IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE, :
: I.D. No. 0411008300
v. :
:
AMBROSE L. SYKES, :
:
Defendant. :

Submitted: October 16, 2013
Decided: January 21, 2014

ORDER

Upon Defendant's Amended
Motion for Post-Conviction Relief.
Denied.

John Williams, Esquire of State of Delaware, Department of Justice, Dover, Delaware; attorney for the State.

Patrick J. Collins, Esquire and Albert J. Roop, V, Esquire of Collins & Roop, Wilmington, Delaware; attorneys for the Defendant.

WITHAM, R.J.

INTRODUCTION

Before the Court is Petitioner Ambrose Sykes' (hereinafter "Petitioner") extensive Amended Motion for Postconviction Relief. Petitioner raises twenty-three grounds for relief[1] from his 2006 conviction for Murder in the First Degree, Rape in the First Degree, and other related offenses, and relief from this Court's subsequent imposition of the death sentence. The majority of Petitioner's claims for relief are based on allegations of ineffective assistance of counsel against Petitioner's two trial attorneys, Thomas Donovan (hereinafter "Donovan") and Christopher Tease (hereinafter "Tease") (collectively "Trial Counsel"). Petitioner also alleges a host of additional constitutional violations under the U.S. Constitution and Delaware Constitution.

In 2011 and 2012, this Court held an evidentiary hearing on Petitioner's Motion over the course of eleven days. After careful consideration of the parties' filings, the affidavits of Trial Counsel, the trial record, the evidence and testimony presented at the evidentiary hearing, and the post-hearing briefs of both Petitioner and the State, the Court concludes that Petitioner's Amended Motion for Postconviction Relief must be DENIED.

[1] Petitioner only addresses twenty-two claims in his Post-Hearing Opening Brief, and addresses them in an order different from his Amended Motion. Petitioner's Post-Hearing Brief omits Claim VI of Petitioner's Amended Motion, which alleges that this Court improperly commented on Petitioner's right to remain silent. In order to address the merits of this claim, the Court will analyze each of Petitioner's twenty-three claims in the order utilized in his Amended Motion. Reference to a claim by its number refers to its number in the Amended Motion, not the Post-Hearing Brief.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

On November 8, 2004 sixty-eight-year-old Virginia Trimnell (hereinafter "Trimnell"), of Dover, failed to arrive as scheduled to visit her daughter in Detroit, Michigan. Trimnell's daughter reported Trimnell as missing. The Dover Police Department sent an officer to Trimnell's apartment to check on her, but the apartment appeared undisturbed and showed no signs of forced entry. Trimnell's car and purse could not be located.

At approximately 3:30 a.m. on November 10, 2004, Sergeant Timothy Mutter (hereinafter "Sergeant Mutter") of the Dover Police Department saw Trimnell's vehicle traveling in downtown Dover. As Sergeant Mutter began to follow the vehicle, the car pulled over across from Trimnell's apartment complex and the driver exited the car. The driver was later identified as Petitioner. Upon seeing Trimnell's name on the vehicle's registration, Sergeant Mutter questioned Petitioner as to Trimnell's whereabouts, at which point Petitioner fled on foot. Sergeant Mutter was unable to apprehend Petitioner that night.

Detective Todd Case (hereinafter "Detective Case") of the Dover Police Department's criminal investigation unit was assigned to investigate Trimnell's disappearance. Detective Case searched the vehicle and found a shovel, gas cans, rubber gloves, a blood-stained pillow, and women's clothing inside the car. In the trunk, police found Trimnell's purse inside a duffel bag, and a large suitcase with Trimnell's name on it. Inside the suit case, police discovered Trimnell's body.

Petitioner's fingerprints were later found on the car frame, gas tank, shovel, and one of the gloves.

Assistant Medical Examiner Jennie Vershvovsky (hereinafter "Dr. Vershvovsky") conducted Trimnell's autopsy, and determined that Trimnell died as a result of asphyxiation by strangulation. Semen was found in Trimnell's vagina, and later DNA testing matched the semen to Petitioner.[2] Dr. Vershvovsky found no defensive wounds on Trimnell, nor could Dr. Vershvovsky conclude when sexual intercourse occurred relative to Trimnell's death.

A search of Trimnell's apartment revealed two toothpicks which were matched to Petitioner's DNA. Additionally, a search of Trimnell's computer uncovered that the computer had been used to access pornographic websites on November 7, 2004. Access to the sites was paid for with Trimnell's credit cards. Trimnell's computer had never been used to access pornography prior to November 7. Police later seized several computers and magazines from the mobile home in Hartly where Petitioner resided with Jenny St. Jean (hereinafter "St. Jean"), Petitioner's girlfriend and the mother of his child, A.S.[3] Pornographic images found on those computers were similar to the pornography found on Trimnell's computer. Police also discovered a bag of silver dollars on St. Jean's dresser. Trimnell's daughter later identified those coins as belonging to her mother. A search of Trimnell's phone records revealed that

[2] Semen was also found on a comforter found in Trimnell's vehicle, which was also confirmed by DNA testing to be Petitioner's.

[3] Due to the child's age at all times relevant to this case, the Court declines to give the child's full name.

a cell phone registered to Petitioner made three phone calls to Trimnell's home on the morning November 7, 2004. Petitioner was employed at the time as a night custodian at Dover Downs, and did not arrive for his scheduled shift on November 7. On November 8, Petitioner informed his supervisor that he quit, citing problems with his vehicle. Dover Downs surveillance footage captured Petitioner leaving the parking lot in Trimnell's vehicle following his resignation.

Following Petitioner's flight from Sergeant Mutter on November 10, Petitioner was not seen again until November 29, 2004, when police arrested Petitioner in the vicinity of his home. Based on the foregoing, Petitioner was indicted for: one count of Murder in the First Degree (Intentional Murder), one count of Murder in the First Degree (Felony Murder), one count of Rape in the First Degree (Physical Injury), one count of Rape in the First Degree (During Commission of a Felony), one count of Kidnapping in the First Degree, two counts of Burglary in the Second Degree, one count of Theft of a Senior, one count of Unlawful Use of a Credit Card, one count of Unauthorized Access to a Computer System, and one count of Resisting Arrest. The rape charges were ultimately merged into one count of Rape in the First Degree, and the burglary charges were ultimately merged into one count of Burglary in the Second Degree.

Trial and Sentence

Donovan was appointed to represent Petitioner in December of 2004 on the basis of conflict, because the Public Defender's Office already represented St. Jean at the time. In March of 2005, Donovan challenged his appointment on the basis that

no actual conflict existed. Donovan requested that Petitioner be referred back to the Public Defender.[4] This Court found merit to Donovan's argument and concluded that no actual conflict existed, but held that Donovan must continue to represent Petitioner based on the appearance of impropriety that may be created by the Public Defender's representation.[5]

Tease joined the defense team in June of 2005. Donovan was lead counsel and primarily responsible for the guilt phase of Petitioner's trial. Tease was responsible for the penalty phase, but also participated in aspects of the guilt phase, including the cross-examination of several witnesses.

Jury selection began on May 30, 2006 and continued until June 7, 2006. The guilt phase of the trial proceeded from June 9, 2006 through June 26, 2006. On June 27, following deliberations, the jury found Petitioner guilty on all counts.

The penalty phase of the trial began on June 29, 2006 and lasted through June 30. Tease presented the testimony of four witnesses: St. Jean (who also testified at the guilt phase of trial as both a State witness and a defense witness); Petitioner's mother, Debora Sykes; and two of Petitioner's sisters, Debray Sykes and Creshenda Jacobs. Petitioner did not allocute. On June 30, 2006, the jury unanimously found beyond a reasonable doubt the existence of a statutory aggravating factor: that Trimnell was murdered while Petitioner was engaged in the commission of, or during

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[4] At the time, the Office of Conflicts Counsel had not yet been established.

[5] *State v. Sykes*, 2005 WL 1177567, at *3 (Del. Super. May 2, 2005). The Court held that Donovan could be relieved from his appointment if both Petitioner and St. Jean executed waivers, which ultimately did not occur. *Id.*

his flight after committing, Burglary in the Second Degree. This Court found that two additional statutory aggravating factors–the murder was committed while the defendant was engaged in the commission of, or during his flight after committing, Rape in the First Degree; and the murder was committed while the defendant was engaged in the commission of, or during his flight after committing, Kidnapping in the First Degree–were established beyond a reasonable doubt by virtue of the jury's guilty verdict. The Court also found the following statutory and non-statutory aggravating factors were established by a preponderance of the evidence: the victim was 62 years of age or older; the murder was committed for pecuniary gain; the victim was targeted and the murder was planned in advance; the murder was heartless, depraved, cruel and inhuman; Petitioner terrorized and abused the victim before murdering her; the murder had an adverse impact upon the victim's family; and Petitioner is potentially dangerous in the future.

The Court found that Petitioner failed to establish the mitigating factor of residual doubt, based on the strength of the State's evidence. The Court found the existence of several mitigating factors, including: Petitioner's relationships with A.S., St. Jean, his siblings, and his mother; the negative impact his execution would have on his family; his lack of guidance as a youth; the lack of intervention by his parents during a troubled childhood; and his ability to adjust well in a controlled environment. The jury, in balancing the aggravating and mitigating factors, unanimously recommended the death penalty. This Court agreed with the jury's

recommendation and sentenced Petitioner to death by lethal injection.[6]

Direct Appeal

Trial Counsel also represented Petitioner on appeal. The Delaware Supreme Court initially remanded this case to this Court for further factual findings on whether there was discriminatory intent behind the State's peremptory challenges.[7] This Court concluded that the State had provided credible race-neutral reasons for each of its challenges, and these reasons were not a pretext for racial discrimination.[8] Petitioner raised six claims on direct appeal to the Delaware Supreme Court: (1) the trial judge infringed upon Petitioner's Fifth Amendment right to remain silent when he erroneously instructed the jury during the guilt phase that Petitioner would have the opportunity to allocute following closing arguments; (2) the State improperly exercised its peremptory challenges on the basis of race, violating *Batson* by denying Petitioner his right to an impartial jury; (3) the trial judge improperly denied Petitioner's motion for a change of venue; (4) the trial judge failed to order a new trial after St. Jean improperly contacted two jurors after the guilt phase of trial but before the penalty phase; (5) death by lethal injection violates the Eighth Amendment's prohibition against cruel and unusual punishment; and (6) Petitioner's death sentence is disproportionately severe compared to other similar cases.[9] The Supreme Court

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[6] *State v. Sykes*, No. 0411008300, at 17 (Del. Super. Aug. 15, 2006).

[7] *Sykes v. State*, No. 516 & 566, 2006 (Del. Aug. 30, 2007).

[8] *State v. Sykes*, No. 0411008300, (Del. Super. Oct. 30, 2007).

[9] *Sykes v. State*, 953 A.2d 261, 264 (Del. 2008).

declined to address Petitioner's fifth claim because it was not properly preserved below and was more appropriate for a motion for postconviction relief.[10] The Supreme Court found no error in Petitioner's remaining claims and affirmed Petitioner's sentence.

As to the allocution comment claim, this Court mistakenly informed the jury during the guilt phase of trial that Petitioner would have an opportunity to allocute. This Court immediately recognized its error and called the attorneys to chambers. Trial Counsel moved for a mistrial. This Court denied the motion and instead promptly issued a curative instruction to the jury. The Supreme Court found that the curative instruction "was a meaningful and practical alternative" to a mistrial and rejected this claim.[11]

As to Petitioner's *Batson* claim, the Supreme Court closely examined this Court's findings on remand, and determined that while Petitioner made a *prima facie* showing under *Batson*, this Court's analysis showed there was no constitutional violation.[12] As to the change of venue claim, the Supreme Court determined that the pre-trial publicity surrounding Petitioner's case was insufficient for this Court to presume prejudice, and Petitioner had failed to demonstrate actual prejudice justifying a change of venue.[13] As to Petitioner's death penalty claim, the Supreme Court found

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[10] *Id.*

[11] *Id.* at 269.

[12] *Id.* at 271.

[13] *Id.* at 272.

Petitioner's sentence to be proportional to similar cases.[14]

Finally, as to the improper juror contact claim, Petitioner argued that prejudice should have been presumed on the basis of St. Jean's contact with Juror No. 6 and Juror No. 9 during a little league game. This Court interviewed both jurors about the incident, and allowed Juror No. 6 to remain on the jury, but dismissed Juror No. 9 based on her fear of St. Jean following the incident. The Supreme Court concluded that Petitioner failed to establish identifiable prejudice or egregious circumstances warranting a new penalty hearing.[15]

Petitioner next filed a petition for a writ of *certiorari* with the United States Supreme Court in June of 2008. The petition was denied.[16]

Motion for Postconviction Relief

On October 24, 2008, Petitioner, represented by new counsel, timely filed his original Motion for Postconviction Relief as well as Motion for Stay of Execution, which this Court granted on December 15, 2008. On October 19, 2009, Petitioner filed his Amended Motion for Postconviction Relief in which Petitioner raises twenty-three separate claims for relief. The State subsequently filed its response, to which Petitioner filed a reply. Donovan and Tease each filed sworn affidavits responding to the allegations in the Amended Motion.

Beginning October 10, 2011 and concluding November 7, 2012, the Court

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[14] *Id.* at 273.

[15] *Sykes*, 953 A.2d at 272-73.

[16] *Sykes v. Delaware*, 555 U.S. 969 (2008).

held an evidentiary hearing over the course of eleven days. Over 40 exhibits were admitted into evidence, and 21 witnesses, including Trial Counsel, testified during the hearing. An additional three witnesses who did not testify were deposed. Both parties submitted briefs in support of their arguments following the hearing.

On April 12, 2013, Petitioner filed a Motion to Amend to add two additional claims to his Amended Motion for Postconviction Relief. By Order dated July 12, 2013, this Court denied Petitioner's Motion to Amend on the grounds that the amendments would be futile.[17]

Evidentiary Hearing

Given the breadth of Petitioner's claims, this Court shall briefly summarize the testimony presented at the evidentiary hearing before conducting its legal analysis.

a. Thomas Donovan

Donovan testified over the course of two days. Petitioner's questioning of Donovan attempted to portray Donovan as having a single-minded focus on escaping his appointment as Petitioner's attorney, and as a result did not begin investigating Petitioner's case as early as he should have. Donovan acknowledged that approximately sixteen months elapsed between Petitioner's proof positive hearing in June of 2005 and Donovan's next face-to-face meeting with Petitioner in April of 2006. Petitioner had previously mailed Donovan a letter that month expressing Petitioner's "utter alarm" that Donovan had not visited him at prison.

Donovan testified that he chose Tease as his co-counsel based on Donovan's

[17] *State v. Sykes*, 2013 WL 3834048, at *3 (Del. Super. July 12, 2013).

mistaken belief that Tease had considerable experience in capital cases. Donovan also failed to hire a forensic expert to rebut Dr. Vershvovsky's testimony, which Donovan acknowledged to be a mistake on his part because, at the time, Donovan believed he or Tease could effectively cross-examine Dr. Vershvovsky without the aid of a forensic expert. Much of Petitioner's questioning also focused on Donovan's supposed failures to either obtain certain evidence, object to comments made by the State during closing arguments, or to call specific witnesses.

On cross-examination, Donovan described the defense's trial strategy as two-fold: (1) to implicate St. Jean in Trimnell's murder, on the theory that Petitioner had a consensual sexual relationship with Trimnell which St. Jean found out about; and (2) to show there was a lack of evidence implicating Petitioner. Donovan acknowledged there were difficulties in pursuing both strategies. Donovan testified that as of December of 2004, Petitioner initially denied knowing Trimnell, and once Petitioner told Trial Counsel in June of 2005 that he had a sexual relationship with Trimnell, there was not enough information to prove the relationship existed. Further, Petitioner specifically told Trial Counsel not to attempt to implicate St. Jean, and it was not until halfway through the trial that Petitioner changed his mind, leaving Donovan little time to prepare the strategy. Trial Counsel were also concerned that if they pursued St. Jean too aggressively, St. Jean could provide damaging testimony against Petitioner. Still, Donovan chose to not prepare St. Jean for her testimony for Petitioner, in order to potentially implicate her in Trimnell's death. Finally, Donovan testified that the strength of the State's evidence against Petitioner made his lack of

evidence strategy difficult to pursue.

