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Case Number 350,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CORY J. HOLMES,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 350, 2012
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

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

STATE'S ANSWERING BRIEF

Elizabeth R. McFarlan
Deputy Attorney General
ID #3759
Department of Justice
State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500

DATE: September 4, 2012

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NATURE AND STAGE OF THE PROCEEDINGS

On January 27, 2009, Wilmington Police arrested Cory J. Holmes. DI 1. On March 16, 2009, a New Castle County grand jury indicted Holmes on the following charges: carjacking first degree (11 *Del. C.* § 836); five counts of possession of a firearm during the commission of a felony ("PFDCF") (11 *Del. C.* § 1447A); two counts of robbery first degree (11 *Del. C.* § 832); burglary first degree (11 *Del. C.* § 826); attempted robbery first degree (11 *Del. C.* §§ 531 & 832); possession of a deadly weapon by a person prohibited ("PDWPP") (11 *Del. C.* § 1448); and resisting arrest (11 *Del. C.* § 1257(b)). DI 5.

Beginning on October 27, 2009, Superior Court held a four-day jury trial, after which the jury found Holmes guilty of all charges (except the charge of resisting arrest, which the State had dismissed at trial). DI 21. On November 20, 2009, Superior Court sentenced Holmes to an aggregate of 42 years at level V incarceration, suspended after serving 37 years. DI 29. The Delaware Supreme Court, sitting *en banc*, affirmed Holmes' convictions and sentence on December 9, 2010.[1]

In October 2011, Holmes moved for postconviction relief under Criminal Rule 61. DI 44. Holmes' postconviction motion was referred to a Superior Court Commissioner for consideration

[1] *Holmes v. State*, 2010 WL 5043910 (Del. Dec. 9, 2010).

of the claims.[2] After receiving defense counsel's affidavit responding to Holmes' claims of ineffective assistance of counsel (DI 49), the State's response (DI 52), and Holmes' responses to the State (DI 53) and his counsel (DI 55), the Commissioner recommended that Superior Court deny relief. DI 56. Holmes filed objections to the Commissioner's Report and Recommendation. DI 58. After *de novo* review, Superior Court in June 2012 adopted the Commissioner's Report and Recommendation and denied relief. DI 60. This appeal ensued; and this is the State's answering brief in opposition on appeal.

[2] *See* 10 *Del. C.* § 512(b)(1)b; Super. Ct. Crim. R. 61(a)(5).

SUMMARY OF THE ARGUMENT

I. Appellant's arguments are denied. Superior Court did not abuse its discretion by denying Holmes' motion for postconviction relief. Holmes' claims of ineffective assistance of counsel were properly denied by Superior Court because Holmes failed to meet his heavy burden under *Strickland v. Washington*. His counsel provided competent representation at every stage (including plea bargaining), and counsel made informed strategic decisions regarding how to handle evidence and impeachment of witnesses at trial. Holmes' claim of prosecutorial misconduct is procedurally defaulted under Criminal Rule 61(i)(3) for failure to have presented the claim on direct appeal. Moreover, because, as Superior Court found, the claim has no merit, Holmes cannot establish prejudice. Finally, Superior Court properly found Holmes' claim that the trial judge abused her discretion by incorrectly instructing the jury to be barred under Criminal Rule 61(i)(4) as formerly adjudicated, this Court having denied relief on the same claim on direct appeal. Superior Court thus properly denied Holmes' meritless motion for postconviction relief.

STATEMENT OF FACTS[3]

While driving his mother's car in New Castle, Resean Freeman saw a man that he recognized on the side of the road. It was snowing, and Freeman offered the man, Holmes, a ride. After Holmes indicated his preferred destination, Freeman testified that Holmes "pull[ed] a gun out and sa[id], 'Get the fuck out the car you bitch ass.'" Freeman testified that Holmes was wearing a "black skull cap, a black car jacket, dark blue pants." After Freeman exited the vehicle, Holmes drove away with the car. Later that evening, Holmes called Freeman and informed him of the location of the car. Approximately one week later, after seeing Holmes' picture in a newspaper article, Freeman identified his assailant as Holmes and notified the police.

Later on that same evening that Freeman encountered Holmes, Madinah Elder and Harry Smith were at home and heard a knock on the door. Before opening the door, Smith asked, "who is it?", and a voice replied, "WPD." Smith testified that he then opened the door, and that the visitor pointed a gun at his waist, and exclaimed, "[w]ho the fuck is staying here?", and demanded money. First, Elder gave the man twenty dollars. Elder then gave the man an additional one hundred dollars. Elder testified

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[3] These facts are taken verbatim from this Court's decision in *Holmes v. State*, 2010 WL 5043910, at *1-2 (Del. Dec. 9, 2010).

that immediately thereafter, the man "clicked the gun and said, 'Bitch, stop playing.'" Elder then retrieved another one hundred dollars and gave it to the man.

When the man's attention was temporarily distracted, Elder ran out of the house. Subsequently, Smith fled the house too. Shortly thereafter, the police were notified of the incident. Elder and Smith testified that the man was wearing a black skull cap, a black Carhartt jacket, and dark pants.

Police arrived at the scene. After following footprints in the snow that began at Elders' home, Officer Ryan Dorsey observed a man scaling the fence of a nearby home. After the man ignored Dorsey's demand to stop and attempted to scale another fence and kick in a door, Dorsey tasered the man, who turned out to be Holmes. When police arrested Holmes, he was wearing a white T-shirt. The police recovered a black jacket nearby, but never recovered a gun. Holmes was charged by indictment with carjacking first degree, five counts of PFDCF, two counts of robbery first degree, burglary first degree, attempted robbery first degree, PDWPP, and resisting arrest.

As to the carjacking incident, Holmes testified that he did not have a gun and that he drove away in Freeman's car because he feared for his safety. Holmes also testified that, while he was in Freeman's vehicle, Freeman asked him to pay a debt related to a drug deal. Holmes then asked Freeman to take him

to a nearby apartment complex to collect money from tenants, but when he attempted to exit the vehicle to collect the money, Freeman told Holmes to instruct the tenants to bring the money to the car. Holmes further testified:

> So, I'm trying to negotiate, because really, I wasn't talking to nobody that'd never bring me nothing. So, you know, I just kind of got out and was saying, yo, I'm ready to go get it, and then he says that something's funny by the way I'm acting. And then he came out of his side, left the door open, and I ran from around his car and I jumped in and pulled off.

As to the burglary and robbery, Holmes testified that he visited Elder's home and was invited inside to buy PCP from Elder. Holmes believed that Elder had provided approximately half the agreed upon amount of PCP; nevertheless, Elder and Smith demanded that Holmes pay for the full amount. Holmes "begged [Elder] to take [the PCP] back, [but] she wouldn't take it back." Holmes further testified: "Well, when they, they caved in on me, like, kind of like one coming-not like they was straight, but they was like coming slowly but surely close to me, so I inched out the door and ran out the door."

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING HOLMES' MOTION FOR POSTCONVICTION RELIEF.

Question Presented

Whether the trial court abused its discretion in denying Holmes' motion for postconviction relief?

Standard and Scope of Review

The Superior Court's denial of postconviction relief is reviewed for abuse of discretion.[4] Nevertheless, this Court reviews the record to determine whether competent evidence supports the Superior Court's findings of fact and whether its conclusions of law are not erroneous.[5]

Merits[6]

In his postconviction motion, Holmes asserted several claims for relief, categorized by the court as follows: (1) ineffective assistance of trial counsel for failing to investigate, use and present phone record evidence, for incorrect legal advice regarding the law applicable to weapons offenses, for allowing Holmes to testify without conducting a thorough investigation, and for offering a lesser-included defense during closing arguments; (2) prosecutorial misconduct

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[4] *Panuski v. State*, 41 A.3d 416, 419 (Del. 2012); *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003).

[5] *Panuski*, 41 A.3d at 419; *Zebroski*, 822 A.2d at 1043.

[6] This argument addresses all arguments in the opening brief.

for presenting false testimony; and (3) abuse of discretion by the trial judge in providing a misleading jury instruction.[7] The Commissioner, considering the claims on the merits, recommended that the court deny relief. Superior Court, on *de novo* review of the Commissioner's Report and Recommendation, found all of Holmes' claims to be without merit[8] and denied relief.[9] On appeal, Holmes now asserts that Superior Court abused its discretion by denying his claims. Holmes' claims for relief are unavailing, Superior Court having acted well within its discretion in denying his meritless claims.

