

2. DOC only provided Powell with one prison uniform for several weeks.

This complaint appears to be based primarily on the contents of a letter Ms. Tsantes sent to DOC attorney, Aaron Goldstein, on September 28, 2009. In this letter, Ms. Tsantes noted Powell appeared to be wearing the same soiled uniform when she met with him on several occasions and Powell reported to her that he had only been issued one uniform. Further details were not flushed out in subsequent briefing or at the evidentiary hearing but it appears from the PDO Log that Powell complained of lack of access to "necessities" during a visit with counsel on

September 24, 2009. The PDO Log indicates Powell was unwilling to keep a journal to document any mistreatment or denial of access to necessities. By all accounts, it appears the specific issue of the issuance of a single uniform was resolved shortly after Mr. Goldstein received Ms. Tsantes' letter; the record does not contain another mention of Powell being compelled to wear soiled clothing. The court notes Powell engaged with trial counsel prior to his preliminary hearing on September 10, providing them with the names of family members and friends to whom they could speak. Powell does not indicate how, and the court cannot conclude, Powell's wearing of a soiled uniform for the first days in DOC custody interfered with his ability to interact in a meaningful manner with trial counsel.

3. Powell suffered general harassment at the hands of prison guards, such harassment including tampering with his food.

Of more concern to the court is the allegation Powell was routinely harassed by DOC personnel. At the evidentiary hearing, the members of the defense team all testified Powell complained of harassment by the guards. It is clear from the record that Powell frequently bemoaned his prison conditions. Ms. Tsantes addressed this matter in the aforementioned letter to DOC's counsel in September of 2009.

On May 26, 2010, Ms. Bryant noted in the PDO Log that she had received a phone call from Powell's father. Powell's father had received a letter from Powell indicating that Powell had been beaten by DOC guards on May 20, 2010. The defense team arranged for an investigator to accompany Mr. Johnson on his previously scheduled visit for the following day in order to document any injuries. The meeting took place as planned. Mr. Johnson's notes from that day read, in pertinent part, "Visit with [investigator]. Derrick not assaulted but did receive a write up.

On a new tier with sentenced inmates and finds it much improved."[127] In December of 2010, two members of the defense team visited JTVCC to interview other inmates about Powell's harassment by the guards. The PDO Log indicates these interviews were conducted in connection with trial counsel's efforts to develop Powell's mitigation case.

In her Rule 61 affidavit and at the evidentiary hearing, Ms. Tsantes noted that trial counsel walked a line between keeping their client happy and highlighting any maltreatment. She observed that placing the alleged maltreatment "out there," so to speak, would have opened the door for the State to get into Powell's alleged behavior that allegedly triggered the alleged harassment. There was at least one incident, discussed *infra* in this claim, where Powell admitted he spat at a correctional officer. There was another situation where Powell refused to be transported for medical testing and he caused a disruption in the infirmary.

The record reflects the fact that Powell was often a difficult client and frequently a difficult inmate. The PDO Log documents numerous visits where Powell was in a "foul" or "sour" mood and cut visits with members of the defense team short. The record is replete with references to Powell's desire to fire his defense team and his objection to presenting a mental health defense. In addition, the PDO Log illustrates that Powell was not only frequently upset with his defense team but he was constantly complaining about the lack of familial and monetary support. It is apparent from the PDO Log that members of the defense team spent a great deal of time addressing Powell's ongoing complaints. Powell's frustration is noted several times in the PDO Log and was documented by the trial judge in the office conference held when Powell

[127] Defense Exhibit #13, at PCR274.

refused to be transported for medical testing.[128] However, members of the defense team also often noted Powell was in a good mood during a visit and had been seen laughing or joking with the guards.

Related to the issue of general harassment is the specific allegation that DOC staff tampered with Powell's food. Ms. Tsantes' September 28, 2009, letter to Mr. Goldstein raised this concern. The next mention of food tampering is in an entry to the PDO Log made by the mitigation specialist and dated December 8, 2010. She noted that Powell received a write-up after an incident with a guard. According to Powell, he witnessed a guard spitting in his food and, in return, he spat at the guard. The guard then pulled Powell out of his cell to conduct a shakedown search. During that search, the guard found what could be considered a shank. The guard and Powell got into a verbal disagreement regarding the authenticity of the search. The sergeant on duty intervened and escorted Powell to his cell safely. Powell had an administrative hearing on the write-up and was found not guilty. The mitigation specialist noted Powell was in "a very good mood" at the time of her visit on December 8.[129]

It is clear Powell had run-ins with the some of the prison guards. It is also clear Powell engaged with the guards during these run-ins. The record reflects supervisors and trial counsel intervened and addressed the situations appropriately.[130] What is not clear is how these incidents interfered with Powell's ability to communicate with counsel. As indicated by counsel's representations to this court, *supra*, it is unclear how much responsibility for the often hostile

[128] This office conference is discussed in more detail, *infra*, at Claim XI.

[129] Defense Exhibit #13, at PCR198.

[130] *See Bailey*, 521 A.2d at 1085-86 (noting the trial court properly addressed perceived prejudice to the defendant and fashioned an appropriate remedy).

relationship between Powell and the guards lay with Powell. In any event, Powell was able to meet and communicate with his attorneys. Powell has not presented this court with any evidence that any hostility Powell experienced at the hands of DOC guards interfered with his right to counsel.

4. DOC officials denied Powell face-to-face meetings with trial counsel and denied him access to pen and paper during attorney-client meetings.

The PDO Log reflects Ms. Bryant requested face-to-face visits with Powell on September 4, 2009. A DOC representative responded that face-to-face visits would be permitted, although Powell would be shackled and cuffed during the visits. However, it appears that face-to-face visits were not permitted. Ms. Tsantes' letter to Mr. Goldstein dated September 28, 2009, mentions her concern that Powell was not permitted pen and paper during her visit with him.

After this judge was assigned to Powell's case, I held an initial office conference where Ms. Tsantes reiterated her concerns about face-to-face visits and access to pen and paper. Ms. Tsantes noted the denial of these amenities did not appear to be isolated to Powell but to all defendants placed in SHU. Immediately following the office conference, this judge wrote to the Warden, ordering face-to-face visits and that trial counsel and Powell be able to "sit at the same table and be able to engage in oral communications and exchange written documents in an environment where the correction officer cannot hear their confidential communications."[131] In response, the Warden provided the court and trial counsel with a written copy of DOC's policy for requesting a face-to-face visit.[132]

During the following year, the record shows there were only two meetings that were not

[131] Trial Docket Entry #12.

[132] Trial Docket Entry #18.

face-to-face. One of those visits took place on April 1, 2010, and was a visit between Powell and Ms. Bryant. The second incident was on September 21, 2010, when trial counsel met with Powell to discuss his refusal to cooperate with preparation for medical testing.

DOC has, and is permitted to have, a policy in place under which face-to-face visits may be granted.[133] That policy includes an advance notice provision. At the September 21, 2010, office conference held because Powell refused the test preparation, Mr. Johnson noted trial counsel had "spoke[n] with the warden and got an expedited kind of emergency meeting."[134] The court believes it is safe to conclude trial counsel was not able to provide DOC with the required advance notice to have a face-to-face visit. With respect to the April 1, 2010, visit, the record does not reflect why this visit was not face-to-face. Nevertheless, the court concludes the denial of two face-to-face visits, even if requested in compliance with DOC's policy, did not serve to deny Powell his right to counsel. Moreover, the denial of two face-to-face visits in light of the numerous weekly visits counsel had with Powell, does not amount to a "frequent" denial.

Finally, with regard to the lack of face-to-face contact prior to this judge's assignment to the case, Ms. Tsantes testified she made a purposeful decision not to seek judicial assistance because she was "afraid if I filed anything before" the trial judge was assigned, she would wind

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[133] Section 6504 of Title 11 of the Delaware Code provides, in pertinent part:

> The Department [of Correction]... shall have the duties set forth in this chapter and the exclusive jurisdiction over the care, charge, custody, control, management, administration and supervision of:
>
> (1) All offenders and persons under the custody of the Department [of Correction]....

[134] A4726.

up with a judge she did not want on the case.[135]

5. DOC seized Powell's legal documents from his cell.

At the evidentiary hearing, members of the defense team testified that Powell would frequently return from meetings with them to find his belongings had been moved. The PDO Log documents one occasion where guards ransacked Powell's cell and took legal documents. That incident took place on September 30, 2010, when Powell was moved to the infirmary in preparation for medical testing. Powell disclosed this information to trial counsel on October 6, 2010. Powell informed trial counsel that he had filed a grievance and had received most of his belongings back but that he was still missing some items. The PDO Log indicates Ms. Tsantes immediately followed up on Powell's report by contacting a Lieutenant Baynard. Per Ms. Tsantes' notes, Lieutenant Baynard indicated to her the shakedown should not have occurred because Powell's move to the infirmary was temporary. Lieutenant Baynard "[s]aid he gave client his legal material back and that his box(s) of stuff was coming from receiving supposedly this pm and he would assist with getting some of Powell's things back to him."[136]

In no way does the court sanction DOC's interference with or confiscation of a defendant's legal paperwork. However, a public jail is not a place where a prisoner "can claim constitutional immunity from search or seizure of his person, his papers, or his effects."[137] In this case, the incident appears to have been isolated and both DOC officials and trial counsel

[135] A6059 ("I was afraid if I filed anything before I got that assignment request that I would probably end up with this Judge here. And I was trying to not do anything to initiate the normal process of the President Judge making the assignment and hoping that I would get a different judge, to be frank.").

[136] Defense Exhibit #13, at PCR212.

[137] *Lanza v. New York*, 370 U.S. 139, 143 (1962).

immediately sought to remedy the error.[138]

6. DOC used a shock device when transporting Powell in DOC vehicles.

The record reflects that DOC implemented a procedure whereby Powell was hooked to some sort of device that had the ability to shock the person wearing it when he was transported to and from the courthouse.[139] This device was first used on January 12, 2010, when DOC transported Powell to his arraignment. Prior to Powell's next court appearance, trial counsel contacted the prosecutors and relayed their concern about the use of the device. The trial judge held an office conference on May 11, 2010, during which he called the DOC Commissioner and directed him to remove the device from Powell when Powell entered the courthouse. Trial counsel was satisfied with this remedy.

At the evidentiary hearing in these proceedings, trial counsel testified the shock device affected Powell's willingness to be transported to court. Trial counsel also testified they were wary of putting anything on the record about the use of the device because they were concerned about negative press coverage at the time.[140]

The use of the stun device, while not unprecedented, is unusual. However, the court is not in charge of prisoner security when the prisoners are in DOC's custody. As noted previously, the

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[138] *See Bailey*, 521 A.2d at 1084 ("Situations involving interference with the assistance of counsel are subject to the general rule that the remedy should be tailored to the injury suffered and should not unnecessarily infringe upon society's competing interest in the administration of criminal justice.").

[139] This device was worn on Powell's ankle and was not a "shock collar" as it has been referred to at various times during these proceedings.

[140] Ms. Tsantes testified, "There was also, you know, the side issue that you know if you filed anything in this case it was going to wind up in the newspaper. And so there was, you know, definitely at times strategic reasons why we wouldn't have brought [the shock device] to the Court's attention to deal with it." A6067.

court is "loathe to interfere with" the decisions made by DOC officials.[141] Powell does not specify how, exactly, his relationship with his attorneys would have been improved if he had not been forced to wear the device during his transportation to and from court. The court notes that Powell was transported to court on only a handful of occasions prior to trial and during the critical time when the defense team worked together with Powell to develop trial strategy. Accordingly, Powell has not shown that his constitutional rights were infringed upon when DOC used a shock device when transporting Powell to and from the courthouse.

7. A DOC lieutenant pulled a gun on Powell in the "lock up" area in the courthouse.

Powell also cites to an incident that allegedly occurred after his trial commenced. On January 4, 2011, trial counsel brought to the court's attention that Powell had alleged a DOC lieutenant pulled a gun on him in cellblock the previous day. The court questioned the lieutenant on the matter. The lieutenant denied that he pulled a gun on Powell and told the court that the correction officers are required to secure their weapons upon entering cellblock. The judge advised trial counsel that, if they filed an affidavit with respect to the incident, he would remove the lieutenant from transportation duty. Trial counsel did not file an affidavit and they were not questioned as to why they did not do so at the evidentiary hearing in these proceedings. The court will not speculate as to what their testimony may have been on this issue.

The court concludes the trial judge did precisely what the *Bailey* court prescribed: he treated the matter seriously, gave the parties an opportunity present their respective cases, and, ultimately, did not intervene as there was no factual basis for doing so.

8. DOC denied the defense team access to Powell in the courthouse.

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[141] *State ex rel. Tate v. Cubbage*, 210 A.2d 555, 564 (Del. Super. 1965).

Powell asserts his defense team was "routinely" denied access to him when he was in the courthouse. At the December 5, 2015, hearing on this matter, trial counsel clarified that the mitigation specialist was denied access to Powell on two specific occasions. Once, when the mitigation specialist attempted to use an attorney's security identification card to access cell block. It is courthouse policy that identification cards may not be shared and access was denied for this reason. The PDO Log reflects the second occasion occurred after the jury returned a guilty verdict, an understandably emotionally-charged time. A DOC lieutenant advised Ms. Bryant that she needed to wait for Powell's attorneys before she would be able to see Powell. The PDO Log documents other occasions when Ms. Bryant was permitted to visit with Powell in the courthouse. The court cannot conclude, given DOC's safety concerns, that DOC deprived Powell of meaningful access to counsel by limiting Ms. Bryant's access to her client in these two isolated situations.

9. DOC delayed in bringing Powell to the attorney interview room or returning him to his cell after an attorney visit.

Although Ms. Tsantes testified that, due to delays in bringing Powell from his cell, scheduled two hour visits "turned into 45 minutes because of those issues,"[142] the PDO Log indicates two occasions on which DOC brought Powell to the interview room after a delay. One occasion took place on May 17, 2011, after the conclusion of the trial. The other occasion took place on February 15, 2010, when a visit scheduled for one and a half hour was cut to one hour due to a delay. *In fact*, the PDO Log is replete with evidence that Powell had several meetings with his defense team that were at least two hours in length. One meeting with the mitigation specialist was three hours and fifteen minutes. On the other hand, there are many notations

[142] A6062.

indicating Powell either refused to meet with his defense team or cut the meeting short. The defense team met with Powell "almost every week unless he had Court appearances."[143] The fact remains Powell was a difficult client. Powell was uncooperative, disagreeable, demanding, and was frequently in a "horrible" or "sour" mood. However, when special visits were requested or special scheduling needs were sought, DOC cooperated with the defense team. DOC facilitated transporting Powell for desired medical testing. Trial counsel, in fact, seemed pleased with DOC's handling of Powell, overall: trial counsel noted in the PDO Log on September 10, 2010, "[Counsel for DOC] gets it and does not want anything on [DOC] that they are violating [Powell] any constitutional rights."[144] The record does not support Powell's claim that DOC restricted his access to trial counsel by way of engineering unnecessary delays or otherwise denying Powell access to members of his defense team.

In conclusion, none of the specific actions or inactions, viewed in isolation or cumulatively, resulted in DOC interfering with Powell's constitutional right to counsel. The PDO Log evidences some hostility between DOC employees and Powell. However, the claims now made *far exceed* those that were documented at the time. The PDO Log shows Powell, on several occasions, engaged in playful banter with DOC employees. More importantly, the PDO Log reflects the problems the defense team had in communicating with Powell and that this difficulty originated from Powell's hostile attitude and his failure to cooperate with the defense team.

Trial Counsel's Failure to Request the Court Intervene

Powell now complains trial counsel should have done more to protect Powell's

[143] A6061.

[144] Defense Exhibit #13, at PCR222.

constitutional right to counsel. Powell cites other cases where trial counsel asked the court to intervene by ordering the defendant removed from Secure Housing Unit ("SHU") and placed in the Medium Housing Unit ("MHU") to protect the attorney-client relationship. Although Powell does not specifically argue trial counsel should have made a similar request, the implication is clear. The court does not find counsel's failure to so move was objectively unreasonable.

Trial counsel testified they made a strategic decision not to put Powell's conduct "out there" for fear that DOC would introduce evidence of his behavior that could be used to "justify" the treatment he received. With respect to a general failure to file for such a request, the two cases to which Powell now cites in support of the contention trial counsel should have moved to have Powell transferred to MHU were decided after the conclusion of Powell's trial by one judge. Finally, the court notes that the trial court assumed that trial counsel would want Powell moved to Sussex Correctional Institution ("SCI") during trial, anticipating trial counsel would desire more accessibility to Powell during that critical time. However, trial counsel objected to such a move, noting Powell was comfortable with the living environment at JTVCC and voicing their concern that moving Powell would cause him undue stress.

Trial counsel met frequently with Powell. They documented his concerns and followed up with DOC officials as was appropriate. When trial counsel were unsuccessful in obtaining relief from DOC officials, they turned to the court for assistance. In light of the foregoing, the court does not conclude that trial counsel were required to do more to safeguard Powell's attorney-client relationship.

CLAIM VIII - THE STATE IMPROPERLY INJECTED RACE INTO THE GUILT PHASE OF POWELL'S TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, §§ 7 AND 11, OF THE DELAWARE CONSTITUTION, AND THE COURT DID NOT PROPERLY CURE THE HARM; APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO RAISE THE STATE'S AND COURT'S ERRORS ON APPEAL

Powell's argues that race was improperly injected into the guilt phase of his trial. This complaint has four prongs: ineffective assistance of trial counsel; error on the part of the State; independent error on the part of the trial court; and a claim of ineffective assistance of appellate counsel.

