EFiled: Mar 11 2016 03:35PM EST
Filing ID 58709007
Case Number 660,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EMMETT TAYLOR, III,	)	
	)	
Defendant Below,	)	
Appellant,	)	Case No. 660, 2015
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE OF DELAWARE'S ANSWERING BRIEF

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DATE: March 11, 2016

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NATURE AND STAGE OF THE PROCEEDINGS

In October 2007, a Sussex County grand jury indicted Appellant Emmett Taylor, III (Taylor) with first degree murder, possession of a deadly weapon during the commission of a felony (PDWDCF), and abuse of a corpse, for the beating death of his fiancée, Stephanie Mumford. DI 4[1] at A001. In October 2009, a jury found Taylor guilty of all charges. DI 184 at A018-19. After a penalty hearing in November 2009, the jury unanimously found the existence of the statutory aggravating factor beyond a reasonable doubt and, by a preponderance of the evidence, found that aggravating circumstances outweighed mitigating circumstances by a vote of 11-1.[2] On March 12, 2010, Superior Court sentenced Taylor to death.[3] DI 207 at A021. Taylor appealed his convictions and sentence to this Court, which affirmed them on September 12, 2011.[4]

On September 10, 2012, Taylor filed a Motion for Postconviction Relief. DI 290 at A028. Taylor filed a First Amendment to his Motion for Postconviction Relief in June 2013. DI 301 at A029. Trial and appellate counsel submitted affidavits in August 2013, and the State answered on November 8, 2013. DI 310, 311, 314 at A030-31. Taylor replied on December 12, 2013. DI 315 at A031.

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[1] "DI" refers to Superior Court docket entries in *State v. Emmett Taylor*, ID No. 0708020057 (A001-035).
[2] *Taylor v. State*, 28 A.3d 399, 404 (Del. 2011)
[3] *Id.*
[4] *Id.*

Superior Court held evidentiary hearings on February 19-21, and 24, 2014. DI 319 at A031. Testimony was provided by E. Stephen Calloway and Dean Johnson, (trial counsel), Nicole Walker and Santino Ceccotti (appellate counsel), Sergeant William Marvel, Sergeant Kelly Wells, Corporal Keith Collins, and Dr. Ali Z. Hameli.[5]

On November 14, 2014, Taylor filed his Post-evidentiary Hearing Opening Brief. DI 326 at A032. The State answered on February 20, 2015 and Taylor filed his reply brief on March 20, 2015. DI 332, 335 at A033. On May 19, 2015, Superior Court granted Taylor leave to amend his Motion for Postconviction Relief. DI 340 at A033. Thereafter, Taylor filed his Second Amendment, the State answered, and Taylor filed a reply. DI 345, 348, 349 at A034-35. Superior Court denied Taylor's Motion for Postconviction Relief on November 24, 2015. DI 350 at A035. Taylor appealed and filed his Opening Brief. This is the State's Answering Brief.

[5] *See* Tr. of Postconviction Hearing, Vols. A through D.

SUMMARY OF THE ARGUMENT

I. Appellant's first claim is DENIED. Superior Court did not abuse its discretion in finding Taylor failed to substantiate his claim of ineffective assistance of counsel. Taylor fails to show his counsel rendered constitutionally deficient performance because: 1) Joinder of the abuse of a corpse charge was appropriate under Superior Court Criminal Rule 8 because the charges were connected and the circumstances of the cucumber photographs and of the murder were inextricably intertwined; 2) Mi Jung's and her husband's statements contained only minor inconsistencies; 3) The evidence bag for the frying pan, which noted "fry pan with blood," was not evidence and the jury was aware from testimony that the pan had no blood on it; 4) Dr. Hameli's assessment of the case was based completely on Taylor's trial testimony, which contradicted his previous statements and which the jury found lacked credibility, and Dr. Hameli's essential conclusions did not contradict Dr. Tobin's and were consistent with the State's theory of the case; 5) a cookware expert would not have helped Taylor's case, because the condition of the pan was irrelevant to proving it was used as a deadly weapon and Taylor admitted he hit Mumford with it; 6) Trial counsel were unable to successfully argue for a better plea simply because the State was not willing to offer a better plea; 7) Trial counsel appropriately pursued a mental health defense while still preparing for trial, but competently pursued Taylor's chosen self defense trial strategy once they

realized Taylor wished only to pursue that defense; 8) The prosecutor did not make improper arguments during closing and rebuttal statements; and, 9) Trial counsel did not know there was commentary on the crime scene video, nor can Taylor show prejudice because the video did not introduce anything that was not already properly introduced into evidence, nor can it be shown that the jury even heard it.

II. Appellant's second claim is DENIED. Superior Court did not abuse its discretion in finding Taylor failed to substantiate his claim of ineffective assistance of trial counsel during the penalty phase. Taylor fails to show his counsel rendered constitutionally deficient performance because: 1) Dr. Mechanick's rebuttal testimony was permissible under the Fifth and Eighth Amendments and under 11 *Del C.* § 4209(c). The State does not violate a defendant's right against self-incrimination when it rebuts a defendant's presentation of psychiatric evidence during the penalty phase with statements he made during a mental exam. Taylor's Eighth Amendment argument is not supported by Supreme Court precedent. And, 11 *Del. C.* § 4209(c) permits the State to present rebuttal evidence during the penalty hearing. 2) Superior Court correctly permitted Earline Harris's testimony about uncharged acts of physical abuse Taylor committed. 3) Superior Court correctly found Taylor's *Alford* plea amounted to a conviction for the purpose of proving the State's statutory

aggravator that Taylor had previously been convicted of a felony involving the use of force or violence upon another person.

III. Appellant's third claim is DENIED. Superior Court did not abuse its discretion in finding Taylor failed to substantiate his claim of ineffective assistance of appellate counsel. Taylor fails to show his appellate counsel rendered constitutionally deficient performance because none of his alleged claims would have succeeded on appeal and appellate counsel effectively chose the strongest claims they had to argue on direct appeal.

STATEMENT OF FACTS

The Crime[6]

Emmett Taylor and Stephanie Mumford, set to wed on August 18, 2007, scheduled a rehearsal in Georgetown for August 14, 2007. When they failed to arrive at the rehearsal, Mumford's family drove to the townhouse the couple shared in Millsboro. When the family arrived at the townhouse, they found Mumford's body behind the door of the second floor bathroom. The family noticed a warped frying pan on the kitchen island, along with damage to the drywall and blood all over the kitchen and bathroom. Taylor and the couple's car were missing. The family later found a butcher knife on top of the refrigerator and gave it to police.

Based on an autopsy, the medical examiner opined that the cause of Mumford's death was blunt force trauma to the head and that the manner of death was homicide. Doctors officially pronounced Mumford dead at 9:36 p.m. on August 14. The medical examiner did not provide an opinion regarding the actual time of Mumford's death.

On August 17, 2007, police located Taylor in Washington DC and took him into custody in connection with Mumford's death. When police seized Taylor, they also seized two cell phones from his car—one was his and the other was Mumford's. Police forensically examined the phones and obtained call histories,

[6] The Statement of Facts of the crime is taken verbatim from this Court's decision on direct appeal in *Taylor*, 28 A.3d at 403-04 (footnotes omitted).

videos, and photos from them. Some of the photos they retrieved from Taylor's phone showed Mumford lying on the floor of their townhouse with cucumbers inserted in her mouth, vagina, and anus. The time stamps on the images ranged from 12:23 a.m. to 12:35 a.m. on August 14, 2007.

Detective William Porter interrogated Taylor in Washington D.C. Taylor told Porter that on the night of Mumford's death—the night of August 13th into August 14th—Taylor told Mumford that he was having second thoughts about their wedding. According to Taylor, Mumford stood next to the kitchen sink cutting food for dinner while the two argued. Taylor explained that he headed toward Mumford to get something from the cupboard when she turned toward him with the knife she was using to cut food. Taylor said that he grabbed her wrist and went into what he called a "self defense mechanism." He then explained that he struck her with a frying pan several times before she gave up the knife.

Mi Jung, the couple's next door neighbor, testified at trial that she heard loud banging noises coming from the couple's townhouse between 10:00 and 10:30 p.m. on August 13, along with Taylor screaming at Stephanie. Jung testified that she never heard Mumford's voice in response. Jung also testified that this was unusual because she generally had heard Mumford's voice along with Taylor's voice when the couple had argued in the past.

Taylor told Porter that he did not believe Mumford pointed the knife at him intentionally and she never threatened him with it. Taylor claimed he was in a rage because she had a knife pointed at him despite everything he had done for her. This account conflicts with what Taylor later told Dr. Zingaro, a licensed psychologist that Taylor's attorneys retained.

According to Taylor, the argument ended and he told Mumford that he wanted to leave for a while to clear his mind. He said that Mumford became angry because she thought he was going to see another woman. He explained that she threw the car keys at him, and then, when he was heading down the steps toward the garage, she jumped on his back. He explained that the two of them fell together down the stairs and rammed into the wall at the bottom of the steps. The weight of their bodies, according to him, caused a hole in the drywall, and Mumford absorbed most of the impact from the fall.

Taylor told Zingaro that he was not trying to kill Mumford—only trying to get away from her—but he also told and showed Porter that he had no defensive wounds, injuries, or scratches. He also agreed with Porter's characterization of the incident as a one-sided fight. Taylor told both Zingaro and the trial judge that after they fell down the stairs, he and Mumford had sex using cucumbers at her request.

According to Taylor, after the couple had sex, Mumford's head began to swell from their fall down the stairs. While Taylor says he insisted that she go to

the hospital, Mumford refused. Instead, Taylor explained, he helped Mumford to the bathroom so she could clean up. He said that he went to the living room and fell asleep on the sofa while she remained in the bathroom, only to awake later to find her dead on the bathroom floor. He explained that he then changed his clothes and left for Washington D.C., where police arrested him.

Trial Counsels' Defense Strategy

Soon after beginning their representation of Taylor, trial counsel retained Dr. Joseph C. Zingaro, a psychologist, to evaluate Taylor. B25-26. Dr. Zingaro met with Taylor several times. *Id.* He determined that Taylor suffered from, *inter alia*, Dissociative Identity Disorder (DID), which is diagnosed when a person exhibits two or more identities or personality states. B36-37. On April 17, 2008, trial counsel notified the State that they intended to present expert testimony at trial and during the penalty phase that Taylor was "guilty, but mentally ill" (GBMI) when he killed Mumford.[7] DI 24 at A003; B6-7. The State moved and Superior Court ordered Taylor, pursuant to Superior Court Criminal Rule 12.2(c), to submit to an examination by the State's expert, Dr. Stephen Mechanick. DI 27 at A003.

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[7] *See* 11 *Del. C.* § 401(b) (providing "[w]here . . . at the time of the conduct charged, a defendant suffered from a mental illness . . . which substantially disturbed such person's thinking, feeling or behavior and/or that such mental illness . . . left such person with insufficient willpower to choose whether the person would do the act or refrain from doing it, although physically capable, the trier of fact shall return a verdict of 'guilty, but mentally ill.'"); Super. Ct. Crim. R. 12.2(b) (providing that if defendant intends to present expert testimony relating to any mental or emotional condition of the defendant bearing upon the issue of guilt, he must notify the attorney general in writing).

Dr. Mechanick met with Taylor on June 2, 2008. B-17. Just prior to his examination, Dr. Mechanick told Taylor that the State had retained him and that anything Taylor told him would not be confidential. *Id.* Dr. Mechanick concluded that Taylor did not meet the GBMI criteria. B43-44.

Trial counsel made many attempts to retain a psychiatrist to examine Taylor. A065, 67, 70-72, 74; B46. The psychiatrist counsel eventually retained, Dr. Fink, disagreed with Dr. Zingaro's diagnosis of DID. A074-77. Instead, he believed Taylor suffered from Intermittent Explosive Disorder, a diagnosis that could support a finding of GBMI, but that counsel believed would be detrimental to Taylor's case. A074-76, 80-81; B46. Trial counsel decided to proceed only with Dr. Zingaro's testimony. DI 80 at A008.

In March 2009, however, Taylor, dissatisfied with his counsel, notified the court that he no longer wanted them to represent him. DI 84, 88 at A009. Taylor disagreed with his counsel's focus on his mental health and, instead, wanted to pursue self-defense. A108. Trial counsel did not believe they had a basis to show Taylor killed Mumford in self-defense. A102.

On May 6, 2009, the Court stayed Taylor's trial pending the outcome of *Cooke v. State*.[8] On May 19, 2009, Superior Court denied Taylor's request to terminate counsel. DI 114 at A012. After *Cooke* was decided in July 2009, Taylor

[8] 977 A.2d 803 (Del. 2009).

again requested to dismiss his counsel. DI 123 at A013. At an *ex-parte* hearing on September 2, 2009, Superior Court denied Taylor's motion after counsel stated they would forego pursuing a GBMI verdict and were prepared and competent to present self-defense to the jury. B59-66.

Although trial counsel no longer intended to pursue a mental health defense , they still intended for Dr. Zingaro to testify in the guilt phase to show that Taylor did not have the requisite intent for first degree murder. B59-61, 67-69. However, after consulting with Taylor they decided not to call Dr. Zingaro during trial. A269.

Penalty Phase Mental Health Presentations

As part of the defense mitigation case, Taylor presented Dr. James Walsh, a therapist and pastoral counselor, and Dr. Zingaro, a psychologist. Both doctors testified to, among other things, Taylor's history of mental illness, and that Taylor was suffering from DID at the time he killed Mumford. B127-30, 134-35, 140. Dr. Walsh presented Taylor's psychosocial assessment. B118. He testified extensively about Taylor's psychological history based on his review of records and on Dr. Zingaro's report and Taylor's self-reporting. *See, e.g.*, B118-20, 121-24. Dr. Walsh also testified that Taylor's version of the events that led to Mumford's death was consistent with him having entered an altered mind state or dissociated himself from his actions. B125-32.

Dr. Zingaro diagnosed Taylor with DID, generalized anxiety disorder, major depression, alcohol dependence and antisocial disorder. A320. To reach his conclusions, he testified that he had relied on, among other things, psychological tests and clinical observations of Taylor, as well as information Taylor provided him during the course of six visits. B133. Dr. Zingaro also testified about Taylor's version of events leading up to Mumford's death. B137-41. Taylor stated that before he had hit Mumford over the head with a frying pan, she turned to him with a knife, alarming him. B140. Dr. Zingaro testified that when Taylor felt threatened, his alternate personality, Sergeant Taylor came out to defend him. B134-35.