1. Trial counsel's representation was not deficient.[10]

Under well-settled Delaware law, the trial court must first determine whether Holmes met the procedural requirements of Superior Court Criminal Rule 61 before considering the merits of

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[7] *State v. Holmes*, Del. Super., ID No. 0901020659, Streett, J., order at 6-7 (June 7, 2012) (hereinafter "Order") (Ex. A); *State v. Holmes*, Del. Super., ID No. 0901020659, Vavala, Comm'r, Report & Recommendation at 3 (April 20, 2012) (hereinafter "R&R") (Ex. B).

[8] Superior Court also found Holmes' claim regarding the allegedly misleading jury instruction to be barred under Superior Court Criminal Rule 61(i)(4). Order at 16.

[9] Order at 16.

[10] On appeal, Holmes has failed to brief his ineffective assistance claims regarding his decision to testify and allegedly incorrect advice provided by counsel during the plea bargain stage of the litigation. Those claims have thus been waived on appeal. *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

his postconviction claims for relief.[11] The Superior Court Commissioner found Holmes' motion to be timely under Criminal Rule 61(i)(1), Holmes having filed his motion within a year after this Court's issuance of a mandate after direct appeal.[12] Thus, Holmes' claims of ineffective assistance of counsel, not otherwise procedurally barred, were considered and rejected by the Commissioner on the merits. And the Superior Court judge, after *de novo* review, came to the same conclusion. Superior Court was manifestly correct in denying Holmes' claims of ineffective assistance of counsel.

In order to establish that he received constitutionally ineffective assistance of counsel, Holmes was required to demonstrate that: 1) defense counsel's representation fell below an objective standard of reasonableness; and 2) there exists a reasonable probability that, but for his counsel's unprofessional errors, the outcome of the trial would have been different.[13] Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate

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[11] *See Ayers v. State*, 802 A.2d 278, 281 (Del. 2002); *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996); *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (citing *Harris v. Reed*, 489 U.S. 255 (1989)).

[12] R&R at 4.

[13] *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Zebroski*, 822 A.2d at 1043; *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

concrete allegations of actual prejudice.[14] There is a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.[15] Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.[16] In evaluating an attorney's performance, a reviewing court should also "eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time."[17] Holmes had the burden of showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[18]

Furthermore, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment."[19] "[A] court need not determine whether counsel's performance was

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[14] *See Zebroski*, 822 A.2d at 1043; *Gattis v. State*, 697 A.2d 1174, 1178-79 (Del. 1997); *Younger*, 580 A.2d at 556.

[15] *See Strickland*, 466 U.S. at 689; *Gattis*, 697 A.2d at 1184.

[16] *See Strickland*, 466 U.S. at 689; *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990).

[17] *See Strickland*, 466 U.S. at 689; *Gattis*, 697 A.2d at 1184.

[18] *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (quoting *Strickland*, 466 A.2d at 687) (internal quotations omitted).

[19] *Strickland*, 466 U.S. at 691.

deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."[20] Because the defendant must prove both parts of his ineffectiveness claim, the court may dispose of a claim by first determining if the defendant has established prejudice.[21] The first consideration in the "prejudice" analysis alone "requires more than a showing of theoretical possibility that the outcome was affected."[22] The defendant must actually show a reasonable probability of a different result but for trial counsel's alleged errors.[23] In turn, "actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice."[24] "It is not enough to 'show that the errors had some conceivable effect on the outcome of the proceeding.'"[25] True prejudice requires a "substantial," not just "conceivable,"

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[20] *Id.* at 697.

[21] *Id.*

[22] *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).

[23] *Strickland*, 466 U.S. at 694; *Reese v. Fulcomer*, 946 F.2d 247, 256-57 (3d Cir. 1991).

[24] *Strickland*, 466 U.S. at 693. *See id.* at 696 (court "must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors").

[25] *Richter*, 131 S. Ct. at 787 (quoting *Strickland*, 466 U.S. at 693).

likelihood of a different result.[26] Thus the defendant must identify the particular defects in counsel's performance and specifically allege prejudice (and substantiate the allegation).[27]

In considering the *Strickland* two-part paradigm, the United States Supreme Court has noted the importance of avoiding the temptation to second-guess trial counsel's performance:

> "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, and 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.[28]

In light of the foregoing standards, Superior Court properly found that Holmes had failed to meet his burden under

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[26] *Richter,* 131 S. Ct. at 791.

[27] *Dawson v. State,* 673 A.2d 1186, 1196 Del. 1996).

[28] *Richter,* 131 S. Ct. at 788 (citations omitted).

Strickland to show that his counsel's actions amounted to deficient performance of counsel and resulted in prejudice.[29]

A. Trial counsel's strategic decision not to offer phone records into evidence was reasonable.

Holmes complains that his trial counsel failed to utilize phone records to impeach Freeman's testimony. As defense counsel stated in his affidavit submitted in response to Holmes' allegations of ineffective assistance of counsel, he received all discovery materials in this case, including phone records, and reviewed them with his client. B80. Counsel used the phone records during his cross-examination of Freeman. B80. As counsel explained, "Freeman did admit to having telephone contact with the defendant prior to the date of the robbery. He also admitted to having telephone calls with the defendant after the robbery. Furthermore, the defendant took the witness stand and fully explained his position to the jury." B80.

It is clear from the transcript of Freeman's testimony and defense counsel's cross-examination, that although defense counsel did not seek to admit the phone records as a trial exhibit, he did review the records and use relevant portions to impeach Freeman's testimony. B25-29. As explained in counsel's affidavit, this decision – to utilize the records during cross-examination, yet not admit them as exhibits during trial – was a

[29] Order at 14.

strategic decision counsel believed would benefit his client. B80-81. Defense counsel wisely acknowledged that Holmes' characterization of his crimes as "drug deals gone bad" did not mitigate Holmes' culpability and, in fact, could have served to bolster the State's case with respect to Holmes' motive and the victims' identification of Holmes. B80. Moreover, such characterization could have supported the State's theory that Holmes had a firearm - if, as Holmes claims, he was entering into drug transactions with allegedly known drug dealers, the probability of Holmes arming himself with a weapon would be higher. Moreover, the jury could believe that a drug dealer would be unlikely to hand over his property to an unarmed robber.

Even more important, as defense counsel recognized, the phone records contained evidence that corroborated the State's witnesses' testimony and could have been more damaging than helpful to Holmes. B81. Holmes failed to establish that the phone records would have impeached Freeman more effectively than the cross-examination conducted by trial counsel. In fact, it is unclear that the phone records would have been admissible in any case. As a result, Superior Court properly found that Holmes had failed to establish either deficient performance or prejudice from his counsel's strategic decision not to have the phone records admitted into evidence.

B. Defense counsel's closing argument was proper.

Holmes also complains that counsel was ineffective in making arguing that Holmes' could have possessed a toy gun rather than a firearm - the prosecution not having been able to produce the alleged weapon. Defense counsel never conceded that Holmes committed the crimes with which he was charged or any lesser-included offenses; nor did counsel abandon the defense that the crimes were actually drug deals gone bad. *See* B68-75. To the contrary, counsel argued that the State had failed to produce the gun and concluded his closing argument by reminding the jurors that they must acquit Holmes if they had any reasonable doubt, and not to convict him of lesser charges because he admitted his own guilt. B75. Given the evidence presented at trial, including Holmes' own testimony in which he admitted committing crimes, defense counsel's closing argument was appropriate and reasonable. Moreover, Holmes again failed to show any prejudice, especially in light of his own admissions of stealing the car from the first victim and money from the second victim.[30] He did not, and cannot, show that if defense counsel had never mentioned the weapon, the trial outcome would have been any different. Superior Court properly found that Holmes failed to meet either prong of the *Strickland* paradigm.

[30] *See* Order at 13.

