

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	)	
	)	
v.	)	Cr. I.D. No. 1006001378
	)	
BRYAN M. BROCHU,	)	
	)	
Defendant.	)	

**Upon Defendant’s Motion for Postconviction Relief – DENIED**  
Submitted: February 11, 2015  
Decided: May 26, 2015

**Upon Motion to Withdraw as Counsel – GRANTED**  
Submitted: February 11, 2015  
Decided: May 26, 2015

**Upon Defendant’s Motion for Appointment of New Counsel – DENIED**  
Submitted: February 11, 2015  
Decided: May 26, 2015

**Upon Defendant’s Motion to Expand the Record – DENIED**  
Submitted: February 11, 2015  
Decided: May 26, 2015

**OPINION**

**I. BACKGROUND**

On June 2, 2010, Defendant, Bryan M. Brochu, and Gregory Walters were drinking at McGlynn’s Pub in Newark, Delaware. Both men, while intoxicated, got into a physical altercation in the parking lot. After the fight, Brochu got into his truck, drove around the parking lot “doing donuts” and struck Walters at a speed of forty-four miles per hour. Walters suffered brain damage, leaving him permanently disabled.

On August 2, 2010, Brochu was indicted on six charges: (1) Attempted Murder First Degree; (2) Possession of a Deadly Weapon During the Commission of a Felony; (3) Driving Under the Influence of Alcohol; (4) Spinning Tires; (5) No Proof of Insurance; and (6) Failure to Transfer Title and Registration.

Brochu was represented by Joseph A. Hurley, Esquire (“Trial Counsel”). On February 7, 2011, with the assistance of Trial Counsel, Brochu pled guilty to Assault First Degree, a lesser-included offense of Attempted Murder First Degree, and Possession of a Deadly Weapon During the Commission of a Felony. On April 29, 2011, the Trial Court sentenced Brochu to 20 years at Level V, suspended after 15 years for decreasing levels of probation.<sup>1</sup> The Trial Court also ordered Brochu pay restitution in the amount of \$174,306.09.<sup>2</sup>

On May 4, 2011, Trial Counsel filed a Motion for Reduction of Sentence with supplemental mitigation evidence. On June 16, 2011, the Trial Court modified Brochu’s sentence, effectively reducing Brochu’s Level V time by three years. On July 6, 2011, the Trial Court again modified Brochu’s sentence, this time vacating the previous order of restitution.<sup>3</sup>

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<sup>1</sup> On April 13, 2011, the Trial Court granted Trial Counsel’s request to continue the April 15, 2011 sentencing. The Trial Court dated the sentencing Order April 15, 2011, but did not impose the sentence until April 29, 2011.

<sup>2</sup> As required under 11 *Del. C.* § 4106, the Trial Court ordered Brochu pay restitution in the amount of \$138,407.17 to cover Walters’ rehabilitation medical bills and \$35,898.92 to cover Walters’ medical expenses from Delaware medical service providers.

<sup>3</sup> See Letter from Trial Court, D.I. 33 (July 6, 2011). The Trial Court explained:

On July 13, 2011, Trial Counsel filed an appeal to the Delaware Supreme Trial Court arguing that the Trial Court improperly identified excessive cruelty as an aggravating circumstance in its June 16, 2011 modified sentencing order.<sup>4</sup> On January 26, 2012, while the appeal was pending, Trial Counsel filed a second Motion for Reduction of Sentence with the Trial Court. However, the Trial Court did not address the second Motion for Reduction of Sentence on the merits because the Trial Court did not have jurisdiction during pendency of appeal. In a letter to Trial Counsel, the Trial Court wrote:

I have received your motion for reduction of sentence, but cannot act on it. Since you have appealed the sentence in this case, [the Trial] Court has lost its jurisdiction. At this point, the motion [for a reduction of sentence] is neither granted or denied but will be held pending the outcome of that appeal. Having no idea what the outcome will be, I have to rely upon you, contingent on the outcome of that appeal, to notify me whether I should act on the motion once the case has been returned to this [Trial] Court.<sup>5</sup>

One week later, on February 21, 2012, the Supreme Court affirmed the Trial Court's sentence, noting that the "trial court was not required to accept Brochu's self-serving claim that the collision was an accident. There was reliable evidence

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[Trial Counsel's] point about [Brochu]'s length of incarceration is well taken. In addition, since the State is requesting that the restitution matter be kept open, I believe it is within [the Court's] discretion to not order restitution in this case. A restitution total of \$174,306.09 to be paid by someone incarcerated for the length of time as Mr. Brochu is not reasonable . . . . Mr. Walters has other avenues to obtain compensation not only for past medical expenses but future medical expenses.

