IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID No. 1001018873A
	)	
CARLOS TORRES,	)	
	)	
Defendant.	)	

Submitted: June 15, 2015
Decided: October 2, 2015

On Petitioner Carlos Torres's Motion for Postconviction Relief – DENIED

OPINION

Brian J. Robertson, Esquire, Department of Justice, 820 N. French Street, Wilmington, DE 19801, Attorney for State of Delaware.

Natalie S. Woloshin, Esquire, Benjamin S. Gifford IV, Esquire, 3200 Concord Pike, Wilmington, DE 19803. Attorneys for Defendant.

CARPENTER, J.

Defendant Carlos Torres ("Torres") seeks to set aside his judgments of conviction on one count each of Manslaughter and Possession of a Firearm During the Commission of a Felony. For the foregoing reasons, the petition will be denied although the Court will vacate the defendant's sentence, order a new presentence report and sentence the defendant once the report is completed.

FACTUAL AND PROCEDURAL BACKGROUND

Torres's arrest and conviction stem from the shooting death of Marco Cruz that occurred in Wilmington, Delaware on January 25, 2010. Marco's brother Dominick Cruz was also shot and injured that evening. Dominick was in contact with the police soon after the shooting and eventually claimed that Torres was the shooter. He was arrested on February 17, 2010.

On June 21, 2010, a Grand Jury indicted Torres, charging him with First Degree Murder, First Degree Attempted Murder, Possession of a Deadly Weapon by a Person Prohibited, Carrying a Concealed Deadly Weapon, and two counts of Possession of a Firearm During the Commission of a Felony. Jan A. T. van Amerongen, Jr., Esquire, was assigned to represent Torres.

Trial was scheduled to begin on June 9, 2011. During an office conference with the Court that morning, the State indicated that the parties were ready to proceed to jury selection. When the Court inquired as to what plea offer had been made, the State responded that no offer had been made because "Mr. Torres has

maintained his lack of interest in anything involving a homicide" so it did not "make much sense for the State to climb the chain of command to get authorization to offer something that defendant has already indicated he is not going to accept."[1] The Court explained that its preferred practice was to conduct a colloquy with the defendant regarding any rejected pleas prior to jury selection so as to ensure the defendant is "fully informed" and proceeding to trial "knowingly and voluntarily."[2] Before the conference concluded at 9:40 a.m., the Court asked the parties "to come up with some kind of offer so there's something on the record, so there is something he can accept or reject" before jury selection at 10:30 a.m.[3]

Approximately 2 hours and 45 minutes later, the parties signed a plea agreement, with Torres pleading guilty to Manslaughter and Possession of a Firearm During the Commission of a Felony and the State entering a *nolle prosequi* on the remaining charges.[4] Prior to accepting Torres's guilty plea, the Court conducted a plea colloquy,[5] and accepted Mr. Torres's guilty plea, finding it "knowing, voluntary and intelligent."[6] Upon the parties' recommendation, the Court ordered a presentence investigation ("PSI") and explained to Mr. Torres the purpose of the investigation and how it was "in [his] best interest" to cooperate.[7]

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[1] Tr. 3:3-8, 6, June 9, 2011.
[2] *Id*. at 3:9-13.
[3] *Id*. at 9:4-8, 17:4-18.
[4] *Id*. at 18:11-23, 19:1-5.
[5] *Id*. at 21-34.
[6] *Id*. at 34:14-20.
[7] *Id*. at 34:21-23, 35:1-10, 13-14.

On June 16, 2011, Torres wrote a letter to counsel expressing his regret about entering the plea agreement. Mr. van Amerongen submitted an affidavit in response to this Rule 61 petition, in which he maintains Torres changed his mind several times in the months leading up to sentencing about whether or not he wanted to withdraw his guilty pleas.[8] Counsel met with Torres on July 25 and August 1, 2011 via video to discuss withdrawing his pleas:

> Mr. Torres advised that he had not understood the nature of a motion for substantial assistance at the time of the plea, specifically indicating that he believed he could file such a motion if he provided assistance to the state. Mr. Torres advised that he has not had adequate time to consider the plea or discuss it with his family due to the fact that the plea was offered the morning of jury selection . . . [,] that he has not shot anyone and that he did not intend for anyone to be hurt . . . [,] [and] that he wanted to withdraw his guilty pleas.[9]

Mr. van Amerongen subsequently requested transcripts and began drafting a motion to withdraw guilty pleas based on Torres's sentiments.[10] On August 24, 2011, Mr. van Amerongen received a letter from Torres advising he changed his mind and no longer desired to withdraw his plea.[11] Counsel "continued to draft and revise a motion to withdraw guilty pleas in case Mr. Torres changed his mind again."[12] On September 6, 2011, in a meeting with counsel, Torres again represented that he wished to proceed to sentencing.[13] Two days later, counsel

[8] van Amerongen Aff. ¶¶ 12-25.
[9] *Id*.¶ 17.
[10] *Id*. ¶ 19.
[11] *Id*. ¶ 20.
[12] *Id*. ¶ 21.
[13] *Id*. ¶ 23.

"received a voice mail from Mr. Torres' mother advising that Mr. Torres wished to withdraw his guilty pleas."[14] On the morning of sentencing, September 9, 2011, Torres communicated to counsel that he did not want his pleas withdrawn.[15] As such, the completed motion to withdraw guilty pleas was not filed.