2. Holmes' claim of prosecutorial misconduct is procedurally defaulted under Criminal Rule 61(i)(3).

In his postconviction motion, Holmes alleged for the first time that the prosecutor engaged in misconduct by eliciting and encouraging false testimony by Freeman. This claim could have been raised on direct appeal and is, therefore, barred by Criminal Rule 61(i)(3) unless Holmes is able to show cause for relief from the procedural bar and prejudice as a result of a violation of his rights, or a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings that led to the judgment of conviction. Holmes failed to meet his burden for relief from the bar of Criminal Rule 61(i)(3). As there was no misconduct, Holmes can not overcome the procedural hurdle.[31]

In order to prove misconduct, Holmes was required to show that the State knowingly suborned perjury. He did not meet this burden. Holmes' claim hinges on his assertion that Freeman's testimony was inconsistent with the phone records. But there is nothing in the record to support the allegation that Freeman committed perjury when he testified. First, the prosecutor did

[31] Superior Court rejected the claim on the merits, after noting that claims that could have been presented on direct appeal but were not, should be barred. R&R at 4. *See Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361 (Del. 1995).

not elicit any testimony from Freeman about phone calls between Freeman and Holmes during direct examination. B10-19. That topic was first broached on cross-examination by defense counsel. B25. During the course of Freeman's testimony on both cross-examination and re-direct, it became clear that confusion existed regarding which phone was being referenced. Freeman had two cell phones on the date of the carjacking - one was his own and one belonged to Torian. B25, 27. Freeman attempted to explain his telephone contact with Holmes, testifying that he spoke to Holmes when he had Torian's phone because Holmes was trying to reach Torian and Freeman was confused. B25-28. Additionally, the exact time frame that Freeman had Torian's phone was never established, as Freeman could not remember exactly how long he had the phone. In short, Freeman admitted to calls between himself and Holmes, but also admitted confusion as to the exact number and timing of the calls. Not surprisingly, there were some inconsistencies between Freeman's testimony and the phone records. There is nothing to suggest, however, that the inconsistencies were intentional or solicited by the prosecutor.[32] Holmes' misconduct claim is an unsupported

[32] *See, e.g., Weston v. State*, 2001 WL 265964, *3 (Del. Mar. 7, 2001) ("inconsistencies in testimony alone are insufficient to establish the State's knowing use of perjury, 'especially where, as here, the jury has been exposed to all inconsistencies.'") (quoting *Gutridge v. State,* 1987 WL 38798 (Del. June 30, 1987)).

attempt to mischaracterize common and expected inconsistencies in witness testimony as perjury, which is simply not the case.

Moreover, Holmes failed to show any prejudice. At trial, Holmes admitted stealing Freeman's car and to carjacking Freeman. B36, 49 53. The only real issue that remained for the jury was whether or not Holmes possessed a gun at the time. Three separate witnesses, Freeman, Elder and Smith, testified that Holmes displayed a gun to them. Three separate witnesses described the gun they saw in Holmes' hands while they were being robbed. In short, Holmes cannot show that minor inconsistencies between Freeman's memory of phone calls on two separate cell phones and the cell phone records would have affected the outcome at trial. Accordingly, Holmes' allegation of prosecutorial conduct was properly rejected by Superior Court.

3. Holmes' claim of an improper jury instruction by the trial judge is procedurally barred under Criminal Rule 61(i)(4) as formerly adjudicated.

Superior Court Criminal Rule 61(i)(4), in relevant part, bars reconsideration of any ground for relief that was formerly adjudicated in the proceedings leading to the judgment of conviction unless reconsideration of the claim is warranted in the interest of justice. Because Holmes' third claim for relief mirrors his second argument in his direct appeal, and that claim

was rejected by this Court, the claim is now barred by Criminal Rule 61(i)(4).

In his direct appeal, Holmes raised two arguments, which were summarized by the Court as follows: "First, Holmes contends that his convictions must be reversed because the Superior Court admitted a newspaper article into evidence. Second, Holmes contends that the Superior Court erred in interrupting his counsel's closing argument and in giving an instruction that mischaracterized Holmes' argument."[33] Holmes concedes that he is raising the same claim in postconviction that he raised on direct appeal.[34] Because Holmes has offered no new evidence or provided any reason why this formerly adjudicated claim should now be revisited "in the interest of justice," Superior Court reasonably found the claim barred under Criminal Rule 61(i)(4).[35]

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[33] *Holmes*, 2010 WL 5043910, at *1.

[34] *See* Op. Brf. at 16 ("This Court denied appellant's claim of abuse of discretion on direct appeal (2010 WL 5043910 at 4).").

[35] *See Collingwood v. State*, 2000 WL 1177630, at *1 (Del. Aug. 11, 2000); *Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992) (*Riley v. State*, 585 A.2d 719, 721 (Del. 1990)).

CONCLUSION

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

/s/ Elizabeth R. McFarlan
Deputy Attorney General
Department of Justice
State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500
ID #3759

DATE: September 4, 2012

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

STATE OF DELAWARE,	:	
	:	
v.	:	Case No. 0901020659
	:	
CORY J. HOLMES,	:	
	:	
Defendant.	:	

ORDER

This 7th day of **June, 2012**, the Court having considered Defendant's Motion for Appointment of Counsel to represent him in his Motion for Postconviction Relief and Defendant's 93-page Memorandum accompanying his Motion for Postconviction Relief, and a careful, thorough, and *de novo* review of the record, said Motion is **DENIED**.

IT IS SO ORDERED.

Judge Diane Clarke Streett

Original to Prothonotary
xc: Dep. Atty. Gen. Cynthia L. Faraone
Michael C. Heyden, Esquire
Cory J. Holmes, *Pro Se*

Exhibit A

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

STATE OF DELAWARE,	:	
	:	
v.	:	Case No. 0901020659
	:	
CORY J. HOLMES,	:	
	:	
Defendant.	:	

ORDER

This 7th day of **June, 2012,** upon consideration of Defendant's Motion for Postconviction Relief, Counsel's Affidavit, Defendant's Reply to Counsel's Affidavit, the State's Response to Defendant's Motion, Defendant's Reply to the State's Response, the Commissioner's Report and Recommendation that Defendant's Motion for Postconviction Relief should be **DENIED**, Defendant's Reply to the Commissioner's Report and Recommendation, and a careful and thorough *de novo* review of the record in this case, it appears that:

1. On January 27, 2009, Defendant was arrested while scaling a fence in the snow after a report of a robbery at a nearby residence. On March 16, 2009, based on that arrest and a separate report of a carjacking, Defendant was indicted on the charges of Carjacking First Degree,

Possession of a Firearm During the Commission of a Felony ("PFDCF")(5 counts), Robbery First Degree (2 counts), Burglary First Degree, Attempted Robbery First Degree, Possession of a Deadly Weapon By a Person Prohibited ("PDWBPP") and Resisting Arrest.

2. On November 2, 2009, a jury found the Defendant guilty of all charges (except the resisting arrest which had been dismissed by the State prior to trial).

3. On November 9, 2009, Defendant was sentenced to a total of 42 years at Level 5, suspended after serving 37 years. Probations in Criminal Action Nos. VN08-04-1072-01 and VN-09-01-1605 were discharged as unimproved.

4. On December 2, 2009, Defendant filed a notice of appeal to the Delaware Supreme Court. Defendant's appeal raised two issues: that his conviction should be reversed because a newspaper article was admitted into evidence at trial; and that the court allegedly erred when it interrupted counsel's closing arguments concerning a choice-of-evils defense and allegedly mischaracterized the defense argument.

5. On December 9, 2010, the Delaware Supreme Court affirmed Defendant's conviction.[1] The Delaware Supreme Court held that "[b]ecause

[1] *Holmes v. State*, 2010 WL 5043910 (Del.).

the other, admissible evidence against Holmes was sufficient to sustain his convictions, we conclude that the error in admitting the newspaper article without a limiting instruction was harmless beyond a reasonable doubt".[2] Additionally, the Supreme Court said that the "Superior Court did not err in concluding that Holmes was not entitled to a choice-of-evils instruction."[3]

6. This case involves two separate incidents that occurred on the same day, January 27, 2009. Complainant, Mr. Resean Freeman, testified that the first incident occurred when Defendant displayed a gun and drove off in Freeman's car without permission after Mr. Freeman had offered Defendant a ride because it was snowing. Ms. Medina Elder, the second complainant, testified that the second incident occurred when Defendant came to her house and demanded money at gunpoint. After she and a guest complied, she escaped, flagged down a vehicle, and immediately reported the events to the police who were nearby. The police responded to her house, followed footprints in the snow, and apprehended Defendant as he attempted to kick in a door. Defendant was arrested forthwith for the home invasion. He was arrested for the carjacking approximately one week later.

7. Defendant testified that both incidents involved drug activity in which Defendant and complainants were engaged. Defendant denied using a

[2] *Id.* at *5.
[3] *Ibid.*

gun but admitted taking Freeman's car. Defendant denied that a home invasion occurred and explained that the second incident was a drug deal gone bad so he ran away.