<sup>4</sup> The Court notes that the April 15, June 16, and July 6 sentencing Orders each listed excessive cruelty as an aggravating factor.

<sup>5</sup> Letter from the Trial Court, D.I. 44 (Feb. 14, 2012).

from which the trial court could have concluded that Brochu, in a drunken rage, drove straight at Walters.”<sup>6</sup> Subsequently, on March 30, 2012, the Trial Court addressed and denied Brochu’s second Motion for Reduction of Sentence.

On February 14, 2013, Brochu filed the pending Motion for Postconviction Relief (“PCR Motion”). By Order dated August 19, 2013, Andrew J. Witherell, Esquire (“Rule 61 Counsel”), was appointed to represent Brochu for the purpose of postconviction relief.<sup>7</sup> On July 7, 2014, Rule 61 Counsel filed a Motion to Withdraw from representing Brochu on the basis that Brochu’s postconviction claims were procedurally barred and/or meritless. On September 22, 2014, the State filed a Response to Brochu’s PCR Motion and to Rule 61 Counsel’s Motion to Withdraw. On February 11, 2015, Brochu filed a Reply to the State’s Response and Rule 61 Counsel’s Motion to Withdraw.

In addition to expanding upon his postconviction claims, Brochu also filed a Motion to Expand the Record and a Motion for Appointment of New Counsel. This is Brochu’s first motion for postconviction relief. Pursuant to Superior Court Criminal Rule 61, it is within the Court’s discretion to proceed in a number of different ways. For instance, the Court may summarily dismiss a postconviction motion if it “plainly appears” from the motion and the record that a defendant is

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<sup>6</sup> *Brochu v. State*, 2012 WL 566770, at \*1–2 (Del. Feb. 21, 2012) (TABLE).

<sup>7</sup> The Court confirmed appointment of Rule 61 Counsel on September 16, 2013.

not entitled to relief.<sup>8</sup> Otherwise, as is the case here, the Court “shall order the [State] to file a response.”<sup>9</sup> Further, although not mandated by Rule 61, the Court “may direct that the record be expanded by the parties by the inclusion of additional materials . . . . [and] may direct the lawyer who represented the movant to respond to the allegations.”<sup>10</sup> The Court finds, under the applicable law and upon the record in this case, that it is not necessary to expand the record. In addition, Brochu is not entitled to appointment of different postconviction counsel.<sup>11</sup> Brochu relies on *Anders v. California*,<sup>12</sup> to establish that Rule 61 Counsel failed to advocate for him because it filed a “no-merit” letter regarding Brochu’s PCR Motion.<sup>13</sup> However, Brochu ignores the following paragraph of the *Anders* decision, which states, “Of course, if counsel finds [the defendant’s] case to be wholly frivolous, after a conscientious examination of it, [counsel] should so advise the court and request permission to withdraw.”<sup>14</sup> Indeed, Rule 61 Counsel has examined the record in this case and filed a motion to withdraw.<sup>15</sup>

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<sup>8</sup> Super. Ct. Crim. R. 61(d)(4).

<sup>9</sup> Super. Ct. Crim. R. 61(f)(1).

<sup>10</sup> Super. Ct. Crim. R. 61(g)(1), (2).

<sup>11</sup> See *State v. Roten*, 3012 WL 4744681, at \*2 (Del. Super. Sept. 3, 2013) *aff’d*, *Roten v. State* 80 A.3d 961, 961 (Del. 2013) (TABLE) (noting that there is no constitutional right to counsel for a defendant’s first motion for postconviction relief); *Kostyshyn v. State*, 51 A.3d 416, 419–20 (Del. 2012) (explaining forfeiture of the right to postconviction counsel).

<sup>12</sup> 386 U.S. 738 (1967).

<sup>13</sup> See *id.* at 744.

<sup>14</sup> *Id.*

<sup>15</sup> See *infra* Part III.

Accordingly, Brochu's Motion to Expand the Record and Motion for New Counsel are hereby DENIED.