At sentencing, the Court addressed Torres about his unwillingness to talk to the presentence investigator and Torres explained, "[a]t the time I was talking to my lawyer about probably withdrawing my plea, so he advised me that that's what we were going to do and not to speak with the [investigator]."[16] Mr. van Amerongen confirmed for the Court the advice given to Mr. Torres:

> MR. VAN AMERONGEN: … --and even though he did not get an opportunity to speak with the presentence officer, Your Honor, he is remorseful for what has happened.
>
> THE COURT: He had an opportunity, he declined to take advantage of that opportunity.
>
> MR. VAN AMERONGEN: Upon my advice, Your Honor. Because at that time I did not realize that we were going to be going down the road that we're going. But that – he is accurate when I told him that if that's the case, then you shouldn't say anything about the circumstances.[17]

The Court explained the ramifications to Mr. Torres: "unfortunately, because you did not give any information to the presentence investigator, I don't have a lot of information on you. I don't have a full picture on you so I'm going to sentence

[14] *Id*. ¶ 24.
[15] *Id*. ¶ 25.
[16] Tr. 3:9-12, September 9, 2011.
[17] *Id*. at 18:16-23 – 19:1-3.

you based on what I have."[18] Ultimately, all that was provided to the Court in the PSI report under the section dedicated to Torres's family history, education, marital history, employment, financial condition, and health was the following:

> When this writer attempted to interview the offender, he advised me of his intention [to withdraw his guilty pleas]. This writer emailed the offender's Counsel and the assigned Deputy Attorney General, advising them of this development. The offender declined the opportunity to participate in the presentence investigation. Therefore, no information is available. This writer has [examined] the Pretrial Services Report, which provides some information. This information indicates that the offender was born in New York …[,] [that he] was unemployed at the time of his arrest for the instant offenses, and that he has at least one child. The report further states that the offender is a member of the Latin Kings. …The offender has no identifiable out of State record. His Delaware record consists of seven prior misdemeanor convictions, one of which was pled down from a felony. He also has a felony adjudication of guilt in New Castle County Family Court for the offense of Burglary 2nd. He has one misdemeanor adjudication of guilty that was pled down from the felony level.[19]

In addition to the limited information contained in the PSI report, the Court heard testimony from the victims' mother, Mr. Amerongen presented two certificates of participation Torres earned while incarcerated, and Mr. Torres received an opportunity to address the Court. After explaining that he worked in "hard labor" since age sixteen to provide as head of household to two young children, Torres provided the following statement:

> I just want to ask for forgiveness, even though forgiveness is not going to bring him back. If I would have knew that was going to happen that day, it's a possibility that I could have stopped something, but I didn't know anybody's actions. I didn't know what anyone was planning to do. It

[18] Tr. 3:19-23, September 9, 2011.
[19] Def.'s Ex. E, 3-4.

> wasn't a plan. And I just want to ask that you be lenient, Your Honor. I don't want to come home to my children as teenagers and I'm a grandfather. I have a grandmother who's ill. …My mother is ill, she can't stand to see me in jail. And I just ask for forgiveness, Your Honor. I'm not a career criminal. I just chose to hang out with the wrong people and this is the outcome of it.[20]

Taking the State's recommendation, the Court applied the aggravating factor of undue depreciation of the offense and sentenced Mr. Torres to an aggregate of twenty-eight years at Level V incarceration to be suspended after serving eighteen years in prison for decreasing levels of supervision.[21]

On October 4, 2011, Mr. Torres filed a Motion for Reduction of Sentence *pro se*. Shortly after, Mr. Torres sought appointment of new counsel alleging conflict between himself and Mr. van Amerongen. At the Court's request, Mr. van Amerongen filed a Motion to Withdraw as Counsel, and new counsel was appointed to represent Mr. Torres. Torres's original *pro se* motion was withdrawn on February 29, 2012, but he filed another motion for sentence modification without counsel's assistance on June 5, 2012. The Court issued an order dated June 12, 2012 denying Torres's request as time-barred under Superior Court Criminal Rule 35(b),[22] which the Delaware Supreme Court later affirmed.[23]

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[20] Tr. 19-20, September 9, 2011.
[21] *Id*. at 22-25.
[22] Super. Ct. Crim. R. 35 ("The court may reduce a sentence of imprisonment on a motion made within 90 days after the sentence is imposed. … The court will consider an application made more than 90 days after the imposition of sentence only in extraordinary circumstances or pursuant to 11 Del.C. § 4217. The court will not consider repetitive requests for reduction of sentence.").
[23] *Torres v. State*, 2012 WL 4846542, at *2 (Del. Oct. 10, 2012).

On May 16, 2014, counsel filed this motion pursuant to Superior Court Criminal Rule 61. Alleging violations of his Sixth and Fourteenth Amendment rights under the United States Constitution, along with various violations under the Delaware Constitution, Mr. Torres raises three grounds for postconviction relief:[24]

> (1) "The trial court interfered with [his] right to a jury trial and coerced him into taking a plea;"[25]
>
> (2) Ineffective assistance of trial counsel for "failing to provide…effective representation in the pre-trial phase of his case," for "failing to give him competent legal advice," and for "permitting [him] to plead guilty to Manslaughter and Possession of a Firearm During the Commission of a Felony when the record did not support such charges;"[26]
>
> (3) Ineffective assistance of trial counsel for "advising [him] not to cooperate with the presentence investigation and [for] failing to investigate and present mitigating evidence."[27]

The Judge who presided over the proceedings underlying Torres's postconviction claim granted counsel's Motion for Judicial Recusal on July 14, 2014. As a result, Torres's Rule 61 petition was specially assigned to this Judge for review.