8. The facts of the case were summarized by the Delaware Supreme Court and are supplied here[4]:

> While driving his mother's car in New Castle, Resean Freeman saw a man that he recognized on the side of the road. It was snowing, and Freeman offered the man, Holmes, a ride. After Holmes indicated his preferred destination, Freeman testified that Holmes "pull[ed] a gun out and sa[id], `Get the fuck out the car you bitch ass.'" Freeman testified that Holmes was wearing a "black skull cap, a black car jacket, dark blue pants." After Freeman exited the vehicle, Holmes drove away with the car. Later that evening, Holmes called Freeman and informed him of the location of the car. Approximately one week later, after seeing Holmes' picture in a newspaper article, Freeman identified his assailant as Holmes and notified the police.
>
> Later on that same evening that Freeman encountered Holmes, Madinah Elder and Harry Smith were at home and heard a knock on the door. Before opening the door, Smith asked, "who is it?", and a voice replied, "WPD." Smith testified that he then opened the door, and that the visitor pointed a gun at his waist, and exclaimed, "[w]ho the fuck is staying here?", and demanded money. First, Elder gave the man twenty dollars. Elder then gave the man an additional one hundred dollars. Elder testified that immediately thereafter, the man "clicked the gun and said, `Bitch, stop playing.'" Elder then retrieved another one hundred dollars and gave it to the man.

[4] *Holmes v. State* at *1-2.

When the man's attention was temporarily distracted, Elder ran out of the house. Subsequently, Smith fled the house too. Shortly thereafter, the police were notified of the incident. Elder and Smith testified that the man was wearing a black skull cap, a black Carhartt jacket, and dark pants.

Police arrived at the scene. After following footprints in the snow that began at Elders' home, Officer Ryan Dorsey observed a man scaling the fence of a nearby home. After the man ignored Dorsey's demand to stop and attempted to scale another fence and kick in a door, Dorsey tasered the man, who turned out to be Holmes. When police arrested Holmes, he was wearing a white T-shirt. The police recovered a black jacket nearby, but never recovered a gun. Holmes was charged by indictment with carjacking first degree, five counts of PFDCF, two counts of robbery first degree, attempted robbery first degree, PDWBPP, and resisting arrest.

As to the carjacking incident, Holmes testified that he did not have a gun and that he drove away in Freeman's car because he feared for his safety. Holmes also testified that, while he was in Freeman's vehicle, Freeman asked him to pay a debt related to a drug deal. Holmes then asked Freeman to take him to a nearby apartment complex to collect money from tenants, but when he attempted to exit the vehicle to collect the money, Freeman told Holmes to instruct the tenants to bring the money to the car. Holmes further testified:

So I'm trying to negotiate, because really, I wasn't talking to nobody that'd never bring me nothing. So, you know, I just kind of got out and was saying, yo, I'm ready to go get it, and then he says that something's funny by the way I'm acting. And then he came out of his side, left the door open, and I ran from around his car and I jumped in and pulled off.

As to the burglary and robbery, Holmes testified that he visited Elder's home and was invited inside to buy PCP from Elder. Holmes believed that Elder had provided approximately half the agreed upon amount of PCP; nevertheless, Elder and Smith demanded that Holmes pay for the full amount. Holmes

> "begged [Elder] to take [the PCP] back, [but] she wouldn't take it back." Holmes further testified" "Well, when they, they caved in on me, like, kind of like one coming – not like they was straight, but they was like coming slowly but surely close to me, so I inched out the door and ran out the door."

9. On January 5, 2011, the Delaware Supreme Court issued a Mandate affirming the Superior Court conviction.

10. The Defendant next filed a motion for Post Conviction Relief, accompanied by a 93 page memorandum, on October 4, 2011, alleging ineffective assistance of counsel, prosecutorial misconduct, and judicial abuse of discretion.

11. Specifically, Defendant faults his attorney for:

- misadvice about the law regarding weapons
- failure to investigate phone records
- failure to use phone records to impeach complainant Freeman
- allowing defendant to testify without conducting a thorough investigation
- offering a lesser included defense during closing arguments

12. Defendant also contends that the prosecution should have acted as an advocate for the defense but instead drew inferences from false evidence. Defendant further claims that the court provided a "misleading" jury instruction, improperly prevented the defense from arguing a choice-of-

evils defense, and did not present a "legal explanation of what choice evils means."[5]

13. The Court referred this Motion for Postconviction Relief to Superior Court Commissioner Mark Vavala pursuant to 10 Del.C. § 512(b) and Superior Court Criminal Rule 62 for a proposed report and recommendation. The Commissioner solicited a response from defense counsel and the State.

14. Defense counsel submitted an affidavit on November 21, 2011. Counsel stated that:

- counsel filed the appropriate pleadings
- received the required discovery
- reviewed all discovery with Defendant
- Defendant, not counsel, insisted that the State could not convict Defendant of a weapons charge if they could not find a gun
- counsel did not misadvise Defendant about a weapon
- Counsel "repeatedly" told Defendant that Defendant's belief that a conviction could not be obtained without finding a gun was incorrect
- Counsel was concerned that the telephone records might establish a drug dealing relationship between Defendant and the complainant which would support the State's case that the identification was accurate, provide a motive, and corroborate the robbery complaint.

[5] Defendant's Memorandum, October 4, 2011, at p. 78.

- Counsel cross examined complainant about the telephone records
- Defendant decided to go to trial because Defendant knew that the complainants were drug dealers and Defendant believed that they would not appear for trial
- Defendant made his own decision regarding whether to accept or reject the State's plea offer
- Counsel advised Defendant of the advantages and disadvantages of testifying
- Defendant made his own decision regarding whether to testify
- Counsel discussed with Defendant how he should present himself on the witness stand

15. Defendant responded to counsel's affidavit by positing that counsel's assessment of the telephone records contradicts counsel's attempts during trial to introduce the records into evidence and counsel's argument on appeal.

16. The State also submitted a response to this Rule 61 Motion. Regarding the telephone records, the State wrote "It is clear from the transcript of [complainant's] testimony and defense counsel's cross-examination, that although defense counsel did not admit the phone records as a trial exhibit, he did review the records and use relevant portions to impeach [complainant's] testimony.[6]

[6] State's Response to Defendant's Motion for Postconviction Relief, February 14, 2012 at p. 10.

17. As to prosecutorial misconduct, the State responded that it had turned over all phone records to the defense, the State did not ask complainant Freeman about phone records on direct examination, and there is no evidence that Freeman committed perjury. The State also argued that Defendant's complaint concerning the Court's instruction to the jury is barred by Rule 61(i)(4) because it was formerly adjudicated.

18. The law is clear that Defendant's motion, having been filed within one year of the Delaware Supreme Court's Mandate, is timely and is not procedurally barred by Rule 61(i)(1).[7] Furthermore, for the reasons stated in the Commissioner's Report and Recommendation, including the

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[7] Superior Court Criminal Rule 61(i) provides, in pertinent part:

(i) Bars to Relief.

(1) Time limitation. A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) Repetitive Motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

(3) Procedural Default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

(A) Cause for relief from the procedural default and

(B) Prejudice from violation of the movant's rights.

(4) Former Adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

fact that this is Defendant's first Rule 61 Motion and it raises issues of ineffective assistance of counsel, the Court will consider Defendant's Motion on the merits.

19. Although Defendant admitted at trial and in his submissions that he committed the carjacking and robbery – but without the gun,[8] Defendant has filed this Rule 61 Motion blaming his attorney, the prosecution, and the trial court, primarily because he believes that telephone records would have shown that complainant Freeman was a liar.

20. A claim of ineffectiveness of counsel is "normally not subject to the procedural default rule"[9] and, because it alleges that counsel's substandard work prejudiced Petitioner's case, prevented Petitioner from having a fair trial, and weakened Petitioner's appeal, it is not barred.

21. Nevertheless, an analysis of the law concerning attorney performance leads to the conclusion that, in the instant case, Defendant's attorney did not fall below normal standards despite Defendant's dissatisfaction with his attorney's use of information obtained from certain telephone records.

22. In order for Defendant to establish ineffective assistance of counsel, Defendant must show that counsel's alleged errors "were so

[8] *Holmes v. State*, at 1-2.
[9] *State v. Gattis*, 1995 WL 790961, *3 (Del. Super).

grievous that his performance fell below an objective standard of reasonableness ... and there is a reasonable degree of probability that, but for counsel's unprofessional errors, the outcome of the proceedings would have been different ..."[10]

23. There is a strong presumption that an attorney's representation is competent and falls within the "wide range" of reasonable professional assistance.[11] Moreover, deference must be given to counsel's judgment in order to promote stability in the process.[12]

24. Furthermore, to overcome the strong presumption that counsel has acted competently, the defendant must demonstrate that counsel did not act "reasonably considering all the circumstances"[13] and that the unreasonable performance prejudiced the defense. The essential question is whether counsel made mistakes so crucial that counsel was not functioning at the level guaranteed by the Sixth Amendment[14] and deprived Defendant of a fair trial.

25. Here, Defendant has failed to overcome the presumption that, under the totality of circumstances, counsel's action "might be considered

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[10] *Gattis* at *4. *See also, Harrington v. Richter*, 131 S.Ct. 770, 778 (2011). *See also, Premo v. Moore*, 131 S.Ct. 733, 736 (2011); *Scott v. State*, 7 A.3d 471, 475 (Del. 2010). *Strickland v. Washington*, 466 U.S. 668 (1974). *See, Duross v. State*, 494 A.2d 1265 (Del. 1985); *Zebrowski v. State*, 822 A.2d 1038 (Del. 2003).
[11] *Id.*
[12] *Premo*, 131 S.Ct. at 736.
[13] *Cullen v. Pinholster*, 131 S.Ct. 1388, 1392 (2011) citing *Strickland v. Washington* at 688.
[14] *Harrington*, 131 S.Ct. at 778.

sound trial strategy."[15] The question is not whether counsel deviated from the best of most common practices, but whether counsel's representation was inadequate under the prevailing professional norms.[16] Indeed, as stated in the Commissioner's Report and Recommendation, "[i]solated poor strategy, inexperience, or bad tactics do[es] not necessarily amount to ineffective assistance of counsel."[17] Here, Defendant essentially asserts that the witnesses (particularly Mr. Freeman) were not credible, and criticizes his attorney for not pursuing that line of defense. The record, however, shows that defense counsel attacked witness credibility throughout the entire trial.[18]

26. In evaluating Defendant's representation from counsel's perspective,[19] counsel was an active and engaged advocate. Counsel communicated with his client, reviewed the State's evidence with Defendant, abided by Defendant's choice to go to trial, appropriately and vigorously cross-examined the State's witnesses, abided by Defendant's choice to testify at trial, and appropriately addressed the jury. Moreover, although Defendant speculates that counsel should have utilized the telephone records more aggressively, the State and counsel reason that a restrained focus on the records may have actually prevented prejudice to the

[15] *Strickland*, 466 U.S. at 689, citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955).
[16] *Harrington*, 131 S.Ct. at 778.
[17] Commissioner's Report and Recommendation at p. 9, citing *Bellmore v. State*, 602 NE 2nd 111, 123 (Ind. 1992).
[18] Trial Transcript, October 27, 2009 at p. 18.
[19] *Strickland* at 689.

Defendant because a more aggressive use of the records could have unduly emphasized Defendant's involvement in the drug world. Objectively, counsel acted reasonably under all of the circumstances.

27. Moreover, in order to show prejudice, the defendant must prove that, but for counsel's errors, the result would have been different.[20] The court does not need to be certain that counsel's performance had no effect on the outcome[21] but, there must be a substantial probability that there would have been a different result.[22]

28. Hence, although Defendant has speculated about the usefulness of phone records and alleged actual prejudice, he is required to substantiate his claim.[23] Defendant has failed to do this.

29. Defendant has also failed to show how portions of counsel's closing argument prejudiced his case. Defendant alleges that he was convicted because counsel conceded Defendant's guilt when counsel argued to the jury that the State did not produce the gun. Defendant, however, had already admitted his theft of the car from the first complainant and money from the subsequent complainant.[24]

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[20] *Cullen*, 131 S.Ct. at 1392.
[21] *Id.* At 779.
[22] *Id.*
[23] *Scott*, 7 A.3d at 475.
[24] Defendant testified that "... I stole the car ..." Trial Transcript, October 29, 2009 at p. 31; and "I left with ... stuff and I didn't pay her ...". Trial Transcript, October 29, 2009 at p. 69.

30. Since Defendant has not and cannot satisfy either prong of an ineffective assistance of counsel claim, Defendant has not established a miscarriage of justice based on a constitutional violation that undermined the fundamental legality, reliability, integrity, or fairness of his trial pursuant to Rule 61 (i)(5).

31. Defendant next attacks the prosecution. This thrust hinges on complainant Freeman's arguably inconsistent and/or contradictory recollection regarding telephone calls. Defendant characterizes Freeman's testimony as "extensive lies".[25] Defendant alleges that the prosecution, "allowed false testimony to go uncorrected, ... elicited false evidence, ... [and] aided, and encouraged extensive false testimony ... which he knew to be false beyond a reasonable doubt."[26] Continuing his reliance on telephone records, Defendant also argues that the State intentionally failed to properly use the telephone records because the State "allowed" Freeman to lie.[27]

32. Extrapolating on his theory of lies, Defendant next advances the argument that the prosecutor and defense counsel were involved in a conspiracy. This was evidenced, he claims, when the prosecution allowed defense counsel to abandon [counsel's] efforts to use the phone records because the phone was not registered to Mr. Freeman. Defendant concludes

[25] Defendant's Memorandum at p. 5.
[26] Defendant's Memorandum at p. 5.
[27] *Ibid.*

. "that the prosecutor and defense counsel were both against him.[28] He also chastises the prosecution for failing to "act as an advocate for the Defendant".[29]

33. Defendant speculates that the discrepancies between the complainants' testimony and the telephone records prove that complainant's testimony was false. However, the State explained that witness recollection is often faulty. In fact, Freeman offered several explanations about the phone calls including confusion, that the phone calls were not intended for him, that he underestimated the number of calls, and even regarded some as coincidental.[30]

34. Thus, although the jury was aware that complainant Freeman's recollection of telephone calls was inaccurate, Defendant has not shown that Freeman is unworthy of belief concerning the core issue of this case – the robbery. By Defendant's own admission, Mr. Freeman was the victim of a robbery. Indeed, Defendant's own testimony – that Defendant "ran from around [complainant's] car and [he] jumped in and pulled off" – corroborated, bolstered, and helped to establish Freeman's credibility.

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[28] *Id.* at 53.
[29] Defendant's Motion for Postconviction Relief at p. 3.
[30] Defendant's Reply to State's Response/Commissioner's Report and Recommendation, May 2, 2012, at p. 8-9.

35. Finally, the issue of the court and the choice-of-evils defense, which Defendant again raises, was already decided and rejected by the Delaware Supreme Court. Defendant's explanation, that he found himself wrongfully embroiled in the two incidents because he was paying a drug-deal debt and because he was obtaining drugs, formed the basis for the Delaware Supreme Court to hold that "[t]he Superior Court did not err in concluding that [Defendant] was not entitled to a choice-of-evils instruction".[31]

36. Defendant's contention that the court erred is barred under Rule 61(i)(4) for the reasons stated in the Commissioner's Report and Recommendation. It was formerly adjudicated. Defendant's attempt, in the instant motion, to seek a second review of the same issue by parsing the trial judge's words in the instruction that the choice-of-evils defense is inapplicable to the evidence, does not remove that bar.

37. Thus, after careful, thorough, and *de novo* review of the record in this case, the Court adopts the Commissioner's Report and Recommendation that Defendant's Motion for Postconviction Relief is **DENIED.**

[31] *Holmes v. State* at *5.

38. Accordingly, Defendant's Motion for Postconviction Relief is **DENIED**.

IT IS SO ORDERED.

Judge Diane Clarke Streett

Original to Prothonotary
xc: Dep. Atty. Gen. Cynthia L. Faraone
Michael C. Heyden, Esquire
Cory J. Holmes, *Pro Se*

#56

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
V.	)	I.D. # 0901020659
	)	
COREY HOLMES	)	
	)	
Defendant	)	

Date Submitted: April 5, 2012
Date Decided: April 20, 2012

REPORT AND RECOMMENDATION

Defendant's Pro Se Motion for Postconviction Relief should be **DENIED.**

On this 20th day of April, 2012, it appears to the Court that:

1. On a cold snowy winter day in January, 2009, Defendant accepted a ride from an acquaintance, Resean Freeman, then pulled a gun on Freeman and said, "Get the fuck out the car, you bitch ass."[1] Freeman followed Defendant's orders and watched as Defendant took his car.[2] Defendant called Freeman later that evening and

[1] *Holmes v. State*, 2010 WL 5043910 (Del.) at *1.

[2] *Id.*

informed Freeman of the car's whereabouts.[3] Approximately one week later, Freeman saw Defendant's picture in a newspaper, identified Defendant as the person who took his car using a weapon, and notified the police.[4] On January 27, 2009, the same night that police received the call from Freeman, police arrested Defendant after Defendant held two other victims at gunpoint in their home, robbed them of their money, fled police, and ultimately found himself tasered by the arresting officer.[5]

2. On November 2, 2009, after a four-day trial, Defendant was found guilty on one count of Carjacking First Degree, five counts of Possession of a Firearm During Commission of a Felony ("PFDCF"), two counts of Robbery First Degree, one count of Burglary First Degree, one count of Attempted Robbery First Degree, and Possession of a Deadly Weapon by a Person Prohibited. The State entered a Nolle Prosequi as to one count of Resisting Arrest.

3. On November 20, 2009, Defendant was sentenced to 42 years of incarceration, suspended after serving 37 years.

4. On December 9, 2010, Defendant's convictions were affirmed by the Delaware Supreme Court.

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[3] *Id.*

[4] *Id.*

[5] *Id.*

5. On October 4, 2011, Defendant filed a Motion for Postconviction Relief ("Rule 61 Motion"), in which he claims numerous grounds for dismissing his case and categorizes these grounds in four main categories: a) Ineffective assistance of trial counsel such that Counsel failed to "investigate, utilize, and present exculpatory discovery material;" b) prosecutorial misconduct; and c) abuse of discretion by the trial judge; and d) ineffective assistance of counsel in the guilty plea stage.[6]

6. Before addressing the substantive merits of any claim for postconviction relief, the Court must determine whether the defendant has satisfied the procedural requirements of Superior Court Criminal Rule 61 ("Rule 61").[7] Rule 61(i) establishes four procedural bars to motions for postconviction relief: (1) the motion must be filed within one year of a final judgment of conviction;[8] (2) any grounds for relief which

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[6] Def. Memorandum of Law in Support of Rule 61 Motion ("Supp. Memo."), 2-3. (Note: Defendant's Supp. Memo. does not number the first four pages and misnumbered the remaining pages, omitting a page 10. The Court manually re-numbered Defendant's submission which now includes 96 pages of Defendant's argument, prior to his later submissions during the course of this motion.)

[7] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990). *See also Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *State v. Mayfield,* 2003 WL 21267422, at *2 (Del. Super. Ct. June 2, 2003).

[8] The motion must be filed within one year if the final order of conviction occurred after July 1, 2005. *See* Rule 61, annot. *Effect of amendments*. For the purposes of Rule 61, a judgment of conviction becomes final under the following circumstances: "(1) If the defendant does not file a direct appeal, 30 days after the Superior Court imposes sentence; (2) If the defendant files a direct appeal or there is an automatic statutory review of a death penalty, when the Supreme Court issues a mandate or order finally determining the case on direct review; or (3) If the defendant files a petition for certiorari seeking review of the Supreme Court's mandate or order when the United States Supreme Court issues a mandate or order finally disposing of the

were not asserted previously in any prior postconviction proceeding are barred; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules; and (4) any basis for relief must not have been formerly adjudicated in any proceeding.

7. Because Defendant's motion has been filed within one year of the Supreme Court mandate affirming his convictions, his motion is timely and, therefore, not able to be dismissed under Rule 61(i)(1). Because this is Defendant's first Rule 61 motion, Rule 61(i)(2) does not apply. Defendant could have made some of the arguments in his present motion before trial, at trial, immediately after trial or in his direct appeal, and Rule 61(i)(3) should bar such claims.

8. A defect under Rule 61(i)(1), (2), or (3), however, will not necessarily bar a movant's "claim that the court lacked jurisdiction or . . . a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity, or fairness of the proceedings leading to the judgment of conviction."[9] Because an ineffective assistance of counsel claim alleges a constitutional basis for postconviction relief, the procedural bars contained in Rule 61(i)(1), (2), or (3) *may* be overcome if the

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case on direct review." Super. Ct. Crim. R. 61(m).

[9] Super. Ct. Crim. R. 61(i)(5).

defendant asserts a colorable ineffective assistance of counsel claim.[10] As this is Defendant's first motion and it is timely, the Court will review Defendant's motion on its merits rather than analyze the applicable procedural bars.

A. Whether Defendant's Motion should be granted because Counsel was ineffective at trial and during any time in preparation for trial.

9. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-part *Strickland* test by showing both: (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that the errors by counsel amounted to prejudice.[11] Generally, a claim for ineffective assistance of counsel fails unless *both* prongs of the *Strickland* test have been established.[12]

10. The *Strickland* test requires Defendant to show that counsel's errors were

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[10] *See State v. MacDonald*, 2007 WL 1378332, at *4, n.17 (Del. Super. Ct. May 9, 2007), (emphasis added).

[11] *Albury v. State*, 551 A.2d 53, 58 (Del. 1988) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)).

[12] *Strickland*, 466 U.S. at 687 (emphasis added).

so grievous that his performance fell below an objective standard of reasonableness.[13] To delineate his claims that Counsel was ineffective, Defendant argues ten grounds.[14]

11. Many of Defendant's grounds for relief center around Counsel's use of, or Counsel's failure to use, cell phone records in a manner which Defendant feels would have best represented his defense. Defendant argues Counsel failed to "discover, present and cross-examine Freeman with phone records establishing a drug meeting when meeting was consistant (sic) with sole defense."[15] He further asserts Counsel failed to counter the State's motive theory with these records, failed to discover and introduce evidence contradicting Freeman's testimony concerning the phone records, failed to properly cross-examine Freeman, failed to impeach Freeman's testimony about a specific call, and failed to offer evidence consistent with his own defense theory that Freeman was contacting him regarding a drug deal.[16] The State opines that Defendant's first eight allegations of ineffective assistance of counsel are really a single claim that Counsel was ineffective for failing to use the

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[13] *Strickland*, 466 U.S. at 687-88; *see also Dawson v. State*, 673 A.2d 1186 (Del. 1996). at 1190.

[14] Defendant actual "letters" his grounds from a to k, which would indicate 11 grounds; however, on page 3 of his Supp. Memo., Defendant lists ground (f) and ground (h) consecutively, thus skipping a potential ground (g).

[15] Def. Supp. Memo., 2.

[16] *Id.* at 2-3.

phone records in a manner Defendant finds effective.[17]

12. Defendant argues that the phone records show five phone calls made to and from Defendant's aunt's residence and that they were made at the same times the calls between Defendant and his victim were made, thus establishing Defendant's defense that his victim was actually setting up a drug deal.[18] Counsel agrees that Defendant's sole defense included a scenario whereby the victim was engaged in drug dealing relationship with Defendant and, on the night Defendant took Freeman's car, it was Defendant who was in fear of a victim who was demanding payment for drugs[19] Moreover, Counsel states that Defendant claimed the apartment robbery was perpetrated in order to obtain PCP to sell and then repay Freeman.[20] Counsel states that he reviewed the relevant telephone records and cross-examined the victim about those records.[21] It is Counsel's contention that Freeman admitted to the calls and that Defendant took the stand to fully explain this defense to the jury.[22] Defendant argues that Counsel's answers are deficient and that he failed to use the phone records to

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[17] St. Resp., 9.

[18] *Id.* at 7.

[19] Counsel affidavit ("Aff."), 2.

[20] *Id.* at 4.

[21] *Id.* at 5.

[22] *Id.*

show Freeman was "dishonest about the amount of contact" with Defendant or that Freeman "knew . . . he was corresponding with [Defendant] for drug involvement."[23] Defendant states that Counsel's arguments were "useless."[24]

13. Counsel articulates he made a determination that the cell phone records "could be used to show the robbery was planned" in that Defendant selected his victims as targets.[25] Moreover, Counsel states that the records "reflected a 911 call by Freeman that substantiated the State's claim that [Freeman] was being robbed."[26] Defendant, on the other hand, believes Counsel's decision to allow Freeman's explanation that he was confused without further cross-examination is an indication that Counsel "did not investigate the phone records."[27] Corroborating Counsel's affidavit, the State indicates that Counsel "astutely recognized" that the phone records would bolster the State's evidence against Defendant.[28]

14. The State contends that Counsel's decision to use the records, but not to

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[23] Defendant's Reply to Counsel's Aff. ("Def. Reply 2"). 3 (Again, it should be noted Defendant's submission is 10 pages long, but he begins numbering on page 3 as "1". The court has renumbered the submission.)