Donovan acknowledged that there were issues which he failed to raise on appeal, including the argument that Juror No. 9 was improperly allowed to remain on the jury despite being an alleged acquaintance of St. Jean. Donovan claimed he only raised arguments on appeal which he believed were most likely to result in a reversal of conviction.

b. Christopher Tease

Tease testified over the course of three separate days. Tease was primarily responsible for the penalty phase of trial, but did not retain a mitigation specialist, nor did he obtain any records pertaining to Petitioner such as school records, medical records or family records. Tease did not admit that this was error, but conceded that there was no tactical or strategic reason for doing so. Tease justified his decision to not hire a mitigation specialist on the basis that before representing Petitioner, Tease had worked on another capital case with an experienced attorney, and had not retained a mitigation specialist in that case. Tease also testified that he was working on three separate murder trials at the same time when he was working on Petitioner's case, which hampered his ability to fully prepare Petitioner's case. Additionally, at this point in Tease's career, Tease did not have much experience in murder trials.

At the outset of the case, Tease had his law clerk interview several of Petitioner's family members as preparation for the penalty phase of trial. Tease claimed he also conducted interviews, and stated that he interviewed Petitioner on numerous occasions. Tease believed early on in the case that, due to the strength of

the State's evidence, Petitioner "had no shot" in the guilt phase. Thus, Tease testified that he began prepping several of the mitigation witnesses during the guilt phase of trial. Tease's strategy for the penalty phase was to present the testimony of Petitioner's family to focus on Petitioner's then-ten-year-old son, and the need for the son to have a father figure because Petitioner's own father, Jesse Sykes (hereinafter "Jesse) was a negative influence on Petitioner's upbringing. However, Petitioner was "adamant" that he wanted neither A.S. nor Jesse to testify at his penalty hearing. Petitioner was also adamant in not wanting to allocute. Petitioner's questioning at the evidentiary hearing focused on Tease's alleged failure to focus on the physical abuse Jesse inflicted on Petitioner and Petitioner's exposure to Jesse's substance abuse as potential mitigators.

Tease had Petitioner evaluated by a psychologist, Dr. Mandell Much (hereinafter "Dr. Much").[18] Tease claims that Petitioner was not very cooperative during Dr. Much's evaluation, and that Dr. Much's evaluation would not have been helpful during the penalty phase because Dr. Much's only conclusion was that Petitioner suffered from an anti-social personality disorder, which would not be a helpful mitigating factor. Tease's testimony also referred to a Dr. Dougherty; it appears that this psychologist, whom Tease had worked with on another case, may have initially been retained as well, but ultimately an evaluation was never scheduled

[18] Tease's affidavit, as well as the State's briefings, refer to a Dr. Mensch as conducting this evaluation. However, Tease's testimony clarified that it was Dr. Much who performed the evaluation, and Tease was mistaken when he referred to the psychologist by the wrong name. Transcript of Rule 61 Hearing, at 199, *State v. Sykes*, No. 0411008300 (Oct. 11, 2011).

with Dr. Dougherty.

Tease cross-examined several key witnesses during the guilt phase, including Dr. Vershvovsky and Detective Case. Tease acknowledged that his cross-examination of Dr. Vershvovsky might have been benefitted if Trial Counsel had retained their own medical expert or pathologist. Tease defended his decision to not challenge Detective Case's lay testimony that drag marks on the floor of the basement in Trimnell's apartment complex matched the suitcase in which Trimnell's body was discovered. Tease stated that the drag marks suggested that a second person may have been involved in moving the suitcase, and thus Detective Case's testimony was helpful to the defense.

Finally, Tease indicated that communication between himself and Donovan was not as effective as it could have been. Tease also disagreed with several of Donovan's tactical decisions, especially Donovan's decision to not prepare St. Jean for her testimony during the guilt phase. Tease acknowledged that not preparing St. Jean was a tactical decision by Donovan, in order to potentially "blind-side" her and implicate her in Trimnell's death, but Tease did not believe the strategy paid off. Tease did prepare St. Jean for the penalty phase. Tease also formulated his own strategy during the guilt phase which he presented during the penalty phase: a "residual doubt" theory that Trimnell accidentally suffocated to death once she was bound, and that there was not enough evidence that she was intentionally strangled to death.

c. other members of the defense team

Tease's law clerk[19] during the early stages of Petitioner's trial also testified at the evidentiary hearing. The law clerk testified that Tease prepared a questionnaire for the law clerk to use in interviewing Petitioner's family members in preparation for the penalty phase. The law clerk interviewed Petitioner's mother and two of Petitioner's sisters, and prepared a memorandum on his findings. Other than the interviews, the clerk did not perform any other task related to the Sykes' case, and left Tease's employment shortly thereafter.

Gary Marshall (hereinafter "Marshall") was a private investigator hired by Donovan to work on Petitioner's case, which was the first murder case Marshall had worked on. Prior to becoming a private investigator, Marshall had approximately 10 years of experience as a police officer in Virginia and Maryland and had also worked as an internal investigator for Wal-Mart. Marshall interviewed Sykes at prison approximately six weeks before trial, worked closely with Donovan in participating in meetings and interviews with potential witnesses, and reviewed phone records and Trimnell's bank records in an attempt to establish a prior relationship between Petitioner and Trimnell. Marshall also interviewed Trimnell's neighbors and St. Jean's employer to investigate whether there was a link between St. Jean and Trimnell.

Marshall testified that he believed that St. Jean was involved in some way in

[19] The Court declines to name the law clerk as he was not a Delaware barred attorney at all times relevant to this case.

Trimnell's death, but that petitioner did not want the defense team to explore that route. Marshall also testified that despite his efforts, there was not enough information to establish a pre-existing relationship between Trimnell and Petitioner or St. Jean. Petitioner asked a series of questions in an attempt to show that Marshall cut his investigation short based on a lack of funds, but Marshall adamantly denied these allegations and testified that lack of funds was not an issue that affected the investigation.

Philip Malmstrom (hereinafter "Malmstrom") is the owner of Diamond Computer Incorporated, which provides a variety of computer-related services including data recovery. Donovan hired Malmstrom to retrieve data from Trimnell's and Petitioner's computers and compare the data on both computers. Malmstrom's findings validated the accuracy of the police's findings. Malmstrom testified that Donovan never asked Malmstrom to be a witness in the case. Prior to Petitioner's case, Malmstrom had not done data recovery for any other court case.

d. David Bruner

David Bruner (hereinafter "Bruner") knew St. Jean because Bruner's aunt had employed St. Jean as a home care nurse in late 2003 and early 2004. Bruner had a positive impression of St. Jean, but eventually Bruner noticed unauthorized charges on his aunt's credit card and checking account. Bruner contacted the police, St. Jean ceased working for Bruner's Aunt, and Bruner had no further contact with St. Jean. Bruner was socially acquainted with Donovan and met with Donovan and Marshall to discuss his knowledge of St. Jean. Donovan told Bruner that Bruner would be

called as a witness at trial. Despite being subpoenaed and arriving at trial prepared to testify, Bruner was never called as a witness. Bruner was told he would not be called, but never received an explanation as to why.

e. Mike McClements

Floyd "Mike" McClements (hereinafter "McClements") was St. Jean's former fiancé. While Petitioner was incarcerated in Pennsylvania for an unrelated crime, McClements lived with St. Jean and her son at the Hartly mobile home for approximately ten months. McClements was "sure" that while he lived at the mobile home, he used the computer to access pornographic websites. McClements could not recall the specific sites he accessed, but testified he did not view pornography frequently and that he did not pay for the sites he visited. McClements recalled one occasion where his bank account was overdrawn due to access to a paid website; McClements later confronted St. Jean about this, who according to McClements admitted she had used his account to access a pornographic site.

f. Jenny St. Jean

St. Jean testified that in June of 2004 she was laid off from her job as a home care nurse as a result of the incident involving Bruner's aunt. St. Jean subsequently pled guilty to one count of unauthorized use of a credit card and one count of felony theft; she also pled guilty to one count of hindering prosecution in regards to Petitioner's case. St. Jean was also arrested in May of 2004 for offensive touching when St. Jean punched a female coworker whom St. Jean believed was flirting with petitioner.

St. Jean regularly saw a psychiatrist, and testified that she had a long history of having "nasty moods," which included mood swings, explosive bursts of anger, and impulsive behavior. In July of 2004 St. Jean was hospitalized after taking an overly large amount of Prozac, and was diagnosed with bipolar disorder. St. Jean took medication for her condition, but testified that she did not always remember to take her medication if Petitioner did not remind her. She stopped taking her medication in October of 2005.

St. Jean testified that it was her decision to not bring A.S. to the penalty hearing because the child had been "troubled" ever since Petitioner's arrest, and St. Jean believed it would be inappropriate. St. Jean also claimed that she only had one meeting with Donovan before she testified at the guilt phase of trial, and that she did not confer with Tease at all before the penalty hearing except for a brief conversation in the hallway before St. Jean took the stand.

Perhaps the most important testimony given by St. Jean at the evidentiary hearing concerned a statement St. Jean made to Trial Counsel during the guilt phase. St. Jean testified that during the guilt phase of the trial, St. Jean informed both Donovan and Tease that on the night Petitioner was arrested, nineteen days after his flight from Sergeant Mutter, Petitioner told St. Jean: "[i]f they had been 30 seconds later it would have been on fire."[20] St. Jean testified that "they" meant police, and "it" meant Trimnell's vehicle that Petitioner was driving on November 10, 2004. St. Jean

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[20] Transcript of Rule 61 Hearing, Volume D, at D-105, *State v. Sykes*, No. 0411008300 (Oct. 17, 2011).

claimed she did not tell police about Petitioner's statement because she was not certain if she remembered the statement correctly. St. Jean never testified about that statement at Petitioner's trial, and the revelation of that statement at the evidentiary hearing was the first time that statement was introduced into the record in this case.

g. Petitioner's family

Petitioner's mother, Debora Sykes (hereinafter "Debora") and Petitioner's sister, Debray Sykes (hereinafter "Debray"), both of whom testified at the penalty hearing, also testified at the evidentiary hearing. Petitioner's other sister who testified at the penalty hearing, Creshenda Jacobs (hereinafter "Jacobs") was deposed, but did not testify. Petitioner's older sister, Richelle Herriott (hereinafter "Herriott"), and Petitioner's younger sister, Jania Watkins (hereinafter "Watkins") also testified at the evidentiary hearing. Neither Herriott nor Watkins testified at the penalty hearing; both stated that they were never contacted by Trial Counsel for an interview or asked to testify in the penalty hearing, but would have agreed to testify if asked.

Debora, Debray and Jacobs all testified that they had little to no contact with Trial Counsel prior to the penalty hearing and were either not prepared by Tease before they testified or received only minimal preparation. Debray claimed she was never interviewed about Petitioner's life growing up or her family's background in general. However, on cross-examination, Debray acknowledged that Trial Counsel may have contacted her towards the beginning of Petitioner's case to interview her, but Debray declined to share any information because she did not know who the attorneys were.

All of these witnesses testified that Petitioner had a loving relationship with A.S. Watkins further testified that she had a loving relationship with Petitioner. The testimony of Debora, Debray, Jacobs, and Herriott was largely consistent and can best be summarized as follows: Petitioner's household when he was a child was one of little to no means and no real parental presence, particularly by Petitioner's father, Jesse. The neighborhood where the family lived was one infested with crime and high drug use. Debora attempted to maintain a strict household and often inflicted corporeal punishment upon her children that at times could be considered harsh; Petitioner would often receive the worst of this punishment. Jesse was verbally and physically abusive to Debora, and made no attempts to conceal his dalliances with other women before ultimately abandoning the marriage. Despite this, Petitioner adored Jesse as a child, and ultimately Debora allowed Petitioner to live with Jesse for approximately two years. While living with Jesse, Petitioner continued to be exposed to his father's sexual relationships and substance abuse, and Petitioner was physically abused by his father.

h. Dawn Hawkins

Dawn Hawkins (hereinafter "Hawkins") testified via video deposition. Hawkins was Jesse Sykes' girlfriend for a number of years, and shared a house with him. Hawkins testified that Jesse was physically abusive towards her, and that Jesse once violently threatened Hawkins with a gun. Petitioner lived in Jesse and Hawkins' home as a teenager for approximately two years. Hawkins' young son and younger sister also lived in the house during that time. Hawkins testified that Jesse physically

abused Petitioner on a frequent basis, and Jesse would smoke marijuana in Petitioner's presence. Hawkins stated that Jesse often stole items from his job as a moving van driver, and would force Hawkins and Petitioner to accompany him on his thefts. Hawkins stated that Trial Counsel never contacted her about testifying at the penalty hearing.

i. Tara Whittlesay

Tara Whittlesay (hereinafter "Whittlesay") also testified via video deposition. Whittlesay is Hawkins' younger sister, and as a teenager lived in the house Hawkins shared with Jesse and Petitioner. Whittlesay testified that Petitioner longed for Jesse's affection, despite the physical abuse that Jesse would often inflict upon Petitioner. Whittlesay testified that Jesse frequently smoked marijuana, and was uncertain whether Jesse used other drugs. Whittlesay also testified that Jesse sexually abused her, and that Petitioner was likely aware the sexual abuse was occurring. Whittlesay was never contacted by Trial Counsel to testify at Petitioner's penalty hearing, but stated she would have testified if asked.

j. Yolanda Jones

Yolanda Jones (hereinafter "Jones") was Petitioner's teacher during Petitioner's childhood in Virginia. Jones was a "homebound teacher," meaning that she would visit children at their homes to teach them if they were unable to attend school. Jones testified that she often taught Petitioner at his home due to a number of chronic illnesses he suffered from as a child. Jones described Petitioner's neighborhood as one with a high poverty and crime rate, and described the Sykes

household as being kept in very poor condition. Jones testified that Petitioner struggled as a student, and had to repeat first grade and fifth grade.

k. Douglas Dyer

Douglas Dyer (hereinafter "Dyer") was the facility manager of the Jiffy Lube in Dover in 2004, and had hired Petitioner that year as a lube technician. Dyer described Petitioner as a hard worker and testified that he and Petitioner were friends outside of work. Dyer also testified that Petitioner had a positive relationship with A.S. According to Dyer, Petitioner stopped showing up for work one day without explanation, and Dyer had no further contact with Petitioner since then.

l. Dana Cook

Dana Cook (hereinafter "Cook") is the Deputy Director of the Atlantic Center for Capital Representation in Philadelphia. Cook works as a mitigation specialist and has consulted on other capital cases in conducting mitigation investigations; however, Cook has never testified as a mitigation expert. Cook was retained by Petitioner and reviewed the mitigation evidence Tease compiled in presenting Petitioner's case at the penalty phase, as well as the hearing testimony of Donovan, Tease and other witnesses including Petitioner's family members.

Cook described the typical process of a mitigation investigation, and stressed that it was important for an attorney to develop a relationship with the client at the outset of representation. Cook testified that it is good practice to gather all records pertaining to a client and to interview all members of a client's family as well as third parties such as friends and teachers. Cook stated that there were a number of "red

flags" in the evidence and interviews compiled by Trial Counsel that warranted further investigation, though none was conducted. Cook stated that the questionnaires used by his law clerk in early interviews were not comprehensive enough. Cook also found the testimony of Hawkins and Whittlesay significant in portraying an abusive atmosphere in Jesse Sykes' household that should have been presented at the penalty phase. Cook also focused on medical records that showed that Petitioner was hospitalized shortly after his birth due to a lack of oxygen. Cook testified that this should have signaled to Trial Counsel that a medical expert should have been retained to diagnose Petitioner for brain damage, another mitigator. Cook concluded that Trial Counsel's mitigation investigation was not a reasonable one, based on the failure to collect life history records, the limited number of interviews, and lack of further investigation into multiple red flags.

