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Case Number 599,2013D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Craig Zebroski,	)	
	)	No. 599, 2013D
Defendant,	)	
	)	On Appeal from Superior
v.	)	Court, New Castle County
	)	Honorable Fred S. Silverman
State of Delaware,	)	
	)	Capital Case
Plaintiff.	)	

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

On January28, 1997, Defendant Craig Zebroski, was convicted by a jury in New Castle County, of two counts of First Degree Murder, and related charges, and sentenced to death. *Zebroski*, 1997 Del. Super. LEXIS. 304 (Del. Super. Aug. 1, 1997). On July 28, 1998, this Court affirmed Defendant's convictions and sentence. *Zebroski v. State*, 715 A.2d 75 (Del. 1998).

Defendant filed a motion and amended motion for post-conviction relief, pursuant to Del. Super. Ct. Crim. R. 61 ("Rule 61"). The Superior Court denied the motion. *State v. Zebroski*, 2001 Del. Super. LEXIS 344 (Del. Super. Aug. 31, 2001). This Court affirmed. *Zebroski v. State*, 822 A.2d 1038 (Del. 2003).

On September 2, 2003, Defendant filed a Petition for Writ of Habeas Corpus in the Federal District Court for the District of Delaware. On September 27, 2007, the Federal District Court stayed those proceedings pending the outcome of the litigation challenging Delaware's use of lethal injection, in *Jackson v. Danberg*, C.A. No. 06-300 (D. Del.). While the stay was pending, Defendant filed a second Rule 61 Motion which the Superior Court granted in part, and denied in part, leaving the conviction for first degree murder and death sentence undisturbed. *State v. Zebroski,* 2009 Del. Super. LEXIS 108 (Mar. 19, 2009). On appeal, this Court remanded the case to the Superior Court to conduct an analysis of the exceptions to the potential procedural bars to Defendant's penalty phase ineffective

assistance claim. *Zebroski v. State*, 12 A.3d 1115, 1120 (Del. 2010). The Superior Court again denied post-conviction relief on this claim. *State v. Zebroski*, 2010 Del. Super. LEXIS 228 (May 14, 2010). This Court affirmed. *Zebroski v. State*, 21 A.3d 598 (Del. 2011).

Following this Court's affirmance, Defendant, with new co-counsel in federal court, filed his Amended Petition for a Writ of Habeas Corpus, on October 12, 2011. In its July 23, 2012 Answer, the State argued that many of Defendant's claims were unexhausted and therefore procedurally barred. In reply, Defendant asked the District Court to stay the federal proceedings to permit him to exhaust any unexhausted claims in state court. Defendant argued, and argues herein, that each of his asserted claims are "colorable claims" of a "miscarriage of justice." Rule 61(i)(5). The District Court granted the stay.

On June 28, 2013, Defendant filed a Rule 61 Motion[1] asserting all of the claims that the State had argued were unexhausted, and seeking discovery and a hearing on all of the claims.[2] The Superior Court summarily dismissed the Motion. *State v. Zebroski*, 2013 Del. Super. LEXIS 448 (Sept. 30, 2013).[3] On October 29, 2013, Defendant filed his timely Notice of Appeal.

[1] Defendant filed a corrected motion on July 29, 2013, which added specific citations to the Appendix submitted on June 28, 2013.
[2] Defendant also raised two claims not identified by the State as unexhausted: Trial counsel's ineffective assistance at penalty; and trial counsel's conflict of interest (which, to date, has not been raised in the federal proceedings).
[3] Hereafter, the Superior Court's Opinion will be cited as "Op."

SUMMARY OF ARGUMENT

1. The sentencing judge violated the commands of *Gardner v. Florida*, 430 U.S. 349, 354 (1977), by considering prejudicial and constitutionally prohibited evidence, unseen by defense counsel or the jury, including a secret death recommendation, in sentencing Defendant to death. Trial counsel's failure to take the elementary step of reviewing the presentence report and supporting materials, which he knew the judge would consider before imposing sentence, deprived Defendant of the effective assistance of counsel. The judge's consideration of the sentencing recommendations of the victim's family – without any objection or advocacy from trial counsel, who was unaware of the recommendations because counsel had not reviewed the presentencing materials – independently violated Defendant's Eighth Amendment rights under *Booth v. Maryland*, 482 U.S. 496 (1987), and *Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991).

2. The sentencing judge violated his constitutional obligation to consider all relevant mitigating evidence by deeming Defendant's good conduct in prison, troubled childhood, and youth, as aggravating. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *see also Skipper v. South Carolina*, 476 U.S. 1 (1986), *Wiggins v. Smith*, 539 U.S. 510 (2003).

3. Trial counsel was constitutionally ineffective, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), by: failing to utilize an expert to challenge the unreliable testimony of the State's firearms expert; stipulating to the prejudicial hearsay statement of the co-defendant; introducing Defendant's prejudicial bad act that the trial court had previously excluded; failing to object to an inadmissible and prejudicial portion of a personal letter written by Defendant in which he expressed nothing more than a feeling; and failing to utilize an expert to explain the probative and admissible connection between his PCP use, introduced by the State, and his trial defense.

4. Trial counsel was constitutionally ineffective for failing to object to the State's violation of an *in limine* ruling excluding inflammatory race-related evidence at the guilt phase of trial. The injection of similar race-related evidence *at the penalty phase* violated the constitutional commands of *Dawson v. Delaware*, 503 U.S. 159 (1992).

5. The State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding evidence of the consideration given to its witness Lance Lawson in exchange for his testimony against Defendant, and by failing to disclose the exculpatory statement taken from Lisa Klenk. The State also committed prosecutorial misconduct by exhorting the jury that the "community" would be satisfied with nothing less than a death sentence.

6. Trial counsel was ineffective at the penalty phase trial pursuant to the standards established in *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000). Counsel's preparation and presentation were cursory conclusory, and constitutionally inadequate. As a result of counsel's deficiencies, the sentencer never heard voluminous and readily available evidence that, it is reasonably probable, would have led to a life sentence.

7. Trial counsel suffered from a conflict of interest by his simultaneous representation of State's witness Lance Lawson, adversely affecting his representation of Defendant, in violation of *Wood v. Georgia*, 450 U.S. 261 (1981).

The Superior Court abused its discretion by conducting either flawed or, in most cases, *no* interest of justice or miscarriage of justice analyses, pursuant to Rule 61(i). *See* discussion in Argument Section *infra.* The fundamental nature of the constitutional violations set forth above warrant full and fair interest of justice and miscarriage of justice review.

STATEMENT OF FACTS

This Court is familiar with the facts recited in the briefing in the previous appeals and in its previous opinions. *Zebroski*, 715 A.2d at 77-78; *Zebroski*, 822 A.2d at 1042-43; *Zebroski*, 12 A.3d at 1117. The facts necessary for the Court's consideration of this appeal follow.

Dual Representation: Defendant was represented by the State Public Defenders Office (PD). Yet at a *capias* hearing for State's witness Lance Lawson, held shortly before Defendant's trial, the PD simultaneously represented Lawson and obtained his release. A482. At the time the PD *knew* that Lawson was a State's witness against its client, Defendant. A496.

Trial Counsel's Stewardship at Guilt Phase: Trigger Pull Weight. A firearms expert testified to the "heavy" trigger pull weight based on his testing of the murder weapon. A190. The weapon tested, however, was in a mechanically different condition than it was at the time of the incident. *Id.* The different condition made the trigger weight testimony unreliable, yet the State argued without objection that the trigger pull weight confirmed Defendant's deliberation and intent. A357. Trial counsel neither consulted with, nor called, an expert, and conceded that the trigger pull weight during the incident was "heavy." A214.

Co-defendant's Statement. Trial counsel stipulated to a hearsay statement of the co-defendant, A200, which accused Defendant of being the instigator of the

incident, shooting the decedent for no reason, and laughing after the incident. A369-384. The jury heard nothing of the co-defendant's violent, criminal background. The co-defendant reneged on his deal with the State, and refused to testify, yet the State, without objection, trumpeted his "cooperation" to the jury. A210-11;

Prior Bad Act. *Trial counsel* introduced evidence of Defendant's alleged plan, two years earlier, to rob the same service station robbed in the instant case, A205, even though the trial court had earlier ruled that the State would not be permitted to introduce this evidence. A181;

Letter. The State introduced a letter, without objection, from Defendant to a friend in which he stated "Shit, I feel like beatin' the shit out of a few guards in here just to get out of this fuckin' jail. I hate this jail." A395-99;

PCP. During the guilt phase of the trial, the State introduced evidence of Defendant's PCP use during the night of the incident. A191. Although the trial defense was accident, trial counsel called no expert to address PCP's dissociative and distorting effects upon psychomotor functioning;

Use of Racial Epithet. During the guilt phase the State sought to introduce Defendant's alleged post-incident use of a racial epithet ("nigger") to demonstrate Defendant's longstanding desire to shoot the decedent. A185. Based on this proffer, the trial court permitted the evidence. A186. No evidence of a

longstanding desire to shoot the decedent was ever introduced, yet the epithet was introduced without objection. A187. At the penalty phase the State introduced, through a new witness, Lance Lawson, another alleged use by Defendant of the epithet two years earlier. A227. During his testimony, *Lawson was out of custody*, having been released at the earlier *capias* hearing.

Prosecutors' Conduct. In exchange for his testimony, Lawson received favorable consideration in his pending burglary cases. A460-63; 468. This was never disclosed to trial counsel, and the State argued to the jury that no promises were made to Lawson. A358. The State also interviewed Lisa Klenk, who contradicted the State's theory that Defendant expressed no remorse and used a racial epithet. A464-65. This was never disclosed to trial counsel. Finally, in closings, both prosecutors urged the jury to take their cue regarding sentence from the prosecutors' perception of the community's conscience. A360-62.

Trial Counsel's Penalty Presentation. Trial counsel called three of Defendant's friends and an uncle's girlfriend, who testified that Defendant was nice and respectful. A231, 240-245. Two of them testified that they were aware he had abused substances. A231, 240-41. James Dunlap, Defendant's former substance abuse counselor, also testified that Defendant had abused substances. A235-38. Defendant's uncle testified that Defendant's mother and step-father, John Tyler, drank and had "disputes." A238-41. His mother and sister testified that

Tyler drank and hit the mother and the children. A246-52. The mother's friend, Maureen Porter, testified about two incidents of domestic violence. A241-43. A defense psychologist, who had evaluated Defendant for approximately three hours, testified about Defendant's drug use, the volatile relationship between Defendant and his biological father and step-father, and his mother's substance abuse and mental health issues. A255-350.

Sentencing Considerations. In sentencing Defendant to death, the judge relied on, *inter alia*: Aggravating evidence never seen by the jury or defense counsel, including death recommendations from the decedent's wife and daughter, and a secret death recommendation from the presentence report writer; the Defendant's youth *as aggravating*, *Zebroski*, 1997 Del. Super. at 34; the Defendant's good conduct in prison *as aggravating*, *id.* at 42; the Defendant's horrific childhood *as aggravating*, *id.* at 35; and the thoughts expressed in Defendant's letter to his friend as aggravating, *id.* at 37.

Defendant's Rule 61 Motion sought, *inter alia,* discovery, and a hearing on all contested issues of fact. The Superior Court summarily dismissed the Motion, finding all of the claims to be "procedurally barred as being repetitive or untimely." Op. at *15. Defendant appeals this ruling.