DISCUSSION

Mr. Torres's Motion for Postconviction Relief, filed May 16, 2014, is controlled by Superior Court Criminal Rule 61 prior to its amendment in June

[24] Def.'s Mot. for Postconviction Relief.
[25] *Id*. at 12.
[26] *Id*. at 20.
[27] *Id*. at 33.

2014.[28] Before considering the merits of a motion for postconviction relief, the Court must first address the four procedural requirements of Superior Court Criminal Rule 61(i).[29]

First, a motion for postconviction relief must be filed within one year of the conviction's final judgment.[30] A judgment of conviction becomes "final" when the defendant does not file a direct appeal within 30 days from the date sentence was imposed.[31] Second, the motion must not assert any ground for relief not raised in a prior postconviction motion.[32] Third, the motion must not advance any claims the movant did not raise in the proceedings leading to his conviction unless he shows cause for relief from the procedural default and prejudice from the violation of his rights.[33] Fourth, the motion must not contain any claim that has already been adjudicated in a proceeding leading to the conviction unless the interest of justice requires reconsideration.[34]

If a procedural bar exists, the Court will not consider the merits of the postconviction claim unless the Defendant can show that the exception found in Rule 61(i)(5) applies.[35] Superior Court Criminal Rule 61(i)(5) provides that

[28] Super. Ct. Crim. R. 61 (2013).
[29] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).
[30] Super. Ct. Crim. R. 61(i)(1) (2013).
[31] Super. Ct. Crim. R. 61(m)(1) (2013).
[32] Super. Ct. Crim. R. 61(i)(2) (2013).
[33] Super. Ct. Crim. R. 61(i)(3) (2013).
[34] Super. Ct. Crim. R. 61(i)(4) (2013).
[35] Super. Ct. Crim. R. 61(i)(5) (2013).

consideration of otherwise procedurally barred claims is limited to claims that this 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."[36]

At the outset, the Court notes that the only procedural requirement applicable to Mr. Torres's Motion for Postconviction Relief is the one-year time limitation set forth in Rule 61(i)(1).[37] Mr. Torres's sentence was imposed on September 9, 2011 and he did not directly appeal.[38] Because this Motion for Postconviction Relief was not filed until May 16, 2014, nearly three years after Torres's sentence was imposed, it is time-barred under Rule 61(i)(1).[39] Thus, the Court will not consider the merits unless Mr. Torres can prove his postconviction claims fall under Rule 61(i)(5).

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[36] *Id*.

[37] *See* 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 or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court."). While the record reflects Torres attempted to file a *pro se* motion under Rule 61, it was not considered because he failed to use the prescribed form. Thus, this Torres's first successfully filed motion for postconviction relief. His claims do not present issues of procedural default or former adjudication.

[38] *See* Super. Ct. Crim. R. 61(m)(1) ("A judgment of conviction is final for the purpose of this rule as follows: (1) If the defendant does not file a direct appeal, 30 days after the Superior Court imposes sentence; (2) If the defendant files a direct appeal or there is an automatic statutory review of a death penalty, when the Supreme Court issues a mandate or order finally determining the case on direct review; or (3) If the defendant files a petition for certiorari seeking review of the Supreme Court's mandate or order, when the United").

[39] Super. Ct. Crim. R. 61(i)(1).

Torres does not dispute the Court's jurisdiction; rather, he contends he should be permitted relief despite the delay in filing his motion because he presents "a colorable claim" that there has been a "miscarriage of justice" under Rule 61(i)(5).[40] The "miscarriage of justice" exception is very narrow and only applies in limited circumstances.[41] Delaware courts have applied Rule 61(i)(5) to permit "colorable claims" for ineffective assistance of counsel in violation of the Sixth Amendment[42] and mistaken waiver of important constitutional rights,[43] "such as a mistaken waiver of rights to trial, counsel, confrontation, the opportunity to present evidence, protection from self-incrimination and appeal."[44] The Court will address each of Torres's postconviction claims separately below.

I. Coerced Guilty Plea

Mr. Torres contends the Court "interfered with [his] right to a jury trial and coerced him into taking a plea," thereby violating his constitutional rights.[45] Superior Court Criminal Rule 11 prohibits the Court from accepting a plea of

[40] Def.'s Mot. for Postconviction Relief 4.
[41] *See State v. Wilmer*, 2003 WL 751181, at *3 (Del. Super. Feb. 28, 2003) *aff'd*, 827 A.2d 30 (Del. 2003).
[42] *See id.* ("[The Rule 61(i)(5)] exception to the procedural bars is very narrow and is only applicable in very limited circumstances. A claim of ineffective counsel in violation of the Sixth Amendment to the United States Constitution, by its very nature, qualifies as just such an exception.").
[43] *See Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992) (where petitioner claimed "that he mistakenly waived his entitlement to all the processes by which guilty is determined, a right all criminal defendants enjoy," the Court found Rule 61(i)(5) was available to him).
[44] *State v. Mayfield*, 2003 WL 21267422, at *3 (Del. Super. June 2, 2003).
[45] Def.'s Mot. for Postconviction Relief 12.

guilty "without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement."[46] The plea colloquy transcript should "make it indisputably clear that the [Rule 11] requirement … has been complied with."[47]

The foundation of Torres's first argument to support his Rule 61 petition is that the trial judge inappropriately interjected herself into the plea negotiation process. He further asserts that, once the Court initiated plea negotiations, the Court's time limitation resulted in a plea that was hurried and of which the consequences were not fully appreciated. The record, however, does not support these contentions.

