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Case Number 108,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY PLOOF,	)	
	)	
Defendant Below-	)	No. 108, 2012
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE'S ANSWERING BRIEF

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DATE: October 8, 2012

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NATURE AND STAGE OF PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as set forth in Appellant Gary W. Ploof's September 17, 2012 Opening Brief. This is the State's Answering Brief in opposition to Ploof's appeal of the January 30, 2012 decision of the Kent County Superior Court's denial of post-conviction relief to this capital defendant.

SUMMARY OF ARGUMENT

I. DENIED. Former counsel was not ineffective at the pretrial and guilt phases of the Superior Court trial, or in failing to reassert on direct appeal defense objections and mistrial motions rejected at trial. The Superior Court conducted an evidentiary hearing in 2010 on Ploof's ineffectiveness allegations. There was no abuse of discretion in denying post-conviction relief as to any of the claims Ploof now argues. Trial counsel was not professionally deficient in either pretrial preparation or conduct of the defense at trial, and Ploof has not established any resulting prejudice from his former counsel's actions.

II. DENIED. Former counsel was also not professionally deficient at the penalty phase of Ploof's Superior Court capital prosecution. The additional mitigation evidence Ploof argues should have been presented on his behalf would not have altered the unanimous jury recommendation in any substantial fashion or changed the trial judge's assessment of the appropriateness of a sentence of death. Reweighing the sum total of the old and new mitigation evidence against the still formidable aggravation evidence of a calculated, execution-style killing of a spouse to obtain a financial benefit will not result in any different outcome. Ploof has failed to establish any resulting prejudice from his former counsel's alleged deficiencies, and there was no abuse of discretion in denying post-conviction relief.

III. DENIED. The summary listing of eight other Constitutional claims in Argument III without any supporting legal argument is an insufficient assertion of those contentions in an appellate brief. The undeveloped arguments must all be summarily rejected for failing to make any meaningful presentation of a supporting argument.

STATEMENT OF FACTS

On direct appeal in 2004, this Court found the following operative facts in the Gary Ploof capital murder prosecution:

> Gary W. Ploof was a U.S. Air Force Staff Sergeant stationed with his wife, Heidi, at Dover Air Force Base during 2001. Beginning that year, Ploof had an affair with Adrienne Hendricks, a colleague with whom he worked part-time at a towing service. Ploof learned that effective November 1, 2001, the U.S. Air Force would provide $100,000 life insurance for military spouses. He was informed that he would be automatically enrolled unless he took affirmative action to disenroll. Ploof told his supervisor of his intent to refuse the policy coverage, but he took no action to do so. Ploof also told Hendricks that she should plan to move in with him starting November 5, 2001 because he and Heidi were having marital problems, and Heidi was preparing to move out.
>
> In truth, Heidi was not planning to move out nor did Ploof have any intention of rejecting the spousal U.S.A.F. life insurance coverage. Instead, Ploof intended to murder his wife soon after the life insurance policy became effective on November 1. On November 3, 2001, Ploof drove with Heidi to the parking lot of the Dover Wal-Mart where he shot her in the head with a .357 magnum revolver. He did that in a way that (he believed) would suggest that she committed suicide. He also developed a scheme to mislead the police in the event that a homicide investigation ensued. Security videotape of the Wal-Mart parking lot on the day that Heidi's body was found showed Ploof hurriedly walking away from her vehicle. Ploof also constructed an elaborate alibi by making numerous frantic phone calls feigning his concern for his missing wife. One of the calls prompted a friend to search for Heidi on the dark country roads on which she would have driven home from work. Ploof even called Heidi's cell phone in an attempt to deflect suspicion of his involvement. He then hid the murder weapon on his property and asked friends to hold on to another pistol and a gun case so that they would not be found by the police. Finally, he lied to police about his mistress, Hendricks, (suggesting that she was just a friend), about his weapons (maintaining that he owned no pistols), and about a life insurance policy in which Heidi was recently enrolled (insisting that he had no knowledge of the policy).

Ploof v. State, 856 A.2d 539, 540-41 (Del. 2004).

I. FORMER DEFENSE COUNSEL WAS NOT INEFFECTIVE AT THE GUILT PHASE OF TRIAL

QUESTION PRESENTED

Is the capital defendant entitled to post-conviction relief because he received ineffective assistance at the guilt phase of the Superior Court jury trial?

STANDARD AND SCOPE OF REVIEW

The trial court's denial of post-conviction relief after conducting an evidentiary hearing is reviewed on appeal for an abuse of discretion. See Panuski v. State, 41 A.3d 416, 419 (Del. 2012); Norcross v. State, 36 A.3d 756, 765 (Del. 2011); Taylor v. State, 32 A.3d 374, 380 (Del. 2011). Questions of law and claims of constitutional violations are reviewed de novo. See Panuski, 41 A.3d at 419.

MERITS OF ARGUMENT

Gary W. Ploof argues that he is entitled to post-conviction relief from his June 16, 2003 Kent County Superior Court jury convictions for first degree murder and possession of a firearm during the commission of a felony and his August 22, 2003 death sentence because his former defense counsel was ineffective at the pretrial and guilt phases of his trial. He contends that the Superior Court decision denying post-conviction relief after conducting an evidentiary hearing in October and November 2010 is

incorrect and should be reversed. State v. Ploof, 2012 WL 1413483 (Del. Super. January 30, 2012)(ORDER AND OPINION).