## **II. BROCHU'S MOTION FOR POSTCONVICTION RELIEF**

Brochu filed his PCR Motion in 2013.<sup>16</sup> Brochu asserted ten grounds for relief: (1) the Delaware Supreme Court's decision affirming his sentence was an inconsistent application of law; (2) ineffective assistance of Trial Counsel because Brochu's plea agreement to the lesser-included offense was not knowing, voluntary, and intelligent; (3) Brochu's understanding regarding his plea proceedings was not knowing, voluntary, and intelligent; (4) the ineffective assistance of Trial Counsel had a cumulative prejudicial effect; (5) ineffectiveness of Trial Counsel during pre-sentencing and sentencing was prejudicial to Brochu; (6) sentencing errors by the Trial Court; (7) the sentence imposed by the Trial Court was cruel and unusual; (8) ineffective assistance of Trial Counsel regarding his review of evidence; (9) prosecutorial misconduct; and (10) cumulative prejudicial effect.

### *A. Procedural Bars to Postconviction Relief*

Before addressing the merits of a motion for postconviction relief, this Court must consider the procedural requirements of Rule 61(i).<sup>17</sup> A motion for

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<sup>16</sup> Accordingly, the Court will apply the version of Superior Court Criminal Rule 61 prior to the enactment of the 2014 amendments.

<sup>17</sup> *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

postconviction relief is procedurally sufficient for consideration on the merits if the motion is timely,<sup>18</sup> and the motion does not assert grounds for relief already adjudicated.<sup>19</sup> This Court will reconsider the merits of formerly adjudicated claims if warranted in the interest of justice.<sup>20</sup> The interest of justice exception of Rule 61(i)(4) is construed narrowly.<sup>21</sup> Furthermore, any ground for postconviction relief not asserted in the proceedings below leading to the judgment of conviction is thereafter barred unless the movant shows cause for relief from the procedural default and prejudice.<sup>22</sup> To establish cause for relief, a movant must show “some external impediment” which prevented him from raising the claim.<sup>23</sup> To demonstrate prejudice, a movant must show a “substantial likelihood” that if the issue had been raised on appeal, the outcome would have been different.<sup>24</sup> Upon consideration of the record, this Court finds grounds one, six, seven, and nine set forth in Brochu’s PCR Motion are procedurally barred because each of these claims either has been adjudicated or because Brochu failed to raise these claims on appeal.<sup>25</sup>

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<sup>18</sup> Super. Ct. Crim. R. 61(i)(1) (“A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final[.]”).

<sup>19</sup> Super. Ct. Crim. R. 61(i)(4).

<sup>20</sup> *Id.*

<sup>21</sup> *Richardson v. State*, 3 A.3d 233, 237 (Del. 2010).

<sup>22</sup> Super. Ct. Crim. R. 61(i)(3)(a), (b).

<sup>23</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

<sup>24</sup> *Flamer v. State*, 585 A.2d 736, 748 (Del. 1990).

<sup>25</sup> Super. Ct. Crim. R. 61(i)(3); Def.’s Reply, 11 (admitting the lack of external impediment in this case).

With respect to the first claim for relief set forth in Brochu's PCR Motion, Brochu contends that the Delaware Supreme Court violated his Fifth and Fourteenth Amendment rights under the United States Constitution by affirming the Trial Court's sentence.<sup>26</sup> The Supreme Court affirmed the Trial Court's use of excessive cruelty as an aggravating factor for purposes of sentencing.<sup>27</sup> Brochu does not set forth an ineffectiveness of counsel claim in ground one. Instead, Brochu argues the Supreme Court misapplied the law in reviewing the Trial Court's decision. Brochu simply reframes his appeal arguments under the procedural context of postconviction relief. Therefore, Brochu's formerly adjudicated claims are barred pursuant to Rule 61(i)(4). The interests of justice do not warrant reconsideration of this claim because Brochu offers no legal or factual developments for this Court to consider. Accordingly, postconviction relief on the first claim for relief is denied on procedural grounds.

With respect to the sixth claim for relief set forth in Brochu's PCR Motion, Brochu claims the Trial Court violated his due process rights during sentencing by "bifurcating" sentencing. According to Brochu, when the Trial Court denied Trial Counsel's second continuance request and instructed Trial Counsel to file the supplemental mitigation evidence in a later request for a sentence modification, this was an improper bifurcation of the sentencing proceedings. Brochu argues the

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<sup>26</sup> See *Brochu*, 2012 WL 566770, at \*1-2.

<sup>27</sup> See *supra* text accompanying note 2.



