IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID No. 1109012491
	)	
DAVID A. SALASKY, JR.,	)	
	)	
Defendant.	)	

Submitted: August 7, 2013
Decided: September 26, 2013

On Defendant's Motion to Suppress Searches – DENIED
On Defendant's Motion to Suppress and Other Remedies-Subpoenaed Material – DENIED
On Defendant's Motion for Attorney-Conducted *Voir Dire* – DENIED IN PART
On Defendant's Motion for Relief from Prejudicial Joinder – DENIED
On Defendant's Motion to Preclude the State from Seeking the Death Penalty Against a Severely Mentally Ill Defendant – DENIED
On Defendant's Motion to Suppress Statements – GRANTED IN PART
On Defendant's Motion in Limine to Exclude Expert Opinion Testimony – DENIED
On Defendant's Motion in Limine for Access to Criminal Histories of Potential Jurors - DENIED

OPINION

Steven D. Wood, Esquire; John W. Downs, Esquire, Department of Justice, 820 N. French Street, Wilmington, DE 19801.

Kevin J. O'Connell, Esquire; Robert M. Goff, Esquire; Ross Flockerzie, Esquire, Office of the Public Defender, 820 N. French Street, Wilmington, DE 19801.

CARPENTER, J.

Before this Court are the following motions filed by Defendant David A. Salasky, Jr. ("Salasky"): 1) Motion to Suppress Searches; 2) Motion to Suppress and Other Remedies-Subpoenaed Material; 3) Motion for Attorney-Conducted *Voir Dire*; 4) Motion for Relief from Prejudicial Joinder; 5) Motion to Preclude the State from Seeking the Death Penalty Against a Severely Mentally Ill Defendant; 6) Motion to Suppress Statements; 7) Motion *in Limine* to Exclude Expert Opinion Testimony; and 8) Motion *in Limine* for Access to Criminal Histories of Potential Jurors. This is the Court's decisions on these motions.

FACTUAL BACKGROUND

In the early morning hours of September 16, 2011, Sergeant Joseph Szczerba ("Szczerba"), an on duty and in uniform officer of the New Castle County Police Department ("NCCPD"), responded to 911 reports of a theft from a motor vehicle and an altercation that occurred in the Penn Acres community in New Castle, Delaware. Specifically, the 911 reports stated that an individual had broken into a motor vehicle and that, after being confronted, the perpetrator used a knife to cut the owner of that vehicle. The subsequent investigation revealed that the perpetrator was Salasky and that he had engaged in a string of car burglaries in the late evening hours of September 15, 2011. Further, it was determined that stolen from one of the vehicles was a 5-inch, fixed blade knife which Salasky used

to cut Kevin Byrd ("Byrd"), the owner of one of the vehicles, and also later used to stab Szczerba.

After initially stealing the knife, Salasky continued to the area of Finney Road in Penn Acres where he then attempted to enter a Cadillac sedan owned by Byrd. However, when Byrd observed Salasky in his car, Byrd went outside to confront him. Upon seeing Byrd, Salasky ran and a chase ensued, leading to the backyard of another home on Finney Road. In an effort to escape Byrd, Salasky unsuccessfully attempted to climb a fence but after he was unable to do so, he threatened to stab Byrd and used the knife to slash at him. Although Byrd suffered a minor wound, he was able to restrain Salasky until he determined that Salasky had not stolen anything from his car and released him. Salasky fled leaving behind a cell phone, which was later determined to belong to Salasky's girlfriend, Aleigha Hart ("Hart"). Based upon his interaction with Salasky, Byrd stated to the police that he believed Salasky was under the influence of methamphetamines during their altercation.

Along with several other NCCPD officers, Szczerba responded to the Finney Road area in Penn Acres. Shortly after responding, Szczerba observed an individual matching the description of the suspect in the 300 block of East Roosevelt Avenue, which is located several blocks from Byrd's residence.

Immediately thereafter, Szczerba radioed that he was in foot pursuit of the suspect. Shortly thereafter other officers joined Szczerba and observed him struggling on the ground with a suspect, later identified as Salasky. The other NCCPD officers indicated that Szczerba was giving them commands and warning them that he could not secure the suspect's arms. The officers noticed blood and Szczerba quickly stood up, walked away from the suspect, and announced: "I think I've been stabbed." Szczerba soon lost consciousness and collapsed. After Salasky was subdued and taken into police custody at the scene, both he and Szczerba were transported to Christiana Hospital. Szczerba died at the hospital and the Medical Examiner later determined that he had suffered multiple stab wounds to the neck, face, shoulder, back, and jugular. A 5-inch, fixed blade knife, which appeared to be covered in a reddish-brown substance visually consistent with blood, was recovered from the scene.

While at the hospital, a partially-consumed container of "bath salts," which was packaged in a cylindrical container and labeled "XTREME," fell from Salasky's pocket. Subsequent testing of both Salasky's blood and the container collected from the hospital revealed the presence of methylenedioxypyrovalerone ("MDPV"), a chemical compound that is often found in bath salts and has psychoactive effects. Salasky informed hospital personnel that he had recently

been using bath salts, and his presentation of physical symptoms of tachycardia, renal failure, acidosis, and rhabdomyolysis were, according to his treating physicians, believed to be attributable to his ingestion of bath salts.

Over the course of the investigation, the police learned that Salasky was a frequent and heavy user of bath salts, particularly in the weeks leading up to September 16, 2011. During Salasky's recorded interviews with the NCCPD, he indicated that he had purchased and smoked bath salts during both the afternoon and evening hours of September 15, 2011. To corroborate this information, NCCPD secured a surveillance video that showed Salasky purchasing bath salts at a tobacco store, about four (4) hours prior to his arrest and approximately a half-mile away from the 300 block area of Penn Acres where he was taken into custody. Further, the NCCPD obtained video surveillance of the defendant's girlfriend, Hart, purchasing bath salts earlier that same day. Moreover, Hart informed the NCCPD that she and Salasky were smoking bath salts in Salasky's mother's backyard during the afternoon of September 15, 2011. Hart told the NCCPD that Salasky had discarded the pipe they used to smoke the bath salts that day into his mother's swimming pool and the NCCPD was able to recover this pipe from the pool. Subsequent analysis of the pipe's residue revealed the presence of MDPV.

Although Salasky denied committing the car burglaries and confronting Byrd during his interviews with NCCPD, he acknowledged his confrontation with Szczerba. Specifically, Salasky stated that he was aware Szczerba was a police officer, but that he stabbed Szczerba after he "grew fangs" and "turned into something else." Salasky informed NCCPD that he had previously been hospitalized at the Rockford Center, a private mental health facility. Additionally, Hart, family members, and others confirmed that Salasky had a history of both mental illness and drug use.

PROCEDURAL BACKGROUND

On September 16, 2011, police arrested Salasky on a warrant, which charged him with First Degree Murder and a related weapons offense. Salasky provided NCCPD detectives with statements on Friday, September 16, 2011 and Sunday, September 18, 2011.

On December 5, 2011, Salasky was indicted and charged with several offenses, which included three (3) counts of Murder First Degree, five (5) counts of Possession of a Deadly Weapon During Commission of a Felony, two (2) counts of Possession of a Deadly Weapon by a Person Prohibited, one (1) count of Resisting Arrest, three (3) counts of Assault Second, one (1) count of Attempted

Robbery First Degree, four (4) counts of Burglary Third Degree, four (4) counts of Theft, and one (1) count of Criminal Mischief.

On March 30, 2012, Salasky filed a Notice of Intent to Rely Upon a Mental Health Defense pursuant to Superior Court Criminal Rule 12.2.

I. MOTION TO SUPPRESS SEARCHES

Salasky has moved to suppress any and all evidence, which was seized pursuant to search warrants for the following: 1) a 1999 green Ford Ranger; 2) a black Samsung phone; 3) Salasky's person; 4) 125 Lea Road, New Castle, Delaware; and 5) 1604 North Rodney Street, Apartment 3, Wilmington, Delaware. Specifically, Salasky claims that the search of the abovementioned locations violated his Fourth Amendment rights and, therefore, the State should be precluded at trial from using evidence seized from these locations. For the reasons set forth below, Salasky's Motion to Suppress is hereby denied.

After Salasky was taken into custody, Detective Clifton Vikara of the NCCPD applied for seven (7) search warrants. The affidavits in support of these warrants provided background facts as to the charged crimes as well as additional details specific to the locations sought to be searched. The warrant applications requested authorization to search the locations for various items, including the

following: drugs; weapons; stolen goods; legal records; electronic data; samples of Salasky's DNA, hair, and fingernail clippings; the clothes Salasky wore when taken into custody; Salasky's medication and medical information; Salasky's writings; and keys to a Ford Ranger. All seven (7) warrants were approved by Magistrates of the Justice of the Peace, Court Number 11. Specifically, the following warrants are at issue here:

1. Dated September 16, 2011, for a 1999 green Ford Ranger, registered to David Salasky, Sr., Delaware registration CL23960 ("Search Warrant A");

2. Dated September 16, 2011, for a black, Samsung, flip-style cellular telephone ("Search Warrant B");

3. Dated September 16, 2011, for the body of Salasky ("Search Warrant C");

4. Dated September 16, 2011, for 125 Lea Road, New Castle, Delaware, residence of Salasky's mother ("Search Warrant D");

5. Dated September 16, 2011, for 1604 North Rodney Street, Apartment 3, Wilmington, Delaware, Salasky's residence ("Search Warrant E");

6. Dated September 20, 2011, for 125 Lea Road, New Castle, Delaware, residence of Salasky's mother ("Search Warrant F");

7. Dated September 20, 2011, for 1604 North Rodney Street, Apartment 3, Wilmington, Delaware, Salasky's residence ("Search Warrant G").

Standard of Review

On motions to suppress evidence presented to this Court, the defendant bears the burden of establishing that the challenged search or seizure violated his Fourth Amendment rights.[1] Specifically, the defendant must prove by a preponderance of the evidence that he is entitled to relief.[2] As the underlying search warrants were issued by a magistrate, this Court should give great deference to the magistrate's probable cause determination making only a substantial basis review to determine whether "the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances…."[3] However, if "a logical nexus between the items sought and the place searched"[4] exists, this Court should affirm the issuance.

A. Parties' Contentions

Salasky argues that the affidavits in support of the search warrants did not adequately establish a logical nexus between the evidence sought and the locations to be searched. As a result, Salasky contends the warrant should not have been approved by the magistrate and, thus, this Court should suppress any/all evidence gathered therefrom. Specifically, Salasky contends that the supporting affidavits

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[1] *See Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978); *State v. Bien-Aime*, Cr.A. No. IK92-08-032 (Del. Super. Mar. 17, 1993).
[2] *See Bien-Aime*, at 3 (citing *United States v. Casteneda*, 951 F.2d 44, 48 (5th Cir. 1992)).
[3] *LeGrande v. State*, 947 A.2d 1103, 1108 (Del. 2008).
[4] *Dorsey v. State*, 761 A.2d 807, 811 (Del. 2000).

of probable cause primarily focused on establishing that Salasky was the appropriate target of the police investigation regarding Szczerba's death, the attempted robbery at 19 Finney Road, and several car burglaries. Salasky claims that this was insufficient to warrant a broad search of Salasky's residences, vehicle, and electronic equipment. Stated alternatively, Salasky asserts that the warrants were defective because they failed to establish that the objects sought were: 1) seizable; and 2) likely to be found in the locations to be searched. Therefore, notwithstanding the substantial deference owed to issuing magistrates, Salasky concludes that this Court should suppress the evidence that was seized.

In response, the State first asserts that Salasky does not have standing to challenge Search Warrants A, D, or F, authorizing searches for the 1999 Ford Ranger and 125 Lea Road residence because Salasky was neither the registered owner of the vehicle nor resided at that address. As such, the State contends that Salasky does not have a reasonable expectation of privacy in the vehicle which was his fathers, or the address where his mother resides. The State further contends that even if Salasky does have standing, all of the search warrants were supported by the underlying affidavits relevant to the police's ongoing investigation of the murder of Szczerba and vehicular burglaries that had taken place earlier that evening.

Instead of reviewing the sufficiency of each individual search warrant, Salasky analyzes the validity of the supporting affidavits according to the seven categories of items sought by the various warrants. They include intoxicating substances; weapons; stolen goods; legal records; electronic data; medications and medical treatment records; and Salasky's writings. The Court can only surmise that this was done because there is significant consistency in the affidavits supporting each one and, thus, there is a repetitiveness in the arguments that Salasky desires to advance as to each warrant. However, the Court finds that in performing its function, the Court must consider each warrant separately and, therefore, it will consider the parties arguments as to each category as it relates to a specific warrant obtained by the police.

B. Standing/Probable Cause

As articulated in *Hanna v. State*,[5] this Court must engage in a "two-prong inquiry" when facing a motion to suppress evidence.[6] First, this Court must determine if the movant has a right to contest the search or seizure: does he have standing.[7] Second, "[o]nly when the movant has standing must the court assess the validity of the police conduct."[8]

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[5] 591 A.2d 158, 162 (Del. 1991).
[6] *Id.*
[7] *Id.*
[8] *Id.*

1. *Standing*

The United States Supreme Court in *Rakas v. Illinois*[9] stated that:

> Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections.[10]

Finding guidance in *Rakas*, the Delaware Supreme Court stated in *Thomas v. State:*[11]

> a proponent of a motion to suppress has standing to contest the legality of a search and seizure only if he can assert either a property or a possessory interest in the areas searched on the property seized and if he can show a legitimate expectation of privacy in the areas searched.[12]

Therefore, the threshold inquiry to Salasky's Motion to Suppress is whether Salasky has standing to contest the searches. The State has brought standing challenges to Search Warrant A, the 1999 Ford Ranger, and Search Warrants D and F, both relating to the residence at 125 Lea Road.