Procedural Bar Exceptions of Rule 61(i)(4) & (5)

Although Rule 61(i)(1)-(3) establishes procedural bars for motions filed out of time or not raised in earlier post-conviction proceedings, these bars are excused under the "miscarriage of justice" exception of Rule 61(i)(5). Rule 61(i)(5) "[i]s a general default provision, and permits a defendant to seek relief if he or she was otherwise procedurally barred under Rules 61(i)(1)-(3)." *Bailey v. State*, 588 A.2d 1121, 1129 (Del.1991). Both the plain language and judicial constructions of the miscarriage of justice exception are broad.[4] Meritorious ineffective assistance claims, readily satisfy the standard,[5] as this Court explicitly declared in this very case. *Zebroski*, 12 A.3d at 1121.[6] Rule 61(i)(4) bars formerly adjudicated claims, but that bar too is excused "in the interest of justice." As discussed *infra*, all of Defendant's claims fall under the bar-exception provisions of Rule 61(i)(4) or (5).

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[4] *See, e.g., Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992) (mistaken waiver of a constitutional right sufficient to satisfy (i)(5) exception); *Guy v. State*, 999 A.2d 863, 866-69 (Del. 2010) (engaging in (i)(5) merits analysis of claim arising under *Batson v. Kentucky*, 476 U.S. 79 (1986)); *Deputy v. State*, 1993 Del. Super. LEXIS 227, at *4 (Del. Super. Aug. 13, 1993) (Confrontation Clause violation "potentially contained a constitutional basis triggering" (i)(5) exception); *State v. Rosa*, 1992 Del Super. LEXIS 411, at *9 (Del. Super. Sept. 29, 1992) (improper jury instructions "present colorable questions of constitutional dimensions" sufficient to satisfy (i)(5)).

[5] *See St. Louis v. State*, 2008 Del. Super. LEXIS 82 at *9 (Del. Super. Mar. 6, 2008) ("Ineffective assistance of counsel is encompassed within the 'miscarriage of justice' category and the mere invocation of that term is sufficient to prevent a cursory dismissal on procedural grounds."); *State v. Hackett*, 2005 Del. Super. LEXIS 379, at *5 n.10 (Del. Super. Nov. 15, 2005) (same); *State v. Wilson*, 2005 Del. Super. LEXIS 372, at *3 n.6 (Del. Super. Nov. 4, 2005) (same).

[6] Although this Court recently imposed a limitation of one year from the conclusion of the first postconviction proceeding for claims of ineffective assistance of post-conviction counsel, *Guy v. State, 2013* Del. LEXIS 603 at *11 (Del. Nov. 27, 2013), it retained 61(i)(5) exception to procedural and statute of limitations bars to successive claims in state postconviction. *Id.* at *12.

ARGUMENT

I. QUESTION PRESENTED – RELYING ON A SECRET SENTENCING RECOMMENDATION AND OTHER PREJUDICIAL MATERIALS UNSEEN BY TRIAL COUNSEL, WHETHER THE SENTENCING JUDGE VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS, AND WHETHER TRIAL, APPELLATE AND PRIOR RULE 61 COUNSEL WERE INEFFECTIVE FOR FAILING TO OBTAIN, REVIEW AND ADDRESS THE MATERIALS, CONSTITUTING A MISCARRIAGE OF JUSTICE.[7]

Scope of Review: This Court reviews questions of law *de novo, Outten v. State,* 720 A.2d 547, 551 (Del. 1998), findings of fact for clear error, *Burrell v. State,* 953 A.2d 957, 961 (Del. 2008), and a decision to deny post-conviction relief for abuse of discretion. *State v. Zebroski*, 12 A.3d 1115, 1119 (Del. 2010).

Merits of Argument: The sentencing judge considered a highly prejudicial presentence report, with voluminous prejudicial attachments, ***including a sealed document containing a probation department recommendation that Defendant be put to death,***[8] that was never presented at Defendant's guilt or penalty phase trial, never addressed by trial counsel, and never made part of the record on appeal in this Court. The material included, but was not limited to, unadjudicated charges, an uncounseled statement to the report writer, and numerous pejorative assessments from a variety of institutional and individual sources. A1036-1335.

[7] Preserved below in Rule 61 Motion. A50-65.

[8] Counsel was given access to the presentence file, and reviewed and hand-copied the death recommendation. Thereafter, counsel requested and received an actual copy of the file, A1036-1335, from Investigative Services; however, the copy did not include the death recommendation. Counsel will request the entire file in discovery in the event of a remand.

Trial and appellate counsel failed to obtain and review the material, and trial counsel made no objection to his client's uncounseled interview with the presentence report writer. Thus, Defendant's sentence of death was obtained in violation of his right to be sentenced in accordance with 11 Del. C. § 4209(d)(1) and 11 Del. Code § 4209(g)(2)(b), as well as his rights to the effective assistance counsel, to present a defense, confrontation, compulsory process, due process, freedom from cruel and unusual punishment and a fair, reliable, accurate determination of his sentence, as guaranteed by the Delaware and United States Constitutions.

A. The Sentencing Court's Reliance on a Secret Sentencing Recommendation Violated Defendant's Constitutional Rights.

In *Gardner v. Florida*, 430 U.S. 349, 354, 362 (1977)9, the United States Supreme Court vacated a death sentence because the sentencing judge reviewed a presentence report containing "evidence" and "opinion" unseen and unaddressed by trial counsel. In *Gardner*, "the only explanation for the lack of disclosure [was] the failure of defense counsel to request access to the full report." *Id.* at 361. In contrast, in the instant case the recommendation was sealed, and trial counsel was forbidden to view it in any event. Rule 32(c)(3). These factors impaired counsel's

[9] Although *Gardner* was a plurality decision, eight of the nine justices agreed that the sentencing judge's review of the information required that the death sentence be vacated. Five justices – albeit one in dissent who expressed the view that a life sentence, rather than a resentencing hearing, was constitutionally required - found a due process violation; two justices simply concurred in the judgment; and one justice found an Eighth Amendment violation; only one justice would have affirmed the sentence.

"opportunity to comment on facts which may influence the sentencing decision," *id.* at 349, and permitted what *Gardner* forbids, a "decision[]" based "on secret information." *Id.* at 360.[10] The error was compounded because the death recommendation came from a presentence investigator "engage[d] in adjudicatory duties." *Thompson v. Burke*, 556 F.2d 231, 236 (3d Cir. 1977). Such "recommendations [] play a *significant*[11] part in a decisionmaking process," *Anton v. Getty*, 78 F.3d 393, 396 (8th Cir. 1996), and when submitted at the behest of a judge, are an integral part of the sentencing. While Defendant was constitutionally entitled to the assurance that no juror believed the death penalty was always required for a first degree murder conviction, *Morgan v. Illinois*, 504 U.S. 719 (1992), he had no such assurance from the presentence investigator.

Because "it is possible that full disclosure, followed by explanation or argument by defense counsel, would have caused the trial judge to sentence Defendant to life, *see Gardner*, 430 U.S. at 362, this Court must vacate the death sentence and remand for a new penalty trial, without requiring a specific showing of prejudice. A death sentence imposed after consideration of aggravation unseen by and unknown to defense counsel or the jury, compromises the impartiality of the decision maker, and renders a sentencing fundamentally unfair. This constitutes

[10] *See also Marshall v. Hendricks*, 307 F.3d 36, 50 (3d Cir. 2002) (decrying "a process that entrust[s] the interpretation of the [presentence] report to a trial court's discretion without allowing for the advocacy of defense counsel") (citation omitted).
[11] All emphasis herein are added, unless otherwise noted.

structural error requiring automatic reversal. *See Arizona v. Fuliminante*, 499 U.S. 279, 310 (1991) ("defect affecting the framework within which the trial proceeds" constitutes structural error, dispensing with the requirement that prejudice be demonstrated). *See also Rose v. Clark*, 478 U.S. 570, 579 (1986) (prejudice requirement dependent on impartiality of arbiter). The Court in *Strickland* 466 U.S. at 692, recognized the interdependence between adversarial testing and the impartiality of the tribunal. The former is meaningless without the latter, even if the latter is compromised unintentionally.

B. Counsel's Failure to Review and Address the Voluminous Prejudicial Information Deprived Defendant of the Effective Assistance of Counsel at the Culminating Stage of the Sentencing Process.

There is no indication in the docket, in any of the Rule 61 proceedings, or in any of the post-trial/pre-sentencing written communications from trial counsel to the sentencing judge, that trial counsel ever requested, received or reviewed a copy of the Report or its attachments. If he had, there would have been no excuse for his failure to address formerly unseen aggravating evidence, or failure to object to that portion of the evidence which may not be constitutionally reviewed by the sentencer. As the Court declared in *Rompilla v. Beard*, 545 U.S. 374, 377 (2005), critical review of a file that defense counsel *knows* may aggravate his client's sentence is a "*sure bet*: whatever may be in that file is going to tell defense counsel something about what" will be leveled against his client. As in *Rompilla*, trial

counsel was deficient for allowing the sentencing judge to violate 11 Del. C. § 4209(d)(1), which did not authorize consideration of extra-record evidence; for failing to object to the judge's review of material that neither he, nor the penalty phase jury, had ever seen; for failing to review the material himself; and for failing to seek to unseal the death recommendation. After *Gardner*, Rule 32(c)(3) as applied to capital sentencings was no longer constitutional. As for the portion of the extra-record material that trial counsel's subordinate submitted, uncritically, to the to the Report writer, A1298, trial counsel was ineffective for doing so without conducting an adequate investigation into Defendant's psychosocial history to explain the significance of the information in the documents submitted, which resulted in the sentencing judge weighing the evidence as aggravating.

As discussed above, and as strongly suggested by *Gardner*, 430 U.S. at 404-05, reliance upon information unseen and unchallenged by defense counsel constitutes structural error, dispensing with a prejudice requirement. In any event, counsel's unreasonable failure to review and address the new, previously undisclosed material was highly prejudicial. The sentencing judge's opinion explicitly and exhaustively relied on this aggravating evidence, and is remarkably resonant of it in content, organization and conclusions.[12] The unseen aggravating

[12] *See e.g., Zebroski*, 1997 Del. Super. at *17/ A1161-62; *id.* at *18/A1167, -1178; *id.* at 19-20/A1165, -1177-78, -1181, -1186, -1194; *id.* at *21/A1194; *id.* at *22/A1283-84; *id.* at *30/A1119-20; *id.* at *37-*38/A1113, -1119-20, -1280. *See also* A53-57.

evidence included the decedent's daughter's and wife's views about the crime, the defendant, and their pleas for a death sentence. A1112-13, 1147-1152. The Court relied upon their assessments in imposing sentence.[13] There is a reasonable probability that, but for counsel's complete failure of advocacy regarding this devastating material, the court's sentencing decision would have been different. *Rompilla*, at 390-393.

In addressing this argument, the sentencing judge held, *inter alia*, that the "passage of time" foreclosed "reconstruction of the role of the presentence investigation." Op. at *11-*12. Considering the substantial amount of undisclosed aggravation reviewed and cited by the sentencing judge, in what was one of Delaware's "closer cases where the scale has come down on the aggravating factors' side," *Zebroski*, 1997 Del. Super. at *58, however, prejudice is amply demonstrated. *See id.* *58 (acknowledging careful weighing of "presentence investigation."); *see also id.* at *17, *19-22, *30, *37-38 (extensively discussing the *extra-record aggravating evidence*).

The opinions of the decedent's wife and daughter regarding the crime and appropriate punishment, and the wife's characterizations of Defendant, separately rendered the death sentence unconstitutional. The Eighth Amendment forbids a victim's family member to offer their characterizations or opinions about the crime, the defendant, or the appropriate sentence. *Dodd v. Trammel*, 730 F.3d

[13] *See e.g., Zebroski, 1997* Del. Super. at *35.