On rebuttal, the State presented Dr. Mechanick who disagreed with Drs. Zingaro's and Walsh's opinions that Taylor suffered from DID (B142-43), finding instead that at the time of the charges, Taylor suffered from alcohol intoxication and personality disorder with anti-social features (A331-32). Dr. Mechanick further testified that Taylor's version of the crime, as told to him, varied from that which he provided Dr. Zingaro and the police. B142-43.

ARGUMENT

I. SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING TAYLOR FAILED TO SUBSTANTIATE HIS CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THE GUILT PHASE

Question Presented

Whether Taylor demonstrated his trial counsel provided ineffective assistance during the guilt phase of his trial?

Standard of Review

This Court reviews a trial court's denial of a postconviction relief motion for an abuse of discretion.[9] Legal or constitutional questions are reviewed *de novo.*[10]

Argument

Taylor argues that trial counsel were ineffective at trial for: 1) failing to move to sever the abuse of the corpse charge from the other charges in the indictment; 2) pursue information regarding the identity of Mi Young Jung's husband and effectively cross-examine Jung; 3) prevent admission of the evidence bag that contained the frying pan, which was mislabeled "fry pan with blood"; 4) consult a forensic pathologist regarding the cause and manner of Mumford's death; 5) consult with a cookware expert about what caused the dent in the fry pan; 6) negotiate a plea offer to a lesser charge; 7) pursue a trial strategy consistent with

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[9] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (internal citations omitted).
[10] *Swan v. State,* 28 A.3d 362, 382 (Del. 2011) (internal citations omitted).

Taylor's self-defense claims; 8) object to prosecutorial misconduct in closing argument; and 9) object to the jury having access to the crime scene video, which had audible speculative commentary. As Superior Court determined, Taylor cannot substantiate his claims.

Legal Analysis

In order to succeed in an ineffective assistance of counsel claim, the United States Supreme Court held in *Strickland v. Washington*, that a defendant must show both: (1) "that counsel's representation fell below an objective standard of reasonableness;" and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[11] There is a strong presumption that the legal representation was professionally reasonable.[12] As such, mere allegations will not suffice; instead, a defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.[13] In other words, conclusory, unsupported, and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.[14]

In fairly assessing an attorney's performance under *Strickland*, "every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the

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[11] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).
[12] *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990) (citations omitted).
[13] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).
[14] *Id.*

circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."[15] A defendant must also overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.[16] Indeed, the United States Supreme Court has stated that:

> Surmounting *Strickland's* high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom.[17]

Because the defendant must prove both parts of his ineffectiveness claim, a court may dispose of a claim by first determining if the defendant established prejudice.[18] The first consideration in the "prejudice" analysis alone "requires

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[15] *Strickland*, 466 U.S. at 689.
[16] *Id.*
[17] *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citations omitted).
[18] *Strickland*, 466 U.S. at 697.

more than a showing of theoretical possibility that the outcome was affected."[19] The defendant must actually show a reasonable probability of a different result but for trial counsel's alleged errors.[20] "It is not enough to 'show that the errors had some conceivable effect on the outcome of the proceeding.'"[21]

1. Motion to Sever Charges

Taylor argues that Trial Counsel was ineffective for failing to file a motion to sever the abuse of a corpse charge from the murder first degree and PDWDCF charges. Corr. Op. Brf. at 18. Taylor contends that Superior Court incorrectly determined that severance was not warranted because joinder of the charges manifestly prejudiced him. *Id.* at 18-23. He is mistaken.

Superior Court properly concluded that "joinder of the abuse charge with the other two charges was proper and that it would not have been severed from the other charges."[22] Superior Court Criminal Rule 8 provides that two or more offenses may be charged in the same indictment if the offenses are of the same or similar character or are based on two or more transactions connected together or constituting parts of a common scheme or plan. Rule 8(a), in part, promotes judicial economy and efficiency, objectives which outweigh a defendant's

[19] *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).
[20] *Strickland*, 466 U.S. at 695.
[21] *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 693).
[22] *See State v. Taylor*, 2015 WL 7753046, at *6 (Del. Super. Ct. Nov. 23, 2015).

unsubstantiated claim of prejudice.[23] Nonetheless, if the defendant shows that he is substantially prejudiced by the joinder of charges, the court may sever counts of an indictment.[24]

It is the defendant's burden to demonstrate prejudice, and "mere hypothetical prejudice" is not sufficient.[25] Prejudice that the court considers includes that:

> 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 may use evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crimes; and 3) the defendant may be subject to embarrassment or confusion by presenting different defenses to different charges.[26]

But, a defendant is not entitled to severance merely because he might stand a better chance of being acquitted of one or the other charges in separate trials.[27]

Taylor's abuse of Mumford's corpse was part of the tragic night that he killed Mumford and then fled with the photographs of her dead body on his phone.[28] They photographs were inextricably intertwined with the rest of the facts and would have been admitted at his trial regardless of severance. Taylor's

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[23] *Mayer v. State*, 320 A.2d 713, 717 (Del. 1974).
[24] Del. Super. Ct. Crim. R. 14; *Skinner v. State*, 575 A.2d 1108, 1117-18 (Del. 1990).
[25] *Skinner,* 575 A.2d at 1118 (citing *Bates v. State*, 386 A.2d 1139, 1142 (Del. 1978)).
[26] *Weist v. State*, 542 A.2d 1193, 1195 (Del. 1988).
[27] *Bradley v. State*, 559 A.2d 1234, 1241 (Del. 1989).
[28] *See Taylor*, 2015 WL 7753046, at *13.

argument is completely meritless because it presupposes that evidence that he was in possession of the photos would not have been admissible in his murder trial if the abuse of the corpse charge had been severed. Not so. Superior Court disagreed concluding that it would not have even considered severing the charge, stating:

> Taylor has (1) understated the prohibitive [sic] value of the cucumber photographs in proving the murder charge, disproving Taylor's defenses, and explaining Taylor's reason for murdering Mumford and abusing her corpse; (2) overstated the prejudice of the cucumber photographs; and (3) failed to appreciate that the proof of the murder and abuse charges were inextricably intertwined.[29]

Photographs of Mumford's desecrated body would have been admissible as evidence against Taylor, irrespective of severance. "Although reciprocal admissibility is not a prerequisite for initial joinder, reciprocal admissibility is a pertinent factor for the trial court to consider."[30] "Where proof of more than one crime is 'so inextricably intertwined so as to make proof of one crime impossible without proof of the other,' the offenses should not be severed."[31] Indeed, "where evidence concerning one crime would be admissible in the trial of another crime ... there is no prejudicial effect in having a joint trial."[32]

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[29] *Taylor*, 2015 WL 7753046, at *7.

[30] *Skinner,* 575 A.2d at 1118 (finding evidence of 2 separate robberies could have been admissible in separate trial of third incident involving an attempted robbery/murder to establish defendants' intent at the time of the attempted robbery).

[31] *Younger v. State*, 496 A.2d 546, 550 (Del. 1985) (quoting *McDonald v. State*, 307 A.2d 796, 798 (Del. 1973)).

[32] *Bates*, 386 A.2d at 1142. Taylor incorrectly relies on *Pope v. State*. *Pope* dealt with admissibility of uncharged evidence that was "inextricably intertwined," not the issues of joinder and severance of charged crimes. 632 A.2d 73, 76-77 (Del. 1993).

Superior Court succinctly stated that the photographs were inextricably intertwined with the murder:

> [T]he acts that gave rise to the murder and abuse charges are part of one continuous series of events, starting with the argument between Taylor and Mumford in the kitchen and ending with Taylor fleeing to Washington, D.C. Taylor beat Mumford to death and abused her corpse. Leaving out a critical act – the abuse of Mumford's corpse that occurred in the middle of this sequence of connected events – would have made no sense because it would have left a gaping hole in the tragic story of what happened that night between Taylor and Mumford.[33]

The cucumber photographs were extremely useful in proving the murder charges. The photographs, taken from 12:32 a.m. to 12:36 a.m. put Taylor at the crime scene in the relevant time frame, approximately two hourse after, Mi Jung, the couple's neighbor, testified that she heard loud banging noises and Taylor yelling.[34] The photographs depict Mumford's naked and beaten body unnaturally and awkwardly positioned.[35] It was reasonable to determine that when Taylor took these pictures, Mumford was deceased. The police found the photographs in Taylor's possession on a cell phone in Washington, D.C., three days after he fled from the home, which was powerful evidence of Taylor's consciousness of guilt.[36]

In addition, Taylor's defense at trial was a combination of self-defense and that Mumford's death was an accident. In light of the photographs, Taylor testified

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[33] *See Taylor*, 2015 WL 7753046, at *6.
[34] *See Taylor v. State,* 28 A.3d 399, 409 (Del. 2011)
[35] *Taylor*, 2015 WL 7753046, at *8.
[36] *Id.*

to things that he did not tell Det. Porter. He testified that in the time between sustaining her injuries and her death, Mumford engaged in consensual sexual activity with Taylor involving cucumbers, such that he was unaware that she was dying, and he took pictures. Afterwards, Taylor went to sleep instead of getting her medical treatment. Taylor's own pre-trial statements and trial testimony only bolstered the relevance of the cucumber photographs and therefore, militated against severance. As Superior Court stated, "[t]he cucumber photographs were useful in proving the murder and abuse charges and in undermining all of Taylor's defenses. That was Taylor's problem. The cucumber photographs made his defenses seem implausible."

Therefore, under the facts of this case and despite his protestations, Taylor cannot substantiate his claim that the probative value of the photographs was outweighed by their prejudicial effect. All evidence, of course, "is meant to be prejudicial; it is only *unfair* prejudice which must be avoided."[37] "[I]n the absence of a showing of particularized danger of *unfair* prejudice, the evidence must be permitted."[38] Given the obvious relevance of the photographs, Taylor has completely failed to demonstrate any "unfair" prejudice he suffered. His argument that the State's only purpose to admit the photographs was to present Taylor as a

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[37] *United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989): *see also United States v. Cruz-Garcia*, 344 F.3d 951, 956 (9th Cir. 2003) ("That evidence may decimate an opponent's case is no ground for its exclusion under 403").

[38] *McOueeney v. Wilmington Trust Co.*, 779 F.2d 916, 923 (3d Cir. 1985) (emphasis added).

"perverted" person falls flat. Taylor's real complaint is that he had to fashion a self-defense/accident story that acknowledged the cucumber photographs. He did not want to do that. That does not constitute unfair prejudice. And to the extent Taylor relies on *Monceaux* to support his position that bifurcation was warranted in this case, that reliance is misplaced. Not only is *Monceaux* factually dissimilar, but in Monceaux, this Court expressly limited its holding to Section 777A cases (Sex Offender Unlawful Conduct Against a Child).[39]

Superior Court conclusion that joinder was logically and legally proper was correct[40] Taylor's trial attorneys reasonably determined that a motion to sever would be denied. A434; B168, 184-86, 189. Taylor's argument that trial counsel agreed that they had "nothing to lose" by filing a motion to sever, changes nothing. The United States Supreme Court has specifically repudiated a "nothing to lose" standard for evaluating *Strickland* claims.[41] And because photographs of Mumford would have been admissible regardless of severance, Taylor can show no prejudice. His claim fails.

2. Witness Information on Mi Jung's Husband

Taylor argues that a police statement made by Mi Jung's husband was in material conflict with Jung's statements and, as such, constituted crucial

[39] *Monceaux v. State*, 51 A.3d 474, 478 (Del. 2012).
[40] *See Taylor*, 2015 WL 7753046, at *12.
[41] *Knowles v. Mirzayance,* 556 U.S. 111, 122 (2009) ("This Court has never established anything akin to the Court of Appeals' 'nothing to lose' standard for evaluating *Strickland* claims.").

exculpatory and/or impeachment material that trial counsel failed to pursue by securing the husband's testimony and by successfully cross-examining Jung at trial. Corr. Op. Brf. at 24. Taylor contends that this alleged failure of trial counsel rises to constitutionally ineffective assistance, requiring relief. As Superior Court found, Taylor failed to substantiate his ineffectiveness claim.

In pretrial discovery, the State provided Taylor with Det. Wells' police report that included Jung's husband's statement. Taylor also received Det. Wells' handwritten notes. The detective did not ask Jung's husband his name.

Ms. Jung's husband's statement to the police was summarized by Det. Wells as follows:

> [Ms. Jung's husband] stated that he came home from work that night [August 13, 2007] around 2010 hours and saw 3 men sitting in a small dark green car outside Stephanie's residence. He noticed it was Emmett and 2 other black males. He said hi to Emmett and noticed all three were huddled in the car. He said that while he was inside his house he heard movement from Stephanie's house, sounds like furniture being moved, he said he heard scratching sounds and something being dragged on the floor. He said that before the dragging sounds he heard grunting and 2 male voices talking. He described the grunting sound like someone being punched.

A397. This statement is neither exculpatory nor is it impeaching. Indeed, as Superior Court determined, it is largely consistent with the evidence known at the time which included the statements of the two men, who stated they had been in

the car with Taylor and, at one point, in the apartment with Mumford.[42] The men Jung's husband was referring to, Victor Perez and Carlton Gibbs, stated they left the residence around 10:00 pm. A179; B71.

Taylor finds no support for his repeated statement that Jung's husband said the scuffling sounds ended around 12:00 a.m. Corr. Op. Brf. at 26, 28. When Det. Wells testified at the evidentiary hearing, she stated she did not know what the solitary notation "12:00 a.m." signified on the notes she wrote when interviewing Jung's husband. B165-66. *See also* A404 (Det. Wells' Notes).

Ms. Jung, testified at trial, with the aid of a Korean interpreter. A186. Jung stated she was wearing headphones and watching a movie on her computer between 10:00 and 10:30 p.m. when she first heard banging noises next door. A186-87. She took off her headphones and listened through the wall as the noises continued for about the next half hour. A187. She also heard Taylor yelling "get out" or "get out of here." A187.