On cross-examination, Cook admitted that while the American Bar Association (hereinafter "ABA") Guidelines recommend retaining a mitigation specialist, there is no actual requirement to hire one. Cook's testimony was inconclusive on whether retaining a mitigation specialist was commonplace at the time of Petitioner's trial. Cook stated that testimony on the physical abuse Petitioner was exposed to in Jesse's home would have supplemented the testimony that was presented at the penalty hearing. However, Cook admitted that there was no direct link between physical abuse and why a person would commit murder.

m. Dr. Carol Armstrong

Dr. Carol Armstrong (hereinafter "Dr. Armstrong") is the director of the

neuropsychology lab for the Children's Hospital of Philadelphia and was accepted by the Court as Petitioner's expert in neuropsychology. In July of 2009, Dr. Armstrong evaluated Petitioner over the course of six hours. Dr. Armstrong found that Petitioner's abilities meet the range of someone his age, but Petitioner scored statistically lower on memory tests compared to the rest of his evaluation. Dr. Armstrong concluded that Petitioner suffered from brain damage in the form of associative memory impairment, which would cause Petitioner to be unable to remember new information or learn new things beyond his normal effort. Dr. Armstrong speculated that the physical abuse Petitioner suffered as a child was a possible cause of his memory impairment, but could not conclusively state this. In response to cross-examination, Dr. Armstrong testified this type of brain damage would not compel Petitioner to commit murder.

n. Dr. Jonathan Arden

Dr. Jonathan Arden (hereinafter "Dr. Arden") is a forensic consultant retained by Petitioner and was accepted by the Court as an expert in forensic pathology. Dr. Arden reviewed Dr. Vershvovsky's autopsy report of Trimnell, autopsy photographs, and transcripts of Dr. Vershvovsky's trial testimony. Dr. Arden concluded, contrary to remarks made by the State during closing arguments at trial, that Trimnell was bound by stockings after her death, not before; Dr. Arden also found that there was no evidence she had been gagged. Dr. Arden based his conclusions on the absence of marks or injuries indicating the victim had been alive when she was bound and no evidence that a gag was ever used. Dr. Arden's findings were otherwise consistent

with Dr. Vershvovsky's report: Dr. Arden found scattered scalpine hemorrhages (but did not believe them to be as severe as Dr. Vershvovsky did), found no defensive wounds on the body just as Vershvovsky did, agreed with Dr. Vershvovsky that the cause of death was asphyxiation by strangulation, and also agreed with Dr. Vershvovsky that it could not be determined whether the sexual activity that occurred before the victim's death was consensual or nonconsensual.

o. Dr. Craig Haney

Dr. Craig Haney (hereinafter "Dr. Haney") is a psychology professor and Director of the Legal Studies Program at the University of California at Santa Cruz. Dr. Haney was retained by Petitioner and accepted by the Court as an expert in the narrow field of the correlation between the circumstances of a crime committed outside of prison and the offender's future dangerousness while in prison. Dr. Haney testified that Petitioner would not be a future danger in prison if sentenced to life imprisonment instead of death. Dr. Haney based his conclusion on his study that the correlation between violent crimes and a criminal's future dangerousness in prison is low to nonexistent. Dr. Haney testified that individuals who commit violent crimes often become acquainted with prison life, no longer represent a danger to the rest of the prison community, and that individuals sentenced to life in prison tend to behave better. He also testified that older inmates are less likely to cause issues. Dr. Haney stressed that Petitioner's past criminal history and chaotic and abusive childhood had no relevance on his future dangerousness in prison. However, Dr. Haney admitted on cross examination that he is personally opposed to the death penalty in all cases.

p. Andrew Lash

Andrew Lash (hereinafter "Lash") is a computer forensic investigator retained by Petitioner. Lash analyzed the hard drives of Trimnell's computer and Petitioner's computers. Lash's review included a comparison of the internet searches conducted on the computers. Lash testified that between April 1, 2004 and November 29, 2004, there was no internet search utilizing pornography-related search terms conducted on Petitioner's computers. However, Lash testified that the same pornographic website that was visited on Trimnell's computer on November 7 was previously visited several times on Petitioner's computers.

q. Dr. Robert Nobilini

Dr. Robert Nobilini (hereinafter "Dr. Nobilini") was retained by Petitioner and accepted by the Court as an expert in mechanical engineering and biomechanics. Dr. Nobilini reviewed the investigation and trial testimony of Detective Case concerning the drag marks on the floor of the basement in Trimnell's apartment complex; he also conducted his own investigation of the basement floor. Dr. Nobilini testified that there were hundreds of marks on the floor that could have been caused by any number of sources other than the suitcase in which Trimnell's body was found. Dr. Nobilini further testified that there was no scientific evidence to support Detective Case's testimony that the suitcase caused the drag marks.

r. Dallas Drummond

Dallas Drummond (hereinafter "Drummond") was incarcerated based on a conviction for Rape in the First Degree at the time of his testimony. Drummond was

formerly engaged to be married to Juror No. 9, and testified that while dating Juror No. 9, Drummond's brother was dating St. Jean. Drummond stated he "never knew" if Juror No. 9 and St. Jean knew each other while they were dating Drummond and Drummond's brother. Drummond testified that the two women became casual acquaintances when both were pregnant at the same time in the same hospital. Drummond testified that while St. Jean went to the same high school as Juror No. 9, St. Jean was several grades ahead of Juror No. 9. Other than the time when Juror No. 9 and St. Jean were in the hospital together, Drummond testified he was not aware of any other interaction or relationship between the women. On cross-examination, Drummond admitted he had prior convictions for several crimes involving dishonesty, including Criminal Impersonation and Theft by False Pretenses.

LEGAL STANDARD

Based on the number of claims asserted by Petitioner, the Court finds it helpful at the outset to discuss Rule 61's procedural requirements and the standard for ineffective assistance of counsel.

Procedural Requirements of Rule 61

Superior Court Criminal Rule 61 provides that a defendant convicted of an offense may collaterally attack his conviction following exhaustion of his direct appeal by filing a motion for postconviction relief that shall specify all available grounds for relief.[21] Rule 61 sets forth several procedural requirements which the Court must consider these requirements before addressing the merits of the

[21] Del. Super. Ct. Crim. R. 61(b)(2); *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

underlying motion.[22] Rule 61(h)(3) allows the Court to summarily dispose of a motion "as justice dictates."[23]

Rule 61(i)(3) provides that a defendant is procedurally barred from raising any ground for relief in a postconviction motion that was not asserted in the proceedings leading to a judgment of conviction.[24] A defendant may raise a procedurally barred claim if the defendant can establish (A) cause for relief from the procedural default and (B) prejudice from violation of the defendant's rights.[25] Both prongs must be established in order for the Court to consider the claim.[26] The procedural bar applies to claims not asserted during trial as well as claims not raised on direct appeal, though establishing cause for the default in the latter instance "ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim."[27] However, claims of ineffective assistance of counsel are appropriately

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[22] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990). The Court will not discuss the time bar of Rule 61(i)(1) because Petitioner's original motion was timely filed. *See Ploof v. State*, 75 A.3d 811, 821-22 (Del. June 4, 2013). The repetitive motion bar of Rule 61(i)(2) is also inapplicable as this is Petitioner's first motion for postconviction relief.

[23] Del. Super. Ct. Crim. R. 61(h)(3).

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

[25] Del. Super. Ct. Crim R. 61(i)(3)(A)-(B).

[26] *See Shelton v. State*, 744 A.2d 465, 478 (Del. 2000) (dismissing procedurally barred claim for failure to establish cause, without considering prejudice prong).

[27] *Younger*, 580 A.2d at 556 (citing *Murray v. Carrier*, 477 U.S. 478, 492 (1986)).

raised in the first instance in a motion for postconviction relief.[28] Attorney error short of ineffective assistance of counsel does not constitute cause sufficient to excuse procedural default.[29] The defendant must make concrete and substantiated allegations of cause and actual prejudice in order for the exception to apply.[30]

Rule 61(i)(4) provides that any ground for relief that was formerly adjudicated in the proceedings leading to conviction, direct appeal, a prior postconviction proceeding, or a federal habeas proceeding is barred.[31] This rule is based on the "law of the case" doctrine.[32] The Court will only reconsider formerly adjudicated claims if reconsideration "is warranted in the interest of justice."[33] This exception applies when a defendant shows that "subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him."[34] The "interest of justice" exception may also apply when the previous ruling was clearly in error, there is an "important change in circumstances, in particular, the factual basis for issues previously posed," or when the equitable concern of preventing injustice is otherwise

[28] *Flamer*, 585 A.2d at 753 (citing *DuRoss v. State*, 494 A.2d 1265, 1267-68 (Del. 1985)).

[29] *Id.*

[30] *Id.*

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

[32] *Weedon v. State*, 750 A.2d 521, 527 (Del. 2000).

[33] Rule 61(i)(4).

[34] *Flamer*, 585 A.2d at 746.

implicated such that the concern trumps the law of the case doctrine.[35] A defendant cannot evade the former adjudication bar simply by refining or restating a formerly adjudicated claim.[36] Such claims will be dismissed.[37]

Rule 61(i)(5) provides an exception to the rule's procedural requirements for claims that "the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity, or fairness of the proceedings leading to the judgment of conviction."[38] This "fundamental fairness" exception is a narrow one, and has only been applied in "limited circumstances," such as when the right relied upon has been recognized for the first time after direct appeal.[39] The defendant has the burden of proof to show that he was deprived of a "substantial constitutional right" before he is entitled to relief under this exception.[40]

Ineffective Assistance of Counsel

Claims of ineffective assistance of counsel are evaluated under the well established and "highly demanding" two-pronged standard set forth by the United

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[35] *Weedon*, 750 A.2d at 527-28 (citations omitted).

[36] *See Duhadaway v. State*, 877 A.2d 52, 2005 WL 1469365, at *1 (Del. June 20, 2005) (TABLE) (citing *Collingwood v. State*, 2000 WL 1177630, at *2 (Del. Aug. 11, 2000)); *Garvey v. State*, 979 A.2d 1110, 2009 WL 2882873, at *1 (Del. Sept. 10, 2009) (citation omitted).

[37] *Id.*

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

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

[40] *Id.*

States Supreme Court in *Strickland v. Washington*.[41] A defendant asserting ineffective assistance counsel claims must establish both (1) deficient performance by trial counsel and (2) prejudice suffered as a result of the deficient performance.[42] This inquiry may be undertaken in any order, and if the defendant fails to establish either prong, then the entire claim must fail.[43]

As to the first prong, the defendant must show that the trial attorney's conduct "fell below an objective standard of reasonableness.[44] There is no strict standard for what constitutes reasonably effective assistance of counsel; prevailing norms of practice such as standards promulgated by the ABA "are guides to determining what is reasonable, but they are only guides."[45] Trial attorneys have "wide latitude" in making tactical decisions, thus there is a "strong presumption" that the challenged conduct falls within "the wide range of reasonable professional assistance;" *i.e.*, that the challenged action "might be considered sound trial strategy."[46] Accordingly, judicial review of an attorney's performance is "highly deferential," and entails: judging the reasonableness of the attorney's conduct based on the facts of the particular case at the time of the challenged conduct; requiring the defendant to

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[41] *Flamer*, 585 A.2d at 754 (citing *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986)).

[42] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[43] *See id.* at 697.

[44] *Id.* at 688.

[45] *Id.*

[46] *Id.* at 689.

identify the acts or omissions of the attorney that "are alleged not to not have been the result of reasonable professional judgment;" and determining whether, in the light of all the circumstances, the identified conduct falls outside the "wide range of professionally competent assistance."[47] Examples of tactical decisions entitled to deference include whether or not to call a witness and how to cross-examine that witness.[48] Conclusory and unsubstantiated assertions that defense counsel acted unreasonably will not be accepted.[49]

As to the second prong, the defendant must affirmatively prove that counsel's unreasonably deficient performance had a prejudicial effect on the judgment; *i.e.*, that the attorney's mistakes had an actual adverse effect on the proceedings.[50] The defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[51] Reasonable probability means "a probability sufficient to undermine confidence in the outcome."[52] The totality of the evidence presented before the judge or jury must be considered in making the prejudice determination.[53] When a conviction is

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[47] *Id.* at 689-690.

[48] *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

[49] *See Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

[50] *Strickland*, 466 U.S. at 693.

[51] *Id.* at 694.

[52] *Id.*

[53] *Id.* at 695.

challenged, the analysis is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."[54] When a death sentence is challenged, "the question is whether there is a reasonable probability that, absent the errors, the sentencer. . .would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."[55] If the defendant fails to "state with particularity the nature of the prejudice experienced," such failure is "fatal to a claim of ineffective assistance of counsel."[56]

The Delaware Supreme Court, in summarizing the holding of the United States Supreme Court in *United States v. Cronic*, has explained that in certain contexts that analysis under the second prong of the *Strickland* test is unnecessary "because prejudice is presumed."[57] There are three scenarios when prejudice is presumed under *Cronic*: (1) when there is a "complete denial of counsel"; (2) defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) if the attorney is asked to provide assistance under circumstances where "competent counsel likely could not."[58] In order to presume prejudice under the second scenario, the defendant must allege a defect in the proceedings as a whole

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[54] *Id.*

[55] *Id.*

[56] *Dawson*, 673 A.2d at 1196.

[57] *Cooke v. State*, 977 A.2d 803, 848 (Del. 2009) (citing *United States v. Cronic*, 466 U.S. 648, 659-62 (1984)).

[58] *Sahin v. State*, 72 A.3d 111, 114 (Del. July 26, 2013) (citing *Cooke*, 977 A.2d at 848).

rather than at specific points in the trial, and "the attorney's failure must be complete."[59] Stated differently, if there is no "structural defect" in the adversarial process that is "so inherently prejudicial to the adversarial process and a fair trial," prejudice is not presumed under the second scenario of *Cronic* and the two-pronged test of *Strickland* applies instead.[60]

DISCUSSION

Claim I: *Trial Counsel were ineffective in failing to conduct an investigation that would have uncovered readily available evidence of Petitioner's innocence*

Petitioner first argues that Trial Counsel were ineffective by failing to conduct a reasonable investigation into evidence that would have demonstrated his innocence. This claim was not asserted in the proceedings leading to Petitioner's conviction, and thus is procedurally barred unless Petitioner can establish both prongs of *Strickland*. In his Amended Motion, Petitioner cites to *Cronic*, but fails to establish that any of the three *Cronic* scenarios apply; accordingly, *Strickland* is the appropriate standard for this claim.

Petitioner also alleges a variety of constitutional violations arising from this alleged failure to investigate, including the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and Article I, §§ 4, 7, 9, 11, 12, and 13 of the Delaware Constitution. Petitioner merely mentions these provisions in his section headings and otherwise provides no citation to these sections nor any actual analysis

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[59] *Cooke*, 977 A.2d at 849 (citing *Bell v. Cone*, 535 U.S. 685, 696-97 (2002)).

[60] *See Sahin*, 72 A.3d at 115; *Cooke*, 977 A.2d at 852.

as to how Petitioner's rights under these provisions were violated. Accordingly, these claims, to the extent they can be considered distinct from Petitioner's ineffective assistance claim, are denied pursuant to Rule 61(h)(3).

The *Strickland* Court explained that an attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[61] Decisions not to investigate "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."[62] The defendant's own statements and actions are critical in determining the reasonableness of investigation decisions, because the attorney's actions "are usually based, quite properly, on informed strategic choices made by the defendant and on information provided by the defendant."[63] The need for further investigation "may be considerably diminished or eliminated altogether" when counsel are generally aware of facts that support a potential line of defense.[64] Additionally, "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."[65]

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[61] *Strickland*, 466 U.S. at 691.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

a. general lack of investigation

Petitioner's Post-Hearing Opening Brief makes much of the fact that Donovan initially attempted to be excused from his appointment as Petitioner's counsel. Petitioner characterizes Donovan's efforts from the time of his appointment in January of 2005 until May of 2005 as a needless delay in the investigation. However, as noted *supra*, this Court found merit to Donovan's argument that the PDO had no conflict of interest preventing it from representing Petitioner. Even though the matter was ultimately resolved so that Donovan stayed on as Petitioner's counsel, Donovan's time and effort spent in attempting to be excused from the appointment cannot be said to fall below an objective standard of reasonableness given the merit of his position.

Petitioner argues that the investigation was deficient in other ways: Donovan did not visit Petitioner in prison until sixteen months had elapsed from the time of his appointment; Donovan failed to maintain an ongoing dialogue with Petitioner; and Marshall did not actively investigate the case. Notwithstanding his initial efforts to be excused from his appointment, it is troubling that Donovan did not keep Petitioner actively updated on the status of his case; Donovan acknowledged as much during the evidentiary hearing. Petitioner correctly points out that the ABA Guidelines for the Performance of Counsel in Death Penalty Cases recommend interviewing a client within 24 hours of the attorney's appearance,[66] and maintaining an active dialogue with the client regarding factual investigation.[67] Nonetheless, as noted in *Strickland*,

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[66] ABA Guideline for the Performance of Counsel in Death Penalty Cases 10.5(B)(2).

[67] ABA Guideline for the Performance of Counsel in Death Penalty Cases 10.5(C)(1).

the guidelines are just that: guidelines. They are not binding law. Failure to comply with them does not automatically establish unreasonable performance.

