

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CRAIG ZEBROSKI,	§
	§ No. 599, 2013
Defendant Below,	§
Appellant,	§ Court Below – Superior Court
	§ of the State of Delaware,
v.	§ in and for New Castle County
	§ Cr. I.D. 9604017809
STATE OF DELAWARE,	§
	§
Plaintiff Below,	§
Appellee.	§

Submitted: May 7, 2014
Decided: May 14, 2014

Before **STRINE**, Chief Justice, **HOLLAND**, **JACOBS** and **RIDGELY**,
Justices, and **NOBLE**,¹ Vice Chancellor, constituting the Court *en Banc*.

ORDER

This 14th day of May 2014, the Court having considered this matter on the briefs filed by the parties and after oral argument has determined that:

1) Except for the claims that we next describe, the Superior Court's determination that the claims raised in Craig Zebroski's third motion for postconviction relief were procedurally barred under Superior Court Criminal Rule 61(i) should be affirmed on the basis of and for the reasons assigned by the Superior Court in its Opinion dated September 30, 2013.

¹ Sitting by designation pursuant to Del. Const. art. IV, § 12 and Supr. Ct. R. 2 and 4.

2) Zebroski also claims that a presentence investigation report, including a “secret sentencing recommendation that Zebroski be executed,” was not disclosed to his trial counsel.² Zebroski argued to the Superior Court that the failure to disclose that presentence investigation report and sentencing recommendation violated his constitutional right to due process under *Gardner v. Florida*,³ because he was not given the opportunity to deny or explain the information and recommendation in the report.

3) Zebroski’s *Gardner* claim is procedurally barred by Superior Court Criminal Rule 61(i)(4), because it was raised in Zebroski’s second Rule 61 petition as part of a “layered” *Strickland* claim challenging the effectiveness of the mitigation case presented on his behalf. Nevertheless, we will address the merits of the *Gardner* claim because the Superior Court did not specifically cite the procedural bar of Rule 61(i)(4) but, instead, relied upon Rule 61(i)(1) and 61(i)(2).

4) The Superior Court correctly concluded that Zebroski’s motion did not plead facts supporting an inference that his trial counsel was unaware of, and did not receive, the presentence investigation report. That determination was correct, because Zebroski concedes that his trial counsel developed information specifically for the purpose of having it included in

² See Corrected Motion for Postconviction Relief at 23, Appendix to Opening Br. at A59.

³ *Gardner v. Florida*, 430 U.S. 349 (1977).

that report. The Superior Court also explained that the presentence investigation process used in this case was authorized by Superior Court Criminal Rule 32(c). That Rule requires the Superior Court to allow the prosecution and defense counsel to read the presentence investigation report, but excludes any final sentencing recommendation made by the presentence officer from the information required to be disclosed to the prosecution and defense counsel.

5) The Superior Court never reached the question of whether *Gardner* requires the presentence officer's recommendation to be disclosed to defense counsel. Zebroski argues on appeal that Rule 32(c) is unconstitutional to the extent that it allows a sentencing judge to consider the recommendation of a presentence officer without disclosing that recommendation to the defendant.

6) As this Court explained in *Whitaker v. State*, *Gardner* does not require the disclosure of a presentence officer's recommendation, which is a privileged internal communication between judicial employees, where "the Superior Court did not rely on any factual assertions not disclosed in the [presentence investigation] report."⁴ *Gardner* holds that a defendant cannot

⁴ *Whitaker v. State*, 2011 WL 81998, at *2 (TABLE) (Del. Jan. 10, 2011); accord *United States v. Baldrich*, 471 F.3d 1110, 1113 (9th Cir. 2006) (rejecting a defendant's claim that Federal Rule of Criminal Procedure 32(e)(3), which permits district courts to adopt

be sentenced to death on the basis of information that he had no opportunity to deny or explain. But Zebroski did not argue that there was any *factual* information, contained in the presentence officer's one sentence recommendation, that he was denied the opportunity to deny or explain. Thus, Zebroski's claims that Rule 32(c) is unconstitutional, and that his constitutional right to due process was violated because his trial counsel did not see the presentence officer's recommendation, are without merit.

7) The Superior Court opinion also does not address Zebroski's argument, raised both in his briefs on appeal and at oral argument, that the sentencing judge's review of the presentence report was unconstitutional because it included letters from the victim's family members expressing their opinion that Zebroski should be sentenced to death. Zebroski claims the sentencing judge's review of those letters was improper and unfairly prejudicial. But this argument was not fairly raised in Zebroski's Motion for

rules that make the sentencing recommendation confidential, violated due process because the defendant had received all of the underlying factual information); *United States v. Kalady*, 941 F.2d 1090, 1096 (10th Cir. 1991) (rejecting a defendant's claim that it is unconstitutional under *Gardner* for a probation officer's sentencing recommendation to remain confidential when the recommendation contained no factual information that was not also in the presentence report that had been disclosed); *United States v. Heilprin*, 910 F.2d 471, 474 (7th Cir. 1990) (holding that where a defendant has reviewed the presentence report and had an opportunity to refute its contents he has received what due process requires and he has "no constitutional or statutory right to be informed of the particular sentencing recommendation made by the probation office to the district court.").

Postconviction Relief, or otherwise presented to the Superior Court, and therefore it has been waived.⁵

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice

⁵ Supr. Ct. R. 8.