First, it is important to emphasize that the trial judge was not involved in any way with determining or suggesting what the appropriate resolution of the case should be. This unfortunate process simply began with an inquiry as to what the plea offer had been in the case since it was her practice to insure that the defendant was aware of the offer and the consequences that would flow if the defendant rejected the offer and proceeded to trial. So this is not a situation, as suggested by

[46] Super. Ct. Crim. R. 11; *see also Brown v. State*, 250 A.2d 503, 504 (Del. 1969).
[47] *See Brown*, 250 A.2d at 504.

Torres, of a trial judge participating in the plea process or forcing a defendant to plea the case.

Once the trial judge learned that no formal written plea had been provided by the State, even though counsel had informally discussed a possible resolution, she simply asked that these discussions be formalized so she could discuss them with Mr. Torres. While perhaps the Court's conduct acted as a catalyst to resolving the case, the record is completely absent of any inappropriate influence or coercion by the Court. At all times, Torres was free to continue to reject the State's plea offer and proceed to trial. The decision to enter the plea was simply a result of Torres finally appreciating that he would face a possible life sentence at trial and now, he had been presented with an offer that would substantially reduce that time. As defense counsel indicated in his affidavit, a plea to charges of manslaughter and possession of a firearm during the commission of a felony was a possible resolution previously discussed with Torres and one, in spite of his statements now to the contrary, he was interested in considering. [48]

While perhaps in hindsight the preferred practice would have been simply to proceed to trial, the trial court's inquiry here actually resulted in a more favorable resolution than that expected from a trial. While the Court will not hesitate to insure a defendant's right to a jury trial, this was not a situation where the

[48] van Amerongen Aff ¶ 3.

defendant's participation during the murder was disputed or unknown. Torres was there when the homicide occurred, but disputed that he was the one who discharged the weapon. Unfortunately for Mr. Torres, that did not provide a complete defense to the Murder in the First Degree charge.

Further, there is nothing in the plea colloquy to suggest that Torres's decision was hurried or that more time was requested by counsel and denied.[49] Just because plea negotiations took place on the day of trial does not make Torres's plea coerced or involuntary.[50] The negotiations lasted for nearly three hours and right before accepting the plea, the trial judge even asked Mr. Torres, "Do you have any questions for your lawyer right now? If you do, we'll stop and you can ask him any questions before we continue" to which he responded "No, ma'am."[51] While clearly not the best of situations, there is nothing to suggest that the plea was not knowingly and intelligently made. Finally, the fact that Torres did not have time to discuss the plea offer with his family is of no consequence. Mr. Torres was 21 years of age at the time of the plea and certainly was mature enough to make these decisions.

[49] *See Brown v. State*, 250 A.2d 503, 504-505 (Del. 1969) (finding defendant's plea knowing and voluntary where State offered manslaughter plea the morning of trial and defendant conferred with attorney for thirty minutes).
[50] *See id.*
[51] Tr. 34:9-13, June 9, 2011.

II. Ineffective Assistance of Counsel

All claims of ineffective assistance of counsel are governed by the two-part test set forth by the United States Supreme Court in *Strickland v. Washington.*[52] That is, a movant must show both (1) that counsel's representation fell below an objective standard of reasonableness and (2) that a reasonable probability exists that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. [53] Failure to prove either prong renders the claim insufficient.[54] Additionally, when evaluating counsel's representation, the Court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct"[55] and apply a "strong presumption that counsel's conduct was professionally reasonable."[56]

Mr. Torres alleges trial counsel was ineffective for a number of reasons during both the plea negotiation and sentencing phases of representation. This Court will discuss the claims separately below.

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[52] *466 U.S. 668 (1984).*
[53] *See Albury v. State*, 551 A.2d 53, 58 (Del. 1988); *see also Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.")
[54] *Strickland*, 466 U.S. at 688.
[55] *Id.* at 690.
[56] *See Albury*, 551 A.2d at 59; *see also Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.").