1177, 1202 (10th Cir. 2013). *See also United States v. McVeigh*, 153 F.3d 1166, 1217 (10th Cir. 1998) (same).

Because the presentence report and attachments were never made part of the record for review by this Court, trial and direct appeal counsel were ineffective for failing to object to the State's failure to comply with 11 Del. C. § 4209(g)(2); or alternatively for failing to provide this Court with these materials. "[T]he record on appeal [must] disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed," *Gardner,* 430 U.S. at 361 a fact which this Court acknowledged. 715 A.2d at 82. Yet this Court was *not* provided with much of significant material relied upon by the sentencing judge.

In *State v. Jackson*, 21 A.2d 27 (Del. 2011), this Court conducted full merits review in a second Rule 61 proceeding in which the Defendant claimed that the sentencing judge received prejudicial information – in that case from his prior counsel - unknown to subsequent counsel. The breadth, nature and extent of aggravation relied upon by the sentencing judge herein, makes this matter of far greater constitutional concern than *Jackson.* It warrants a searching merits analysis under Rule 61(i)(5), *as well as* Rule 61(i)(3), because if counsel were not ineffective, Rule 32(c)(3) and the sealed nature of the death recommendation surely constitute "cause." Appellate and prior Rule 61 counsel were ineffective as there was no strategic rationale for their failures to raise these claims.

II. QUESTION PRESENTED – WHETHER THE SENTENCING JUDGE'S CONSIDERATION OF MITIGATING EVIDENCE AS AGGRAVATING EVIDENCE, AND WHETHER TRIAL, APPELLATE AND PRIOR RULE 61 COUNSELS' UNREASONABLE FAILURES TO RAISE THIS ISSUE, VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS, CONSTITUTING A MISCARRIAGE OF JUSTICE.[14]

Scope of Review: This Court reviews questions of law *de novo, Outten v. State,* 720 A.2d 547, 551 (Del. 1998), findings of fact for clear error, *Burrell v. State,* 953 A.2d 957, 961 (Del. 2008), and a decision to deny post-conviction relief for abuse of discretion. *State v. Zebroski,* 12 A.3d 1115, 1119 (Del. 2010).

Merits of Argument: The sentencing judge found that all of Defendant's mitigating factors were "double-edged," *Zebroski,* 1997 Del. Super. at *34, violating Defendant's state and federal constitutional rights.

Youth. The judge found that although "Defendant's youth is the first and strongest mitigator, . . . a defendant's youth may even constitute an *aggravating* factor," *id.* (emphasis in original), and the judge so found here: "Unfortunately . . . the fact that Defendant devolved so quickly also suggests that even at his young age, the horrible damage inflicted on him by his family and 'friends' is irreparable absent a miracle," and "Defendant is so young to be so twisted." *Id.* at * 35, *45.[15] It is impermissible to consider youth as aggravating. *Roper v. Simmons,* 543 U.S.

[14] Preserved below in Rule 61 Motion. A65-72.

[15] Respectfully, this finding is wrong, has subsequently been proven wrong, and was no doubt informed by a penalty phase presentation that failed to provide readily available evidence that Defendant was, in fact, redeemable.

551, 573 (2005) (prosecutor's argument that the "defendant's youth [should be] counted against him" was "overreaching").[16] Even the *Simmons* dissent agreed, *id.* at 603, and referred repeatedly to youth as only mitigating. *Id.* at 569; 570; 571; 588; 599; 614; and 621. The Court's recognition of youth as *only* mitigating predates *Simmons* and is a long accepted principle of capital jurisprudence.[17]

Good Conduct in Prison. After acknowledging that Defendant would not "present any kind of risk to himself or anyone else," *Zebroski*, 1997 Del. Super. at *42, the judge turned the evidence on its head, finding that, "*[m]ore importantly* . . . there is nothing in the record to suggest that Defendant's adaptation to prison involves anything more than merely continuing to exist without being a risk . . . or that his personality inventory includes the resources necessary to develop a meaningful existence in prison." *Id.* The judge did not specifiy what would convert a non-violent prison adjustment from an aggravating to mitigating factor. Evidence "that the defendant would not pose a danger if spared (but incarcerated) *must* be considered potentially mitigating." *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986), without regard to whether his existence would be "meaningful."

Abusive Childhood. The judge weighed as aggravating the unrelenting

[16] While the *holding* of *Simmons* applied only to those under eighteen – Defendant was eighteen years and seven months old at the time of the incident – its discussion of the mitigating effects of youth was not qualified by that limitation.

[17] *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("youth must be considered a relevant mitigating factor"); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 261 (2007) ("[Y]outh [is] a *universally applicable* mitigating circumstance that every juror has experienced . . . .").

trauma and abuse inflicted upon Defendant as a child. *Zebroski*, 1997 Del. Super. at *35-*39. The judge found that it rendered him ruined, short of a "miracle[]," and therefore the better course would be to sentence him to death. *Id.* at *35. A defendant's Eighth Amendment rights are violated by a sentencer's failure to consider as mitigating, *let alone to consider as aggravating*, evidence that a defendant endured childhood physical and mental abuse, and suffered severe emotional disturbance as a result.[18]

But for trial and appellate counsels' failures, there is a reasonable likelihood that Defendant would have been sentenced to life. Prior Rule 61 counsel were also ineffective as there was no strategic rationale for their failures to raise this claim. The Superior Court found the "youth" portion of this claim to have been previously adjudicated, Op. at *5, and further found that there was no constitutional restriction on weighing mitigation as aggravation. *Id.* at *6-*7. The Court was incorrect on both counts; this claim has never been previously addressed, and as discussed above, a sentencing judge may not disregard the Supreme Court's Eighth Amendment jurisprudence regarding the effect of certain categories of mitigation. The judge's sentencing determination constituted a miscarriage of justice warranting full Rule 61(i)(5) review.

[18] *See Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) ("sentencer [may not] refuse to consider, *as a matter of law*, any relevant mitigating evidence," in that case, *inter alia*, evidence of the defendant's troubled childhood) (emphasis in original). *See also Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003); *Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Johnson v. Bagley*, 544 F.3d 592, 599 (2008) (6th Cir. 2008).

III. QUESTION PRESENTED: WHETHER TRIAL COUNSEL'S INEFFECTIVENESS AT THE GUILT PHASE TRIAL, AND WHETHER APPELLATE AND PRIOR RULE 61 COUNSELS' FAILURES TO RAISE THESE CLAIMS, VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS, CONSTITUTING A MISCARRIAGE OF JUSTICE.[19]

Scope of Review: This Court reviews questions of law *de novo, Outten v. State*, 720 A.2d 547, 551 (Del. 1998), findings of fact for clear error, *Burrell v. State*, 953 A.2d 957, 961 (Del. 2008), and a decision to deny post-conviction relief for abuse of discretion. *State v. Zebroski*, 12 A.3d 1115, 1119 (Del. 2010).

Merits of Argument: Defendant's convictions and sentence of death were obtained in violation of his federal and state constitutional rights to the effective assistance of counsel during the guilt phase of his trial. Counsel's errors and omissions rendered his performance constitutionally deficient. But for these errors, there is more than a reasonable probability that the result of the proceeding would have been different. Separately, and cumulatively, these errors require reversal of Defendant's convictions and sentence of death.

Firearms Evidence. Trial counsel unreasonably and prejudicially failed to object to the admission of irrelevant, misleading and prejudicial firearms evidence and failed to rebut such evidence with readily available expert testimony. Counsel's failures prejudiced Defendant at guilt and penalty. The defense theory at trial was accident. Trial counsel argued that Defendant's finger "[h]it the trigger

[19] Preserved below in Rule 61 Motion. A80-110.

accidentally," firing the shot that killed the decedent. A216. The issue of trigger pull and its relation to the question of intent was of vital importance to the jurors: They asked to test the trigger *and* submitted three separate questions on the meaning of "intent." A368. The State countered the defense theory with the testimony of its firearms examiner that the trigger pull, at 12 ½ lbs., was "heavy." A190. The prosecution, likening the trigger pull weight to a "bag of potatoes," argued that the heaviness of the trigger proved that the shooting of the decedent was deliberate. A209. The firearms examiner also testified that the gun was not intact when he tested the trigger, A190, a fact disclosed to trial counsel in discovery. A401. Trial counsel was also provided with pre-trial discovery revealing that the gun *was* intact during the incident. A451. Yet trial counsel failed to consult with a firearms expert, which would have equipped him to effectively cross-examine the State's expert, and present readily available expert testimony showing the following: The gun was in vastly different condition at the time of the homicide than it was when the trigger pull test was performed, rendering the testimony of trigger pull weight thoroughly unreliable; even if the testimony were reliable, a trigger pull of 12 ½ lbs. is in no way inconsistent with an accidental, unintended firing; it is misleading to liken the exertion required to pull a trigger of a particular weight to that of lifting the same amount of dead weight with one's

finger; and the particular model of gun at issue[20] has a design defect that can cause it to discharge even if the trigger is not touched.[21] A443. Undersigned counsel proffered such expert testimony below. *Id.* Trial counsel was constitutionally obligated to educate himself on these issues before cross-examining the State's expert. *Gersten v. Senkowski*, 426 F.3d 588, 611 (2nd Cir. 2005). Even if effective cross-examination had occurred, which it did not, counsel would still have been ineffective for failing to call an expert because testimony elicited through cross-examination would not have been "nearly as strong as that which could [be] provided by an expert." *Showers v. Beard*, 635 F.3d 625, 631 (3d Cir. 2011).[22]

Aware of the vital importance of this issue, trial counsel urged the jurors not to test the trigger, since "the gun is not in the same operating condition as it was when it was fired by Mr. Zebroski." A214. Yet – inexplicably – he conceded that, at the time of the incident, the trigger pull was "heavy," *id*., thus *adopting the point he was urging the jury to reject*. The prosecutor capitalized on counsel's failures, emphasizing the trigger pull weight, and telling the jury that "[t]here is absolutely

[20] The F.I.E. Titan single action .25 caliber semi-automatic firearm.

[21] Evidence of the defect would have further refuted the prosecutor's discounting of the possibility of accidental discharge. A218.

[22] *See also Siehl v. Grace*, 561 F.3d 189, 197-98 (3d Cir. 2009) (choice not to seek expert appeared to have been made without full investigation); *Driscoll v. Delo*, 71 F.3d 701, 708-09 (8th Cir. 1995) (despite eliciting a helpful concession from the state's expert, defense counsel ineffective for failing to take measures "to understand the laboratory tests performed and the inferences that one could logically draw from the results."); *Troedel v. Wainwright*, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986) (holding counsel's failure to consult with a firearms expert for challenge to crucial government expert's ballistics testimony constituted deficient peformance), *aff'd, Troedel v. Dugger*, 828 F.2d 670 (11th Cir. 1987) (*per curiam*).

no testimony or evidence to support the [the defense theory]," A218; this left counsel to feebly argue "I would respectfully submit that there was no evidence about a 10-pound bag of potatoes from any witness in this case." A214. Notably, trial counsel's failures *also prejudiced Defendant at penalty*, when the State re-argued as aggravation Defendant's alleged calculation and deliberation in firing the weapon. A357. Reasonably effective counsel would also have been able to exclude the prejudicial and irrelevant expert testimony of trigger weight by objecting to it as beyond the scope of the State's proffer. A188. ("I'll limit my questions [regarding trigger weight] to the specifications of this type of handgun.").[23] Yet after the expert professed ignorance as to "specifications . . . for this particular gun," trial counsel sat silent while the prosecutor violated the proffer and asked about "general parameters for normal range trigger pull," prompting the prejudicial and irrelevant testimony. A189.