[24] *Id.* at 4.

[25] Aff. at 6.

[26] *Id.*

[27] Supp. Memo. at 18.

[28] St. Resp. at 9.

admit the records as exhibits, was a "strategic decision" which Counsel believed would benefit Defendant. The State presents a litany of ways the phone records would have assisted the State in convicting Defendant.[29]

15. The *Strickland* test requires Defendant to show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.[30] In order to meet the first prong of the Strickland inquiry, Defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"[31] Even evidence of "[i]solated poor strategy, inexperience, or bad tactics do[es] not necessarily amount to ineffective assistance of counsel."[32] Despite all of Defendant's protests in his motion and in both replies, he is unable to show clearly that Counsel's actions were so unreasonable as to amount

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[29] St. Resp. at 11-14. Specifically, the State claims the records a) bolster Freeman's assertions he called 911 after the carjacking; b) bolster Freeman and another witness's testimony that Freeman frantically called his own mother after being robbed by Defendant; c) corroborates Freeman's testimony Defendant called his victim after the carjacking to report where the car was; d) supports Freeman's testimony that he received calls meant for another friend of Defendant; e) supports Freeman's testimony that Defendant was intending to reach another person and not his victim's phone; f) corroborates Defendant's initial statement to police that he was desperate; and g) impeached Defendant's own testimony about the robbery at the apartment a week after the carjacking.

[30] *Strickland*, 466 U.S. at 687-88; *see also Dawson v. State*, 673 A.2d 1186 (Del. 1996). at 1190.

[31] *Strickland*, 466 U.S. at 689 (citations omitted).

[32] *Bellmore v. State*, 602 N.E. 2d 111, 123 (Ind. 1992).

to ineffective assistance. Counsel is not required to present the evidence in the manner Defendant wants him to, nor is Counsel required to present a strategy that Defendant asserts would have been more valuable to his defense.

16. In *Harrington v. Richter,*[33] the Supreme Court established that representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that Defendant was denied a fair trial.[34] It is not enough to show that Counsel's actions may have had some possible effect on the outcome of the proceeding, but that Counsel's actions were so serious that Defendant was deprived of a fair trial.[35] Furthermore, Defendant must rebut a 'strong presumption' that trial counsel's representation fell within the 'wide range of reasonable professional assistance, and this Court must eliminate from its consideration the distorting effects of hindsight when viewing that representation.'"[36] Counsel is not required to provide perfect representation, the high court opines, but one that is "reasonably competent."[37] Both Counsel and the State have articulated sound reasons why Counsel's actions may have been sound judgment and reasonably

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[33] *Harrington v. Richter*, 131 S.Ct. 770 (2011).

[34] *Id.* at 791.

[35] *Id.*

[36] *U.S. v. Cronic,* 466 U.S. 648, 658 (1984), (quoting *Strickland,* 466 U.S. at 689).

[37] *Id.*

competent representation. The fact that Counsel's representation and the tactics he chose did not result in a jury's acceptance of Defendant's testimony or acquittal for Defendant does not render that representation "useless," as Defendant has stated.

17. Even if Defendant were able to show Counsel was, indeed, ineffective, it is still Defendant's burden to fulfill the second prong of *Strickland*, by making and substantiating concrete allegations of actual prejudice.[38] With regard to the required showing of prejudice, the *Strickland* Court requires that Defendant show that there is a reasonable probability that, but for counsel's errors, the disposition of this case would have been different.[39] To meet his burden, Defendant must show more than a theoretical possibility that the outcome was affected.[40] Defendant asserts that Counsel's better use of the phone records would have attacked the credibility of his witnesses and that the case hinged on credibility.[41] But Defendant's assertions are theoretical, not the necessary concrete proof of prejudice required under the law. As the State and Counsel have stated, further use of the records may have theoretically harmed Defendant's case, as well, and may have attacked his own credibility.

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[38] *Outten v. State*, 720 A.2d 547, 557 (Del. 1998).

[39] *Strickland*, 466 U.S. at 669.

[40] *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).

[41] Def. Reply to State ("Def. Reply 1"), 9.

18. Defendant's assertion that Counsel was ineffective because he failed to investigate Defendant's evidence, is not supported by the record.[42] Counsel asserts that he "filed the appropriate pleadings and received discovery" in the case, and reviewed the discovery with Defendant.[43] A review of the file and trial transcripts support Counsel's contentions. While Defendant argues that various phone calls on the phone record could have been used to contradict some witness testimony,[44] the Court strains to find the prejudice required under *Strickland*, as the State shows Defendant's own admissions to police and at trial showed he carjacked Freeman and robbed his other victims.[45]

19. Defendant further claims that Counsel was ineffective for allowing Defendant to testify without properly investigating Defendant's case.[46] Counsel states that the decision to testify or not testify was Defendant's decision alone.[47] Counsel advised Defendant on the "advantages and disadvantages of testifying and

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[42] Supp. Memo. at 34.

[43] Aff. at 5.

[44] Supp. Memo. at 36-37.

[45] St. Resp. at 16.

[46] Supp. Memo. at 48.

[47] Aff. at 6.

discussed how [Defendant] should present himself on the witness stand."[48] Counsel also states he advised Defendant not to proceed to trial and that Defendant should accept the State's plea offer.[49] The State further argues that Defendant should be precluded from making this assertion because Counsel properly advised Defendant regarding the decision to testify and the Court ultimately permitted Defendant to do so after the required colloquy.[50]

20. Based upon the record, it is appears that Defendant's own decision to present his case and open himself up to credibility attacks and cross-examination was most problematic for Defendant. However, after reviewing the full record, the Court is convinced that Counsel provided the requisite advice and the Court followed the appropriate procedure to ascertain whether Defendant wished to testify.[51]

21. Finally, Defendant argues that Counsel was ineffective for, as the State puts it, "implicitly conceding that [D]efendant committed crimes."[52] Defendant argues his sole defense was that there was no carjacking or robbery and Counsel's

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[48] *Id.* at 7.

[49] *Id.*

[50] St. Resp. at 17.

[51] Trial Transcript, Oct. 28, 2009 ("Tr.2"), 181.

[52] *Id.*

comments deprived him of a fair trial.[53] The State, however, considers Defendant's comments as "mischaracterization" of Counsel's closing arguments.[54] According to the State, Counsel never conceded guilt, but suggested a means to argue that the jury should have reasonable doubt regarding the State's and the victims' contentions that Defendant had a gun.[55] The State opines that Counsel's arguments were "appropriate and reasonable."[56]

22. Most problematic for Defendant, however, is the fact that his own testimony seems to concede the commission of crimes.[57] Defendant stated, "They can say that I stole the car because I did. I ran around the car, jumped in while the door was open and pulled off the door."[58] Later, Defendant testifies, ". . . I left with [the victim's] stuff and I didn't pay her . . ."[59] And, to assist the prosecutors in attacking his credibility regarding the robbery and his running out of the apartment with his victim following Defendant, Defendant states, "Oh, no, no, no excuse me. You

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[53] Supp. Memo. at 51.

[54] St. Resp. at 17.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] Trial Transcript, Oct. 29, 2009 ("Tr. 3"), 31.

[59] *Id.* at 69.

caught me in a — I didn't see her leave."[60] In applying the *Strickland* standard, this Court cannot see how any actions or words by Counsel could have prejudiced the jury more so than Defendant's own voluntary testimony.

B. Whether Defendant's Motion should be granted for Prosecutorial Misconduct.

23. Defendant argues next that the prosecutor permitted "false testimony to go uncorrected" and "elicited false evidence, as well as aided and encouraged extensive false testimony in which he knew to be false beyond a reasonable doubt."[61] To prove this contention, Defendant asserts that Freeman, his victim, provided testimony which was inconsistent with Defendant's interpretation of the phone records.[62] According to Defendant, his victim's testimony was "inextricable interwind (sic) with lies, fabrication, and tailured (sic) munipulation (sic). . ."[63]

24. The State denies any misconduct, stating any inconsistencies within Freeman's testimony are not "out of the ordinary" when reviewing the testimony of any witness.[64] As the State correctly points out, "it is a rare trial that there are not

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[60] *Id.* at 67.

[61] Supp. Memo. at 53.

[62] *Id.* at 54.