Trial Court viewed the later submitted mitigation evidence with a “closed mind.” However, Brochu did not argue this on appeal and the claim is therefore barred under Rule 61(i)(3). Moreover, Brochu’s claim is inconsistent with the record, which demonstrates that not only did the Trial Court review the mitigation evidence provided with Trial Counsel’s request for a sentence modification, but also the Trial Court granted the relief sought by Trial Counsel and modified Brochu’s sentence in light of the mitigating evidence. Under these circumstances, Brochu cannot establish cause from relief or prejudice to warrant this Court’s consideration and this claim is denied. The interests of justice do not warrant consideration of this otherwise procedurally-barred claim.

In addition, with respect to the sixth claim for relief, Brochu contends he was denied the opportunity to timely object to the sentence imposed because the Trial Court did not state its reasoning for the sentence on the record. Moreover, Brochu claims the Trial Court violated his due process rights when his plea agreement was amended from assault by reckless conduct to assault by intentional conduct and that the Trial Court improperly applied the excessive cruelty aggravator. First, Brochu’s claims are inconsistent with the record. During the plea colloquy, the Trial Court reviewed Brochu’s criminal conduct and respective charges. In addition, the Trial Court stated on the record that “the indictment was amended to read ‘recklessly engage in conduct,’ so there’s no intentional element

as far as the guilty plea [the Trial Court is] dealing with.”<sup>28</sup> Second, Brochu raised these issues on appeal to the Delaware Supreme Court, arguing he did not act with excessive cruelty because he did not intend to hit Walters. In affirming the sentence of the Trial Court, the Supreme Court described the events leading to Walters’ injuries and concluded “Brochu’s willingness to endanger Walters in that fashion justifies a finding of excessive cruelty.”<sup>29</sup> Therefore, these claims are procedurally barred pursuant to Rule 61(i)(4). Brochu offers no new legal or factual developments to warrant reconsideration in the interest of justice. Accordingly, postconviction relief on ground six is denied on procedural grounds.

With respect to the seventh claim for relief in his PCR Motion, Brochu claims that the Trial Court abused its discretion by imposing a cruel and unusual sentence. This claim is another attempt to reframe a formerly adjudicated argument. On appeal, the Delaware Supreme Court affirmed Brochu’s sentence, explaining that a “sentence that is within statutory limits, as this one, generally is not reviewed on appeal.”<sup>30</sup> Nevertheless, Brochu asks this Court to find that a sentence within the statutory sentencing guidelines is cruel and unusual. Brochu’s

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<sup>28</sup> Sentencing Tr. 29:7–11, Apr. 29, 2011.

<sup>29</sup> *Brochu*, 2012 WL 566770, at \*2.

<sup>30</sup> *Id.* at \*1.

seventh claim for relief is denied. It is procedurally barred and the interests of justice do not warrant consideration of this otherwise procedurally-barred claim.<sup>31</sup>

With respect to his ninth claim for relief, Brochu alleges that the State committed a *Brady* violation resulting in prosecutorial misconduct because it did not provide certain evidence during discovery. Specifically, Brochu claims the State failed to turn over video surveillance evidence of the June 2nd incident from McGylnn's Pub and/or a toxicology report from Walters on the night of the incident. Brochu contends that this evidence would have been useful to demonstrate that Brochu was the victim of Walters' initial aggressor outside of the pub and that Brochu did not drive at Walters and, rather, that Walters ran at Brochu's moving truck. First, the Court notes that Brochu pled guilty and in doing so, waived his right to challenge the State's evidence.<sup>32</sup> Second, Brochu's claim is barred under Rule 61(i)(3) because Brochu did not assert this claim at sentencing or upon appeal. In addition, Brochu has not shown that an external impediment prevented him from raising this issue at sentencing or on appeal. Moreover, Brochu cannot demonstrate prejudice because the Trial Court had sufficient information to accept his plea and sentence him. Specifically, four witnesses advised that Brochu and Walters were arguing, Brochu said something to the effect

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<sup>31</sup> In his Response to the State, Brochu asserts a claim of "actual innocence of intentional conduct." Def.'s Resp., 9. However, similarly to Brochu's claims denied above, the Court finds this argument is yet another attempt to reframe an argument already adjudicated.

<sup>32</sup> *Smith v. State*, 2004 WL 120530, at \*1 (Del. Jan. 15, 2004).

of, “I won’t forget about this,” Brochu then got into his truck and backed up into Walters at a speed around forty miles per hour, and it appeared Brochu was aiming his truck for Walters. Accordingly, postconviction relief on ground nine is denied under Rule 61(i)(3) because the claim was not raised on appeal and the interests of justice do not warrant consideration otherwise.