Although the Superior Court found this claim to be "potentially impressive," Op. at *8, it dismissed the claim because the "new expert did not opine that the trial expert got it wrong."[24] *Id.* at *10. This is not the standard of *Strickland* or Rule

[23] This limitation was based on the trial court's expressed concern that "absent some testimony that this – that the defendant had that kind of familiarity [with firing semi-automatics], the fact that this weapon might have been as hard or harder to fire than other semiautomatics doesn't seem to say much about this particular defendant's intent in firing this weapon." A188.

[24] The Superior Court also found that the defendant's expert, proffered in the Rule 61 Motion, did not opine that the weapon in this case was "defective." Op. at *10. To the contrary, the expert found that the model, by its very design, was defective. A443. Moreover, the Superior Court's denial of a hearing precluded the defense expert from examining the firearm to confirm the

61(i)(5). Had trial counsel consulted with and called an expert, such as the expert who authored the Report supplied in the attached Appendix, there is more than a reasonable likelihood that the jury – which was consumed with the question of trigger pull and intent – would have concluded that the prosecution "got it wrong;" i.e., that the State examiner's testimony was thoroughly unreliable and irrelevant, and thus had no bearing on the question of intent, or on the degree of calculation and deliberation in penalty. The Superior Court never addressed how trial counsel's failure to present *any* evidence addressing the *only* issue raised by his defense did not raise a colorable claim of a miscarriage of justice.

Stipulation to Sarro Statement: Trial counsel was ineffective under the Delaware and United States Constitutions for stipulating to a highly prejudicial hearsay statement of co-defendant Michael Sarro. A200. The statement contained damaging and false accusations against Defendant, including but not limited to, that Mr. Sarro accused Defendant of coming up with the idea of the robbery, that they both cased the service station before attempting to rob it, that the decedent was scared and doing "nothing" that should have caused Defendant to shoot him, and that when Sarro asked the Defendant why he shot the decedent, the Defendant started laughing. A376-78, 380. It contained nothing of value to the defense.

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existence of the defect and its relation to the incident, which has never been done.

The defense theory was that during the incident Defendant became "scared," fired the trigger because he was "startled" when Sarro punched the victim, and immediately thereafter was "upset" and remorseful. A216. Sarro's statement dismantled that theory. Ridiculing Defendant's claims of accident and remorse, the State trumpeted his alleged laughter no fewer than six times in closings, A208-11, 213, 217-18, and argued that the laughter proved that Defendant was neither "sad," "unhappy," "regretful," or "remorseful." A213. Trial counsel, after stipulating to otherwise inadmissible evidence of laughter, was consigned to make the feeble plea to the jury: "what is a laugh, and what is a smile, under these circumstances?" A214.[25]

The Superior Court, citing to this Court's opinion on direct appeal, held that "the admission of the non-testifying co-defendant, Sarro's, statement" had been addressed "at least once in earlier proceedings." Op. at *5-*6. The issue addressed by this Court, however, was the right of the co-defendant to assert his fifth amendment privilege, *Zebroski v. State*, 715 A.2d 75, 80 (Del. 1998), an issue *unrelated* to the claim asserted herein. Had the Superior Court conducted a Rule 61(i)(5) analysis, which it did not, it would have found that counsel's stipulation constituted a miscarriage of justice, by allowing consideration of irrelevant, prejudicial, and aggravating evidence, for no conceivable purpose. *See Siehl v.*

[25] It is notable that while, according to the evidence, there were many witnesses in Defendant's company after the incident, no other witness testified to having seen Defendant laugh.

Grace, 561 F.3d 189, 196 (3d Cir. 2009) (finding counsel ineffective for stipulation adding nothing to defense case, which led jury to conclude guilt).

Prior Bad Act. Trial counsel was ineffective under the Delaware and United States Constitutions for failing to properly object to the introduction of a highly prejudicial prior bad act: an alleged prior plan two years earlier – which was not carried out - to rob the same Conoco gas station. The evidence was not only in and of itself devastating to Defendant's "accident" defense, it carried the additional baggage of a racially-offensive epithet. Trial counsel had succeeded in having the trial judge properly exclude the evidence, but apparently forgot about the extent of the ruling when the topic was raised during trial.

Prior to trial, the State wrote a letter to trial counsel indicating its intention to elicit the evidence. A366-67. Just before opening statements, however, the trial court ruled the evidence inadmissible. A181. The *only* qualification placed on the ruling was the court's statement that it "may revisit [the ruling] if there is a penalty hearing." *Id.* Later in the trial, the State again raised the issue, and incorrectly characterized the court's ruling, stating, "your Honor had ruled that the evidence of witnesses discussing Mr. Zebroski's intent to rob the gas station previously was out in terms of the State's case in chief." A196. Instead of correcting the State, and reminding the court that its ruling was not confined to the State's case in chief, trial counsel stated that he would head off the (nonexistent) problem by having his

client testify to the prior bad act. *Id*. In view of its earlier ruling barring the prior bad act, the trial court was *understandably* baffled: “I thought that I already ruled it out." *Id*. Inexplicably, trial counsel then reminded the court of something that had never occurred in the first place, that it had “made a comment on the record that you would reconsider [admitting the evidence on] rebuttal.” *Id*. Trial counsel then followed through on his solution to a problem of his own making, by eliciting the prior robbery attempt as part of Defendant’s direct examination. A205. The State exploited trial counsel’s error in closing by describing the incident as fulfillment of Defendant’s alleged “long-time desire.” A211. Trial counsel had no reasonable tactical basis to introduce this evidence. In doing so, he forfeited the issue on which he had prevailed. Indeed, *even after trial counsel informed the court of his ill-advised plan*, the court assured all counsel that unless Defendant disputed the robbery - which trial counsel conceded and Defendant *admitted* to the jury - the prior bad act evidence would not be admitted. A204.

Evidence of prior bad acts is devastating. A jury hearing that a defendant has engaged in past criminal conduct may be influenced to return a guilty verdict simply because the jury considers the defendant a law-breaker. The core problem with other crimes evidence is the risk that it will “over persuade” a jury because such evidence tends “to weigh too much with the jury and to so over persuade them as to prejudice one with a bad general record and deny him a fair opportunity to

defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 475-76 (1948). In *United States v. Murray*, 103 F.3d 310, 316 (3d Cir. 1997), the Court, in an opinion by then-Judge Alito, further emphasized the need for trial judges "to exercise particular care in admitting such evidence" due in part to the "substantial danger of unfair prejudice." The admission of evidence of the prior bad act in this case was a self-inflicted wound. Reasonably competent counsel would have kept this evidence from the jury by either remembering the trial court's initial ruling, or understanding that the trial court's subsequent assurance rendered unnecessary and highly prejudicial having his own client testify to it.

In its ruling on this claim, the Superior Court placed the claim into a category of several others which it decided were "previously ruled upon . . . indisputably matters of trial strategy, or remain unsubstantiated as anything other than speculation." Op. at *14. There was nothing "speculative," however, about the State's heavy reliance on the bad act in urging the jury to recommend death. The Court engaged in no Rule 61(i)(5) analysis nor, for that matter, discussed the claim at all. In view of the powerfully prejudicial nature of the bad act evidence and the prosecution's explicit reliance upon it, its introduction undermined the fundamental legality, reliability, integrity and fairness of the proceedings leading to the judgment of conviction.

False Portrayal of Michael Sarro. Trial counsel was ineffective under the Delaware and United States Constitutions for failing to rebut the State's theory that between Defendant and co-perpetrator Sarro, Defendant was the leader, the one who came up with the idea of committing the crime, and the overall bad guy. The State took pains at trial to paint Defendant in this manner. A182-84, 206-07. Trial counsel failed to introduce co-defendant Sarro's bad character and propensity for violence, and failed to introduce the fact that he reneged on his cooperation agreement with the State. Central to Defendant's guilt and penalty defense was that the shooting was accidental, or at the very least a spontaneous reaction to Sarro's punching the decedent, and that Defendant was remorseful. Indeed, as the prosecutor told the jury, the "only issue" for them to decide was Defendant's "state of mind at the time of the killing." A210. Sarro's version of events,[26] that it was Defendant's idea to commit the robbery that night and that Defendant laughed after shooting the decedent, undermined the defense, and the jury was never given a reason to discredit it. Had counsel been acting as a reasonably competent advocate, the jury would have heard plentiful and readily available evidence showing that, of the two, Sarro was by far the more violent and the more criminally inclined, and that it was correspondingly unlikely that he was simply along for the ride, as the State contended. A simple review of Sarro's Superior Court files would have

[26] Sarro's "version" was presented through trial counsel's inexplicable stipulation to his videotaped statement, *see supra* at 25-26.

disclosed an extensive criminal record – worse than Defendant's – including a chilling history of violent assault, and a demonstrated refusal to be rehabilitated. A385-394. Reasonably competent counsel also would not have permitted the State to hide from the jury the fact that Sarro had reneged on his plea agreement.

While this evidence was essential to undermine Sarro's credibility at the guilt phase, it also would have provided the jury with an accurate portrait of the relative culpability of Defendant and Mr. Sarro as it related to penalty. Relative culpability, as well as character of the co-defendant, is relevant to penalty. Beyond Sarro's background, his reneging on his agreement to testify, A198-99, was an important factor in this calculus. Yet his plea agreement was introduced into evidence, without any explanation to the jury that it had been violated, A202, leaving the jury with the false impression that Sarro was willing to stand by his earlier accusations and would thus receive a twelve year sentence while Defendant faced execution. This impression was reinforced by the State's urging the jury to credit Sarro's "cooperation" in view of the risk he faced in coming forward. A210-11. Trial counsel could have easily refuted this prejudicial falsehood.

"Trial counsel has an obligation to 'investigate possible methods for impeaching a prosecution witness, and [the] failure to do so may constitute ineffective assistance of counsel,'" especially the failure to investigate a crucial witness. *Alexander v. Shannon*, 163 Fed. Appx. 167, 173 (3d Cir. 2006) (quoting

Tucker v. Ozmint, 350 F.3d 433, 444 (4th Cir. 2003)). Had the penalty phase jurors been presented with evidence of Sarro's background and unwillingness to stand by his prejudicial accusations, there is a reasonable probability that the jurors' would have discounted his testimony, which bore heavily on the question of intent, and refused to find that Defendant intended to kill. At the very least, because Sarro was to receive only a twelve year sentence, there is a reasonable probability that the jury would have rejected death for Defendant, out of a sense of basic fairness and proportionality.

There is no conceivable strategic or tactical reason for counsel not to have allowed this thoroughly discreditable witness to remain completely unimpeached. In its opinion, the Superior Court found this claim to have been previously adjudicated. Op. at *4. The Court was incorrect; it never has been presented to any court before the current Rule 61 Motion. Regardless, considering the gross disparity in sentence between Defendant and Sarro, the distortion of the nature of his cooperation, and the readily available evidence to rebut the State's claim that Defendant was the leader of the two, counsel's unreasonable and prejudicial failures amounted to ineffectiveness and constitute a miscarriage of justice, and/or warrant consideration in the interest of justice.