In determining standing, this Court must determine whether the defendant had a reasonable or legitimate expectation of privacy in the places to be

[9] 439 U.S. 128 (1978).
[10] *Id.* at 133-34.
[11] 467 A.2d 954 (Del. 1983).
[12] *Id.* at 958.

searched.[13] In *Smith v. Maryland*,[14] the United States Supreme Court articulated a two-prong test to evaluate whether a defendant enjoys a reasonable expectation of privacy in the area searched. "The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy'…. The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as 'reasonable'"[15] Accordingly, "[w]hen a defendant does not claim a possessory or proprietary interest in either the property searched or seized he is not entitled to challenge a search of the areas in which the property was located."[16]

Using this standard, the Court will review the warrants issued for the 1999 Ford Ranger and the residence at 125 Lea Road.

(a) Ford Ranger

The 1999 Ford Ranger appears to be owned and registered to Salasky's father and Salasky has no ownership interest. Further, Salasky does not have his own keys to the vehicle and there were no keys to the vehicle found on Salasky's person when he was arrested. As Salasky states in this Motion, Salasky only had the ability to access keys to the vehicle when he was at the 125 Lea Road

[13] *State v. Rossitto*, 1988 WL 97863 (Del. Super. Sept. 9, 1988); *Rakas v. Illinois*, 439 U.S. 128 (1978).
[14] 442 U.S. 735 (1979).
[15] *Id.* at 740 (quoting *Katz v. United States*, 389 U.S. 347, 351, 353, 361 (1967)).
[16] *Winward v. State*, 1991 WL 12114, at *3 (Del. Jan. 8, 1991). *See also Thomas v. State*, 467 A.2d 954, 958 (Del. Super. 1983) (quoting *Rakas v. Illinois*, 493 U.S. at 148 (1978)).

residence.[17] Salasky admits that he had no ownership or possessory interest in the vehicle, and states that the vehicle was "merely possibly accessible to him."[18] This case is clearly distinguishable from *State v. Parker*[19] where, although the defendant did not own the searched vehicle, the vehicle was parked on their property, they possessed a key thereto, and they were currently borrowing the vehicle from the owner.[20] Here, the vehicle was only periodically accessible to Salasky, he had no ownership interest in it, and it was simply his father's vehicle that he would borrow on occasion. Therefore, as Salasky has asserted no possessory or proprietary interest in the 1999 Ford Ranger, he cannot challenge the search thereof.

(b) Lea Road

Similarly, Salasky fails to establish standing to contest the search of the residence at 125 Lea Road. The Delaware Supreme Court has made a clear distinction between overnight guests in third party residences and casual or transient visitors at such residences.[21] The former are found to have standing while the latter do not have a reasonable expectation of privacy within the residence.[22]

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[17] Pl. Mot., p. 21.
[18] *Id.*
[19] 1997 WL 716905 (Del. Super. Aug. 22, 1997).
[20] *Id.* at *3.
[21] *Compare Hanna v. State*, 591 A.2d 158 (Del. 1991) (finding the overnight guest had standing) *with Skyers v. State*, 608 A.2d 730 (Del. 1992) (finding a mere casual, transient guest did not have standing).
[22] *See id.*

Overnight guests are deemed to have a reasonable expectation of privacy in the residences they are staying and, thus, are found to have standing to contest the searches thereof. The Delaware Supreme Court in *Hanna v. State*,[23] found that a frequent overnight guest who was arrested outside the residence had standing to contest to the search thereof.[24] Similarly, in *Nave v. State*,[25] the defendant was found to have standing when the defendant had a key to the property and the express permission from the owner to stay overnight whenever they needed.[26]

Conversely, in *Washington v. State*,[27] the Delaware Supreme Court denied a motion to suppress for lack of standing when the defendant did not reside at the property and offered no evidence of being an overnight guest there.[28] Similarly, in *Wilson v. State*,[29] the defendant, although in the home alone with no shoes during the search, was found to be a casual guest and not an overnight guest in the residence.[30] Thus, he did not have standing to contest to the search.[31] Lastly, in *Skyers v. State*,[32] the defendant could not contest to the search of his friend's house

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[23] 591 A.2d 158 (Del. 1991).
[24] *Id.* at 164.
[25] 1993 WL 65099 (Del. Mar. 3, 1993).
[26] *Id.* at *1. *See also State v. Harris*, 642 A.2d 1242, 1245 (Del. Super. 1993) (finding the defendant had standing when he had a specified room within the house with a lock he installed and he stayed in that room once or twice a month for over a year); *State v. Pierce*, 2009 WL 3335328, at *2-*3 (Del. Super. Sept. 25, 2009) (finding the defendant had standing as he was an overnight guest).
[27] 1994 WL 716044 (Del. Dec. 20, 1994).
[28] *Id.* at *2.
[29] 2002 WL 31106354 (Del. Sept. 18, 2002).
[30] *Id.* at *1.
[31] *Id.*
[32] 1992 WL 21140 (Del. Jan. 16, 1992).

where he had gone in the early morning to purchase illegal drugs and had fallen asleep on the couch watching television. The arrival in the early morning hours, coupled with the defendant's own testimony that he was stopping by before going home, categorized Skyers as an business invitee or casual and transient visitor rather than an overnight guest.[33]

The 125 Lea Road property belongs to Salasky's mother and it is where Salasky's two children reside. Salasky does not own or reside at the property and, in fact, has his own apartment that was searched by the police. Although the property is listed as one of Salasky's addresses in DELJIS, the Court can only surmise that this is the address given by Salasky during a previous arrest. However, the listing of an address in a criminal database does not establish an interest in the property or an expectation of privacy at that location. Salasky was a frequent visitor at the Lea Road address simply because his mother and children resided there. There is nothing to suggest he regularly stayed overnight or maintained some reasonable privacy interest anywhere in the home. Salasky, therefore, has not exhibited any subjective expectation of privacy in the residence at 125 Lea Road, let alone one that society would find reasonable.

[33] *Id.* at *3.

Accordingly, the Court finds Salasky lacks standing to challenge the searches of the 1999 Ford Ranger (Search Warrant A) and the 125 Lea Road residence (Search Warrants D, and F). Therefore, the remainder of this analysis relates only to the remaining Search Warrants B, C, E, and G.

2. *Probable Cause*

The United States and Delaware Constitutions protect the right of persons to be secure in their homes against "unreasonable searches and seizures."[34] Searches and seizures are per se unreasonable, in the absence of exigent circumstances, unless authorized by a warrant supported by probable cause.[35] The Delaware probable cause requirement has been codified in Title 11, Sections 2306 and 2307 of the Delaware Code, which set forth the requirements for the contents of an affidavit in support of a search warrant and the substantive and procedural requirements for a magistrate's issuance of a search warrant, respectively.[36]

The Delaware Supreme Court has interpreted these two sections, read together, as being a "four-corners test for probable cause."[37] This test requires that "sufficient facts [] appear on the face of the affidavit so that a magistrate's personal knowledge notwithstanding, a reviewing Court can verify the existence

[34] U.S. Const..amend. IV; Del. Const. art. I, § 6.
[35] *State v. Poli*, 390 A.2d 415, 418 (Del. 1978); *Schramm v. State*, 366 A.2d 1185, 1189 (Del. 1976).
[36] 11 *Del. C.* § 2306, 2307.
[37] *Dorsey v. State*, 761 A.2d 807, 811 (Del. 2000) (internal citations and quotation marks omitted).

of probable cause."[38] Further, the affidavit, within the four-corners, must "set forth facts adequate for a judicial officer to form a reasonable belief that an offense has been committed and the property to be seized will be found in a particular place."[39] Therefore, the analysis is two-fold: first, whether there is probable cause to believe a crime has been committed, and second, whether there is probable cause to believe evidence of the crime will be in the place sought to be searched.[40] Each question must be answered by looking at the totality of the circumstances, considering the affidavit as a whole.[41]

Title 11, Section 2305 of the Delaware Code provides that:

> [a] warrant may authorize the search of any person, house, building, conveyance, place or other things for any of the following:
> (1) Papers, articles or things of any kind which were instruments of or were used in a criminal offense, the escape therefrom or the concealment of said offense or offenses;
> (2) Property obtained in the commission of a crime, whether the crime was committed by the owner or occupant of the house, building, place or conveyance to be searched or by another;
> (3) Papers, articles, or things designed to be used for the commission of a crime and not reasonably calculated to be used for any other purpose;
> (4) Papers, articles or things the possession of which is unlawful;
> (5) Papers, articles or things which are of an evidentiary nature pertaining to the commission of a crime or crimes[.][42]

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[38] *Pierson v. State*, 338 A.2d 571, 573 (Del. 1975).
[39] *State v. Sisson*, 903 A.2d 288, 296 (Del. 2006).
[40] *Id.*; *State v. Cannon*, 2007 WL 1849022, at *4 (Del. Super. June 27, 2007).
[41] *Gardener v. State*, 567 A.2d 404, 409 (Del. 1989); *Jensen v.* State, 482 A.2d 105, 111 (Del. 1984).
[42] 11 *Del. C.* § 2305.

As previously mentioned, Salasky has challenged the magistrates probable cause determination as it relates to seven specific items for which the police requested to search: 1) intoxicating substances; 2) weapons; 3) other stolen goods; 4) legal records; 5) electronic data; 6) medication and medical treatment records; and 7) Salasky's writings. These challenges will be addressed as they relate to each specific warrant.

(a) 1604 N. Rodney Street (Search Warrant E)

Search Warrant E authorizes the search of Salasky's residence. The affidavit of Detective Bikara reflects that a DELJIS inquiry lists 1604 N. Rodney Street as the address of Salasky. The address was also confirmed by the Wilmington Police Department based upon a domestic dispute complaint they had responded to the day before the incident with Szczerba.

Salasky contends that the affidavits authorizing the search of this residence failed to establish probable cause as to why seizable property was likely to be found at this residence. Salasky challenges the warrant for 1604 N. Rodney Street insofar as it requested approval to search for:

> . . .any suspected intoxicating substances, including, but not limited to, Xanax, "bath salts," medication, whether or not prescription or otherwise, any an all illegal drugs, and the derivatives of any of the aforementioned intoxicating substances, the collection and processing of any and all small

> white plastic cylindrical container marked with "XTREME" and its contents, any and all medical treatment records, including those related to physical, mental, and/or emotional conditions, any documentation of the guilty plea agreement David Salasky reached with the State of Delaware on July 19, 2011 as well as the documentation of Mr. Salasky's sentence and ramifications of his felony guilty plea, any and all documentation from Probation and Parole regarding Mr. Salasky's conditions of probation including required treatment, curfew, or evaluation required, any and all deadly weapons as defined in 11 Delaware Code 222(5), including firearms, or similar weapon capable of firing a projectile, knives and/or cutting instruments of any sort, blackjacks and/or bludgeons and, metal knuckles, documentation of the possession, purchase, sale, trade, transfer, or storage of any such deadly weapons, items stolen in recent thefts from motor vehicles in the area including, a registration card in the name of a documented victim of a theft from motor vehicle on 08/30/11, Marlboro Light cigarettes, a set of "Blue Point" sockets, a set of "Matco" sockets, a "Matco" race driver set, a set of "Snap-On" sockets, a "Snap-On" cordless impact gun, a "Blue Point" power probe, and a "Blue Point" multi meter and the processing of any items collected for trace evidence documentation related to the planning, method, and/or motive of the crime of Murder 1st 11/636 F/A, used or intended to be used for Murder 1st 11/636 F/A is being concealed on the Person(s), Premise, Facility, or Computer system/Server described in the annexed affidavit and application or complaint.

Salasky's argument will be addressed as it relates to each category Salasky contends is unwarranted: 1) intoxicating substances; 2) weapons; 3) stolen goods; 4) legal records; and 5) medication and medical treatment records.

i. *Intoxicating Substances*

Salasky first asserts that "bath salts" containers marked "XTREME," and Xanax did not constitute seizable contraband because: 1) "bath salts" were not illegal substances at the time the search was effectuated; 2) the containers marked "XTREME" were likely connected to "bath salts" and, for similar reasons, were not illegal substances; 3) there was no reason to believe the Xanax was acquired illegally; and 4) there was no allegation that these intoxicating substances were the items stolen from the burglarized cars. As such, Salasky maintains that because the intoxicating substances are neither contraband nor instrumentalities/fruits of a crime committed, the only other valid reason for the State's interest in seizing them must have been for evidentiary value. However, Salasky notes that the affidavits did not explain how the discovery of these intoxicating substances would have either advanced the investigation or assisted in Salasky's conviction. Instead, Salasky suggests that the true purpose of these search warrants was to assist in Salasky's conviction by establishing a pattern of drug abuse, thereby preempting a possible affirmative defense. Therefore, Salasky contends that the affidavits failed to establish probable cause that the intoxicating substances, regardless of their legality, constituted seizable

property that would be found at the locations to be searched.

Conversely, the State argues that the police were seeking all medications and drugs, regardless of their legality, to which Salasky had access in order to determine the effect, if any, they could have had on his behavior. As such, the State asserts that this constituted a legitimate purpose, which would have assisted in the police investigation into Salasky's state of mind and activity on September 16, 2011.