Factual Background

When Powell was found in Ms. Jefferson's house a few blocks from the shooting of Officer Spicer, a commotion ensued. Many officers were on the scene and they struggled to secure Powell's firearm and take Powell into custody. During the guilt phase of the trial, one of the arresting officers, Corporal Michael Trestka, testified Powell called the officers "crackers" during this struggle. The defense objected and the court held a sidebar discussion to address the use of, and the meaning of, the word "cracker." Trial counsel moved to strike the "cracker" references from the record and also moved for a mistrial. The trial court denied the request for a mistrial but granted the motion to strike. The trial court instructed the jury, "The Court strikes the answer concerning the specific name the police officer was called and the jury shall not consider that in any way, shape, or form to the extent it is humanly possible in deliberations."[145]

Prior to trial counsel's cross-examination of Corporal Trestka, counsel met at sidebar to further discuss the meaning of the term "cracker." The court then took a short recess. After the recess, the trial judge read the definition of "cracker" he was able to locate on-line using the

[145] A1426.

Google search engine: "A disparaging term for poor white folk from the south. Hillbilly. See hillbilly, honky, redneck."[146] The trial judge also informed counsel he had sought the input from an African American courthouse employee and this employee had told the court "cracker" is a derogatory, but not racially-charged, term for white people. The print out of the definition of "cracker" was marked as a court exhibit. Trial counsel then proceeded to cross-examine Corporal Trestka.

Later on in the trial, Ms. Jefferson testified Powell was "[c]alling you people crackers, fussing, cussing, carrying on" when he was arrested in her home.[147] Trial counsel did not object. After the jury was excused for lunch following Ms. Jefferson's testimony on direct, the trial court noted to counsel, "The last witness has mentioned the [sic] cracker or crackers in front of the jury again. There was no objection, probably because we have learned more about what cracker is all about."[148] The court proposed language for a cautionary jury instruction on the meaning of "cracker." Trial counsel expressed distress at the State's use of the term. The judge told counsel:

> [M]ay be [sic] your client thinks it is a derogatory term, but in Wikipedia and Google, it's not a racial term. It's a term basically for white folks, specifically, poor white southern folk, kind of redneck-ish, perhaps. And that is the term. So, you know, it's kind of like calling somebody a son of a bitch. It is not complimentary that you're calling them that, but it doesn't mean by calling them a son of a bitch you are using a racial slur. Think about it.[149]

During the lunch break, trial counsel had the opportunity to conduct their own research on the meaning of the term "cracker." The trial court drafted a cautionary jury instruction for

[146] A1435.

[147] A1489.

[148] A1496.

[149] A1497.

counsel's review. Following further discussion with counsel, the jury was ultimately instructed as follows:

> During the trial today, you have heard the word "cracker" being used as part of name calling. That term sometimes refers to poor, southern white folk, but it is also sometimes used as a racial slur. During the trial, there may be other testimony that you may hear which includes racial slurs. During the jury selection process, I specifically asked each of you whether each of you had any racial prejudices. You told me you didn't. Therefore, it is very important to understand that you may not allow the use of any of these types of terms to influence you in any way in your deliberations. Each of you must impartially, fairly, and squarely decide what happened in this case and decide whether or not the State has established the defendant's guilt beyond a reasonable doubt. You must do so and not allow any testimony concerning racial slurs to influence your deliberations in any way.[150]

Neither Corporal Trestka nor Ms. Jefferson had used the term "cracker" or "crackers" pre-trial when describing the language Powell used as he was taken into custody. Their trial testimony came as a surprise to the State, defense counsel, and this judge, in contrast to the known use of the words "nigga" and "crackers" contained in the text messages between Flores, Reeves, Powell, Bundick, and Adkins.

Flores, Reeves, Bundick, Adkins, and Powell communicated via text messages to set up the fake drug deal turned unsuccessful robbery. Several texts were also sent after the shooting at McDonald's. The occupants of Flores' car, driven by Reeves, were sharing phones during the course of the events; therefore, a text message sent from a phone did not necessarily mean that the owner of the phone sent the text. Out of the 221 text messages entered into evidence, some variation of "*nigga*" or "cracker" was used in eight text messages.[151] Defense counsel did not object to the admission of the text messages. The text messages at issue read as follows, and are

[150] A1555-56.

[151] Except for Bundick, all of the men are African-American.

identified by the phone from which they were sent, not necessarily the texter:

- Flores to Powell: "Did it clear though yo read it rite u a smart nigga rite"
- Flores to Bundick: "Well yo u should of brought it then cuz yo can u bring it later then yo after i get off work and stop bein scared 2 ride wit it nigga i have to ride wit"
- Flores to Powell: "After work see I know how 2 talk 2 them crackers 2"
- Flores to Bundick: "Yo im almost off cuz be ready bring scales 2 my nig"
- Bundick to Flores: "Yo bitch you going to get it bitch Nigga"
- Adkins to Flores: "Yeah, pussys, ima real nigga and i got both yall pussy faces ima see u lol no bitch here"
- Adkins to Bundick: "Yea nigga wats good u gond ride"
- Adkins to Bundick: "Wat da fuck i want u to do is looj at da news right now dog and tell me where them niggas 4rm?"[152]

After Reeves' testimony, during which he referenced the text messages, this judge gave the following instruction:

> Ladies and gentlemen, I am going to reiterate a message I communicated to you last week. In the testimony concerning the text messages and things that you have seen displayed, there are terms used that would normally be considered racial slurs. Whether the text messages are racial slurs or just street talk, you should only take from the text messages the communication they're in.
>
> To the extent you perceive the terms to be racial slurs, you must not allow the terms, racial slurs, to influence you in any way in your deliberations. As you told me, each of you could decide this case fairly and squarely without any racial matters in any way interfering in your ability to reach a fair and just verdict. As I have said, each of you must do so impartially, fairly, decide what happened in the case, and whether or not the State can establish the defendant's guilt beyond a reasonable doubt. And you must do so and not allow any testimony concerning racial slurs to influence your decision in any way.[153]

Later, in the middle of Adkins' testimony, this judge gave another limiting instruction:

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[152] State's Trial Exhibit #145.

[153] A2224-25.

> Ladies and gentlemen, out of an abundance of caution, I will repeat again: In these text messages, there is a bunch of, what I would characterize, as vulgar language and terms that would normally be considered racial slurs. These messages are not presented to you as any means to offend you. It is just what occurred. You should only take from the message the communications that are being made. To the extent that specific terms are racial slurs or vulgar, you must not allow any of these terms to influence or inflame you in any .... degree during your deliberations. Take them as cold communications.[154]

At the conclusion of the guilt phase, the trial court included the following instruction in its final charge to the jury:

> Once again I wish to reiterate my instruction about some of the language or words presented in the testimony. Some of the language may be considered vulgar. Some of the words, in isolation, could be considered to be a racial slur. Neither the State nor the defense contend that the words or language were used to or meant to convey any racial slur or to create any racial bias in this case.
>
> The language is what may be labeled as "street talk." You may consider the message of the communication, but you shall not allow yourselves, in any way, to use this testimony in any way that would create an inference of racial prejudice or bias against the defendant.[155]

Current Claims of Intentional Injection of Race Into the Proceedings

Powell now argues trial counsel failed to object adequately to the State's introduction of racial epithets, the State improperly failed to notice trial counsel of its intent to introduce the inflammatory testimony, the court failed to offer "proper curative instructions," and appellate counsel was ineffective in failing to appeal this issue. With the exception of the ineffectiveness of counsel claims, these arguments are procedurally barred by Rule 61(i)(3). Nevertheless, the court will address the claims on their merits.

As evidenced by the citations to the record, *supra*, trial counsel was vigilant as to the issue of potential racial bias and vigorously pursued the issue at trial.

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[154] A2529.

[155] A3138.

Corporal Treska's and Ms. Jefferson's live testimony as to Powell's use of the word "cracker" was not a deliberate attempt by the State to inject race into the guilt phase of Powell's trial. As noted above, their testimony with regard to the language Powell used as he was being taken into custody surprised the State, defense counsel, and this judge, alike. The State did not notify trial counsel of "its intent and the extent to which it intended to introduce this testimony" because it did not, in fact, intend to introduce the testimony ultimately elicited at trial.

After several discussions and independent research by the State, the defense, and this judge, the trial court offered to give a curative instruction. The defense objected to the word being interjected into this trial and stated that they considered the word "cracker" to be "a derogatory term used against white people... opposite of the word 'nigger'."[156] Defense counsel continued to object to the use of the word and brought their client's concern to the court's attention, as well. Significantly, there was no suggestion made before or during the trial that Powell's crimes were racially motivated or the terms were used in any context other than "street talk." The text messages were admitted as relevant to establish the time line for the attempted robbery.[157] Ultimately, the trial judge determined the matter could be addressed by way of a curative instruction. As noted previously, a curative instruction was given, for both the live testimony as to the Powell's use of the term "cracker" and also for the text messages containing variations of "nigga" and "cracker" that were admitted into evidence. Finally, this judge gave a curative instruction at the conclusion of the guilt phase to reiterate the terms were not used as

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[156] A1499.

[157] *Compare Floudiotis v. State*, 726 A.2d 1196 (Del. 1999) (holding the admission of comments and photographs of tattoos that tended to paint the defendants as racists inadmissible when irrelevant and intended only to inflame the passions of the jury).

racial slurs. Powell now argues that, by including the language "to the extent it is humanly possible" and "to the extent you perceive these terms to be racial slurs, you must not allow the terms, racial slurs, to influence you in any way in your deliberations," this judge qualified the instruction, thus allowing the jury an "out," or a pathway by which the jury could justify ignoring this judge's instruction. Powell contends the court's comments served to throw fuel on the fire. This argument is conclusory and just plain wrong.

When the trial court gives a curative, cautionary, or limiting instruction, the jury is expected to follow the trial court's instruction.[158] Advising the jurors that, to the extent they consider the terms to be racial slurs, they must not allow those terms "to influence you in any way in your deliberations" was a blatant admonition. That instruction rebuts any claim of prejudice. Powell is unable to show how the use of a few terms with racial overtones, addressed by the way of multiple curative instructions, undermines the confidence in the jury's verdict.

With regard to the merits of this claim, neither trial counsel nor this judge ignored the fact that the words "nigga" and "cracker" were in the evidence heard by the jury. After the first "cracker" reference and an objection thereto was made, the defense did not object further. The terms were used in the context of "street talk" and this judge took proactive action in instructing the jury as discussed.

Powell also argues that this judge violated Powell's constitutional rights by conducting its own inquiry and research into the meaning of the term "cracker" and trial counsel were ineffective for failing to object to the trial court's research. Being ignorant as to what the term "cracker" may or may not mean, the trial court did conduct independent research. The court's

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[158] *Hamilton v. State*, 82 A.3d 723, 726 (Del. 2013).

researching the term is analogous to a judge conducting a Westlaw search to find and review factually similar cases. This judge made trial counsel fully aware of the results of his research and heard from counsel as to what they had learned in conducting their own independent research. When determining the admissibility of evidence, the trial court is not bound by the Rules of Evidence except with respect to privileges.[159] To propose that a judge, when faced with an evidentiary issue, cannot leave the bench, explore and research the issue and then take the bench to make a ruling is frivolous.

Rule 61(i)(3) requires present counsel to establish cause for this claim not having been raised on direct appeal as well as prejudice to Powell. Powell alleges the injection of race into Powell's trial constituted plain error and, thus, appellate counsel's failure to raise the issue of race was ineffective and prejudicial. Powell's Reply Brief and Powell's post-evidentiary hearing briefing do not further address this claim.

In their Rule 61(g) affidavit, appellate counsel acknowledged they considered raising this issue on appeal. Appellate counsel concluded that (1) the use of "nigga" had not been adequately preserved for appeal and (2) the curative instructions on the use of "cracker" rendered the issue moot on appeal. As has been repeated in this opinion previously, appellate counsel are not bound to raise every possible issue.[160] Appellate counsel must cull the record in search of their client's

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[159] DRE 104(a) ("Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of paragraph (b) of this rule. In making its determination it is not bound by the rules of evidence except those with respect to privileges.").

[160] *See Scott*, 7 A.3d at 480 ("Under *Jones* [*v. Barnes*, 463 U.S. 745 (1983)] and *Evitts* [*v. Lucey*, 469 U.S. 387 (1985)], [appellate] counsel need not advance every argument the defendant wishes to raise, regardless of merit.").

strongest issues on appeal and their strategic decisions are entitled to deference.[161] A tactical decision made by counsel precludes plain error review.[162] Powell must establish appellate counsel's failure to pursue the argument on direct appeal was objectively unreasonable. Powell has not done so. Therefore, this claim is procedurally barred.

Even assuming this claim was not procedurally barred, it would be denied on the merits for the reasons discussed above: the alleged harm was addressed at trial, discussed with counsel and resolved by way of instructions given to the jury. The claim fails on the merits and would have likewise failed had it been raised on direct appeal.

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[161] *Scott*, 7 A.3d at 479 ("[T]he defendant does *not* have a constitutional right to compel his [appellate] counsel raise issues that [appellate] counsel, in exercising his own independent and professional strategic judgment, decides not to present.").

[162] *See Williams v. State*, 98 A.3d 917, 921-22 (Del. 2014).

CLAIM IX - POWELL'S CONVICTION AND DEATH SENTENCE WERE THE RESULT OF RACIAL DISCRIMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, §§ 7 AND 11, OF THE DELAWARE CONSTITUTION, AND THE ARBITRARINESS PROVISIONS OF 11 *DEL. C.* § 4209(g)(2)

Powell alleges systemic racial discrimination exists in the Delaware Superior Court as established by a study published in the *Iowa Law Review* (the "Study").[163] The defense alleges that Powell's state and federal constitutional rights were violated in both the guilt and sentencing phases of his trial because the cited data confirms racial disparity in the imposition of the death penalty in Delaware. The Study's authors concluded that racial discrimination exists in the Delaware criminal justice system when an African American is accused of killing a white victim. The defense states Powell's death sentence was "the result of racial discrimination."

This claim is procedurally barred by Rule 61(i)(3). Nevertheless, as with the other procedurally barred claims contained in the Motion, the court will address the substance of the claim.

Powell's current claim is based entirely upon the conclusions of the Study. Powell seeks to have his sentence vacated and, on remand, to eliminate death as a possible punishment. Powell also claims the racial prejudice or discrimination already inherently present in the system was exacerbated due to the admission of racial slurs at his trial[164] and, accordingly, both his conviction and sentence should be vacated. Finally, Powell asserts trial counsel's failure to move to bar death as a possible punishment in light of the alleged systemic racial discrimination violated Powell's right to effective representation.

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[163] Sheri Lynn Johnson, et al., *The Delaware Death Penalty: An Empirical Study*, 97 Iowa L. Rev. 1925 (2012).

[164] These racial slurs are those discussed, *supra*, in Claim VIII.

The State argues this claim is conclusory and must be rejected as it fails to meet the threshold pleading standard for an alleged State constitutional violation pursuant to the Delaware Supreme Court's holding in *Ortiz v. State*.[165] Powell did not address this claim further in his Reply Brief nor did he raise it in subsequent briefing.[166]

The Study focused on death penalty statistics in Delaware in the "modern era"[167] and analyzed statistics gathered from the Bureau of Justice Statistics Database ("BJS"), the Federal Bureau of Investigation Supplemental Homicide Reports ("SHR"), and the Delaware Capital Trials dataset ("DCT").[168] The authors found fifty-eight criminal defendants had been sentenced to death in the modern era in Delaware. Nine of these fifty-eight death sentences were overturned because they were sentenced under Delaware's mandatory death sentence statute, later deemed to be unconstitutional. The authors excluded the overturned sentences and gathered their data from the remaining forty-nine individuals sentenced to death in the modern era.

Out of these forty-nine individuals, 39% of criminal defendants who received the death penalty were white, 53% were black, and 8% were Hispanic or Native American. At the time the Study was published, Delaware's population was 69% white, 21% black, and 8% Hispanic. Of

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[165] 869 A.2d 285, 291 n. 4 (Del. 2005) ("The proper presentation of an alleged violation of the Delaware Constitution should include a discussion and analysis of one or more of the criteria set forth in *Jones* [*v. State*, 745 A.2d 856, 864-65 (Del. 1999)] or other applicable criteria."); *Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008).

[166] Rule 61 counsel raised the same claim in *State v. Sykes*, discussed, *infra*, but elected not to pursue the denial of the claim on appeal to the Delaware Supreme Court.

[167] The article explains the "modern era" references the time period following the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972).

[168] The BJS and the SHR are national databases. DCT was developed in connection with the Study by the authors' research team.

the sixteen inmates actually executed in the modern era, 50% were white, 44% were black, and 6% were Native American.

The claim that a death sentence is the result of systemic racial discrimination has been addressed and rejected by the United States Supreme Court. It has also been rejected twice by Delaware courts.

In *McCleskey v. Kemp*, the United States Supreme Court considered the case where a black man was convicted of murdering a white police officer and sentenced to death.[169] McCleskey challenged his death sentence, arguing it was the product of racial discrimination. McCleskey cited a statistical study (the "Baldus Study") that examined over 2,000 murder cases in Georgia, and purported to show racial disparity in the imposition of the death penalty in Georgia. The Supreme Court explained that a defendant who alleges an equal protection violation has the burden of proving "the existence of *purposeful* discrimination," and such discrimination "had a discriminatory effect on him."[170] The Supreme Court concluded the defendant relied solely on the study and offered no evidence *specific to his own case* supporting an inference that race played a role in his sentencing.