Taylor argues that because Jung only heard Taylor's voice that night, her credibility is in question. Not so. Nor is there an issue because Jung's husband said he heard two voices. Jung testified that she was listening to a movie through headphones when she first heard noises and therefore, could not have heard

[42] *See Taylor*, 2015 WL 7753046, at *12.

everything.[43] Gibbs and Perez testified at trial that on that evening Taylor and Mumford argued in front of them and Peter Mitchell testified that during the course of the evening, Mumford called him to tell him that Taylor and she were arguing.[44] In the last call between Mumford and Mitchell, Mumford was trying to be quiet while Taylor stated he did not care if Mitchell heard him yelling.[45]

Taylor told Det. Porter at the time of his arrest and testified at trial that no one but he and Mumford were present in the home during their physical confrontation.[46] The fact that Jung heard one voice at one point and her husband heard two voices does nothing to assist Taylor. Trial evidence made clear that Taylor and Mumford were arguing and that Taylor was loud. Jung's statements, and that of her husband, are consistent with the other evidence.

Taylor's additional argument that Ms. Jung indicated there were two males present outside after 11:30 calls the State's timeline into question also fails. Taylor is simply incorrect in his claim. Detective Wells' notations of Ms. Jung's interview, while not exceptionally clear, indicate that another male, shorter than Taylor, slammed the door car door twice. A402. The notes also indicate the word "Steff." A402. Ms. Jung's recorded statement makes clear that around 10:30; she could not see the person who slammed the car door, but thought the person was

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[43] *See Taylor*, 2015 WL 7753046, at *17.
[44] *See Taylor*, 2015 WL 7753046, at *19.
[45] *Id.*
[46] *Id.*; *see also*, B85-88.

small and "I assumed that it was Stephanie the body was smaller much smaller than Emmett." A412; B5. Ms. Jung did not testify that she saw two people outside at 11:30 p.m. While Ms. Jung's husband may have seen two people, Perez and Gibbs at around 10:00 p.m., there is no indication that anyone said that two people were seen at 11:30 p.m.[47] Moreover, Taylor never told Porter that such a thing occurred.

To the extent that Taylor argues that counsel's failure to explore minimal inconsistencies between Ms. Jung's statement and that of her husband's equates to ineffective assistance of counsel, he is mistaken. First, Ms. Jung's first language was Korean. Det. Wells did not have the aid of a Korean interpreter for the first untaped statement at the scene and the second audio-taped statement. Ms. Jung's deposition and trial testimony were aided, however, by a Korean interpreter. Superior Court reasonably found that Ms. Jung's deposition and trial testimony were much clearer than her recorded statement and that accounted for the alleged discrepancies on which Taylor relied.[48]

While trial counsel made an effort to contact Ms. Jung's husband, they were unsuccessful. In any case, trial counsel thought that Ms. Jung's statements were largely consistent with the other witnesses and the discrepancies in the timeline of events were of little consequence, particularly because none of the witnesses were

[47] *See Taylor*, 2015 WL 7753046, at *21.
[48] *Id.*

keeping track of time and such things commonly vary among witnesses.[49] In closing argument, the State argued that the vicious attack was completed "sometime around 11:00 o'clock." Testimony at trial was entirely consistent with the State's argument. Further cross-examination of Ms. Jung would not have changed anything, nor would testimony from Ms. Jung's husband have changed the outcome of the proceedings. As Superior Court found, Taylor has failed to show ineffective assistance of trial counsel.

3. Evidence of Bag Labeled "fry pan with blood"

Taylor argues that Trial Counsel failed to prevent the submission of an "evidence bag mischaracterizing the murder weapon as bloody" to the jury and he was therefore convicted on materially false evidence. Corr. Op. Brf. at 30. He is incorrect.

Superior Court correctly found that the mislabeled bag itself was not evidence, that the State did not argue that frying pan was the "murder weapon" and that the evidence in the case was that the pan did not have blood on it.[50] Taylor's right to fair trial thus was not unfairly prejudiced and Taylor's claim of ineffective assistance of counsel fails.[51]

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[49] *Id.* at 22.
[50] *See Taylor*, 2015 WL 7753046, at *23-25.
[51] *Id.* at *25.

At the townhouse, Det. Marvel found the frying pan that Taylor admitted he used to hit Mumford and because it field tested positive for blood, Det. Marvel put it in an evidence bag he labeled "fry pan with blood." The frying pan was admitted at trial and provided in its evidence bag to the jury during deliberations.[52]

Trial counsel was unaware that the jury viewed the frying pan in its evidence bag and therefore did not object.[53] In addition, Trial Counsel averred in their affidavits, contrary to Taylor's claim here, that the frying pan was not the sole cause of death, but that the blunt force trauma Mumford suffered included the purported fact that Mumford hit her head on the sheet rock wall at the base of the stairwell where some of her hair and blood was found.[54] Superior Court agreed the State's theory and the evidence in the case was not that Taylor beat Mumford to death "with the frying pan to the exclusion of everything else" but rather the "blunt force trauma could have been caused by "a frying pan, a fist, a wall, or other flat surface."[55]

Moreover, the trial testimony was that the frying pan did not have blood on it.[56] Det. Marvel identified the frying pan he collected from the scene at trial but did not say he found blood on it.[57] Jennifer VanZanten, DNA casework manager

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[52] *Id.* at *23.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at *24.

from the Medical Examiner's office testified that she tested the frying pan and it did not have human blood on it. A217. Thereafter, in its instructions, Superior Court advised the jury that "[y]our verdict must be based solely and exclusively on the evidence in this case."[58] The frying pan, not the bag, was the evidence, the jury was aware from testimony that the pan did not have blood on it, and the State never argued that it did. Nor did the State argue that Taylor striking Mumford with the frying pan was the sole cause of Mumford's death. Superior Court correctly determined that Taylor was not prejudiced by the submission, but not admission into evidence, of the labeled bag with the frying pan.

4. Forensic Pathologist

Taylor alleges that trial counsel were constitutionally ineffective by failing to consult with a forensic pathologist regarding the cause and manner of Mumford's death. Superior Court correctly found Taylor's claim unavailing.

Dr. Judith Tobin, former Assistant State Medical Examiner for over 45 years, testified at trial that the cause of Mumford's death was blunt force trauma to the head and that the manner of her death was homicide. A232; B72. Dr. Tobin stated that Mumford's entire face was swollen as was the top of her head, which was detached from the skull. A223-24; B73-81. Mumford's eyelids were purple, her lips were swollen and lacerated, and she was covered in bruises and abrasions.

[58] *Id.* at *25.

Id. Mumford had a subdural hemorrhage over the base of the skull and around the brain stem, a diffused subarachnoid hemorrhage beneath the brain's fine covering and the tissue which extended over the top of the brain, and the brain was congested with blood. B80-81. Although Dr. Tobin could not conclude the precise cause of Mumford's fatal head injuries, she stated that Mumford suffered multiple blows that could have been caused by a non-cast iron frying pan, fists, or hitting drywall.[59] A229-30, 248. Due to the severity of some injuries, Dr. Tobin stated that had Mumford tumbled down the stairs, she would have had to have been thrown into the drywall rather than merely fallen. A229-30.

For postconviction, Taylor hired a forensic pathologist Ali Z. Hameli, M.D. At the evidentiary hearings, Dr. Hameli testified that in his opinion, Mumford "sustained multiple external blunt-force injuries non-fatal singly or in combination." A077. In his opinion, Mumford's death was caused by the intercranial injuries of the base of the skull, including subdural hemorrhage and compression of the brainstem, caused by the "fall and forcefully striking her head against the wall." A080. Dr. Hameli testified that Mumford died within a few hours of her impact with the wall but he did not opine as to her level of

[59] *See Taylor*, 2015 WL 7753046, at *25.

consciousness. A130. "Dr. Hameli was unable to say whether Mumford's fall down the stair way was accidental or not."[60]

Taylor alleges that the precise injury which caused Mumford's death was of paramount importance because while Taylor conceded he struck Mumford, he also testified that her fall down the stairs and collision with the wall was accidental. Therefore, Taylor argues that had Trial Counsel provided Dr. Hameli's testimony at trial, the jury would have acquitted him based on Dr. Hameli's opinion that Mumford's manner of death was undetermined and the cause was the fall down the stairs. Taylor's argument fails for the simple reason that he ignores the facts.

Although Superior Court found that Trial Counsel should have retained a forensic pathologist to determine Mumford's cause of death, it also determined, that counsel's decision not to do so did not matter because the evidence supported that Taylor in some manner beat Mumford to death.[61] Specifically, Superior Court stated "Dr. Hameli's opinions do not matter because they rest on Taylor's testimony about Mumford's fall down the stairway."[62] The jury rejected Taylor's story at trial that Mumford accidentally fell and "for good reason."[63] Because Dr. Hameli's postconviction testimony did nothing more than fit Taylor's belated version of events with Mumford's injuries, it did not assist Taylor.

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[60] *Id.*
[61] *Id.* at *26.
[62] *Id.*
[63] *Id.*

Taylor's trial testimony was not "believable,"[64] for a number of reasons including: 1) Taylor never told Det. Porter that Mumford fell down the stairs in an effort to prevent him from leaving;[65] 2) Taylor's statement to Det. Porter amounted to a confession by a guilty man who recognized "he is full of rage and that he is too dangerous to be around other people;" 3) Taylor's trial testimony was extremely detailed unlike the statement he made to Det. Porter; 4) Taylor's trial testimony was not supported by the evidence in the case and his flight reflected consciousness of guilt.[66]

At trial, the State presented Det. Porter's interview with Taylor at the time of Taylor's arrest on August 17, 2007.[67] Det. Porter asked Taylor what happened and Taylor told him that he snapped in a bad way and "fucked up." A049-50. Taylor said Mumford had a knife because she was cooking. A052. When he saw her with the knife, his initial rage started, which Taylor called a "black woman with a knife syndrome." *Id.* Mumford turned toward him with the knife as they were speaking to each other and Taylor picked up a frying pan and hit her. A051-52, 56. Taylor agreed with Det. Porter that it was a one-sided fight and he had no injuries from her. A052-53, 57. Talking about himself, Taylor said, "I don't ever want to see

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[64] *Id.*

[65] Defense counsel testified at the evidentiary hearings that they struggled with the number of different stories Taylor had told and therefore, it was not really credible to argue self-defense. (B180-84).

[66] *See Taylor*, 2015 WL 7753046, at *26.

[67] At Taylor's request, the transcript of that interview was entered into evidence at trial as State's Exhibit 124. (B110-12).

that man that acted that way again ever because that's not a good thing," and "obviously there's a part of me that I don't know exists and I don't want to see that no more." A054-55. Taylor said that he had "violent tendencies but nothing ever like that." A048. Taylor ripped Mumford's clothes off. A051. When Detective Porter commented, "I mean nothing happened after you rip her clothes off." Taylor responded, "[t]here was nothing that I wanted you know. It's nothing like that." A051. Despite talking to Det. Porter twice about leaving the townhouse, Taylor made no mention of anything happening on the stairs.[68] Nor did Taylor discuss any sexual acts occurring between him and Mumford. In sum, Superior Court found that in his statement to Det. Porter, Taylor said he did not know what happened but admitted it was a one-sided fight and "blamed it all on something that was not him and knew that he was going to jail and should not ever be around other inmates or guards again."[69]

When Taylor testified at trial two years later, he presented a strikingly different and more detailed picture of what occurred. Taylor had been drinking, having had at least a half pint of Crown Royal before he and Mumford argued. B103. Taylor stated that he was irritated with Mumford and that evening she had disrespected him and cursed him out in front of his friends. B82-85. Taylor asked Mumford to leave and she did, returning about 20 minutes later in a better mood.

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[68] *See Taylor*, 2015 WL 7753046, at *27.
[69] *Id.* at 31.

B85. Taylor's friends left around 10:00 pm. B85, 108. After that, Mumford became increasingly agitated and threw clothes around the house as Taylor watched. B88-89. Mumford then seemed to calm down and returned to the sink and started chopping food for dinner. B90-91. Taylor said he went to stand behind Mumford to grab a tumbler from the cabinet above her. A255; B91. Mumford spun around with a butcher knife. A255-56. Thinking she was trying to cut him, Taylor grabbed Mumford's hand as she grabbed his shirt and they struggled over the knife. A256-58. Taylor picked up a frying pan and, at first, swiped at the knife with it, but then struck her head with it. A157-58. They struggled all over the house, knocking things over as Mumford just became stronger and stronger. A259. Taylor finally got the knife away from Mumford and put it on top of the refrigerator. A260. He also put the frying pan down. *Id.* Mumford was holding her bleeding face and crying. A260-61. Taylor decided to leave and headed for the front door. A260-61. As he got to the first set of steps, Taylor said that Mumford grabbed his arm and jumped on his back to keep him from leaving. A262. Taylor spun around and they hit the wall but Mumford would not let go. A262-63. Taylor spun around again and they both fell down the stairs with Taylor on top of Mumford. A264. Mumford's head went through the wall at the bottom landing. A264-65. Taylor denied throwing or pushing Mumford down the steps. A264. Because her head was bleeding, Taylor told Mumford that she needed a

doctor but she refused and stated she was fine. B92-93. They went to the garage and washed the blood from her hair and then walked back into the house and took off her wet clothes. B93-98. This caused Mumford to become amorous and Taylor ripped off her bra and panties. B98-99. Mumford got cucumbers from the refrigerator and baby oil from the bedroom and they engaged in consensual sexual activity using the cucumbers, which Taylor photographed. A266-67. While taking the photographs, Taylor noticed Mumford's face swelling. B109. He took at least one more picture and then they went to the bathroom where Mumford spat blood. A267; B109. While Mumford stayed in the bathroom, Taylor went to the couch and fell asleep. A175-76. When he woke up, Mumford was dead in the bathroom. B100-02. Because she was dead, Taylor did not even consider calling 911. B102. He panicked and "got the hell out of there," ending up in Washington, D.C., where he was taken into police custody three days later. *Id.* When asked why he did not provide this detailed information to Detective Porter, Taylor stated repeatedly that he was not asked. B105-07.