None of the above-mentioned grounds for relief qualifies for relief under the miscarriage of justice exception. Under Rule 61(i)(5), this Court may consider the merits of an otherwise procedurally barred claim if the defendant presents 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.”<sup>33</sup> In order to warrant relief under Rule 61(i)(5), the movant “has the burden of proof and must show that he has been deprived of a substantial constitutional right[.]”<sup>34</sup>

As noted above, Brochu has not been deprived of a substantial constitutional right. Moreover, Brochu received the benefit of a reduced sentence by pleading guilty. For example, if a jury had found Brochu guilty of Attempted Murder First Degree, Brochu faced a minimum mandatory sentence of 15 years of Level V incarceration, and up to the possibility of a life sentence.<sup>35</sup> However, Brochu’s

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<sup>33</sup> Super. Ct. Crim. R. 61(i)(5).

<sup>34</sup> *Jackson v. State*, 1995 WL 439270, at \*3 (Del. July 19, 1995) (TABLE).

<sup>35</sup> See 11 *Del. C.* §§ 4205(b)(1), 636, 531.

Trial Counsel negotiated a plea to the lesser-included offense of Assault First Degree under which Brochu faced a minimum mandatory sentence of 2 years of Level V incarceration with the possibility of up to 25 years incarceration.<sup>36</sup> In addition, the Trial Court engaged in a detailed plea colloquy in open court and on the record in which Brochu expressed his understanding of the nature and terms of his plea agreement. Finally, Brochu received the benefit of two sentence reductions upon Trial Counsel's subsequent motions for sentence modifications. Brochu cannot show deprivation of a substantial constitutional right requiring the Court's consideration under the miscarriage of justice exception. Accordingly, claims one, six, seven, and nine are hereby DENIED.

## *2. Brochu's Claims of Ineffective Assistance of Counsel*

Brochu contends that Trial Counsel rendered ineffective assistance of counsel in violation of his federal and state constitutional rights. To establish a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*.<sup>37</sup> The defendant must show that (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for trial counsel's unprofessional

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<sup>36</sup> See 11 Del. C. §§ 4205(b)(2), 613. Brochu faced an additional minimum mandatory sentence of 2 years of Level V incarceration with the possibility of up to 25 years incarceration with respect to the charge of Possession of a Deadly Weapon During the Commission of a Felony. See 11 Del. C. §§ 4205(b)(2), 1447.

<sup>37</sup> 466 U.S. 668 (1984).

errors, the result of the proceeding would have been different.<sup>38</sup> The defendant must overcome the strong presumption that counsel's conduct was professionally reasonable.<sup>39</sup> Because the defendant must show that counsel made a professionally unreasonable error and that the error had an effect on the judgment, failure to prove either is sufficient to defeat a claim of ineffective assistance.<sup>40</sup> Proof of an ineffective assistance of counsel claim "requires showing that the counsel's errors were so serious as to deprive the defendant of a fair trial," such that the result is unreliable.<sup>41</sup> In making this determination, this Court must eliminate the "distorting effects of hindsight."<sup>42</sup>

With respect to his second, third, fifth, and eighth claims for relief, Brochu asserts a variety of arguments related to the entry of his guilty plea to the lesser-included offense of Assault First Degree. Brochu contends that Trial Counsel's representations coerced Brochu into an unknowing, involuntary, and unintelligent guilty plea. According to Brochu, Trial Counsel knowingly ignored inconsistencies in the State's evidence. For instance, Brochu contends Trial Counsel knew of inconsistencies in the State's Crash Reconstruction Unit Report ("CRU Report") but failed to hire an independent crash reconstruction expert to reconcile the inconsistencies. In addition, Brochu claims Trial Counsel failed to

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<sup>38</sup> *Id.* at 688.

<sup>39</sup> *Id.* at 687–88.

<sup>40</sup> *Id.* at 697.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 689.

advise him that the Trial Court could determine Brochu intentionally struck Walters despite Brochu entering a plea to recklessness or that the Trial Court could consider excessive cruelty as an aggravating factor for sentencing.