Donovan was only one member of a two-man team: the record reflects that Tease met with Petitioner numerous times throughout the case and spoke with Petitioner about potential leads to investigate. Additionally, even though Donovan did not visit Petitioner in prison until April of 2006, Donovan had met with Petitioner in person on two prior occasions, at the preliminary hearing and proof positive hearing, and held extended conversations with Petitioner at both proceedings. Additionally, the record reflects that Marshall also pursued leads as directed by Donovan, canvassed Trimnell's apartment building, and conducted further investigation in an attempt to link Trimnell to St. Jean. Petitioner indicates that Marshall should have done more work on his own initiative, but fails to allege what it is exactly that Marshall should have done. Finally, Petitioner fails to specifically allege prejudice: even if a more thorough investigation were conducted, Petitioner fails to argue what evidence such investigation would have uncovered that could have possibly rebutted the overwhelming amount of evidence presented by the State. Thus, even if Donovan's lack of communication with Petitioner can be said to be unreasonable, there is no reasonable probability of prejudice based on the efforts of Tease and Marshall and the overwhelming evidence presented by the State.

b. prior relationship between Trimnell and Petitioner

Petitioner also argues that Trial Counsel failed to gather evidence of a prior sexual relationship between Trimnell and Petitioner. Petitioner also argues that had

Trial Counsel interviewed Dyer and Dyer's wife, Trial Counsel would have learned that Petitioner had driven Trimnell's car on several occasions prior to her murder, indicating that Petitioner had permission to use the vehicle. Both of these claims are raised in Petitioner's Amended Motion, but are noticeably absent from his Post-Hearing Opening Brief. This is likely because the testimony of Donovan, Tease and Marshall at the evidentiary hearing established that Petitioner did not tell Trial Counsel that he had a prior relationship with Trimnell until September of 2005. Prior to that, Petitioner had in fact denied any prior knowledge of Trimnell. Further, Trial Counsel and Marshall testified that they did in fact attempt to investigate the existence of a prior relationship, but could uncover no evidence that one existed. Finally, even though Dyer testified at the hearing, Dyer gave no testimony whatsoever concerning Petitioner's use of Trimnell's vehicle. This claim is clearly without merit and must be denied.

c. failure to interview James Thomas

Petitioner also alleges that Trial Counsel were ineffective in failing to interview James Thomas (hereinafter "Thomas"), who stayed at the Hartly mobile home during the weeks before Trimnell's murder. Petitioner indicates that such interview may have revealed that Thomas was somehow involved in the murder. Petitioner asserts this claim in his Amended Motion but fails to raise it again in his Post-Hearing Brief. Tease testified that he spoke with Petitioner about investigating Thomas' involvement in the murder, but Petitioner "laughed off" Tease's suggestion that Thomas could have been involved. Given that Petitioner indicated to Tease that this line of

investigation was pointless, failure to pursue it cannot be said to be unreasonable.

d. failure to investigate and subsequent mishandling of St. Jean

Petitioner's other primary argument relating to failure to investigate focuses on St. Jean. St. Jean testified as a witness for both the State and Petitioner during the guilt phase of trial. Petitioner argues that Trial Counsel were ineffective in failing to fully investigate and present evidence on St. Jean's bipolar disorder and other mental issues as well as St. Jean's history of violent jealousy. Petitioner argues that Trial Counsel should have made better attempts to admit evidence of St. Jean's prior conviction for offensive touching for assaulting a woman who was allegedly flirting with Petitioner, should have made further investigation into other individuals such as a former fellow mental patient, as well as a former lover of Petitioner's, and should have made better use of St. Jean's diary once it was admitted into evidence to show her obsessive jealousy. Petitioner also makes much of Trial Counsel's failure to call Bruner as a witness to establish St. Jean's credit card theft of Bruner's aunt.[68] Finally, Petitioner argues that Trial Counsel was ineffective in failing to adequately investigate the pornography found on Petitioner's computers. Petitioner contends that had Trial Counsel interviewed McClements and either better utilized Malmstrom or

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[68] In his Amended Motion, Petitioner specifically argues that Donovan should have investigated allegations he made in a letter to this Court referencing two witnesses who would have testified that St. Jean worked for Trimnell as a maid. At the evidentiary hearing, Donovan testified that one of these witnesses was Bruner, and he was not certain of the identity of the other witness. This argument was not pursued by Petitioner in his Post-Hearing Opening Brief. Given the lack of argument and evidence surrounding this claim, as it was most likely speculation by Donovan rather than actual evidence, it will not be discussed further.

hired an additional expert besides Malmstrom, Trial Counsel would have been more likely to establish that St. Jean had accessed the pornographic websites on Petitioner's computers and accessed similar websites on Trimnell's computer in an effort to frame him for Petitioner's murder.

The Court finds this latter argument farfetched, unsupported by the evidence, and unlikely to change the outcome of the trial if presented due to the abundance of evidence presented by the State. As for the other arguments, there are three reasons why they too must fail. First, because St. Jean was a witness for both the State and Petitioner, Trial Counsel had good reason to not impeach St. Jean's credibility to a great extent. Thus, failing to call Bruner to testify at trial, despite Donovan's statement that not calling Bruner was not a strategic decision, was not unreasonable. The record and testimony from the hearing indicates that Donovan still made attempts to implicate St. Jean at trial, such as by admitting the diary into evidence. Second, Donovan testified that "it was hard to paint [St. Jean] as a participant in the crime without also implicating [Petitioner]. . .[t]hat was my–that was a difficulty."[69] Trial Counsel were concerned that if they pursued St. Jean too aggressively, that St. Jean could provide testimony that would be damaging to Petitioner. This was why Donovan made the strategic decision to not prepare St. Jean to any great extent prior to her trial testimony; such decision falls within the wide range of reasonableness. This concern was also validated by St. Jean's testimony that she had told Trial

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[69] Transcript of Rule 61 Hearing, Volume A, at 79, *State v. Sykes*, No. 0411008300 (Oct. 10, 2011).

Counsel that Petitioner had told St. Jean he intended to burn Trimnell's vehicle before Sergeant Mutter stopped him. It should be noted that St. Jean never actually testified to this statement at trial.

Petitioner expressly told Trial Counsel to not attempt to implicate St. Jean. Trial Counsel still pursued several avenues of investigation, such as attempting to establish a link between Trimnell and St. Jean, but it was not until halfway through trial that Petitioner relented and told Trial Counsel to attempt to implicate St. Jean. Marshall testified that Trial Counsel suspected that St. Jean had greater involvement in the crime than Petitioner let on, but that Petitioner's requests that St. Jean not be investigated prevented Trial Counsel from fully pursuing this lead. As with Petitioner's initial denials of a relationship with Trimnell and Petitioner's indication to Tease that investigating James Thomas would have been fruitless, Petitioner cannot now argue it was unreasonable to not investigate St. Jean further when Petitioner originally insisted that St. Jean not be implicated.

Lastly, Petitioner alleges for the first time in his Post-Hearing Brief that Trial Counsel should have asserted a *Jencks* violation on appeal in reference to the State's comments during a trial conference that St. Jean had made statements during an interview with the State regarding a woman with whom Petitioner had an affair. Petitioner does not assert this claim in his original Amended Motion. The Court notes that even if this somehow violated the *Jencks* rule, such violation constituted harmless error in light of the overwhelming untainted evidence presented by the

State.[70]

Based on the foregoing, Trial Counsel's failure to more fully investigate and attempt to implicate St. Jean did not fall below an objective standard of reasonableness, nor did it create actual prejudice.

e. Susan Carden's potential alibi testimony

Petitioner also argues that Trial Counsel was ineffective in not presenting a memorandum prepared by Susan Carden (hereinafter "Carden"), the Dover Downs employee whom Petitioner had informed of his resignation on November 8, 2004. Carden prepared a memorandum of her interaction with Petitioner, which stated that Petitioner had told Carden that Petitioner had missed work due to car trouble, and had stayed at a Wilmington motel on November 7 in order to retrieve his car from a local impound lot. Petitioner contends that Carden's memorandum could have been utilized to establish a timeline that would provide an alibi for the time of Trimnell's murder. However, the State correctly points out that even if the memorandum were introduced into evidence, the timeline described in Carden's memorandum still includes a substantial amount of unaccounted time during which Petitioner could have still traveled back to Dover and committed the murder. Petitioner has failed to establish actual prejudice, *i.e.*, that the jury would not have found Petitioner guilty beyond a reasonable doubt if this purported alibi were presented. Thus, this claim also fails.

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[70] *See Lance v. State*, 600 A.2d 337, 342-43 (Del. 1991) ("violations of the *Jencks* rule are subject to a harmless error analysis.").

f. Trimnell's answering machine

In his Amended Motion but not his Post-Hearing Brief, Petitioner argues that Trial Counsel should have obtained access to Trimnell's answering machine in order to determine if there were any messages from Petitioner for Trimnell in order to establish a prior relationship between the two. Petitioner merely argues that there "could" have been messages on the machine; this is hardly enough to establish prejudice under *Strickland*. Thus, this claim too must fail.

g. investigation was not ineffective assistance

Based on the foregoing, Donovan may have been unreasonable in not maintaining a more communicative relationship with Petitioner. But such lack of communication does not satisfy the prejudice prong of *Strickland*. Petitioner's own limitations that he imposed on the investigation are responsible for many of the alleged deficiencies that Petitioner now argues. Further, none of the foregoing would have established Petitioner's innocence or rebutted the State's evidence. Thus, Trial Counsel's investigation of evidence of Petitioner's innocence does not amount to ineffective assistance of counsel under *Strickland*.

Petitioner has also failed to otherwise establish cause and prejudice under Rule 61(i)(3) nor has Petitioner established that the fundamental fairness exception of Rule 61(i)(5) should apply. Accordingly, this claim is procedurally barred under Rule 61(i)(3).

<u>Claim II</u>: *Trial Counsel were ineffective in failing to seek disclosure of several Brady violations committed by the State*

Petitioner alleges that the State committed three *Brady* violations by failing to disclose certain information, and that Trial Counsel was ineffective in failing to seek disclosure of this information and in failing to assert these violations on appeal. As with Claim I, Petitioner asserts violations of his rights under numerous provisions of the U.S. Constitution and Delaware Constitution in conclusory fashion, and fails to elaborate upon these arguments. They therefore are denied.[71] Petitioner did not raise this claim in the former proceedings, thus it is procedurally barred under Rule 61(i)(3) unless Petitioner establishes ineffective assistance of counsel or establishes that the exception of Rule 61(i)(5) applies based on the *Brady* violations.

In *Brady v. Maryland* the United States Supreme Court held that when the prosecution fails to disclose evidence requested by the defendant, such failure to disclose "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[72] To establish a *Brady* violation, the defendant must establish: (1) that the evidence is favorable to the defendant in that it is either exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3)

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[71] *See* Del. Super. Ct. Crim. R. 61(h)(3).

[72] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

prejudice must have ensued.[73] The State has no obligation to disclose purely speculative or preliminary information.[74] To establish the third prong of prejudice—*i.e.*, materiality—the defendant must show that there is a reasonable probability that, had the evidence been disclosed, the result of the trial would have been different.[75] In other words, the suppressed evidence must "undermine. . . confidence in the outcome of the trial."[76] However, when the State's "untainted evidence of guilt [is] overwhelming," the State's nondisclosure amounts only to harmless error.[77]

a. promises of financial assistance

Petitioner alleges three *Brady* violations. First, Petitioner argues that the State failed to disclose the nature of promises of financial assistance made by Detective Case to St. Jean in exchange for her testimony. Petitioner points to a sidebar conversation during St. Jean's testimony in which the State admitted there were discussions between the detective and St. Jean concerning her finances, and an entry in St. Jean's diary listing Detective Case's contact information in an entry related to her financial situation. This claim is meritless: during the guilt phase, St. Jean did in

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[73] *Atkinson v. State*, 778 A.2d 1058, 1063 (Del. 2001) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

[74] *Burke v. State*, 692 A.2d 411, 1997 WL 139813, at *2 (Del. Mar. 19, 1997) (citing *United States v. Agur*, 427 U.S. 97, 109 n. 16 (1976)).

[75] *Atkinson*, 778 A.2d at 1063 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

[76] *Id.*

[77] *Michael v. State*, 529 A.2d 752, 757 (Del. 1987).

fact testify about Detective Case's offer of assistance to help prevent St. Jean from losing her home. Further, during the evidentiary hearing, St. Jean elaborated upon her trial testimony by explaining that Detective Case provided her with information to contact Delaware Social Services about assistance with paying her rent. St. Jean testified that she did not understand this gesture to mean that Detective Case was offering to pay St. Jean's rent with his own money.

Thus, this evidence was not favorable to Petitioner in that the nature of the alleged "promises" had little to no impeachment value. Even if it was favorable impeachment evidence, such evidence cannot be said to be material in that there is no reasonable probability the outcome of the trial would have been different had these conversations been disclosed to the jury.

b. seizure of physical evidence from the Hartly mobile home

Second, Petitioner alleges that the State failed to disclose the seizure of several pieces of physical evidence from the Hartly mobile home. According to St. Jean, there was a third pornographic magazine seized from the mobile home in addition to the two other magazines. This third magazine contained pornographic content that differed from the content of the other two magazines, and was different from the type of content accessed on the computers as well. Petitioner argues that this third magazine was somehow an "important opportunity to impeach Detective Case's credibility," because the material differed in content from the other two magazines which Detective Case said illustrated Petitioner's penchant for a particular kind of woman. The State argues that this third magazine was never seized from the mobile

home, nor was the magazine's existence proven at the evidentiary hearing. Given the questionable existence of this evidence, it cannot be said that the State suppressed it. Further, had the magazine been disclosed at trial, there is no reasonable probability that the outcome would have been different.

In his original Amended Motion, Petitioner also argued that the police failed to disclose the seizure of two additional items: bus ticket stubs for Atlantic City, New Jersey during the week of November 1 through 7, 2004; and a key ring, which Petitioner claims included a spare key to Trimnell's apartment. Petitioner raises neither of these claims in his Post-Hearing Brief. Neither of these pieces of evidence can be said to be exculpatory for Petitioner; the bus tickets fall far short of establishing an alibi, as Petitioner still could have easily had time to murder Trimnell during that time. As for the key ring, Petitioner argues that the spare key establishes that Petitioner was well known to Trimnell and thus had been given a spare key. The obvious argument that Petitioner misses, however, is that his possession of the key could also be used to establish that Petitioner had stolen the key while at Trimnell's apartment complex. Thus, collectively, the nondisclosure of these pieces of physical evidence does not amount to a *Brady* violation.

c. Detective Case's knowledge of the bag of coins

Third, Petitioner argues that the State failed to disclose how Detective Case knew about the bag of silver coins being discovered by St. Jean at the Hartly mobile home. This bag of coins was later identified as belonging to Trimnell. Petitioner argues that had the State provided Trial Counsel with information on how Detective

Case knew of the coins, Trial Counsel could have impeached the detective's credibility. What this argument overlooks is that Detective Case testified at trial that St. Jean had told him about the coins on her dresser. St. Jean denied this at trial, and testified she had not told Detective Case about the coins and found it odd that he knew about them. This was merely a credibility determination for the jury to resolve. It does not fall within the scope of *Brady*.

d. no ineffective assistance of counsel

Individually and collectively, the alleged nondisclosure of the foregoing evidence fails to amount to a *Brady* violation, because such nondisclosure does not undermine confidence in the outcome of the trial. Because there is no *Brady* violation, it follows that it was not ineffective assistance for Trial Counsel to fail to request disclosure of this evidence, nor was it ineffective assistance to not assert these claims on appeal. Petitioner has otherwise failed to establish an exception to the procedural bar under Rule 61(i)(3) nor has Petitioner established the application of the fundamental fairness exception of Rule 61(i)(5). Claim II of Petitioner's Amended Motion is therefore dismissed.

Claim III: ***Trial Counsel were ineffective in failing to rebut the testimony of the Assistant Medical Examiner and other witnesses***

In his original Amended Motion, Petitioner raised three arguments in regards to this claim. Petitioner argued that Trial Counsel were ineffective in failing to investigate and presenting any rebuttal evidence or testimony pertaining to: (1) the testimony of Assistant Medical Examiner Vershvovsky; (2) the testimony of

Detective Steven Whalen (hereinafter "Detective Whalen"), the investigator who uncovered evidence from Trimnell's and Petitioner's computers; and (3) the testimony of the State's fingerprint examiner, Rodney Hegman (hereinafter "Hegman"). In his Post-hearing Brief, Petitioner only raises this claim in regards to Dr. Vershvovsky, and makes no mention of Detective Whalen or Hegman.

This ineffective assistance of counsel claim was not asserted previously in the proceedings, and is procedurally barred if ineffective assistance is not established. In his Amended Motion, Petitioner cites to both *Strickland* and *Cronic* as applying to this claim. However, Petitioner has failed to allege a defect in the trial proceedings as a whole, and instead only asserts this claim in regards to the testimony of three specific witnesses. Thus, *Strickland* is the appropriate standard.

a. Dr. Vershvovsky

Petitioner first contends that Trial Counsel failed to adequately prepare for and effectively challenge Dr. Vershvovsky's testimony at trial. Petitioner argues that Trial Counsel were ineffective in failing to object to the introduction of "very gruesome" autopsy photos into evidence prior to Dr. Vershvovsky's testimony. Petitioner also argues that Trial Counsel were ineffective in failing to retain their own forensic pathologist to rebut Dr. Vershvovsky's findings. Tease cross-examined Dr. Vershvovsky, and also called Dr. Vershvovsky as a defense witness to question the medical examiner about a medical article that Tease believed would have supported his theory that Trimnell died as a result of suffocation as opposed to strangulation.