Specifically, Ploof claims trial counsel was ineffective at the pretrial and trial guilt phases in three general respects. First, former defense counsel was ineffective under Strickland v. Washington, 466 U.S. 668, 687-88, 693-94 (1984), by allegedly failing to investigate ballistics and toxicology issues surrounding the November 3, 2001 shooting death of Heidi Ploof, Gary Ploof's wife, or consult with ballistics, toxicology, or forensic pathology experts. Second, trial counsel was deficient during jury selection for failing to object to or rehabilitate potential jurors dismissed by the trial judge because of their beliefs about the death penalty. Third, trial counsel was ineffective in failing to act in connection with four specific matters: (A) the prosecutor's post-guilt phase comment to the press that Ploof was a "cold-blooded killer"; (B) not renewing a change of venue motion; (C) not removing a sleeping juror or another juror who allegedly discussed the case with co-workers after conclusion of the guilt phase; and (D) failing to cross-examine prosecution witness Deborah Jefferson "in keeping with a single, coherent defense theory." (September 17, 2012 Opening Brief at 17). In addition to these three general arguments, Ploof asserts on appeal that former counsel was ineffective on direct appeal to this Court by not raising all meritorious issues, although Ploof does not state what the omitted meritorious appellate issues may be. (Opening Brief at 18-19).

Finally, focusing on the second prong of the Strickland ineffective assistance of counsel test, Ploof claims that he was prejudiced by his former counsel's allegedly deficient professional performance. (Opening Brief at 19-20).

Before considering any post-conviction relief claims, whether they are based upon allegations of ineffective assistance of counsel or are assertions of legal or Constitutional error, a court must first apply the procedural requirements of Delaware Superior Court Criminal Rule 61, governing State post-conviction relief proceedings, before reaching the merits of any claim. See Richardson v. State, 3 A.3d 233, 237 (Del. 2010); Stone v. State, 690 A.2d 924, 925 (Del. 1996). All of the Rule 61 post-conviction relief claims contained in Ploof's June 9, 2008 amended motion and the July 21, 2008 (Corrected) Amended Motion (A-1319-1437), and all claims Ploof asserts in the three arguments of his September 17, 2012 Opening Brief in this appeal are procedurally barred as untimely under Del. Super. Ct. Crim. R. 61(i)(1) because they were not asserted within 3 years of when Ploof's judgment of conviction was final.

A judgment of conviction is final under Rule 61 when this Court "issues a mandate or order finally determining the case on direct review." Del. Super. Ct. Crim. R. 61(m)(2). This Court's Order finally determining Ploof's case on direct appeal was issued on August 11, 2004. Ploof v. State, 856 A.2d 539 (Del. 2004). Since no reargument motion was filed in Ploof's direct appeal, this Court's mandate was issued 15 days after the August

11, 2004 Opinion. Del. Supr. Ct. R. 19(a). Because Ploof also filed no petition for certiorari review in the United States Supreme Court [See Del. Super. Ct. Crim. R. 61(m)(3)], the 3 year time limit for seeking State post-conviction relief commenced at the end of August 2004, and expired in 2007. Thus, Ploof's Rule 61 Superior Court filings in 2008 (A-1319-1437), and thereafter are all untimely and are now procedurally barred by Del. Super. Ct. Crim. R. 61(i)(1).

Although the State affirmatively asserted the untimeliness bar of Rule 61(i)(1) in both its July 31, 2008 Superior Court Answer at pages 14-18, and the August 25, 2011 Superior Court post-hearing answering submission at pages 6-10, the Superior Court did not apply the procedural bar of Rule 61(i)(1), and ruled: "The amended and supplemental filings made subsequent to Petitioner's original motion were at leave of the Court. Accordingly, Petitioner satisfies the first procedural requirement." State v. Ploof, 2012 WL 1413483 (Del. January 30, 2012) at * 3. This legal ruling by the Superior Court is incorrect and the procedural bar of Rule 61(i)(1) applies.

The time limitations for court filings are jurisdictional. See Smith v. State, 47 A.3d 481, 483 (Del. 2012). If the trial court lacked jurisdiction as a result of the untimely filing by Ploof's new counsel, the Superior Court should have denied Ploof's claims as procedurally barred. This Court has authority to revisit this matter. See Cropper v. State, 2005 WL 850423 (Del. April 11, 2005) at * 1 ("Notwithstanding the Superior

Court's ruling on the merits of ... claims, this Court first will apply the rules governing the procedural requirements of Rule 61 before giving consideration to the merits of any underlying claims for post-conviction relief.") (citing Younger v. State, 580 A.2d 552, 554 (Del. 1980)). The procedural bar exception of Rule 61(i)(5) is unavailable to save Ploof's claims because the contentions are also ultimately meritless.

Not only are Ploof's post-conviction claims procedurally barred as untimely under Rule 61(i)(1), the contentions also fail because Ploof cannot establish by a preponderance of the evidence that his former counsel's assistance at either the guilt or penalty phases of the 2003 Superior Court jury proceeding was deficient. Ploof must show that his former counsel's representation in this capital murder trial fell below an objective standard of reasonableness; and, second, that there exists a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the 2003 trial or the 2004 direct appeal would have been different. Strickland, 466 U.S. 687-88, 693-94; Williams v. Taylor, 529 U.S. 362, 391 (2000); Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011). Accord, Scott v. State, 7 A.3d 471, 475-76 (Del. 2010); Guy v. State, 999 A.2d 863, 870 (Del. 2010). Ploof cannot establish either prong of the two part ineffective assistance of counsel test enunciated in Strickland. Accordingly, all his claims of ineffective assistance by former counsel fail, and the trial court did not abuse its discretion in denying relief.