On cross-examination, the State pointed out the many inconsistencies between Taylor's statement to Det. Porter and his trial testimony, repeatedly emphasizing that Taylor never told Det. Porter that Mumford was enraged and came at him with a knife so he hit her with a frying pan, that Mumford jumped on his back and they fell down the stairs together and her head went into the drywall,

or that Mumford became amorous after falling down the stairs and proposed to and did have consensual sexual activity with Taylor using cucumbers which he photographed.[70] As Superior Court properly determined, the fact that Taylor left out the "alleged fall" when he spoke to Det. Porter is powerful evidence that it never happened.[71]

The State argued to the jury that based upon the blood, clothing and destruction in the house, Mumford was beaten around the home and went hurdling down the steps. A171. The State argued that the crime scene showed a "vicious and sustained attack through the second and first floors of their home." B446. The State maintained "[a]ll of that conduct is the beating of Stephanie Mumford; not just the frying pan." B115. The State pointed out that Dr. Tobin opined that the source of Mumford's injuries, including the subarachnoid and subdural hematoma, could have been caused by a frying pan, a fist, a wall, or other flat surface. B114. As such, the State's theory was consistent with Superior Court's determination that Dr. Hameli's opinion about the cause of Mumford's death was irrelevant because it is largely consistent with Dr. Tobin's conclusion – Mumford died as a result of blunt force trauma to the head.[72]

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[70] *See Taylor*, 2015 WL 7753046, at *32.
[71] *Id.* at *33.
[72] *Id.*

Dr. Hameli's testimony, provided at the evidentiary hearing fell far short of calling into question the jury's verdict in this case. Indeed, Superior Court reasoned that Dr. Hameli's opinion that Mumford's primary cause of death was the collision with the wall at the base of the stairs was hardly surprising because the evidence showed that the drywall at both the base of the stairway and the base of landing had dents and Mumford's hairpieces, fake fingernails, clothing and dental appliance were on the stairway, while nothing belonging to Taylor was.[73] Mumford was badly injured and found dead while Taylor was virtually uninjured.[74] From the evidence, it appeared that Taylor either threw or pushed Mumford down the stairs instead of them falling together.[75]

Moreover, neither Dr. Hameli nor Dr. Tobin had first-hand knowledge of how Mumford's injury occurred. It was for the jury to decide the circumstances under which Mumford died based upon the evidence presented at trial. The jury rejected Taylor's testimony.[76]

To the extent that Taylor raises a new claim that a specific unanimity instruction was needed for the murder charge, Taylor failed to present this argument to the Superior Court. Because his issue was not fairly presented below,

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[73] *Id.* at *26.
[74] *Id.*
[75] *Id.*
[76] *Id.* at *33.

the interest of justice does not require this Court to consider it here.[77] In any case, a specific unanimity instruction was not required here. A specific unanimity instruction is required where criminal liability could be attributed to a defendant from two acts that are so wholly separate and distinct that a court could not be satisfied that the jurors were in substantial agreement as to the defendant's actions constituting commission of a crime.[78] That is not the case here. Taylor's actions in murdering Mumford were one continuous event for which he was charged.

As Superior Court found, Taylor failed to substantiate his claim of ineffective assistance of counsel regarding trial counsel's failure to consult a forensic pathologist.

5. "Cookware" Expert

Taylor argues that trial counsel were constitutionally ineffective for failing to consult a cookware expert to "determine the likelihood that the pan's apparent deformities were caused by it striking either a human body or head." Corr. Op. Br. at 50-51; A491-92. He claims the jury viewed the frying pan as the murder weapon because of its appearance. Corr. Op. Br. at 50. Superior Court denied his claim, finding there Taylor's trial counsel did not need to hire a cookware expert, nor was there any resulting prejudice to Taylor, because 1) the State did not argue that Taylor hit Mumford so hard with the frying pan that it was misshapen or that

[77] Del. Supr. Ct. R. 8.
[78] *See Probst v. State*, 547 A.2d 114, 121 (Del. 1988).

the frying pan was the murder weapon, and 2) "the mere fact that the deformities in the frying pan were not caused by Taylor hitting Mumford in the head with the frying pan does not mean that Taylor did not hit Mumford in the head with it."[79]

Taylor was charged by indictment with possessing a deadly weapon during the commission of a felony. A036. A "deadly weapon" includes any "'dangerous instrument,' which is used, or attempted to be used, to cause death or serious physical injury."[80] "Dangerous instrument" includes "any instrument . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury."[81]

Whether or not the warping of the pan was caused by a hit to Mumford, Taylor admitted he hit Mumford with it and he agreed with Det. Porter that the fight was one-sided. A052, 57, 257-58. The State argued that it was not one isolated injury, but the totality of the beating Taylor inflicted on Mumford that caused her death.[82] The State did not claim that the pan itself was the murder

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[79] *Taylor*, 2015 WL 7753046, at *35.
[80] 11 *Del. C.* § 222 (5).
[81] 11 *Del. C.* § 222(4).
[82] The State argued on rebuttal: "Nowhere are you required to determine or find that that is the instrument that caused the fatal injury. . . . Dr. Tobin testified that it was multiple injuries. Maybe one with the frying pan, maybe two, maybe more. . . . Multiple blunt force trauma could have been fists, could have been anything that caused the blunt force trauma to Stephanie Mumford's head.". A276. *See also* A229-30 (Dr. Tobin opining injuries were caused by blunt force or hard surface); B114 (State summarizing in closing Dr. Tobin's opinion).

weapon.[83] With or without the warping, the pan still qualified as a deadly weapon. Taylor attempted to use it to cause serious physical injury to Mumford.[84]

Taylor's contentions as to what the jury thought are nothing more than conclusory and unsupported allegations that are insufficient to establish a claim of ineffective assistance of counsel.[85] Superior Court did not err in denying this claim.

6. Plea Bargaining

Taylor claims that because trial counsel did not adequately investigate the cause of Mumford's death, they were unable to successfully argue for a plea to something less than Murder First Degree. Corr. Op. Br. at 51-53. Superior Court denied this claim, noting that it was premised on Taylor's mistaken belief that the State would have found his version of events at trial more credible if he had had experts "willing to testify at trial that Mumford sustained a fatal head injury when her head crashed into the wall" and "that the frying pan was not the murder

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[83] *See* A274 (State arguing in closing that Taylor was charged with possession of a deadly weapon, that weapon is the frying pan, and that Taylor admitted he possessed it and struck her with it once, maybe more).

[84] *See* A257-58 (Taylor testifying on direct examination that he hit Mumford *in the head* with the pan); B104 (Taylor acknowledging on cross that he might have hit her with the pan more than once); *Carter v. State*, 933 A.2d 774, 778 (Del. 2007) (noting that in determining whether an object is a deadly weapon, the circumstances considered include the actor's intent and manner of use, "[f]or example, a blow to an unprotected human head resulting from the force used with and by a lacrosse stick presents quite a different circumstance than a 'warding off' blow to a human's unprotected hand").

[85] *Younger*, 580 A.2d at 555-56.

weapon."[86] But, the court pointed out: "Taylor's problem in not being able to negotiate a better plea was not a lack of experts.[87] Taylor's problem was that his own statements and the undisputed evidence put him in a position where he was simply unable to negotiate a better plea." Superior Court was correct.

Taylor speculates that the State might have offered him a better plea had he provided the prosecutors with Dr. Hameli's and the cookware expert's opinions. Corr. Op. Br. at 51-52. However, notwithstanding Taylor's argument that the sum total of Mumford's injuries resulted from a mutual "fall" down the steps, he never mentioned such a fall to Detective Porter. *See* A038-61. Instead he told the detective that something snapped, they fought, he hit Mumford with a frying pan and the fight was one-sided. A049-52, 56-57. In addition, the evidence showed Mumford "lost several fake fingernails, some of her hair, part of her dentures, small amounts of blood, and reached the bottom of the steps with such force that her head went thru [sic] the dry wall." B150. And, the autopsy showed that Mumford's entire face was swollen; she had four purple eyelids, lacerated and swollen lips, and abrasions and bruises covering her body. A223-57; B73-81.

The horrific facts of this case militated against a reduced plea offer. Trial counsel realized this and reasonably explored a mental health defense in the hopes of receiving a reduced plea offer. B151-52. But, because Taylor disagreed with

[86] *Taylor*, 2015 WL 7753046, at *36.
[87] *Id.*

trial counsel's strategy, counsel were unable to effectuate a favorable plea resolution that considered Taylor's possible mental diagnosis. *Id.* As is evidenced by the State's letter, dated June 9, 2009, given the facts of this case, the State would not have offered a plea resolution short of Murder First Degree.[88] *Missouri v. Frye*[89] stands for the proposition that defense counsel has a duty to communicate with his client plea offers that the prosecution makes, not that he has a duty to lobby the prosecutor to make a more generous plea offer. Taylor has failed to satisfy either prong of the *Strickland* analysis, and Superior Court did not abuse its discretion in rejecting this claim.

7. Taylor's Chosen Trial Strategy

Taylor argues that trial counsel failed to conduct a sufficient investigation into his self-defense/accident claim and instead, against his wishes, unreasonably focused their time and resources on preparing a mental health defense that Taylor suffered from Dissociative Identity Disorder (DID). Corr. Op. Br. at 53-56. Taylor also claims counsels' comments to the court during *ex parte* hearings on his motions to disqualify counsel disparaged his credibility and disclosed confidential communications, resulting in a "complete denial of the right to counsel." *Id.* at 57-

[88] The June 9 letter states, "Please be advised that the plea offered extended by the State, to a charge of Murder in the First Degree, with a recommendation for life imprisonment without parole, is the only plea offer we intend to extend to Mr. Taylor. The evidence in this case, including Mr. Taylor's own statement does not support a self defense theory." A161.
[89] 132 S. Ct. 1399, 1408 (2012).

58. He argues prejudice should be presumed.[90] *Id.* at 58. In the alternative, he claims he was prejudiced because "it is impossible to believe" that when sentencing Taylor, the judge did not take into consideration the information he learned during those *ex parte* hearings. *Id.* Superior Court correctly rejected Taylor's arguments.[91]

At the evidentiary hearing, trial counsel stated that from the outset they pursued a mental health defense because of what they considered to be overwhelming evidence of Taylor's guilt. A434. When first interviewed, Taylor told them only that Stephanie had a knife in her hand and was "raising hell" when he went into the kitchen. B192-94. When she saw him, Stephanie turned around with the knife and that is when he "lost it" and "I hit her on the head with a frying pan. I think it was iron. Yes. Iron pan." B193.

Counsel testified that initially Taylor agreed with a mental health defense but later, changed his mind. B175, 178-79. Taylor was also on board with a guilty but mentally ill plea to first degree murder, and trial counsel were surprised when he refused to accept the plea when it was offered.[92] A459; B175, 177. Apart from

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[90] *See Sahin v. State*, 7 A.3d 450, 452 (Del. 2010) (noting prejudice is presumed, *inter alia*, when there is a complete denial of counsel (citing *United States v. Cronic*, 466 U.S. 648, 659-62 (1984))).

[91] *Taylor*, 2015 WL 7753046, at *37-38.

[92] Taylor was arrested on August 21, 2007. DI 1 at A001. Trial counsel told the court in an office conference prior to trial that Taylor was on board with a GBMI plea until at least July 2008. B45.

plea negotiations, counsel reviewed the physical evidence and prepared for trial. B176.

After Taylor rejected the State's plea offer in the summer of 2008, Trial Counsel was aware that Taylor no longer agreed with their strategy. B178-79. Once Taylor stated he wanted to pursue a self-defense/accident strategy, trial counsel pursued that objective, within the confines of the case's obvious factual limitations, including Taylor's varying stories, the disparity in size between him and the victim, and the obvious lack of facts supporting self-defense. B182-84. Trial counsel, nevertheless, still believed that Taylor's DID diagnosis could effectively be used to argue that Taylor did not intend Mumford's death. B187-88. Taylor's mid-trial refusal to allow Dr. Zingaro's testimony in the guilt phase of his trial foreclosed that option. B188.

Although trial counsel did not ultimately pursue a mental health defense, exploration of such a defense to justify Taylor's actions in killing Mumford was not unreasonable. Mental health evidence may corroborate a criminal defendant's actual belief[93] and a mental health defense was not inconsistent with Taylor's self-defense/accident theory.

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[93] *Cf. Daniels v. Woodford*, 428 F.3d 1181, 1207-1208 (9th Cir. 2005) (noting proof of petitioner's mental disorder together with evidence of his background, might "have demonstrated imperfect self-defense" or that he was incapable of forming the requisite intent to commit first degree murder); *Lang v. Cullen*, 725 F. Supp. 2d 925, 1015 (C.D. Cal. 2010); *In re Little*, 2008 WL 142832, at *16 (Cal. Ct. App. Jan. 16, 2008) (evidence of Little's PTSD could also have been potentially relevant in disproving that Little had the requisite state of mind for murder).

If a jury believed the facts as Taylor described them: 1) that he hit Mumford with the pan in response to seeing her come toward him with a knife; 2) they struggled and he hit her with a frying pan and disarmed her; 3) she ripped her own clothes off and tore up the condominium in her anger; 4) she jumped on him as he was leaving, which catapulted her into the wall at the base of the stairs; 5) she was dazed and bleeding from the head; 6) she then became amorous and suggested sexual relations with cucumbers, which he photographed; and 7) she subsequently died in the bathroom as he slept—evidence of a mental health disorder could have only assisted his claim.[94] Taylor has not demonstrated either constitutionally deficient representation or the prejudice required for relief under *Strickland.*

Moreover, to the extent that Taylor alleges that the representations trial counsel made to the Court "went far beyond what was necessary to identify a conflict and permit the Court to 'determine whether there is indeed a conflict between attorney and client,'" (Corr. Op. Br. at 56)[95] this claim is similarly meritless. Taylor went to great lengths to remove counsel. He attacked trial

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[94] At the evidentiary hearings, Mr. Calloway testified: "It was our belief that, at time of the incident, the defendant was having an episode of his multiple personality or identity disorder and that he could not have the conscious object, the intent, to commit a homicide because of that mental illness." B190-91.

[95] quoting *Cooke v. State*, 977 A.2d 803, 842 (Del. 2009).

counsel's performance and ethics before the trial judge, thus requiring counsel to defend and explain their actions.[96] *See, e.g.,* A125-58.