When taken to the hospital, Salasky admitted to medical personnel that he had taken Xanax and ingested bath salts earlier that evening. Bath salts were also found on Salasky's person when he was arrested, further corroborating his statements. Relatives of Salasky also disclosed to law enforcement that he was being treated and had been prescribed medication for a bipolar condition and stomach pain. That information coupled with Salasky's conduct that evening, which was bizarre and extremely violent, leads to a fair inference that this medication or a combination thereof caused the conduct that led to the killing of Szczerba. Since only a limited amount of bath salts were actually found on Salasky, it is logical and reasonable to also infer that additional drugs or residue/remainder of the drugs taken by Salasky would be at Salasky's residence at 1604 N. Rodney Street. The

facts detailed above were contained in the affidavit and supported the conclusion that intoxicating substances were relevant as they perhaps contributed to the crimes and might be found in his residence.

Salasky's reliance on *State v. Cannon*[43] is misplaced. This Court, in *Cannon*, determined there was an insufficient nexus between the alleged crime and the location to searched when:

> (1) the tips came from unproven citizen informants; (2) no one suggested Cannon was using his residence for drug dealing; (3) the police never conducted a controlled buy; (4) 0.1 grams of cocaine [did] not support an allegation that Cannon was selling large amounts of drugs; and (5) the police never observed Cannon leaving or returning to his residence with anything that looked related to drug dealing.[44]

This Court in *State v. Holton*[45] further clarified Cannon's holding as follows:

> Based on the Court's analysis in *Cannon,* there was no probable cause to believe that Cannon was selling large quantities of drugs—a crime that would justify a reasonable belief that an individual is hiding evidence or contraband in his home. To put it another way, the police in *Cannon* had no probable cause to suspect Cannon's involvement in the crime for which he was investigated. Logically, this means the police had no probable cause to search Cannon's home for evidence of that crime.[46]

This same premise is not true here. As ruled by the Supreme Court in *State v. Jones* "although probable cause to arrest does not automatically provide probable

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[43] 2007 WL 1849022 (Del. Super. June 27, 2007).
[44] *State v. Holton*, 2011 WL 4638781, at *4 (Del. Super. Sept. 22, 2011) (describing and clarifying *Cannon*).
[45] *Id.*
[46] *Id.* at *5.

cause to search the arrestee's home, the fact that probable cause to arrest has been established increases the probability that the defendant is storing evidence of that crime in the defendant's residence."[47] The investigation being conducted by the police on the night of this incident clearly supports this conclusion.

The police here had direct knowledge that a crime was committed involving intoxicating substances. Salasky had advised medical personnel that he had ingested bath salts and Xanax prior to the incident and bath salts had been found on Salasky's person. Further, the police had information of Salasky's underlying medical and mental conditions, which were potentially attributable to the alleged crimes, and knew that Salasky, in the past, had taken medication for these conditions. Therefore, because of the nature of the crime and the involvement of intoxicating substances that likely contributed to that crime, there was probable cause to believe that evidence of the crime in the form of intoxicating substances would reasonably be found at Salasky's residence.

Salasky also argues that the police requested the ability to search for intoxicating substances for the improper motive of looking for evidence to rebut a potential mental illness defense. This argument is unfounded as there was overwhelming probable cause to believe that Salasky had committed the crimes

[47] *State v. Jones*, 2000 WL 33114361, at *4.

alleged and the additional evidence being sought by the police was clearly relevant in an attempt to explain the unusual conduct of Salasky that evening. The fact that the evidence may have some relationship to a potential defense to be asserted by Salasky does not prohibit its seizure. As Salasky argued "probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction"[48] and here the sought-after evidence does just that.

Therefore, the substances that were the subject of the warrant clearly have an evidentiary value pertaining to the commission of the underlying crimes and, as such, were the proper subject of a search warrant of Salasky's residence.[49] Accordingly, the Motion to Suppress Searches as it relates to the search for intoxicating substances is denied.

ii. *Weapons*

Salasky next contends that the affidavit which authorized the search of Salasky's residence for deadly weapons and/or documentation of their possession, purchase, sale, trade, transfer, or storage, failed to establish probable cause that the items constituted seizable property likely to be found at the locations to be searched. Although Salasky was precluded from possessing a deadly weapon due

[48] *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967).
[49] *See State v. Turner*, 826 A.2d 289, 291 (Del. 2003) (stating that "a warrant may issue for anything of an evidentiary nature pertaining to the commission of a crime or crimes").

to his conviction and probation status, he notes that the supporting affidavits made no attempt to draw a connection between the search for deadly weapons and the homicide, attempted robbery, or car burglaries. Further, Salasky argues that there is no factual basis for seeking a deadly weapon in connection with the murder charge because the knife believed to have caused Szczerba's injuries was found at the scene and there were no facts to suggest Salasky possessed any other weapons at his residence. As such, Salasky suggests that the affidavits sought blanket authority to search for anything that could constitute a potential violation of probation or new charge, which was not only suggestive of a fishing expedition but also insufficient to authorize the search warrants.

The Court agrees that it appears that the only asserted nexus between Salasky's apartment and other weapons is the fact that Salasky used a knife in his confrontation with Szczerba. This inference is not sufficient to support the search for other weapons. However, the Court notes that no other weapons were found at his residence. Therefore, regardless of whether there was sufficient nexus between Salasky's residence and potential weapons, Salasky's argument in relation to a search warrant for weapons is simply moot as no weapons or evidence of those records were uncovered in the search. There is, therefore, nothing to suppress. As such, the Motion to Suppress the search as it relates to the search for weapons at Salasky's apartment is denied.

iii. *Other Stolen Property*

Salasky next claims that the affidavit authorizing the search of his residence for the items reported stolen from vehicles on Finney Road, failed to establish a nexus between the items sought and the location to be searched. Although Salasky concedes that the supporting affidavits provided a sufficient factual basis to conclude that the items sought were seizable as fruits of a crime, he argues that since he was arrested in the neighborhood where the crimes occurred it was unlikely he secreted the stolen items in his residence that was miles away. As such, Salasky concludes that the police did not narrowly tailor their search and, therefore, a magistrate should not have authorized the search warrant.

In response, the State contends that it was reasonable to infer that a person apprehended in the Penn Acres community for committing vehicular burglaries could have been involved in other, recent car burglaries that had been committed in the same area and reported to the police. As such, the search warrants sought to seize items stolen from other vehicles within the past thirty (30) days.

The Court agrees that the warrant was sufficient to allow for the search of other property stolen from similar thefts in the same neighborhood. However, the State again notes that no other stolen items were found at Salasky's residence and,

therefore, no evidence of this nature will be introduced at trial. Therefore, the Motion to Suppress the search as it relates to other stolen property is also moot and is denied.

iv. *Legal Records*

Salasky next challenges the warrant insofar as it authorized the search of his residence for legal documents pertaining to his July 19, 2011 felony plea agreement and conditions of probation. Salasky contends the affidavit failed to establish that these legal documents were seizable property likely to be found at his residence. Salasky notes that the legal documents were neither contraband nor instrumentalities/fruits of a crime nor did the affidavits present any facts suggesting that the legal documents had evidentiary value regarding the crimes for which Salasky was charged. Salasky maintains that the affidavits confirmed what was already known about the details of Salasky's prior plea, sentence, and probation. Moreover, Salasky argues that even if these details were unknown, there was no articulated justification for seizing the legal documents. As such, Salasky concludes that although such legal documents would reasonably be kept at his residence, the affidavits failed to establish why they would be seizable.

Conversely, the State asserts that searching for documentation regarding Salasky's prior plea, sentence, and probation would have been relevant to show Salasky's knowledge that he was prohibited from possessing deadly weapons. As such, the State contends that the documents were of an evidentiary nature and would have assisted the police investigation.

The information requested in the search warrant falls within Title 11, Section 2305(5) of the Delaware Code which allows for warrants to authorize searches for "[p]apers, articles or things which are of an evidentiary nature pertaining to the commission of a crime or crimes."[50] Since one of the crimes charged is Possession of a Deadly Weapon by a Person Prohibited, the records of Salasky's prior felony conviction have evidentiary value. Salasky argues that because such documents are obtainable through other avenues, they are not seizable through a warrant. While perhaps attainable elsewhere, this does not preclude the police from obtaining a warrant for such documents. The Court agrees that Salasky's prior plea, sentence, and probation documentation would have been relevant to Salasky's knowledge that he was prohibited from possessing deadly

[50] 11 *Del. C.* § 2305.

weapons and while they have minimum evidentiary value they would have assisted the police in their investigation. As such, the Court finds the warrants for the search for legal documents was warranted and the Motion as it relates to legal records is denied.

v. *Medications and Medical Treatment Records*

Finally, Salasky claims that the affidavit in support of the search of his residence for medication and medical treatment records failed to demonstrate how the medication and treatment records could likely be discovered at his residence. Specifically, Salasky asserts that there was no suggestion that either the medications or the records constituted contraband or instrumentalities/fruits of a crime. As such, Salasky argues the State's interest in seizing Salasky's medical information could have only been for evidentiary purposes. Although the affidavit indicated that Salasky suffered from bipolar disorder, had been noncompliant with his medical treatment, and was recently treated and prescribed medication for stomach pain, Salasky contends that these limited allegations are insufficient to constitute evidentiary purposes for which his medical information could be seized. Moreover, Salasky argues that the State should not have been privy to Salasky's medical information, especially any information pertaining to his

mental health status, until mental health defenses are raised. Therefore, Salasky concludes that there was no substantial basis upon which to find his medications and medical records were seizable.

The State contends that it would have been important to determine whether Salasky had been prescribed Xanax and what effects the medication could have potentially had on him. Additionally, the State notes that the police were on notice that Salasky's mental condition would likely be relevant to the crime committed and, therefore, medical records regarding any physical or mental illness would have had evidentiary value to the police investigation.

Through the search warrant, the officers were looking for "medication, whether or not prescription or otherwise" and "any and all medical treatment records, including those related to physical, mental, and/or emotional conditions." This request falls within Subsection 1 and/or 5 of Title 11, Section 2305 of the Delaware Code which allow for warrants to authorize searches for "[p]apers, articles or things of any kind which were instruments of or were used in a criminal offense, the escape therefrom or the concealment of said offense or offenses" and "[p]apers, articles or things

which are of an evidentiary nature pertaining to the commission of a crime or crimes," respectively.[51]

Salasky relies on *In re Search Warrant (Sealed)*[52] for the proposition that "[t]he individual privacy interest in the patients' medical records must be balanced against the legitimate interests of the state in securing the information contained therein."[53] However, *In re Search Warrant (Sealed)* involved the compulsion of patient medical records from the physician's files.[54] There is a clear difference between the privacy interests in medical documents on file in a physician's office and those that might be found in an individual's home. By searching for medical records in the custody of the individual patient, the officers would not be recovering privileged communications made by any physicians regarding medical treatment nor would they be recovering the physicians records as to that treatment. Instead, the warrant simply allowed them to recover documents that would provide information as to what treatments were being provided to Salasky that may assist in explaining his unusual behavior that evening. The information gained by the police of Salasky's past medical history from his

[51] *Id.*
[52] 810 F.2d 67 (3d Cir. 1987).
[53] *Id.* at 71-72.
[54] *Id.*

family members coupled with the circumstances of the crimes led to a reasonable inference that medication or medical prescriptions may have contributed to the alleged crimes. Further, it is a reasonable inference that medical documentation would be kept at Salasky's home address. Accordingly, the Motion to Suppress Searches as it relates to medical records is denied.

The Court also notes that in the returns filed with the Motions to Suppress regarding this warrant, there does not appear to be any medication or medical records seized. However, since the State, in its response, did not indicate that there was no evidence of these records being seized, the Court in an abundance of caution, has addressed the issue, giving note that it believes there is no evidence to suppress.

(b) 1604 N. Rodney Street (Search Warrant G)

A second warrant was issued for Salasky's residence at 1604 N. Rodney Street identified herein as Search Warrant G. During the initial search of Salasky's residence on September 16, 2011, the police noted the presence of a desktop computer and another cell phone. This led the investigators to request a second warrant for Salasky's residence. Some of the items listed in this warrant are simply a duplicate of the material

requested to be searched in Search Warrants B and E. As such, the Court's decision regarding those items also applies here. However, what distinguishes this warrant is the request to search for computer and other electronic/digital contents, and any documentation about the planning, method, or motive for committing the murder.

As the Court has previously noted, Szczerba was called to this neighborhood and subsequently stabbed due to a 911 call from a victim of a vehicular burglary and assault. Further investigation led to the discovery that additional vehicles had been broken into in the same vicinity. The request to search the information contained on the computers and the newly discovered cell phone was to determine whether there was evidence to link Salasky to those prior events. The police had received reliable information that Salasky had a facebook account and the affidavit supports the conclusion that it is common with individuals involved in such criminal activity to post photos or comments to document their illegal activity or to even communicate the availability of merchandise that has been stolen. The same type of documentation can occur through text messaging on a cell phone or by e-mail. As such, the Court finds this to be an appropriate investigative activity of the police and there is at least probable cause to

suspect that evidence as to the prior burglaries would be stored on these items. Therefore, the warrant was justified and supported by probable cause.

While there is a justifiable link to the electronic information requested, the same cannot be said for "documentation related to the planning, method and/or motive" for the killing of Szczerba. While the warrant notes the investigation had revealed that Salasky frequently wrote in books and papers, its conclusion that they "may demonstrate a state of mind or contribute to motive for the case of murder" is simply conjecture unsupported by any evidentiary basis. There is nothing to suggest that this killing was planned or that it was anything other than Salasky's reaction to his contact with the police while under the influence of an intoxicating substance. The Court is unable to determine from the return documents or briefing whether any such evidence was collected or discovered by the police. However, while it suspects that there was none, if some was recovered, that evidence may not be admitted into the State's case in chief. This ruling, however, does not foreclose its use at other junctions in the trial, if the State can support its admission on other grounds.

(c) Samsung Flip Phone (Search Warrant B)

Salasky next challenges the search of a cell phone he left behind during his confrontation with Mr. Byrd.[55] He argues that the affidavit in support of the warrant did not explain how the data retrieved from the cellular phone had evidentiary value in the investigation. Specifically, Salasky notes that the phone was taken from him immediately after the car burglaries and before he interacted with Szczerba. As such, Salasky maintains it is unreasonable to infer the evidence of those crimes would be on the phone. Further, Salasky asserts that the warrant's reference to recent thefts in the neighborhood, which cited the possibility the thief may have used a cell phone to communicate about the fruits of those crimes, is attenuated and unsupported by the evidence indicating Salasky's involvement. Therefore, Salasky concludes that the search warrant for electronic data and the search of this cellular phone should not have been issued.

The confrontation that eventually led to the stabbing of Szczerba was in response to Salasky's attempt, earlier that evening, to break into a car in the Penn Acres neighborhood. A subsequent inquiry determined that there

[55] This was the phone of Salasky's girlfriend but the parties have not asserted a standing or abandonment issue regarding the phone. As such, the Court has chosen to address the merit of the motion as presented.

had been a series of motor vehicle break-ins in the area, and the Court finds it would be a reasonable investigative inquiry to inquire into the contents of Salasky's phone to determine whether Salasky had documented the previous thefts, had contacted others soon after those thefts, or had voicemails regarding the disposition of such property. While Salasky is correct that it is unlikely that the phone would have contained information relative to the stabbing, it clearly had evidentiary value to establish why he was in the area and ran from the police. The Court finds this to be an appropriate search, and the affidavit in support thereof is sufficient. As such, the search of Salasky's phone will not be suppressed and the Motion is denied.

Conclusion

Salasky lacks standing to contest to the searches conducted on the 1999 Ford Ranger (Search Warrant A) and the residence at 125 Lea Road (Search Warrants D and F). Further, the Court finds, subject to the limitations set forth in this opinion, that the affidavits sufficiently support the issuance of the warrants for Salasky's residence and the cell phone (Search Warrants B, E, and G).[56]

[56] The defense has made no specific arguments challenging the legality of Search Warrant C. However, the Court finds there is no good faith basis to object to the search, and to the extent there is a general objection, it would have been denied by the Court.

II. MOTION TO SUPPRESS AND OTHER REMEDIES-SUBPOENAED MATERIAL

Salasky next moves to Suppress Subpoenaed Material regarding medical and mental health records collected by the State. Prior to Salasky's indictment, the Attorney General's office issued several subpoenas for his various medical and mental health records.[57] Specifically, the following subpoenas are at issue here:

a. Dated September 20, 2011, for all records concerning Salasky in the custody of Delaware Department of Services for Children, Youth and Their Families ("DYRS").

b. Dated September 16, 2011, for all records of probation concerning Salasky in the custody of the Delaware Department of Correction ("DOC").

c. Dated October 3, 2011, for medical records concerning Salasky from January 1, 2000 to September 20, 2011 in the custody of Christiana Care Health Services.

d. Dated October 3, 2011, for "all treatment records, and/or services rendered to" Salasky "for both physical and mental health purposes, including, but not limited to any all testing, results, and diagnoses from his initial date of incarceration to the present" in the custody of DOC.

e. Dated October 5, 2011, for "any medical or mental health treatment or counseling services provided to" Salasky in the custody of Brandywine Counseling, Inc.

[57] These records were provided to Salasky as they were received by the State, which occurred from September 2011 to November 2011.

("BCI"), with an Ex Parte Order compelling such production issued by the Honorable Calvin L. Scott.

f. Dated October 6, 2011, for medical and mental health treatment records concerning Salasky in the custody of TASC/Community Mental Health.

_____Salasky argues that the State, in securing these subpoenas and the confidential information contained therein, failed to notify him or provide him an opportunity to object to the information's disclosure. As such, Salasky argues the subpoenaed material should be suppressed for the following reasons: 1) the Attorney General exceeded the scope of his authority under 29 *Del. C.* Sections 2504(4) and 2508(a); 2) the subpoenas were unreasonable and, therefore, violated Salasky's Fourth Amendment rights; 3) the subpoenas violated Salasky's health care privileges under D.R.E. 503; and 4) the subpoenas violated Salasky's due process and privacy rights.

Conversely, the State argues that the requested, subpoenaed records were relevant and material to the criminal investigation and prosecution of Salasky. The State contends that because the evidence implicating Salasky as the sole individual responsible for the death of Szczerba was overwhelming and Salasky had a history of mental illness and self-reported

delusions, it was likely that Salasky's defense would be based upon his mental health status. As such, the State maintains that the records were subpoenaed in accordance with a systematic inquiry to fully investigate Salasky's actus reus and mens rea.

1. Scope of Attorney General's Authority

First, Salasky argues that the Attorney General exceeded the scope of his authority in issuing the subpoenas here because they were improperly used as a discovery tool, which enabled the State to prematurely preview Salasky's anticipated defense and preempt the appropriate discovery process between the parties. Specifically, Salasky contends that this provided the State with an unfair advantage and that the State should have, instead, received the information contained in the subpoenaed material only after Salasky's mental health defense was asserted. As such, Salasky claims that, in subpoenaing the requested material, the State was essentially fishing for character evidence for the penalty phase of trial.

The Attorney General's "right to seize evidence pursuant to a subpoena is statutory, arising under two provisions of the Delaware Code."[58] "First, under Title 29, section 2504(4) of the Delaware Code, the Attorney

[58] *Johnson v. State*, 983 A.2d 904, 919 (Del. 2009) (citing *In re McGowen*, 303 A.2d 645, 647 (Del. 1973)).

General has the power, duty and authority '[t]o investigate matters involving the public peace, safety and justice and subpoena witnesses and evidence in connection therewith . . . .'"[59] "Second, under Title 29, section 2508(a), '[t]he Attorney General or any assistant may . . . issue process to compel the attendance of persons, witnesses and evidence at the office of the Attorney General or at such other place as designated.'"[60] As this Court previously noted, "[i]n defining the scope of the subpoena power granted to the Attorney General, Delaware case law seems to interpret these statutes as interchangeable."[61] Further, the Court echoes the sentiments of the Delaware Supreme Court, which interpreted "[t]he purpose of this statutory grant of power [as] . . . 'confer[ring] upon the Attorney General, in the investigation of crime and other matters of public concern, powers similar to those inherent in grand juries', including the grand jury's power to 'compel the appearance of witnesses and the production of documents.'"[62] However, the Court recognizes that "although this subpoena power is similar to that of a grand jury, the Attorney General's power to investigate is not terminated by

[59] *Id.* at 919 (citing 29 *Del. C.* § 2504(4)).
[60] *Id.*, at 919-20 (citing 29 *Del. C.* § 2508(a)).
[61] *Id.* at 920 (citing *In re Pennell*, 583 A.2d 971, 972 (Del. Super. 1989)).
[62] *In re McGowen*, 303 A.2d at 647.

arrest or indictment, and continues throughout the prosecution of an alleged crime."[63]

The Court finds the arguments advanced by the defense, that these are the type of documents that should only be available to the State as part of the discovery exchange, mischaracterizes the purpose of the subpoena power conferred upon the Attorney General and the criminal procedure and evidentiary rules of this Court. The rules of this Court are intended to create a litigation balance to ensure the fundamental fairness of the trial. As such, the procedural rules mandate the exchange of records of experts and the documents they rely upon so that the other party may fairly respond to those opinions during the trial. The rules, however, do not address how the records are obtained. Rather they simply require disclosure if such documents are intended to be utilized at trial. The subpoena power conferred upon the Attorney General provides that office with nearly unfettered discretion to gather records, documents, and testimony as long as it can be established they are investigating "matters involving the public peace, safety and justice."[64] While the statute is written in an archaic manner, the Court believes a fair interpretation of the statute is that as long

[63] *Johnson*, 983 A.2d at 920 (citing *In re Pennell*, 583 A.2d at 973).
[64] 29 *Del. C.* § 2504(d).

as the Attorney General is conducting an investigation of alleged criminal activity, they are acting within the statutory authority provided to them by the General Assembly. The statute has never been interpreted to limit the investigative power of the Attorney General to documents unavailable in the normal litigation process and this Court refuses to do so now.

The Court also refuses to limit the authority of the State to only subpoena documents or testimony that have an inculpatory evidentiary value. As argued by the State, there is very little dispute in this matter that Salasky stabbed Szczerba and those injuries eventually led to his death. It is, therefore, not unreasonable or surprising that the State in investigating this crime would also seek information regarding the mental state of Salasky. The State is required to establish that Salasky intentionally, recklessly, or with criminal negligence committed the homicide. Information that may be relevant regarding Salasky's mental state prior to the homicide being committed is an appropriate investigative matter allowed under their subpoena power. All the documents requested by the subpoenas issued in this case were relevant to a criminal investigation being conducted before Salasky was indicted and were appropriately seeking

information that was critical to the State's evidentiary burden once the indictment had been returned.

Finally, having found the documents subpoenaed had relevance to the investigation of the criminal matter, the fact that such evidence may also be relevant to the potential penalty phase of this case does not render the use of such subpoenas inappropriate.[65] As such, the Court concludes that it was within the scope of the Attorney General's power to subpoena the records that are at issue here.

2. Salasky's Fourth Amendment Rights

Salasky next argues that the subpoenaed records were unreasonable and violated Salasky's Fourth Amendment rights. Although Salasky concedes that a subpoena does not require probable cause, Salasky asserts that it must, nevertheless, still be reasonable. Salasky, therefore, claims that the subpoenas at issue were attenuated and requests records extending over the course of Salasky's life which are not necessarily correlative to proof of a murder charge.

This Court notes that "[t]he Fourth Amendment and Article I, § 6 of the Delaware Constitution protect individuals from 'unreasonable searches

[65] The question of the use of subpoena power solely to gather relevant penalty phase evidence is not at issue here, and this remains a question for another case where the facts support that the only purpose of the subpoena was to gather penalty phase evidence.

and seizures.'"[66] When evaluating a claim of this nature, the Court must determine "whether a person's constitutionally protected reasonably expectation of privacy has been violated."[67] "The Fourth Amendment of the United States Constitution requires that a subpoena for the seizure of documents to be 'reasonable.'"[68] This Court in *In re Blue Hen Network*[69] adopted a three-part test to determine a subpoena's reasonableness. It requires a subpoena to: 1) be reasonably specific; 2) cover a reasonable period of time; and 3) request only relevant materials be produced.[70] The Court finds that these three (3) requirements are fulfilled here.

First, the Court is satisfied that the subpoenas specified the records sought with reasonable particularity. The subpoena clearly sets forth the documents being requested with such specificity that there would not be any confusion over the documents requested. With respect to the reasonableness of the time span covered by the records, the Court finds that, contrary to Salasky's suggestion, the subpoenaed records did not cover the entirety of Salasky's life. Instead, the subpoenas either listed a specific time

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[66] *State v. Johnson*, 2011 WL 4908637, at *3 (Del. Super. Oct. 5, 2011) (citing U.S. Const. amend. IV and Del. Const. art. 1, § 6).
[67] *Id.* (citations omitted).
[68] *Id.* (citations omitted).
[69] 314 A.2d 197, 201 (Del. Super. 1973)
[70] *See id.*

frame or the limitation was established by the type of records requested. As an example, while the subpoena requesting records from the probation department did not specify a particular time frame, it would obviously be limited to only those times Salasky was on probation. This is also true for records while Salasky was in custody of DOC or DYRS or in treatment at Brandywine Counseling or under the supervision of TASC. As such, the subpoenas had appropriate and reasonable time limitations.

Finally, all the records had relevance to Salasky's mental status prior to the homicide and were appropriate information regarding the mental state of Salasky at the time the crime was committed. In determining relevance, this Court is required "to look to the stated purpose of the subject investigation."[71] In doing so, this Court must determine whether the stated purpose of the subpoena was "sufficiently relevant to the subject matter of the subpoena."[72] The Attorney General's stated purpose of the subpoena was to ascertain Salasky's mental state at the time the crime was committed. This purpose is "sufficiently relevant" to the subpoena's request for all records pertaining to Salasky's mental status leading up to the incident.

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[71] *In re Attorney Gen.'s Investigative Demand to Malened*, 493 A.2d 972, 976 (Del. Super. 1985).
[72] *Johnson v. State*, 988 A.2d 904, 921 (Del. 2009).

Having satisfied the requisite criteria, the Court finds that it was reasonable to subpoena the production of any and all records concerning Salasky's medical, mental health, and substance abuse history. As such, the Court concludes that there was no violation of Salasky's Fourth Amendment rights.

3. Salasky's Health Care Privileges

Salasky next argues that the subpoenaed medical, mental health, and substance abuse records were requested without notice to Salasky and without justification for doing so. Accordingly, Salasky asserts that he not only has a privilege to refuse to disclose information and communications with a mental health professional or licensed chemical dependency professional but also that the information and communications are confidential. Although Salasky recognizes that an exception to this privilege occurs when a mental health condition is an element of a patient's defense, he argues the exception is inapplicable here because the State issued the subpoenas before the defense was asserted. Further, Salasky contends that, pursuant to 29 *Del. C.* § 2504(4) and 2508 (a), the Attorney General' subpoena power does not allow them to lawfully obtain one's privileged health care information.

In general, protected health information cannot be publicly disclosed without the informed consent of the individual.[73] However, this protection is not absolute and an individual's protected health information can be disclosed without the individual's informed consent "for law-enforcement purposes in accordance with 16 *Del. C.* § 1232(d)(2) and 45 C.F.R. Parts 160, 162, and 164 . . . ."[74] Further, pursuant to 45 C.F.R. § 164.512(f), "[a] covered entity may disclose protected health information for a law enforcement purpose to a law enforcement official if" it constitutes a "permitted disclosure," which includes a court order, court-ordered warrant, subpoena or summons by a judicial officer, grand jury subpoena, administrative subpoena or summons, civil or authorized investigative demand, or similar process authorized under the law.[75] The subpoenas issued here were within the realm of "permitted disclosure."

Pursuant to 29 *Del. C.* § 2504(d) the Attorney General "in the investigation of crime and other matters of public concern, [has been conferred] powers similar to those inherent in grand juries." [76] The Delaware Supreme Court stated "it is clear that the general investigative

[73] *See* 16 *Del. C.* § 1212.
[74] *Id.* at § 1212(d)(2).
[75] 45 C.F.R. § 164.512(f)(1)(ii).
[76] *In re Hawkins*, 123 A.2d 113, 115 (Del. 1956).

powers of the grand jury are now shared, at least to a substantial extent, by the Attorney General."[77] Accordingly, the Delaware Supreme Court has applied the standards and guidelines for grand jury subpoenas to Attorney General subpoenas "in view of the historic equality of [the Attorney General's] subpoena power with that of a grand jury."[78] Therefore, in view of their historic equality with grand jury subpoenas, Attorney General subpoenas are included within "permitted disclosure."

Salasky attempts to correlate the subpoenaing of records to the privilege that is attached to D.R.E. 503. However, the rules of evidence are designed to govern the admissibility of evidence in court proceedings and are not intended to govern the production of those documents outside of a court matter. Evidentiary rules may still be applicable if and when the State attempts to introduce the records at trial but have no application during the investigative phase of the case.

However, even Salasky acknowledges the privilege under D.R.E. 503 is waived when the defendant's physical, mental, or emotional condition is relied upon as an element of the defense. Thus, under the facts of this case, even during its investigation, Salasky's mental status at the time of the

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[77] *Id.*

[78] *In re McGowen*, 303 A.2d 645, 648 (Del. 1973).

crime would be a critical issue. From the Court's view, Salasky's argument is more procedural and technical than it is substantive or meritorious. In this case, the State has agreed not to present evidence to rebut a defense based upon mental illness in its case in chief and, therefore, this issue would not even materialize until Salasky has created it. As such, whatever protection Salasky believes is mandated will still be available and within his control at trial.

The Court, however, wants to be clear. It finds there is no requirement for the State to seek pre-approval of its subpoenas even when the possibility exists that the records provided in response to those subpoenas will be inadmissible in the subsequent application of evidentiary rules.

4. Salasky's Due Process and Privacy Rights

Finally, Salasky argues that the subpoenas were effectuated in a manner that did not provide Salasky either notice or an opportunity to be heard, violating his due process and privacy rights. Specifically, Salasky argues that since there is a reasonable expectation of privacy in a patient's medical records, the failure to obtain prior judicial review of a subpoena thereof constitutes a constitutional violation similar to a warrantless search.

Essentially, Salasky maintains that the State should have identified specific records, provided a compelling basis for their disclosure, and proceeded according to either standard discovery procedures or to obtain a search warrant in order to comport with Salasky's due process and privacy rights.

In spite of Salasky's winding constitutional review of the constitutions of Delaware, Pennsylvania, and Connecticut, the Court can find no constitutional right to prior notice of the investigative actions of the State even when they relate to medical records. There is no question that the confidential relationship between patients and their medical providers is one that should be carefully guarded, as the unreasonable breach of that confidence would undermine the importance of frank and candid disclosure of medical information by the patient to the physician. However, despite the importance of this principal, when there is relevant information that may assist law enforcement in a criminal investigation, that principal will not create an absolute bar to the information's production. The Court can find no constitutional or legislative enactment that reflects an intent to deprive law enforcement of relevant information simply because it is in the form of medical records. The justification used to support the subpoena can be subsequently challenged in court, for example if the State had no good faith

basis to believe relevant and material evidence would be contained within the records subpoenaed. However, the Court here does not have before it an unbridled abuse of the subpoena power by the State, as even Salasky would be hard pressed to argue that the items subpoenaed would be irrelevant based upon his bizarre behavior on the evening of the homicide.

Here, again, the Court believes this argument, in spite of Salasky's attempt to cloak it in a robe of constitutional importance, is an argument of form over substance. Clearly, the State would be entitled to the records that were subpoenaed once Salasky asserted his mental health defense. Therefore, even if the production was constitutionally prohibited before this defense was asserted, which the Court does not find, whatever harm may have arisen has been waived and the argument has become moot.

Here, the Attorney General subpoenaed Salasky's medical, mental health, and substance abuse records for law enforcement purposes related to the investigation and there was clearly a good faith basis to do so. Therefore, the State was not required to notify Salasky that his protected health information had been requested. Further, the Court notes that it would likely hinder the investigation if law enforcement were required to put an individual on notice of the records they were subpoenaing in a

criminal investigation. The time to make these challenges is when those records are attempted to be utilized against Salasky in a criminal proceeding. Therefore, the Court finds that neither Salasky's due process nor privacy rights were violated.

Conclusion

Salasky contends that subpoenas issued by the State have demonstrated a pattern of overreaching and, as a result, asks the Court to impose a number of conditions limiting their admissibility. However, based upon the reasoning above, the Court will not impose any of the limitations requested. The Court finds that it was not unreasonable for the State to ascertain information relevant to Salasky's mental and physical health which could possibly explain his conduct. Further, the Court recognizes that the subpoenaed records would be relevant to both the investigation and the prosecution, particularly where the death penalty is sought and a mental health defense is expected. As such, the Court concludes that the subpoenas were appropriate and within the authority given to the Attorney General and Salasky's Motion to Suppress and Other Remedies-Subpoenaed Materials is hereby denied.

III. MOTION FOR ATTORNEY-CONDUCTED *VOIR DIRE*

Next is Salasky's Motion for Attorney-Conducted *Voir Dire*, specifically requesting the right to have counsel participate in the *voir dire* process by submitting a "special questionnaire" to potential jurors and orally questioning jurors who are not excused for cause. Specifically, Salasky argues that: 1) Delaware Superior Court Criminal Rule 24(a) permits attorneys to submit questions for potential jurors to the Court and/or participate directly in examining prospective jurors; 2) precluding counsel from reasonably participating in the *voir dire* process would amount to an abuse of discretion and reversible error; 3) jurors are more likely to be forthcoming when answering questions from attorneys; and 4) attorneys have a better grasp of facts of the case and, therefore, are more likely to ascertain juror bias.

Specifically, Salasky requests the following *voir dire* process:

a. Use of a "specialized questionnaire" addressing issues specific to this case developed after counsel for both parties confer on its form and content, (matters upon which the parties cannot agree will be resolved by this Court);

b. Distribution of the completed questionnaires to "the parties in sufficient time before the start of *voir dire* to enable the parties to adequately review them before the start of that examination;"

c. This Court will then "engage in general questioning of the jury," including the questioning mandated by 11 *Del. C.* § 3301;

d. Counsel for both parties will then be "provided an opportunity to question [for no longer than an agreed upon reasonable length of time] jurors who have not been excused for cause";

e. The parties will then exercise their peremptory challenges.[79]

Salasky asserts that this process is reasonable and will provide: 1) an opportunity for counsel to more effectively ascertain juror bias; and 2) enable this Court to maintain better control over the process.

As the Delaware Supreme Court explained in *Ortiz v. State,*[80] "[t]he purpose of *voir dire* is to ensure the selection of qualified jurors, who have no bias or prejudice that would prevent them from returning an impartial verdict based on the law and the evidence that is properly admitted during trial."[81]

> In order to identify unqualified jurors, the "[*v*]*oir dire* must be probing enough to reveal jurors' prejudices so the trial judge can ascertain whether a prospective juror would be impartial and for all counsel to evaluate each prospective juror for the purpose of making either a challenge for cause or exercising a peremptory challenge."[82]

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[79] R. at 49; Def. Mot., p. 16.
[80] 869 A.2d 285 (Del. 2005).
[81] *Id.* at 291 (citing *Reyes v. State*, 819 A.2d 305, 310 (Del. 2003)).
[82] *Id.* (citing *State v. Miller*, 476 S.E.2d 535, 550 (1996)).

However, because the Unites States Constitution does not prescribe a protocol for conducting *voir dire*, courts have interpreted the extent of *voir dire* examination as within the discretion of the trial judge.[83]

In Delaware, the *voir dire* examination of prospective jurors in a Superior Court criminal prosecution is generally governed by Delaware Superior Court Criminal Rule 24(a).[84] Specifically, "Delaware Superior Court Criminal Rule 24(a) provides that the trial judge shall either conduct or permit examination of jurors that is 'reasonably calculated to ascertain prejudice of a juror."[85] In a capital case, however, the provisions of 11 *Del. C.* § 3301, which relate to "death-qualified" juries under the United States Supreme Court's holding in *Witherspoon v. Illinois,*[86] are also applicable.[87] Additionally, in looking to Delaware case law, "this Court has consistently recognized that the method of conducting the *voir dire* examination of prospective jurors is a matter committed to the trial judge's discretion," which is only restricted by constitutional requirements and "the essential demands of fairness."[88]

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[83] *Id.* (citations omitted).
[84] *See id.* at 292.
[85] *Id.* (citing Super. Ct. Crim. R. 24(a)).
[86] 391 U.S. 510 (1968).
[87] *Ortiz*, 869 A.2d at 292 (citations omitted).
[88] *Id.* (citing *Parson v. State*, 275 A.2d 777, 780 (Del. 1971)).

The Court, for decades, has conducted an extensive *voir dire* process in relation to jury selection in murder cases where the death penalty is being sought. Each prospective juror is individually questioned by the Court, with input, both before and during the process, from counsel. The questioning often takes fifteen to twenty minutes for each juror and the process is extensive and exhaustive. Before a "cause" decision is made, the Court asks counsel if there are additional questions they would like the Court to ask. It is difficult to envision that the process would be improved or would provide additional information if the Court allowed counsel to ask questions directly. Candidly, the request of Salasky goes against a practice that has ensured fair and equitable trials for decades and is simply not required or needed. If anything, the Court finds allowing counsel to directly question jurors would be more intimidating to prospective jurors and would not improve the information available to counsel in making their decisions. Additionally, questions directly asked by counsel may simply be an opportunity for them to "argue the case in advance, . . . indoctrinate the jury[,] or ascertain the advance reactions of [potential jurors] to particular

issues involved in the trial."[89] Therefore, the Court will not change the *voir dire* procedure.

Having decided that counsel may not directly question prospective jurors, the same concerns do not exist as to the use of a questionnaire. Although the purpose of *voir dire* is generally accomplished by using the Superior Court's standard written jury questionnaire, which is supplemented by any additional questions submitted by counsel, the Court recognizes that this case presents an unusual set of facts. Therefore, a questionnaire may be helpful to ensure that the *voir dire* is sufficiently thorough and probing so as to assure the selection of an impartial jury. Accordingly, if the parties submit a questionnaire to the Court it will consider its use in this case. The Court asks that the questionnaire not be duplicative of the questions normally asked by the Court, but rather aimed at addressing the unique issues presented in this case. Once the questionnaire is submitted, the Court will decide whether and to what extent it will be used.

Based on the foregoing reasons, Salasky's Motion for Attorney-Conducted *Voir Dire* is therefore, granted in part and denied in part.

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[89] *Id.* (citing *Jacobs v. State*, 358 A.2d 725, 783 (Del. 1976)).

IV. MOTION FOR RELIEF FROM PREJUDICIAL JOINDER

Salasky next asserts that he will suffer prejudice as a result of the joinder of all his charges and requests the offenses be separated into four parts, as follows: 1) the charges arising from the attempted robbery of Byrd; 2) the charges arising from the car burglaries; 3) the charges arising from the homicide; and 4) the Possession of the Deadly Weapon by a Person Prohibited charges.

The burden is on the Defendant to demonstrate prejudice from a denial of severance.[90] In determining whether Salasky has met his burden, this Court will consider "whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the Court's discretion to sever."[91]

Salasky asserts in his Motion that he will suffer prejudice under three distinct theories. First, he contends that the cumulative evidence presented in support of the multiple charges would overwhelm the jury and result in a conviction on all charges, whereas a jury hearing the separated evidence for each set of charges at separate trials would not do so. Specifically, Salasky contends that since the State's evidence on the homicide charge is

[90] *Bates v. State*, 386 A.2d 1139, 1141 (Del. 1978).
[91] *State v. Howard*, 1996 WL 190045, at *4 (Del. Super. Mar. 12, 1996).

substantial, the jury will infer guilt for the burglary charges even though the evidence on the burglary charges is significantly less convincing. Salasky argues that this would equate to prejudice as it will result in a conviction on the burglary charges that would not occur in a separate trial.