There is a strong presumption that counsel's representation was professionally reasonable, and judicial scrutiny of counsel's actions is highly deferential. See Strickland, 466 U.S. at 689-90; Grosvenor v. State, 849 A.2d 33, 35 (Del. 2004); Righter v. State, 704 A.2d 262, 264 (Del. 1997). The performance inquiry turns on whether counsel's assistance was reasonable under all the circumstances. Wong v. Belmontes, 558 U.S. 15, 130 S. Ct. 383, 384 (2009). While Ploof makes frequent reference to the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty cases, the United States Supreme Court has observed: "Restatements of professional standards ... can be useful as 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." Bobby v. VanHook, 558 U.S. 4, 130 S. Ct. 13, 16 (2009).

During the time of Ploof's representation by trial counsel in 2001-2003, the American Bar Association on February 10, 2003 approved a 131 page set of Guidelines for Appointment and Performance of Counsel in Death Penalty Cases. The 2003 edition adopted shortly before Ploof's June 2003 trial expanded upon the earlier 1989 Guidelines. Bobby v. VanHook, 130 S. Ct. at 17. As noted, while the ABA Guidelines are informative, they are not dispositive of defense counsel's obligations in a capital case. See Showers v. Beard, 635 F.3d 625, 633 (3rd Cir. 2011). In fact, the 2003 version was not in existence during most of the pretrial preparation in Ploof's case. Ploof's former counsel was

not ineffective in the pretrial preparation of the defense, during the guilt or penalty phases of the 2003 trial, or at the 2004 direct appeal. To the extent that Ploof may be able to demonstrate any possible professional deficiency, he still cannot demonstrate ultimate prejudice sufficient to undermine confidence in the result. As noted, all of Ploof's post-conviction claims of ineffective assistance of counsel fail, and the Superior Court did not abuse its discretion in denying relief.

The fourth claim in Ploof's July 21, 2008 (Corrected) Amended Motion For Post-Conviction Relief is that former counsel was ineffective for not consulting with and hiring ballistics and toxicology experts for the 2003 trial. (A-1362-1367). Although on appeal, Ploof now attempts to expand this claim to add a "forensic pathologist expert," this last contention was never fairly presented to the trial court and may not now be argued for the first time on appeal. Del. Supr. Ct. R. 8. See State v. Ploof, 2012 WL 1413483 (Del. Super. January 30, 2012) at * 6 (discussing only ballistics and toxicology experts). Furthermore, at the 2010 Superior Court evidentiary hearing on the post-conviction relief motion, Ploof did not present the testimony of either a ballistics expert or a toxicologist.

The expert witness Ploof presented at the November 22, 2010 Rule 61 hearing (A-1169-1318) in this connection was Dr. Werner Spitz, a forensic pathologist. (A-1177). At the Rule 61 evidentiary hearing in 2010, Ploof attempted to use Dr. Spitz as an all purpose expert, but the effort was ultimately unavailing.

Ploof cannot establish any pretrial ineffective assistance by his trial counsel in not consulting with or presenting either a ballistics or toxicology expert at the 2003 trial. When given the opportunity to present such "missing" expert testimony at the 2010 Rule 61 hearing, Ploof presented no such expert testimony; thus, there is no record about what helpful information, if any, either such expert witness might be able to provide. As the Superior Court noted in denying post-conviction relief, "Petitioner has not presented any evidence to refute the toxicology reports that were conducted in connection with the investigation." State v. Ploof, 2012 WL 1413483 (Del. Super. January 30, 2012) at * 7.

Speculation about what such ballistics and toxicology experts could or could not do is insufficient to prove either prong of the two part ineffective assistance of counsel test of Strickland. See Flamer v. State, 585 A.2d 736, 756 (Del. 1990) ("We will not speculate on what testimony these other witnesses might have presented."). Ploof's claims of missing ballistics and toxicology expert witnesses fail for the same reason similar missing witness contentions failed in Flamer, 585 A.2d at 756, there is simply no record about what helpful information these nonappearing potential defense expert witnesses might have provided. The contention that trial counsel in 2003 was ineffective for not presenting such expert witnesses amounts only to speculation. See generally Cape v. Francis 741 F.2d 1287, 1301 (11th Cir. 1984), cert. denied, 474 U.S. 911 (1985).

Defense counsel Sandra W. Dean testified at the 2010 Rule 61 hearing that the defense did not hire a ballistics expert because Ploof said the .357 caliber handgun the police found hidden on his property underneath a pallet covered with hay and a tarp was the Ruger that killed Heidi. (A-508-09). With no dispute as to the identity of the weapon that fired the fatal shot, Dean quite reasonably saw no reason to consult with or retain a ballistics expert. There was little reason to consult a ballistics expert because the only crucial issue in the case was not the range or angle of the fatal gunshot to Heidi's head, but who pulled the trigger. As the trial judge pointed out, "Dr. Spitz admitted that it is impossible for a forensic pathologist to determine, with certainty, who pulled the trigger in this case." State v. Ploof, 2012 WL 1413483 (Del. Super. January 30, 2012) at * 7.