Admitting that statistical disparities can be accepted as proof of equal protection violations in limited situations, the Supreme Court observed, "the nature of capital sentencing, and the relationship of the statistics to that decision are fundamentally different" from those cases.[171] The Supreme Court held that the Baldus Study, alone, was "insufficient to support an

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[169] 481 U.S. 279 (1987).

[170] *Id.* at 292 (citation omitted) (emphasis added).

[171] *Id.* at 294.

inference that any of the decisionmakers in [the defendant's] case acted with discriminatory purpose."[172]

The Supreme Court also addressed proportionality review under the cruel and unusual punishment clause of the Eighth Amendment: "Because [defendant's] sentence was imposed under Georgia sentencing procedures that focus discretion 'on the particularized nature of the crime and the particularized characteristics of the individual defendant,' we lawfully may presume that [defendant's] death sentence was not 'wantonly and freakishly' imposed."[173] This discretion supported the Supreme Court's determination that other variables or factors could have easily led the jury to determine death was an appropriate sentence.

Finally, the defendant in *McCleskey* argued that the application of capital punishment was arbitrary and capricious because racial considerations may influence capital sentencing decisions in Georgia and, therefore, his sentence was excessive. The Supreme Court stated:

> Statistics at most may show only a likelihood that a particular factor entered into some decisions.
>
> . . . .
>
> Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. Our efforts have been guided by our recognition that "the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice[.]"[174]

Jurors are tasked with focusing their judgment on the unique characteristics of a particular defendant and the specific facts of his case. The Supreme Court acknowledged there is an

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[172] *Id.* at 296.

[173] *Id.* at 308 (citations omitted).

[174] *Id.* at 308-09 (citations omitted).

inherent unpredictability of jury verdicts, but this unpredictability does not justify their nullification.

The Supreme Court concluded by stating the Baldus Study only indicates a discrepancy that appears to correlate with race, and that such discrepancies are inevitable in the American criminal justice system. "In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus [S]tudy does not demonstrate a constitutionally significant risk of racial bias. . . ."[175]

The Delaware Supreme Court has also addressed race statistics in the context of the imposition of the death penalty. In *DeShields v. State*, the defendant, following his conviction and prior to the penalty hearing, moved for a new trial and an evidentiary hearing citing a national survey that indicated murderers of white victims stood an 11.1% chance of receiving the death penalty, while murderers of black victims only stood a 4.5% chance of receiving the death penalty.[176] The trial court denied the motion for new trial and refused to hold an evidentiary hearing, noting that proof of disproportionality in the sentencing system was insufficient to establish any inference of discriminatory intent and that *voir dire* of the jury had included questions to address any potential for racial bias. On appeal, the defendant again argued that the national survey "tends to establish that juries throughout the United States act on a racial basis in imposing the death sentence against blacks who have killed white victims."[177]

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[175] *Id.* at 313.

[176] 534 A.2d 630, 646 (Del. 1987).

[177] *Id.* at 646.

The Delaware Supreme Court affirmed the trial court's decision, finding that the statistical survey and a corresponding state-by-state breakdown of those results were "insufficient to create a fact issue warranting an evidentiary hearing."[178] "Such a statistical proffer must be 'so strong that the results would permit no other inference but that they are the product of racially discriminatory intent or purpose.'"[179] The Delaware Supreme Court explained,

> The statistics offered showed no more than a rough correlation: that among all defendants sentenced to die in the United States, those whose victims were white made up a disproportionate number of condemned inmates. This finding of an unexplainable disparity does not account for the racially neutral variables that are present in the sentencing of capital crimes.[180]

The Delaware Supreme Court concluded the defendant's proffer was too speculative and conclusory to warrant an evidentiary hearing.

Recently, the Delaware Superior Court also addressed the issue of racial bias in the imposition of the death penalty. Citing the Study, in *State v. Sykes*, the defendant sought to amend his petition for postconviction relief to add the claim that his death sentence was unconstitutional because it was the product of systemic racial discrimination in the administration of Delaware's capital sentencing system.[181] The court denied the motion to amend. Citing *McCleskey*, Judge Witham concluded, "[The defendant] has offered no evidence *specific to his case* that would support an inference that racial considerations played a part in his sentence, and the [Study] alone is insufficient to support an inference that any of the

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[178] *Id.*

[179] *Id.* (citations omitted).

[180] *Id.*

[181] 2013 WL 3834048 (Del. Super. July 12, 2013).

decisionmakers in his case acted with a discriminatory purpose."[182] Accordingly, the court concluded the defendant's death sentence did not run afoul of the Fourteenth Amendment.

The court found that the defendant's Eighth Amendment argument that his sentence was cruel and unusual punishment lacked merit because the statistics alone did not prove race was a factor for the jury in deciding to sentence the defendant to death. "The Constitution does not require Delaware to 'eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment.'"[183]

As in *Sykes*, Powell relies solely upon the Study in the hope that it will breathe some life into his argument that his sentence was the result of systemic racial discrimination. The court finds this argument to be conclusory and speculative at best. The data used as the basis for the statistics upon which the Study relies are derived from a sample size of forty-nine individuals who were sentenced to death over the last forty-one years. This sample size is not sufficient to establish any sort of systemic racial discrimination with regard to Delaware's capital sentencing system. Second, and most importantly, even if forty-nine cases were sufficient to establish some legally significant statistic sufficient to create an inference of discrimination, the Study's statistics do not prove race was, in fact, a factor for the decisionmakers *in this particular case*. As emphasized by the *McCleskey* and *Sykes* decisions, the statistics cited only show a "demonstrable disparity that correlates with a potentially irrelevant factor,"[184] and at most

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[182] *Id.*, at *2 (emphasis added).

[183] *Id.* (quoting *McCleskey*, 481 U.S. at 319).

[184] *McCleskey*, 481 U.S. at 319.

"indicates a discrepancy that appears to correlate with race."[185] The defense fails to meet its burden to demonstrate that the decisionmakers in his case were motivated by purposeful discrimination.

Additionally, the court notes the *McCleskey* decision made clear that the benefits and protections associated with the defendant's right to present his case to a jury far outweigh the risks associated with discrimination and, in fact, serve as a protection against them.

Lastly, Powell asserts his trial counsel were ineffective under *Strickland* because they failed to move this court to bar death as a possible punishment on account of Powell's race. Although Rule 61 counsel acknowledge the Study was not published until 2012, more than a year after the conclusion of Powell's trial, they assert, "The early edition of the Study was well known and widely distributed in the capital defense community."[186] Assuming that statement is accurate and defense counsel had knowledge of or should have had knowledge of the early edition of the Study, for the reasons discussed, *supra*, trial counsel's attempt to argue the Study's relevance would have failed.

Powell has provided no additional evidence to demonstrate that, absent a racial bias, death was an inappropriate punishment. Powell was otherwise eligible for the death penalty after he was found guilty of felony murder. This claim is unavailing.

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[185] *Id.* at 312.

[186] Motion, at 97. Although Rule 61 counsel drop a footnote at the end of this sentence, seemingly to indicate there is some authority for this assertion, the footnote merely cites to the Study.

CLAIM X - THE TRIAL COURT VIOLATED POWELL'S CONSTITUTIONAL RIGHTS BY IMPERMISSIBLY DIRECTING A VERDICT AS TO THE SOLE AGGRAVATING CIRCUMSTANCE; DEFENSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT

In this claim, Powell argues the trial court erred when it instructed the jury to find as proven the statutory aggravating factor set forth in 11 *Del. C.* § 4209(e)(1)(j). Section 4209(e) reads, in pertinent part:

> (1) In order for a sentence of death to be imposed, the jury, unanimously, or the judge where applicable, must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances which shall apply with equal force to accomplices convicted of such murder:
>
> ....
>
> (j) The murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of rape, unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary.

In the guilt phase of his capital trial, Powell was found guilty of the murder of Officer Spicer while in flight from the attempted robbery of Adkins at McDonald's.

The defense argues that, although the jury found Powell guilty of felony murder in the guilt phase of the trial, the United States Constitution requires the jury to revisit that guilty verdict in the penalty phase.

Section 4209(e)(2) of Title 11 requires the judge to instruct the jury that an aggravating circumstance has been found when the jury has found the defendant guilty of first degree felony murder[187] but Powell argues the United States Constitution requires the jury independently find

[187] Section 4209(e)(2) reads, in pertinent part: "In any case where the defendant has been convicted of murder in the first degree in violation of any provision of § 636(a)(2) - (6) of this title, that conviction shall establish the existence of a statutory aggravating circumstance and the jury, or judge where appropriate, shall be so instructed." 11 *Del. C.* § 4209(e)(2).

the facts necessary for a finding of death eligibility. Powell cites no case law in support of his position. Powell asserts trial counsel erred by not objecting to the court's instruction but does not fault appellate counsel for failing to raise this issue on appeal.

The defense's argument is procedurally barred. Powell ignores Rule 61(i)(3) and offers no explanation for the failure of appellate counsel to raise this issue on direct appeal nor do they address the required showing of prejudice. Therefore, Claim X is dismissed as procedurally barred.

Assuming, without deciding, the court saw reason to set aside the procedural bar of Rule 61(i)(3), the case law is clear that the jury is not required to revisit in the penalty phase a finding of fact that it found unanimously and beyond a reasonable doubt in the guilt phase. In considering the constitutionality of Delaware's death penalty statute in light of the United States Supreme Court decision *Ring v. Arizona*,[188] the Delaware Supreme Court held:

> The sentencing judge, by directing a verdict under 11 *Del. C.* § 4209(e)(2), does not circumvent the holding of *Ring* requiring the jury to find the existence of any fact that increases the maximum penalty to which a defendant may be sentenced. Only those facts that are established by the jury's guilty verdict are subject to a "directed verdict" as to the existence of aggravating factors during the penalty phase. Section 4209(e)(2) complies with *Ring* because the jury's verdict of guilt establishes the existence of the fact which increases the punishment and such finding, necessarily, was made unanimously and beyond a reasonable doubt. In other words, a guilty verdict [of felony murder] authorizes a maximum punishment of death. The fact that this finding is ceremonially rendered a second time during the penalty phase does not alter the analysis. Confusion would undoubtedly result if a sentencing judge were not permitted to instruct a jury that it is required to find the existence of facts it has already found *by its verdict at the guilt phase*. A jury not so instructed could, through inadvertence or ignorance, render a finding in the narrowing phase that rejects the statutory aggravator found in the guilt phase. Such a result would call into question the guilty verdict already

[188] 536 U.S. 584 (2002).

rendered.[189]

Claim X is procedurally barred. Alternatively, it is denied on its merits as contrary to Delaware case law.

[189] *Brice v. State*, 815 A.2d 314, 323 (Del. 2003) (emphasis in original).

CLAIM XI: TRIAL COUNSEL WERE INEFFECTIVE IN THE PENALTY PHASE OF THE TRIAL IN VIOLATION OF POWELL'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS AND HIS RIGHTS UNDER ARTICLE I, §§ 4, 7, 9, 11, 12, AND 13 OF THE DELAWARE CONSTITUTION

Powell also complains trial counsel were ineffective for failing to present an effective mitigation case and for failing to file a motion, or motions, to recuse the trial judge.

Powell's Mitigation Case

Trial counsel's mitigation goal was to show the jury Powell was the product of a dysfunctional upbringing and suffered from brain deficits, for which neither Powell could be faulted. Thus, counsel argued, he was not deserving of the death penalty because he was not the "worst of the worst." Trial counsel presented a number of witnesses to testify to Powell's tragic childhood. The witnesses' testimony may be summarized in that regard as follows.

(a) Tina Durham ("Tina"), Powell's mother, testified that, in addition to Powell, she has three daughters. She told the jury "everyone" fought in the house, physically and verbally. Tina testified Powell also participated in the fighting and that he was a discipline problem. Tina and Powell's father, Joseph ("Joe") Powell, "constantly" fought. Tina admitted to abusing illegal substances, telling the jury her drug of choice was marijuana and Joe's drugs of choice were cocaine and crack cocaine. Drugs were used in the house and sold to support their habit.

Tina and Joe verbally and physically abused Powell. Tina acknowledged having a short temper and that she would frequently become angry with Powell. When she did, she would become "very loud and obnoxious."[190] Neighbors frequently complained and called the police. Social workers were involved with the family "[f]rom the beginning."[191]

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[190] A3735.

[191] A3745.

Tina and Powell had a tumultuous relationship because he always pushed boundaries and would not take "no" for an answer. At age eight, Tina bit Powell while bathing him because he bit her finger and would not release it. Child Protective Services ("CPS") were called in.[192] Tina faced criminal charges as a result of the incident. Powell was placed with his father, who moved in with Powell's paternal grandmother with whom Powell was very close. Powell stayed with his father until approximately age twelve. Tina testified that her visits with Powell were "spotty" during this time.[193] At age twelve, Powell moved back in with Tina because he wanted to spend more time with her and his sisters. Life remained tumultuous. Tina testified, "Everything tends to escalate in our family. We'd start yelling and then the police are called it seems all the time."[194]

At a young age, Powell was diagnosed with ADHD. Powell was enrolled in different programs aimed at addressing his behavioral issues but they were successful only in the short term. He fought in school with other students as well as with teachers. When Powell was either thirteen or fourteen years old, CPS tried to send Powell to a juvenile mental health facility in Maryland, Brook Lane, for a psychological evaluation. Joe would not allow it. Tina testified, and Joe later confirmed, that Joe did not want his son taking medication to treat his ADHD diagnosis and feared Powell would be "labeled" if he did so. Powell dropped out of high school at age fifteen or sixteen. Powell's emotional outbursts continued. Tina reiterated verbal and physical abuse took place and the police responded regularly to their residence.

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[192] This was not the first time CPS was involved with the family.

[193] A3742.

[194] A3743.

(b) Powell's father, Joe, testified. He acknowledged using marijuana, cocaine, and crack cocaine while Powell was young. Joe told the jury that he and Tina fought often and that Tina frequently cheated on him with other men. When Tina became angry, she would throw things, including unusual items like stove grates. He told the jury Tina broke every dish in the house. Often, when things got out of control, Powell would escape to his paternal grandmother's home, which he considered a safe haven. Joe told the jury that "[t]here was nothing she wouldn't do for [Powell]."[195] Powell and his grandmother were very close and Powell was "top dog" at her house.[196] By the time Joe and Powell moved into Joe's mother's home, Joe testified he had stopped using drugs. Powell only saw his mother on birthdays and holidays during the time he lived with Joe.

Joe testified he saw a large bruise on Powell when Powell was living with Tina. After this incident, Joe was awarded temporary custody of Powell. Joe agreed with Tina that he, too, physically disciplined Powell. He acknowledged a fist fight took place between the two of them two weeks prior to Powell's eighteenth birthday. Joe struck Powell several times; Powell fell, hit a coffee stand, and wound up with bruising around his eyes and elsewhere.

Joe admitted both he and Tina cursed at Powell in a derogatory fashion. Joe testified Powell had an explosive temper: "[H]e could be sitting down eating a bowl of ice cream one minute, and the next minute he's throwing the bowl across the room."[197] One time, Powell threw his TV out of the window. Joe's mother, Powell's beloved grandmother, even became so

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[195] A3785.

[196] *Id.*

[197] A3805.

frustrated with Powell's conduct that she punched him on one occasion. Joe acknowledged he resisted giving Powell medications prescribed to treat his son's behavior problems.

(c) Nakota Durham ("Nakota"), Powell's half-sister, also testified at the penalty phase. She lived in Tina's house at the same time as Powell when she was nine or ten years old and Powell was fourteen or fifteen years old. She remembered a lot of verbal and physical fighting. She testified Tina had a temper and threw things when she was angry. Tina would break things and physically hurt Nakota and her siblings, including Powell. Nakota told the jury Powell was not always welcome at Tina's and, on at least one occasion when Powell was living on his own but did not have elsewhere to go, Tina would not even let Powell sleep on the floor. She identified Tina's drugs of choice as alcohol and marijuana.

(d) Clara Powell ("Clara"), Joe's current wife and Powell's stepmother, testified. Joe began dating Clara when Powell was approximately ten years old and she was only approximately sixteen years old. Clara's testimony mirrored that of Powell's other family members. She reported that, initially, she and Powell had a good relationship but that it devolved into a physically violent relationship. When Powell was in his teens and on house arrest, Clara told Joe "enough was enough" and Powell had to move out of their house because Clara did not want Powell around their young children. Powell resumed living with Tina and Tina "partied with him, she did drugs with him."[198]

Clara testified that, when Powell lived with Joe and her, he received his medication as required during the school year but not on weekends or school breaks. Clara also testified that Powell was teased because he was overweight.

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[198] A3863.

(e) Jessica Durham ("Jessica"), Powell's half-sister, testified she lived with her maternal grandmother most of her life. She provided graphic testimony about Tina's propensity for violence. Jessica testified Tina beat the children, causing serious injuries. She told the jury Tina broke her nose on one occasion. Police responded to the house often because their neighbors and Tina's mother would call in complaints. "Often" meant every couple of days. Most nights Jessica and Powell were left alone when their mother went out. Jessica told the jury the family was involved with counseling services but Tina would threaten the children to keep them from disclosing abuse to the counselors and would reward the children if they denied any abuse.

(f) David Smith, a friend from childhood, testified he grew up under similar circumstances as Powell: his father was a good friend of Joe's and also a drug user. Unlike Powell, Mr. Smith wound up being placed in foster care and was able to pull his life together.