Kaufman Letter. Trial counsel was ineffective under the Delaware and United States Constitutions for failing to redact the portion of Defendant's personal

letter to his friend Danielle Kaufman that expressed damaging sentiments (i.e., "Shit, I feel like beatin' the shit out of a few guards in here just to get out of this fuckin' jail. I hate this jail."). A395-96, A193-94. This reference was highly prejudicial and inflammatory and had no probative value whatsoever. There was no evidence that Defendant had ever assaulted any guards, or had ever shown any inclination to do so. A criminal defendant cannot be punished, *let alone put to death*, for his thoughts, absent the remotest indication that he has an intention to act upon those thoughts. *See, e.g., United States v. Shabani*, 513 U.S. 10, 16 (1993) (asserting that the "law does not punish criminal thoughts" in case in which conspiracy was established because, in addition to "mere thought," the government proved a criminal agreement).[27]

The trial court disregarded this fundamental constitutional principle, and specifically relied upon the sentiment expressed by Defendant in his letter in sentencing Defendant to death. *State v. Zebroski*, 1997 Del. Super. at *37 ("As of October 1, 1996, Defendant was toying with the idea of assaulting his jailers and escaping."). The Court's language leaves no doubt that it re-characterized what Defendant himself had described as a "feel[ing]" into a potential plan of action.

[27] *See also United States v. Cicco*, 10 F.3d 980, 984 (3d Cir. 1993) (restating prohibition on punishment for one's "thoughts, desires or motives" absent conduct inspired by such thoughts, desires or motives, in context of a prosecution for offense of attempt); *United States v. Cruz-Jiminez*, 977 F.2d 95, 102 n. 10 (3d Cir. 1992) (same); *United States v. Everett*, 700 F.2d 900, 908-909 (3d. Cir. 1983) (same).

In its ruling on this claim, the Superior Court placed it in a category of claims which it decided had been "previously ruled upon . . . indisputably matters of trial strategy, or remain unsubstantiated as anything other than speculation." Op. at *14. The Court conducted no analysis of the claim, and none of the factors cited by the Court apply to this claim: It was not previously ruled upon; no sound strategy could have supported counsel's failure to move to redact the comment from the letter or object to its consideration at guilt and penalty; and there is nothing "speculative" about the Court's reliance upon this comment in sentencing Defendant to death. As discussed above, it was used to penalize Defendant's thoughts, and as such, violated fundamental constitutional protections, constituting a miscarriage of justice.

PCP Intoxication: Trial counsel was ineffective under the Delaware and United States Constitutions for failing to present expert testimony about Defendant's use of PCP just prior to, and intoxication at the time of, the crime, which the State introduced at trial. A191. Reasonably competent counsel would have introduced an expert at the guilt phase of the trial who was qualified to explain the effects of PCP upon Defendant's mental and physical state at the time of the alleged incident. *See* A453-58. (Report of Dr. Deborah Mash, detailing the profound "dissociative" and "distorti[ng]" effects of PCP upon Defendant's mental

state, and concluding "with certainty" that Defendant "had impaired higher order reasoning and judgment, diminished by intoxicating effects of PCP abuse").

Expert testimony as to PCP's dissociative and distorting effects, and its impact on psychomotor functioning, would have supported the defense theory of accident, because a person in these states is more likely to engage in an inadvertent physical action than one who is not. Even if after receiving this evidence, had the jury rejected Defendant's accident defense, the evidence would certainly have been mitigating as to the question of punishment.

The Superior Court dismissed this claim on the basis that it had been "previously adjudicated." Op. at *4. As with several of the claims the Superior Court found "previously adjudicated," this claim has never been heard by any court. Regardless, had the Superior Court conducted the requisite Rule 61(i)(5) or Rule 61(i)(4) analysis, the Court would have found that counsel's failure to present expert testimony in the guilt phase regarding the impact of PCP on Defendant satisfied both the miscarriage of justice and interest of justice standards.

But for trial and appellate counsels' failures, there is a reasonable likelihood that the result of Defendant's trial and/or sentencing would have been different. Prior Rule 61 counsel were also ineffective as there was no strategic rationale for their failures to raise this claim.

IV. QUESTION PRESENTED: WHETHER THE PROSECUTORS' IMPROPER COMMENTS AT CLOSINGS, AND FAILURES TO DISCLOSE MATERIAL, EXCULPATORY EVIDENCE, AND TRIAL APPELLATE, AND PRIOR RULE 61 COUNSELS' FAILURES TO DISCOVER THE EVIDENCE OR OBJECT TO THE COMMENTS, VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS, SO AS TO RENDER THE RULE 61 BARS INAPPLICABLE.[28]

Scope of Review: This Court reviews questions of law *de novo, Outten v. State,* 720 A.2d 547, 551 (Del. 1998), findings of fact for clear error, *Burrell v. State,* 953 A.2d 957, 961 (Del. 2008), and a decision to deny post-conviction relief for abuse of discretion. *Zebroski v. State,* 12 A.3d 1115, 1119 (Del. 2010).

Merits of Argument: The prosecution committed prejudicial acts of misconduct by failing to disclose to trial counsel material, exculpatory evidence with respect to both guilt and punishment and by making improper comments during closing arguments at the penalty phase. Consequently, Defendant was deprived of his state and federal constitutional rights at trial and sentencing. The State violated the commands of *Brady v. Maryland,* 373 U.S. 83 (1963), because as discussed *infra,* this exculpatory evidence was suppressed by the State, and was material to both guilt and punishment. *Simmons v. Beard,* 590 F.3d 223, 228 (3d Cir. 2009); *Slutzker v. Johnson,* 393 F.3d 373, 386 (2004).

Lance Lawson. The prosecution failed to disclose that Lance Lawson was the police's initial suspect in Mr. Hammond's death, A460, that he only provided

[28] Preserved below in Rule 61 Motion. A72-79.

information regarding Defendant when he was threatened with prosecution for the murder, A460, and that he received favorable consideration on outstanding Delaware state criminal matters. A461, 469-70. This consideration included, but was not limited to the following: despite being from out of state, he received unsecured bond on two counts of burglary and related offenses, and was required to pay no additional bail after a capias was issued for his failure to appear on his criminal cases; he received a probationary sentence for a reduced charge of theft; and he was permitted to serve his probation out of state. A469-86. This evidence was crucial to the effective cross examination of Lawson, whose testimony at penalty was devastating to Defendant. *See infra* at 41; *see also* A226-30. At penalty, the State falsely represented to the jury that Lawson "came in without any agreement from the State to testify, without any promises from the State to come in here and do this. He did this of his own free will, as the defendant sat right over there." A358. The representation violated the constitutional protections of *Giglio v. United States,* 405 U.S. 150 (1972) and *Napue v. Illinois,* 360 U.S. 264 (1959).

Lisa Klenk. The prosecution failed to disclose that Lisa Klenk informed investigators that Brian Morris told her that when he saw Defendant shortly after the homicide Defendant appeared visibly shaken was white as a ghost, and told Morris that the shooting was an accident. A464-65. Notably, Morris did not tell Ms. Klenk that Defendant was laughing or used racial epithets when he described

what happened, as the State alleged at trial. *Id*. Klenk's evidence supported the defense's accident theory, and refuted the State's attempts to portray Defendant as a cold-blooded murderer. It also directly contradicted the State's claims that immediately after the incident Defendant was laughing, A202; and uttered a racial epithet. A185, 187.

A Court reviewing a *Brady* claim must assess the prejudicial impact of all withheld evidence cumulatively. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). The State violated Defendant's constitutional rights by failing to provide him with this material, exculpatory evidence to conduct an effective cross-examination of the State's witnesses.[29] But for the prosecutors' misconduct there is a reasonable probability that the outcome of the trial and sentencing would have been different. Because this exculpatory evidence was withheld from all prior counsel, Defendant satisfies the miscarriage of justice, interest of justice, and cause and prejudice exceptions of Rules 61(i)(2)(3) & (5). To the extent that reasonably diligent trial and/or post-conviction counsel could have discovered this exculpatory evidence, Defendant raises their ineffectiveness as a basis for relief as well.

Closing Argument: The State argued to the jury that "you, as a conscience of the community, have an opportunity to condemn this act and not allow the

[29] *See Breakiron v. Horn*, 642 F.3d 126, 133 n.8 (3d Cir. 2011) (affirming "axiomatic" principle "that prosecutors must disclose impeachment evidence"); *United States v. Smith*, 77 F.3d 511, 517 (D.C. Cir. 1996) (*Brady* reversal where government failed to disclose full extent of consideration offered cooperating witness).

defendant to escape responsibility for what he did." A360; and, "You are compelled to issue punishment according to the conscience of our community." A362. The "escape" reference equated a life sentence with an "escape," allowing the Defendant to avoid the "condemn[ation]" of the community. The reference to being "compelled" instructed the jurors that their punishment was required to be in accord the community's judgment. These comments placed an unfair burden on Defendant by asking the jurors to act in response to the prosecutors' perception of the community sentiment, in lieu of voting in accordance with their individual consciences. Fairly read, the comments were "calculated" to divert the jury from their responsibility to make an individualized determination of punishment based on the background and character of Defendant and the nature of the crime. *United States v. Solivan*, 937 F.2d 1146, 1151 (6th Cir. 1991). The prosecutors' comments, which exhorted the jury to apply a standard that would distort the life or death determination, and trial, appellate and prior Rule 61 counsel failures to raise this most consequential of issues, constituted a miscarriage of justice that undermined the fundamental legality, reliability, integrity or fairness of Defendant's sentencing.

The Superior Court abused its discretion, by conducting *no* analysis of these claims, and merely asserting that "if established," they fail to "make[] out a constitutional claim." Op. at *8.

V. <u>QUESTION PRESENTED</u> – WHETHER THE INJECTION OF RACE AT THE PENALTY PHASE, DEFENSE COUNSEL'S FAILURE TO HOLD THE STATE TO ITS RACE PROFFER AT TRIAL, AND ALL PRIOR COUNSELS' FAILURES TO RAISE THESE ISSUES VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS, CONSTITUTING A MISCARRIAGE OF JUSTICE.[30]

Scope of Review: This Court reviews questions of law *de novo, Outten v. State*, 720 A.2d 547, 551 (Del. 1998), findings of fact for clear error, *Burrell v. State*, 953 A.2d 957, 961 (Del. 2008), and a decision to deny post-conviction relief for abuse of discretion. *State v. Zebroski*, 12 A.3d 1115, 1119 (Del. 2010).

Merits of Argument: During Defendant's guilt phase trial, the trial court allowed the State to present evidence that during a conversation with State's witness Brian Morris, held shortly after the commission of the crime, Defendant used the racial epithet "nigger" to refer to the victim of the crime. A187. On direct appeal Defendant argued that in permitting this evidence to be introduced, the trial court had committed prejudicial error. This Court said it had not. *Zebroski*, 715 A.2d at 79-80. This Court found that although the epithet was "possibly inflammatory," because it was probative of an element of the offense, "intent," it was "sufficiently probative" to have been admitted during the guilt phase of Defendant's trial. *Id.* In Claim V of the amended Rule 61 petition, two different claims were presented. A110-15. The first of these claims was that that the trial court violated Defendant's state and federal constitutional rights by permitting the

[30] Preserved below in Rule 61 Motion. A110-15.

State, during the penalty hearing, to introduce a different statement that Defendant allegedly made to Lance Lawson "a couple of years" prior to the incident, in which he used the epithet "nigger" to describe the decedent. A224-25, 227. The second claim was that counsel had been ineffective for failing to hold the prosecution to its proffer of what the evidence would be and, when the evidence did not comport with the proffer, failed to move to strike the testimony and/or move for a mistrial. A110-15.