It is in Superior Court's discretion to appoint new counsel.[97] As such, at the April 23, 2009 representation hearing, occasioned by Taylor's motion to disqualify counsel and counsel's motion to withdraw, the Court necessarily had to vet issues between Taylor and his counsel.[98] Counsel advised the Court that at first Taylor admitted responsibility for his actions but stated they were not intentional. A110. Therefore, with Taylor's agreement, counsel explored Taylor's mental health issues, receiving a diagnosis of DID. A111-13. At some point, Taylor changed his mind and his story and wanted to claim self-defense instead. A114. When counsel told Taylor these new facts did not comport with facts already known to them, Taylor called them incompetent. *Id.* Counsel expressed concern to the Court about the ethics of presenting Taylor's defense. *Id.* Taylor told the Court that his

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[96] Taylor accused counsel of such things as refusing to prepare for trial and "refus[ing] to contemplate trial strategy other than a plea agreement," and grandly stated: "Defendant has thoroughly demonstrated that counsel Callaway and counsel Johnson has [sic] violated practically every rule in Delaware Lawyers Rule of Professional Conduct. And, in so doing, not only have they denied the defendant the degree of counsel guaranteed by the Sixth Amendment, they have demoralized the very code and ethics by which they have sworn to uphold." A135; B47.

[97] *Bultron v. State*, 897 A.2d 758, 763 (Del. 2006).

[98] *See Strickland*, 466 U.S. at 698 ("inquiry into counsel's conversations with defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions."). *See also City of Billings*, 932 P.2d 1058, 1060 (Mon. 1997) (stating that when first presented with allegations of ineffective assistance of counsel, the district court must make an initial inquiry into the nature of those complaints and determine if they are seemingly substantial. An inquiry may be adequate where the court "considered the defendant's factual complaints together with counsel's specific explanations addressing the complaints").

attorneys were not listening to him, did not like him, and were unqualified, and that guilty but mentally ill had some merit but he was "more interested in what actually took place." B48-51.

As Superior Court noted here, "it is common for a trial court judge to hear unfavorable things about a defendant – like a confession – that never becomes part of the evidence at trial."[99] Indeed, this Court held in *Jackson v. State*, a case in which this Court upheld a defendant's death sentence notwithstanding the fact that the sentencing judge had heard disparaging comments by a former trial counsel at side bar:

> As a necessary consequence of their evidentiary gatekeeping function, trial judges hear, see, and make judgments about inadmissible evidence regularly. That is equally true for bench trials, where the judge sits as both arbiter of law and factfinder, and for jury trials. . . . To be sure, review mechanisms exist to protect defendants in cases where the fact finder hearing of inadmissible evidence is so prejudicial as to create an unacceptable "appearance of impropriety" that could test reasonable lay persons' trust in the judicial system. But, although the "appearance of impropriety" standard is a potent tool, it does not invalidate judicial conduct in every instance.[100]

Taylor cannot show that the comments made by counsel were either deficient representation or caused him prejudice.[101] That counsel had to discuss

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[99] *Taylor*, 2015 WL 7753046, at * 38.
[100] 21 A.3d 27, 37-38 (Del. 2011) (quoting *Stevenson v. State*, 782 A.2d 249, 258 (Del. 2001).
[101] *Cf. Sahin*, 72 A.3d at 115 (finding no *Cronic* structural defect when "Sahin freely exercised his constitutional rights to plead not guilty and to proceed to trial. Sahin took the stand in his own defense and received the affirmative assistance of his counsel, who questioned Sahin on direct examination and adversarially tested the credibility of the witnesses before the trial judge.").

with the Court unflattering facts about Taylor that were nonetheless relevant to the determination of the proper course for Taylor's representation, does not amount to a valid claim of ineffectiveness. Moreover, Superior Court denied judicial bias in sentencing Taylor, and there is no evidence in the record to the contrary.[102]

8. Closing Statements

Taylor argues that trial counsel were ineffective for failing to object to misstatements made by the prosecutor in closing argument. Specifically, Taylor alleges the prosecutor erroneously: 1) stated that Luther "Pete" Mitchell testified that he missed a phone call from Mumford at 10:00 p.m.; and 2) suggested that Taylor had the burden to offer scientific proof to support his version of events. Corr. Op. Br. at 59-61. Superior Court correctly denied this claim, noting as to the first claim that 1) Taylor had not put the prosecutor's comment in context, and 2) the prosecutor's argument was supported by evidence.[103] Superior Court found no merit to Taylor's second argument, finding the prosecutor's statement was not an improper shifting of the burden of proof.[104] "The State merely used Taylor's words to show that Taylor's trial testimony was false because he testified differently at trial than when he spoke to Detective Porter long before the trial,

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[102] *Cf. id.* (finding no evidence of record supported an inference that defense counsel's negative statements about defendant created an objective appearance of bias by the judge).
[103] *Taylor*, 2015 WL 7753046, at *39.
[104] *Id.* at *41.

suggesting that Taylor had made up a story to explain facts . . . that he could not explain any other way."[105]

a. The missed phone call

In closing statements, the prosecutor argued that Luther "Pete" Mitchell was receiving phone calls from Mumford up until around 10:00 p.m. that night, when he missed a call from Mumford, and, according to Ms. Jung's testimony, she heard fighting from the Taylor/Mumford residence around 10:00 or 10:30 that "lasted 30 minutes, maybe more." A271, 274. The prosecutor then argued "[t]hat means the vicious attack was completed sometime around 11:00 o'clock." A274.

In fact, Mitchell did not testify that he missed a call from Mumford at 10:00 p.m. He stated that he last spoke with Mumford around 10:00 p.m and missed a call from the Taylor/Mumford residence at 1:50 a.m. A197-199. Because he did not answer it, Mitchell did not know who called him. *Id.* Ms. Jung's timing of the fight was independent evidence of the time of the crime, as was the fact that around 10:00 p.m. was the last time Mitchell spoke to Mumford.

In closing argument, a prosecutor may properly draw "legitimate inferences of the [defendant's] guilt that flow from the evidence."[106] Although the prosecutor mistakenly said that Mitchell missed a call from Mumford at 10:00, instead of

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[105] *Id.*

[106] *Hooks v. State,* 416 A.2d 189, 204 (Del. 1980); *see also Benson v. State*, 2014 WL 6998397, at *4 (Del. Dec. 1, 2014).

stating that that was the last time he spoke with her, her argument regarding the timing of the murder in relation to the phone calls to Mitchell was still a permissible and accurate comment on the evidence.[107] As noted by Superior Court, "there is no direct evidence that Mumford tried to call Mitchell at 1:50 a.m."[108] Taylor failed to show both deficient performance in trial counsel's failure to object and prejudice.

b. Taylor's memory

Next, Taylor argues the prosecutor improperly shifted the burden to the defense by arguing in closing:

> Even when Detective Porter asked about the hole in the drywall at the base of the steps and whether Stephanie was brought back upstairs or went back upstairs on her own, Emmett Taylor didn't know. He didn't know what happened. If he could put it in scientific facts, he would, but he couldn't. He didn't remember. And at best, he only vaguely remembered things like tearing off Stephanie's clothes.

A277-78. There was nothing improper about this statement. The prosecutor merely restated what Taylor told Det. Porter when he was interviewed: "if I could explain to you what happened, if I could put it in scientific facts, if I could write it down, I would. I can't tell you what possessed me, or us, because it came out of the sky blue from nowhere. I don't know." A048. Again, the prosecutor's statement was a legitimate comment on the evidence. The comment only

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[107] *See also* B[C93-94] (trial counsel agreeing there was a basis in evidence for the argument).
[108] *Taylor*, 2015 WL 7753046, at *40.

highlighted Taylor's lack of memory at the time of his arrest regarding the facts surrounding his self-defense claim. As Superior Court noted: "[t]he prosecutor merely used Taylor's own words to show that Taylor's trial testimony was a recent fabrication."[109] Defense counsel's failure to object to this statement does not amount to ineffective assistance of counsel.[110]

9. Unredacted Crime Scene Video

Taylor argues that trial counsel were ineffective for failing to object to the crime scene video, State's Exhibit 12, without first confirming that the sound was redacted.[111] Corr. Op. Br. at 62-63. Superior Court denied this claim, concluding that 1) trial counsel were not ineffective because they had no idea the commentary existed at the time, and 2) Taylor was unable to show he was prejudiced from it because the comments did not introduce anything that was not already before the jury through properly admitted evidence.[112] Superior Court was correct.

The crime scene video registered background sounds that included television noise and comments by unidentified individuals.[113] Taylor specifically complains about 30 seconds of a 24 minute video, consisting of low volume commentary by

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[109] *Taylor*, 2015 WL 7753046, at *41.
[110] *See also* B152 ("Your affiants are unable to agree that the jury was left with the conclusion that the defense had the burden to prove, with scientific evidence as to the cause of the hole in the dry wall.").
[111] This video was played for the jury during trial without sound, but with live narration by a police officer. A211.
[112] *Taylor*, 2015 WL 7753046, at *41-43.
[113] Superior Court Prothonotary has provided State Ex. 12 to this Court.

two unidentified, unseen individuals speaking off-camera while the detective is video-taping the kitchen. The following comments can be discerned: "We get up at the top of the landing, … blood here, broken plaster, a defect here, defect there, massive defect right there …"; "I'm thinking she's thrown here and all the way down to there, definitely impacted that … hard. Remind you of another scene, John, mmmhmm, has a little less blood, a little less blood." A few minutes later, an unseen man comments that it was a big struggle and a female voice states that someone said there was an argument.[114]

Testimony from the evidentiary hearing makes clear: 1) trial counsel were unaware the videotape had commentary (B171); 2) despite playing the videotape numerous times during the pendency of trial, trial counsel never heard the commentary (A444; B172); 3) after finding out post-trial that the tape had commentary, trial counsel were still unable to hear it even after several attempts on a number of different computers (A444); 4) trial counsel heard the commentary for the first time the day of the evidentiary hearings (A444-45); 5) it is unknown whether the jury played the videotape and if they did, whether they heard the commentary (B172-74); and 6) it is unknown what type of equipment existed in the jury room for viewing and listening to the videotape evidence at the time of the 2009 trial (B173-74).

[114] This is not a verbatim transcript. The sound on the videotape was poor and it had to be played at full volume a number of times in order to provide a reasonable recitation.

Taylor cannot substantiate a claim of ineffective assistance of counsel because of the failure to object to the commentary contained on the crime scene videotape. Counsel were unaware of its existence[115] and Taylor can show no prejudice.[116] To find prejudice, the Court would first have to speculate that the jury had the capability to and did watch the video, that they heard the commentary, and that their verdict was affected by the commentary. Blood, broken plaster, defects, a hard impact, an argument and a struggle were all facts that were placed into evidence multiple times during trial. Taylor himself testified that there was an argument and struggle. A255-63. He advised that Mumford jumped on his back, and then they went hurtling down the stairs with him on top of her and she impacted the wall twice hard and bled. A264-65. In addition, Dr. Tobin opined that while a fall against drywall was not likely to cause Mumford's injuries, a throw could have. A229-30.

The additional, barely audible ten-second commentary in the background about "she" being thrown in an undefined location did not cause Taylor any

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[115] Taylor claims the State knew about the commentary because the State asked that the video be muted during playback at trial. Corr. Op. Br. at 62. Taylor offers no proof. In actuality, the State requested that the video be muted so that the "extraneous background noises on the video would not be audible." A211.

[116] *See Franklin v. Sec'y, Florida Dep't of Corr.*, 2014 WL 6909694, at *8 (M.D. Fla. Dec. 9, 2014) (Counsel could not be ineffective for failing to call a witness of whom he was unaware); *United States v. Davidson*, 122 F.3d 531, 538 (8th Cir. 1997) ("Counsel cannot be deemed ineffective if he is unaware of the potential witnesses"); *People v. Buford*, 533 N.E.2d 472, 478 (1988) (finding no ineffective assistance of counsel where the facts show that during the trial and post-trial motions, defense counsel did not know of his past relationship with victim's son).

prejudice. As noted by Superior Court: "The jury did not find Taylor guilty of murdering Mumford because of the musings of a couple of police officers. It did so because of the mountain of evidence against Taylor, including his own inculpatory pretrial statements and preposterous trial testimony."[117]

[117] *Taylor*, 2015 WL 7753046, at *43.

II. SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING TAYLOR FAILED TO SUBSTANTIATE HIS CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL DURING THE PENALTY PHASE.

Question Presented

Whether Taylor demonstrated that his trial counsel provided ineffective assistance by during the penalty phase of his trial?

Standard of Review

This Court reviews a trial court's denial of a postconviction relief motion for an abuse of discretion.[118] Legal or constitutional questions are reviewed *de novo.*[119]

Argument

Taylor argues that trial counsel were ineffective for failing to: 1) object to the State calling Dr. Stephen Mechanick in its rebuttal case; 2) object to testimony about instances of Taylor's uncharged misconduct; and 3) successfully challenge the State's sole statutory aggravating factor. Taylor's claims are unavailing.