Trial counsel also presented expert medical testimony as to Powell's mental health diagnoses and brain disorders. Their testimony may be briefly summarized as follows:

(a) The defense's psychiatric expert, Dr. Saadi Alizai-Cowan further educated the jury as to the family's history with social services. In the course of Dr. Alizai-Cowan's testimony, a large number of events described in the CPS records were discussed. Dr. Alizai-Cowan detailed for the jury a substantiated incident in 1994 when Tina tied Nakota to a bed with an extension cord. The following year, Tina admitted to hitting Powell's half-sister, Jessica, with a vacuum cleaner wand and causing injury. Tina was criminally charged for both incidents.

Dr. Alizai-Cowan diagnosed Powell with ADHD, bipolar II disorder, panic disorder without agoraphobia, PTSD, cognitive disorder not otherwise specified, cannabis abuse, and anti-social personality disorder.

(b) Dr. Sidney Binks, a neuropsychologist, performed an array of tests on Powell. Dr. Binks testified he reviewed the Powell/Durham CPS records as well as Powell's school and mental health records prior to reaching his diagnoses. Dr. Binks told the jury about Powell's "multi-generational substance-abuse family" and described the abuse and neglect Powell suffered at the hands of his parents.[199] Ultimately, Dr. Binks gave Powell several diagnoses with the primary diagnosis being cognitive disorder severe, with global deterioration of cognitive functioning and impairments in reading, writing, attention, inhibition, and executive functioning and motor skills. Secondary diagnoses included Attention Deficit Disorder ("ADD"), reading disorder, written expression disorder, and a history of noncompliance with medical treatment prescribed for his ADD diagnosis. Dr. Binks testified at length with regard to Powell's troubles with impulsive tendencies.

(c) Dr. Ruben Gur, also a neuropsychologist, testified. Dr. Gur reviewed Powell's MRI and PET scan. His testimony focused on evidence that Powell had brain damage as shown by his enlarged brain ventricles. Dr. Gur also opined that Powell had a diminished ability to make a rational fight-or-flight response as the result of his abnormal brain development.

There can be no doubt the aforementioned evidence showed Powell had an explosive and violent temperament. But trial counsel also elicited testimony highlighting Powell's positive characteristics:

(a) Nakota testified that Powell encouraged her to stay in school, stay out of trouble, and follow on the "right" path.[200]

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[199] A4080.

[200] A3772.

(b) Joe testified his son was a difficult child but Powell has a heart of gold. Joe testified as to his son's willingness to help neighbors. He told the jury Powell could be the loveliest person and would do anything in the world for anybody.

(c) Clara testified that, when she was dating Joe, Powell was "wonderful," "well-mannered," and "very polite."[201] She said "couldn't have asked for a better step-son."[202] Unfortunately, their relationship took a negative turn after her marriage to Joe. However, Clara said she currently has a good relationship with Powell and that Powell has a wonderful relationship with her daughters, his half-sisters.

(d) Jessica testified that, once she moved into her own apartment at age seventeen, Powell would visit regularly. Her apartment was a safe place for him to go when he had no food or other place to go. Powell helped out with the care of their ailing maternal grandmother. Jessica told the jury Powell had been planning to turn himself in to the Maryland police when the events of September 1, 2009, unfolded. Jessica's testimony clearly established the fact she and Powell have a close relationship.

(e) Roberta Mills testified she met Powell when her daughter was dating him. He was "polite," "cordial," and "mannerly."[203] She liked him straight away. At the time of the trial, Ms. Mills testified she and Powell exchanged correspondence. They were reading the same books so they could discuss them together. She told the jury, "He's a good person."[204]

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[201] A3856.

[202] *Id.*

[203] A3900.

[204] A3902.

(f) Mr. Smith, Powell's good friend from childhood, described their relationship as one of family. Mr. Smith has two daughters and Powell is "Uncle Derrick" to them. Mr. Smith told the jury Powell was always great with his kids and, "[w]hatever the kids wanted to do, he was ready to do."[205] When Powell needed a place to stay, he was always welcome at Mr. Smith's house. Powell would help out around the house, with or without being asked. Mr. Smith testified Powell went to church "a good bit" and that he would help out in the church's food pantry.[206] Mr. Smith never saw a negative side of Powell.

Ineffective Presentation of Mitigation Allegations

Powell now contends trial counsel was ineffective for failing to present effective mitigation evidence. He complains, specifically, that trial counsel failed to (1) secure the presence of necessary witnesses; (2) utilize Powell's life history records effectively; (3) prepare defense witnesses; (4) present witnesses who would advance mitigation; (5) effectively cross-examine the State's witnesses; and (6) present evidence on mitigators. The court will address the allegations in turn.

1. Trial counsel's alleged failure to secure the presence of necessary witnesses.

Powell argues trial counsel should have secured the presence of Mary Brown and Sharon Grapes.

Ms. Brown is referenced in Powell's Amended Motion but is not mentioned in subsequent briefing.

The record reflects the defense had intended to call Ms. Brown to rebut testimony that

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[205] A3910.

[206] A3916-17.

Powell allegedly brandished a knife at Tykwan James. The State called Mr. James during the penalty phase to testify to Powell's uncharged criminal conduct in Delaware, a nonstatutory aggravator upon which the State sought to rely. Trial counsel subpoenaed Ms. Brown but she failed to appear. Trial counsel brought the matter to the court's attention and the court sent the Harrington Police out to locate Ms. Brown, which they did. However, it appears counsel did not subsequently arrange for Ms. Brown's transportation to court.

Powell's assertion that the failure to secure Ms. Brown's presence at trial was ineffective is conclusory and unsupported by the record. Rule 61 counsel did not call her as a witness in these proceedings. The record is devoid of any information regarding the nature of her testimony. The court will not speculate as to what testimony Ms. Brown might have presented.[207] Moreover, trial counsel have discretion in presenting mitigation evidence and there is no evidence to support a conclusion they did not properly exercise this discretion.[208] The court cannot conclude trial counsel were ineffective because they failed to secure the presence of Ms. Brown at trial.

Ms. Grapes was a family friend and neighbor to Joe and Tina during Powell's youth. She had agreed to testify at the penalty phase and trial counsel had arranged for her transportation to, and lodging in, Sussex County. However, on February 15, 2011, trial counsel learned Ms. Grapes was suddenly unwilling to testify. Ms. Grapes decided not to testify because her son, Antonio, who Powell allegedly pistol-whipped just prior to his flight from Maryland, and Tina had threatened her. The mitigation specialist's entry in the PDO Log entry highlights the turn of events:

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[207] *Flamer*, 585 A.2d at 756.

[208] *Id.* at 757.

> Received a frantic call from Roberta Mills. Per Ms. Mills, she got a phone message from Sharon Grapes stating that she would not come to [Delaware] to testify. She alleges that Tina has called her and threatened her. She says that her son has threatened her. She will "plead the 5th." Spent all day trying to contact Ms. Grapes many, many times. She did not answer either her cell or her home phone. The home answering machine was shut off....[209]

Needless to say, Ms. Grapes did not appear as previously agreed.

Powell now argues Ms. Grapes was a crucial witness and the failure of defense counsel to subpoena her to testify constituted ineffective assistance of counsel. The court disagrees. While Ms. Grapes' deposition given in these proceedings reveals that she could attest to the abusive environment in which Powell grew up and also to his underlying kind personality, this testimony would have been cumulative in nature. The court specifically found Powell's abusive upbringing and dysfunctional family background as mitigators.

Moreover, to the extent Powell argues trial counsel should have sought to secure an out-of-state subpoena for Ms. Grapes, trial counsel does not have an affirmative duty to subpoena a witness who is "available and apparently willing to testify."[210] Trial counsel were under the impression that Ms. Grapes would, in fact, appear in court to testify about Powell's upbringing and good character. Trial counsel learned Ms. Grapes would not be appearing when Ms. Grapes left a message for Ms. Mills, another witness who had agreed to transport Ms. Grapes to Sussex County. That message made clear that Ms. Grapes, due to threats made by Tina and her own son, Antonio, had no intention of appearing at trial and, moreover, that Ms. Grapes would be unable to be located by any authorities who sought to secure her presence in court. Finally, Ms. Grapes empathetically stated that, if dragged to court unwillingly, she would "plea the fifth": "I'm not

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[209] Defense Exhibit #13, at PCR172.

[210] *Bohan v. State*, 2012 WL 2226608, at *2 (Del. June 15, 2012).

helping anybody. I'm not doing it. I'm sorry. There is nothing I can do to help [Powell]."[211] Despite an emphatic about-face with regard to her willingness to assist in the presentation of Powell's mitigation case, trial counsel testified she tried to reach out to Ms. Grapes several times after receiving this message.[212] Trial counsel were not ineffective for failing to secure Ms. Grapes' presence at trial.

2. Trial counsel's alleged failure to utilize Powell's life history records effectively.

Powell also contends trial counsel failed to use Powell's life history records effectively. Powell's juvenile mental health records, pediatric records, CPS records, and educational records were admitted by way of the testimony of trial counsel's mitigation specialist, Ms. Bryant. Powell alleges, however, that "no witnesses ever testified about their contents" and trial counsel failed to call a single witness who had taught, treated or diagnosed Powell. Thus, Powell asserts trial counsel ineffectively left the responsibility of digesting the voluminous background records to the jury. The court disagrees that trial counsel were ineffective in the way in which they presented evidence of Powell's backstory to the jury.

First, and importantly, Ms. Tsantes, Mr. Johnson, and Ms. Bryant all testified at the evidentiary hearing that Powell had "put the word out" in Cumberland that he did not trust his attorneys and that he did not want anyone to cooperate with his defense team. Mr. Johnson testified he learned of this information from Powell, himself. Joe also told trial counsel Powell did not want his friends and family to cooperate with trial counsel. Ms. Bryant testified about her trip to Cumberland: "[O]nce I got there and started trying to make contacts and set up times, then

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[211] A6175.

[212] A6176.

I got a lot of folks that either didn't, you know, answer the phones or told me they were too busy or, you know, things like that. They were backpedaling."[213]

Despite several prospective witnesses' refusal to cooperate, the defense team secured the presence and testimony of family members and friends who were able to testify to the nature and extent of Powell's dysfunctional upbringing. In addition to live testimony from witnesses with first-hand knowledge, the jury also heard from Dr. Alizai-Cowan and Dr. Binks. Dr. Alizai-Cowan and Dr. Binks reviewed all of Powell's records prior to reaching their diagnoses. When testifying, Dr. Alizai-Cowan, in particular, repeatedly cited to, and elaborated upon, the records' contents. She testified social services were involved with the family from 1993-2005, with the first incident that triggered CPS involvement occurring when Powell was either five or six years old and the last incident occurring two weeks prior to Powell's eighteenth birthday. Trial counsel quizzed Dr. Alizai-Cowan on a number of specific incidents where CPS was called to the house. The first incident occurred when Powell's maternal grandmother slapped him, leaving a welt, and CPS was called in to investigate. Dr. Alizai-Cowan made note of the fact that a crisis intervention was scheduled in May of 2005 due to Powell's behavior and the problems the family was experiencing handling that behavior. The intervention was never held. Dr. Alizia-Cowan also testified that CPS removed Powell from his mother's custody at age eight. Powell's paternal grandmother punched him in the face, resulting in CPS involvement when Powell was twelve years old.

Additionally, the court observes that Dr. Victoria Reynolds, Powell's psychologist in these Rule 61 proceedings, testified that she felt Powell's mitigation evidence was "not fully

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[213] A7211.

developed."[214] She did not testify that it was not presented or investigated at all. In essence, Dr. Reynolds opined that the case could have been presented more effectively with the benefit of the knowledge obtained from trial counsel's investigation and the additional time Dr. Reynolds had to prepare.

Finally, both the State and the defense in their closing arguments encouraged the jury to review the records in evidence. The State said, "There isn't time to go through each and every incident that's contained within those records. You will have those records. I urge you to look at them, to go through them."[215] Further, the State conceded, "We have heard of the defendant's home life and his family history. There is no doubt that he had a *terrible* childhood. His family is, at best, dysfunctional."[216] In trial counsel's closing statement, Ms. Tsantes referred to, and displayed for th jury, several of the CPS records. Ms. Tsantes emphasized that the jury saw only "glimpses" of the records and pointedly noted that the entire record was available for the jury to peruse.[217]

The fact that both the State and the defense cited the CPS records highlights an interesting point: these records cut both ways for Powell. On the one hand, the records document the physical and emotional abuse he suffered at the hands of his family; on the other hand, they document the physical and verbal abuse he doled out to others.[218] Trial counsel was not

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[214] *See, e.g.*, A7283.

[215] A4453.

[216] A4455 (emphasis added).

[217] A4463.

[218] *See Burger v. Kemp*, 483 U.S. 776, 793-94 (1987) (holding counsel's failure to mount an all-out investigation into defendant's background in search of mitigating circumstances was

ineffective in their presentation of Powell's life history records.

3. Trial counsel's alleged failure to prepare defense witnesses.

Next, Powell complains trial counsel failed to prepare defense witness, Dr. Binks. Powell cites numerous alleged ways in which Dr. Binks' testimony was undermined on cross-examination. This claim must fail. This allegation is a prime example of "Monday morning quarterbacking." A rhetorical question presents itself: Who is unable to reflect on a trial performance and not find fault with some aspect of it? This reality is especially true when counsel presents a novel theory and its legitimacy is hotly debated.

Not only is the claim conclusory and unsubstantiated, Powell is unable to demonstrate prejudice. The trial judge specifically found evidence supporting Powell's mental health mitigator.

4. Trial counsel's alleged failure to present witnesses who would advance mitigation.

Powell also alleges trial counsel failed to present witnesses who would advance Powell's mitigation case. Specifically, Powell alleges counsel's decision to call Dr. Alaiza-Cowan was "unfathomable" and that Dr. Gur's presentation was "completely ineffective."

Powell attests Dr. Alizai-Cowan's diagnosis of anti-social personality disorder was not evidence in mitigation but, to the contrary, supported the State's case for a death sentence. Powell also cites the strained relationship between Dr. Alzai-Cowan and Powell as a reason not to call the doctor as a mitigation witness. The court fails to see how trial counsel were remiss for

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supported by reasonable professional judgment when the evidence not presented at trial could be used as mitigation but also to support the prosecution's theory of the case: "On one hand, a jury could react with sympathy over [the defendant's] tragic childhood.... On the other hand... the prosecution could use this same testimony.... to emphasize that it was this same unpredictable propensity for violence which played a prominent role in the death of [his] victim.").

calling Dr. Alizia-Cowan to the stand. Counsel are not entitled to, much less required to, "shop around" for a mental health expert and Powell is not constitutionally entitled to a mental health expert for whom he has respect or admiration. As Judge Silverman held in *State v. Taylor*, "Trial counsel's hires were objectively reasonable, and trial counsel were not required to find 'the best' psychologists and psychiatrists available."[219] Dr. Alaiza-Cowan opined as to Powell's mental health limitations. She testified to his family background and history of abuse. Trial counsel's objectively and professionally reasonable mitigation strategy was to show the jury that Powell was the product of a dysfunctional family background. They succeeded. Any claim that Dr. Alaiza-Cowan should not have been called is conclusory and unsubstantiated. Rule 61 counsel have not indicated how another psychiatrist could have objectively testified about mitigation without needing to address Powell's diagnosis of anti-social personality disorder. Moreover, Powell is unable to show an "effective" presentation would have resulted in a different outcome: the sentencing judge found Powell's mental health diagnoses were mitigators.[220]

Powell posits that trial counsel's presentation of Dr. Gur was "completely ineffective." In support of this claim, Powell complains Dr. Gur's testimony "clearly did not have any effect on the judge."[221] This claim is conclusory and unsubstantiated. Powell criticizes trial counsel's performance but does not offer any evidence as to how another approach could have fared better with the jury. To reiterate, Powell has not provided, or even argued, to this court what

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[219] 2010 WL 3511272, at *20 (Del. Super. Aug. 6, 2010), *aff'd*, 32 A.3d 374 (Del. 2011).

[220] The sentencing judge did not give the diagnoses of ADHD, bipolar II disorder, panic/anxiety disorder, cannabis abuse and PTSD much weight; however, he did give the diagnosis of a cognitive disorder "more significant" weight.

[221] Motion, at 113.

information could have been uncovered or produced that would have resulted in a different line of questioning of Dr. Gur that would have changed the jury's recommendation of seven to five in favor of death. That a fact finder may reject testimony does not render trial counsel ineffective for introducing it. The court notes Dr. Gur's brain deficit testimony was hotly disputed by the State's expert. Trial counsel were not professionally or objectively unreasonable in presenting Dr. Gur's testimony to the jury.

5. Trial counsel's alleged failure to cross-examine the State's witnesses.

Powell then turns to trial counsel's allegedly deficient cross-examination of the State's expert witnesses, Dr. Thomas Swirsky-Sacchetti and Dr. Stephen Mechanick.

As above, Powell did not produce these witnesses at the evidentiary hearing and conduct the allegedly missing cross-examination. Nor did Powell offer other evidence in an attempt to prove the allegation of a deficient cross-examination. As such, these conclusory allegations may be summarily dismissed.[222]

A final comment is required with regard to Rule 61 counsel's allegations and argument as to the effectiveness of the presentation of the brain disorder/cognition deficit evidence and the failure of trial counsel to cross-examine in an effective manner the State's witnesses who disagreed with the defense experts. This evidence was in great dispute. The medical and scientific studies in this field were conducted and published fairly recently. It is not unusual for the experts to disagree. Rule 61 counsel have not presented any evidence to this court to lead it to the conclusion trial counsel were ineffective in their efforts to present this theory nor to defend it. The present attacks are mere criticisms made without any supporting evidence.