A. Ineffective Assistance of Counsel in Connection with Guilty Plea

Because "[a] criminal defendant's decision to plead guilty involves the waiver of several important constitutional rights …[,] a guilty plea agreement waiving these rights must be entered into knowingly, intelligently, and voluntarily."[57] While the ultimate decision to plead guilty to an offense is personal to the defendant, "the decision must be an informed one and the advice of counsel is vital to the decision-making process."[58]

The two-part *Strickland* test has been specifically held to apply to guilty plea challenges based on claims of ineffective assistance of counsel.[59] In terms of the first prong, "[a] guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys in criminal cases.'"[60] Regarding the second prong of *Strickland*, "the defendant must show that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'"[61]

Here,Torres argues trial counsel was ineffective by (1) providing faulty legal advice that induced him to plead guilty and (2) permitting Torres to enter a guilty

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[57] *See Bass v. State*, 2002 WL 31796076, at *1 (Del. Dec. 12, 2002).
[58] *See State v. Alley*, 2014 WL 605440, at *3 (Del. Super. Feb. 14, 2014) *aff'd*, 105 A.3d 988 (Del. 2014).
[59] *See Albury*, 551 A.2d at 58 (citing *Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985)).
[60] *Strickland*, 466 U.S. at 687 (citing *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970)).
[61] *See MacDonald v. State*, 778 A.2d 1064, 1075 (Del. 2010) (citing *Hill*, 474 U.S. at 59).

plea to charges that lacked any factual basis and for which he maintained his innocence.

(1) Mistaken Advice Regarding Substantial Assistance

Torres first alleges trial counsel failed to provide competent legal advice as to the procedure surrounding substantial assistance motions and that, had counsel "properly advised that only the Office of the Attorney General could file a motion to reduce a sentence based on substantial assistance, there is a reasonable probability that he would not have pled guilty, and instead would have gone to trial."[62] Specifically, Torres alleges "[t]he only opportunity trial counsel had to discuss the specific offer made by the State was the two and a half hours between the conclusion of the office conference and Mr. Torres's appearance in open court," and during that time, counsel incorrectly advised him that he could attempt to reduce any sentence imposed after the plea by filing a substantial assistance motion with the Court.[63] In Delaware, only the *State* can move the sentencing court to modify a defendant's sentence for substantial assistance.[64]

[62] Def.'s Mot. for Postconviction Relief 24.
[63] *Id*. at 22 (citing Def.'s Ex. B, ¶ 7).
[64] *See* 11 *Del. C.* § 4220 ("The Attorney General may move the sentencing court to modify, reduce or suspend the sentence of any person who is convicted of any crime … and who provides substantial assistance in the identification, arrest, or prosecution of any other person.").

In support of his contention, Torres cites counsel's unfiled Motion to Withdraw Guilty Pleas.[65] The motion states in pertinent part:

> Unfortunately, defense counsel did not adequately explain the procedures regarding a substantial assistance motion and Mr. Torres believed that such motion could be filed by the defendant, and was not limited to the State. As a result, Mr. Torres believed that if he were to provide assistance to the State and the State refused to file a motion, then he could file a motion with the court to explain his assistance and seek a lesser sentence.[66]

In his affidavit, Mr. van Amerongen maintains that he properly advised Torres regarding substantial assistance motions both before and during plea negotiations:

> [B]eginning months prior to trial, I communicated to Mr. Torres that the State had expressed interest in information he may have regarding certain individuals and events. … On more than one occasion, we discussed how he might receive a more generous plea offer if he was able and willing to provide the requested information. We also discussed how the State could file a Motion for Substantial Assistance if the State felt that the information provided was valuable. I explained how this motion could be filed by the State either before or after sentencing and could work to reduce any sentence to be imposed or already imposed. I further explained that if he provided any information and/or testimony, it would be *entirely up to the State* to determine whether or not the information was valuable and whether or not to file a Motion for Substantial Assistance.[67]
>
> ….
>
> When I communicated the [State's plea offer] to Mr. Torres, he advised me that he wished to accept the offer. …I again advised [him] that it was *entirely up to the State* to decide … whether or not to file a Motion for Substantial Assistance.[68]

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[65] *See* Def.'s Ex. B.
[66] *Id.* ¶ 7 (emphasis added).
[67] van Amerongen Aff ¶ 4 (emphasis added).
[68] *Id.* ¶ 8 (emphasis added).

Regardless of whether Mr. van Amerongen erroneously advised Torres as to substantial assistance, Torres's allegations are insufficient to satisfy the prejudice prong of *Strickland.* Torres failed to allege any special circumstances to support the conclusion that he placed "particular emphasis" on his ability to unilaterally file a substantial assistance motion in deciding to enter his guilty plea.[69] Torres claims only that, as a result of counsel's advice, Torres mistakenly believed he could *unilaterally* initiate substantial assistance proceedings to move the Court to reconsider his sentence. What is missing from the record is any connection between this belief and Torres's ultimate decision to plead guilty to Manslaughter and Possession of a Firearm During the Commission of a Felony instead of going to trial. Conclusory allegations that counsel's mistaken advice "induced" Torres to plead guilty, without more, are insufficient to prove prejudice.[70] Even if the law operated as Torres believed it did when he agreed to plead guilty, there was never a guarantee his sentence would be reduced or modified because the Court would still

[69] *See Hill*, 474 U.S. at 60 (finding defendant's claim failed *Strickland* regardless of his counsel's erroneous advice as to his parole eligibility because defendant did not sufficiently allege prejudice).
[70] *See Jamison v. State*, 825 A.2d 238 (Del. 2003) ("To the extent he alleges that his guilty plea was involuntary due to the ineffective assistance of his trial counsel, Jamison has failed to satisfy his burden of proof. In the context of a guilty plea, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that, but for his counsel's deficient performance, he would not have pled guilty but would have insisted on going to trial. Jamison's conclusory allegations fail to satisfy either prong of this standard. Jamison's plea agreement reflected that the agreement was not an agreed-to sentence under Superior Court Criminal Rule 11(e)(1)(C) and that nobody had promised Jamison what his sentence would be.").