[63] *Id.*

[64] St. Resp. at 19.

some inconsistencies in the testimony of either witnesses or in the testimony of a single witness.[65]" Freeman's testimony came nine months after a violent carjacking. The State opines that "under the pressure of court testimony," it would be difficult for the victim to remember "the exact number of calls he received, as well as the timing of those calls, on a cell phone that did not belong to him."[66] Furthermore, Freeman's responses admit to confusion, thus providing a jury the opportunity to consider whether Freeman's responses are credible.[67]

25. To show prosecutorial misconduct, Defendant must prove the State knew the witness testimony was false.[68] Defendant has failed to demonstrate much more than Freeman's testimony had inconsistencies which often exist in witness testimony. Defendant shows no active or passive deliberate actions by the State to suborn perjury, nor does Defendant prove any of Freeman's testimony reached the level of perjury.

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[65] *In re Cousins*, 2003 WL 22810504, *2 (Del. Super.).

[66] St. Resp. at 19.

[67] *Id.*

[68] *Conlow v. State*, 441 A.2d 638, 640 (Del. 1982).

C. Whether Defendant's Motion should be granted because the Trial Judge abused his discretion.

26. Defendant's third ground for relief is a belief that the trial judge used wording in a supplementary jury charge which was "misleading and adversely affected [Defendant's] rights to testify in his own defense as well as implicity (sic) directed a verdict of first degree carjacking and that Counsel was ineffective for failing to request a limited curative instruction to clarify" the offending comments.[69]

27. Defendant states that when the State objected to Counsel seeking a "choice of evils" instruction, the Court intervened and stated that the judge would not instruct the jury on this legal defense because it was not available to Defendant in this case.[70] The trial judge explained to the jury that they could not "consider that [Defendant] was in some kind of bind, and just had to do what he did with regard to taking the car."[71] He further articulated, "That's a conceivable defense if a lot of technical things are proven, but its not in this case."[72] Defendant states that the trial judge's comments "precluded the jury from considering a critical portion of

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[69] Supp. Memo. at 79.

[70] *Id.*. at 77, citing Trial Transcript ("Tr.4"), Oct. 30, 2012, 74-75.

[71] Tr.4 at 75.

[72] *Id.*

[Defendant's] testimony."

28. The State argues that the Supreme Court of Delaware has already adjudicated whether the trial judge erred by interrupting Counsel's closings and making the statement which Defendant argues was abuse of discretion.[73] Indeed, the Supreme Court reviewed the full text of the judge's comments and printed them verbatim in its mandate affirming Defendant's convictions.[74] After fully considering the text of the judge's comments and reviewing whether a choice of evils defense was supported by the evidence at trial, the Supreme Court ruled that the trial judge did not err in concluding that the choice of evils instruction was unavailable to Defendant.

29. Defendant argues that the Supreme Court ruled only as to the trial judge's decision to avoid such a jury instruction, but did not comment on the language the trial judge used.[75] Defendant contends that the Supreme Court never examined the words used by the trial judge and the impact those words had on the jury's consideration of Defendant's testimony.[76]

30. The Court finds that Defendant's attempt at re-examining the "choice of

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[73] St. Resp. at 20.

[74] 2010 WL 5043910 at *4.

[75] Def. Reply 1 at 16-17.

[76] *Id.*

evils" interruption is merely an attempt to reexamine something which has already been thoroughly examined. The Supreme Court of Delaware has demonstrated that it was fully aware of the comments made by the trial judge and made its ruling affirming the Defendant's convictions, which includes affirming those comments. As such, Defendant's assertions should be precluded under Rule 61(i)(4). In any case, Defendant's arguments that these comments confused the jury or affected the outcome of his case,[77] are not supported by fact, nor do they take into consideration that the judge provided adequate jury instructions at the appropriate time. Defendant complains that this confusion may have caused the jury to be confused or to discount his testimony, but Defendant ignores the possibility that the jury may have ignored his testimony because they did not believe his accounts, or because they found his testimony to be less reliable than the victims' testimony.

D. Whether Defendant's Motion should be granted because Counsel was ineffective at the guilty plea phase.

31. Finally, Defendant contends that Counsel was ineffective because Counsel advised Defendant that the firearm charges would be "thrown out" and that,

[77] Supp. Memo. at 88-89.

had Defendant known this was not true, he would have accepted the six years of incarceration offered by the State.[78] Counsel patently denies this allegation.[79] Counsel asserts that it was Defendant who made the assertion that the weapons charges would be overcome and that Counsel advised him that this was an incorrect assumption.[80]

32, Defendant claims support for his assertion in Counsel's motion at the conclusion of the State's evidence.[81] Counsel did indeed attempt to have some charges dismissed based upon the possibility that the State had not met its burden of showing an operable firearm as required by the criminal statutes for which Defendant was tried.[82] The Court denied Counsel's motion, explaining that sufficient evidence existed within the facts presented at trial and in testimony to fulfill the requirements of the statute.[83] Defendant asserts that this exchange between Defendant and the judge "clearly suggest[s] Counsel held the mistaken belief that the proof of the firearm was not sufficient" and that this proved Counsel advised Defendant of this

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[78] Supp. Memo. at 90-91.

[79] Aff. at 6.

[80] *Id.*

[81] Supp. Memo. at 92.

[82] Tr. 2 at 179.

[83] *Id.* at 180.

mistaken belief when Defendant was deciding to take the plea.[84] Defendant is mistaken. The words spoken by Counsel merely represent an attempt to establish whether the evidence was sufficient and nothing can be asserted beyond that. The motion made by Counsel at the end of the State's evidence was a "standard" motion "commonly made in cases where no firearm is recovered."[85] They do not represent what Counsel advised Defendant and Counsel has denied Defendant's contentions. As the State astutely points out, had Counsel been so misinformed of the law, he would have made this motion long before this stage in the process, most likely before trial began.[86]

33. Defendant submits as proof of his alleged bad advice at the time the plea was offered, a sworn affidavit from LaTonya Newsome[87] which states "myself and my step-father (unnamed) were informed on separate occasions by way of telephone (no dates provided) from [Counsel] that they would weapons (sic) charge would be

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[84] Supp. Memo. at 93.

[85] St. Resp. at 21.

[86] *Id.*

[87] In Defendant's Supp. Memo at 93, he claims to have provided affidavits from two other persons, he in reality only provided two copies of Ms. Newsome's affidavit. The Court reviewed the extensive submission of Defendant and found no other "proof" as Defendant describes. However, if those affidavits are similar to the one provided by Ms. Newsome, they have the same substantive value in presenting Defendant's claim.

dismissed due to not have founding a gun by the authorities."[88] The affidavit is submitted by a person, unknown to the Court whose relationship to Defendant is unclear, who has no absolute knowledge of the information Counsel may have provided Defendant over the course of representation concerning any plea and provides no specific information regarding when Counsel made such representations nor what exactly Counsel said. The Court believes the credibility of the affidavit should be questioned as to its content.

34. The State and Counsel both inform the Court that Defendant's decision to go to trial was based upon his mistaken belief that the victims in the case would not appear at trial because they were drug dealers.[89] The Court finds this representation far more credible than the affidavit provided by Newsome or the innuendo Defendant finds in Counsel's motion at trial. Defendant has not met his burden under *Strickland* to show that but for some action by Counsel, he would not have gone to trial.

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[88] Newsome Aff. Augst 22, 2011.

[89] Aff. at 7 and St. Resp. at 22.

35. Accordingly, for the reasons stated above, Defendant's Motion for Postconviction Relief is DENIED. Defendant's motion for Appointment of Counsel is also DENIED. The Court will appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown.[90] Prisoners have no constitutional right to counsel beyond their direct appeal, and the appointment of an attorney at taxpayer expense occurs only in exceptional circumstances.[91] Defendant has demonstrated the ability to effectively represent his concerns in his motion; the Court found his arguments coherent, but not compelling.

IT IS SO ORDERED,

Mark S. Vavala, Superior Court Commissioner

Original to Prothonotary

cc: Defense Attorney
State's Attorney
Defendant Pro Se
Angie Hairston, Prothonotary Pending Actions
Investigative Services

[90] Super. Ct. Crim. R 61(e).

[91] *St. v. Johnson*, 2004 WL 3029940 (Del. Super.); *State v. Andrus*, 2006 WL 3492293 (Del. Super.).

AFFIDAVIT OF MAILING

The undersigned, being a member of the Bar of this Court, hereby certifies that on September 4, 2012, she caused two copies of the within document to be placed in the United States Mail, first class postage prepaid, addressed to the following:

Cory J. Holmes
No. 00399190
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

/s/Elizabeth R. McFarlan
Deputy Attorney General
ID #3759