[222] *Flamer*, 585 A.2d at 755 (summarily rejecting the claim of improper cross-examination for failure to present missing evidence).

6. Trial counsel's alleged failure to present evidence on mitigators.

Powell claims mitigators were never presented to the jury; specifically, Powell contends evidence of the following should have been introduced: (a) Powell suffers from substance abuse issues without the benefit of treatment; (b) Powell's conditions of incarceration are extremely harsh; and (c) future dangerousness. This complaint is without merit.

Trial counsel candidly admit in their affidavits that they did not present evidence on the mitigators now suggested by Rule 61 counsel. Trial counsel made a strategic trial decision to avoid introducing evidence of the harsh conditions Powell suffered at JTVCC: counsel was concerned that doing so would open the door for the State to bring in prison guards who would testify to Powell's alleged behavior warranting such treatment. Trial counsel would have no way to refute such evidence without putting their client on the stand and counsel could not control whether Powell would testify or how he would testify. Additionally, trial counsel consulted with colleagues and learned that an attempt to introduce evidence of harsh treatment in a New Castle County case had "backfired in penalty."[223] Trial counsel made an informed decision not to introduce evidence of the harsh prison conditions and the court cannot find fault with their reasoning.

As to the other alleged mitigators, substance abuse without the benefit of treatment and future dangerousness, there was no evidence as to these issues introduced at the evidentiary hearing in these proceedings. This fact renders these claims conclusory. The court will not speculate as to what evidence trial counsel could have produced to support the finding of these two mitigators. The claim as it pertains to those two alleged mitigators must be summarily

[223] Defense Exhibit #2, at PCR60.

dismissed.

Trial Counsel's Failure to File for Recusal

Powell also argues trial counsel were ineffective for failing to file a motion or motions to recuse the trial judge and that the failure to do so was objectively unreasonable. He alleges trial counsel should have filed a motion to recuse based upon the trial judge's "comments [made] during office conferences evincing an appearance of partiality."[224]

Judges must be impartial; this concept is "a fundamental principle of the administration of justice."[225] The Delaware Code of Judicial Conduct requires a judge to recuse himself when "his impartiality might reasonably be questioned...."[226] Powell's argument was fleshed out by way of trial counsel's testimony at the evidentiary hearing. Rule 61 counsel argue the following situations raised concerns about the trial judge's impartiality warranting the filing of a motion to recuse before trial:

(a) The trial judge made an inappropriate and judgmental comment in September 2009 regarding Powell's guilt;

(b) The trial court's consideration of an interrogatory to be sent to the jury if Powell was convicted of murder to determine whether the jury found Powell had acted intentionally or recklessly; and

(c) The trial judge made comments about Powell's failure to cooperate that are alleged to denigrate his then-pled mental illness defense.

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[224] Motion, at 128-29.

[225] *Los v. Los*, 595 A.2d 381, 383 (Del. 1991).

[226] Delaware Judges' Code of Judicial Conduct R. 2.11.

In addition, Powell argues the trial judge made comments during the course of the trial that served as a basis for filing a motion to recuse. The specific allegations will be discussed in turn.

(a) The trial judge's alleged comment pre-assignment.

Mr. Brendan O'Neill, the Public Defender, testified he remembered the allegation that another attorney with the PDO, Stephen Callaway, overheard the trial judge make a statement that reflected "some pre-judgment of the case"[227] prior to the assignment of a trial judge in this case. Mr. O'Neill could not say what, exactly, this trial judge was alleged to have said but Mr. O'Neill contacted Mr. Callaway. Mr. Callaway told Mr. O'Neill the trial judge did not make any such comment and, in fact, he "had never heard a remark from Judge Graves that reflected any pre-judgment...."[228] As a result, the matter was dropped. This court is flummoxed as to how trial counsel could have performed in an objectively unreasonable manner by failing to file a motion to recuse based upon a comment allegedly made and for which no proof was, or has been, proffered. This claim is unfounded.

(b) The trial court's consideration of a special interrogatory.

This judge did suggest the court send an interrogatory as to Powell's state of mind to the jury in the event Powell was found guilty of murder.[229] The murder counts alleged a reckless state of mind. Because a reckless state of mind is proven if the jury determines the defendant's conduct was intentional, this judge thought an interrogatory would be helpful in knowing what the jury concluded: culpability is different based on a defendant's state of mind. The defense

[227] A6448.

[228] A6451.

[229] This suggestion is also addressed in this court's decision on Rule 61 counsel's motion to recuse. *State v. Powell*, 2015 WL 10767325 (Del. Super. June 26, 2015).

objected and the interrogatory was not given.[230] The court remains of the opinion that an interrogatory may be helpful in the right circumstances.[231] Nevertheless, because defense counsel objected, the interrogatory was not given and there is no basis for Powell's assertion a motion to recuse should have been filed based upon the discussion about the interrogatory.[232]

(c) The trial judge's comments with regard to Powell's mental health defense.

The trial judge and counsel met many times in office conferences leading up to the trial and Powell now argues that a recusal motion could have been made based upon an appearance of bias due to comments made by the trial judge in some of these conferences. On September 21, 2010, trial counsel and this judge met in an *ex parte* office conference. At some point, this judge, quoting a popular movie, remarked, "Chump don't want no help, chump don't get no help."[233] Although on its face, this comment may be interpreted as dismissive or skeptical of Powell's mental health defense, the background and context of this quote show otherwise.

Ms. Tsantes was immediately assigned to Powell's case following his arrest on September 1, 2009. Ms. Tsantes brought a psychiatrist on board who was able to interview Powell within weeks. Powell was indicted in November and this judge assigned to his case in

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[230] Ultimately, the guilty verdict for resisting arrest with force shed light on this matter, as Powell was found guilty of resisting arrest by intentionally shooting at the police.

[231] Had an interrogatory been given in the Lamont Norman murder trial as to Norman's insanity defense and the jury informed the court the insanity defense was rejected only because of Norman's voluntary intoxication, that finding would have been very beneficial to Norman. Regrettably, no interrogatory was given in that case.

[232] Transcripts of the office conferences where the possible use of a special interrogatory was discussed and a letter from the trial court to counsel addressing the same are attached hereto as Exhibit 1.

[233] The quote is taken from the 1980 movie "Airplane!".

late December 2009. On January 7, 2010, a scheduling order was entered with an October 11, 2010, trial date. The court scheduled an office conference for May 20, 2010, to discuss any psychological or psychiatric issues. That date came and went with trial counsel informing the court they were still working on the psychiatric and/or mental illness defense. As noted in this court's July 22, 2010, letter to counsel, since May 20, the court had set two additional dates for the defense to take a formal position on a mental illness defense and the defense basically said, "no can do."[234]

More deadlines passed and eventually the case had to be continued. Ms. Tsantes testified at the evidentiary hearing that, although this judge did not know this fact at the time, she knew the October trial date was never going to happen due to scheduling issues.

I remarked previously to counsel, "This was the summer of our discontent." Powell was difficult and uncooperative with the entire defense team. Counsel were pursuing a brain disorder defense. They initially filed a notice of an insanity defense but subsequently withdrew it. Because of the novelty of the brain disorder defense and the difficulty in identifying experts and securing funding for the same, the case stumbled along and a new trial date was set for January 2011. However, trial counsel's problems persisted.

On August 30th and 31st, 2010, two office conferences took place that Powell now cites as the basis for trial counsel to file a motion to recuse. Powell identifies the following areas of concern: the trial judge threatened a contempt citation, the court alleged "foot dragging" by defense counsel, the judge "voiced his extreme displeasure that trial counsel were a part of the defense team," and the judge demanded trial counsel detail their efforts in securing defense

[234] Trial Docket Entry #90.

experts.[235]

The court held many office conferences between May 20, 2010, and August 31, 2010. The defense had a deadline of May 20, 2010, pursuant to the scheduling order entered in January of 2010, to notify the State and the court of any mental health defenses. As noted, in January of 2010, Ms. Tsantes had been on the case since September 2, 2009, and a psychiatrist had been involved since mid-September of 2009.

On May 20, 2010, trial counsel advised the court they were not yet prepared to identify their position on a mental illness defense. The court issued new deadlines. On June 30, 2010, the defense reported they were still not in a position to identify their position on a mental health defense. Counsel gave reasons, including the fact that the end of the budget year was approaching and financial pressures caused delays in funding for the necessary tests and experts. The court said, "I sense foot dragging. I sense that you have never liked the October trial date."[236] Trial counsel reported they were not foot dragging and that they were having difficulties with witnesses. The summer of our discontent continued with many conferences; the defense missed more deadlines.

On August 30, 2010, the last deadline the court had set for the defense to identify any mental health defense, the defense filed a continuance request and another office conference was held. Trial counsel detailed the difficulties they were encountering in lining up their expert reports and obtaining Powell's mental health records from Maryland. The court recognized the probability that the trial date would be "bumped." Frustrated, the court commented on the issues

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[235] Motion, at 126.

[236] Trial Docket Entry #101 (June 30, 2010, Office Conference Transcript), at 12.

with scheduling around two high profile cases; one, Powell's capital case, and the other, the trial of the pediatrician Earl Bradley. The court repeated its concern that trial counsel were also assigned to the Bradley case. The court stated, "I'm not throwing bricks at anybody right now, but it's all too convenient to say, well, we need more tests."[237] The court requested counsel return the following day to explain why the issues raised had not been resolved earlier.

The parties met again on August 31st, along with Mr. O'Neill, who presumably made an appearance to support his team and to weigh in on the matter of potential sanctions. At that time, the court made the following comments:

> THE COURT: Another date was chosen. You weren't able to do that. Another date was chosen. You weren't able to do that. Another date was chosen. I don't know how many conferences. We went through the summer, from May until now. I think August 11th or August 12th you filed a mental illness defense that the Court has been asking you to, basically, fish or cut bait since May 20th. The concerns of the Court is, basically, that it appears that is foot dragging. Whether there is or not, there seems to be smoke.

Later, the court commented:

> THE COURT: I never accused you all of going out there and trying to create a situation. What my concerns are, is that when we set a scheduling order, okay, there are certain expectations to be met. And, quite frankly, we very well may talk about this later. I told you yesterday, I think it was a mistake for you all to be on the Bradley case, too.
>
> I don't know how you have, Brendan, I don't know how you have two lawyers on two high-profile cases, like Cooke and Capano, or any of the others and having them preparing for both simultaneously. This may be a byproduct.

The court then held separate teleconferences (without the prosecutors present) with two of the defense experts to obtain "real" deadlines for final reports. Based on those representations, the court decided a January trial date was viable. The court did not order sanctions against trial counsel.

[237] Trial Docket Entry #330 (August 30, 2010, Office Conference Transcript), at 18.

Trial dates and dates contained in scheduling orders are not to be treated as guidelines but as dates set firmly in stone. When trial counsel repeatedly failed to comply with the scheduling order, the court was within its rights to require defense counsel to explain the missed deadlines that resulted in the need to move the trial date back.

Finally, as to the court's alleged "extreme displeasure that trial counsel were part of the defense team," the record does not support this claim. Rule 61 counsel admitted as much at the December 4, 2015, hearing.[238] The court takes such comments seriously and, when they are baseless, frowns upon the use of such hyperbole by members of the Delaware Bar.

The brain disorder defense required Powell to be transported to medical facilities to have MRIs and other scans conducted. Trial counsel encountered difficulty in finding a facility willing to conduct the testing on a prisoner charged with murder and willing to take the necessary precautions required by DOC. Later, the defense experts needed additional scans; more time passed.

On September 21, 2010, an *ex parte* office conference took place with defense counsel to discuss Powell's behavior and his refusal to be transported for testing.

> THE COURT: All right. I have you both here because it pertains to the testing, but it is nothing that is confidential. Mr. Powell refused yesterday and to a degree [broke] bad – if you give that, one each for you all. Those are the copies of the -- if you remember, I told them to document. They document everything now anyway. They moved him to the infirmary for the purposes of diet or whatever was necessary for the PET scan.
>
> MR. JOHNSON: Right.
>
> THE COURT: And they had some incidents with him which culminated in some threats. Then he took paper – this is in the report – toilet paper and put toothpaste on it. Then he got up on a chair and stuck it on the camera so that they could not

[238] December 4, 2015, Transcript, at 75-77.

see in his cell. He was in a solitary infirmary. So, they had to muster, but he did not physically fight them.

That is the refusal on the front page, Stephanie. The refusal as to the CAT scan too. He refused it all So, the only thing I sent you – I did not have this information yesterday.

I just got a phone call yesterday saying that we have a problem. He is refusing. That is well documented, and he is – I will send you what we have when we finish documenting it. That came in today.

You know, I am not looking for comments. It is --

MR. JOHNSON: I understand, but I can tell you that we spoke with the warden and got an expedited kind of emergency meeting. I am going to see him at 6:00 o'clock tonight. I will find out further but -

THE COURT: You know, when the cards are dealt to you, you got to figure out what hand you have. But, this is disruptive of your timetable and disruptive of my timetable. My timetable is fixed. He is making life either miserable for you all or miserable for his doctors.

Instead of just handing it over, I wanted to hand it over to you with the – you all know, and he knows that the clock is ticking. If they ultimately do not get their opportunity for an exam and whatever tests their doctors need, then you have a problem. He will deemed to have abandoned that defense.

MR. JOHNSON: Well, I guess there is nothing for me to say.

THE COURT: Yes. I mean –

MR. JOHNSON: I got a --

THE COURT: I am the dealer today –

MR. JOHNSON: All right. And you know what concerns me is that they called on [sic] the PET scan immediately. That was cancelled. If they had called on the MRI to be cancelled and I talked to him at 6:00 o'clock –

THE COURT: Well, they did not cancel it, he refused. Do you have that sheet there? That is a refusal of treatment. It says, "PET scan and MRI of the brain for trial purposes."

MR. JOHNSON: That is just the PET. He wasn't having the MRI done.

THE COURT: He was going to have an MRI later.

MS. TSANTES: He didn't need any prep for it, Your Honor. Part of the problem is that we strategically scheduled the MRI to take place first to have a certain comfort level in the client's ability to cooperate with that procedure. There is no prep. He had been to the facility before. He knew all about it when we scheduled the PET scan, that appointment date got changed for whatever reason –

THE COURT: Security.

MS. TSANTES: For whatever reason, Your Honor.

THE COURT: You all knew that. They had the right to change it. We talked about that the first time. Because for security purposes, they do not want to walk into an ambush.

MS. TSANTES: I think part of –

THE COURT: You do not have to comment. It is your problem. It is his problem. It is not my problem right now. It is not the State's problem right now.

MS. TSANTES: Well, what we would like to make sure happens when Mr. Johnson and Ms. Bryant meet with him this evening, is that he cooperate with the MRI and get transported whatever date they have that scheduled.

THE COURT: Well, you know, I will wait to hear from you all. But, you know, I hate to use this expression in this situation because it is so grave, but it seems to be applicable, "Chump don't want no help; chump don't get no help."

If he fights them and gives them grief –

MS. TSANTES: He's mentally ill, Judge.

THE COURT: You know what? I have talked with him. He is articulate. He has written me letters. It seems to me that he is frustrated. He did not behave well here. Per the allegations, there were threats of violence. Those are your allegations. It is your baby now.

MR. JOHNSON: Okay.

THE COURT: If you want to come back with another order, I will consider another order. I will ask the warden to cooperate again. What I am saying is, October 25th and November 5th, those dates are still in line.

MR. JOHNSON: Okay.

THE COURT: Okay.

MS. TSANTES: In terms of this document that you have handed to us –

THE COURT: It is not going into our file. They have a copy because it is confidential. It is part of the Department of Corrections's records because they have to do that to protect themselves. You have a copy. This will not go into the file. It will go into my chamber file.

MR. JOHNSON: Thank you.

THE COURT: Thanks for coming over on such short notice. I think it is important to keep the ball rolling.[239]

The court still stands by its comment in light of the reason for the conference. My comment, "[H]e is frustrated," came on the heels of Ms. Tsantes' conclusory opinion that he was mentally ill. My comment was not a rejection of any mental illness defense or any mental health mitigation. Therefore, taken in context, the above-cited comments did not give rise to a reason for trial counsel to file a motion to recuse. The court noted another order would be signed and the court would ask for cooperation from the DOC Warden but the scheduling order dates were to be met.

As mentioned previously, the notice of a mental illness defense was later withdrawn.

Powell also cites an email from Marc Bookman, a national expert in the area of capital defense law. Mr. Bookman suggested that a motion for recusal be filed based upon the trial judge's comments belittling Powell's mental health defense. When the court asked counsel in these proceedings to identify any comment in the record to support Mr. Bookman's assertion, Rule 61 counsel conceded nothing could be found.[240] Every conversation with counsel was on the

[239] A4725-30.

[240] Trial Docket Entry #458 (Letter from Rule 61 counsel to this judge stating, "I have reviewed the office conference transcripts ... and I cannot find any instance in the record in which

record. Any claim based upon Mr. Bookman's email is unfounded.

Powell also argues that a recusal motion should have been filed based on Ms. Tsantes's comments to the court on December 2, 2010.