The "gruesome or unpleasant" nature of an autopsy photograph of a victim

does not render the photograph inadmissible.[78] Here, the Court issued a cautionary instruction to the jury warning them of the nature of these photos. Petitioner argues this instruction highlighted the gruesome nature of these photos. But that alone, if true, is not enough to render the photos inadmissible or the instruction invalid. The photos were relevant to Dr. Vershvovsky's testimony about her findings from the autopsy. Thus, Trial Counsel were not ineffective in failing to object to the photos.

Donovan testified that he did not believe retaining a forensic expert was necessary for him or Tease to effectively cross-examine Dr. Vershvovsky. Thus, the decision to not retain a forensic expert falls within the presumption of sound trial strategy. Further, the testimony of Dr. Arden at the evidentiary hearing reveals that the testimony of an expert such as Dr. Arden would not have been particularly helpful to the jury. Dr. Arden's testimony primarily focused on his conclusion that Trimnell was bound after death. Dr. Arden also testified that he believed the scalpine hemorrhages did not indicate blunt force trauma to the head, contrary to Dr. Vershvovsky's conclusion. Other than these distinctions, Dr. Arden agreed with the rest of Dr. Vershvovsky's findings, including the determination that Trimnell died as a result of asphyxiation by strangulation. The remaining differences between Dr. Arden's and Dr. Vershvovsky's conclusions, if presented at trial, would have been left for the jury to assess in a credibility determination. This cannot be said to rise to the level of a reasonable probability that the outcome of the trial would have been different had Dr. Arden or another expert testified. Thus, this portion of the claim

[78] *Keperling v. State*, 699 A.2d 317, 319 (Del. 1997).

fails the prejudice prong of *Strickland*.

The remainder of this claim concerning Tease's handling of Dr. Vershvovsky falls within the range of sound trial strategy. Such presumption applies to decisions as to what witnesses to call and how to cross-examine them. Petitioner thus fails to establish how Tease's handling of Dr. Vershvovsky falls below an objective standard of reasonableness.

b. Detective Whalen

In his original Amended Motion but not in his Post-Hearing Opening Brief, Petitioner argues that Trial Counsel were ineffective in failing to challenge the computer forensic evidence gathered by Detective Whalen, who also testified about his findings. Petitioner contends that Trial Counsel should have retained their own computer forensic expert. This argument fails, as Trial Counsel retained their own computer forensic investigator, Malmstrom, who testified at the evidentiary hearing that his findings confirmed all of Detective Whalen's findings. Further, the testimony of Andrew Lash only revealed that different pornographic search terms were used on Petitioner's computers during a particular time. Lash also confirmed that a certain pornographic site was accessed on Petitioner's computers and on Trimnell's computer. Thus, were Lash's testimony presented at trial, it would not have been particularly helpful to the jury, and at best would have left the jury with a credibility determination to make. This fails to establish prejudice under *Strickland*.

c. Hegman

At great length in his Amended Motion, Petitioner attacks Trial Counsel for not

raising a *Daubert* challenge to Hegman's testimony about the fingerprints found in Trimnell's vehicle and several items therein that were linked to Petitioner. Petitioner does not assert any of these arguments in his Post-Hearing Opening Brief. In his affidavit, Tease states that there was no reason to challenge the fingerprint testimony because the fingerprints in Trimnell's vehicle supported the defense theory that Petitioner had a preexisting consensual relationship with Petitioner. Further, Sergeant Mutter saw Petitioner driving the vehicle. Thus, it was a strategic decision to not challenge the fingerprint testimony, and challenging it would be cross purpose to the defense's theory. This claim also fails.

d. no ineffective assistance

Trial Counsel were not ineffective in their handling of the three foregoing witnesses under either *Strickland* or *Cronic*. Petitioner has also failed to otherwise establish cause and prejudice under Rule 61(i)(3) and has also failed to show why the exception of Rule 61(i)(5) should apply. Accordingly, Claim III of Petitioner's Amended Motion is denied.

<u>Claim IV</u>: *Trial Counsel was ineffective in including an unauthorized admission to burglary in his opening statement*

Petitioner next contends that Donovan made comments that were tantamount to an admission of burglary in his opening statement. These comments included:

> the State says they don't know how he entered the apartment, but he entered the apartment. That fact should not go unnoticed. Those facts should be looked into. . . .We don't know when or how he got into the building. . . .We don't know how or when Mr.

> Sykes got into that apartment. . . .Steps were taken to cover up whatever happened inside that apartment. So the State, I am sure, intends to show what happened inside that apartment. . . .We don't know how or when it was committed, or why it was committed, or why Mr. Sykes would return two days later to the scene of the crime which he had apparently gotten away with.

Petitioner argues that Donovan never consulted with Petitioner before making the above statements. Petitioner contends that the "fair reading" of these statements is that Donovan was admitting that Petitioner was inside Trimnell's apartment. Thus, Petitioner argues, these statements amount to an admission to the burglary charges, which also constitutes an admission to a statutory aggravating factor.[79] Donovan concedes in his affidavit that there was no strategic or tactical reason for these remarks. Petitioner argues that these comments amount to a lack of meaningful adversarial testing under *Cronic*, and this comment, as well as the failure to address this argument on direct appeal, amounts to ineffective assistance of counsel. This claim was not raised in the proceedings below and is procedurally barred unless ineffective assistance is established.

Burglary in the Second Degree does not merely require entry into a victim's dwelling; it also requires, *inter alia*, that the entry be made "knowingly" and

[79] Petitioner also inexplicably raises his insufficiency of the evidence argument pertaining to the Burglary, Rape, and Kidnapping charges when discussing this claim in his Post-Hearing Opening Brief. The Court shall discuss that argument when addressing Claims XIX and XX of the Amended Motion.

"unlawfully."[80] While Donovan's remarks, when viewed objectively, do seem to convey that Petitioner entered Trimnell's apartment, they hardly establish that Petitioner knowingly or unlawfully entered the apartment. Thus, it cannot be said that these remarks amount to an admission to burglary.

Prejudice cannot be presumed under *Cronic* because Petitioner only alleges one instance during the proceedings of lack of meaningful adversarial testing–the opening statements. This falls far short of a pervasive structural defect in the proceedings. *Strickland* is the appropriate standard.

This claim fails to satisfy either prong of *Strickland*. One of Trial Counsel's strategies was to establish a prior relationship between Petitioner and Trimnell; Petitioner's presence in Trimnell's apartment is consistent with that strategy. Thus, notwithstanding Donovan's concession in his affidavit, such remarks are not objectively unreasonable. Additionally, independent evidence, including Petitioner's DNA on two toothpicks found inside Trimnell's apartment, places Petitioner inside the apartment. Thus, even if Donovan's remarks are objectively unreasonable, there is no prejudice. It follows that since the opening statement did not constitute ineffective assistance of counsel, it was not ineffective for Trial Counsel to not pursue this claim on appeal. Because Petitioner has failed to establish ineffective assistance of counsel, this claim is procedurally barred pursuant to Rule 61(i)(3). Petitioner has failed to establish that there is otherwise cause and prejudice excusing the procedural default under Rule 61(i)(3). Petitioner has also failed to raise a colorable claim of a

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[80] 11 *Del. C.* § 825(a).

miscarriage of justice under Rule 61(i)(5). Claim IV is therefore denied.

<u>Claim V</u>: *the Court's improper comment on allocution compromised Petitioner's right to a fair trial before an impartial jury*

Petitioner argues that the Court's reference to allocution during the guilt phase violated Petitioner's right to an impartial jury under the Sixth and Fourteenth Amendments of the U.S. Constitution and Article I, §§ 4 and 7 of the Delaware Constitution. On direct appeal, Petitioner asserted this same claim but in the context of a violation of Petitioner's Fifth Amendment right to remain silent. The Supreme Court thoroughly analyzed and rejected Petitioner's argument.

Petitioner is simply attempting to refine and restate his first claim on direct appeal in the context of different constitutional rights. Thus, this claim is barred as formerly adjudicated under Rule 61(i)(4). Petitioner has failed to establish that the interest of justice exception applies, nor has Petitioner alleged a lack of jurisdiction or colorable claim of miscarriage of justice sufficient to invoke Rule 61(i)(5). Claim V is therefore rejected and will not be considered further.

<u>Claim VI</u>: *Petitioner is entitled to a new trial because the Court's allocution comment violated Petitioner's right to remain silent*

In his Amended Motion, Petitioner argues that the Court's allocution comment violated his right to remain silent under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution as well as Article I, §§ 4 and 7 of the Delaware Constitution. Petitioner fails to raise this claim in his Post-Hearing Opening Brief. Even moreso than the previous claim, this is merely a restatement of Petitioner's first claim on direct appeal. For the same reasons as with Claim V, this claim is barred as

formerly adjudicated under Rule 61(i)(4). Neither the interest of justice exception of Rule 61(i)(4) nor the fundamental fairness exception of Rule 61(i)(5) applies. This claim is denied.

<u>Claim VII</u>: *Trial Counsel failed to subject the State's case to meaningful adversarial testing*

Petitioner raises several different ways in which Trial Counsel failed to subject the State's case to meaningful adversarial testing. These claims were not raised during trial or on direct appeal; accordingly, they are procedurally barred under Rule 61(i)(3) unless Petitioner can establish ineffective assistance of counsel or otherwise establish an exception to procedural default under Rule 61(i)(3) or Rule 61(i)(5).

Petitioner's claim falls within the second scenario of *Cronic*. However, each of the six instances of lack of meaningful adversarial testing are specific and particular–Petitioner does not allege a structural defect in the proceedings as a whole. Accordingly, prejudice will not be presumed under *Cronic* and this Court will analyze each of the alleged errors individually under the two-pronged test of *Strickland*.

a. Detective Case's drag mark testimony

Tease cross-examined Detective Case during the guilt phase of trial. At the evidentiary hearing, Petitioner presented the testimony of Dr. Nobilini, who testified as to several alleged defects in Detective Case's testimony describing the process of matching drag marks found on the basement floor of Trimnell's apartment complex to the suitcase in which her body was discovered. Petitioner now claims that it was ineffective assistance for Tease to not raise a *Daubert* challenge. However, Tease testified that it was a strategic decision to not challenge Detective Case's testimony

regarding the drag marks, because Tease believed such testimony established that the suitcase was too heavy for Petitioner to move by himself, indicating the involvement of at least one other person. Such strategic decision falls within the wide latitude accorded attorneys under the first prong of *Strickland*. Accordingly, Tease's decision to not challenge the drag mark testimony did not fall below an objective standard of reasonableness and does not constitute ineffective assistance.

b. remarks made during the State's closing argument

Petitioner contends that Trial Counsel were ineffective in failing to object to several improper remarks made by the prosecutor during the State's closing argument. The Delaware Supreme Court has observed that "[t]he test is not whether the statements were improper but whether they were so prejudicial as to compromise the fairness of the trial process."[81] It follows that there is no ineffective assistance if the prosecutor's remarks did not rise to a level of prejudice that compromised the trial's fairness. In determining whether a prosecutor's remarks during closing arguments rises to the level of prosecutorial misconduct, three factors are examined: (1) the closeness of the case; (2) the centrality of the issue affected by the alleged error; and (3) the steps taken to mitigate it.[82]

Petitioner raises two specific challenges to the State's closing arguments: that the prosecutor improperly commented on facts not in evidence, and made racially

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[81] *Black v. State*, 616 A.2d 320, 324 (Del. 1992) (citing *Brokenbrough v. State*, 522 A.2d 851, 864 (Del. 1987)).

[82] *Id.*

charged statements to the jury. These comments include: that force was used to enter Trimnell's apartment; the scalpine hemorrhages suffered by Trimnell were contemporaneous with her death; and that Trimnell was bound and gagged before her death. The prosecutor also remarked that Sergeant Mutter "immediately picked out the defendant" in a photo lineup, when in fact the officer originally picked out two photos, one of the Petitioner, as the driver of the vehicle he stopped.

The prosecutor's comment regarding force used to enter the apartment was in fact that Petitioner gained entry to the apartment "either by cunning or by force." This alone cannot be said to be prejudicial, as two toothpicks with Petitioner's DNA established that he was in the apartment, and the prosecutor was merely suggesting fair inferences to be drawn from the evidence. While Sergeant Mutter in fact picked out two photos from the lineup and the comment was inaccurate, the case still was not a close one, as other evidence including fingerprints established that Petitioner was driving the vehicle and Sergeant Mutter also promptly picked out Petitioner in an in-court identification. The scalpine hemorrhages and bound and gagged comment both also fail under the closeness and centrality prongs of the prosecutorial misconduct. In sum, the untainted evidence against Petitioner was so great, that there was no prejudice under *Strickland* created by these comments, assuming *arguendo* that it was objectively unreasonable to not object to these remarks.

As to the allegedly racially charged comments made by the prosecutor, Petitioner contends that there were "implicit, but unmistakable and highly improper, racial overtones" in the prosecutor's description of Petitioner's rape of the victim.

There is no express reference to race whatsoever, and viewed objectively the prosecutor's closing remarks contain no racial overtones of any kind.

Based on the foregoing, no prejudice resulted from Trial Counsel's failure to object to these remarks. This claim also fails under *Strickland*.

c. failure to exclude irrelevant and prejudicial evidence

Petitioner also argues that Trial Counsel were ineffective in failing to move to exclude several pieces of evidence Petitioner calls irrelevant and prejudicial: an electronic key card reader for the Dover Ramada Inn; a steak knife found near Trimnell's apartment and a photograph of a knife set in the Hartly mobile home; photographs of a gun lockbox and handgun taken from the mobile home; the autopsy photos; and two pornographic magazines seized from the mobile home.

As noted *supra* in regards to Claim III, admission of the autopsy photos was not error. All of the other photos were relevant under D.R.E. 403–the admission of the Ramada Inn key card had nothing to do with attempting to access Trimnell's apartment, but rather was a piece of evidence found in Trimnell's car that established that Petitioner was inside the vehicle. Similarly, the steak knife was found in the parking lot near Trimnell's apartment, and the knife set at the mobile home where Petitioner lived contained a similar set of knives. No handgun was used in the commission of the crime in this case, thus any prejudice created by admission of the photos of the lockbox and gun was minimal. Further, the gun and lockbox were relevant to substantiating St. Jean's reason for attempting to call Petitioner during his disappearance: their housemate was allegedly showing the gun to St. Jean's and

Petitioner's child, A.S. In other words, admission of these photos showed a legitimate, non-criminal reason for St. Jean's attempts to contact Petitioner while he was evading police custody following his flight from Sergeant Mutter. This rebutted Trial Counsel's theory that St. Jean was somehow involved in the crime, thus this evidence was relevant.

Finally, the two pornographic magazines seized from the mobile home were similar in substance to pornography found on Petitioner's computers and on Trimnell's computer. Thus, they were relevant as circumstantial evidence that Petitioner was present inside Trimnell's apartment and using her computer on the day of her disappearance. It follows that the failure to object to the foregoing relevant evidence was not ineffective assistance of counsel.

d. failure to challenge improperly seized evidence

In his Amended Motion but not his Post-Hearing Opening Brief, Petitioner argues that Trial counsel were ineffective in challenging the seizure of several pieces of evidence, including the handgun and lockbox as well as a steak knife from the Hartly mobile home. As noted *supra*, these items were relevant, and Petitioner fails to allege any details as to how the seizure of these items was improper. Thus, it was not ineffective assistance for Trial Counsel to not attempt to challenge the seizure of this evidence.

e. no *Getz* instruction given regarding Petitioner's access of pornography

Upon agreement by the parties, the Court had agreed to deliver a jury instruction pursuant to *Getz v. State* pertaining to St. Jean's testimony that Petitioner

had previously used their computer at the mobile home to access pornography. This instruction was ultimately not given. Petitioner only raises this argument in his Amended Motion and not his Post-Hearing Brief. The State contends that the lack of such instruction, which would have instructed the jury that an adult viewing pornographic images of other adults is not a crime, is merely an oversight by the court of no magnitude. In fact, if given, the instruction would have highlighted a collateral fact in the case. This Court concludes that failure to deliver the *Getz* instruction constituted harmless error in light of the overwhelming evidence presented by the State. Accordingly, no prejudice resulted from Trial Counsel's failure to object to the lack of a *Getz* instruction. Thus, this argument also fails.

f. failure to obtain a 609 instruction for St. Jean

Lastly, Petitioner contends it was error for Trial Counsel to belatedly request a jury instruction pursuant to D.R.E. 609 that would have instructed the jury that they could consider St. Jean's testimony regarding her prior criminal convictions in assessing St. Jean's credibility. The jury returned a verdict before the instruction could be issued.