As revealed on cross-examination at the Rule 61 hearing, Dr. Spitz was given only limited information to review. (A-1204-20). He thought the .357 Ruger should be test fired to determine the range of fire (A-1191-92), but he was unaware of the Maryland State Police Crime Lab report that the weapon had been test fired. (A-1215-17). Spitz, likewise, admitted on cross-examination that he had never seen the gun or test fired it. (A-1238). He was also not given information that Gary Ploof had testified at trial claiming to have witnessed his wife's suicide (A-1220), and Spitz did not know about the $100,000 Air Force life insurance policy on the life of Heidi Ploof that went into effect 2 days before the shooting. (A-1215). Dr. Spitz did not

know Gary Ploof took the gun and hid it (A-1220), or that the defendant's girlfriend, Adrienne Antonucci, had been told that she could move into Gary Ploof's home on November 5, 2001, because Heidi Ploof was leaving the marital home. (A-1215). While Dr. Spitz testified about the entrance and exit wounds (A-1197-98), he was unaware that Heidi's body had allegedly been moved by her husband from the claimed suicide scene to the Wal-Mart parking lot. (A-1214-15).

The Superior Court Judge accurately assessed the limited utility of Dr. Spitz's Rule 61 testimony. State v. Ploof, 2012 WL 1413483 (Del. Super. January 30, 2012) at * 6-7. He summarized that Dr. Spitz thought "it was possible that Mrs. Ploof committed suicide," the weapon was fired from a slightly closer range than the autopsy physician, Dr. Judith Tobin, testified to at trial, and that he would not rely on general statistics in determining a cause of death. Id. at * 6. The Rule 61 hearing judge added: "In essence, Dr. Spitz did not present any evidence that contradicted Dr. Tobin's trial testimony." Id. at * 7. The Court below observed:

> What is significant, however, is what Dr. Spitz did not say. He did not say that Mrs. Ploof's death was a suicide. He did not say that the weapon was pressed against her head when the shot was fired. He did not say that suicide was more or less likely than homicide. Dr. Spitz said only that he felt more testing could have been desirable, and that he was not willing to rule out the possibility that Mrs. Ploof committed suicide.

Id. at * 6.

Dr. Spitz's November 22, 2010 post-conviction hearing testimony that it is "possible" that Heidi Ploof died from a self-inflicted gunshot wound is not competent expert medical testimony, and it would not have been admissible at Gary Ploof's murder trial. (A-1189-90, 1205-07). The State objected to this "possibility" expert medical testimony at the Rule 61 hearing. (A-1189). This Court has made clear that an expert medical witness's opinion must be based upon a reasonable medical certainty. A doctor saying that something is "possible" amounts only to inadmissible speculation. Oxendine v. State, 528 A.2d 870, 873 (Del. 1987). See Kardos v. Harrison, 980 A.2d 1014, 1017 (Del. 2009); Perkins v. State, 920 A.2d 391, 394-95 (Del. 2007) (cause of death in first degree murder prosecution).

Gary Ploof presented no expert toxicology evidence at the Rule 61 hearing, so this contention fails for lack of evidence. As the Court below pointed out, although initial testng showed the presence of some illegal substances in Heidi Ploof's body, further testing was negative. While further testing was not done for marijuana, this was not done because remnants of marijuana can be present in the blood for so long that such testing does little to pinpoint a time of usage. State v. Ploof, 2012 WL 1413483 (Del. Super. January 30, 2012) at * 7 ("Even if Mrs. Ploof was under the influence of marijuana when she died, that fact, alone, would not make it reasonably likely that the jury would have accepted the theory that she committed suicide.").

Trial counsel's actions were not professionally deficient in investigating Gary Ploof's belated claim that his wife committed suicide by using her left hand to shoot herself in the left side of the head. Defense counsel did investigate the left-handedness claim prior to trial, but only found two contrary witnesses who both said Heidi was right-handed. (A-628). This defense pretrial investigation of the issue was only confirmed at trial when Steve Lee, the victim's brother, testified that Heidi was right-handed. Being left-handed, Lee was conscious of the difference. At most the 2010 testimony of Ashley Hurley and Dr. Spitz that Heidi was left-handed presents only a factual issue that a jury would have to resolve.

On appeal, Ploof next argues that his trial counsel was ineffective for failing "to object to or rehabilitate jurors" who were dismissed for cause as a result of their expressed views on the death penalty. (Opening Brief at 15-17). As originally asserted in Claim IX of his 2008 Rule 61 motion, Ploof only challenged the exclusion of potential juror Amy V. Kellam (A-1547-58), but in this appeal, Ploof now asserts a belated challenge to four other potential jurors who were dismissed, Eileen Adriance (A-1542-46), Corey Garnett (A-1559-63), Paulette Darling (A-1564-68), and Susan Smith (A-1579-94).

In denying post-conviction relief as to potential juror Amy Kellam, the Superior Court Judge correctly noted that she was properly removed because of her equivocal responses to the death penalty questions. State v. Ploof, 2012 WL 1413483 (Del. Super.

January 30, 2012) at * 11. Since Ploof did not fairly present any post-conviction challenge to potential jurors Adriance, Garnett, Darling, and Smith, those new challenges have been waived. Del. Supr. Ct. R. 8. Ploof can demonstrate no plain error in the removal of the four belatedly challenged potential jurors because, as the Superior Court noted, "the State exercised only 3 of its 12 peremptory challenges." Id. at * 11. With 9 unused peremptory challenges, the State could have removed Adriance, Garnett, Darling, and Smith from the jury even if they had not been previously removed for cause.

All of the five potential jurors Ploof now challenges were properly removed for cause as a result of their views on the death penalty. (A-1542-68, 1579-94). Death-qualified juries are appropriate in capital prosecutions. See Barrow v. State, 749 A.2d 1230, 1240 (Del. 2000); Manley v. State, 709 A.2d 643, 654 (Del. 1998). See also Morgan v. Illinois, 504 U.S. 719, 728-29 (1992). Equivocal responses are sufficient for removal. See Jackson v. State, 684 A.2d 745, 749-50 (Del. 1996). With 9 unused peremptory jury challenges by the State, there is no reason to assume that any of the five potential jurors Ploof now wishes to review could ever have served on his jury.