> MS. TSANTES: There is one more issue, Your Honor, that perhaps we should discuss on another day.
>
> In reading Your Honor's letter again of August 2nd, I realize that we neglected – were not filing something specifically, but that's why the defense specifically is objecting strenuously to Your Honor's consideration of a special interrogatory about whether or not this case is reckless or intentional, especially in light of the proposed statutory aggravating factors by the State. This isn't something that the State is asking for, this is something that the Court initiated.
>
> Quite frankly, Your Honor, with all due respect, it feels like a third prosecutor is in the room by even proposing this. I know of no statutory case law, anything that would suggest that our Legislature has given Your Honor the authority to do that special interrogatory.
>
> THE COURT: Well, they get the instruction. That's the standard instructions, okay, which if you go to 255 or 253, whatever it is, the statute says that if you prove intentional conduct, you prove reckless.
>
> MS. TSANTES: Well, that's jury –
>
> THE COURT: You have raised a constitutional issue. You raised a constitutional issue with me, that reckless conduct cannot be used. And I presume if there were bad consequences in the guilt phase, and if there were bad consequences for Mr. Powell in the ultimate outcome, that [sic] that would be an appeal issue. And the finder of fact, the jury, I think that would – that is important.
>
> It goes back to some other cases that we have had where things, one way or the other, would have been a lot clearer at the end of the case in the decision-making process.
>
> MS. TSANTES: But in this case, Your Honor, this is the State's Attorney General's Office, who is the charger of the case, and they have gone before a *Grand Jury* and sworn that this murder was reckless conduct. I know of no reason why the Court should now become the charger, you know, the one who decides, well, the State, you didn't charge it quite good enough, it should have been charged as just straight intentional murder of Chad Spicer, not recklessly killing someone during the lawful performance of their duties.

Your Honor ridiculed the brain impairment information.").

Your Honor is now injecting your own thoughts as to how this case should have been charged. I agree with you, Your Honor, that there is that statutory language that says that the State has to prove intentional conduct. It also means, the definition of reckless and criminal negligence, that you can prove a higher standard.

But I know of nothing in this particular case or statutory authority that allows Your Honor to ask for that special interrogatory, specifically since the State hasn't asked for it, they are not alleging it in any of their statutory aggravators that this is intentional conduct. They have all along in their indictment alleged this is a reckless killing.

And quite frankly, Your Honor, you know, given that Your Honor is the ultimate decider of life or death, it seems to me Your Honor may have already prejudged this case and --

THE COURT: Well, I take exception to your remarks that I prejudged the case, Stephanie. I don't know anything about the case, other than what you all have told me, and I don't know anything about your client. And I know what has been indicted is per the statute.

MS. TSANTES: All right.

THE COURT: So if the State chooses not to, it won't go in. If the State desires that, it will go into the instructions if the State desires that. The instruction – the reason that came up is because I am working on, and have been working on, instructions in the guilt phase and in the penalty phase, as is my responsibility. You do not wait until the end of the case to start doing that. And that's one of the things that is normally given in those circumstances. And if the facts don't fit, that instruction won't be given.[241]

This conversation is a follow up to other office conferences where the special interrogatory was discussed. I have made clear my reasoning to consider an interrogatory. Knowing this jury's finding as to Powell's state of mind would be helpful to any reasonable sentencing judge. If reckless, it would help Powell; if intentional, it would not. As stated earlier, this issue was discussed and, ultimately, the defense prevailed and the interrogatory was not given.

The exchanges outlined above are representative of those that take place when attorneys,

[241] A4843-47.

their clients, and presiding judges do not see eye-to-eye. Ms. Tsantes' remarks were probably out of line but accepted by the court as zealous advocacy from an attorney who strongly objected to an idea proposed by the court. Per her testimony at the evidentiary hearing, Ms. Tsantes made clear she never wanted this trial judge to be assigned to this case. This fact, the problems leading up to trial, and the court's desire to keep to the scheduling order perhaps were the source of her frustration. But the communications between counsel and the court were never grounds for recusal. If the contents of counsel's remarks to a judge can that easily create grounds for recusal, judge shopping would become commonplace.

Finally, Rule 61 counsel allege that this trial judge's comment about Dr. Gur's appearance was another reason to file a motion for recusal. During Dr. Binks' testimony for the defense, the judge made the following remark concerning Dr. Gur, the neuropsychologist who would be testifying next.

> THE COURT: All right. Are we ready? Did you find the report that you needed?
>
> MS. TSANTES: We have provided it during the break, Your Honor.
>
> MR. COSGROVE: Can we approach, Your Honor?
>
> (Whereupon, counsel approached the bench and the following proceedings were had:)
>
> THE COURT: Before we get started, so I can make light of the moment and break the tension a little bit, there is a new person in the courtroom. Is that one of the testifying doctors? He looks exactly like a brain doctor should look.
>
> MR. JOHNSON: He should be in a lab.[242]

This exchange took place immediately following a recess that was necessary because the defense had failed to turn over to the State two reports Dr. Gur relied upon in authoring his

[242] A4106.

report, upon which Dr. Binks had just testified he had relied when reaching his expert opinion. The court had admonished defense counsel and tension was palpable. Dr. Gur looked more like Albert Einstein in the iconic photograph of him than Albert Einstein, himself. The court's comment in no way denigrated Dr. Gur.

Trial counsel also testified that the trial judge's comments, seeking to understand how the experts' opinions related to Powell's actions on September 1, 2009, gave rise to grounds for recusal. As has been noted repeatedly herein, the trial judge found the defense's mental health experts' testimony established mitigators. Powell did not suffer prejudice based upon the court's expressed concern that the testimony did not "explain away" Powell's behavior giving rise to the death of Officer Spicer. The experts testified Powell had a diminishing IQ and trouble responding appropriately in flight-or-fight circumstances. Powell acted in an aggressive fashion when setting up the botched robbery and in shooting at Adkins. These intentional acts ultimately resulted in the death of Officer Spicer.

I find there was no legitimate basis for trial counsel to have filed a recusal motion. Based on Ms. Tsantes' testimony that she did not want this judge assigned to the case, I am sure that trial counsel would have jumped at the chance to file such a motion had they had any basis for the same. At the evidentiary hearing, Ms. Tstantes testified she entertained filing a motion to recuse for over a five month period of time. The fact that she never finished, much less filed, a motion to recuse reflects the fact trial counsel must have concluded they did not have any basis to do so. Therefore, trial counsel's performance was not objectively unreasonable and Powell fails to satisfy the first prong of the *Strickland* analysis.

In addition, applying the law as set forth in the June 26, 2015, decision on this same

issue, I find no prejudice and the second prong of *Strickland* is not satisfied.

As a matter of subjective belief, I was and am satisfied that I could preside over this case free of bias or prejudice to Powell and his counsel. Judges realize defense counsel have difficult and demanding jobs, especially in capital cases and judges should have thick skin when frustration boils over.

No reasonable observer of the proceedings could conclude the court was biased against Powell. Powell has taken snippets from the many office conferences held in this matter and attempted to show bias. When a reasonable observer looks at the entire record and the efforts of the court to assist defense counsel, I am satisfied that observer would conclude the court did its best in keeping the playing field level.

CLAIM XII: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT AVAILABLE MITIGATING EVIDENCE IN VIOLATION OF POWELL'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND HIS ARTICLE I, §§ 4, 7, AND 11 RIGHTS UNDER THE DELAWARE CONSTITUTION

Powell next complains trial counsel conducted a "rather meager investigation" in developing a mitigation case. Powell argues: (1) the witnesses who testified did not advance a theory of mitigation; (2) trial counsel failed to explore and document Powell's social history; and (3) thirty-four identified areas of mitigation were not, but should have been, presented to the jury. Powell asserts trial counsel's failure to develop further and present effectively a mitigation case was objectively unreasonable and prejudiced Powell. These three areas of inquiry overlap.

In his Motion, Powell lists fifty-two "key individuals" trial counsel failed to contact and interview in preparation for the penalty phase. At the evidentiary hearing, Powell presented the testimony of a total of five of these fifty-two identified individuals.[243] Altogether, twelve lay witnesses testified at the evidentiary hearing: Larry Banks, church mentor; Jessica, Powell's older half-sister;[244] Tifani Fisher, Powell's former babysitter; Ms. Grapes, family friend; Dr. Steven Hartsock, family counselor; Felisha Hewlin, friend; Rose Hughson, landlord; Sandra Lew, maternal grandmother ("Sandy"); Nicole Meade, Powell's younger half-sister ("Nicole"); Candice Miller, teacher; Taunia Phillips, friend; and Marcus Trimble, cousin. All of these witnesses testified via depositions taken in Cumberland, Maryland.

[243] Clearly, Rule 61 counsel learned more about what these individuals could contribute in the intervening months before the evidentiary hearing. Nevertheless, the fact that such a bald criticism is leveled against trial counsel and then, presumably, discovered not to be grounded in fact demonstrates how difficult it can be to locate helpful witnesses. Trial counsel labored under a scheduling order and on behalf of an uncooperative client. Rule 61 counsel had no such constraints.

[244] Jessica was a mitigation witness at Powell's trial.

Mr. Banks testified he ran a mentoring program for at-risk youth through his church and in which Powell was active for a period of time. Powell was "rough" when he started the program but eventually improved and became a mentor. At age fifteen or sixteen, he stopped participating in the program.

Jessica testified to their mother's violent temper, as she did at trial. She elaborated on specific incidents of physical violence between Tina and her children. She described a life of poverty, neglect, and constant drug use. Jessica also testified that all the children would physically fight with Tina. Jessica detailed sexual abuse she suffered at the hands of Tina's boyfriend.[245] She reiterated that Powell is really good with children and is a "big softy." Jessica described an incident that occurred when she was eleven or twelve years old and in charge of babysitting a neighbor's children. One of the children was found dead on the railroad tracks and Jessica was arrested in connection with the child's death. Jessica testified she was uncomfortable testifying at Powell's trial because Tina was present and "she'll hold a grudge."[246]

Ms. Fisher testified she used to babysit Powell and she had known Joe was abusive toward Powell. She had not witnessed any violence but she saw bruises and she heard yelling. Ms. Fisher stated she saw Powell suffer the same type of abuse at Tina's hands. Ms. Fisher was with Powell when he was stabbed at a night club in 2008. Ms. Fisher described the incident thusly:"[Powell] was drunk. He was belligerently drunk. ... He went up to the bar to get a drink and there was a girl that's also the bartender at [another bar] there. She said no. The boyfriend

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[245] Jessica told Powell about this abuse some time after he was incarcerated for the death of Officer Spicer.

[246] A7041.

was there, and he stabbed [Powell]."[247] Ms. Fisher took Powell to the hospital where he received treatment. The man who stabbed Powell was, according to Tina and other family members, "some bad guy" and these family members told Ms. Fisher "not to give their correct information because those people will be after me...."[248] Powell left the hospital against medical advice after "those people" showed up there, looking for him. Ms. Fisher took him in for approximately two weeks before he returned home to Tina and Sandy's home. Ms. Fisher also revealed Powell was very sweet to her and her family.

Ms. Grapes, a family friend, had been contacted by the defense team and had been prepared to testify on Powell's behalf during the penalty phase. Ms. Grapes testified she did not appear at trial because Tina had threatened to beat her if she went. The PDO log cited, *supra*, includes Ms. Grapes' communication to the defense team at the time of trial. That communication included a reference to threats made by her own son. Ms. Grapes described Tina and Joe's relationship as rocky and their fights laced with profanity. She detailed the horrific language Tina would use to refer to Powell when he was a child. Ms. Grapes also detailed an incident where a child Jessica was babysitting was run over by a train and killed. She described Powell as distraught when he found the young child and also when his sister was arrested in connection with the incident. Ms. Grapes' son, Antonio, and Powell were best friends and inseparable. Powell would help Ms. Grapes handle the daily care of her brother, Jimmy, after he suffered brain damage as a result of a beating in May of 2008. Powell would help with the lifting and moving of Jimmy and with changing his diapers. Ms. Grapes testified Powell provided this

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[247] A6699.

[248] A6701.

care to Jimmy for about a year. Ms. Grapes spoke with a member of the defense team "months" before trial and she committed to testifying on Powell's behalf.

Dr. Hartsock testified he is a clinical social worker who saw Powell for play therapy for approximately ten to twenty sessions when he was in elementary school. He was unable to locate any records regarding Powell. However, he recalled that Tina and Joe would come in and complain about each other. He acknowledged Tina seemed resistant to the concept of therapy and was hostile toward Dr. Hartsock. Dr. Hartsock does not recall Powell having anger issues but, rather, impulsivity issues.

Ms. Hewlin is a friend of Powell's and is three years older than him. She met him when she was approximately thirteen years old. Ms. Hewlin testified Powell had a toxic relationship with Tina. She witnessed Tina hit Powell when he was approximately sixteen or seventeen years old. Tina constantly verbally abused him. Powell was picked on in school for his clothing, his hygiene, and his racially mixed background. Ms. Hewlin testified Powell had anger outbursts, like anyone does, but that he did not act out in a violent manner. She sees Powell as a big teddy bear and very protective of women. At some point, Powell confided to her that something sexual had been "done to him" when he was eight or nine years old and she suspects that fact may be why he is so protective of women. Powell was very good with her children. Ms. Hewlin knew Powell dealt and used drugs. Interestingly, Powell informed her via a letter from prison that he had to use a private investigator to find her address.

Ms. Hughson testified she was a former landlord for Tina when Powell was between the ages of five or six and seven or eight. Tina and Joe's relationship was very volatile. Ms. Hughson could hear Tina yelling at her children and she called the police on several occasions. Ms.

Hughson testified Tina had a particular dislike for Powell and called him terrible names. Because men were in and out of the apartment, eventually Ms. Hughson had to evict her.

Sandy, Powell's maternal grandmother, testified. She called CPS many times on Tina because of her violent temper. Jessica came to live with Sandy in order to get away from Tina. Tina left Nakota in Sandy's care when Nakota was about eight years old. Tina told Powell she did not love him because he was black. Sandy testified all of Tina's children have problems in their adult lives and have a terrible temper like their mother. Sandy has not traveled to Delaware to see Powell. She did not meet trial counsel but believed she might have received a phone call from someone on the defense team.

Nicole, Powell's younger half-sister testified. She portrayed Powell as a kind-hearted and strong-willed person. Nicole testified that Tina's various kids moved in and out of the house a lot as they grew up. Nicole started fighting at age eleven and was kicked out of school in the eleventh grade for fighting. Powell has written to her from prison but she has not replied because it is too difficult for her to do. As she is six years younger than Powell, Nicole was not yet eighteen when Powell went to trial.[249]

Ms. Miller, one of Powell's former teachers, was also deposed. She testified that Powell was on an "emotional behavioral support" track ("EBS") and was performing well enough to be placed in her class, a "regular" class. She and Powell had an informal deal that, if he was well-behaved, he could stay in a "regular" class the following year. In April, Ms. Miller learned that Powell would be placed in a special education class the next year. Ms. Miller thought this

[249] Rule 61 counsel did not ask trial counsel why they did not call Nakota as a witness. The court will not speculate as to why they did not but notes Nakota portrays Tina in a much more sympathetic light than did the other witnesses who testified.

decision was unfair but was the decision was not hers to make. Both she and Powell were devastated. The day after Powell learned he would be placed in a special education class the following year, Powell had an explosive episode at school and was moved back down to the EBS classroom.[250] Ms. Miller was not surprised when she learned about the charges Powell faced in this case.

Ms. Phillips, who is four to five years younger than Powell, met him when he was eighteen years old. She described him as a big teddy bear, "just a nice person."[251] He introduced her to Antonio Smith, Ms. Grapes' son and the father of Ms. Phillips' child. Ms. Phillips revealed Powell and Antonio were very close friends who enjoyed spending time together while smoking weed and selling drugs. She also testified Powell helped Antonio and Ms. Grapes care for Ms. Grapes' brother, Jimmy, after an altercation left him paralyzed. Ms. Phillips testified Antonio and Powell had a falling out after Powell's girlfriend cheated on him with Antonio. On July 16, 2010, Ms. Phillips met with trial counsel and told them much of the same information she described during these proceedings, including Ms. Grapes' significant role in Powell's life. At that time, trial counsel discussed with Ms. Phillips some postings Antonio and Powell had put on social media where the two were displaying what could be interpreted as gang signs. Ms. Phillips said they were actually fake gang signs. Ms. Phillips thinks of Powell as the brother she never had.[252]

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[250] The record is unclear how long Powell was a student in Ms. Miller's classroom.

[251] A6896.

[252] Trial counsel met with Ms. Phillips but ultimately did not call her as a mitigation witness. At the evidentiary hearing, Rule 61 counsel did not inquire as to why trial counsel did not call Ms. Phillips. The court will not speculate as to what trial counsel's testimony would have been. It bears repeating that trial counsel's strategic decisions are entitled to great deference.

Finally, Mr. Trimble, Powell's paternal cousin, testified. Mr. Trimble revealed Powell was hyperactive as a child and always acted in an extreme manner. He had a "trigger temper" similar to Tina's. Mr. Trimble witnessed physical fights between Joe and Tina. He described a family deeply imbedded in the drug culture; Mr. Trimble testified at least ten people in his family sold drugs. Unfortunately, Mr. Trimble revealed, Powell was not a terribly good drug dealer. He also recounted that Powell struck Antonio with a gun when Powell learned Antonio had sexual relations with his girlfriend, Nikki.

Members of the defense team – trial counsel, appellate counsel, and the mitigation specialist – also testified at the evidentiary hearing. Finally, the court also heard from Christine Penry, the mitigation specialist retained by Rule 61 counsel, and Victoria Reynolds, Ph. D., the clinical psychologist hired by Rule 61 counsel.