The first prong of *Strickland* assesses counsel's performance by an objective standard of reasonableness. Even though Trial Counsel specifically sought an instruction pursuant to D.R.E. 609, it was not objectively unreasonable to not obtain one. St. Jean was a witness for both the State and Petitioner. Thus, any damage to St. Jean's credibility would impeach the value of her testimony for Petitioner as well. It was not unreasonable to fail to obtain such an instruction. Further, the jury still

heard testimony about St. Jean's prior convictions; it cannot be said that there is a reasonable probability the trial's outcome would have been different had the instruction been requested. Thus, both prongs of *Strickland* are not met.

g. no ineffective assistance of counsel

Based on the foregoing, none of these alleged errors amount to ineffective assistance of counsel. It follows that this claim in its entirety is procedurally barred pursuant to Rule 61(i)(3). Petitioner has failed to establish that an exception to the procedural bar applies. Accordingly, this claim is denied.

Claim VIII: ***Trial Counsel were ineffective in failing to investigate and present available mitigating evidence at the penalty phase of trial***

Petitioner's next claim is that Tease was ineffective in failing to conduct a thorough mitigation investigation for the penalty phase of trial. This claim was not raised on direct appeal and is procedurally barred pursuant to Rule 61(i)(3) unless Petitioner establishes the two-pronged test of *Strickland* or an exception to the procedural bar under Rule 61(i)(3) or 61(i)(5).

The reasonableness prong of *Strickland*, when applied to a claim of ineffective mitigation investigation in a capital case, entails a determination as to whether counsel's "decision not to introduce mitigating evidence. . .was itself reasonable."[83] The prejudice prong of *Strickland* in the death penalty context asks "whether there is a reasonable probability that, absent the errors, the sentencer. . .would have concluded that the balance of aggravating and mitigating circumstances did not

[83] *Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

warrant death."[84] In making this determination, the Court must "reweigh the evidence in aggravation against the totality of available mitigating evidence," which includes mitigators established through a postconviction evidentiary hearing, and anti-mitigation evidence the State would have presented to rebut the new mitigation evidence.[85]

There is no absolute duty on the part of defense counsel to pursue all lines of investigation about mitigating evidence for potential use at the penalty stage.[86] Further, counsel need not present all mitigating evidence the investigation uncovered, nor need the attorney present cumulative evidence or every witness who can offer testimony.[87] The ABA Standards on mitigation investigations, while instructive on reasonableness, are merely guidelines, not legal mandates.[88]

Petitioner argues that Tease was inexperienced and overwhelmed at the time when he handled Petitioner's mitigation investigation. Drawing on the testimony and

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[84] *Swan v. State*, 28 A.3d 362, 391 (Del. 2011) (citing *Strickland*, 466 U.S. at 695).

[85] *Id.* (citing *Wiggins*, 539 U.S. at 534).

[86] *Flamer*, 585 A.2d at 756 (citing *Burger v. Kemp*, 483 U.S. 776, 794-95 (1987)).

[87] *Id.* at 757 (citations omitted); *see also Rompilla v. Beard*, 545 U.S. 374, 389 (2005) ("[q]uestioning a few more family members and searching for old records can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there.").

[88] *See Ploof*, 75 A.3d at 821 (citing *Strickland*, 466 U.S. at 690-91); *see also Taylor v. State*, 2010 WL 3511272, at *17 (Del. Super. Aug. 6, 2010) ("[n]either the United States Supreme Court nor the Delaware Supreme Court has held that failure to meet the ABA Guidelines is legally tantamount to ineffective assistance of counsel.").

evidence presented at the evidentiary hearing, Petitioner argues that there was numerous mitigating evidence that was not presented to the jury. This includes: health issues at birth and in childhood; parental separation at an early age; early childhood exposure to domestic violence; early exposure to substance abuse; extreme economic deprivation; dangerous community environment; malnourishment; brain damage; inconsistent parenting by mother; inconsistent parenting by father; rejection of affection by both parents; abandonment by both parents; family conflict and management problems; exposure to and impact of father's infidelity; physical and verbal abuse as a child; history of early emotional problems; substance abuse; multiple periods of fulltime employment; lack of consistent father figure and role model; lack of mental health evaluation and intervention; history of positively adjusting to prison environment; family history of substance abuse; family history of criminal behavior; lack of danger to others while incarcerated; forced participation in father's criminal activity; exposure to father's physical and sexual abuse of loved ones; role as a father; role as a brother and son; and mercy.

In addition to the foregoing mitigating circumstances, Petitioner relies on the Third Circuit's holding in *Outten v. Kearney*[89] in support of his claim. In *Outten*, the attorney's primary strategy at sentencing was to reargue the defendant's innocence, and the attorney also failed to focus on the positive aspects of the defendant's

[89] 464 F.3d 401 (3d Cir. 2006).

character.[90] The jury reached a close vote of 7 to 5 in favor of the death penalty.[91] The Third Circuit found that counsel's cursory investigation and failure to obtain any records relating to the defendant constituted an unreasonable investigation, given that there was "easily accessible evidence" of mitigators such as: neurological damage, poor school performance and learning disabilities, low IQ, placement in foster homes, and sexual abuse.[92] The court further found that had the jury been presented with all available mitigating evidence, there was "a reasonable probability that at least one juror [or more] would have struck a different balance."[93]

a. *Outten* does not apply

The Court finds *Outten* sufficiently distinguishable from this case. Tease's "residual doubt" argument was only an ancillary strategy of his at the penalty hearing, in contrast to the attorney in *Outten*. Tease's primary strategy was Petitioner's relationship with his child, A.S., and "breaking the chain" of a childhood without a strong father figure that Petitioner had as a child. The positive aspects of Petitioner's character and relationships with A.S. and other members of his family, including St. Jean, Petitioner's mother and Petitioner's siblings, were found to be mitigating factors. This stands in stark contrast to *Outten*, in which the defendant's positive characteristics were not focused on by the attorney. Additionally, unlike the "close"

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[90] *Id.* at 415-16.

[91] *Id.* at 422.

[92] *Id.* at 420.

[93] *Id.* at 422 (citing *Wiggins*, 539 U.S. at 537).

7 to 5 vote in *Outten*, the jurors here voted unanimously in favor of the death penalty. Finally, several of the mitigating circumstances revealed in the postconviction investigation in *Outten*, including learning disabilities, foster home placement and sexual abuse, are not present here. The instant case is thus sufficiently distinct from *Outten*.

Further, the Delaware Supreme Court has noted that the *Outten* court's reference to "at least one juror" in its prejudice analysis was incorrect under Delaware's statutory death penalty scheme.[94] The Supreme Court found that the "one juror" rationale did not satisfy *Strickland*'s prejudice prong under Delaware's death penalty statute because the trial judge ultimately determines the sentence and has discretion whether to follow the jury's recommendation.[95] Thus, even if the new mitigating evidence uncovered during postconviction proceedings may create a reasonable probability that one juror's mind would have been changed, that is still not enough to create a reasonable probability of a different sentencing outcome under *Strickland*, at least in Delaware.[96] For these reasons, Petitioner's reliance on *Outten* is misplaced and unavailing.

b. Viewed in its totality, Tease's investigation was not unreasonable

Turning now to the merits of Petitioner's claim, the Court finds that Tease's investigation, while not perfect, did not fall below an objective standard of

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[94] *Norcross v. State*, 36 A.3d 756, 770-71 (Del. 2011).

[95] *Id.* at 771.

[96] *Id.*

reasonableness. As noted *supra*, there is no absolute duty to investigate every possible piece of potentially mitigating evidence, nor does every ABA Standard have to be followed to the strictest letter. The record reflects that Tease commenced his investigation early on in his representation of Petitioner, based on his opinion that the guilt phase would likely end in a conviction. To that end, Tease had his law clerk conduct interviews of several members of Petitioner's family. While Tease did not follow up on every lead noted by the clerk, the record reflects that Tease continued to meet with Petitioner on an ongoing basis, and to also conduct his own interviews of Petitioner's family, including during the guilt phase of trial. Family members not interviewed by Tease, including Herriott and Watkins, had little to offer in terms of new information.

Tease also had Petitioner evaluated by at least one expert, Dr. Much. Dr. Much's evaluation only revealed an anti-social personality. Based on this, Petitioner made the decision to not pursue any further investigation because he determined such information would not have been helpful at the penalty hearing. Tease testified that Petitioner himself was not cooperative during Dr. Much's evaluation.

Tease developed his "breaking the chain" theory that focused on Petitioner's relationship with his child, A.S., early on in the representation. Tease discussed calling A.S. and Petitioner's father, Jesse, as witnesses at the hearing, but Petitioner was adamant that they would not be called. While the record is unclear as to what steps Tease took after these discussions, it appears that Tease still attempted to locate Jesse to no avail. Petitioner cannot now fault Tease for decisions that were his in the

first place. In any event, as a result of Tease's strategy, multiple mitigating factors focusing on Petitioner's good character, his troubled childhood and his relationship with his child and family were found by this Court.

While it is true that Tease did not retain a mitigation specialist and failed to get any records relating to Petitioner, that alone does not result in his investigation being unreasonable. Further, while Dana Cook testified that Dawn Hawkins and Tara Whittlesay could have testified to the abuse that Petitioner was exposed to while living with Jesse, Cook also acknowledged that such abuse has no direct link to why someone would commit murder.

Based on the totality of the evidence, Tease got an early start on the investigation, developed a reasonable strategy focusing on Petitioner's family and his troubled childhood, and had to manage a busy trial schedule and an uncooperative client at the time of the penalty phase. Thus, Tease's investigation, while far from perfect, did not fall below an objective standard of reasonableness.

c. Even if the investigation was unreasonable, there was no prejudice

Assuming *arguendo* that the first prong of *Strickland* is satisfied, Petitioner cannot establish prejudice. The Court has restated the aggravating factors and mitigating factors found during the penalty phase *supra* and shall not restate all of them again here. To summarize, the Court found the aggravating factors–particularly the heinous and cruel nature of the crime–to be overwhelming compared to the mitigating factors, all of which focused to some extent on Petitioner's relationships with his family, his troubled childhood, is ability to readjust well in controlled

environments, and the effect his death would have on his family.

Many of the so-called new mitigating factors are merely more specific restatements of the mitigating factors already found by this Court, such as his lack of guidance as a youth and the lack of intervention by his parents during a troubled childhood. Testimony by Petitioner's family members and his teacher, Yolanda Jones, as well as Dawn Hawkins and Tara Whittlesay, established the new mitigators of a dangerous community environment, malnourishment, extreme economic deprivation, substance abuse, history of early emotional problems, and physical abuse by his father and mother–particularly his father. The video testimony of Hawkins and Whittlesay also establish Petitioner's exposure to his father's substance abuse and his forced participation in his father's criminal activity. The Court rejects the remainder of Petitioner's proposed new mitigating factors as either subsumed by the mitigators already found by this Court or not established during the evidentiary hearing.

Petitioner's troubled relationship with his parents and his home life, apart from the physical abuse, was already established at the original sentencing. Further, Petitioner's relationship with A.S., the focus of the testimony of Petitioner's family as well as his former coworker, Doug Dyer, was established at the original sentencing as well. The Court further notes that it does not find Dyer's claims that he was close friends with Petitioner to be particularly credible, as Dyer admitted he made no effort whatsoever to contact Petitioner after Petitioner stopped arriving for work. The Court also finds that "multiple periods of fulltime employment" was not established as a mitigating factor based on the evidence presented. Further, the testimony of Hawkins

and Whittlesay does not establish that Petitioner was exposed to the sexual abuse allegedly suffered by Whittlesay at the hands of Jesse. Both only testified that Petitioner was "likely" exposed, but neither woman could say for sure whether Petitioner knew about the abuse.

The testimony of Dr. Armstrong and Dr. Haney was also unavailing. Dr. Armstrong testified that Petitioner was "brain damaged," but this brain damage consisted only of associative memory impairment. Dr. Armstrong also was unable to conclusively state the cause of Petitioner's memory issues, and admitted that this condition would not compel Petitioner to commit murder. Thus, no valid mitigating evidence can be drawn from her testimony. As to Dr. Haney, while the Court does not doubt the validity of Dr. Haney's report on a general scale, the Court finds that Dr. Haney failed to specifically apply his report to Petitioner. The expert only testified as to his report and study on the likelihood of prisoners incarcerated for life reoffending in general terms and failed to specifically apply his study to Petitioner's characteristics. Further, the Court had already found Petitioner's ability to adjust well to a controlled environment at the original sentencing. Thus, no valid mitigator can be drawn from his testimony as well.

It is unfortunate that Petitioner had such a troubled childhood and experienced abuse, both physical and emotional, at the hands of those he trusted most. However, in weighing these and the other new mitigating factors against the aggravating factors, the Court finds that the outcome of the original sentencing remains the same. Petitioner's crime was cruel, depraved and heinous, committed against a 68-year-old

woman simply for pecuniary gain, sexual gratification and to cover up his crimes. The abuse Petitioner suffered as a child neither compels nor excuses his criminal actions. Thus, there is no reasonable probability, considering the totality of mitigating evidence now presented, that the outcome of the original sentencing would have been different if this new evidence was presented. Thus, there is no prejudice under *Strickland*.

d. no ineffective assistance

Based on the foregoing, Petitioner has failed to establish ineffective assistance under *Strickland*. This claim is therefore procedurally barred under Rule 61(i)(3), and no exception applies. This claim must be denied.

Claim IX: *Trial Counsel were ineffective in failing to challenge the presentation of duplicative, vague and irrelevant non-statutory aggravating factors*

Petitioner argues that his constitutional rights to a fair sentencing hearing were violated by the Court's consideration of duplicative, vague and irrelevant aggravating factors. Petitioner further contends that Trial Counsel were ineffective in failing to raise this objection during the penalty phase and failing to assert this claim on direct appeal. This claim is procedurally barred pursuant to Rule 61(i)(3) unless Petitioner establishes ineffective assistance or an exception to the procedural bar.

Petitioner first argues that three non-statutory aggravators relied upon by the Court were duplicative with three statutory aggravators. Specifically, Petitioner argues that the following non-statutory factors: Petitioner terrorized and abused the victim before murdering her; selected her at random for the purpose of rape and murder; and murdered her in an effort to destroy or conceal evidence, "substantially

overlapped" with the following statutory factors: the murder was committed during the course of Burglary in the Second Degree, Rape in the First Degree, and Kidnapping in the First Degree, respectively. Petitioner relies on the Tenth Circuit's opinion in *United States v. McCullah* for the proposition that statutory and non-statutory aggravating factors cannot be so duplicative as to "substantially overlap" with each other.[97] The Tenth Circuit stated that relying upon duplicative aggravating factors results in "double counting" that creates an arbitrary sentencing process.[98]

The Tenth Circuit's decision is not binding authority on this Court. Further, the "substantially overlap" analysis of *McCullah* has been rejected by the Pennsylvania Supreme Court,[99] and the United States Supreme Court has declined to adopt it.[100] Even the Tenth Circuit has later clarified that *McCullah* "does not stand, however, for the proposition that any time evidence supports more than one aggravating circumstance, those circumstances impermissibly overlap, *per se*."[101] Given that the foregoing cases illustrate that *McCullah* lacks any persuasive authority, and based on Petitioner's failure to cite to any binding authority for his "double counting" argument, the Court rejects this argument as meritless.

Petitioner next argues that the non-statutory aggravating factor that Trimnell's

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[97] *United States v. McCullah*, 76 F.3d 1087, 1111 (10th Cir. 1996).

[98] *Id.*

[99] *Commonwealth v. Lesko*, 15 A.3d 345, 403 (Pa. 2011)

[100] *Jones v. United States*, 527 U.S. 373, 398 (1999)

[101] *Cooks v. Ward*, 165 F.3d 1283, 1289 (10th Cir. 1998).

murder was heartless, depraved, cruel and inhuman is unconstitutionally vague. The United States Supreme Court has held that aggravating factors cannot be unconstitutionally vague; *i.e.*, the factor must have "some common-sense core of meaning that juries should be capable of understanding."[102] The challenged non-statutory factor easily satisfies this broad standard. This argument is meritless on its face and need not be discussed further. Finally, Petitioner also fails to establish how any of the statutory or non-statutory aggravators were irrelevant.

Because this claim lacks merit, it follows that it was not ineffective assistance for Trial Counsel to not raise this claim via objection or on direct appeal. Petitioner has also failed to establish an exception to the procedural bar; thus, this claim is procedurally defaulted under Rule 61(i)(3) and must be denied.