Second, he argues that having all of the charges in one trial will lead the jury to find that Salasky has a general criminal disposition and the jury will subsequently convict him on all charges, regardless of the lack of sufficient evidence linking Salasky to some of the alleged crimes. He states that since his criminal history might be admissible for certain charges, but not others, the disclosure of that information would be highly prejudicial and lead to convictions that would not occur in separate trials. In addition, he contends that the large number of counts and the media publicity of the homicide would hinder a jury's ability to fairly consider the multiple charges individually as they would infer a general criminal disposition to Salasky. Again, Salasky argues that his would result in convictions which would not have occurred in separate proceedings.

Lastly, Salasky asserts that it will be confusing to present separate and conflicting defenses to the multiple charges. Specifically, Salasky plans to present a mental illness defense to the homicide charge and a sufficiency

of the evidence defense to the burglary and assault charges. He argues that forcing him to present both defenses at the same trial will unduly prejudice him. Further, Salasky argues that there are potential Fifth Amendment issues; as he might wish to testify as to one charge without waiving his rights against self-incrimination as to the other charges.

Joinder of two or more offenses is permissible under Superior Court Criminal Rule 8 "if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."[92] Rule 8 promotes judicial economy and efficiency, but recognizes these factors must be balanced with the right of the accused to receive a fair trial.[93] Accordingly, the Court, in its discretion, may sever properly joined offenses and order separate trials on each if the defendant can prove that prejudice has resulted from as otherwise proper joinder.[94]

The Delaware Supreme Court has identified three ways a defendant may suffer prejudice from joinder:

> 1) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; 2) the jury

[92] Super. Ct. Crim. R. 8(a).
[93] *Wiest v. State*, 542 A.2d 1193, 1195 (Del. 1988) (citing *Mayer v. State*, 320 A.2d 713, 717 (Del. Super. 1974).
[94] Super. Ct. Crim. R. 14.

> may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes; and 3) the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges.[95]

Salasky argues in his Motion that he will suffer all three forms of prejudice absent severance of the robbery related charges, the car burglary charges, and the homicide charges.

The first instance of prejudice alleged is that "the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find...."[96] This Court found such prejudice in *State v. McKay*,[97] when a single defendant was charged with thirty-five counts stemming from eight separate incidents which occurred over the course of forty-five days. The Court found that the "sheer mass" of the charges made it extremely unlikely that a jury would be able to resist the cumulative effect of the evidence.[98]

Conversely in *Skinner v. State*,[99] the Delaware Supreme Court upheld this Court's denial of severance of the robberies of two different victims and the attempted robbery and murder of a third victim when all were committed within a

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[95] *Wiest v. State*, 542 A.2d at 1195.
[96] *Id.*
[97] 382 A.2d 260, 261-63 (Del. Super. 1978).
[98] *Id.*
[99] 575 A.2d 1108 (Del. 1990).

span of 10.5 hours.[100] The Court reasoned that the robberies and subsequent murder "involve[d] a similar course of conduct within a relatively brief span of time and were properly joined."[101] The separation of the incidents in time and place and the multiple victims did not require severance.[102]

As with *Skinner*, all of Salasky's charges involve a similar course of conduct and were allegedly committed within a short period of time, occurring in even closer proximity than those in *Skinner*. Further, the amount of charges Salasky is facing is sufficiently smaller than the "sheer mass" in *McKay* and the Court is confident that the jury will be able to delineate and compartmentalize each charge and make an independent finding on each at trial.

Salasky next argues that the second type of prejudice, that "the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes[,]"[103] is also present. However, this Court has found that "the possibility of 'criminal propensity' prejudice would be in no way enlarged by the fact of joinder"[104] when the evidence of the other crimes would be admissible in multiple trials for proper purposes such

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[100] *Id.* at 1118-19.
[101] *Id.* at 1118. *See also Brown v. State*, 310 A.2d 870, 871 (Del. Super. 1973).
[102] *Id.* at 1118-19. *McDonald v.* State, 307 A.2d 796, 798 (Del. Super. 1973).
[103] *Weist*, 542 A.2d at 1195.
[104] *State v. Howard*, 1996 WL 190045 (Del. Super. Mar. 12, 1996).

as to show intent, plan, knowledge, and absence of mistake.[105] Accordingly, in *State v. Price*, where the crimes were found to be "so inextricably intertwined" this Court found they should be tried by one jury.[106] Furthermore, the Delaware Supreme Court has affirmed this Court's denial of severance when the defendant engaged in a "continuous spree of related criminal conduct" that occurred in the course of one evening.[107]

Here, any possibility of criminal propensity prejudice is negated by the reciprocal admissibility of the criminal conduct in separate trials. Here, the burglaries led to the assault that led to the police contact that led to the homicide. Working backwards from the homicide, the police were called to the Penn Acres community as a result of Salasky's confrontation with Byrd. During that confrontation, Byrd was stabbed with the knife that was eventually used to stab Szczerba. That knife was taken in a burglary of a vehicle on E. Van Buren Street. The State also has asserted that a bluetooth device found in the vehicle of Byrd was linked to a vehicle burglary on Tatlow Lane and that a lanyard taken from another vehicle on Tatlow Lane was discovered on the lawn where the

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[105] *State v. Price*, 2009 WL 5852853 (Del Super. Nov. 3, 2009); *State v. Howard*, 1996 WL 190045 (highlighting the "unusual and distinctive facts relating to the manner in which the crimes were committed" as the reason why evidence of each would be admissible in separate trials).
[106] *Id.*
[107] *Downes v. State*, 1996 WL 145836, at *2 (Del. Mar. 13, 1996), *aff'g* 1995 WL 478794 (Del. Super. July 24, 1995).

confrontation with Byrd took place. These events are so intertwined, evidence from each event would be appropriately introduced by the State to support the other charges.

The only burglary that appears to have no direct link is a vehicle burglary on Morrison Road where a latent print on a CD matched that of Salasky. It appears to the Court that this burglary is connected to the other counts of the indictment as being part of a common plan or scheme of Salasky in continuing a series of vehicle burglaries in the Penn Acres community. So while this burglary's link to the homicide is not nearly as well defined, it is reflective of the common criminal activity of Salasky that eventually led to the homicide. The Court finds that the charges are so inextricably intertwined and involve a continuous spree of related criminal conduct over the course of one evening, that joinder would not result in any undue prejudice to Salasky.

The last type of prejudice alleged is that "the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges."[108] Severance is not required in every instance where a defendant will present multiple or inconsistent defenses; it is only granted when the inconsistencies would unduly prejudice the defendant.[109] In *State v. Rivera*,

[108] *Weist*, 542 A.2d at 1195.
[109] *State v. Rivera*, 1995 WL 156059, at *5 (Del. Super. Mar. 3, 1995), *aff'd*, 676 A.2d 906 (Del. 1996).

this Court found that the presentation of two defenses is not inconsistent if "proof of one does not disprove the other."[110] In *Rivera*, this Court found "[i]t [wa]s not inconsistent to assert that a defendant was under extreme emotional distress at the time he allegedly committed a crime, and also assert that he was mentally ill during that same time period."[111]

Conversely in *State v. Flagg*,[112] this Court found that severance was necessary due to the reasonably probability that the defendant would suffer substantial injustice from presenting two separate and distinct defenses. Flagg was charged with numerous sex and weapons offenses against one victim and substantially similar charges against two subsequent victims, which resulted in homicide. The two events occurred on different days in different locations and there was no evidence linking them, other than that they shared the same *modus operandi*. Flagg planned to argue insanity in defense of the charges ending in death, for which there was substantial evidence of his involvement, while fully denying the other set of charges, where the evidence linking him thereto was less persuasive.[113] Due to the unique posture of the case and the lack of an evidentiary

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[110] *Id.*
[111] *Id.*
[112] 739 A.2d 797 (Del. Super. 1999).
[113] *Id.* at 798-800.

interrelationship between the two incidents, the motion for severance was granted.[114]

In this case, Salasky plans to assert mental illness as a defense to the homicide and insufficient evidence on the robbery-related charges. Proof of one of these defenses does not preclude finding the other. It is not inconsistent to assert that Salasky was mentally ill at the time he allegedly committed the homicide and also assert that the charges for the prior events lack sufficient evidence for conviction. This case is unlike *Flagg* in that the multiple charges have substantial overlap in evidence and are so inextricably entwined that they must be addressed together. Further, unlike *Flagg*, Salasky's two defenses relate to different crimes, not involving a seemingly identical *modus operandi*. Therefore, admitting to the homicide and defending on mental health grounds would not equate to an admission of the burglaries and assault, as it would have in *Flagg*.

Finally, Salasky seeks to have the Possession of a Deadly Weapon by a Person Prohibited charges severed, as they would require the admission of Salasky's prior conviction and would taint the jury's consideration of the other charges. This Court has denied similar motions as the Court can use protective measures against the admission of the details of the underlying crimes.[115] The State

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[114] *Id.*

[115] *State v. Murphy*, 2000 WL 303349 (Del. Super. Feb. 18, 2000).

has offered, in their response, to stipulate that there is a qualifying factor making Salasky a prohibited person without introducing any evidence thereof. The State has agreed to also amend the indictment to reflect the stipulation. The Court finds this action would eliminate any prejudice that Salasky might have suffered and, therefore, this count will not be severed. However, the Court would suggest that the parties consider agreeing to sever this count and allow the Court to decide the matter once the trial is concluded. This eliminates any potential improper inference that may be surmised by the jury and simply removes any argument of potential prejudice.

Based on the foregoing reasons, Salasky's Motion for Relief from Prejudicial Joinder is therefore denied.

V. MOTION TO PRECLUDE THE STATE FROM SEEKING THE DEATH PENALTY AGAINST A SEVERELY MENTALLY ILL DEFENDANT

Salasky argues that at the time of the alleged crime, in addition to a significant portion of his life, he has suffered from severe mental illness and, therefore, moves to preclude the State from seeking the death penalty. Specifically, Salasky explains that he has been admitted for inpatient treatment at the Rockford Center on two occasions. During these admissions, Salasky states that he experienced symptoms, including but not limited to: auditory and visual hallucinations;

delusional/illogical thoughts; bizarre behavior; paranoia; decreased sleep/ability to function; and homicidal ideations. Further, Salasky notes that he has been diagnosed with Bipolar Affective Disorder, Mania, and substance abuse, which have been treated with antipsychotics and mood stabilizing medicines. Additionally, Salasky asserts that Dr. Steven Ciric diagnosed him with Schizoaffective Disorder, Bipolar type, after analyzing and reviewing the records here. As such, Salasky claims that federal and state constitutional provisions as well as relevant case law preclude the State from imposing the death penalty against him.

In support of this argument, Salasky contends that people, like him, with chronic psychotic disorders, share key characteristics with cognitively impaired individuals, who the United States Supreme Court has excluded from the death penalty. Salasky explains that the Supreme Court arrived at this determination because a great likelihood existed for a mentally retarded person's impairments to be used as aggravating—rather than mitigating—factors at sentencing. Salasky reasons that, given his history of mental illness, a jury would likely use manifestations of his mental illness against him at trial to the same extent. Thus, Salasky argues he is entitled to the same protections from that prejudicial effect as given to a mentally challenged person. Additionally, Salasky notes that public

opinion not only opposes the death penalty for the mentally ill but also that state, federal, and international law prohibits the execution of mentally ill offenders. Therefore, Salasky claims that the State should be barred from seeking the death penalty against him.

In response, the State argues that Salasky's motion is premature at this state of the proceedings and the Court agrees. Delaware has a "hybrid" system, which bifurcates the guilty and penalty phases of the trial and only uses the jury's punishment determinations as a recommendation. Therefore, a defendant facing trial for a death penalty-eligible offense would not be subject to the death penalty until convicted of the offense and there has been a judicial determination that the death penalty is appropriate. If there is a conviction, there will be sufficient time before sentencing to address these issues raised by Salasky. In addition, the Court will be in a better position after the penalty hearing, if one occurs, to determine the extent of Salasky's mental illness and whether such renders the imposition of the death penalty a constitutional violation. Therefore, at this juncture, the Motion is denied, without prejudice, to be raised again before sentencing if the issue remains ripe for consideration.

VI. MOTION TO SUPPRESS STATEMENTS

Salasky has moved to suppress statements he made in conversations with police on September 16 and 18 of 2011. The State has withdrawn their opposition to the Motion and has agreed not to introduce these statements in their case in chief.

However, should Salasky introduce these statements in his defense, either directly or through expert testimony relying on such, the State is not foreclosed from requesting permission to use them to rebut or impeach such testimony. This Court will rule on such requests if/when it becomes appropriate. With this caveat, the Motion to Suppress is granted in part.

VII. MOTION IN LIMINE TO EXCLUDE EXPERT OPINION TESTIMONY

Salasky next seeks to exclude the testimony of three State expert witnesses: 1) Christopher P. Holstege, M.D.; 2) Stephen Mechanick, M.D.; and 3) Dr. Gregory Saathoff.

The proponent of the expert testimony bears the burden of establishing by a preponderance of the evidence the relevance, reliability, and admissibility of the

expert testimony.[116] However, "[p]roponents do not need to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of the evidence that their opinions are reliable."[117] Further, this Court does not need to choose which scientific theory is stronger; but rather "whether the proponent of the evidence has demonstrated that scientific conclusions have been generated using sound and reliable approaches."[118]

Salasky argues for this Court to exclude expert testimony proffered by three State witnesses for substantially similar reasons. First, Salasky argues that because the literature on bath salt intoxication is so limited, there lacks an adequate foundation for any expert testimony on the toxicology of bath salts. Further, Salasky argues that the literature relied upon is lacking in necessary variables pertinent to this case, such as a user's prior mental illness or simultaneous use of additional drugs. Thus, Salasky argues, the limited literature is neither relevant nor reliable. Salasky argues that this lack of supporting research is too great an "analytical gap" to allow the experts' testimony.

The State counters Salasky's arguments on a number of grounds. First, in regard to Dr. Holstege, the State highlights that Dr. Holstege has provided Salasky

[116] *Minner v. Am. Mortgage & Guar. Co.*, 791 A.2d 826, 843 (Del. Super. 2000).
[117] *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994).
[118] *State v. McMullen*, 900 A.2d 103, 112-19 (Del. Super. 2006).

with over thirty articles on bath salt intoxication. Although the State agrees that the articles do not contain or explain all variables of bath salt intoxication and its reaction in patients with prior mental illnesses, the State argues that such does not preclude Dr. Holstege's expert testimony at trial. Rather, these variables are the proper subject of cross-examination. Lastly, the State counters Salasky's arguments against the testimony of Dr. Mechanick and Dr. Saathoff by highlighting their use of a reliable method of differential diagnosis.

D.R.E. 701 governs the admission of expert testimony, providing that:

> [i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[119]

Since D.R.E. 702 is substantially similar to Federal Rules of Evidence ("F.R.E.") 702,[120] the Delaware Supreme Court followed the United States Supreme Court's interpretation of F.R.E. 702 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[121]

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[119] D.R.E. 702.

[120] *See* Fed. R. Evid. 702, providing:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> **(b)** the testimony is based on sufficient facts or data;
> **(c)** the testimony is the product of reliable principles and methods; and
> **(d)** the expert has reliably applied the principles and methods to the facts of the case.

[121] 509 U.S. 579 (1993). *See M.G. Bancorp. v. LeBeau*, 737 A.2d 513, 521 (Del. Super. 1999).

Thereunder, the trial judge is tasked with determining whether scientific testimony is relevant and reliable, while serving as a "gatekeeper" to the admission of any expert testimony.[122] In making such determination, the trial judge should focus on the "principles and methodology" used to formulate the opinion rather than the resulting conclusions.[123] In *Daubert*, the following factors were identified as valid considerations of a trial judge while acting as a gatekeeper:

> (1) whether a theory or technique has been tested;
> (2) whether it has been subjected to peer review and publication;
> (3) whether a technique had a high known or potential rate of error and whether there are standards controlling its operation; and
> (4) whether the theory or technique enjoys general acceptance within a relevant scientific community.[124]

These factors, however, are not a definitive checklist and their applicability will depend on the particular facts of each case.[125] In addition to the *Daubert* factors, this Court has applied a five-step test to determine the admissibility of expert testimony. This Court looks at whether:

> (1) the witness is qualified as an expert by knowledge, skill experience, training or education;
> (2) the evidence is relevant;
> (3) the expert's opinion is based upon information reasonably relied upon by experts in the particular field;
> (4) the expert testimony will assist the trier of fact to understand the

[122] *M.G. Bancorp.*, 737 A.2d at 523.
[123] *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787, 794 (Del. 2006); *Daubert*, 509 U.S. at 595.
[124] *Daubert*, 509 U.S. at 590-94.
[125] *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (quoting *Daubert*, 509 U.S. at 593).

evidence or to determine a fact in issue; and
(5) the expert testimony will not create unfair prejudice or confuse or mislead the jury.[126]

Under these tests, the trial judge is not required to exclude sufficiently reliable testimony merely because the underlying foundation can be challenged on cross-examination and ultimately determined unpersuasive by the trier of fact.[127] Further, even a seemingly inconsistent diagnosis can surpass a *Daubert* challenge if it is nonetheless based in science and fact, and holds sufficient indicia of reliability.[128]

Further, this Court has highlighted that the differences in hard science and clinical medicine make a rigid application of the *Daubert* factors inappropriate for experts in clinical medicine.[129] Specifically, this Court has stated "the *Daubert* factors, which are hard scientific methods selected from the body of hard scientific knowledge and methodology generally are not appropriate for use in assessing the relevance and reliability of clinical medical testimony."[130] Therefore, in situations where expert testimony is grounded in clinical medicine, this Court has looked at the expert's use of differential diagnosis.[131]

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[126] *Tolson v. State*, 900 A.2d 639, 645 (Del. 2006); *Eskin v. Carden*, 842 A.2d 1222, 1227 (Del. 2004).
[127] *Minner v. Am. Mortgage & Guar. Co.*, 791 A.2d 826, 869 (Del. Super. 2000).
[128] *Id.* at 872.
[129] *State v. McMullen*, 900 A.2d 103, 112-19 (Del. Super. 2006) (highlighting the differences in the goals of clinical medicine, the need to take into account human values, and the patient-driven conditions of a clinical study as reasons to address expert testimony based on clinical medicine differently).
[130] *Id.* at 115 (emphasis in original) (citations omitted).
[131] *Id.* at 116-18.

Although differential diagnosis is deemed reliable within the clinical medicine community, it does not, *ipso facto*, make it reliable under *Daubert*.[132] As such, the Court will look at the method used by the expert in conducting the differential diagnosis to determine whether the conclusion reached is reliable.[133] Generally, a reliable means of conducting differential diagnosis involves "conduct[ing] a physical examination, tak[ing] a medical history, review[ing] clinical tests, including laboratory tests, and exclud[ing] *obvious* (but not all) alternative causes."[134] This Court, however, has held that an expert need not employ all of the referenced techniques and may rely on examinations and tests performed by others in conducting their differential diagnosis.[135] Further, there is no requirement that the expert review or cite to additional research in their proffered report or testimony.[136] Accordingly, this Court has found that "a 'soundly performed' differential diagnosis *alone* satisfies the *Daubert* requirements for reliability in the context of clinical medicine."[137]

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[132] *Id.* at 116-17.
[133] *Id.* at 117-18.
[134] *Id.* at 171 (citing *Bowen v. E.I. DuPont De Nemours and Co., Inc.*, 2005 WL 1952859, at *10 (Del. Super. June 23, 2005), *aff'd*, 906 A.2d 787, 794 (Del. 2006).
[135] *McMullen*, 900 A.2d at 117.
[136] *Id.*
[137] *Id.* at 79.

A. Christopher Holstege, M.D.

Dr. Holstege is a board certified medical toxicologist at the University of Virginia. A medical toxicologist is a physician who has additional training in the field of toxicology and whose expertise is focused on the effects of various toxins and chemicals, both natural and synthetic, on the human body. Dr. Holstege has written case reports, reviewed scholarly articles, and has lectured extensively on MDPV, the active ingredient for the bath salts relevant to this case. The doctor's qualifications are unchallenged by Salasky and the Court agrees he has the training, experience, and expertise necessary to give opinions regarding bath salts and their effect on the human body.

MDPV, methylenedioxypyrovalerone, is a synthetic cathinone that emerged in the United States around the early part of 2010. Depending upon the dosage consumed by the patient, an individual under the influence of MDPV can exhibit extreme anxiety, intense prolonged panic attacks, paranoia, severe agitation, aggressive behavior, super human strength and combativeness, confusion, delirium, hallucinations, psychosis, suicidal ideation, and a sense of over stimulation. Dr. Holstege, as director of the Blue Ridge Poison Center, has assisted in the care of 174 patients who have taken bath salts and has personally managed 19 of these patients at his University of Virginia hospital. The testimony

presented at the *Daubert* hearing clearly established that Dr. Holstege is extremely qualified regarding the effects of bath salts and the appropriate treatment for those patients. The Court has no question that he is qualified to give an opinion that Salasky's physical and behavioral symptoms observed at the time of the offense and when he was treated in the hospital are consistent with bath salts or MDPV intoxication. The doctor has reviewed the medical records of Salasky and has a good faith basis to give the opinions he is rendering.

Recognizing the expertise of Dr. Holstege, Salasky focuses his objection on the basis of the lack of tested research on the effects of MDPV published through articles or case studies. Dr. Holstege, however, explains that, the body of research is growing, and the time frame for such documentation is consistent with the general process of documenting the effects of a new drug in the medical community. He testified that the medical community must first recognize there is an outbreak from a new substance. Information on new outbreaks is usually developed from hospitals, emergency rooms, and the medical community in general when they are treating individuals exhibiting unusual behavior that the physician cannot explain from known medical conditions or illegal substances. This information is gathered by the treating physician or hospital and normally forwarded to poison centers that will partner with other labs to analyze the new

substance and determine the precise nature of the drug. Once the substance is identified, the medical community then needs time to collect clinical data pertaining to the substance and then correlate that information to the signs, symptoms, and adverse laboratory results that have been found in the patient population. This information will then lead to the publication of scholarly articles and studies regarding the drug. Since the outbreak of bath salts in this country is relatively recent, the process of creating research data has lagged behind the emergence of bath salts as a drug of abuse. However, the research data that Salasky claims is now lacking is being developed.

During Dr. Holstege's testimony, he outlined a series of research and case studies on bath salts which have been published in recognized medical journals. A 2012 article published in the *NeuroToxicology Journal* studied the effects of bath salts compared to those found in cocaine and methamphetamine use.[138] The article described the emerging use of bath salts as follows:

> The active components contained in bath salts are synthetic cathinone analogs. Within the first 8 months that bath salts were on the U.S. drug market, there were more than 1400 cases of misuse and abuse reported to U.S. poison control centers in 47 of 50 states. The number of calls to poison control centers in the U.S. regarding bath salts rose from 303 in 2010 to 6072 in 2011. The growing prevalence of

[138] Julie A. Marusich et al., *Effects of Synthetic Cathinones Contained in "Bath Salts" on Motor Behavior and a Functional Observational Battery in Mice*, 33 NeuroToxicology 1305 (2012).

bath salt use makes them a major health concern throughout the U.S. and Europe.

Cathinone is naturally occurring in the leaves of the khat plant (*Catha edulis*), which grows in eastern Africa and southern Arabia where it is used for its amphetamine-like effects. In rats, cathinone produces locomotor increases similar to those produced by amphetamine, and increases extracellular dopamine. The synthetic cathinones that have been found in bath salts include. . . MDPV methylenedioxyphyrovalerone), mephedrone (4-methyl-methcathinone), methedrone (4-methoxymethcathinone), methylone (3,4- methylenedioxymethcathinone), and naphyrone (naphthylpyrovalerone). MDPV, mephedrone, and methylone are the most commonly found active components worldwide, with MDPV being the most commonly found component in the U.S.

.

To the extent that the *in vivo* effects of synthetic cathinones have been examined, they have been found to share pharmacological properties with other abused drugs that increase levels of monoamine neurotransmitters (*e.g.*, stimulants such as cocaine and methamphetamine). For example, a low does of mephedrone (3mg/kg) produced moderate increases in locomotor activity in rats, and higher doses (10 mg/kg and 30 m/kg) produced significant locomotor increases in mice. Acquisition of mephedrone self-administration also has been demonstrated. Anecdotal and case reports of human use of bath salts suggest these substances produce powerful psychological effects, including psychotic behavior, paranoia, delusions, hallucinations, and self-injury. In addition, since 2010, multiple cases of death while under the influence of bath salts in the U.S. have occurred, including some suicides. Based on poison control center reports and case studies in

> the U.S., MDPV in particular tends to produce increased aggression, hallucinations, and paranoia.[139]

Further, *The American Journal of Medicine*, in a 2012 article, described the behavioral and mental status toxicities of bath salts as follows:

> MDPV in high doses reportedly causes a sense of overstimulation, extreme anxiety, intense prolonged panic attacks, paranoia, severe agitation, aggressive behavior, "superhuman" strength and combativeness, confusion, delirium, hallucinations (which can be terrifying), psychosis, and suicidal ideation. Insomnia frequently occurs, and sleep deprivation may contribute to the psychosis. Users also have described anhedonia, depression, and lethargy.[140]

Additionally, a detailed chemical analysis of MDPV was documented in an article published by the American College of Neuropsychopharmacology in 2013.[141] More notably, an article from the University of Virginia, co-authored by Dr. Holstege, provided an outstanding overview of bath salts and its effects on humans, together with clinical management advice for treating patients diagnosed with bath salts intoxication.[142]

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[139] *Id.* at 1305 (internal citations omitted).

[140] Edward A. Ross, et al., *Psychoactive "Bath Salts" Intoxication with Methylenedioxypyrovalerone*, 125 Am. J. Med. 854, 857 (2012).

[141] Michael H. Baumann et al., *Powerful Cocaine-Like Actions of 3, 4-Methylenedioxypyrovalerone (MDPV), a Principal Constituent of Psychoactive 'Bath Salts' Products*, 38 Neuropsychopharmacology 552 (2013).

[142] Heather A. Borek & Christopher P. Holstege, *Hyperthermia and Multiorgan Failure After Abuse of "Bath Salts" Containing 3, 4-Methylenedioxypyrovalerone*, 60 Ann. Emergency Med. 103 (2012).

While the literature on bath salts is not overwhelming, the knowledge base of its pharmaceutical makeup and its effect on individuals is well documented.[143] Therefore, not only is Dr. Holstege's testimony based upon his own practice, it is supported by a sufficient base of research material that is consistent with his opinions.

Based upon the above, the Court finds no basis to exclude Dr. Holstege's testimony, and the Motion *in Limine* as to his testimony is hereby denied.

B. Steven Mechanick, M.D.

Dr. Mechanick is a physician specializing in the practice of psychiatry. He has testified often in this Court and his qualifications in his area of expertise are not questioned by Salasky. Dr. Mechanick was retained by the State to render an opinion as to the defendant's state of mind and criminal responsibility at the time of the offense. His opinion as to the cause of Salasky's psychiatric symptoms at the time of the crime is that they were directly attributable to his voluntary intoxication from bath salts (MDPV) and benzodiazepines (Xanax, Ativan). Dr.