have the final say.[71] Additionally, Torres was clearly not prejudiced by his inability to initiate substantial assistance proceedings because Delaware law affords him, as a criminal defendant, other means of petitioning the Court for sentence modification, such as Superior Court Criminal Rule 35.[72]

Furthermore, Torres holds the key to the substantial assistance door. He had the opportunity before sentencing or even now to convince the State that the information he possesses is sufficiently valuable to justify the filing of a substantial assistance motion. In spite of all of Torres's posturing regarding who could file the motion, he has failed to even avail himself of the opportunity to provide such information. To argue now that he was misinformed is simply not convincing, as the remedy he seeks is still available to him.

Similarly absent from the record is any indication that substantial assistance was part of the ultimate plea agreement. During the plea colloquy, Mr. Torres told the Court he read, understood, and signed the plea agreement and Truth-in-Sentencing Form.[73] The Court also asked if Mr. Torres had been promised anything by anyone that was not provided for in the plea agreement, to which he

[71] *See* 11 *Del. C.* § 4220 ("[A] judge of the court that is imposing or that has imposed a sentence, upon hearing a motion filed pursuant to subsection (a) of this section, may modify, reduce or suspend that sentence, including any minimum or mandatory sentence, or a portion thereof, if the court finds that the person rendered such substantial assistance.").
[72] *See* Super. Ct. Crim. R. 35 (governing correction or reduction of sentence).
[73] Tr. 20-23, June 9, 2011.

answered "No, ma'am."[74] Under Delaware law, "a defendant's statements to the Court during the guilty plea colloquy are presumed to be truthful" and without clear and convincing evidence to the contrary, Torres is "bound by his answers on the Truth-in-Sentencing Guilty Plea Forms and by his testimony prior to the acceptance of the guilty plea."[75]

Finally, the motion Mr. van Amerongen was fully prepared to file for Mr. Torres proves that he had the opportunity to request his guilty pleas be withdrawn prior to sentencing on the very same grounds he complains of here. Instead, he directed trial counsel not to file the motion to withdraw his pleas because he wanted to proceed to sentencing. This Court cannot find it "reasonably probable" Torres would not have pled guilty but for trial counsel's allegedly mistaken advice when the evidence makes clear that Torres learned after entering the plea agreement that he could not unilaterally file substantial assistance motions and still instructed his attorney not to withdraw the pleas. Thus, Torres's first ineffective assistance claim fails.

(2) Failure to Challenge Factual Basis of Plea

Torres next contends that trial counsel was ineffective by permitting him to plead guilty to Manslaughter because there was no factual basis for the charge and

[74] *Id.* 23:13-16.
[75] *See Somerville v. State*, 703 A.2d 629, 632 (Del. 1997).

Torres maintained his innocence.[76] The State argues the colloquy adequately reflects that Torres's liability was predicated as an accomplice and that the record supported his convictions, so counsel was not ineffective for permitting a guilty plea to those offenses.[77]

A person is guilty of Manslaughter when he or she recklessly causes the death of another.[78] To act recklessly for purposes of Manslaughter, one must be aware of and consciously disregard a substantial and unjustifiable risk that the death of another will result from his or her conduct. Delaware courts have held that a person can act as an accomplice to a reckless act, such as manslaughter.[79] Under accomplice liability, a person is guilty of a crime committed by another when, intending to promote or facilitate the commission of the offense, the person:

> a. Solicits, requests, commands, importunes or otherwise attempts to cause the other person to commit it; or
>
> b. Aids, counsels or agrees or attempts to aid the other person in planning or committing it; or
>
> c. Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so; …[80]

[76] Def.'s Mot. for Postconviction Relief 25-32. This ineffective assistance of counsel claim purports to rest on the lack of any factual basis for both charges Torres pled guilty to, but Defendant's Motion does not provide any argument disputing the factual foundation underlying the Possession of a Firearm During the Commission of a Felony charge. Thus, the Court addresses only the Manslaughter charge in deciding this claim.
[77] State's Resp. to Def.'s Mot. for Postconviction Relief 12.
[78] 11 *Del. C.* § 632.
[79] *See Martin v. State*, 433 A.2d 1025, 1029 (Del. 1981)
[80] 11 *Del. C.* § 271.

To incur liability as an accomplice, a defendant need not "specifically intend that the result, a killing, should occur. As long as the result was a foreseeable consequence of the underlying felonious conduct their intent as accomplices includes the intent to facilitate the happening of this result."[81]

Torres argues Mr. van Amerongen was ineffective in failing to object to his Manslaughter plea because the record does not support that he acted recklessly or caused Marco Cruz's death. In support of his assertion, Torres cites lengthy portions of the plea colloquy transcript:

> THE COURT: Are you pleading guilty to those charges because you are guilty?
>
> THE DEFENDANT: I'm guilty because I went to confront somebody and I didn't know anybody was going to get killed. So yes, ma'am.[82]
>
> …
>
> THE COURT: The first charge is Manslaughter. In violation of Title 11, Section 632 of the Delaware Code in that Carlos Torres, on or about the 25th day of January 2010, in the County of New Caste, State of Delaware, did recklessly cause the death of Marco Cruz by shooting him with a firearm. Did you understand that charge?
>
> MR. VAN AMERONGEN: He's looking at me, Your Honor. I can indicate to the Court that he understands the charge. I think he looked at me because he did not – he's not indicating that he, himself shot the individual, Mr. Cruz, but that somebody he was with did.