<u>Claim X</u>: *Petitioner is entitled to a new sentencing proceeding because the Court gave several improper instructions to the jury*

Petitioner raises four distinct arguments as to how the Court's jury instructions delivered at the penalty phase of trial violated Petitioner's rights under the Sixth, Eighth, and Fourteen Amendments of the U.S. Constitution and Article I, § 4, 7 and 11 of the Delaware Constitution. Petitioner further contends that it was ineffective assistance for Trial Counsel to not object to these instructions or assert this claim on direct appeal. This claim is procedurally barred under Rule 61(i)(3) if Petitioner fails to meet the two-pronged test of *Strickland* or otherwise establish an exception to the

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[102] *Tuilaepa v. California*, 512 U.S. 967, 973 (1994) (citing *Jurek v. Texas*, 428 U.S. 262, 279 (1976) (internal quotations omitted).

procedural bar.

Each of Petitioner's four arguments are meritless. First, Petitioner challenges the Court's anti-sympathy instruction as preventing the jury from fully considering the mitigating factors. The Delaware Supreme Court has clearly held that anti-sympathy instructions are required under Delaware law and have been upheld by the United States Supreme Court.[103] Thus, it was not ineffective assistance of counsel to not raise this claim.

Second, Petitioner argues that the Court's instructions improperly defined mitigating circumstances and precluded the jury from considering Petitioner's background based on the following sentence: "which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender." Jury instructions are viewed as a whole; isolated statements are not reviewed in a vacuum.[104] A jury instruction is valid so long as it is "reasonably informative and not misleading, judged by common practices and standards of verbal communication."[105] The instructions fully define aggravating and mitigating circumstances in the following sentence. Further, viewing the instructions as a whole, the challenged sentence does not restrict the jury's consideration of Petitioner's background–so long as that background is relevant to the character and

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[103] *Taylor v. State*, 32 A.3d 374, 388 (Del. 2011) (citing *California v. Brown*, 479 U.S. 538, 542 (1987)).

[104] *Floray v. State*, 720 A.2d 1132, 1138 (Del. 1998) (citing *Flamer*, 490 A.2d at 128).

[105] *Id.* at 1137.

propensities of Petitioner. Accordingly, this instruction did not improperly define mitigating circumstances.

Third, Petitioner argues that the instruction impermissibly allows jurors to consider aggravating circumstances in their weighing process that have not been found unanimously or beyond a reasonable doubt. However, such instruction complies with Delaware's death penalty statute,[106] and this procedure has been upheld by the Delaware Supreme Court.[107] This claim is without merit.

Fourth, Petitioner argues that the following instruction created an improper presumption of death: "which factual circumstances require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." Petitioner cites to no legal authority for this argument, and as with Petitioner's second argument, this is merely an isolated sentence of the jury instructions. Viewed as a whole, the instructions cannot be said to create an improper presumption of death. This argument also fails.

Because all of these arguments lack merit, it was not ineffective assistance to not raise these claims on objection or direct appeal. Thus, this claim is procedurally barred pursuant to Rule 61(i)(3). Petitioner has failed to establish the application of an exception under Rule 61(i)(3) or Rule 61(i)(5).

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[106] 11 *Del. C.* § 4209(d)(1).

[107] *Brice v. State*, 815 A.2d 314, 322 (Del. 2003).

<u>Claim XI</u>: *Petitioner is entitled to imposition of a life sentence or to a new sentencing proceeding because the Court improperly discharged the jury prior to the start of the penalty phase of trial*

Petitioner next contends that he is entitled to a life sentence or in the alternative a new sentencing proceeding because the Court improperly released the jury from its admonitions at the close of the guilt phase, but prior to the commencement of the penalty phase. Trial Counsel subsequently moved for imposition of a life sentence, on the basis that this error allegedly violated Petitioner's double jeopardy rights. Petitioner now alleges that Trial Counsel was ineffective in failing to contemporaneously object, and in failing to pursue this claim on appeal. This claim was not raised in the proceedings leading to conviction.

This Court immediately recognized its error when it released the jury from its admonitions following the announcement of the verdict. The Court immediately had the bailiff bring the jury back into the courtroom and issued a curative instruction that informed the jury it was not released from its admonitions and that the admonitions remained in effect. The Court repeated the admonitions. Approximately one minute had passed between the jury's earlier release and the Court's curative instruction. In addressing Petitioner's motion for a life sentence, the Court held a hearing in which the bailiff testified that the jurors held no discussions about the verdict or case in the time following their release and prior to the curative instruction. This Court subsequently denied Petitioner's motion for a life sentence on the basis that no prejudice had occurred.

Jurors are presumed to follow curative instructions that are immediately given

following an error or introduction of inadmissible evidence.[108] The Third Circuit, in a recent case involving analogous circumstances, stated that "the pivotal inquiry is whether the jurors became susceptible to outside influences," and found no error when the court immediately reconvened the jury after prematurely discharging it.[109] The Third Circuit reasoned that the lower court "retained control of the jury at all times after it informed the jurors they were released" and "[t]he jurors did not disperse and interact with any outside individuals, ideas, or coverage of the proceedings."[110]

In the instant case, this Court immediately realized it prematurely released the jury from its admonitions and promptly gave a curative instruction. The jurors were not exposed to outside influences at any time. Thus, the curative instruction immediately cured any error that may have resulted. It follows that it was not ineffective assistance of counsel to not contemporaneously object or to not raise this claim on appeal. Thus, this claim is procedurally barred pursuant to Rule 61(i)(3). Petitioner has failed to establish that cause and prejudice otherwise exists under Rule 61(i)(3), or that the fundamental fairness exception of Rule 61(i)(5) should apply. Accordingly, this claim is denied.

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[108] *See Guy v. State*, 913 A.2d 558, 565-66 (Del. 2006) (citing *Dawson*, 637 A.2d 57, 62 (Del. 1994)); *Hendricks v. State*, 871 A.2d 1118, 1123 (Del. 2005) (citing *Capano v. State*, 781 A.2d 556, 589 (Del. 2001)).

[109] *United States v. Figueroa*, 683 F.3d 69, 73 (3d Cir. 2012).

[110] *Id.*

<u>Claim XII</u>: *the sentencing procedure used at the penalty phase violated Petitioner's constitutional rights*

Petitioner alleges that the sentencing procedure used at the penalty phase of trial violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and the United States Supreme Court's holding in *Ring v. Arizona*.[111] Petitioner's claim consists of four distinct arguments. This claim was not asserted in the proceedings leading to Petitioner's conviction and is procedurally barred pursuant to Rule 61(i)(3). However, Petitioner further argues that Trial Counsel's failure to object to the sentencing procedure or to raise this claim on appeal constitutes ineffective assistance of counsel; if established, this would provide an exception to the procedural bar.

Each of these arguments can quickly be disposed of, as they are clearly meritless on their face. First, Petitioner states in conclusory fashion that because the State did not charge the aggravating factors through an indictment, his constitutional rights were violated. Petitioner provides no case law for this assertion. The Superior Court in *Manley v. State* specifically rejected this argument,[112] and the Delaware Supreme Court affirmed.[113] This argument is therefore without merit.

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[111] 536 U.S. 584, 609 (2002).

[112] *Manley v. State*, 2003 WL 23511875, at *41 (Del. Super. Oct. 2, 2003) (finding the indictment requirement of both the Delaware Constitution and U.S. Constitution has never been interpreted so broadly).

[113] *Manley v. State*, 846 A.2d 238, 2004 WL 771659, at *1 (Del. Apr. 7, 2004) (TABLE) (adopting the reasoning of the Superior court).

Petitioner's second argument is that the U.S. Supreme Court's holding in *Ring* was violated when the mitigating circumstances were found by a preponderance of the evidence rather than beyond a reasonable doubt. *Ring* held that it was unconstitutional for a sentencing judge, sitting without a jury, to find the existence of an aggravating circumstance necessary for the death penalty to be imposed.[114] Delaware's death penalty statute addresses the holding in *Ring* by requiring a jury to unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt.[115] However, the statute also expressly provides that the balancing determination of whether the aggravating circumstances outweigh the mitigating circumstances shall be made by a preponderance of the evidence.[116] In *Brice v. State*, the Delaware Supreme Court upheld this statutory scheme, and explained that "*Ring* does not. . .require that the jury find every fact relied upon by the sentencing judge in the imposition of the sentence."[117] The statutory requirement that the balancing of mitigating and aggravating circumstances be determined by a preponderance of the evidence is therefore consistent with *Ring* and has been upheld by the Delaware Supreme Court.

Petitioner's third argument–that Petitioner's constitutional rights were violated because the Court, and not the jury, found Petitioner eligible for the death

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[114] *Ring*, 536 U.S. at 609.

[115] 11 *Del. C.* § 4209(c)(3)(b)(1); (d)(1).

[116] 11 *Del. C.* § 4209(c)(3)(b)(2); (d)(1).

[117] *Brice*, 815 A.2d at 322.

petition–also fails under *Brice*. The Delaware Supreme Court explained in *Brice* that under Delaware's death penalty statute, "the sentencing judge retains exclusive responsibility for weighing the aggravating and mitigating factors, and for the ultimate sentencing decision."[118] Thus, this argument also lacks merits.

Petitioner's fourth and final argument also fails under *Brice*. Petitioner argues that *Ring* was violated when this Court, rather than the jury, found the existence of several statutory and non-statutory aggravating factors by a preponderance of the evidence. The statute clearly states that the jury must first find "the existence *of at least 1*statutory aggravating circumstance" unanimously and beyond a reasonable doubt before proceeding to the balancing determination.[119] *Brice* states that "[o]nce the jury determines that *a* statutory aggravating factor exists, the defendant becomes death eligible."[120] Thus, based on this authority, it clearly follows that the jury must only find the existence of one statutory aggravator before the sentencing judge commences his role as the ultimate decision-maker as to whether to impose the death penalty. Based on this exclusive responsibility for the ultimate decision, the sentencing judge can consider further aggravators, both statutory and non-statutory, by the preponderance of the evidence as part of "the total mix" the judge must consider in reaching his decision.[121] Thus, this argument is also meritless.

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[118] *Id.*

[119] 11 *Del. C.* § 4209(d)(1) (emphasis added).

[120] *Brice*, 815 A.2d at 322 (emphasis added).

[121] *See id.*

Based on the foregoing, all four of Petitioner's alleged *Ring* violations are without merit. It follows that failure to assert these arguments on appeal was not ineffective assistance of counsel, and thus this claim is procedurally barred. Petitioner has also failed to establish an exception to the procedural bar. This claim is therefore denied.

<u>Claim XIII</u>: *Delaware's statutory death penalty scheme is unconstitutional on its face and as applied to Petitioner*

Petitioner argues that his rights under the Eighth and Fourteenth Amendments of the U.S. Constitution, as well as Article I, §§ 7 and 11 of the Delaware Constitution were violated by Delaware's death penalty statute, both facially and as applied to Petitioner. Specifically, Petitioner argues that the twenty-two aggravating factors contained in 11 *Del. C.* § 4209(e) are "so numerous, broadly drafted, and expansively interpreted that the statutory scheme fails to genuinely narrow the class of persons eligible for the death penalty." Petitioner also argues that the statute is impermissibly and unconstitutionally vague in that the statute permits the consideration of non-statutory aggravating factors, and does not enumerate mitigating factors. This claim was not raised in the proceedings leading to Petitioner's conviction; Petitioner alleges that Trial Counsel were ineffective in failing to raise this constitutional claim on direct appeal.

Petitioner's claim regarding the statutory aggravating factors has been

specifically rejected in other cases by the Delaware Supreme Court.[122] The Superior Court has also specifically rejected Petitioner's vagueness argument.[123] For those same reasons, Petitioner's constitutional arguments must be rejected here. Because Petitioner has failed to raise a valid constitutional claim, Trial Counsel were not ineffective in failing to raise it on appeal. Thus, this claim is procedurally barred under Rule 61(i)(3), and the exceptions of Rule 61(i)(3) and Rule 61(i)(5) do not apply.

Claim XIV: *the Court improperly denied Petitioner's motion for a change of venue in violation of his rights to an impartial jury and due process*

Petitioner raised this claim on direct appeal, and the Delaware Supreme Court thoroughly analyzed and rejected it. Petitioner concedes in his Post-Hearing Opening Brief that Trial Counsel raised this claim on direct appeal, but attempts to restate this as an ineffective assistance of counsel claim based on Trial Counsel's "failing to properly litigate this issue on direct appeal." Petitioner does little to expand upon this statement. Because Petitioner is merely restating his third claim raised on direct appeal, this claim is barred as formerly adjudicated pursuant to Rule 61(i)(4). Petitioner fails to show why the interest of justice exception of Rule 61(i)(4) or the fundamental fairness exception of Rule 61(i)(5) should apply. This claim must be denied.

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[122] *Steckel v. State*, 711 A.2d 5, 13 (Del. 1998); *Stevenson v. State*, 709 A.2d 619, 636 (Del. 1998).

[123] *Taylor*, 2010 WL 3511272, at *30 ("Delaware's courts have not found that the statute is unconstitutionally vague or broad. . . .")

<u>Claim XV</u>: *the State discriminatorily exercised its peremptory challenges in violation of Petitioner's constitutional rights*

As with the preceding claim, Petitioner raised this claim on direct appeal as well. The Delaware Supreme Court initially remanded so that this Court could perform a thorough *Batson* analysis. This Court found that the State's proffered reasons for the challenges were not mere pretext for racial discrimination. The Supreme Court affirmed this Court's findings on remand and rejected Petitioner's claims. Petitioner now merely attempts to refine this same claim and argues that Trial Counsel was ineffective in failing to properly litigate this claim on direct appeal. Because Petitioner is attempting to relitigate his second claim raised on direct appeal, this claim is barred as formerly adjudicated pursuant to Rule 61(i)(4). The exceptions of Rule 61(i)(4) and Rule 61(i)(5) do not apply.

<u>Claim XVI</u>: *Trial Counsel were ineffective in failing to request individual voir dire on racial prejudice*

During group *voir dire*, the Court asked the jury panel whether the fact that Petitioner was a black male and Trimnell was a white female gave rise to any prejudice that may have affected the juror's ability to render a fair and impartial verdict. Petitioner now contends that Trial Counsel were ineffective in failing to request individual *voir dire* on racial prejudice. This claim was not raised in the proceedings leading to conviction, and is procedurally barred pursuant to Rule 61(i)(3) if ineffective assistance of counsel is not established.

It is well settled that "the trial judge has broad discretion in determining how

and to what extent to conduct *voir dire*."[124] There is no constitutionally prescribed protocol for conducting *voir dire*.[125] However, the Delaware Supreme Court has held that trial judges are required to question prospective jurors about prospective racial prejudice when the charges involve a violent crime, the victim and defendant are from different racial groups, and the defense attorney specifically requests questions on potential racial prejudice.[126] This precedent does not delineate what form questions on potential racial prejudice must take; *i.e.*, whether the question must be asked in group *voir dire* or individual *voir dire*. However, both of the above-cited cases involved questions posed (or proposed to be posed) in group *voir dire*.[127]

Petitioner provides no authority for his argument that Trial Counsel were ineffective in failing to request *individual voir dire*. Nothing in the above-cited Delaware Supreme Court precedent requires questions on potential racial prejudice to be asked individually rather than in group *voir dire*. Additionally, Petitioner fails to allege how the question being asked to the panel at large resulted in prejudice under *Strickland*. Thus, Trial Counsel's failure to request individual *voir dire* on racial prejudice was not ineffective assistance of counsel. This claim is procedurally barred pursuant to Rule 61(i)(3), and the exceptions of Rule 61(i)(3) and Rule

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[124] *Ortiz v. State*, 869 A.2d 285, 291 (Del. 2005) (citing *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981)).

[125] *Id.* (citing *Morgan v. Illinois*, 504 U.S. 719, 729 (1981)).

[126] *Filmore v. State*, 813 A.2d 1112, 1117 (Del. 2003); *Feddiman v. State*, 558 A.2d 278, 283 (Del. 1989).

[127] *Id.*

61(i)(5) do not apply. This claim is denied.

Claim XVII: ***Due to Court error and ineffective assistance of Trial Counsel, biased jurors were not dismissed in violation of Petitioner's constitutional rights***

Petitioner next contends that as a result of court error and ineffective assistance of counsel, two jurors, Juror No. 6 and Juror No. 9, were allowed to remain on the jury despite being biased and incapable of rendering a fair and impartial verdict. Petitioner argues that this resulted in a violation of his constitutional rights under the Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and Article I, § 7 of the Delaware Constitution.