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[143] *See also* Erik W. Gunderson, Matthew G. Kirkpatrick, Laura M. Willing & Christopher P. Holstege, *Substituted Cathinone Products: A New Trend in "Bath Salts" and Other Designer Stimulant Drug Use*, 7 J. Addiction Med. 153 (2013); Thomas M. Penders & Richard Gestring, *Hallucinatory Delirium Following Use of MDPV: "Bath Salts"*, 33 Gen. Hosp. Psychiatry 525 (2011); Thomas M. Penders, Richard E. Gestring & Dmitry A. Vilensky, *Intoxication Delirium Following Use of Synthetic Cathinone Derivatives*, 38 Am. J. Drug & Alcohol Abuse 616 (2012); Jane M. Prosser & Lewis S. Nelson, *The Toxicology of Bath Salts: A Review of Synthetic Cathinones*, 8 J. Med. Toxicology 33 (2012); Henry A. Spiller et al., *Clinical Experience with and Analytical Confirmation of "Bath Salts" and "Legal Highs" (Synthetic Cathinones) in the United States*, 49 Clinical Toxicology 499 (2011).

Mechanick opined that this voluntary condition impaired Salasky's thinking, feeling, judgment, and behavior and caused confusion, delusion, and hallucination. In addition, Dr. Mechanick found that Salasky was suffering from pre-existing marijuana dependency, polysubstance abuse, schizotypal personality disorder, and anti-social personality disorder. While Dr. Mechanick recognized the significance of Salasky's pre-existing mental illness, he opined that, while Salasky had a greater risk of decompensating from exposure to these substances (MDPV) because of his underlying mental illness, the fact that he had a mental illness neither explains nor was the proximate cause for Salasky's behavior throughout the relative time period of the homicide.

Salasky objects to the testimony of Dr. Mechanick asserting that there is too great of a "analytical gap" between the available research and the doctor's opinions that Salasky's hallucinations were the product of his use of MDPV. First, consistent with the decision regarding Dr. Holstege's testimony, the Court finds that research available today on the use and effects of MDPV, while limited, is sufficient to support the conclusion of Dr. Mechanick. Depending upon the amount consumed and the unique characteristics of the patient, the literature clearly reflects that hallucination is a consistent and common effect of the use of

MDPV. Thus, whatever clinical research "gaps" are suggested by Salasky simply do not exist today.

As such, the only remaining objection by Salasky is the process used by Dr. Mechanick to determine that Salasky's mental state was the result of an intoxication-induced delirium and not simply the effects of a long term mental illness. While there appears to be no question that Salasky had a previous mental health condition, Dr. Mechanick, using the recognized differential diagnosis model, was able to eliminate the mental illness as a cause of Salasky's conduct. Simply stated, during the periods of time that Salasky was not using the substance, the symptoms that he exhibited during the homicide were not present. During the hearing Dr. Mechanick stated:

> ...there's some underlying psychiatric disorder, whatever we call it, whether it's a schizotypal personality or schizophrenia.
>
> What he doesn't have over this period leading up to the charge is any history of the kind of behavior that he demonstrated at that time, this kind of extreme agitation, hallucinations of people, seeing fangs. The only thing we have is one report by him and his girlfriend that at one other point he saw someone with fangs when he wasn't on bath salts. And we don't know what substances he was using then, and we don't even know if it occurred. But nothing to the extent of what he did this time where his behavior was so agitated and out of control.

So, again, that doesn't prove that this wasn't due to a schizophrenic psychosis, but it's another piece of information.

Another very important piece of information is what we know of his presentation at that time, the time of the charges. And what I saw there was features of a delirium that are not typical of schizophrenia. And what I mean is – some of the features of a delirium include what we call waxing and waning levels of consciousness. People go from very alert or hyperalert and agitated to obtundent or impaired, sleepy, reduced levels of consciousness. And that can go up and down. And that's typical of a delirium. It's not so typical with schizophrenia.

They have impairments in memory, which is typical of a delirium but not so typical with schizophrenia. Again, these are not absolute black-and-whites, but these are the cardinal features of a delirium. They can have delusions and hallucinations.

And I think one feature that he has that's more consistent with delirium than schizophrenia is that these things that he experienced on that day were not ongoing delusions. He didn't have ongoing delusions that there were demons populating the world, and he wasn't visually hallucinating people being demons in prior years. This was a new phenomenon for him. So, it has the features of a delirium more than the features of schizophrenia.

One other feature that's relevant is the literature. And the literature says that his presentation is one that's described in other people who have used bath salts. The agitation, the types of hallucinations, the paranoia, the delusions. Even the fact of seeing demons was reported

> in other case reports. It seems to be a particular feature of this drug for some people. So, it fits with it. If it didn't fit with it, then it would certainly raise the question of whether it was relevant . . .
>
> The other feature is the course of it. It corresponds to the use of the bath salts. That is, it wasn't there - this wasn't there before. It happens during it and it resolves. He doesn't continue to see people growing fangs or have this kind of extremely agitated and violent behavior after he's apprehended and hospitalized and incarcerated. So, once the drugs are out of his system, we don't see this phenomenon repeating itself, which, again, is another piece of evidence that supports the conclusion that this was related to a bath-salts-related delirium."

The Court finds Dr. Mechanick's analysis, described above, is a logical and appropriate process of differential diagnosis recognized in the medical community, which supports Dr. Mechanick's conclusions. Certainly those opinions can, and likely will, be challenged on cross-examination as Salasky's mental status clearly provides a range of issues that will need to be decided by the jury. However, it does not affect the admissibility of Dr. Mechanick's testimony, and Salasky's Motion *in Limine* regarding this testimony is hereby denied.

C. Gregory B. Saathoff, M.D.

Lastly, Salasky objects to the testimony of Dr. Saathoff, a psychiatrist who practices at the University of Virginia. Additionally, Dr. Saathoff serves as a

psychiatric consultant at three of Virginia's correctional facilities where he assists in the diagnosis and treatment of inmates who experience mental health problems. Dr. Saathoff also serves on the FBI's Critical Incident Response Group and has testified as an expert in some of the country's highest profile criminal cases in the past decade. Again, Salasky has not challenged that Dr. Saathoff is unqualified to render his opinions. Rather, Salasky questions Dr. Saathoff's underlying conclusions based upon his limited contact with and research on patients who have used bath salts. After reviewing Salasky's medical and psychological records and interviewing Salasky for fourteen hours over a period of two days, Dr. Saathoff opined:

> Based upon my review of all materials provided to me by the government [] as well as my interviews with Mr. Salasky, it is my opinion that he has a rational as well as factual understanding of the proceedings against him, and he maintains a sufficient ability to consult with his attorneys, with a reasonable degree of rational understanding.
>
> Further, it is my opinion that David Salasky intentionally ingested bath salts and also illegally procured and intentionally ingested the prescription drug Xanax (alprazolam) with the knowledge that these substances could have negative effects on his behavior. Based upon my review of materials provided to me it is my opinion that Mr. Salasky's behaviors on 15 September and morning of 16 September 2011 were affected by his documented use of MDPV in the form of "bath salts" as

> well as his illicit use of the prescription medication, Xanax (alprazolam). Mr. Salasky's rapid deterioration in the weeks following his release from Gander Hill in July of 2011 is a direct consequence of his decision to smoke bath salts and illegally acquire and ingest Xanax prior to the events of 16 September 2011 and the homicide of Lt. Szczerba.

While Dr. Saathoff acknowledges Salasky suffers from a mental illness, he found that the significance it played in the death of Szczerba was to a large degree discounted because the symptoms displayed by Salasky that evening are normally not present, and clearly less prevalent, in the absence of substance abuse. As such, Dr. Saathoff concluded that it was Salasky's voluntary intoxication and not his mental illness that led to the stabbing incident. In this vein, Dr. Saathoff testified:

> Well, it was helpful to interview Mr. Salasky, as well as to review his prior documentation, mental health records, et cetera.
>
> But I think what was significant about Mr. Salasky's case, in a case like this, was that there had been a significant recent change in his behavior and that the symptoms, which included the agitation, the combative, violent behavior, the rapid heart rate, the confusion - I mean, he had slurred speech. And slurred speech is not something that you are going to see with a major mental illness. Someone who has got a problem with a mood disorder or serious symptoms is not going to be affected usually in terms of speech.

> So, it's really the constellation of symptoms that they saw there in the emergency department, that, taken together with the history and noting the recent rapid change in his mental state, led them to the conclusion that this was really secondary to ingestion of substances.

Salasky's primary objection is that Dr. Saathoff's opinions are again generated despite the lack of research material on the effects of MDPV when combined with Xanax. While Dr. Saathoff can point to no studies on the effect of these drugs combined, the Court does not find this to be fatal to the introduction of his opinions. Dr. Saathoff stated during his testimony that while Salasky's use of Xanax impacted his behavior, it did not affect his opinion that Salasky's behavior was primarily associated with his drug use and not his mental illness. When specifically questioned about Xanax, Dr. Saathoff testified:

> Well, Mr. Salasky described a long period of insomnia as a result of the bath salt use. As I mentioned, bath salts function as a stimulant. And so I think it's important to think about not only the acute effects, but also the effects over time, in which lack of sleep can cause difficulties for an individual.
>
> And so, based upon the longer-term use, over a period of weeks, of bath salts and over the two days or so prior to his - the event, there was a deterioration in his behavior that was noted. He was having more difficulties, as described by his family. And he had mentioned to me, and in the record there is indication,

> that his prior use of Xanax had also been difficult for him in terms of creating agitated behavior, as well.
>
> So, whether it's the - to what extent there was disinhibition by the Xanax, which is certainly something that we see, as well as the agitation and combative behavior and some of the physiologic effects of the bath salts, it's hard to parse and determine exactly what contributed. But according to the record, I believe - and David Salasky's own experience with Xanax, I believe that the Xanax also appears to have had some impact on his behavior.

The Court again finds the objections raised by Salasky, while fruitful grounds for cross-examination, do not affect the admissibility of Dr. Saathoff's opinions. Dr. Saathoff's opinions are based upon his review of the medical and psychological records of Salasky, an extensive interview with Salasky, his review of numerous transcripts of other interviews with Salasky, and his review of Salasky's employment, school, and prison documentation. Dr. Saathoff submitted an extensive thirty page report to support his conclusions. The method he used to reach his conclusions is consistent with the mode of analysis and information customarily relied upon in the medical field. The Court finds that Dr. Saathoff's testimony will assist the jury in the decisions it will be asked to make in this matter. As such, the Motion *in Limine* directed toward Dr. Saathoff is denied.

VIII. MOTION IN LIMINE FOR ACCESS TO CRIMINAL HISTORIES OF POTENTIAL JURORS

The defense has recently filed a motion requesting to have access to the criminal records of potential jurors during the jury selection process equal to the State. It is a routine and common practice in all criminal cases for the State to run the criminal histories of each potential juror utilizing the Delaware Criminal Justice Information System (DELJIS). Salasky is seeking the same access.

Title 11, *Del. C.* § 8513 addresses the dissemination of criminal histories of potential jurors. Subsection (g) prohibits the disclosure of criminal histories to the defendant or defense counsel of a prospective juror. It states in pertinent part:

> Notwithstanding any law or court rule to the contrary, the dissemination to the defendant or defense attorney in a criminal case of criminal history record information pertaining to any juror in such case is prohibited. For the purposes of this subsection, "juror" includes any person who has received notice or summons to appear for jury service. This subsection shall not prohibit the disclosure of such information as may be necessary to investigate misconduct by any juror.

The Delaware Supreme Court has ruled, in accordance with this statute, that a defendant's due process rights are not violated when the Court refuses to force the State to disclose its "jury cards" that include a prospective juror's criminal

history.[144] While the "jury card" process has disappeared with the introduction of the one day/one trial selection process, the same underlying principals prevail.

The Supreme Court has, however, implied that the due process rights of a defendant would be violated when the State has information that it fails to disclose to the defense relating to a juror's ability to render an impartial verdict.[145] Such a finding is consistent with the statutory exception found in 11 *Del. C.* § 8513(g) that allows disclosure of criminal histories when it is necessary to investigate misconduct by a juror.

In light of the above, while finding no due process or equal protection violation nor a constitutional right to this information, the Court will establish the following procedures to ensure a fair trial and balance the due process concerns expressed in the *McBride* decision.

(1) Each juror will be provided a questionnaire to complete prior to the *voir dire*. One of the questions that they will be asked is whether they have ever been arrested or convicted of a criminal offense other than a traffic violation.

[144] *McBride v. State*, 477 A.2d 174 (Del. 1984).
[145] *Id.* at 190.

(2) If the juror answers yes to this question, they will be asked to list the nature of the arrest and/or conviction and the year(s) that such occurred.

(3) If the information provided by the juror is inconsistent with the information contained on the DELJIS criminal history, the State will be required to disclose that information to the Court and defense counsel, so a proper inquiry can be conducted to ensure the juror can be impartial and is not intentionally concealing information relevant to their qualifications to serve as a juror.

The Court believes this procedure will satisfy the fairness and due process concerns expressed by the Supreme Court, is consistent with the legislative enactment found in 11 *Del. C.* § 8513, and will not interfere with the privacy interest of any potential juror. To the extent Salasky is seeking a disclosure of the full criminal histories of all potential jurors, that request is denied.

IT IS SO ORDERED.

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