Ploof's next contention about alleged ineffective assistance by his trial counsel is a brief listing of four claims on page 17 of his Opening Brief. These four items amount only to conclusory allegations unsupported by any legal argument. The four contentions are waived because they have not been briefed even in

a rudimentary fashion on appeal. See Somerville v. State, 703 A.2d 629, 631 (Del. 1997); Murphy v. State, 632 A.2d 1150, 1152 (Del. 1993). Even if not waived by a lack of any substantive appellate briefing, these four miscellaneous contentions fail because they are all legally meritless. Ploof reasserts the first three of these four arguments in summary fashion in Argument III of his Opening Brief, but there too he presents no substantive argument in favor of any of the contentions.

The first miscellaneous claim is that trial counsel was ineffective in responding to two comments of the prosecutor. The first challenged prosecutorial remark is a statement made during closing argument at the guilt phase of the 2003 jury trial. After noting that the accused had made a false missing person report to law enforcement authorities, the prosecutrix observed: "Now, it took nineteen months to hear the claim of suicide and cover-up to protect his wife's reputation." State v. Ploof, 2012 WL 1413483 (Del. Super. January 30, 2012) at * 11. Following a defense objection to the remark, the trial judge promptly informed the jury that the remark is stricken and the jury is to disregard it. Id. Although defense counsel acted promptly, Ploof now argues that a more elaborate curative instruction should have been requested, or a mistrial motion should have been made. As the Superior Court noted in denying post-conviction relief [Id. at * 12], jurors are presumed to follow the trial judge's instructions. See Hendricks v. State, 871 A.2d 1118, 1123 (Del. 2005); Shelton v. State, 744 A.2d 465, 483 (Del.

2000). Since the jury was instructed to disregard the brief remark, there is no reason to assume that the jury did not do this. See Pennell v. State, 602 A.2d 48, 52 (Del. 1991). A more detailed curative instruction would be counterproductive, and "the Court could very easily do further damage by way of emphasis." Ploof, supra at * 12. This matter was properly handled by both defense counsel and the trial judge, and there was no basis to declare a mistrial. Likewise, counsel was not ineffective for not raising the matter on direct appeal.

The second challenged prosecutorial remark is another single comment by the prosecutor reported in a local newspaper the day the penalty phase proceeding commenced. The prosecutor referred to Ploof as "a cold blooded killer." Ploof, supra at * 12. The context of this brief reference is that it came after the jury had already convicted Ploof of first degree murder for shooting his wife in the head and leaving her body in a Wal-Mart parking lot. The unflattering characterization appears accurate given the prior jury finding that Ploof had executed his wife motivated at least in part by a $100,000 life insurance policy that had recently gone into effect. In denying the defense mistrial motion, the trial judge did note the accuracy of the comment given the State's prior closing argument. Not only is the remark accurate, but Ploof can demonstrate no prejudice because there is no evidence any penalty phase juror saw the newspaper comment report. In denying post-conviction relief, the Superior Court noted "the Court's instructions to the jury to avoid media

coverage...." Ploof, supra at * 12. The defense mistrial motion was properly denied, and there was no basis to pursue the subject further on direct appeal.

The second miscellaneous claim is that defense counsel was ineffective for not renewing a change of venue motion and for not raising the argument on direct appeal. Ploof, supra at * 9-10. A defense change of venue motion was docketed on April 1, 2003, and denied April 11. State v. Ploof, 2003 WL 21537911 (Del. Super. April 11, 2003). The Superior Court's original denial of the defense change of venue motion pointed out that the pretrial newspaper coverage was "largely informational in scope, and they are not sufficient for this Court to presume prejudice ...." Id. Routine pretrial publicity in a murder prosecution is not a basis for a change of venue. Riley v. State, 496 A.2d 997, 1014 (Del. 1985). "Informational" reporting is not highly inflammatory or sensational. State v. Cooke, 910 A.2d 279, 283 (Del. Super. 2006). Due process does not mandate that prospective jurors be entirely ignorant of the facts of a pending prosecution. See Irwin v. Dodd, 366 U.S. 717, 722 (1961); McBride v. State, 477 A.2d 174, 185 (Del. 1985). There was no basis to renew the change of venue motion, and former counsel was not ineffective in not raising the contention on direct appeal. State v. Ploof, 2012 WL 1413483 (Del. Super. January 30, 2012) at * 9-10.

Ploof's third miscellaneous claim of ineffective assistance concerns the conduct of two jurors. First, Ploof argues that his trial counsel was ineffective for not requesting dismissal of

juror number 8 who may have been sleeping. The trial judge questioned the juror who admitted dozing "maybe for a second," but stated that he could continue. Id. at * 12. "This level of inquiry was completely adequate," and there was no reason for defense counsel to seek the juror's dismissal or raise the issue on direct appeal. Id. at * 12. Second, Ploof now argues that the defense mistrial motion was insufficient when the trial judge received notice from a third party that juror number 4 had made comments about Ploof's trial at her workplace following conclusion of the guilt phase. Id. at * 12. The juror was questioned about her comments, and there was no "manifest necessity" to declare a mistrial. While Ploof faults former counsel for not requesting "further questioning" of the juror, he does not indicate what else should have been asked or what additional information would be revealed. The issue was "thoroughly explored" by the trial judge [Id. at * 12], and further inquiry was unnecessary. There was no reason to raise this juror misconduct contention on direct appeal. Id. at * 12.