Petitioner's claims regarding Juror No. 6's contact with St. Jean at the little league game were already raised on direct appeal, and are also raised again in Claim XVIII. The Delaware Supreme Court thoroughly considered and rejected Petitioner's arguments regarding Juror No. 6. Accordingly, the aspects of this claim pertaining to Juror No. 6 are barred as formerly adjudicated pursuant to Rule 61(i)(4). Petitioner fails to establish why the interest of justice exception of Rule 61(i)(4) or the fundamental fairness exception of Rule 61(i)(5) should apply. To the extent that this claim also addresses St. Jean's contact with Juror No. 9 at the little league game, those aspects of the claim are also barred as formerly adjudicated pursuant to Rule 61(i)(4), for the same reasons.

Petitioner also raises two additional arguments regarding Juror No. 9 that were not raised on direct appeal. As to the first argument, Petitioner contends that Juror No. 9 was biased based on her personal relationship with St. Jean. On the ninth day of trial, St. Jean maintained that she had known Juror No. 9 since childhood, and the

juror denied this allegation. The Court held a hearing for further inquiry on the subject: St. Jean offered numerous instances of contact with Juror No. 9, including a time when Juror No. 9 held St. Jean's infant child. Juror No. 9 denied each of these instances. The Court was satisfied that Juror No. 9 could remain impartial. At the evidentiary hearing, St. Jean maintained that she knew Juror No. 9 very well, and repeated many of the same claims she made during the Court's earlier inquiry. Petitioner also offered the testimony of Juror No. 9's ex-fiancé, Dallas Drummond, to establish a personal relationship between the two women. However, notwithstanding credibility issues with Drummond's testimony based on his status as an incarcerated felon and his prior convictions for several crimes of dishonesty, Drummond's testimony actually established that the two women were nothing more than "casual acquaintances," at best. Drummond stated he "never knew" if the two women knew each other while Drummond dated Juror No. 9 and Drummond's brother dated St. Jean. According to Drummond, the only instance of specific interaction between the two women was when they were both pregnant and in the same hospital at the same time.

Second, Petitioner also argues that Juror No. 9 was biased based on the juror's acknowledgment to the Court that she was a victim of rape. Juror No. 9 revealed this during jury selection. The rape occurred in 1996, a decade prior to the trial. Juror No. 9 stated that this did not create bias or prejudice for or against either the defendant or the State. The juror was informed that rape was one of the charges in the case, and answered "yes" when asked whether she could remain fair and impartial.

Trial Counsel ultimately declined to exercise a peremptory challenge nor raised a challenge for cause to remove Juror No. 9 based on her status as a rape victim.

The Delaware Supreme Court has stressed the importance of an impartial jury, and has held that actual or apparent bias on the part of a juror "undermines society's confidence in its judicial system" and violates the defendant's right to an impartial jury.[128] Trial judges are normally accorded discretion in determining whether a juror can fairly and objectively render a verdict.[129] In *Banther v. State*, the Supreme Court found that the trial court's failure to remove a juror who had untruthfully answered a question during *voir dire* as to whether she had been the victim of a violent crime violated the defendant's right to an impartial jury.[130] Conversely, in *Caldwell v. State*, the Supreme Court found no juror misconduct when it was revealed after the trial had started that an impaneled juror was a social acquaintance of a member of the Attorney General's Office.[131] The juror in *Caldwell* did not intentionally conceal this relationship, because no question pertaining to this kind of relationship was asked during *voir dire.*[132]

Based on the foregoing, both of Petitioner's claims pertaining to Juror No. 9 are without merit. Following St. Jean's revelation that she knew Juror No. 9, the

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[128] *Banther v. State*, 823 A.2d 467, 482 (Del. 2003) (citations omitted).

[129] *Knox v. State*, 29 A.3d 217, 220 (Del. 2011).

[130] *Banther*, 823 A.2d at 484.

[131] *Caldwell v. State*, 780 A.2d 1037, 1058 (Del. 2001).

[132] *Id.*

Court held an extensive inquiry on the nature of the women's relationship. This Court was satisfied that Juror No. 9's testimony was more credible that she truly did not have any sort of personal relationship with St. Jean, contrary to St. Jean's assertions. This conclusion is bolstered by Drummond's testimony at the evidentiary hearing: Drummond "never knew" if the two women actually knew each other while he dated Juror No. 9 and St. Jean dated Drummond's brother. Drummond's testimony, at best, establishes that Juror No. 9 and St. Jean may have been nothing more than casual acquaintances, based on their time spent at the same hospital, and based on the fact that they attended the same high school several years apart. This type of "casual acquaintance" relationship–to use Drummond's words–falls far short of even the social relationship that was found to have been acceptable in *Caldwell*. This conduct falls far short of the juror misconduct in *Banther*: there was no active concealment on the part of Juror No. 9 as to either her status as a rape victim or her prior relationship with St. Jean. The Court was satisfied–and remains satisfied–that in both instances Juror No. 9 could remain fair and impartial. These arguments are without merit.

Based on the foregoing, there was no Court error in regards to Juror No. 9. Petitioner's other arguments are barred as formerly adjudicated pursuant to Rule 61(i)(4), and neither the interest of justice exception nor the fundamental fairness exception applies. It follows that it was not ineffective assistance of counsel for Trial Counsel to fail to assert these claims on appeal. This claim is denied.

<u>Claim XVIII</u>: *Petitioner's rights to an impartial jury and due process were violated by St. Jean's improper contact with two of the jurors*

Petitioner raised this claim on direct appeal, and also addressed these arguments in his preceding claim. In contrast to Claim XVII, Petitioner instills no new arguments into this claim, and merely rehashes and restates the fourth claim he originally asserted in his direct appeal. The Delaware Supreme Court thoroughly examined and rejected this claim. Thus, this claim is barred as formerly adjudicated pursuant to Rule 61(i)(4). The interest of justice exception of Rule 61(i)(4) and the fundamental fairness exception of Rule 61(i)(5) do not apply.

<u>Claim XIX</u>: *Trial Counsel were ineffective in failing to argue that there was insufficient evidence for the Burglary, Rape and Kidnapping charges on appeal*

Petitioner next argues that Trial Counsel were ineffective in failing to assert on appeal that there was insufficient evidence to support Petitioner's convictions for burglary, rape and kidnapping. Petitioner argues that his due process rights were violated because his convictions were based on insufficient evidence. Trial Counsel argued insufficiency of the evidence for these charges in a motion for a judgment of acquittal during the guilt phase, which this Court denied. Given Petitioner's failure to challenge this Court's ruling on appeal, this Claim is procedurally barred under Rule 61(i)(3) unless Petitioner can establish ineffective assistance of counsel.

In determining whether to grant a motion for a judgment of acquittal, the Court must consider whether "any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt

of all the elements of a crime."[133] During the evidentiary hearing, Donovan indicated that he did not raise insufficiency of the evidence on appeal despite properly preserving the issue because Donovan believed the claim would be unsuccessful in light of the overwhelming amount of State evidence. Additionally, despite the heading for this claim, Petitioner only addresses the rape charge in his briefs. He completely fails to address the burglary charge, and the kidnapping charge is addressed in Petitioner's next claim.

Petitioner's only real argument under this claim is that there was insufficient evidence of lack of consent for the rape conviction. Petitioner focuses on the stockings which bound Trimnell's wrists, and argues that because Dr. Vershvovsky could untie them, that there was no indication of lack of consent. However, there was ample other evidence to establish lack of consent, including: the presence of Petitioner's semen in the victim; the reddening of her vaginal area; the lack of a prior relationship between the victim and Petitioner; the fact that the victim was strangled to death; the injuries inflicted upon the victim in regards to the trauma and hemorrhages to her head and scalp; and the fact that the victim's body was naked from the waist down. This evidence, considered collectively and viewed in the light most favorable to the State, supports the conclusion that a rational trier of fact could find lack of consent to be established, and accordingly find Petitioner guilty of rape beyond a reasonable doubt. The Court also finds that a rational trier of fact could find

[133] *Winer v. State*, 950 A.2d 642, 646 (Del. 2008) (citing *Flonnory v. State*, 893 A.2d 507, 537 (Del. 2006)).

Petitioner guilty of burglary beyond a reasonable doubt, based on the evidence establishing Petitioner's presence in the victim's apartment, the circumstances of the crimes committed therein, and the lack of a prior relationship between the victim and Petitioner. The Court addresses the kidnapping conviction in the following claim; for the reasons stated below, the Court also finds there was sufficient evidence to support the kidnapping conviction as well.

Based on the foregoing, there was sufficient evidence to support Petitioner's conviction for burglary, rape and kidnapping. It follows that it was not ineffective for Trial Counsel to not pursue this claim on appeal. This claim is therefore procedurally barred under Rule 61(i)(3). Petitioner has otherwise failed to establish cause and prejudice, and the fundamental fairness exception of Rule 61(i)(5) does not apply. Claim XIX is hereby denied.

Claim XX: ***Trial Counsel was ineffective in failing to argue that the evidence underlying the Kidnapping conviction was incident to the evidence underlying the Rape conviction***

Similarly to his preceding claim, Petitioner argues that there was insufficient evidence to support his conviction for kidnapping. Specifically, Petitioner argues that the evidence supporting his kidnapping conviction was merely incident to, and not independent of, the evidence supporting his underlying conviction for rape. This claim was not raised in the proceedings leading to Petitioner's conviction; thus, it is procedurally barred under Rule 61(i)(3) unless ineffective assistance of counsel is established.

A defendant is not guilty of kidnapping every time he commits the crime of

rape.[134] Kidnapping in the First Degree is statutorily defined as when the defendant "unlawfully restrains another person" with one of any of six enumerated purposes, including "[t]o facilitate the commission of any felony or flight thereafter."[135] "Restrain" is defined as "restrict[ing] another person's movements intentionally in such a manner as to interfere substantially with the person's liberty."[136] It is well settled that the restraint requirement must be independent of, and not merely incidental to an underlying offense.[137] This requires a determination that there is much more interference with the victim's liberty "than is ordinarily incidental to the underlying crime."[138] The infliction of physical force upon the victim, alone, is not enough to establish restraint in the kidnapping context.[139]

Here, the victim's wrists were bound together by stockings, and her legs were tied together with pantyhose. The victim's body, while still bound, was placed inside a suitcase which was then inserted inside the trunk of the victim's own vehicle, which Petitioner was driving when he was originally stopped by Sergeant Mutter. This evidence is clearly independent from the physical injuries and other evidence discussed *supra* concerning Claim XIX and Petitioner's rape conviction.

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[134] *Burton v. State*, 426 A.2d 829, 833 (Del. 1981).

[135] 11 *Del. C.* § 783A(3).

[136] 11 *Del. C.* § 786(c).

[137] *Weber v. State*, 547 A.2d 948, 958 (Del. 1988).

[138] *Id.* at 959.

[139] *Kornegay v. State*, 596 A.2d 481, 486 (Del. 1991) (citing *Burton*, 426 A.2d at 833-34).

Specifically, the binding of the victim's legs and transporting her inside a suitcase inside the trunk of a vehicle constitutes "much more" interference with her liberty than would have been required for rape. Thus, this claim is without merit, and it was not ineffective assistance for counsel to not raise it on appeal. It is procedurally barred under Rule 61(i)(3), and is hereby denied.

Claim XXI: *Petitioner is entitled to a new trial based on the Court's improper reasonable doubt instruction*

Petitioner next argues that the Court's reasonable doubt instruction given to the jury at the conclusion of the guilt phase: (1) improperly shifted the burden of proof to the defense by using the term "firmly convinced," and (2) lessened the State's burden of proof by using the term "a real possibility." This claim was not asserted in the proceedings leading to Petitioner's conviction; Petitioner argues that it was ineffective assistance of counsel for Trial Counsel to not raise this claim on appeal. This claim is procedurally barred pursuant to Rule 61(i)(3) if Petitioner cannot establish ineffective assistance.

Jury instructions are reviewed as a whole; isolated statements will not be viewed in a vacuum.[140] A jury instruction is not erroneous so long as it is "reasonably informative and not misleading, judged by common practices and standards of verbal communication."[141] The Court's instruction on the beyond a reasonable doubt standard was modeled after the Delaware Pattern Instruction. The Pattern Instruction,

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[140] *Floray v. State*, 720 A.2d at 1138 (citing *Flamer*, 490 A.2d at 128).

[141] *Id.* at 1137.

including the "firmly convinced" language and language closely similar to "a real possibility," has been upheld by the Delaware Supreme Court on numerous occasions.[142]

Petitioner takes issue with two particular and isolated statements from the reasonable doubt instruction given to the jury. Viewed as a whole, the instruction was reasonably informative and not misleading. The Delaware Supreme Court has upheld identical or similar language in the past. Thus, this claim lacks merit because the instruction was not erroneous, and it follows that it was not ineffective assistance for Trial counsel to not raise this claim on appeal. This claim is procedurally barred pursuant to Rule 61(i)(3); cause and prejudice have not otherwise been established under Rule 61(i)(3), and the fundamental fairness exception of Rule 61(i)(5) does not apply. This claim is denied.

Claim XXII: ***Petitioner is entitled to a new sentencing proceeding because the Court failed to give a reasonable doubt instruction prior to the penalty phase of trial***

Petitioner next contends that it was error for the Court to only define reasonable doubt during the guilt phase of trial, and to not redefine it at the conclusion of the penalty phase of trial. Petitioner further alleges that it was ineffective assistance of counsel for Trial Counsel to not assert this claim on direct

[142] *See, e.g., McNally v. State*, 980 A.2d 364, 368 (Del. 2009). The *McNally* Court, despite upholding this language, urged the Superior Court to change the "real possibility" language in the pattern instructions to "prevent any potential confusion." *Id.* However, the *McNally* Court did not invalidate use of this phrase. Further, this Court notes that *McNally*'s questioning of the "real possibility" language was three years after the trial in the instant case.

appeal. This claim is procedurally barred pursuant to Rule 61(i)(3) if ineffective assistance is not established.

Petitioner provides no specific case law for his contention that he was entitled to a new reasonable doubt instruction at the penalty phase, let alone at the conclusion of the penalty phase. The Court specifically instructed the jury that their guilty verdict as to Burglary in the Second Degree established the existence of a statutory aggravating factor beyond a reasonable doubt. Petitioner fails to establish how this was error or why anything further was necessary. Thus, this claim lacks merit and is procedurally barred pursuant to Rule 61(i)(3). Petitioner has also failed to establish cause and prejudice pursuant to Rule 61(i)(3) or a colorable claim of a miscarriage of justice pursuant to Rule 61(i)(5). This claim is denied.

Claim XXIII: ***Petitioner is entitled to relief based on the cumulative prejudicial effect of the foregoing errors***

Petitioner's final claim for relief is that the cumulative prejudicial effect of the errors raised in his Amended Motion provide an independent basis for postconviction relief. The State correctly cites to federal authority for the rule that a claim of cumulative error, in order to succeed, must involve "matters determined to be error; not the cumulative effect of non-errors."[143] Just as the harmless error doctrine implies the weighing of actual individual errors, the cumulative error doctrine requires "two or more individually harmless errors" in order to apply.[144]

[143] *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990)

[144] *Id.* at 1470.

The Court has concluded that none of the foregoing 22 claims, individually, amount to ineffective assistance of counsel or otherwise establish a meritorious claim for postconviction relief. It follows that Petitioner cannot claim cumulative error based on individual non-errors. There are only three individual errors involved in this case: (1) Petitioner's allegation of a *Jencks* violation by the State by failing to disclose an interview with St. Jean; (2) the lack of delivery of the agreed-upon *Getz* instruction pertaining to Petitioner's access of pornography; and (3) the Court's comment regarding allocution at the conclusion of the guilt phase of trial. However, this third error is not part of the cumulative error analysis, because it is barred as formerly adjudicated under Rule 61(i)(4) and cannot be considered by this Court. That leaves the alleged *Jencks* violation and the lack of a *Getz* instruction pertaining to the pornography; even considered cumulatively, these two errors are still harmless. They fall far short, in light of the overwhelming evidence presented by the State, of creating a reasonable probability of a different outcome at trial. Accordingly, there is no cumulative error. Thus, this claim is procedurally barred pursuant to Rule 61(i)(3); no exception applies. This claim, as with all of Petitioner's other claims, must be denied.

CONCLUSION

Based on the foregoing, Petitioner has failed to establish any ineffective assistance of counsel claim against Trial Counsel, nor has he otherwise established a meritorious claim for postconviction relief. All of his claims are either procedurally barred under Rule 61(i)(3) or barred as formerly adjudicated under Rule 61(i)(4), and

must be dismissed. Accordingly, Petitioner's Amended Motion for Postconviction Relief is **DENIED.**

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: John Williams, Esquire
Patrick J. Collins, Esquire
Albert J. Roop, V, Esquire