With respect to the fifth ground for relief in his PCR Motion, Brochu asserts over thirty points of contention regarding Trial Counsel's conduct. For example, Brochu complains that Trial Counsel did not consult with Brochu regarding its sentencing strategy; Trial Counsel failed to read the exhibits relevant to the Presentence Investigation Report ("PSI Report") or otherwise prepare a meaningful sentencing presentation; Trial Counsel did not submit mitigating evidence prior to sentencing; and Trial Counsel should have requested a timely second continuance to submit the mitigation evidence. Brochu also lists approximately one dozen arguments he contends that Trial Counsel should have raised at sentencing to demonstrate that Brochu did not act intentionally.<sup>43</sup>

This Court finds Brochu is not entitled to postconviction relief under grounds two, three, five, or eight of his PCR Motion because Brochu entered into a voluntary, knowing, and intelligent guilty plea. Pursuant to Superior Court Criminal Rule 11(a)(2)(c), the Trial Court addressed Brochu in open court and on the record and determined Brochu understood the nature and consequences of his guilty plea. The Trial Court asked Brochu, "Are you pleading guilty to these . . .

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<sup>43</sup> See Def.'s Mot. 10–12 (I)(A)(1)-(12), (II)(B)-(G), (III)(A)-(E).

offenses because you are, in fact, guilty of them?”<sup>44</sup> Brochu answered, “Yes, sir.”<sup>45</sup> Brochu denied entering the plea upon any coercion or duress and stated that Trial Counsel instructed him on the nature of his plea and reviewed the Truth-In-Sentencing Guilty Plea Form.<sup>46</sup> The Trial Court clearly and accurately spelled out the maximum sentence for charges to which Brochu was pleading.<sup>47</sup> Brochu stated that he was satisfied with Trial Counsel’s representation.<sup>48</sup> The Trial Court reviewed the constitutional rights waived by pleading guilty:

THE TRIAL COURT: [Y]ou should understand from reviewing the [Truth-In-Sentencing] form and talking with [Trial Counsel] that you are giving up important rights by pleading guilty. For your benefit, and the benefit of other people who might think about pleading guilty later, you are giving up your right to be presumed innocent, your right to a speedy and public trial where you and your lawyer *would hear all the evidence against you and present any evidence you have in your defense*. You could testify or not testify at your trial as you saw fit, and if you lost, you could take an appeal to the State Supreme Court. By pleading guilty you are giving up all those rights and others, do you understand that?

THE DEFENDANT: Yes, sir.<sup>49</sup>

The Trial Court further explained:

THE TRIAL COURT: [I]t’s important for you to understand, Mr. Brochu, that today is an extremely important day in your case. If you’ve got questions or concerns about what you’re doing, about

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<sup>44</sup> Plea Tr. 5:3–5, Feb. 7, 2011.

<sup>45</sup> *Id.* at 5:6.

<sup>46</sup> *Id.* at 5:7–23.

<sup>47</sup> *Id.* at 5:7; 8–17 (“That means you are facing a sentence of from 4 to 50 years in prison, total . . . you could receive up to 50 years in prison, do you understand all that?”).

<sup>48</sup> *Id.* at 8:10–12.

<sup>49</sup> *Id.* at 6:8–22 (emphasis added).



[Trial Counsel], about anything, no you've got the [Trial] Court's full attention. Like [the Trial Court] said earlier, once the plea is entered, it's going to be very difficult to raise with the [Delaware Supreme] Court something that we could have talked about now, so is there anything that we need to talk about?

THE DEFENDANT: No, Your Honor, just the fact that it was a very tragic accident.

THE TRIAL COURT: Well, you'll have the opportunity to discuss those things with a pre-sentence officer and also to speak to the Trial Court at sentencing. Anything else that we need to talk about?

THE DEFENDANT: No, Sir.<sup>50</sup>

Brochu's pending postconviction claims are entirely inconsistent with his statements during the plea colloquy. Brochu's statements during the guilty plea colloquy are presumed to be truthful.<sup>51</sup> Brochu understood the nature of the charges to which he was pleading guilty. Brochu understood the maximum sentence he could receive and Brochu signed the Truth-In-Sentencing Guilty Plea Form to that effect. More importantly, Brochu understood his waiver of his constitutional rights upon entering his voluntary plea. Brochu waived the right to challenge any alleged defects before the plea, even those of constitutional dimension.<sup>52</sup> Accordingly, Brochu cannot now challenge the sufficiency of evidence against him; assert arguments he claims Trial Counsel could have raised

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<sup>50</sup> *Id.* at 8:19–23; 9:1–12.