At penalty, over defense objection, the State presented the testimony of Lance Lawson. Lawson testified that two years earlier he remembered Defendant "walking, coming up there, he was either high or drunk, [] talking about he was going to go rob the Conoco station[,]" and that "if anything happened, he would shoot the nigger." A227. There are numerous reasons why the prejudicial impact of Lawson's testimony substantially outweighed any probative value, and why the court abused its discretion in admitting the evidence. The use of the epithet was isolated and devoid of any context of racial hatred or animus. *See, e.g.*, *United States v. Mitchell*, 49 F.3d 769, 780 (D.C. Cir. 1995) (informant's use of term "nigger" does not suggest racial bias that would lead him to testify falsely against a black defendant, so district court's denial of cross-examination on the issue of racial bias upheld). In *Mitchell*, the witness would have suffered no adverse consequences from eliciting evidence of his prior use of the term; here, the adverse

consequence to Defendant was a death sentence. As this Court noted in its direct appeal opinion, this type of evidence "raises special concerns" and is "possibly inflammatory." *Zebroski*, 715 A.2d at 79. This Court, however, found the epithet allegedly uttered to Brian Morris admissible because of its relevance to intent. *Zebroski*, 715 A.2d at 79. The jury's determination of intent had been resolved, however, *before* the penalty hearing. Thus, evidence of an utterance *made two years earlier* had no probative value at penalty, where the risk of inflaming the jurors was heightened due to the life or death decision they were required to make. Nevertheless, over defense objection, the prosecutor was permitted to elicit the testimony. Its admission was constitutional error.[31]

The second issue presented herein arose when the State sought to offer evidence from a friend of Defendant, Brian Morris, as to statements Defendant made to Morris after the homicide. The prosecution's proffer was that Morris would testify that Defendant stated:

> [T]hat old nigger who had it coming, I just shot him. . . . you know, that old black man, you know that old nigger that I always wanted to shoot, I shot him tonight.

[31] *See, e.g., Dawson v. Delaware*, 503 U.S. 159, 166 (1992) (evidence of Defendant's racial attitudes or opinions only admissible when they amount to racial hatred motivating the criminal act); *Barclay v. Florida*, 463 U.S. 939, 1143 (same); *United States v. Fell*, 531 F.3d 197, 228 (2d Cir. 2008) (same); *United States v. Fields*, 483 F.3d 313, 374 (5th Cir. 2007) (Benavides, J., dissenting) (same); *Monschke v. Warner*, 2012 U.S. Dist. LEXIS 92188 at *43 (W.D. Wash. June 11, 2012) (same); *Fults v. Upton*, 2012 U.S. Dist. LEXIS 34150 at *44-46 (N.D. Ga. March 14, 2012) (same).

A185. The prosecution assured the trial judge that it was not the word "nigger" that was important; rather, it was the Defendant's alleged longstanding desire to shoot the victim, as that bore on the issue of premeditation and absence of accident or mistake. A184-87. While the trial judge recognized the potential for unfair prejudice, he allowed the testimony, warning that he assumed the State's proffer was an accurate representation of the evidence to come. A186.

In fact, the proffer was completely inaccurate, and the witness's testimony was simply that Defendant had told him, "I shot the nigger." A187. Strikingly absent was the premise on which the statement had been permitted, *i.e.* to demonstrate the crime had been long planned and that Defendant had "always" wanted to shoot the victim. Defense counsel, however, did nothing to react to this failure of proof. Reasonably competent counsel would have moved for a mistrial and, that failing, moved to strike the evidence.

Had defense counsel acted as the reasonably competent advocate guaranteed by the constitution, and prevented the jury from hearing this inflammatory, prejudicial and irrelevant evidence, there is a reasonable likelihood that the result of the trial and/or sentencing would have been different. Additionally, Defendant was denied the effective assistance of appellate counsel since, although there was a general attack on the use of the racial epithet on *Dawson* and *Barclay* grounds, appellate counsel never made the critical factual points that the actual testimony on

this issue did not live up to the State's proffer and that there was no conceivable basis for introducing a second racial epithet at the penalty phase. The Fourteenth Amendment guarantees the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Smith v. Robbins,* 528 U.S. 259, 277 (2000). Reasonably competent post-conviction counsel would have raised these issues as well.

The improper injection of race in a capital sentencing, let alone in a capital trial, presents a colorable claim of 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 and sentence. Yet the Superior Court conducted no Rule 61(i)(5) analysis of these claims, simply finding them "already adjudicated." Op. at *4. The Court was wrong. The claims have never before been asserted. Regardless, whether the claims are reviewed pursuant to Rule 61(i)(4)'s interest of justice exception or Rule 61(i)(5)'s miscarriage of justice exception, full merits review is warranted and would compel reversal of Defendant's conviction and sentence.

VI. QUESTION PRESENTED – WHETHER TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE, SUCH THAT THE BARS OF RULE 61 ARE INAPPLICABLE.[32]

Scope of Review: This Court reviews questions of law *de novo, Outten v. State,* 720 A.2d 547, 551 (Del. 1998), findings of fact for clear error, *Burrell v. State,* 953 A.2d 957, 961 (Del. 2008), and a decision to deny post-conviction relief for abuse of discretion. *Zebroski v. State,* 12 A.3d 1115, 1119 (Del. 2010).

Merits of Argument: Trial counsel was ineffective under the Delaware and United States Constitutions for failing to discover and present readily available evidence of Defendant's chaotic and violent upbringing. Counsel's preparation and presentation were cursory, conclusory, and constitutionally inadequate. *See supra* at 8-9. Separately, and cumulatively, counsel's errors require reversal of Defendant's sentence of death. Capital counsel has a constitutional "obligation to conduct a thorough investigation of the defendant's background" for "all reasonably available mitigating evidence."[33] Trial counsel failed to interviewe key witnesses and obtain readily evidence detailing the violence and substance abuse that surrounded Defendant from an early age.

Trial counsel's constitutionally inadequate investigation, preparation, and presentation prejudiced Defendant. A reasonable investigation would have

[32] Preserved below in Rule 61 Motion. A115-76.
[33] *Wiggins v. Smith,* 539 U.S. 510, 522, 524 (2003) (quoting *Williams v. Taylor,* 529 U.S. 363, 396 (2000), and ABA GUIDELINE 11.4.1).

uncovered the wealth of available mitigating evidence that Defendant presented to the Superior Court, documenting generational substance abuse and mental illness, and the brutal violence he experienced at the hands of multiple family members, A125-50, as well as a decade of institutional failure. *Id*. Defendant submitted an Appendix with 3,300 pages of corroborating documentation,[34] including witness affidavits, domestic violence reports, institutional records pertaining to Defendant, and his nuclear family, and hundreds of pages of DSCYF records. He presented a profoundly different, and far more accurate and persuasive narrative of his life than was presented at trial. Defendant's jury never heard of his mother's multiple admissions to mental hospitals, A1022-29, or his father's suicide attempts, civil commitments and institutionalizations, A1030-35. They did not hear about the black eye his mother gave him when he was eleven, which prompted the school to contact DSCYF. A92. They heard nothing of the criminal and domestic violence complaints Defendant's mother swore out against John Tyler for beating her and her children, or the contemporaneous medical records reflecting Defendant's injuries from the beatings. A134-36, 497. They heard almost nothing about Defendant's mother's paramour beating him and his mother, nothing about his horrific beating of a man in front of Defendant, and then dragging him off to die. A789-92. Despite hundreds of pages of readily available documents detailing

[34] Due to the volume of the Rule 61 Appendix, Defendant is submitting selected excerpts. At the Court's request, Defendant will submit the document in its entirety.

Defendant's life, trial counsel presented just one contemporaneous exhibit to the jury. A273. Trial counsel's performance fell well below a reasonable standard. There is a reasonable probability that, if counsel had presented the evidence a constitutionally adequate investigation would have disclosed, the sentencing jury would have recommended, and the sentencing court would have imposed, a life sentence.

The Superior Court abused its discretion when it found the claim to be "inexcusably untimely, repetitive, and formerly adjudicated," Op. at *14, and conducted neither the Rule 61(i)(4) "interest of justice" nor a Rule 61(i)(5) "miscarriage of justice" analysis. This Court has declared that a meritorious ineffectiveness claim "satisf[ies] both the interest of justice exception and the miscarriage of justice exception under Rule 61." *Zebroski*, 12 A.3d at 1121. Defendant has made a colorable claim that his counsel failed to comply with constitutional standards, satisfying Rule 61(i)(5). *See St. Louis v. State*, 2008 Del. Super. LEXIS 82 at *9 (Del. Super. Mar. 6, 2008). Furthermore, the substantial and readily available mitigating evidence proffered below provides an "important change" to the "factual basis" for earlier claims in prior Rule 61 proceedings. *Weedon v. State*, 750 A.2d 521, 527 (Del. 2000).

Full consideration of this claim is warranted both in the interest of justice, and because that trial counsel's failures constituted a miscarriage of justice.

VII. QUESTION PRESENTED: WHETHER TRIAL COUNSEL'S CONFLICT ADVERSELY AFFECTED DEFENDANT'S REPRESENTATION, AND PRIOR RULE 61 COUNSEL'S FAILURE TO RAISE THIS ISSUE, VIOLATED THE CONSTITUTION AND CONSTITUTED A MISCARRIAGE OF JUSTICE.[35]

Scope of Review: This Court reviews questions of law *de novo*, *Outten v. State*, 720 A.2d 547, 551 (Del. 1998), findings of fact for clear error, *Burrell v. State*, 953 A.2d 957, 961 (Del. 2008), and a decision to deny post-conviction relief for abuse of discretion. *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010).

Merits of Argument: Defendant's conviction and sentence were obtained in violation of his rights to the effective assistance of counsel as guaranteed by the Delaware and United States Constitutions, because trial counsel suffered from a conflict of interest, which affected Defendant at the guilt and penalty phases. Prior Rule 61 counsel were ineffective for failing to raise this issue.

Lance Lawson was arrested for two counts of burglary two days before Defendant was arrested in this case. A484. Both men were appointed the PD. At a subsequent *capias* hearing, two months before Defendant's trial, the PD, who by then knew that Lawson would be a State's witness against Defendant, A496, represented him and obtained his release, A480-83, 495-96, insuring that he would be out of custody when he testified against Defendant. Potential release from incarceration is a powerful motive that the PD eliminated as an area of cross-

[35] Preserved below in Rule 61 Motion. A176-79.

examination by its successful representation of Mr. Lawson. A lawyer may not represent two clients if their objectives conflict. *Wood v. Georgia*, 450 U.S. 261, 274 (1981) (vacating sentence where petitioner's employer, who retained counsel, had reason not to ask for leniency). Such a lawyer may be "influenced in his strategic decisions by [] considerations" that may aid one client, yet prejudice the other. *Id.* at 268 n.14. The PD achieved his objective of obtaining Lawson's release, which had an adverse effect on Defendant's sentencing proceeding.[36]

The Superior Court stated that the claim was "unsupported by evidence," and failed to "prov[e] that Defendant's conviction was unjust." Op. at *7. First, a Rule 61 Motion need not be accompanied by evidence. *See*, Rule 61(b)(2) ("The motion . . . shall set forth in summary form the facts supporting each of the grounds thus specified."). Second, the claim *was* supported by proffered evidence. *See* A482 (*Capias* Return); A496 (PD letter acknowledging conflict). Third, even if the conflict did not prove that the *conviction* was unjust, in view of the impact of Lawson's release upon his status as a witness *at the penalty phase*, Defendant's death sentence must be vacated. "A conflict of interest denies a defendant a *fundamental* constitutional right," *United States v. Gambino*, 864 F.2d 1064, 1084 (3d Cir. 1988) (emphasis added), and thus constitutes a miscarriage of justice.

[36] *Cuyler v. Sullivan*, 446 U.S 335, 348 (1980). *Compare Mickens v. Taylor*, 535 U.S. 162, 176 (2002) (habeas denial affirmed where attorney's prior representation had no adverse effect attorney's current client).