1. Dr. Mechanick's Rebuttal Testimony.[120]

Taylor argues that because he withdrew his intention to use a mental health defense in the guilt phase and chose not to testify in the penalty hearing, the Fifth

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[118] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (internal citations omitted).
[119] *Swan v. State,* 28 A.3d 362, 382 (Del. 2011) (internal citations omitted).
[120] Taylor also refers to the Delaware Constitution in this claim. Corr. Op. Br. at 68. Because he failed to brief the issue, however, any such claim is waived. *Murphy v. State*, 632 A.2d 1150, 1152 n.2 (Del. 1993). *See Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008) ("This Court has held that 'conclusory assertions that the Delaware Constitution has been violated will be considered to be waived on appeal.'" (citing *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005))).

and Eighth Amendments and 11 *Del. C.* § 4209(c) precluded the State from calling Dr. Mechanick in rebuttal to discuss his evaluation of Taylor. Corr. Op. Br. at 65-68. Because trial counsel did not object to Dr. Mechanick's testimony, Taylor claims they were constitutionally ineffective. *Id.* at 67. Superior Court disagreed and denied Taylor's claim. *Id.* at 66, 68. Superior Court was correct.

a. Taylor's Fifth Amendment right against self-incrimination

Taylor relies on the United States Supreme Court case of *Estelle v. Smith*,[121] for his argument that once he decided against a mental health defense, "any waiver of his Fifth Amendment right was vitiated," and the State's use of Dr. Mechanick's evaluation during the penalty phase violated his right against self-incrimination. Corr. Op. Br. at 66. In *Estelle*, the U.S. Supreme Court found a Fifth Amendment violation when the prosecution used a psychiatrist's testimony during the penalty phase to show future dangerousness.[122] Even though the defendant had not offered an insanity defense or introduced his own psychiatric evidence, the psychiatrist had examined the defendant at the court's request and had based his opinion, in part, on statements the defendants had made during the examination.[123]

The Supreme Court has explicitly limited the holding in *Estelle* to its facts, noting in *Penry v. Johnson*, that the "opinion in *Estelle* suggested that [the] holding

[121] 451 U.S. 454 (1981).
[122] *Id.* at 468.
[123] *Id.* at 464-66.

was limited to the 'distinct circumstances' presented there" and "the Fifth Amendment analysis might be different where a defendant 'intends to introduce psychiatric evidence at the penalty phase.'"[124] Moreover, in *Buchanan v. Kentucky,* the U.S. Supreme Court held that if a defendant presents psychiatric evidence and places his mental status in issue, then the defendant has no Fifth Amendment privilege against the introduction of psychiatric testimony in rebuttal by the prosecution.[125]

Recently, in *Kansas v. Cheever,*[126] the United States Supreme Court reaffirmed and clarified *Buchanan.* At trial in Kansas state court, Cheever presented expert testimony in support of a voluntary-intoxication defense.[127] The trial court permitted the state its own rebuttal expert, who had examined Cheever pursuant to a previous federal court-order.[128] *Cheever* upheld the trial court's decision, holding: "When a defendant presents evidence through a psychological expert who has examined him, the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who has also examined him."[129] The Court noted that to exclude such testimony would

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[124] 532 U.S. 782, 795 (2001) (quoting *Estelle*, 451 U.S. at 472).
[125] 483 U.S. 402, 422-23 (1987). In *Buchanan*, the defendant did not take the stand in his own defense, but presented a mental health defense by having a social worker read psychological reports and other records. *Id.* at 408-09.
[126] 134 S. Ct. 596 (Dec. 11, 2013).
[127] *Id.*
[128] *Id.* at 600.
[129] *Id.* at 601.

undermine the core truth-seeking function of trial.[130] "Any other rule would undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as proxy, with a one-sided and potentially inaccurate view of his mental state. . . ."[131]

The U.S. Supreme Court has not explicitly addressed the specific issue here – whether the State's use of psychiatric testimony in penalty phase rebuttal when the defendant has made his mental state an issue violates the defendant's Fifth Amendment right against self-incrimination. However, the Court has implied,[132] and other courts have extrapolated *Estelle* and *Buchanan* to mean, that the rule is the same in either trial phase. The State does not violate a defendant's right against self-incrimination when it rebuts a defendant's presentation of psychiatric evidence with statements he made during a mental exam.[133] Because Taylor placed his mental state at issue and presented his own statements through Drs. Walsh and

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[130] *Id.* at 602.
[131] *Id.* at 601.
[132] *See Estelle*, 451 at 472 ("Our holding based on the Fifth and Sixth Amendments will not prevent the State in capital cases from proving the defendant's future dangerousness as required by statute. A defendant may request or consent to a psychiatric examination concerning future dangerousness in the hope of escaping the death penalty. In addition, a different situation arises where a defendant intends to introduce U.S. psychiatric evidence at the penalty phase.").
[133] *See White v. Mitchell*, 431 F.3d 517, 537 (6th Cir. 2005) (finding no Fifth Amendment violation for State's use of competency evaluation to rebut mental health mitigating evidence during penalty phase when defendant requested evaluation pretrial to determine competency, but later withdrew insanity plea, then presented mitigating evidence regarding his mental state); *Szuchon v. Lehman*, 273 F.3d 299, 320 n.11 (3d Cir. 2001) (finding no error in Commonwealth's use of doctor's testimony and report at sentencing to rebut defendant's mitigation claims based on alleged mental deficiencies; noting admission of such evidence in penalty hearing was not inconsistent with decision in *Buchanan*).

Zingaro as part of his mitigation case in the penalty phase, the State was permitted to present its own mental health evidence to rebut Taylor's.[134]

b. Taylor's Eighth Amendment right to present mitigation

Taylor claims the State's use of Dr. Mechanick's testimony in rebuttal violated his right to present mitigation because the Eighth Amendment does not intend for "consideration of rebuttal evidence contesting a defendant's mitigating circumstances." Corr. Op. Br. at 67. The United States Supreme Court has held in capital cases, the Eighth Amendment requires that the sentencer must not be precluded from considering any mitigation "the defendant proffers as a basis for a sentence less than death."[135] The Court has never held, however, that the State is precluded from rebutting mitigation evidence.

In fact, the Court has expressed concern for both sides to the fairness of capital penalty, stating that "just as the defendant has the right to introduce any sort of relevant mitigating evidence, the State is entitled to rebut that evidence with proof of its own."[136] Taylor's Eighth Amendment argument is not supported by

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[134] *Cf. Re v. State*, 540 A.2d 423, 429 (Del. 1988) ("Under [*Estelle v.*] *Smith* and *Buchanan,* then, a defendant who either initiates a psychiatric examination *or* attempts to introduce psychiatric evidence may not challenge on either Fifth or Sixth Amendment grounds the prosecution's use of psychiatric evidence in rebuttal.").

[135] *Skipper v. S. Carolina*, 476 U.S. 1, 4 (1986) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

[136] *Dawson v. Delaware*, 503 U.S. 159, 167 (1992). *See also Payne v. Tennessee,* 501 U.S. 808, 825 (1991) ("[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in." (internal quotation marks omitted)).

Supreme Court precedent.[137]

c. State's right to rebut a defendant's mitigation case under § 4209

Taylor argues that Subsection 4209(c) of Title 11 does not permit the State to present rebuttal evidence. Corr. Op. Br. at 67. Superior Court disagreed, finding 1) subsection 4209(c) did not state that only the defense can offer mitigation, and 2) the State could appropriately rebut Taylor's mental health evidence.[138] Taylor claims Superior Court was wrong. Corr. Op. Br. at 67-68. He is mistaken.

"In construing a statute, a Court must first look to the text of the statute in its context to determine if it is ambiguous."[139] Subsection 4209(c) states that the evidence at the hearing "shall include matters relating to any mitigating circumstance and to any aggravating circumstance . . . ." Although the subsection does not specifically state that the State can present rebuttal evidence during the penalty hearing, it does provide that "evidence may be presented as to any matter that the Court deems relevant and admissible to the penalty to be imposed." This Court has held: "Where the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls. If uncertainty

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[137] *Cf. Payne*, 501 U.S. at 823("As we explained in rejecting the contention that expert testimony on future dangerousness should be excluded from capital trials, 'the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder.'"(quoting *Barefoot v. Estelle,* 463 U.S. 880, 898 (1983)).

[138] *Taylor*, 2015 WL 7753046, at *44.

[139] *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998).

exists, . . . rules of statutory construction are applied. To that end, the statute must be viewed as a whole, and literal or perceived interpretations which yield mischievous or absurd results are to be avoided."[140]

Here, the language of subsection 4209(c) clearly gives the court discretion to allow either side to present evidence relating to any mitigating circumstance. Taylor offered his mental health experts' DID diagnosis in mitigation. The court thereafter correctly allowed the State to present Dr. Mechanick's testimony, which was directly relevant to rebut Taylor's expert's diagnoses.[141]

d. Trial counsel not ineffective for failing to object to State's rebuttal

Because Dr. Mechanick's testimony was valid rebuttal evidence, trial counsel were not deficient in failing to object to it, as it would not have succeeded, and Taylor's claim of ineffective assistance of counsel fails. [142]

2. Uncharged Conduct Testimony

Taylor argues that trial counsel were ineffective because they did not object to the penalty phase testimony of Earline Harris about Taylor's uncharged acts of physical and sexual abuse on her. Corr. Op. Br. at 69-71. Taylor acknowledges

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[140] *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989).

[141] *Cf. Ortiz v. State*, 869 A.2d 285, 301 (Del. 2005) (finding court did not abuse its discretion in permitting State's rebuttal witness during penalty hearing when witness did not offer improper evidence of unadjudicated prior crimes).

[142] *Cf. Skinner v. State*, 607 A.2d 1170, 1173 (Del.1992) (holding that decision that claim based on underlying substantive issue would not have succeeded precluded a showing of prejudice on claim of ineffective assistance of counsel regarding issue); *Shelton v. State*, 744 A.2d 465, 503 n.183 (Del. 2000) ("[T]he Sixth Amendment does not require counsel to pursue meritless arguments before a court.").

that uncharged allegations of criminal conduct are admissible in a penalty hearing, but asserts trial counsel nevertheless should have objected in this case for Superior Court to make a ruling whether the acts were admissible under the Delaware rules of evidence. *Id.* at 69-70. Superior Court denied Taylor's claims, finding he could not show prejudice because, had trial counsel objected to Harris's testimony, the court would have overruled it.[143] Corr. Op. Br. at 70. Taylor asserts Superior Court applied the wrong standard in rejecting his claim. He is mistaken.

To support the non-statutory aggravating factors that Taylor had a prior history of domestic violence against women and a history of associating violence and sexual conduct (*see* B144), the State provided the live testimony of Earline Harris, who had been in a two-year relationship and had one child with Taylor. A284-316. Harris testified to three specific instances when Taylor beat her.

The first time Harris recalled being beaten was in October 1999 when an enraged Taylor hit her with a bottle and punched and hit her with his hands. A284-86. Harris did not make a police report. A286-90. In November 1999, Taylor punched her, knocked her from her chair, beat her with her crutch, dragged her inside the house, and beat her with a table leg. A288-90. Taylor then helped Harris wash off the blood, tied her to the bed and anally raped her. A290. After

[143] *Taylor*, 2015 WL7753046, at *45.

Taylor fell asleep, she escaped with her child. *Id.* Harris reported the incident to the police, but was too intimidated or embarrassed to report the rape. A290-91.

On Valentine's Day, 2002, Taylor and Harris argued and Taylor punched her in the face, stomped on her head, beat her and hit her in the head with a bicycle pump. A294, 297-298. During the beating, Taylor ordered Harris to make up the bed, and as she tried, he kicked her and ordered her to suck his penis, which she refused. A299. When Taylor dragged her outside, she caught the attention of a neighbor, who called the police. A300-01. Harris was hospitalized from February 14-18, 2002 with facial fractures. A301. Taylor was arrested and charged, and on September 11, 2006, he entered an *Alford*[144] plea in Mississippi to felony aggravated assault in violation of Miss. Code § 97-3-7(2)(a). A311-12; B1-4.

Evidence of unadjudicated crimes is admissible in a capital penalty proceeding if it is plain, clear and convincing.[145] Eyewitness testimony is normally sufficient to satisfy this standard.[146] Harris personally experienced Taylor's abuse. *See* A271-316. Moreover, her recollection was corroborated by medical records, photographs and police reports. *See* A302-05, 310-12. Harris's eyewitness

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[144] *North Carolina v. Alford*, 400 U.S. 25 (1970).
[145] *Ortiz v. State*, 869 A.2d 285, 301 (Del. 2005) (citing *State v. Cohen*, 634 A.2d 380, 391 (Del. Super. Ct. 1992) and *Getz v. State*, 538 A.2d 726, 734 (Del. 1988))).
[146] *See Johnson v. State*, 983 A.2d 904, 934 (Del. 2009) (finding eyewitness testimony at penalty hearing sufficient to prove unadjudicated misconduct was plain, clear and convincing).

testimony about the abuse satisfies the plain, clear and convincing standard.[147]

Taylor argues the court incorrectly applied the plain, clear and convincing standard to his case because the courts treat victim eyewitness testimony differently from other eyewitness testimony. Corr. Op. Br. at 70. His argument is specious and he does not provide legal support for it. Taylor fails to substantiate his claim of ineffective assistance of counsel.[148]

3. Taylor's *Alford* Plea

In the penalty phase, the State presented as its one statutory aggravating factor that Taylor had previously been convicted of a felony involving the use of force or violence upon another person. A335-36. The State presented certified records of Taylor's *Alford* plea to aggravated assault from Mississippi. A311-12; B1-4. Taylor's assault victim, Earline Harris, also testified about the incident. A294, 297-305. Prior to the penalty hearing, trial counsel filed a motion to preclude the State from using the plea as the State's statutory aggravator but Superior Court denied the motion, holding Taylor's *Alford* plea was a conviction

[147] *Cf. Monroe v. State*, 28 A.3d 418, 429 (Del. 2011) (finding eyewitness testimony of man who had been with defendant during prior robbery attempt was plain, clear and conclusive evidence of uncharged robbery attempt); *Johnson*, 983 A.2d at 934 (finding eyewitness testimony as to what defendant said to her and what she observed was plain, clear and convincing evidence of his prior unadjudicated conduct).

[148] *Cf. Skinner v. State*, 607 A.2d 1170, 1173 (Del. 1992) (holding that decision that claim based on underlying substantive issue would not have succeeded precluded a showing of prejudice on claim of ineffective assistance of counsel regarding issue); *Shelton v. State*, 744 A.2d 465, 503 n.183 (Del. 2000) ("[T]he Sixth Amendment does not require counsel to pursue meritless arguments before a court.").

for the purposes of establishing the State's aggravating factor under 11 *Del. C.* § 4209(e)(1)i. *See* DI 178 at A018, DI 187 at 019; A279-80; B52-58, 116-17.

Taylor argues that his trial counsel were ineffective for failing to either 1) introduce evidence of the nature of his *Alford* plea to Aggravated Assault as a plea in which a defendant maintains his innocence, or 2) request that the court instruct the jury that Taylor was not convicted after a jury trial. Corr. Op. Br. at 71-73. In denying Taylor's claim, Superior Court held that its decision that an *Alford* plea constitutes a conviction under 11 *Del. C.* § 4209(e)(1)i rendered irrelevant both the requested instruction and the evidence Taylor claims trial counsel should have introduced.[149] Taylor asserts the court erred in determining that an *Alford* plea constitutes a conviction. Corr. Op. Br. at 73. Taylor is incorrect.