<sup>51</sup> *See Sommerville v. State*, 703 A.2d 629, 631–32 (Del. 1997).

<sup>52</sup> *Smith*, 2004 WL 120530, at \*1.

against the evidence; or argue that Trial Counsel's review of the evidence was lacking and thus resulted in a coerced plea.<sup>53</sup>

Furthermore, Brochu's allegations against Trial Counsel are unsuccessful not only because of inconsistencies in the record, but also because the claims do not satisfy *Strickland*. First, contrary to Brochu's claims, Trial Counsel argued mitigating factors at sentencing. Indeed, Trial Counsel argued there were no aggravating factors in this case, only mitigating ones.<sup>54</sup> Trial Counsel presented three mitigating factors, including lack of criminal behavior, remorse, and absolute dismemberment of his family.<sup>55</sup>

In addition, Brochu was not prejudiced when Trial Counsel filed the mitigation evidence packet with the Trial Court after sentencing, nor by being denied a second continuance. The Trial Court stated that it would accept the mitigation evidence if Trial Counsel filed a request for a sentence modification and that it would view the evidence as if it had not yet imposed the sentence.<sup>56</sup> On May 4, 2011, Trial Counsel filed a request for a sentence modification and, after review of the evidence, the Trial Court reduced Brochu's sentence. Brochu's claims of ineffective assistance of counsel relating to the presentencing stage fail to satisfy either prong of *Strickland* and are hereby denied.

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<sup>53</sup> See *id.*; *Allen v. State*, 2008 WL 187960, at \*1 (Del. Jan. 14, 2008).

<sup>54</sup> Sentencing Tr. 22:17–20; 23:1–5 (“[T]here is no real aggravator in this particular case . . . . [but] [t]here are several mitigators.”).

<sup>55</sup> *Id.* at 23:1–5.

<sup>56</sup> *Id.* at 11:4–18; 3–17.

Brochu also asserts ineffective representation during sentencing. Brochu claims Trial Counsel should have requested a side bar at sentencing to discuss his unpreparedness with respect to filing the mitigation evidence; objected to the Trial Court’s “bifurcated” sentencing process;<sup>57</sup> and argued the inconsistencies in the CRU Report or the PSI Report as mitigation evidence. Brochu’s claims of ineffective assistance of counsel during sentencing are without merit and do not satisfy *Strickland*.

Despite Brochu’s contention, Trial Counsel did indeed request a sidebar to discuss its time management with regard to filing mitigation evidence.<sup>58</sup> Trial Counsel told the Trial Court it attempted to compile all of the mitigation documents into a packet of evidence, rather than submit individual documents to the Trial Court, which caused the delay in submission.<sup>59</sup> However, Trial Counsel’s delay in submitting the mitigation evidence did not prejudice Brochu because the Trial Court reviewed the evidence and reduced Brochu’s sentence accordingly.

Brochu claims Trial Counsel should not have accepted the Trial Court’s “*sua sponte* order,” that the Trial Court would review the untimely evidence if Trial Counsel requested a sentencing modification. This argument has no merit because,

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<sup>57</sup> Def.’s Mot. 12.

<sup>58</sup> *Id.* at 4:1–9; 14.

<sup>59</sup> *Id.* at 10:2–5.

as stated above, neither the Trial Court's nor Trial Counsel's course of action regarding the untimely mitigation evidence prejudiced Brochu.

Again, despite Brochu's contentions, Trial Counsel did address the issue inconsistencies in the evidence, such as conflicting witness testimony, at the sentencing hearing. In addition, Trial Counsel noted that the four witnesses suggested that this was an accident and argued that a preponderance of the evidence showed it was an accident.<sup>60</sup> Trial Counsel's representation of Brochu's arguments during sentencing was objectively reasonable and did not prejudice Brochu.

Brochu's claims that Trial Counsel failed to make certain objections are without merit and procedurally barred. The Supreme Court addressed all but two issues that, according to Brochu, Trial Counsel should have raised objection. The two outstanding issues are first, that Trial Counsel should have objected out to the Trial Court's denial of its second continuance request to file the mitigation evidence. Second, Trial Counsel should have objected to the Trial Court's failure to record the side bar conversation. For the reasons explained above, Brochu cannot demonstrate prejudice suffered by the conduct of which he complains. Therefore, claims two, three, five, and eight are hereby DENIED.

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<sup>60</sup> *Id.* at 18–22.