[81] *See Martin*, 433 A.2d at 1029.

[82] Tr. 22:15-19, June 9, 2011.

THE COURT: It says "recklessly cause the death."

MR. VAN AMERONGEN: Well, Your Honor, I believe that the legal argument and basis would be that his actions in going with these people to confront the individual when he knew that somebody he was with had a firearm was, by itself, reckless and, therefore, led to his death.

THE COURT: Is that correct, Mr. Torres?

THE DEFENDANT: Yes.

THE COURT: So your plea to that charge is guilty or not guilty?

THE DEFENDANT: Guilty, Your Honor.[83]

…

THE COURT: Now, either I get a proffer from the State or you tell me in your own words what happened. You started to tell me anyway, so perhaps you want to continue telling me.

THE DEFENDANT: Well, I was along with Anthony Matos and Aking DeLeon who are the individuals that was involved in the case, and I went with them to confront Marco Cruz and Dominick Cruz.

THE COURT: Why were you confronting them?

THE DEFENDANT: I'm not very sure about the situation, but I know I went along with them. And as the confrontation went on, I knew that there could have been the possibility of somebody getting into a fight, but I didn't know that there was going to be the possibility of anyone getting shot or killed.

THE COURT: Mr. Van Amerongen, do you want to add anything today?

MR. VAN AMERONGEN: Your Honor, I believe that he also did know that somebody who was present did have a gun. So even though he may not have known that there was an intent to shoot the gun, what he is acknowledging is that by going to confront someone, recognizing there to be

[83] *Id*. at 25:23-26:1-22.

a physical confrontation, recognizing that somebody in his party had a gun, he could – he believes that his actions recklessly brought about the death of Marco Cruz.

THE COURT: Did you hear what your attorney said?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you agree with that?

THE DEFENDANT: Yes, I agree that I did go along, but I don't know – it wasn't my intention for anything to happen.

THE COURT: Right now you've already told me you're guilty, so don't try to sugarcoat it. I need to know what happened. So he said that you were aware of a gun right?

THE DEFENDANT: Yes, ma'am.[84]

…

THE COURT: Tell me how you knew that.

THE DEFENDANT: I knew it because before we left the apartment on 1000 Jackson Street, Anthony Matos had took it out to show basically that he had it in his possession.

THE COURT: So when you saw that, you had a pretty good idea that if he carried it with him, he might plan on using it too?

THE DEFENDANT: In defense, yeah. [85]

…

THE COURT: It sounds like you are trying to have it both ways, you are trying to say that you didn't know what was going on, but you really did know.

THE DEFENDANT: I knew there was going to be a confrontation.

[84] *Id*. at 28-29:1-20.
[85] *Id*. at 30:2-10.

> THE COURT: And there was a gun?
>
> THE DEFENDANT: I knew it was probably going to lead to a fight or something, but I didn't know it was going to lead to anybody getting shot.
>
> THE COURT: Why would somebody carry a gun?
>
> THE DEFENDANT: For protection, I believe, ma'am.[86]
>
> …
>
> THE COURT: You knew there was going to be a confrontation, you knew that there was going to be a gun, and you knew that somebody might use a gun?
>
> THE DEFENDANT: Yes, ma'am.[87]

The Court finds Torres's second ineffective assistance of counsel claim fails the first prong of *Strickland* because Mr. van Amerongen's decision to allow Torres to plead guilty to Manslaughter does not fall outside "the range of competence demanded of attorneys in criminal cases." [88] While the law requires that a guilty plea be entered intelligently, it does not require "that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing."[89] The statement provided by Torres during the colloquy shows that he understood accomplice liability as it was referenced by his counsel. Torres's statements regarding his knowledge that there was going to be a confrontation, that

[86] *Id*. at 30:19-23 – 31:1-7.
[87] *Id*. at 31:11-14.
[88] *See McMann v. Richardson*, 397 U.S. 759, 770 (1970).
[89] *See id*.

one of the participants was bringing a gun, and that one of the participants might use that gun were sufficient to allow the plea to proceed and counsel's advice was not ineffective. Torres also told the Court he was satisfied with counsel's representation, that counsel fully advised him of his rights, and that he felt counsel represented him to the best of his ability.[90] As such, Torres's second ineffective assistance claim also fails.