The State must prove its statutory aggravators beyond a reasonable doubt.[150] Here, the State had to prove 1) that Taylor had been convicted of a felony and 2) that the felony involved the use of, or threat of, force or violence upon another person.[151] Whether or not Taylor's *Alford* plea amounted to a conviction under 11 *Del.* C. § 4209(e)(1)i is a legal question for the judge, not the jury, to decide.[152]

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[149] *Taylor*, 2015 WL 7753046, at *46.
[150] 11 *Del. C.* § 4209(e)(1).
[151] *Cf. Johnson*, 983 A.2d at 936 (noting that with regard to prior violent felony aggravator, State had to prove beyond a reasonable doubt that defendant was convicted of a felony and that the felony involved the use of, or threat of, force or violence upon another person).
[152] *See, e.g., Berra v. United States*, 351 U.S. 131, 134 (1956) (noting the role of the jury is to decide only the issues of fact, taking the law as given by the court (citing *Sparf v. United States*, 156 U.S. 51, 102 (1895))).

A *Robinson* plea is Delaware's version of the *Alford* plea.[153] A *Robinson* plea can serve as a predicate offense in the context of the habitual offender statute.[154] In *Smith v. State*, this Court applied Superior Court Criminal Rule 11 to a *Robinson* plea, noting that the rule provides that "a judgment of conviction upon a plea of guilty or *nolo contendere* may be admissible in any proceeding."[155] Notably, the Court found that Rule 11 applied to a *Robinson* plea despite the fact that the Rule does not include mention of such a plea. Similarly, several federal circuit courts have treated *Alford* pleas as convictions for sentence enhancement purposes even though the predicate statutes do not mention such pleas.[156]

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[153] *See Robinson v. State*, 291 A.2d 279 (Del. 1972) (eliminating requirement that defendant admit commission of offense for judge to accept plea).

[154] *See Smith v. State*, 2000 WL 628346, at *2 (Del. May 2, 2000) (finding unavailing defendant's claim that a judgment of conviction upon a *Robinson* plea cannot serve as a predicate offense under the habitual offender statute).

[155] *Id.* at *2; *See also State v. Winn*, 2010 WL 2477867, at *2 (Del. Super. June 17, 2010) ("It is not clear from the record whether Defendant entered a *nolo contendere* plea or a *Robinson* plea on the Escape After Conviction charge. The difference is immaterial because the State can use either a *nolo contendere* plea or a *Robinson* plea to support a habitual offender petition."), *aff'd,* 15 A.3d 218 (Del. 2011).

[156] *See United States v. King*, 673 F.3d 274, 282 (4th Cir. 2012) (finding a trial court's acceptance of an *Alford* plea qualifies as an "adjudication of guilt" under U.S.S.G. § 4A1.2(a)(1) (defining prior sentence to include "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*")); *United States v. Guerrero-Velasquez*, 434 F.3d 1193, 1197 (9th Cir. 2006) (finding *Alford* plea constitutes conviction under U.S.S.G. § 2L1.2(b)(1)(A) (sentence enhancement provision for unlawfully entering or remaining in U.S. after previous deportation for enumerated convictions); noting "[t]he question under the sentencing guidelines is whether a defendant has "a *conviction* for a ... crime of violence," not whether the defendant has admitted to being guilty of such a crime" (emphasis in original)); *United States v. Martinez*, 30 F. App'x 900, 905 (10th Cir. 2002) ("We agree with the government that an *Alford* plea is an 'adjudication of guilt' under § 4A1.2(e)(1) and therefore can properly be counted as a prior sentence under the USSG."); *United States v. Mackins*, 218 F.3d 263, 268 (3d Cir. 2000) (concluding that "an *Alford* plea is, without doubt, an adjudication

Moreover, an *Alford* plea is essentially a *nolo contendere* plea, and, therefore, is a conviction.[157] Although a plea of *nolo contendere* is inadmissible under Super. Ct. Crim. R. 11(e)(4) in any civil or criminal proceeding, a judgment of conviction upon a plea of *nolo contendere* is admissible in any proceeding. As such, Delaware courts permit the use of judgments of conviction on *nolo contendere* pleas to establish habitual offender status[158] and, as here, as evidence during a penalty hearing on a first degree murder conviction.[159]

Because Superior Court determined that Taylor's *Alford* plea amounted to a conviction, it would have been improper for the Court to have instructed the jury about the nature of an *Alford* plea. Taylor, however, argues that *Norman v.*

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of guilt and is no different than any other guilty plea" for purposes of establishing the defendant's federal criminal history category).

[157] *See, e.g.*, *State v. Connor*, 2005 WL 147931, at *4 n.15 (Del. Super. Jan. 19, 2005) ("[C]ourts have held that an *Alford* plea constitutes 'a guilty plea in the same way that a plea of no contest is a guilty plea.'" (Quoting *State v. Alston,* 534 S.E.2d 666, 669 (N.C.Ct.App. 2000))); 11 *Del. C.* § 222 ("'Conviction' means a verdict of guilty by the trier of fact, whether judge or jury, or a plea of guilty or a plea of *nolo contendere* accepted by the court.").

[158] *See, e.g., State v. LeCato*, 2001 WL 1628311, at *2 (Del. Super. Oct. 22, 2001) *aff'd,* 791 A.2d 750 (Del. 2002) ("While a plea of *nolo contendere* is not admissible against the defendant, a judgment of conviction resulting from such a plea is admissible to establish habitual offender status." (citing *Smith v. State*, 2000 WL 628346 *2 (Del. May 2, 2000))). *See also Mackins*, 218 F.3d at 268 (concluding that "an *Alford* plea is, without doubt, an adjudication of guilt and is no different than any other guilty plea" for purposes of establishing the defendant's federal criminal history category).

[159] 11 *Del. C.* § 4209(c) ("The record of any prior criminal convictions and pleas of guilty or pleas of *nolo contendere* of the defendant or the absence of any such prior criminal convictions and pleas shall also be admissible in evidence."). *See also State v. Deputy*, 1989 WL 158454, at *8 (Del. Super. Dec. 12, 1989) (holding a *Robinson* plea was properly admitted during the penalty phase as evidence of an aggravating circumstance and noting, "[t]he legislature clearly intended for *Robinson* pleas to be admissible under [11 *Del. C.* § 4209(c)(1)].").

State,[160] supports his argument that he should have been allowed to tell the jury that he had maintained his innocence despite his plea. Corr. Op. Br. at 71-72. Taylor's case is distinguishable from *Norman* in two key respects.

First, *Norman* involved out-of-state unadjudicated conduct, not a conviction.[161] Second, and most importantly, an *Alford* plea does not evidence lack of criminal responsibility or legal mitigation for that judgment of conviction.[162] As the United State Supreme Court has noted:

> *Alford* is based on the fact that the defendant could intelligently have concluded that, whether he believed himself to be innocent and whether he could bring himself to admit guilt or not, the State's case against him was so strong that he would have been convicted anyway. Since such a defendant has every incentive to conclude otherwise, *such a decision* made after consultation with counsel *is viewed as a sufficiently reliable substitute for a jury verdict that a judgment may be entered against the defendant.*[163]

Because Taylor's *Alford* plea resulted in a judgment of conviction, he was not entitled to argue his conviction was invalid because he maintained his innocence.

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[160] 976 A.2d 843 (Del. 2009).
[161] *Id.* at 870.
[162] *Compare id.* ("[W]hen the State uses the defendant's unadjudicated conduct in another jurisdiction to establish an aggravating factor, the defendant's lack of criminal responsibility under the law of that jurisdiction is a relevant mitigating circumstance which, if offered by the defendant, must be considered by the jury and judge. Just as the jury must be properly instructed on Delaware law applicable to the aggravating factor, it must also be properly instructed on the non-Delaware law applicable to any legal mitigation of conduct in another state.") *with Mackins*, 218 F.3d at 268 (noting that "the [*Alford*] Court was persuaded that once a factual basis for guilt is established, the fact that the defendant may continue to proclaim his innocence does not negate the legal conclusion that he is guilty" (citations omitted)).
[163] *Henderson v. Morgan*, 426 U.S. 637, 648 n.1 (1976) (emphasis added).

Moreover, Taylor cannot show how maintaining his innocence on the charge of aggravated assault would have convinced the jury there was reasonable doubt as to the statutory aggravating factor. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding."[164] A defendant must show that had a reasonable jury in these circumstances been confronted with the evidence, there is a reasonable probability it would have returned a different sentence.[165]

The *Alford* plea legally amounted to a conviction. The only issue left for the jury to decide was whether Taylor's prior conviction involved the use of force or violence upon another person. Harris testified about the assault (A297-305) and the State submitted photographs, her prior written statement and medical records that corroborated her testimony (A302-03, 310-12). Dr. Zingaro also testified that Taylor admitted to him that he had hit Harris so hard that she was admitted to intensive care and he was arrested. B136. Certainly the jury was not likely to be convinced that the incidence of violence had not occurred when Taylor himself admitted it had. Superior Court did not err in denying this claim. Taylor failed to support his assertion of ineffective assistance of trial counsel.

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[164] *Strickland v. Washington*, 466 U.S. 668, 693 (1984). *Accord Swan v. State*, 28 A.3d 362, 391 (Del. 2011).
[165] *Swan*, 28 A.2d at 392.

III. SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING TAYLOR FAILED TO SUBSTANTIATE HIS CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Question Presented

Whether Taylor was able to show that his appellate counsel provided ineffective assistance on direct appeal?

Standard of Review

This Court reviews a trial court's denial of a postconviction relief motion for an abuse of discretion.[166] Legal or constitutional questions are reviewed *de novo.*[167]

Argument

Taylor claims his appellate counsel were ineffective on direct appeal for failing to: 1) appeal Superior Court's denial of trial counsel's challenge to the constitutionality of the Delaware death penalty statute; 2) challenge Superior Court's ruling that Taylor's *Alford* plea constituted a conviction for purposes of 11 *Del. C.* § 4209(e)(1)i; 3) challenge on plain error grounds, (a) the State's failure to provide the name of Ms. Jung's husband, (b) admission of the evidence bag labelled "fry pan with blood, " (c) provision of the crime scene video to the jury without sound redacted, and (d) statements made by the State during closing

[166] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (internal citations omitted).
[167] *Swan v. State,* 28 A.3d 362, 382 (Del. 2011) (internal citations omitted).

argument; and 4) challenge the State's use of Dr. Mechanick's testimony and the admission of uncharged conduct in the penalty phase. Corr. Op. Br. at 74-82.

A defendant's right to effective assistance of counsel extends to his appeal.[168] As in the case of trial counsel, the *Strickland* test is used to evaluate appellate counsels' performance.[169] Although a defendant is entitled to effective assistance of counsel during an appeal, this does not mean that his attorney must raise every non-frivolous issue.[170] A defendant can only show that his appellate counsel ineffectively represented him where the attorney omits issues that are clearly stronger than those the attorney presented.[171] To determine whether a defendant has been prejudiced because his attorney failed to raise an issue on appeal, a court must consider the issue's merits.

Appellate counsel raised four issues on direct appeal: 1) Taylor was denied his Sixth Amendment right to effective assistance of counsel because Superior Court prevented defense counsel from pursuing a guilty but mentally ill defense over Taylor's objection; 2) the *Cooke* decision violated the Sixth Amendment; 3) Superior Court erred in denying Taylor's motion for judgment of acquittal on the abuse of a corpse charge; and 4) Superior Court "arbitrarily and capriciously imposed the death sentence by not individually addressing each mitigating

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[168] *Evitts v. Lucey*, 469 U.S. 387, 396-397 (1985).
[169] *Flamer*, 585 A.2d at 753 (citing *Strickland, 466 U.S. 668*).
[170] *See Jones v. Barnes*, 463 U.S. 745 (1983).
[171] *See Ploof v. State*, 75 A.3d 811, 832 (Del. 2013).

circumstance."[172] Also, pursuant to 11 *Del. C.* § 4209(g), this Court was required to review Taylor's death sentence to determine "whether (1) the evidence supports, beyond a reasonable doubt, the jury's finding of the particular aggravating circumstances, (2) the judge arbitrarily or capriciously imposed Taylor's death sentence or the jury arbitrarily or capriciously recommended it, and (3) the sentence was disproportionate to the penalty imposed in similar cases."[173] This Court affirmed Taylor's conviction and death sentence.[174]

1. Constitutionality of Death Penalty Statute

On March 26, 2008, Taylor filed a pretrial "Motion to Declare the Death Penalty Unconstitutional." DI 21 at A003; B8-16. The State responded on May 6, 2008 and Superior Court denied the motion on October 18, 2009, noting that this Court had already considered and rejected Taylor's arguments in other cases.[175] DI 30 at A003, DI 162 at A016. B70. Appellate counsel did not thereafter raise the issue on direct appeal.

In postconviction, Taylor renewed his argument and further claimed his appellate counsel were ineffective for failing to challenge Superior Court's determination that Delaware's death penalty statute was constitutional. A548-553.

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[172] *Taylor v. State*, 28 A.3d 399, 405 (Del. 2011).
[173] *Id.*
[174] *Id.* at 411.
[175] *See Starling v. State*, 882 A.2d 747, 757 (Del. 2005); *Ortiz v. State*, 869 A.2d 285, 306 (Del. 2005); *Brice v. State*, 815 A.2d 314, 321-22 (Del. 2003).

Superior Court again denied Taylor's claims.[176] Superior Court also determined appellate counsel were not ineffective for failing to raise the issue on appeal.[177] Taylor's attempt to reargue that appellate counsel were ineffective for failing to challenge Superior Court's denial of trial counsel's motion or in the alternative, ask this Court to summarily vacate Taylor's death sentence because the Delaware Death penalty is no longer sound, fail. Appellate counsel were not ineffective because, based on the state law at the time, a challenge on appeal to the constitutionality of 11 *Del. C.* § 4209 would have failed. This Court has consistently upheld the constitutionality of Delaware's death penalty statute.[178] Appellate counsel cannot be faulted for failing to pursue this claim.