Conclusion

Defendant has made meritorious claims of fundamental constitutional violations individually constituting separate miscarriages of justice, and warranting relief in the interest of justice. Additionally, the cumulative prejudice from these errors separately undermined the fundamental fairness of Defendant's trial and sentencing, and denied Defendant his constitutional rights. Thus, even assuming that the challenged constitutional errors herein could be considered individually harmless, their cumulative impact could not. [37]

WHEREFORE, the Superior Court's order denying Rule 61 relief should be reversed, and a new trial or penalty hearing, or further post-conviction proceedings, should be ordered.

Respectfully Submitted:

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Dated: December 16, 2013

[37] *See, e.g., Johnson v. Folino*, 705 F.3d 117, 129, 131 (3d Cir. 2013) (holding that, when performing *Brady* materiality analysis, courts must conduct "an item-by-item and cumulative evaluation of the suppressed evidence."); *Moore v. Sec'y Pa. Dep't of Corr.*, 457 Fed. Appx. 170, 181 (3d Cir. 2011) (prejudice resulting from ineffective assistance of counsel claims is assessed cumulatively, pursuant to the "clear mandate" set forth in *Strickland*).

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Craig Zebroski, Defendant,	)	
v.	)	No. 599, 2013D
State of Delaware, Plaintiff,	)	Capital Case

I HEREBY CERTIFY that on this sixteenth day of December, 2013, I caused copy of Defendant's opening brief to be served electronically upon the following attorney:

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Dated: December 16, 2013

EXHIBIT 1

1 of 1 DOCUMENT

STATE OF DELAWARE, Plaintiff, v. CRAIG ZEBROSKI, Defendant.

I.D. No.: # 9604017809

SUPERIOR COURT OF DELAWARE, NEW CASTLE

2013 Del. Super. LEXIS 448

June 28, 2013[1] , Submitted

1 Corrected Motion for Post-Conviction Relief Pursuant to Superior Court Criminal Rule 61, and Consolidated Points of Law submitted July 29, 2013.

September 30, 2013, Decided

NOTICE:

THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

PRIOR HISTORY: [*1]

Upon Defendant's Third Motion for Postconviction Relief.

Zebroski v. State, 21 A.3d 598, 2011 Del. LEXIS 256 (Del., 2011)

DISPOSITION: SUMMARILY DISMISSED.

CASE SUMMARY:

OVERVIEW: HOLDINGS: [1]-An inmate's third motion for postconviction relief was summarily dismissed because he had had every aspect of his trial and postconviction proceedings scrutinized and the claims had been rejected; all the claims offered were procedurally barred as repetitive or untimely, and his unsubstantiated innuendo and groundless assertions did not satisfy his burden under Del. Super. Ct. R. Crim. P. 61; [2]-No claim offered by the inmate would pass muster on a first Rule 61 motion, let alone in a third attempt; [3]-The inmate's defaults were not excused, and he did not show that reconsideration of the claims was warranted in the interest of justice or present a colorable claim of a miscarriage of justice because of a constitutional violation to warrant application of the exception in Rule 61(i)(5).

OUTCOME: Third motion for postconviction relief summarily dismissed.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN1] Del. Super. Ct. R. Crim. P. 61, governing postconviction relief, includes four procedural bars that apply if: (1) the motion was untimely; (2) the grounds for relief were not properly asserted previously in a postconviction proceeding; (3) the grounds for relief were not presented in the proceedings leading to final conviction; or (4) the claim has been or should have been formerly adjudicated in a previous proceeding. Rule 61(i)(1)-(4).

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN2] Del. Super. Ct. R. Crim. P. 61(i)(1) has been amended to require motions be filed within one year from the date of final conviction. Final convictions before July 1, 2005 are subject to a three year limitation.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

[HN3] Del. Super. Ct. R. Crim. P. 61 provides a mechanism for preventing the procedural bars from creating or tolerating injustice. Specifically, under Rule 61(i)(5),

these procedural bars do not apply if the defendant presents a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation. Not only that, a defendant may overcome the procedural bars of Rules 61(i)(2) and (4) if the defendant shows reconsideration of the claims is warranted in the interest of justice. Accordingly, even where a claim is ultimately deemed procedurally barred, it must be reviewed when a colorable claim is presented, or review is in the interest of justice.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > General Overview
Criminal Law & Procedure > Postconviction Proceedings > General Overview
Evidence > Inferences & Presumptions > Presumptions > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN4] Because the "interest of justice" is implicated in every criminal case, the "interest of justice" exception to Del. Super. Ct. R. Crim. P. 61's procedural bars has been narrowed so that it does not swallow the rule. Accordingly, the exception is not established by its mere invocation. The exception requires a new fact, or showing that the court lacked authority to convict or punish the defendant. And, as to untimely claims, the defendant must show cause for not raising those claims earlier. Moreover, the defendant has the burden of proof in a postconviction proceeding. And, counsel's effectiveness is presumed.

Criminal Law & Procedure > Postconviction Proceedings > General Overview
[HN5] Procedural dismissal of a postconviction petition is proper where a defendant fails to support his claims.

Criminal Law & Procedure > Postconviction Proceedings > General Overview
[HN6] A defendant is not entitled to have a claim re-examined on a postconviction petition simply because the claim is refined or restated.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances
[HN7] Roper does not hold that a young adult capital murder defendant's youth must, as a matter of law, be given special weight as a mitigating factor. All of these things--actual age, developmental age and upbringing--are potentially powerful mitigators, but they are not legally dispositive.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues
Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances
Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances
[HN8] In a typical capital sentencing situation, the jury and the court may view the evidence as to aggravators and mitigators as it sees fit.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues
Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances
[HN9] The law requires that the jury and judge not be precluded from considering categories of mitigating evidence in sentencing capital offenders. No case holds that "mitigation" evidence must be weighed in a certain way.

Criminal Law & Procedure > Postconviction Proceedings > General Overview
[HN10] All grounds for relief must be raised on appeal or in the first motion for postconviction relief, within three years of final judgment. Any claim not raised when the opportunity first presents itself is deemed waived. And, any claim not raised within three years is untimely.

Criminal Law & Procedure > Sentencing > Presentence Reports
[HN11] In confirming the importance of presentence investigations, the United States Supreme Court holds that the sentencing court should consider the fullest information possible concerning the defendant's life and characteristics as long as the information is disclosed to defense counsel.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > General Overview
Criminal Law & Procedure > Counsel > Right to Counsel > General Overview
Criminal Law & Procedure > Counsel > Right to Counsel > Postconviction
[HN12] Delaware's rules contemplate one trial, one direct appeal and one postconviction proceeding. Del. Super. Ct. R. Crim. P. 61(l). The United States Supreme

Court holds that the Sixth Amendment, *U.S. Const. amend. VI*, right to counsel does not extend, at the latest, beyond the first postconviction relief proceeding. The right to effective assistance of counsel is dependent on the right to counsel itself.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel
Criminal Law & Procedure > Counsel > Effective Assistance > General Overview
Criminal Law & Procedure > Counsel > Effective Assistance > Postconviction Proceedings
Criminal Law & Procedure > Postconviction Proceedings > General Overview
[HN13] If it can be said that ineffective assistance of counsel claims are not subject to Del. Super. Ct. R. Crim. P. 61's procedural bars in the first instance, Delaware's procedural bars apply to subsequent motions for postconviction relief. Second, third, fourth, etc., motions for postconviction relief are not specially exempt from the bars that apply to other successive claims.

JUDGES: Fred S. Silverman, Judge.

OPINION BY: Fred S. Silverman

OPINION

This is a capital murder case stemming from a botched armed robbery committed by Defendant in 1996, when he was 18 years old. Following a 9-3 jury recommendation, Defendant was sentenced to death. The case's facts and the sentencing's reasoning were set-out in a 52-page opinion and several subsequent orders. [2] The conviction was affirmed on direct appeal, as were Defendant's first two motions for postconviction relief. [3] Somehow, Defendant aborted his federal *habeas corpus* proceeding so that he could file a third motion for postconviction relief here. The motion was properly referred, [4] and after preliminary review, it is subject to summary dismissal. [5]

2 *State v. Zebroski, 1997 Del. Super. LEXIS 304, 1997 W L 528287 (Del. Super. Aug.1, 1997)* (Silverman, J.); *see also Zebroski v. State, 715 A.2d 75 (Del.1998)*.
3 *Zebroski, 715 A.2d at 81*; *Zebroski v. State, 822 A.2d 1038, 1049 (Del. 2003)*; *Zebroski v. State, 21 A.3d 598 (Del. 2011)*.
4 *Super. Ct. Crim. R. 61(d)(1)*.
5 *Super. Ct. Crim. R. 61(d)(4)*.

Defendant now makes seven claims:

o The presentence investigation report was not disclosed to defense counsel;
o [*2] The court weighed mitigating evidence as aggravating evidence;
o The State failed to disclose exculpatory evidence;
o Ineffective counsel at the guilt phase;
o Racial animus evidence was improperly admitted;
o Ineffective counsel at the penalty phase;
o Trial counsel had a conflict of interest.

Each claim is also asserted separately as ineffective assistance of counsel. As discussed below, some of the claims seem sensational. On closer examination, however, they are merely repetitive and speculative.

I.

[HN1] *Superior Court Criminal Rule 61*, governing postconviction relief, includes four procedural bars that apply if: (1) the motion was untimely; (2) the grounds for relief were not properly asserted previously in a postconviction proceeding; (3) the grounds for relief were not presented in the proceedings leading to final conviction; or (4) the claim has been or should have been formerly adjudicated in a previous proceeding. [6] Most of Defendant's claims, accordingly, are procedurally barred as previously adjudicated or presented outside the three year [7] limitation.

6 *Super. Ct. Crim. R. 61(i)(1)-(4)*.
7 [HN2] *Super. Ct. Crim. R. 61(i)(1)* was amended to require motions be filed within one year from the date [*3] of final conviction. Final convictions before July 1, 2005 are subject to a three year limitation.

[HN3] *Rule 61*, however, also provides a mechanism for preventing the procedural bars from creating or tolerating injustice. Specifically, under *Rule 61(i)(5)*, these procedural bars do not apply if the defendant presents "a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation." Not only that, defendant may overcome the procedural bars of *Rules 61(i)(2)* and *(4)* if defendant shows "reconsideration of the claims is warranted in the interest of justice." Accordingly, even where a claim is ultimately deemed procedurally barred, it must be reviewed when a colorable claim is presented, or review is in the interest of justice.

[HN4] Because the "interest of justice" is implicated in every criminal case, the "interest of justice" exception

to *Rule 61*'s procedural bars has been narrowed so that it does not swallow the rule. Accordingly, the exception is not established by its mere invocation. [8] The exception requires a new fact, or showing that the court lacked authority to convict or punish the defendant. [9] And, as to untimely [*4] claims, Defendant must show cause for not raising those claims earlier. [10] Moreover, Defendant has the burden of proof in a postconviction proceeding. [11] And, counsel's effectiveness is presumed. [12]

8 *See Travis v. State, 69 A.3d 372 (Del. 2013)* ([HN5] Procedural dismissal proper where Defendant fails to support claims).
9 *Younger v. State, 580 A.2d 552, 555 (Del. 1990)*.
10 *Id.*
11 *Id.*
12 *Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*; *State v. Albury, 551 A.2d 53 (Del. 1988)*.

II.

Defendant's motion reasserts several claims already adjudicated. For example, Defendant claims that allowing the prosecution to elicit testimony, over objection, that Defendant used a racial epithet to describe the victim on two occasions was highly prejudicial and lacked probative value. Yet, on direct appeal, the Supreme Court of Delaware specifically held: "the introduction into evidence of the racial epithet in the context of this case was proper." [13]

13 *Zebroski, 715 A.2d at 80*.