Finally, with respect to the fourth and tenth claims for relief in his PCR Motion, Brochu claims he suffered a cumulatively prejudicial effect from Trial Counsel's representation and the decisions of the Superior Court and the Delaware Supreme Court. This Court does not agree. In *Wright v. State*,<sup>61</sup> the Delaware Supreme Court ordered that the defendant receive a new trial based on the cumulative effect of three errors, which amounted to a *Brady* violation.<sup>62</sup> The Trial Court determined there was a reasonable probability that the verdict might have been different absent the errors and determined that the cumulative impact of the errors created doubt in the outcome of the defendant's trial.<sup>63</sup>

This case is distinguishable from *Wright* because Brochu cannot establish the existence of any errors and/or prejudice suffered at the hands of Trial Counsel or the State. Brochu's postconviction attack attempts to avoid the consequence, but enjoy the benefits, of entering a guilty plea. Brochu asserted an assortment of procedurally barred and/or meritless claims. Brochu has not suffered any prejudice upon which this Court can determine the cumulative effects of warrant postconviction relief. Moreover, there is no reason for this Court to think that a reasonable jury would have reached a different conclusion. The evidence against Brochu included the testimony of four witnesses, which corroborated the facts as

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<sup>61</sup> 91 A.3d 972 (Del. 2012).

<sup>62</sup> *Id.* at 983.

<sup>63</sup> *Id.* at 993–94.

presented by the State rather than Brochu's recitation of the facts; the State's CRU Report—despite some inconsistency—tended to corroborate the State's theory of the case; and Brochu was intoxicated with a blood alcohol content level of .18 at the time of the incident. Even the Delaware Supreme Court explained, Brochu's theory of the case is self-serving and lacks supporting evidence.<sup>64</sup> Indeed, based on the evidence in the record, Brochu might have been convicted of the lead charge, Attempted Murder First Degree, which is substantially more serious than the charge of Assault First Degree, to which Brochu pled. Accordingly, claims four and ten are hereby DENIED.

### **III. RULE 61 COUNSEL'S MOTION TO WITHDRAW**

After reviewing the record and concluding that there are no meritorious grounds for relief, Rule 61 Counsel filed a Motion to Withdraw as Counsel pursuant to Superior Court Criminal Rule 61(e)(2). Withdrawal may be appropriate when “counsel considers the movant's claim to be so lacking in merit that counsel cannot ethically advocate it, and counsel is not aware of any other substantial ground for relief available to the movant, [and therefore] counsel may move to withdraw.”<sup>65</sup> This Court must also review the record to determine whether the defendant's motion contains any reasonable grounds for relief.<sup>66</sup>

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<sup>64</sup> See *supra* text accompanying note 6.

<sup>65</sup> Super. Ct. Crim. R. 61(e)(2).

<sup>66</sup> *State v. West*, 2013 WL 6606833, at \*3 (Del. Super. Dec, 12, 2013).

Rule 61 Counsel undertook a thorough analysis of the record to evaluate Brochu's postconviction claims and determined that the claims do not have enough merit to be advocated ethically. Rule 61 Counsel also reviewed the record to determine if any other meritorious grounds for relief, and concluded that none exist. This Court finds upon review of the record and Brochu's PCR Motion there are no meritorious grounds for relief. Accordingly, Rule 61 Counsel's Motion to Withdraw is hereby GRANTED.

#### **IV. CONCLUSION**

This Court finds no merit to Brochu's postconviction claims. Brochu entered a knowing, intelligent, and voluntary guilty plea and waived certain constitutional rights. Brochu expressed full understanding of the nature of his guilty plea from which he benefited during sentencing. Further, this Court finds there is no basis upon which it may conclude that Trial Counsel was ineffective. In addition, Rule 61 Counsel reviewed the entire record and concluded there were no meritorious grounds for postconviction relief upon which Rule 61 Counsel could advocate for Brochu. Finally, this Court finds that there was no miscarriage of justice.

**NOW, THEREFORE, on this 26th day of May 2015, Brochu's Motion for Postconviction Relief is hereby DENIED; Brochu's Motion for Appointment of New Counsel is hereby DENIED; Brochu's Motion Expand the Record is hereby DENIED; and Rule 61 Counsel's Motion to Withdraw as Counsel is hereby GRANTED.**

**IT IS SO ORDERED.**

*Andrea L. Rocanelli*

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**The Honorable Andrea L. Rocanelli**