B. Ineffective Assistance of Counsel at Sentencing

Torres also alleges trial counsel was ineffective by advising him not to cooperate with the presentence investigation and by failing to investigate and present mitigating evidence at sentencing.[91] To prevail, Torres must demonstrate that Mr. van Amerongen's "representation at sentencing was objectively unreasonable and that, but for counsel's unreasonable representation, there is a reasonable probability that the outcome of [his] sentencing would have been different."[92]

(1) ***Failure to Properly Advise Torres as to Presentence Investigation***

The plea colloquy transcript reflects that the Court explained the purpose of a presentence investigation to Mr. Torres and informed him that it was in his "best

[90] *See* Tr. 34, June 9, 2011. *See also State v. Hester*, 2012 WL 3608713, at *4 (Del. Super. Aug. 21, 2012) ("The fact that Hester admitted to this Court that he was satisfied with his counsel's work during his Plea Colloquy also weighs against the ineffective counsel claim.").
[91] Def.'s Mot. for Postconviction Relief 26.
[92] *See Franklin v. State*, 901 A.2d 119 (Del. 2006).

interest to cooperate with [the investigators]."[93] In his February 2015 affidavit, Mr. van Amerongen claims that, in light of Mr. Torres's desire to withdraw his guilty plea, he advised Mr. Torres "that he should still cooperate regarding his family, social, employment and educational background, and should still demonstrate sorrow and remorse for what happened, but that he should respectfully decline to provide a version of the crime."[94] Unfortunately, if this was the advice provided, it clearly was not understood by the defendant.

On August 12, 2011, presentence officer, James Kostelnik, sent an email to both the State and defense counsel notifying them of Torres's refusal to participate in the investigation by e-mail:

> I attempted to interview Torres on 08/05/2011, and was informed by him that he has filed a motion to withdraw his guilty plea of 06/09/2011. He stated that he was advised by Mr. Van Amerongen to not speak with me due to the motion. I checked the docket, and saw that Torres had written a letter on 07/14/2011 stating his intention to withdraw his plea. Since I see no docket entry reflecting this as of this writing, I will continue with the PSI without Torres' cooperation, unless I hear otherwise.[95]

Mr. van Amerongen purportedly never responded to Mr. Kostelnik's e-mail.[96] After the Court confronted Torres at sentencing about not cooperating with the investigation, Mr. van Amerongen confirmed on the record that he advised Torres

[93] Tr. 35:13-14, June 9, 2011.
[94] van Amerongen Aff. ¶ 18.
[95] Def.'s Ex. G.
[96] Def.'s Reply Br. in Supp. of Def.'s Mot. for Postconviction Relief 11.

not to provide his version of the events from the evening of the crime because he believed they were seeking to have his pleas withdrawn.

The State argues van Amerongen's assistance was not ineffective, and that Torres's "own actions contributed to any oversight, as the affidavit of his counsel reveals that Mr. Torres vacillated about whether to seek to withdraw his plea right up to the time of sentencing."[97] While perhaps true, it does not resolve the issue now before the Court.

The Court is confident that the advice given to Torres would have been consistent with that indicated in trial counsel's affidavit. Mr. van Amerongen is an experienced criminal attorney and would have known that the only potential concern in the presentence report would have been the defendant's version of what had occurred. With Torres's waffling position on the plea, the Court agrees allowing him to give a statement regarding the facts of case would be a dangerous and unknown proposition. The other background information would not present the same concern and the Court is confident this would have been communicated to Mr. Torres.

The concern here is the failure of counsel to correct the misunderstanding when it was brought to his attention by the presentence officer. And while it is

[97] State's Resp. to Def.'s Mot. for Postconviction Relief 13; van Amerongen Aff. ¶¶ 12-25.

difficult to determine the extent of the impact Torres's failure to cooperate with the PSI might have had on the sentence he received, the comments of the judge would seem to indicate it played some role. The remedy, however, is not a new trial or setting aside the conviction, or even withdrawing Torres's plea. It is simply to vacate the sentence, allow a full presentence investigation to be completed, and have the defendant sentenced again.

Ultimately, the record reflects trial counsel knew cooperation with the presentence investigation was in his client's best interests, that trial counsel received advance notice that his client was not participating in the investigation, that trial counsel had sufficient time to take remedial steps to ensure his client's cooperation with the investigation in accordance with his client's best interests, and that trial counsel neglected to do just that. The Court finds such action undermined the fundamental fairness of the sentencing proceeding, and the only remedy to insure the integrity of Torres's sentence is to require he be resentenced with a completed PSI report.[98]

(2) ***Failure to Investigate and Present Mitigating Evidence at Sentencing***

Lastly, Torres alleges trial counsel was ineffective by failing to investigate and present mitigating evidence at sentencing.[99] Given the Court's finding above

[98] To the extent this is a question regarding the remedy crafted by the Court, under Rule 61, the Court finds extraordinary circumstances under Rule 35 to allow the resentencing to occur.
[99] Def.'s Mot. for Postconviction Relief 36.

that Torres is to be resentenced as a result of the inadequate presentence investigation, his final ineffective assistance claim is declared moot. His counsel will have the opportunity to present mitigating evidence at his resentencing.

CONCLUSION

While the circumstances surrounding the preparation of the PSI report mandates that Torres be resentenced, the Court wants to be clear that it is not opening the door for Torres to withdraw his plea or demand any other relief. His plea was entered knowingly and intelligently, and was supported by sufficient facts. Torres need not ask for other relief as it will not be granted. The Court suggests that counsel concentrate their efforts on establishing a complete mitigating case on behalf of Torres and even exploring whether he has information that the State may have interest in sufficient to justify a substantial assistance motion. Once the PSI report is completed, Torres will be sentenced by this Judge, who had no involvement in the plea process. The Rule 61 petition is denied, and the Court hereby vacates the sentence of September 9, 2011. The Court is ordering that a new PSI report be completed and once done, the defendant will be sentenced.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.