The United States Supreme Court's January 2016 decision in *Hurst v. Florida*[179] found that Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring v. Arizona*,[180] because it permits a judge to increase a defendant's sentence from life to death based on her own factfinding.[181] The Court also overruled its prior decisions in *Spaziano v. Florida* and *Hildwin v. Florida* "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death

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[176] *Taylor*, 2015 WL 7753046, at *46.
[177] *Id.* at *46, 48.
[178] *See, e.g., Brice*, 815 A.2d at 318; *Swan*, 820 A.2d at 259; *Cabrera v. State*, 840 A.2d 1256, 1273-74 (Del. 2004); *Ortiz*, 869 A.2d at 305.
[179] 136 S.Ct. 616 (2016).
[180] 536 U.S. 584 (2002).
[181] *Hurst*, 136 S.Ct. at 621-22.

penalty."[182] This Court is currently prepared to consider certified questions in *Rauf v. State*[183] regarding the constitutionality of § 4209 in light of *Hurst* and *Kansas v. Carr*.[184] Even if this Court were to find in *Rauf* that portions of Delaware's death penalty statute are unconstitutional, that decision would not apply to Taylor. *Hurst* is an extension of *Ring*, and, therefore involves a procedural, not a substantive law change.[185] Procedural rule changes, such as the one announced in *Hurst*, do not apply retroactively.[186]

2. Taylor's *Alford* Plea

Taylor argues appellate counsel were ineffective for failing to challenge Superior Court's denial of his Motion to preclude the State's use of his *Alford* plea to prove the State's statutory aggravator. Corr. Op. Br. at 78. Taylor asserts counsel should have argued 1) an *Alford* plea does not constitute a conviction under 11 *Del. C.* § 4209(c)(1), and 2) Superior Court's ruling violated Taylor's Sixth Amendment right to have the jury find every element of an alleged capital crime beyond a reasonable doubt. *Id.* at 79. Taylor's claim is unavailing.

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[182] *Hurst*, 136 S.Ct. at 624.
[183] No. 36, 2016
[184] 136 S. Ct. 633, 642 (2016) (finding Eighth Amendment does not require capital sentencing courts to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt).
[185] *See Schriro v. Summerlin*, 542 U.S. 348, 351-54 (2004) (holding the rule in *Ring* was procedural, rather than substantive).
[186] *See id.* at 353-58 (noting in reference to *Ring* that "[r]ules that allocate decisionmaking authority in this fashion are prototypical procedural rules" and that *Ring*'s rule did not fit either of the two exceptions to the general rule of nonretroactivity for federal habeas corpus collateral review cases).

Appellate counsel did consider the issue of whether an *Alford* plea could be used to prove the State's sole statutory aggravator in Taylor's case. *See* B160-61. They concluded there was no good faith basis to raise the issue on direct appeal. *Id.* at 3. During the evidentiary hearings, appellate attorney, Nicole Walker, testified that she "did do some research of case law in other states," but that she did not locate a Delaware case directly on point. B195. She noted that "the majority of the cases that [she] found said that [use of an *Alford* plea] would be acceptable . . . as an aggravator." *Id.* Walker's conclusions comport with Delaware case law and decisions in other jurisdictions.[187] Appellate counsel's decision to forego the *Alford* plea issue was strategically sound, and therefore, was not constitutionally ineffective.[188]

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[187] *Cf. State v. Deputy*, 1989 WL 158454, at *8 (Del. Super. Dec. 12, 1989) ("The legislature clearly intended for *Robinson* pleas to be admissible under [11 *Del. C.* § 4209(c)(1)]. *Robinson* pleas, more so than pleas of *nolo contendere,* are evidence of the culpability of a defendant and are, therefore, proper for the jury to hear."). At least two high courts in other states have found that no contest pleas can be used to prove the same violent felony statutory aggravator at issue in this case. *See State v. Teague*, 680 S.W.2d 785, 788-89 (Tenn. 1984) ("A conviction based on the plea, however, may be used to enhance punishment in the same manner as a conviction after a not guilty plea, unless there is a specific statute to the contrary. We have no statute or Rule of Criminal Procedure that prohibits the use of a conviction on a plea of *nolo contendere* to enhance punishment." (internal citations omitted)); *State v. Holden*, 362 S.E.2d 513, 535-36 (N.C. 1987) (holding no contest plea was a conviction for purpose of proving statutory aggravating factor that defendant had been previously convicted of a felony involving use or threat of violence to a person).

[188] *Cf. Watson v. State*, 1991 WL 181468, *2 (Del. Aug. 22, 1991) ("Appellate counsel is not constitutionally required to raise all non-frivolous claims on direct appeal. Indeed, diligent counsel is expected to weed through any non-frivolous issues arguably presented by the record and confine the appeal to presenting those, which in his or her professional judgment, appear to be the strongest." (citations omitted)).

The second part of Taylor's argument was initially raised only in his Second Amendment to his Motion for Postconviction Relief, filed after the evidentiary hearing.[189] *See* DI 345 at A034; A553-57. Although Taylor cites no legal support for this argument, it seems to be based on the idea from *Apprendi v. New Jersey* that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[190] Prior convictions, however, are specifically excluded from that rule.[191] And, in any case, to the extent there were facts to be found, i.e., that the conviction involved the use of force, they were submitted to the jury, and proved.[192] Taylor failed to show that appellate counsel were ineffective for failing to make this argument.

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[189] Appellate counsel have not had a chance to respond to this allegation.

[190] 530 U.S. 466, 490 (2000). *See also Ring v. Arizona,* 536 U.S. 584, 589 (2002) (applying *Apprendi* to Arizona's death-penalty scheme and finding "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment").

[191] *Apprendi*, 540 U.S. at 490 ("*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added)). *See also Ring*, 536 U.S. at 597 ("Ring therefore does not challenge *Almendarez–Torres v. United States,* 523 U.S. 224, [] (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence."); *Moody v. State*, 888 So. 2d 532, 597-98 (Ala. Crim. App. 2003) ("[W]hile the Supreme Court in *Ring* extended *Apprendi* to death-penalty cases, it did not purport to alter the express exemption in *Apprendi* for the fact of a prior conviction.").

[192] For discussion of this issue, *see supra at* .

3. Jung's Husband, Evidence Bag, Crime Scene Video and Closings

a. State's Brady obligations

Superior Court correctly found that appellate counsel were not ineffective for failing to allege the State violated *Brady*[193] for not providing trial counsel with the name of Ms. Jung's husband. First, as stated above, such a claim would not have been successful. The three components to a *Brady* violation are: 1) the evidence must be favorable to the accused because it is exculpatory or impeaching; 2) the evidence was suppressed by the State (either willfully or inadvertently); and 3) there must be prejudice to the defendant as a result.[194] "Whether a '*Brady* violation' has occurred often turns on the third component—materiality."[195] Evidence is material "only when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'"[196] Reasonable probability of a different result is shown when the absence of the undisclosed evidence "undermines confidence in the outcome of the trial."[197]

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[193] *Brady v. Maryland*, 373 U.S. 83 (1963).
[194] *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999), quoted in *Starling v. State*, 882 A.2d 747, 756 (Del. 2005)).
[195] *Wright v. State*, 91 A.3d 972, 988 (Del. 2014).
[196] *Starling*, 882 A.2d at 756 (quoting *Jackson v. State*, 770 A.2d 506, 516 (Del. 2001). *See also Strickler*, 527 U.S. at 281 ("[T]here is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.").
[197] *Jackson*, 770 A.2d at 516 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

The fact that Ms. Jung's husband *might* have provided testimony that would have conflicted with his wife's version of events is not information that undermines confidence in the outcome of the trial. A reviewing court is not required to order "a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict.'"[198] Even in the extremely unlikely case that Ms. Jung's husband's statement might have been *Brady* material, i.e. exculpatory or evidence that could have been used to impeach Jung's testimony, it was not material. Thus, the State's failure to provide the name of Ms. Jung's husband was not a *Brady* violation. Moreover, this claim would not have resulted in reversal of Taylor's conviction on direct appeal because other evidence overwhelmingly established his guilt.[199] Taylor cannot establish a reasonable probability that, but for his counsel's failure to raise this *Brady* issue, he would have prevailed on his appeal.

b. "Fry Pan with Blood" Issue

"Defendant counsel cannot be deemed ineffective for failing to raise issues that lack merit."[200] Police did a presumptive test on the fry pan which was returned positive for the presence of blood. A425, 430; B167. Moreover, Taylor admitted

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[198] *Wright*, 91 A.3d at 988.

[199] *Cf. Jackson*, 770 A.2d at 516-517 (finding State's suppression of evidence of witness's implicit agreement with prosecutors in exchange for testimony did not "put the case in such a light 'as to undermine confidence in the verdict' because overwhelming evidence established defendant's guilt).

[200] *State v. Merritt*, 2012 WL 5944433, at *7 (Del. Super. Nov. 20, 2012), *aff'd*, 2013 WL 5432824 (Del. Sept. 24, 2013).

striking Mumford with the frying pan and that she was bleeding.[201] Later lab tests, however, came back negative for human blood. *See* A-217.

Any prejudice from the admission into evidence of the frying pan with its label was mitigated by the testimony of State witness, Jennifer Van Zanten (DNA casework manager from the Medical Examiner's office) that the fry pan did not have blood on it and the fact that no one argued that it did. A217. Because trial counsel did not object to the admission of the fry pan with its evidence labeling, the issue would have been reviewed on appeal for plain error.[202] "[T]he doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[203] That was not the case here. Appellate counsels' failure to raise this issue on appeal was not ineffective assistance of counsel.

c. Provision of crime scene video to the jury without sound redacted.

Taylor raises this claim for the first time on appeal. Because Taylor failed to fairly present the issue below, the interest of justice does not require this Court to consider it now.[204] In any case, appellate counsel cannot be faulted for failing to

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[201] *See* B147.
[202] *See Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) ("Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.").
[203] *Id.*

raise this issue on appeal when trial counsel were unaware that the crime scene video had commentary.[205]

d. Arguments in Closing and Rebuttal Statements

Appellate Counsel testified during the evidentiary hearing that she reviewed the State's closing arguments for improper comments. She stated that the two comments Taylor raised in postconviction did not attract her attention. B196-97. That is so because the statements were not improper.

As noted, *supra*, the prosecutor's argument regarding the timing of the murder in relation to the phone calls to "Pete" Mitchell was a permissible comment on the evidence. The prosecutor's repetition of what Taylor said to Det. Porter about being unable to explain what happened (A277-78) was nothing more than recitation of facts in evidence and therefore also a legitimate comment on the evidence. Taylor failed to show ineffective assistance of counsel.[206]

4. Psychiatric Rebuttal Testimony and Uncharged Bad Acts

a. Dr. Mechanick's Testimony

Taylor failed to show that Appellate counsel were ineffective for failing to challenge the State's use of Dr. Mechanick's testimony during the penalty hearing.

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[204] Del. Supr. Ct. R. 8.

[205] *See* discussion of this issue, *supra* at .

[206] *Cf. Zebroski v. State*, 822 A.2d 1038, 1051 (Del. 2003) (finding no error or ineffective assistance resulting from appellate counsel's strategic choice to omit a questionable argument on appeal).

As previously discussed, 11 *Del. C.* § 4209(c) provides that "evidence may be presented as to any matter that the Court deems relevant and admissible to the penalty to be imposed." The United States Supreme Court has held that the state has the right to rebut a defendant's mitigating evidence during a penalty hearing.[207] Moreover, prior to 2009, Delaware courts had permitted rebuttal evidence during death penalty hearings.[208] Appellate counsel had no reason to believe a challenge under the Eighth Amendment to the State's ability to present rebuttal evidence at the penalty phase would have been successful.

At the time appellate counsel would have considered this issue, the Supreme Court had held in *Buchanan v. Kentucky* that if a defendant places his mental status in issue, he has no Fifth Amendment privilege against the introduction of psychiatric testimony in rebuttal by the prosecution.[209] Appellate counsel had no reason to believe that *Buchanan* would not apply to the penalty phase as well as to the guilt phase and therefore, cannot be faulted for failing to pursue the issue on appeal. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the

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[207] *Dawson v. Delaware*, 503 U.S. 159, 167 (1992).

[208] *See, e.g., Ortiz v. State*, 869 A.2d 285, 300 (Del. 2005) (finding no error in trial court's admission of State's rebuttal witness in penalty phase despite his testimony about unadjudicated crimes). *See also State v. Sullivan*, 1996 WL 191169, at *2 (Del. Super. Mar. 18, 1996) ("Here trial counsels' decision not to pursue an accomplice liability theory at the penalty phase was a reasonable one intended to avoid damaging rebuttal evidence."), *aff'd*, 676 A.2d 908 (Del. 1996).

[209] 483 U.S. 402, 422-23 (1987).

circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."[210]

b. Earline Harris's allegations of uncharged conduct

Appellate counsel were not ineffective for failing to challenge the admission into evidence at the penalty phase of Earline Harris's allegations of Taylor's uncharged misconduct in Mississippi. As noted, *supra*, such claim would not have been successful. Evidence of unadjudicated conduct is admissible in a capital penalty hearing if it is plain, clear and convincing. Harris's eyewitness testimony satisfied this standard. Appellate counsel correctly concluded that there was no good faith basis to raise this issue. *See* B163. "A strategy, which structures appellate arguments on 'those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.'"[211]

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[210] *Strickland*, 466 U.S. at 689.

[211] *Flamer v. State*, 585 A.2d 736, 758 (Del. 1990) (quoting *Smith v. Murray,* 477 U.S. 527, 536, (1986)). *Cf. also Zebroski v. State*, 822 A.2d 1038, 1051 (Del. 2003) (finding no error or ineffective assistance resulting from appellate counsel's strategic choice to omit a questionable argument on appeal); *Washington v. State*, 2008 WL 697591, at *2 (Del. Mar. 17, 2008) (finding appellate counsel not ineffective because there was little chance hearsay argument would have been successful).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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CERTIFICATION OF MAILING/SERVICE

The undersigned certifies that on March 11, 2016, she caused the attached *State's Answering Brief* and *Appendix to State's Anwering Brief* to be delivered to the following persons in the form and manner indicated:

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