Ms. Penry opined the trial team's mitigation investigation was "neither effective nor reasonable." She relies upon the American Bar Association guidelines adopted in 2003 and supplemented in 2008 for guidance in conducting a reasonable mitigation investigation. Ms. Penry stated that it is critical for the defense team to cultivate a relationship with the client and mitigation witnesses from the very beginning and to maintain those relationships throughout the course of the trial. She advocates for face-to-face interviews over written and telephone communication. The upshot of her criticism of the trial team's investigation is that they did not spend enough time interviewing witnesses or in the Cumberland community to present an effective mitigation case.

Ms. Penry identified sixteen inadequately developed mitigating factors: (1) early exposure to constant domestic violence; (2) early childhood exposure to substance abuse; (3) frequent

moves throughout early childhood; (4) Powell spent his childhood in a violent and poor neighborhood; (5) inconsistent parenting by mother; (6) inconsistent parenting by father; (7) father's relationship and subsequent marriage to a teenager; (8) exposure to rape and sexual misconduct of siblings by mother's paramour; (9) childhood exposure to death of a young boy whose body he helped discover; (10) institutional failure by the school system; (11) institutional failure by CPS; (12) constant violence by mother; (13) exposure to abuse and demeaning behavior by stepmother; (14) acceptance and promotion of criminal behavior and substance abuse by male role models in the family and community; (15) generosity and kindness toward those in need; and (16) life-threatening stabbing.

Ms. Perry testified she uncovered trauma, abuse, and neglect in her investigation and opined that an expert on trauma was needed to shed further light on the effect of the same on Powell's development.

Dr. Reynolds is a clinical psychologist who, per her CV, specializes in "the assessment and treatment of the influence of traumatic life experiences." Powell engaged Dr. Reynolds to evaluate the history of Powell's known trauma, to evaluate the potential existence of exposure to other trauma, and to explain the affects of these traumas on Powell's development and behavior.

From 2003 to 2012, Dr. Reynolds was employed by the Veteran's Administration, working with the Women's Comprehensive Health Clinic. Since then, she has been self employed. She has testified thirteen times in death penalty cases as a psychologist, each time testifying for the defense. Dr. Reynolds has testified in three Delaware murder cases on behalf of the defense; specifically, at a clemency hearing for Robert A. Gattis, and at postconviction hearings for Juan Ortiz and Luis G. Cabrera.

Dr. Reynolds scheduled two days to meet with Powell in Delaware. Powell met with Dr. Reynolds the first day but cut the visit short by two hours. Powell refused to permit the evaluation to continue on the second scheduled day. Dr. Reynolds conducted a trauma evaluation and did not conduct any psychological tests. No further interviews or meetings took place.

Dr. Reynolds spent a minimum of forty-five minutes interviewing each of the following people by telephone: Joe, Powell's father; Jessica, Powell's half-sister; Sandy, Powell's maternal grandmother; Ms. Grapes, a family friend; Ms. Fisher, a former babysitter of Powell's; and Ms. Hughson, a neighbor and former landlord.

Dr. Reynolds chose not to interview Tina, Powell's mother, because Dr. Reynolds read the trial transcript in preparation and also possessed other records concerning Tina and her involvement with CPS.

Dr. Reynolds had the PDO's work product. This information included CPS records for the Powell/Durham family, Powell's school records, Powell's pediatric records, and any other documentation the PDO had that supported mitigation. These records were all admitted into evidence at the penalty phase of the trial. Dr. Reynolds also had Ms. Penry's work product.

Dr. Reynolds concluded the abuse Powell suffered was more severe and chronic than had been represented by the testimony of the penalty phase defense witnesses. Her opinion is that Powell was raised in an abusive, substance-abusing, and dysfunctional family environment and he suffered trauma that interrupted his development as a result. Additional factors contributing to the trauma included the family's poverty, the drug culture in the family at large, violence in the community, and Powell being biracial in a racially divided community. Powell's "impairments[,]

shaped by prolonged and severe maltreatment, never ceased to be present, even at the time of the crime."[253]

Trial Counsel's Failure to Present a Mitigation Case

Powell contends that, in light of the information Powell was able to unearth in these proceedings, it is clear trial counsel was ineffective in presenting the mitigation evidence in the penalty phase. Generally, Rule 61 counsel allege trial counsel failed to develop a relationship with Powell and his family members and friends. Trial counsel introduced the CPS records ineffectively.

In support of his argument, Powell cites the United States Supreme Court case *Williams v. Taylor*.[254] In that case, trial counsel failed to prepare for the mitigation phase of the proceedings until the week prior to trial. Trial counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing [the defendant's] nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records."[255] Moreover, trial counsel failed to introduce available evidence that the defendant was "borderline mentally retarded" and did not advance beyond sixth grade in school. Finally, trial counsel did not introduce favorable evidence that the defendant thrived in a regimented and structured environment, *i.e.*, prison.

In finding trial counsel's failures were objectively unreasonable, the United States Supreme Court noted that not all of the additional evidence was favorable to the defendant.

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[253] Defense Exhibit #15, at PCR336 (Reyonlds Report, dated January 12, 2015).

[254] 529 U.S. 362 (2000).

[255] *Id.* at 395.

However, "the failure to introduce the comparatively voluminous amount of evidence that did speak in [the defendant's] favor was not justified by a tactical decision...."[256]

Powell cites the following for trial counsel's inability to develop the relationships Rule 61 counsel deem necessary to present an effective mitigation case: the lack of face-to-face interviews with Powell and potential witnesses; the lack of additional trips to Cumberland to learn about the history of the town and identify prospective witnesses and easing concerns of identified witnesses; and the mitigation specialist's case load at the time the mitigation case was being developed. Powell does not cite any case law holding a specific number of visits is the professional norm or that multiple trips to a capital defendant's hometown are required.

The bottom line is that Powell's claims are conclusory. Rule 61 counsel and/or their team made *eleven* trips to Cumberland and, because Powell now sits on death row, presumably Rule 61 counsel met with a more willing audience once there. However, the vast bulk of the mitigation evidence developed in these proceedings is cumulative in nature. Rule 61 counsel cannot point to any specific newly developed evidence that (a) was not known to Powell at the time and, therefore, available to be disclosed to, and used by, trial counsel and that (b) would have changed the verdict in this case. As all parties have acknowledged, time and again, the jury's seven to five vote in favor of the death penalty in an extremely difficult case involving the shooting of a law enforcement officer in a small community was a very close vote and, frankly, unexpected by trial counsel. The bottom line is trial counsel were extremely effective in mitigating Powell's actions on September 1, 2009, during the penalty phase. Finally, the criticism of the defense team ignores the fact that Powell let it be known that he did not want his friends and family to cooperate with

[256] *Id.* at 396.

his defense team. Powell effectively sabotaged his own mitigation case and the seven to five vote underscores how effective Powell's representation was despite this fact.

When the court evaluates an attorney's actions under *Strickland*, it must keep in mind:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. When a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.[257]

Here, Powell effectively sabotaged his defense team's efforts to present a mitigation case. He may not now complain that they did not do enough on his behalf.

Powell also criticizes the introduction into evidence of the Powell's "paper history" of school records, health records, CPS records, juvenile mental health records, discipline records by way of the mitigation specialist. Ms. Bryant identified the items and trial counsel then moved for their admission into evidence, without objection. Powell argues this strategy left it up to the jury to digest these hundreds of pages of records that tracked Powell's troubled upbringing. Powell faults trial counsel for not going over the records, document by document. This complaint ignores the fact that trial counsel did use these records together with the defense's mental health experts to paint a picture of Powell's very dysfunctional family life. Throughout the expert testimony and again in closing, trial counsel brought pertinent records to the jury's attention.

However, these life history records also revealed Powell's defiant, explosive, and violent nature. Unlike in *Williams*, where there was "comparatively voluminous" mitigation evidence, here almost every incident served not only to point out how others had failed Powell but also how he had inflicted verbal and physical abuse on others.

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[257] *Ploof*, 75 A.3d at 852 (internal quotation marks and citations omitted).

The court does not find trial counsel were ineffective for failing to review the entire paper history before the jury. In the course of these Rule 61 proceedings, trial counsel told the court that they believed witnesses to the events themselves to be more effective witnesses than professional observers, such as responding police officers or social workers. Trial counsel's decision to prioritize obtaining family members and close friends who were witnesses to the events described in the life history records was not objectively unreasonable.[258] The court notes that, although Rule 61 counsel fault trial counsel for not securing the appearance of a social worker or juvenile justice worker at trial, the court did not hear from any such worker during these Rule 61 proceedings. Rule 61 counsel have not identified any part of the paper history that the jury had and was not properly exploited at trial to support their argument that the records were ineffectively introduced. As such, it is impossible to conclude that trial counsel's failure to introduce the life history records in another manner would have resulted in a different outcome. This is a general and conclusory claim and is denied.

Failure to Hire a Clinical Psychologist

Although Powell does not explicitly allege trial counsel were ineffective for failing to hire a psychologist who could testify to the effects of trauma on Powell's development, the implication is there and the court will address it. In *Strickland* terms, the question is whether was the failure to hire a clinical psychologist was an objective professional mistake or error. If so, the next question is whether Powell was prejudiced in the penalty phase because the jury did not hear from a clinical psychologist The court concludes trial counsel were not objectively unreasonable

[258] The court notes trial counsel needed a court order to obtain the CPS records from Maryland. These records were not received by trial counsel until August 2, 2010, *not* in excess of a year prior to trial, as claimed by Rule 61 counsel. Further, the PDO Log evidences trial counsel updated their witness list immediately upon receipt of these records.

for failing to hire an expert in trauma and, in the alternative, that Powell was not prejudiced as a result.

Dr. Reynolds ultimately concludes that Powell's poor upbringing; poor parenting; exposure to domestic abuse, both physical and emotional; and his forced familiarity with the family-wide drug culture resulted in ongoing emotional trauma to Powell. Other matters, such as his familiarity with an incident where a young boy was killed by a train in the "projects" while his sister babysat the child; his mother's relationship with other men; and other traumatic events contributed to ongoing emotional trauma that interrupted his normal development process. As a result, Powell perceives the world around him differently and his behavior is more impulsive than average. His "flight-or-fight" reaction has been negatively influenced due to his life experiences. His perception of what may be, or may not be, a threat has been desensitized. Powell overreacts to situations and can fly off the handle. Dr. Reynolds concluded that Powell's need to adapt to a dysfunctional family environment was a contributor to the oppositional behavior Powell exhibited throughout his life.

Because Dr. Reynolds is not a psychiatrist and did not conduct a diagnostic evaluation of Powell, she could not offer a specific diagnosis for Powell. She did testify that the diagnosis of oppositional defiant disorder that Powell received as a child was a precursor for his subsequent diagnosis of antisocial personality disorder. Neither diagnosis precludes the presence of emotional trauma: trauma may or may not be present.

Dr. Reynolds believes the chronic emotional stress of being raised in a dysfunctional and abusive environment resulted in a distressed, vulnerable child who never felt safe. Powell was repeatedly thrown into survival mode; as a result, his responses are often out of context with

reality.

Dr. Reynolds did not ask Powell about events where he may have inflicted trauma on others: specifically, Dr. Reynolds did not ask Powell about the allegation that he pistol-whipped someone or about the allegation he participated in an armed home invasion. She did not inquire about Powell's continuing possession of a firearm, but testified she would have raised the issue on day two of the interview as she was curious as to how his perceived need to carry a firearm related to his sense of fear and hypervigilance. However, Powell refused to cooperate with Dr. Reynolds on the second scheduled day. Dr. Reynolds did not discuss the events of September 1, 2009, with Powell so the court does not have any specific information before it as to how Powell's survival instincts may have affected his conduct on that fateful day. Dr. Reynolds did not inquire about these matters because she was focused on assessing Powell's own traumatic experiences.

The court finds Dr. Reynolds did provide mitigation evidence. However, this mitigation evidence overlaps substantially with the testimony of experts, family, and friends presented at trial. The vast majority of new mitigation evidence proffered originates from Powell's own self-reporting or others' unsubstantiated recollections.

Dr. Reynolds was asked at the hearing if she was able to reach any conclusions about whether there is a correlation or causal relationship between the abuse of Powell she described and the homicide in Georgetown on September 1, 2009. She answered: "There's a correlation between trauma history and aggressive behaviors, yes. But causation, no."[259]

Much of Dr. Reynolds' information came from her day spent interviewing Powell at the

[259] A7309.

prison. As noted, she planned on a second day, but Powell was uncooperative on the second day and refused to meet with her. Also, as noted above, Powell terminated his first session with Dr. Reynolds two hours short of the time allotted. The information she obtained from Powell that is not independently verifiable must to be viewed in light of what is known about his credibility. At trial, Powell's psychiatrist admitted she had concerns regarding Powell's credibility and fondness for grandiosity. Trial counsel did the same during these proceedings. Other witnesses agreed Powell had a tendency to exaggerate. Had Dr. Reynolds or another psychologist testified at trial, Powell's credibility would have been similarly challenged.

Whether one can rely on Powell's self-reporting is a serious issue. For example, Dr. Reynolds testified Powell told her his father hit him in the head with a whiskey bottle and his mother recruited him to beat up a boyfriend who assaulted her. The whiskey bottle incident had not previously been reported by any witness or referenced in any historical record. Evidence of such an assault would have been useful at trial because physical trauma was a predicate foundation for some of the defense testimony.

Dr. Reynolds had the opportunity to have all of the PDO information gathered for trial and Ms. Penry's mitigation report. Ms. Penry spent many, many months working on this case. It would be surprising to the court if she did not learn more about the dysfunctional family, the dysfunctional upbringing, the physical abuse, and the drug abuse associated with Powell's upbringing, and thereby conclude Powell did not get the parental support a child needs for his emotional development. Dr. Reynolds' conclusion that the abuse in Powell's upbringing was more severe than that presented to the jury recognized that the jury did hear evidence about a horribly dysfunctional family. In its closing, the State acknowledged Powell's upbringing was

"terrible" and urged the jury to review Powell's CPS and school records. The court concludes the presentation of more of the same type of evidence to the jury would be cumulative.

At trial, the defense experts opined as to their conclusions that Powell was diagnosed with a cognitive brain disorder resulting in impulsiveness, a diminished capacity to evaluate threats accurately and make flight-or-fight decisions. Dr. Gur explained that the damage to Powell's amygdala and hippocampus resulted in Powell's diminished capability to relate his experiences and emotions to the circumstances at hand and interpret accurately whether he is in danger. Dr. Reynolds' opinion, or that of any other clinical psychologist, on this subject may have been cumulative as to the conclusions of the trial experts. However, she would have offered a potentially conflicting reason thereby potentially negating the opinion of Powell's neuropsychologist. One must remember that, at the time of his testimony, Dr. Gur was a highly esteemed tenured professor of neuropsychology at the University of Pennsylvania School of Medicine where he directed the brain behavioral laboratory. He was also on staff at the Philadelphia Veterans Administration Medical Center as a psychologist. Dr. Gur's work is on the cutting edge of research, focusing on veterans who have suffered from traumatic brain injuries or PTSD or both. The court concludes the production of a clinical psychologist to offer a potentially alternative theory or opinion would not have been helpful to the defense.

Therefore, the court does not find trial counsel's failure to hire a clinical psychologist to inform the jury Powell's conduct was attributable to trauma suffered as a result of his horrific family upbringing was objectively or professionally unreasonable. The jurors were able to draw upon their own common sense and their own life experiences to conclude that one's personality may be a product of his home environment, especially when that home environment was, as the

State acknowledged to the jury, "terrible."

Also, in reviewing the report and opinions of Dr. Reynolds, one must keep in mind that the issue before the court is not what Powell can prove today, but what he could have proven at trial in February, 2011. Trial counsel were faced with the severe impediment of a difficult and sometimes uncommunicative client who sent word back to Cumberland not to cooperate with his defense team. Had Dr. Reynolds been tasked with this work back then, she would have faced the same lack of cooperation in Cumberland, Maryland. Dr. Reynolds would have had to base her opinions on what was known or reasonably discovered at that time. It is noteworthy that, even after receiving a death sentence, Powell remains uncooperative: cutting Dr. Reynolds' appointment short the first day and by refusing to meet with her the second scheduled day.

The court does not find a *Strickland* violation by trial counsel for not hiring a clinical psychologist.

As to the prejudice prong of *Strickland*, the court must reweigh the evidence in aggravation against the totality of available mitigating evidence.[260] The court has noted that much of Dr. Reynolds' testimony is cumulative and could potentially undermine the testimony of other defense experts who testified at trial. The new information does not undermine the court's confidence in the jury verdict. While this evidence is mitigation as to how Powell became the man he is today, it is of note, in re-weighing the mitigators and aggravators, that there was no evidence at trial that Powell shot at Adkins and Officer Spicer because he felt threatened. To the contrary, all of the evidence presented supported the theory that Powell put in motion the events of September 1, 2009. On that day, he was the aggressor, starting with coordinating the plan to

[260] *Ploof*, 75 A.3d at 858.

rob Adkins, continuing through the attempted shooting of Adkins, up to and ending with his arrest. While the evidence regarding Powell's diminished capacity to perceive a threat and act appropriately due to trauma is mitigation, a reasonable sentencing judge would not give it additional weight in the sentencing weighing process to reach a contrary decision as to sentencing.

The court has reweighed the aggravators and mitigators in light of Dr. Reynolds' testimony and the other mitigation evidence brought to the court's attention in these proceedings. The court has done so, taking into consideration the testimony about Powell's credibility and the fact that Powell cut Dr. Reynolds' evaluation short, thereby depriving her of the full opportunity to complete her evaluation. The court finds that the additional details learned would not have changed the end result: the aggravators outweigh the mitigators by a preponderance of the evidence. Powell's argument that trial counsel was ineffective for failing to investigate and present available mitigating evidence is conclusory and without merit.

CLAIM XIII - THE COURT IMPROPERLY INSTRUCTED THE JURY AT THE PENALTY PHASE, IN VIOLATION OF POWELL'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE DELAWARE CONSTITUTION, ARTICLE I, §§ 4, 7, & 11. AS SUCH, POWELL IS ENTITLED TO A NEW SENTENCING PROCEEDING

In this claim, Powell alleges that the trial court violated his constitutional rights in its charge to the jury at the conclusion of the penalty phase. The only case law cited to support this argument provides that the trial judge must guide the jurors by ensuring that they understand the basis for imposing a death sentence and comprehend their responsibilities in applying such criteria. "It is only through the careful use of jury instructions that the judge properly discharges this function."[261]

Specifically, Powell argues the trial court erred in giving an "anti-sympathy" instruction and a "conscience of the community" instruction. Powell claims trial counsel unreasonably failed to object to these instructions and he suffered prejudice as a result. Powell also alleges error for appellate counsel's failure to raise the issue on appeal.[262] Powell cites no case law to support the argument that these instructions are constitutionally infirm.

Any objection to a jury instruction should be made by way of an objection at the time the trial court provides the jury instruction to counsel and/or after the trial court so instructs the jury.[263] Because these instructions were not objected to at the time, this claim is procedurally barred. Any complaint the defense had with regard to the jury instructions given should have

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[261] *Whalen v. State*, 492 A.2d 552, 559 (Del. 1985).

[262] Although Rule 61 counsel note appellate counsel did not argue this issue on appeal, they do not specifically allege appellate counsel were ineffective for failing to do so.

[263] *Jarmon v. State*, 2002 WL 550979, at *3 (Del. Super. Jan 17, 2002); Super. Ct. Crim. R. 30.

been raised on direct appeal.[264] Because it was not, Powell must satisfy the exemptions to the procedural bar in Rule 61(i)(3). Powell makes no attempt to address any reason for cause for relief nor does he address the prejudice prong of Rule 61(i)(3). A conclusory allegation is "legally insufficient to establish that his counsel's performance fell below an objective standard of reasonableness and was prejudicial."[265] Rule 61(i)(3) requires that Claim XIII be summarily dismissed.

Alternatively, the Delaware Supreme Court has specifically addressed the constitutionality of the "anti-sympathy" instruction as well as the "conscience of the community" instruction. In *Taylor v. State*, the Delaware Supreme Court observed: "[A]n anti-sympathy jury instruction is required under Delaware case law, and [...] the United States Supreme Court has held that an anti-sympathy jury instruction does not violate the U.S. Constitution."[266] Likewise, the Delaware Supreme Court has, for over two decades, ruled consistently that the jury sits as the conscience of the community in the penalty phase of a capital case.[267] Therefore, on the merits, both instructions accurately stated the law as it is in Delaware and the trial court did not err in so instructing the jury.

Claim XIII is summarily dismissed as it is procedurally barred pursuant to Rule 61(i)(3).

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[264] *State v. Monroe*, 2008 WL 2210623, at *3 (Del. Super. May 19, 2008), *aff'd*, 2009 WL 189158 (Del. Jan. 16, 2009).

[265] *White v. State*, 2010 WL 1781021, at *4 (Del. May 4, 2010).

[266] 32 A.3d 374, 387-88 (Del. 2011) (citations omitted).

[267] *State v. Cohen*, 604 A.2d at 856 ("The jury sits as the conscience of the community in deciding whether to recommend life imprisonment or the death penalty."). *See also Norcross*, 36 A.3d at 774 (finding that the constitution did not *entitle* defendant to a "conscience of the community" instruction but noting that such an instruction embodies a "correct statement of substantive law").

Alternatively, since the challenged instructions comply with the decisions of the Delaware Supreme Court, this claim is denied on the merits.

CLAIM XIV: POWELL IS ENTITLED TO RELIEF DUE TO THE CUMULATIVE EFFECTS OF THE PREJUDICE DESCRIBED IN THIS AMENDED MOTION

Finally, Powell claims he is entitled to postconviction relief due to the cumulative effects of trial counsel's failures and the constitutional errors committed by the trial court and the prosecution. Powell's argument must fail.

This court has found none of Powell's other contentions to be a valid basis for relief. "Cumulative error must derive from multiple errors that caused 'actual prejudice.'"[268] Because all of Powell's claims are without merit, his claim of cumulative error is also without merit. Therefore, this final claim is also denied.

[268] *Michaels v. State*, 970 A.2d 223, 231 (Del. 2009).

CONCLUSION

After careful consideration of all of Powell's allegations of error in the proceedings below, the court concludes none of these allegations have merit. Accordingly, Powell's Motion for Postconviction Relief is hereby **DENIED.**

IT IS SO ORDERED.

EXHIBIT 1

107

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DELAWARE 19947
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August 2, 2010

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RE: State v. Derrick J. Powell
Case No. 0909000858 (THG)
Murder 1st Degree - Capital

FILED PROTHONOTARY OFFICE
2010 AUG -2 PM 3:00

Dear Counsel:

Enclosed you will find draft copies of the following:

(1) Preliminary Comments - *Voir Dire*
(2) Preliminary Questions
(3) Questions to Individual Jurors
(4) Preliminary Instructions
(5) Penalty Hearing Preliminary Instructions
(6) Penalty Phase Interrogatories to Jurors
(7) Interrogatory or Question to the Jury (Intentional/Reckless)

I have worked on drafts for the guilty phase charge to the jury, as well as the potential penalty phase instructions, but I am not making those available yet because there are so many variables as to those instructions.

None of what is being provided is set in stone, and my purpose in giving them to you now is to allow you to have the opportunity to offer comments to improve them. This has been my standard procedure in capital cases.

There are some questions I have in which I need your help:

(a) I know there will be testimony about drugs, but will there be allegations of alcohol and/or drug consumption that would trigger a *voir dire* on this subject.

(b) Will there be any child witness testimony at either the guilt phase or any potential penalty phase?

We will discuss these two questions when we meet on August 12, 2010, prior to the suppression hearing, when we also address the Rule 12.2 matter.

I have also drafted a special interrogatory (#7 as listed above) that would only be relevant if the jury finds the defendant guilty of Count 1 and/or Count 3. The state of mind for a conviction is "recklessly." "Recklessly" can be proven if a person acts intentionally. 11 *Del.C.* §253. Whether one's conduct is intentional or reckless is relevant to any sentencing decision. This interrogatory is different than our standard operating procedure, but I feel it would be helpful.

I would like any other comments, suggestions, and feedback to be provided by August 27, 2010.

Very truly yours,

T. Henley Graves

Enclosures
cc: Prothonotary

COPY

#312

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	:	ID No. 0909000858
	:	
v.	:	Criminal Action Nos. 09-09-0366 thru 0372
DERRICK J. POWELL,	:	09-11-0667 thru 0674
Defendant.	:	

T R A N S C R I P T
O F
P R O C E E D I N G S

Sussex County Courthouse
Georgetown, Delaware
Thursday, August 12, 2010

The above-entitled matter was scheduled for an office conference in Judge's Chambers at 9:00 o'clock a.m.

BEFORE:

THE HONORABLE T. HENLEY GRAVES, Judge.

APPEARANCES:

PAULA T. RYAN and MARTIN J. COSGROVE, Deputy Attorneys General, appearing on behalf of the State of Delaware.

STEPHANIE A. TSANTES and DEAN C. JOHNSON, Assistant Public Defenders, appearing on behalf of the Defendant.

KATHY R. HAYNES
OFFICIAL COURT REPORTER

up?

MS. TSANTES: I think August 24th.

MR. COSGROVE: 23rd.

MS. TSANTES: 23rd or 24th is my deadline.

THE COURT: All right. If he is convicted and if we go to a penalty phase, there may be an interrogatory that I think is going to be helpful to everybody involved as to his state of mind, if they find him guilty, as the burden of proof that he recklessly caused the death. If he intentionally caused his death, that meets the reckless standard and the State can provide evidence that he intentionally did that.

It would be beneficial to everyone to know whether he intentionally did it or recklessly did it, and then the jury, as the fact finder, is the one that makes that decision.

MS. TSANTES: Or whether or not he's not guilty.

THE COURT: I said if he's found guilty. I prefaced that whole thing, if he's not found guilty. If he's not guilty, we do not have to worry about it, or anything else at all.

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OFFICIAL COURT REPORTER

And the interrogatory would probably be saying -- basically polling the jury if they determine intentional conduct versus reckless conduct, and that would take place after a conviction.

MS. TSANTES: And would you instruct the jury on what the legal definitions of intentional versus reckless is?

THE COURT: Well, they will get an instruction on intentional in the primary instructions. Because he's alleged to have done intentional conduct, too.

MS. TSANTES: No, it's all reckless, Your Honor.

MS. RYAN: Burglary. Resisting arrest.

THE COURT: Intentional is in the definitions.

MS. TSANTES: I'll have to go and re-look at the indictment. I think the theory of the State's case -- I'll go back and look.

THE COURT: Each individual crime has its own state of mind.

MS. TSANTES: That's correct, Your Honor.

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OFFICIAL COURT REPORTER

I'll go back and look.

Your Honor, with respect --

THE COURT: I want you to be thinking about that interrogatory. And it may be that the cleanest place to do that is if the jury finds him guilty of first degree murder, and they deliver that verdict, we are going to start a penalty hearing in X days, and the State is still pursuing the death penalty. We start it all again -- hypothetically, it looks like the worst case scenario is we do what we have to do. And we have two or three days there.

My thought is that since the jury's focus on the state of mind is going to be when they are doing their deliberations in the X-count indictment and they return a verdict, would be to return them to the jury room at that time to do an interrogatory as to whether or not -- as to either of the murder one's, whether they find intentional or reckless.

Now, in the process of going through cases, sometimes we learn things. Okay. And I will go back to the Norman case.

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MS. TSANTES: Which was indicted as an intentional murder.

THE COURT: I understand that. But the fact issue that was in that case was his state of mind and mental illness.

MS. TSANTES: Correct.

THE COURT: And the jury rejected that. Okay. And the Court rejected that. The Supreme Court did not seem to reject that in writing the decision, and that was one of the reasons when basically we had an office conference and said, the handwriting appears to be on the wall. And then the State withdrew that. That was an important factual matter.

And I think if the death penalty, if we get to that stage, that is something that is an important factor. So I have not made my mind up, but that is something that I am considering.

All right. Anything that you all have to put on the table?

MS. TSANTES: For the record, Your Honor, Mr. Johnson and I did go over to the Attorney General's Office the other day and review a

C E R T I F I C A T E

I, KATHY R. HAYNES, an Official Court Reporter of the Superior Court of the State of Delaware, Certification No. 122-PS, do hereby certify the above and foregoing Pages 2 to 32 to be a true and accurate transcript of the proceedings therein indicated on August 12, 2010, as was stenographically reported by me and reduced to typewriting under my direct supervision, as the same remains of record in the Sussex County Courthouse at Georgetown, Delaware.

This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

Kathy R. Haynes

Kathy R. Haynes

6-2-11

Date

KATHY R. HAYNES
OFFICIAL COURT REPORTER

COPY

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	:	ID No. 0909000858
	:	
v.	:	Criminal Action Nos. 09-09-0366 thru 0372
DERRICK J. POWELL,	:	09-11-0667 thru 0674
Defendant.	:	

T R A N S C R I P T
O F
P R O C E E D I N G S

Sussex County Courthouse
Georgetown, Delaware
Thursday, December 2, 2010

The above-entitled matter was scheduled for an office conference at 9:25 o'clock a.m.

BEFORE:
THE HONORABLE T. HENLEY GRAVES, Judge.

APPEARANCES:

PAULA T. RYAN and MARTIN J. COSGROVE, Deputy Attorneys General, appearing on behalf of the State of Delaware.

STEPHANIE A. TSANTES and DEAN C. JOHNSON, Assistant Public Defenders, appearing on behalf of the Defendant.

KATHY R. HAYNES
OFFICIAL COURT REPORTER

correctional officers tie him up and bring him in and sit him in a chair. One of the instructions basically is that the Court -- the defendant has the right to be in the courtroom throughout the trial. He also has the right to not be in the courtroom, if he chooses.

MS. TSANTES: There is one more issue, Your Honor, that perhaps we should discuss on another day.

In reading Your Honor's letter again of August 2nd, I realize that we neglected -- were not filing something specifically, but that's why the defense specifically is objecting strenuously to Your Honor's consideration of a special interrogatory about whether or not this case is reckless or intentional, especially in light of the proposed statutory aggravating factors by the State. This isn't something that the State is asking for, this is something that the Court initiated.

Quite frankly, Your Honor, with all due respect, it feels like a third prosecutor is in the room by even proposing this. I know of no

statutory authority case law, anything that would suggest that our Legislature has given Your Honor the authority to do that special interrogatory.

THE COURT: Well, they get the instruction. That's the standard instructions, okay, which if you go to 255 or 253, whatever it is, the statute says that if you prove intentional conduct, you prove reckless.

MS. TSANTES: Well, that's jury --

THE COURT: You have raised a constitutional issue. You raised a constitutional issue with me, that reckless conduct cannot be used. And I presume if there were bad consequences in the guilt phase, and if there were bad consequences for Mr. Powell in the ultimate outcome, that that would be an appeal issue. And the finder of fact, the jury, I think that would -- that is important.

It goes I guess back to some other cases that we have had where things, one way or the other, would have been a lot clearer at the end of the case in the decision-making process.

MS. TSANTES: But in this case, Your

Honor, this is the State's Attorney General's Office, who is the charger of the case, and they have gone before a Grand Jury and sworn that this murder was reckless conduct. I know of no reason why the Court should now become the charger, you know, the one who decides, well, the State, you didn't charge it quite good enough, it should have been charged as just straight intentional murder of Chad Spicer, not recklessly killing someone during the lawful performance of their duties.

Your Honor is now injecting your own thoughts as to how this case should have been charged. I agree with you, Your Honor, that there is that statutory language that says that the State has to prove intentional conduct. It also means, the definition of reckless and criminal negligence, that you can prove a higher standard.

But I know of nothing in this particular case or statutory authority that allows Your Honor to ask for that special interrogatory, specifically since the State hasn't asked for it, they are not alleging it in any of their statutory aggravators that this is intentional conduct. They have all

along in their indictment alleged this is a reckless killing.

And quite frankly, Your Honor, you know, given that Your Honor is the ultimate decider of life or death, it seems to me Your Honor may have already prejudged this case and --

THE COURT: Well, I take exception to your remarks that I prejudged the case, Stephanie. I don't know anything about the case, other than what you all have told me, and I don't know anything about your client. And I know what has been indicted is per the statute.

MS. TSANTES: All right.

THE COURT: So if the State chooses not to, it won't go in. If the State desires that, it will go into the instructions if the State desires that. The instruction -- the reason that came up is because I am working on, and have been working on, instructions in the guilt phase and in the penalty phase, as is my responsibility. You do not wait until the end of the case to start doing that. And that's one of the things that is normally given in those circumstances. And if the facts don't

fit, that instruction won't be given.

MS. TSANTES: And one more thing, Your Honor, the State, in presenting their list of statutory aggravators, there is at least one that the defense is going to be objecting to, and I don't know if Your Honor wants to deal with that issue before trial or that we file something.

THE COURT: I think you had better file something, if it's something as a statutory aggravator.

MS. TSANTES: Non-statutory aggravator, Your Honor. I misspoke. And you haven't seen them, so I'm sure you don't know what we're talking about. And since those weren't filed with the Court, if I file something, should I do it under seal?

THE COURT: Yeah, because you don't want the press -- anything that you don't file under seal and get into Chambers, the press is going to get into it.

MS. TSANTES: All right.

MS. RYAN: I think I sent Your Honor a letter saying that we delivered them, but I didn't

include it.

THE COURT: Yeah.

THE JUDGE'S SECRETARY: Just for example, these two envelopes that you delivered directly to Chambers on the voir dire questions that were to be under seal, were not clocked in. I still need to have them clocked in. I mean they can be brought to Chambers, but we still need them clocked in.

MS. TSANTES: Okay. I'm sorry. I didn't know what to do with them. I don't think you were there that day, so I was told to -- actually, I think Cissy said I can leave them on your chair, that you guys would figure it out.

THE JUDGE'S SECRETARY: Nobody can.

THE COURT: All right.

(Whereupon, the proceedings in the above-entitled matter were concluded.)

KATHY R. HAYNES
OFFICIAL COURT REPORTER

C E R T I F I C A T E

I, KATHY R. HAYNES, an Official Court Reporter of the Superior Court of the State of Delaware, Certification No. 122-PS, do hereby certify the above and foregoing Pages 2 to 117 to be a true and accurate transcript of the proceedings therein indicated on December 2, 2010, as was stenographically reported by me and reduced to typewriting under my direct supervision, as the same remains of record in the Sussex County Courthouse at Georgetown, Delaware.

This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

Kathy R. Haynes

Kathy R. Haynes

9-6-11

Date

KATHY R. HAYNES
OFFICIAL COURT REPORTER