Finally, Ploof's fourth miscellaneous claim of ineffective assistance concerns the trial cross-examination of prosecution witness Deborah Jefferson. Id. at * 1. Ploof argues that his counsel was "ineffective in failing to cross-examine Deborah Jefferson in keeping with a single, coherent defense theory." (Opening Brief at 17). This contention amounts only to another conclusory allegation. Ploof does not state what additional questions should have been asked of witness Jefferson or how

further questioning would have affected the trial outcome. Ploof did not summon Jefferson as a witness at the 2010 Rule 61 hearing and make a record of what he now vaguely contends is the missing cross-examination. To be sure, Jefferson was a devasting witness to Ploof's suicide defense when she identified Ploof in court as the man she saw riding as a passenger in Heidi's car when the vehicle entered the Wal-Mart parking lot and as the person she later saw walking in the same parking lot. In the absence of any showing as to what else Jefferson should have been asked on cross-examination, this claim also fails.

Ploof next contends as part of Argument I that former counsel was ineffective for not raising other unspecified "meritorious issues" on direct appeal. (Opening Brief at 18-19). Since Ploof does not identify what these missing "meritorious" appellate issues might be, this vague argument fails for lack of any specificity. You cannot reasonably accuse counsel of failing to do something if you cannot even describe what the precise omission might be.

Ploof concludes his first appellate argument by claiming that he was prejudiced by his former counsel's actions or inactions. This final contention fails because Ploof has made no showing of a reasonable likelihood of a different result. Ploof's belated suicide claim was undercut by substantial contrary evidence. An eyewitness identified Ploof as a passenger in Heidi's car when Ploof claims he was sitting in the driver's seat next to his now dead wife. Ploof's hiding of the gun and

falsely reporting Heidi as missing to the policed and third parties was inconsistent with the suicide defense and appeared as an attempt to deflect suspicion. There was a strong financial motive for the murder, the $100,000 life insurance policy, and Ploof attempted to claim that money shortly after his dead wife was found. Ploof's conduct in not reporting the alleged suicide immediately, not seeking medical assistance, and abandoning Heidi in a Wal-Mart parking lot were all inexplicable behaviors inconsistent with how a normal spouse would react to witnessing a gunshot suicide. Ploof's claims of ineffective assistance all fail because his suicide defense was not credible. When the suicide defense fell flat, there was little else for defense counsel to do. Ploof was prejudiced by his own fanciful trial testimony, not by his former counsel's actions. State v. Ploof, 2012 WL 1413483 (Del. Super. January 30, 2012) at * 1.

II. FORMER DEFENSE COUNSEL WAS NOT INEFFECTIVE AT THE PENALTY PHASE OF TRIAL

QUESTION PRESENTED

Is the capital defendant entitled to a new penalty hearing because of ineffective assistance by his former defense counsel?

STANDARD AND SCOPE OF REVIEW

The trial court's denial of post-conviction relief after conducting an evidentiary hearing is reviewed on appeal for an abuse of discretion. See Panuski v. State, 41 A.3d 416, 419 (Del. 2012); Norcross v. State, 36 A.3d 756, 765 (Del. 2011). Questions of law and claims of constitutional error are reviewed de novo. See Panuski, 41 A.3d at 419.

MERITS OF ARGUMENT

The initial relief requested in Gary Ploof's second appellate argument is that this matter be remanded to the Superior Court to conduct a more explicit reweighing of the aggravating evidence against the combination of the original 2003 penalty hearing mitigation evidence and the new 2010 Rule 61 hearing mitigation evidence. See Norcross v. State, 36 A.3d 756, 771 (Del. 2011). At page 14 of its August 25, 2011 Superior Court post-hearing answering response, the State did note that "

Assessing prejudice at the penalty phase involves a reweighing of the aggravating evidence against both the original mitigating evidence and any new mitigating evidence presented in a post-conviction proceeding," and cited the decision in Porter v. McCollum, 130 S. Ct. 447, 453-54 (2009). See also Wiggins v. Smith, 539 U.S. 510, 534 (2003). Of course, as the United States Supreme Court has also pointed out, this prejudice standard "will necessarily require a court to 'speculate' as to the effect of the new evidence...." Sears v. Upton, 130 S. Ct. 3259, 3266 (2010).

The Superior Court Judge who conducted Ploof's 2010 Rule 61 evidentiary hearing is not the same judge who presided over the original 2003 jury trial. In evaluating the first performance prong of the attack on former counsel's penalty phase assistance, the new judge did state that "It cannot be said that their performance fell below the standard of reasonableness...." State v. Ploof, 2012 WL 1413483 (Del. Super. January 30, 2012) at * 8. Next, in reviewing the second prejudice prong of the ineffective assistance of counsel test, the post-conviction judge added, "...nor can it be said that any of the prolonged foster child information probably could have made any impact, even if presented." Id. at * 8. This latter ruling certainly appears to be at least an implicit reweighing of all the mitigation evidence produced both at the original 2003 penalty hearing and the new 2010 Rule 61 proceeding, and is in accord with the requirements of Porter and Wiggins. Even if this reweighing analysis is

deemed insufficient, as Ploof argues in this appeal, the remedy is merely to remand the case to the Superior Court for a more explicit analysis and statement as was done in the post-conviction appeals of two other Kent County capital defendants, Adam Norcross and Ralph Swan. See Norcross v. State, 2011 WL 2027952 (Del. Super. May 11, 2011)(OPINION ON REMAND); Swan v. State, 2011 WL 976788 (Del. Super. March 16, 2011)(OPINION ON REMAND).

In addition to complaining that the Superior Court did not reweigh all of the mitigation evidence, including the new Rule 61 evidence, Ploof argues on appeal that his former defense was ineffective at the 2003 penalty hearing in two general respects. First, former counsel should have investigated the defendant's childhood home in Poughkeepsie, New York because there was a succession of 33 foster children who lived at the Ploof home at different times while Gary Ploof was growing up. Second, Ploof argues that his former counsel was professionally deficient at the penalty phase in not presenting additional evidence of the defendant's good military service record during the 19 1/2 years Gary Ploof served in the United States Air Force. Former counsel was not ineffective at the penalty phase in either aspect, and Ploof cannot show any prejudice, a reasonable probability of a different sentence. The Superior Court did not abuse its discretion in denying post-conviction relief for the allegation of ineffective assistance of counsel at the penalty phase. State v. Ploof, 2012 WL 1413483 (Del. Super. January 30, 2012) at * 7-

8. Accordingly, Ploof is not entitled to a new penalty hearing nearly 10 years after the original proceeding in 2003.

At the Superior Court penalty hearing on June 18 and 19, 2003, the defense presented three witnesses. "Keith Frye testified regarding Petitioner's standing in the Air Force. Dr. Abraham Mensch testified the Petitioner did not pose a danger to society. Shirley Ploof, Petitioner's mother, testified about the impact Petitioner's execution would have on their family." Id. at * 8. Mrs. Ploof described Gary's childhood in Poughkeepsie, and his old brother Kevin who suffers from cerebral palsy and retardation. She stated that over the years the family had over 30 foster children, and that many of the foster children exhibited behavioral problems.

Sandra W. Dean, lead defense counsel at trial (A-458), testified at the 2010 Rule 61 hearing that her client did not report any childhood abuse (A-594-95), and although he was questioned repeatedly, Gary Ploof said he had a normal family life growing up. (A-467). Dean stated: "He reported that his family life was fine and uneventful." (A-467). Gary also denied any problems with the family's foster children (A-478, 595), and other family members reported to defense counsel that Gary had a normal, happy childhood. (A-476).

Linda Zervas, the psychoforensic evaluator and mitigation coordinator at the Public Defender's office, confirmed that Gary Ploof reported no childhood abuse whatsoever. (A-800). The defendant's parents also told Zervas that everything had been

fine and they corroborated their son's account. (A-812). Zervas did note that the Ploof foster home in New York State was closed in 1984, but by that time 20 year old Gary was already serving in the Air Force. (A-848). Prior to trial in 2003, the defense team did obtain the accused's school and employment records (A-574-75), and his Air Force military records. (A-590). Linda Zervas prepared a final report on May 29, 2003 of all the information collected during the defense pretrial investigation. (A-471-72).

At the 2010 Rule 61 evidentiary hearing, new defense counsel presented 6 of the 33 Ploof foster children and a California psychiatrist, Dr. Pablo Stewart. (A-110-85; B-4-143). There was no indication at the Rule 61 hearing if any of the other 27 foster children were located and interviewed, or what any of these other 27 children reported about their placement at the Ploof home. While some of the six testifying former foster children claimed to have been sexually abused by the defendant's father, Gerald Ploof, there was no evidence that Gerald had ever been criminally charged for any of the claimed conduct. If the allegations of sexual abuse by Gerald voiced in 2010 were true, there was no apparent legal barrier to pursuing a criminal prosecution. As attorney Dean pointed out, "most states have removed their statute of limitations, for example, on child sex abuse." (A-482).

Gary Ploof's trial counsel conducted a reasonable pretrial investigation of the defendant's background. (A-471-72). The

fact that some of the former foster children are now claiming to have been abused in some fashion by one or both of the defendant's parents is not new mitigation evidence creating a reasonable probability of a different outcome at the 2003 penalty phase proceeding. After hearing the new foster child and additional military history evidence, the Superior Court correctly found that Ploof had not demonstrated ineffective assistance by former counsel at the capital penalty hearing. The Rule 61 hearing judge observed: "It cannot be said that their performance fell below the standard of reasonableness; nor can it be said that any of the prolonged foster child information probably could have made any impact, even if presented." State v. Ploof, 2012 WL 1413483 (Del. Super. January 30, 2012) at * 8.

By the time of the penalty hearing, the jury had already rejected Ploof's self-serving claim that his wife had committed suicide in his presence. In the guilt phase the jury convicted Ploof of first degree intentional murder for shooting his wife in the head at very close range with a large caliber handgun. The ostensible motive for this "senseless, unprovoked, execution-style killing of a defenseless individual" was to collect on a $100,000 military spouse life insurance policy that went into effect only two days before the murder. Ploof v. State, 856 A.2d 539, 547 (Del. 2004). Trying to convince the same jury under these outrageous circumstances that Gary Ploof did not also deserve to be executed was going to be a difficult task for any attorney. As this Court pointed out on direct appeal, "this was

not a close case" [Ploof, 856 A.2d at 547]; thus, Gary Ploof's guilt phase testimony that his wife had taken her own life was probably quite offensive to the jury. Ploof's six sentence brief penalty phase allocution was probably of little effect since by that point the jury had already concluded that he was not a credible witness.

In this appeal, Ploof's new counsel does not even address this compelling aggravating evidence and focuses only on the limited new mitigation evidence of a claimed abusive family home. Whatever new mitigation evidence Ploof has assembled after having had years to do so simply pales in comparison to the strong aggravating circumstances present in the case. The power of the aggravating evidence is what led to the unanimous 12-0 jury recommendation for death. That aggravating evidence still stands like the Matterhorn in this capital case. The new mitigation evidence Ploof offers (the six foster children and some additional military service evidence) does not change the fact that the jury unanimously found beyond a reasonable doubt the statutory aggravator that Heidi Ploof's murder was committed for pecuniary gain. Ploof, 856 A.2d at 541.

III. THE OTHER CONSTITUTIONAL CLAIMS ARE NOT A BASIS FOR POST-CONVICTION RELIEF

QUESTION PRESENTED

Has Ploof waived his eight Constitutional claims not based on allegations of ineffective assistance of counsel by failing to brief those contentions on appeal?

STANDARD AND SCOPE OF REVIEW

The trial court's denial of post-conviction relief is reviewed on appeal for an abuse of discretion. See Swan v. State, 28 A.3d 362, 382 (Del. 2011); Zebroski v. State, 12 A.3d 1115, 1119 (Del. 2010). Questions of law and claims of constitutional violations are reviewed de novo. See Panuski v. State, 41 A.3d 416, 419 (Del. 2012).

MERITS OF ARGUMENT

Gary W. Ploof's final argument in this appeal of the Superior Court's denial of post-conviction relief is a brief listing of eight "other Constitutional claims" that were originally asserted as Claims for Relief VII through XIII in his July 21, 2008 (Corrected) Amended Motion For Post-Conviction Relief. (A-1386-1426). Since none of these eight claims was asserted until June 9, 2008, and the 3 year time limit for first presenting State post-conviction relief claims expired in 2007,

these claims are all now procedurally barred by Del. Super. Ct. Crim. R. 61(i)(1) as untimely. See State v. Dickens, 602 A.2d 95, 98 (Del. Super. 1989); Cropper v. State, 2005 WL 850423 (Del. April 11, 2005) at * 1 ("Notwithstanding the Superior Court's ruling on the merits of Cropper's claims, this Court first will apply the rules governing the procedural requirement of Rule 61 before giving consideration to the merits of any underlying claims for post-conviction relief.") (citing Younger v. State, 580 A.2d 552, 554 (De. 1980)). The time limitations for court filings are jurisdictional [See Smith v. State, 47 A.3d 481, 483 (Del. 2012) (30 day time limit for filing State Supreme Court appeal is jurisdictional, and untimely filed appeal deprives the Court of authority to hear the matter)]; thus, the Superior Court's ruling that "The amended and supplemental filings made subsequent to Petitioner's original motion were at leave of the Court. Accordingly, Petitioner satisfies the first procedural requirement." [State v. Ploof, 2012 WL 1413483 (Del. Super. January 30, 2012) at * 3] is legally incorrect. The 3 year time limit of Del. Super. Ct. Crim. R. 61(i)(1) to present post-conviction relief claims is jurisdictional and may not be extended by "leave of the Court."

Ploof also cannot escape the procedural bar of Rule 61(i)(1) as to any of these eight "other Constitutional claims" because as the trial court correctly found [Ploof, supra at * 9-13], all of these assertions are legally meritless. Thus, the procedural bar

exception of Del. Super. Ct. Crim. R. 61(i)(5) is unavailable to save any of the eight arguments.

Not only is the Superior Court's rejection of these eight Constitutional claims legally correct and not an abuse of discretion [Ploof, supra at * 9-13], but Ploof has waived all of these eight contentions by failing to brief any of the matters in this appeal. See Somerville v. State, 703 A.2d 629, 631 (Del. 1997); Murphy v. State, 632 A.2d 1150, 1152 (Del. 1993). See also Roca v. E. I. DuPont DeNemours & Co., 842 A.2d 1238, 1242 (Del. 2004). Ploof's mere listing of the eight constitutional claims at pages 42-43 of his September 17, 2012 Opening Brief in this appeal without any supporting legal argument and with only citations to the 2008 amended Rule 61 motion but not the trial record is insufficient appellate presentation of the arguments. Argument I.C. of Ploof's Opening Brief contains a similar listing of three of these eight claims without any supporting argument. Ploof's unelaborated listing of arguments (presumably because of space constraints) means that the contentions amount only to insufficient conclusory allegations. See Gattis v. State, 697 A.2d 1174, 1178-79 (Del. 1997); Younger, 580 A.2d at 556.

Ploof is not entitled to post-conviction relief for any of his eight "other Constitutional claims." In fact, the first argument that the State improperly used a peremptory challenge to remove potential juror Jacqueline Aull was previously rejected by this Court on direct appeal in 2004.

CONCLUSION

The Kent County Superior Court's January 30, 2012 denial of post-conviction relief should be affirmed.

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Dated: October 8, 2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY PLOOF,	)	
	)	
Defendant Below-	)	**No. 108, 2012**
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

CERTIFICATE OF SERVICE

BE IT REMEMBERED that on this 8th day of October 2012, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on October 8, 2012, she did deposit in the mail two copies of the attached State's Answering Brief properly addressed to:

Patrick J. Collins, Esquire
Collins & Roop
8 East 13th Street
Wilmington, DE 19801

Kathryn J. Garrison, Esquire
Schmittinger & Rodriguez, P.A.
414 South State Street
Dover, DE 19903

Mary T. Corkell
Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

Devera B. Scott
Notary Public

Devera B. Scott, Esquire
NOTARIAL OFFICER
Pursuant to 29 Del.C. § 4323(a)(3)