Similarly, Defendant's youth as a mitigating factor; [14] the admission of the non-testifying co-defendant, Sarro's, statement; [15] expert testimony regarding PCP's effects; [16] and the "florid and unremitting trauma" Defendant faced in childhood [17] [*5] have all been addressed at least once in earlier proceedings. [HN6] A defendant is not entitled to have a claim re-examined "simply because the claim is refined or restated." [18]

14 *State v. Zebroski, 2010 Del. Super. LEXIS 228, 2010 WL 2224646, 11 (Del. Super. May 14, 2010) aff'd, 21 A.3d 598 (Del. 2011)*.
15 *Zebroski, 715 A.2d at 81*.
16 *Zebroski, 822 A.2d at 1049*.
17 *Zebroski, 2010 Del. Super. LEXIS 228, 2010 WL 2224646*.
18 *Skinner v. State, 607 A.2d 1170, 1172 (Del. 1992)* (citing *Riley v. State, Del.Supr., 585 A.2d 719, 721 (1990))*.

III.

Defendant alleges that this court improperly considered mitigation evidence as aggravating evidence. As mentioned above, this claim has already been heard and adjudicated. Specifically, in his Motion to Reopen Postconviction Relief Pursuant to *Superior Court Criminal Rule 61* proceeding, Defendant argued: "At Zebroksi's penalty phase, trial counsel presented Zebroski's age only as a number, i.e. that Zebroski was eighteen (18) at the time of the offense. Trial counsel did not tell the jury that age could be considered as a mitigating factor." As to that, this court held, and the Delaware Supreme Court affirmed, that [HN7] "*Roper* [19], however, does not hold that a young adult capital murder defendant's youth must, as a matter of [*6] law, be given special weight as a mitigating factor.... All of these things--actual age, developmental age and upbringing--are potentially powerful mitigators, but they are not legally dispositive." [20] Accordingly, that claim is procedurally barred here.

19 *Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)*.
20 *Zebroski, 2010 Del. Super. LEXIS 228, 2010 WL 2224646*.

To be clear, [HN8] in a typical capital sentencing situation, the jury and the court may view the evidence as to aggravators and mitigators as it sees fit. In this case, the court observed that some of the evidence introduced as mitigating, such as Defendant's youth, was "double-edged," and the court explained how that was so. [21] There is no legal prohibition on that sort of analysis. Here, the Delaware Supreme Court affirmed that analysis. [22]

21 *Zebroski, 1997 Del. Super. LEXIS 304, 1997 WL 528287*.
22 *Zebroski, 715 A.2d at 83*.

The cases relied on by Defendant as to weighing of evidence relate to mitigation evidence offered to the jury and sentencer. [23] [HN9] The law requires that the jury and judge "not be precluded from considering" categories of mitigating evidence. [24] No case holds that "mitigation" evidence must be weighed in a certain way. There is no claim in this case that the court was precluded from considering, [*7] as it saw fit, evidence offered by Defendant as mitigating.

23 *See e.g. Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)*; *Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986)*; *Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)*.
24 *Skipper, 476 U.S. at 4* (*citing Eddings, 455 U.S. at 104*); *See also Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)*.

IV.

As previously discussed, Defendant's claims are mostly repetitive and barred. To the limited extent they seem new, they are likewise barred. And, they are unsubstantiated. That means review is not justified now. For example, even if the claim were not barred, which it is, Defendant offers no evidence to support his assumption that the presentence investigation report was not supplied to trial counsel. Defendant has not supplied trial counsel's affidavit nor other evidence as to that. Meanwhile, the court takes notice that its rule is to make the report available to both parties. [25] Similarly, the barred claim that original counsel was conflicted because a witness was "well represented" by another public defender at a capias return is unsupported by evidence, such as a transcript. Besides, as presented, the conflict of interest claim is trivial at the worst. It does not come close [*8] to proving that Defendant's conviction was, in fact, unjust.

25 *Super. Ct. Crim. R. 32(c)(3).*

The following barred claims, while seeming important, all suffer from lack of support:

- o Presentence investigation report not provided to Supreme Court;
- o Proceedings and circumstances surrounding Lawson's prosecution;
- o Prosecution's involvement with Lisa Klenk;
- o Wording of prosecution's closing arguments.

None of those claims, even if established, makes out a constitutional claim. Nor does any claim merit further review in the interest of justice. They are all barred.

V.

Superficially, one claim seems new and potentially impressive, meriting specific discussion. Defendant has submitted an affidavit from an apparently qualified firearms expert questioning the opinion of the ATF expert who testified at trial concerning the murder weapon's trigger pull. The trial expert concluded that the murder weapon's trigger pull "weighed 12-and-a-half pounds," which he characterized as "heavy." This testimony tended to establish that the fatal shooting was not accidental or unintended, a pivotal fact.

Obviously, the new expert's opinion is untimely. As explained previously, [HN10] all grounds for relief must be raised [*9] on appeal or in the first motion for post-conviction relief, within three years of final judgment. Any claim not raised when the opportunity first presents itself is deemed waived. And, any claim not raised within three years is untimely. [26] The trigger pull's significance was obvious to Defendant's first three sets of lawyers. Accordingly, Defendant was obligated to present his counter opinion evidence long before now, and certainly within the three years after the conviction became final. Having failed to do so, it is barred. Defendant offers no cause for his procedural default, other than to imply that his first three sets of lawyers were all incompetent. Moreover, Defendant has failed to show prejudice flowing from the procedural default.

26 *Younger, 580 A.2d at 554.*

The new expert alleges nothing more than potential failings in the trial expert's testing. Specifically, in pertinent part, the new expert observes that "it cannot be concluded to a reasonable degree of scientific certainty that the force required to pull the trigger of a gun without its recoil spring and recoil spring guide would be the same as required if those parts were present and operating properly." The expert also [*10] asserts that the anatomy of the human hand provides "mechanical advantages [that] make a direct analogy of force recorded on a spring gage to dead weight misleading." Lastly, the expert alleges that one federal case granting default judgment for the accidental discharge of this type of pistol demonstrates a design defect.

Notably, however, the new expert does not opine that the trial expert got it wrong. He does not say that the weapon just went off or even that it probably fired accidentally. The new expert does not opine that the murder weapon was, in fact, defective. He merely offers theoretical possibilities inviting speculation and conjecture. "Maybe" or "could be" are not the same as "probably" or "certainly," nor do they form a basis for reasonable doubt. And so, those mere possibilities do not justify a new trial, much less an acquittal. They do not even justify an evidentiary hearing in the interest of justice.

VI.

Defendant also alleges that this court improperly relied upon the presentence investigation report, which contained material not presented at the penalty hearing. Specifically, quotes from the sentencing order allegedly relying on this evidence include:

- o "ominous signs [*11] as early as age five when [Petitioner] showed a fascination with fire";
- o Following a 30-day hospital rehab stay, "Defendant regressed quickly. De-

spite outpatient treatment, he became more and more oppositional and defiant."

o "[B]y the time Defendant was thirteen and one half years old he had been arrested three times, suspended from school repeatedly, institutionalized twice and seriously threatened to kill his brother."

o Part of the problem with treating him "was you never had him for a long period of time without him being arrested for other charges."

Defendant also alleges that "the presentence investigator acted as a 13th juror, with more authority and influence than the other 12" and that the sentencing recommendation "has the imprimatur and authority of the court." Defendant further claims that this "process cannot withstand constitutional scrutiny."

This claim, like the firearms opinion and others, brings into specific relief the reasons for *Rule 61*'s procedural bars. The court is being called on to answer questions that should have been raised in the 1990s. Yet, Defendant offers no reason for waiting so long to bring this claim. And now that the passage of time has undermined [*12] or destroyed the court's ability to precisely reconstruct the role of the presentence investigation, Defendant insists that he is entitled to every favorable inference.

The court knows the presentence investigation "process" used in this case was authorized under *Rule 32(c)*. And, [HN11] in confirming the importance of presentence investigations, the United States Supreme Court holds that the sentencing court should consider the "fullest information possible concerning the defendant's life and characteristics" [27] as long as the information is disclosed to defense counsel. [28]

27 *Williams v. People of State of N.Y., 337 U.S. 241, 247, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).*
28 *Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).*

Furthermore, the court knows specifically that the reports reflected in the presentence report and the sentencing decision were mustered and relied on by Defendant's own witness, Dr. Much. Having introduced Dr. Much's opinion and the basis for it, Defendant, both then and now, has no principled reason to object to their having been used by the court. And that assumes, without holding, that there is some factual support for this time-barred, unexcused procedural default.

VII.

As to ineffective assistance of counsel, Defendant [*13] has alleged that at every step of the serial postconviction relief proceedings, with successive sets of lawyers finding reasons to fault their predecessors. The implication seems to be that couching a claim of error as an ineffective assistance of counsel claim is a way around *Rule 61*'s procedural bars. That is incorrect.

[HN12] Delaware's rules contemplate one trial, one direct appeal and one postconviction proceeding. [29] The United States Supreme Court holds that the Sixth Amendment right to counsel does not extend, at the latest, beyond the first postconviction relief proceeding. [30] The right to effective assistance of counsel is dependent on the right to counsel itself. [31]

29 *Super. Ct. Crim. R. 61(l).*
30 *Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987)*; *Murray v. Giarratano, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989).*
31 *Shipley v. State, 570 A.2d 1159, 1166 (Del. 1990)*

Accordingly, Defendant's challenges to subsequent postconviction counsel fail at the outset. [HN13] If it can be said that ineffective assistance of counsel claims are not subject to *Rule 61*'s procedural bars in the first instance, Delaware's procedural bars apply to subsequent motions for postconviction relief. Second, third, fourth, etc., motions for postconviction [*14] relief are not specially exempt from the bars that apply to other successive claims.

By the same token, Defendant's latest claims against his original counsel and the lawyers who represented him in his first motion for postconviction relief are now barred. Whatever those claims were or might have been, the time for raising those claims passed long ago. Defendant alleges dozens of trial counsel's failures, all of which have either been previously ruled on, are indisputably matters of trial strategy, or remain unsubstantiated as anything other than speculation, including:

o Consultation with firearms experts;

o Consultation with psychological experts;

o Treatment of Defendant's letter from prison;

o Prior bad act testimony;

o Presentation of mitigation testimony regarding Defendant's upbringing, home life and abuse, and substance abuse.

Now, like Defendant's other successive claims, his ineffective assistance claims are inexcusably untimely, re-

petitive, and formerly adjudicated, and accordingly procedurally barred. And, they are no more subject to constitutional scrutiny or review in the interest of justice than are his other barred claims.

VIII.

In summary, Defendant has had every aspect of [*15] his trial and postconviction proceedings scrutinized over the course of three postconviction motions. In every case, this court has rejected the resulting claims. At this juncture, all of the claims offered here are procedurally barred as being repetitive or untimely. Further, a preliminary review reveals nothing more than unsubstantiated innuendo and groundless assertions, insufficient to satisfy Defendant's burden under *Rule 61*. No claim offered by Defendant would pass muster on a first *Rule 61* motion, let alone in this third attempt; at the outset, *Rule 61*'s procedural bars preclude considering these claims. Defendant's defaults are not excused. Defendant has not demonstrated that reconsideration of the claim is warranted in the interest of justice. Nor has Defendant presented a colorable claim of a miscarriage of justice because of a constitutional violation to warrant application of the exception in *Rule 61(i)(5)*.

IX.

For the foregoing reasons, Defendant's third Motion for Postconviction Relief is **SUMMARILY DISMISSED.**

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge