EFiled: Feb 24 2014 09:26PM EST
Filing ID 55047688
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 REPLY BRIEF

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Preliminary Statement

This is a Reply Brief in support of Craig Zebroski's appeal of the Superior Court's September 30, 2013, summary dismissal of his capital Rule 61 Petition.

The State's Answering Brief is cited as "AB;" the Opening Brief is cited as "OB;" the Appendix filed with the Opening Brief is cited as "A;" and the Appendix supplied with this Reply is cited as "AR." All of these references are followed by a page number. All emphasis herein is provided unless otherwise indicated.

This Reply Brief addresses several of the State's arguments. The State's arguments not addressed here were anticipated and addressed in Defendant's Opening Brief. Defendant does not waive or concede any of those arguments but instead submits that they have been adequately briefed and thus are ripe for decision.[1]

[1] Thus, for example, the State did not respond on the merits to Argument VI of the Opening Brief; accordingly, having addressed the procedural bar issues of Rule 61 in the Opening Brief, Defendant does not offer an argument in reply here.

TABLE OF AUTHORITIES

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<u>Argument I</u> - 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.

The State does not contest that: an officer of the Court provided a sentencing recommendation to the sentencing judge; providing the recommendation was not an *ultra vires* act of the officer, but rather performed at the behest of the Court; the recommendation was that Defendant be executed; pursuant to Delaware law, trial counsel was not permitted to know the recommendation, let alone examine the person who made the recommendation (as to her qualifications to make a life or death recommendation and her reason(s) for deciding that Defendant should be executed). Despite these incontrovertible facts, the State maintains that "[t]he PSI did not contain secret information." AB10. Unquestionably it did.

A. <u>*Gardner* Is Controlling.</u>

The State argues that *Gardner v. Florida*, 430 U.S. 349 (1977), involved secret *factual* information, and thus its holding only prohibits secret facts, and not a secret recommendation (which the State mischaracterizes as "opinion"), from being conveyed to the capital sentencing judge. AB11. The State misreads *Gardner*. The *Gardner* Court never learned whether the secret information was fact or opinion. *Gardner*, 430 U.S. at 354 n.5. The State cannot presume to know what the Supreme Court did not know. Far from recognizing a distinction between

facts and opinions, the *Gardner* Court included opinions within the category of information that must be disclosed to trial counsel. *See, e.g., id.* (declining Florida's offer to review the secret portion of the presentence file because "[i]t is not a function of this Court to evaluate in the first instance the possible prejudicial impact of facts and *opinions* in a presentence report."); *id.* at 354 (noting the Florida Supreme Court dissenters' concern that "[w]hat evidence or *opinion* was contained in the 'confidential' portion of the report is purely conjectural and absolutely unknown to and therefore unrebuttable by Defendant." (citing *Gardner v. State*, 313 So. 2d 675, 678 (Fla. 1975))); *id.* at 359 (rejecting secrecy because it is "conducive to the transmission of confidences which may bear no closer relation to fact than the average rumor or item of gossip.").

The linchpin of *Gardner* is the principle that death sentences may not be based even "in part, on [] information which [the defendant] had no opportunity to deny or explain." *Id.* at 362. *Gardner* does not qualify "information" in the manner the State suggests, and the State presents *no* authority to this Court that prejudicial information on which a capital sentence relies may be kept from defense counsel.

B. The Jury's 9-3 Vote Does Not Render *Gardner* Inapplicable.

Nothing in *Gardner* suggests that its analysis be confined to death override cases as the State suggests. AB12. The State's argument that Defendant's judge

found no "reason to reject the jury's 9-3 recommendation," *id.*, does not address the impact of the judge's relying on the prejudicial undisclosed information. The jury vote did not relieve the judge of his statutory and constitutional duty to independently evaluate the evidence. A Delaware judge has broad authority to reject such a recommendation and impose a life sentence, *Garden v. State*, 844 A.2d 311, 314 (Del. 2004), and in the overwhelming number of death penalty jurisdictions in the United States, a defendant *could not* be sentenced to death following the same 9 to 3 vote. The judge clearly relied on the undisclosed information in determining not "to reject the jury's 9-3 recommendation." *See* discussion *infra* at 3-5.

The Superior Court below did not address the impact of the recommendation upon the sentence, except to state that it was unable to "precisely reconstruct the role of the presentence investigation." *State v. Zebroski*, 2013 Del. Super. LEXIS 448 at *11-12 (Del. Super. Sept. 30, 2013). Accordingly this Court must assume that the death recommendation had its intended and unconstitutional effect, violating Defendant's due process right as articulated in *Gardner*.

C. Even Assuming *Gardner* Error Is Subject to Harmlessness Analysis, the Court Should Grant Relief.

Citing *Vining v. Sec'y, Florida Dep't of Corr.*, 610 F.3d 568, 574 (11th Cir. 2010), the State argues that any *Gardner* violation here was harmless. In *Vining*, the Eleventh Circuit affirmed the district court's finding that a *Gardner* error was

harmless, in large part because "the outside materials were proven by other sources at trial," *id.* at 573, and the evidence of mitigation was "minimal." *Id.* AB12. *Vining* is inapposite.

First, the "outside materials" at issue were not proven by other sources at trial and the State does not contend otherwise. Rather, the State suggests that because the material was supposedly not "inconsistent" with trial or penalty phase evidence, it could not have prejudiced Defendant. AB11. The State cites no authority, nor articulates any rationale for such a standard, which is unrecognized by *Chapman v. California,* 386 U.S. 18 (1967) or *Strickland v. Washington,* 466 U.S. 668 (1984). Here, with no notice to the defense, the sentencing court relied upon voluminous evidence in aggravation, *never presented at the sentencing hearing, and never addressed by trial counsel.* The evidence was different in kind and degree from any evidence presented at the penalty phase hearing and was highly prejudicial to Defendant. *See, e.g., State v. Zebroski*, 1997 Del. Super. LEXIS 304 at *17 (Del. Super. Aug. 1, 1997)/A1161-62 ("ominous signs as early as five when he showed a fascination with fire"); *id.* at *18/A1167, 1178 (psychiatric diagnosis of "Oppositional Defiant Disorder, severe"); *id.* at *19/A1165, 1177-78, 1181, 1186, 1194 ("mother expressed concern that Defendant had become interested in guns"); *id.* at *21/A1194 ("Finally, one psychologist had seen enough to opine, in effect, that Defendant potentially was a

time bomb."); *id.* at *22/A1283-84 (while in residential treatment Defendant behaved "in an underground manner"); *id.* at *30/A1119-20 (therapist's entry that Defendant was a "small-time drug dealer); *id.* at *37/A1113, 1119-20, 1280 ("A professional has characterized [Defendant's relationship with his mother] as 'co-dependant.'").[2] *See also* A53-57.

Second, unlike *Vining*, the evidence of mitigation here was anything but minimal. *See, e.g., Zebroski*, 1997 Del. Super. at *58 ("[T]his appears to be one of the closer cases where the scale has come down on the aggravating factors' side."); *id.* at *34 ("[A]ll the mitigators alleged by Defendant do exist); *id.* ("Defendant is among the youngest defendants to face the death penalty in Delaware."); *id.*at *37 ("[T]he blame for Defendant's becoming the person that he is falls largely on Defendant's parents. . . . Defendant's father and stepfathers taught him to be abusive and violent. . . . [His mother] tacitly encouraged, or at least allowed, her son to be abused by his father and stepfathers and to be raised by wolves in a place like the Boothhurst Mansion, a drug den and criminals' lair."); *id.* at *38 ("[T]hat Defendant came from a dysfunctional family not only explains, in large part, how he hit bottom, it also brings into relief the terrible wounds Defendant's personality

[2]These quotations from the sentencing opinion are provided as representative examples of the sentencing judge's reliance on the non-record evidence. A fair reading of the opinion alongside the non-record material more fully reveals the substantial extent of this reliance.

has sustained."); *id.* at *40 ("[P]sychological problems were so severe that Defendant was committed twice before he reached fourteen.").

D. Trial Counsel's Providing Some of the Evidence at Issue Was Ineffective, and Did Not Place the Court's Reliance on it Beyond *Gardner*.

The State argues that some of the non-record evidence in aggravation was provided to the presentence writer by trial counsel,[3] and in any event trial counsel was not barred from reviewing it. AB10. As to the former point, "it hardly constitutes a reasonable investigation and mitigation strategy simply to obtain Human Services records from the State, then dump the whole file in front of the [fact-finder, as trial counsel did], without organizing the files, reading them, eliminating irrelevant files or explaining to the [fact-finder] how or why they are relevant." *Johnson v. Bagley*, 544 F.3d 592, 602 (6th Cir. 2008). As to the latter point, the *Gardner* Court was unconcerned (as this Court should be) about counsel's possible access to the "undisclosed" material, noting trial counsel's failure to request the opportunity to "examine the full [pre-sentence] report or to be apprised of the contents of the confidential portion."[4] The important point there – *and even more so here, where counsel's ineffectiveness for failing to seek review is*

[3] The State does not contest that other non-record evidence – in addition to the death recommendation – which was reviewed by the sentencing judge, was *not* supplied by defense counsel.

[4] Regarding trial counsel's access: Although Defendant has a good faith basis to allege that the non-record evidence consisted of (1) records "dumped" by counsel into the presentence file; (2) evidence unseen by trial counsel; and (3) other evidence barred from counsel's review, these questions are best determined at an evidentiary hearing.

alleged – was that evidence reviewed by the sentencer was unseen and unaddressed by trial counsel.

E. Defendant Has Grounds to Overcome the Rule 61 Bars.

Without acknowledging Del. Super. Ct. Crim. R. 32(c)(3), which prohibits disclosure of the sentencing recommendation to trial counsel, the State argues that Defendant cannot establish cause for his failure to raise this claim previously.[5] The prosecution may not argue default when a Defendant's required adherence to a state rule prevents exhaustion. *See Lefkowitz v. Newsome,* 420 U.S. 283, 293 (1975) (state rule that permits appeal of suppression denial following guilty plea cannot be used as "trap" to bar later habeas corpus petition on the basis of guilty plea). In addition, if Delaware law, which precluded counsel from knowing the recommendation, did not constitute cause, then trial counsel's failure to challenge the law's constitutionality falls within the Rule 61(i)(5) exception.

F. The State Failed to Address Several of Defendant's Arguments.

It is notable that the State has chosen not to respond to Defendant's following arguments, all of which implicate trial counsel's ineffectiveness: That the alleged victim impact evidence would have been constitutionally impermissible even if introduced in open court and subject to cross-examination, OB16-17; that

[5] Although all of Defendant's claims satisfy Del. Super. Ct. Crim. R. 61(i)(5)'s miscarriage of justice exception, in regard to his failure to obtain the death recommendation he can also establish cause, as discussed above.

the State's failure to provide this Court on appellate review with the evidence relied upon by the sentencing judge violated Defendant's statutory and constitutional rights, and alone warrants reversal under *Gardner*, OB17; and that the sentencing judge's consideration of evidence not presented at the penalty phase hearing violated 11 Del. C. § 4209(d)(1),[6] which did not authorize the sentencer to receive evidence not presented at the hearing. Section 4209 contains numerous references to the hearing and the reception of evidence, but no provision that suggests or implies the sentencing judge may review non-record evidence. If there is any doubt that the sentencing decision must be confined to the hearing record, it is resolved by § 4209(g)(1),[7] which authorizes *only* the "transcript of the punishment hearing" to be transmitted to this Court (when an appeal has not been taken), for its mandated review of a death sentence. If this Court does not review non-record evidence, then surely the sentencing judge may not.

Trial counsel performed deficiently in permitting wholesale non-record evidence of aggravation to be reviewed by the sentencing judge. Even in the absence of the judge's explicit reliance on so much of this evidence, *Strickland* prejudice would be established. Considering the explicit reliance, there can be no doubt that Defendant suffered a miscarriage of justice.

[6] The version of § 4209 in effect at the time of Defendant's trial is provided in the attached Appendix, at AR42.

[7] At the time of Defendant's trial, § 4209(g) was identical to its current version.

Argument II - 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.

Youth: Defendant challenges the Superior Court's finding as aggravating the very conditions of youth that are inherently mitigating, and its baseless finding of irreparability. OB18. These findings turn the mitigating basis of youth on its head and cannot be squared with the Constitution. Both the State and the Superior Court contend that youth may be viewed as aggravating. AB14; *Zebroski*, 2013 Del. Super. at *6. As proof of this point, the State seizes upon language from *Roper v. Simmons*, 543 U.S. 551, 573 (2005), that "[i]n some cases a defendant's youth may even be counted against him." When read in context, however, it is clear that *Simmons* was making the opposite point: the risk that youth might be viewed as aggravating is unacceptable and such an argument is "overreaching." *Id.* Even in dissent, Justice O'Connor echoed this concern, finding attempts to use "youth as an aggravating circumstance" to be "troubling." *Id.* at 603 (O'Connor, J., dissenting). The Court's numerous references to the mitigating quality of youth dispels any notion that youth may be aggravating. *See, e.g.*, *id.* at 569, 570-71 (majority opinion); *id.* at 588, 599 (O'Connor, J., dissenting); *id.* at 614, 621 (Scalia, J., dissenting). This unqualified recognition of youth as mitigating, absent any suggestion that youth may ever be "double-edged," predates *Simmons* and has

long been an accepted fact of capital jurisprudence. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.").

The State cites *Abdul-Kabir v. Quarterman,* 550 U.S. 233, 255 (2007), as an endorsement of the use of youth in aggravation. AB15. But the *Abdur-Kabir* Court did not remotely address the question of youth *qua* youth as aggravating, and certainly was not faced with that question. Rather the Court was confronted with a Texas statute that only permitted the penalty phase jury to consider deliberation and future dangerousness in assessing penalty. *Id.* at 241-42. The Court held that the statute's channeling the jury's consideration to those issues alone created too great a constitutional risk that the defendant would "find[] himself without a means to give *meaningful* effect to the mitigating qualities" of his "childhood neglect and abandonment and possible neurological damage." *Id.* at 262 (emphasis in original). The State also argues that *Riley v. Taylor,* 1998 U.S. Dist. LEXIS 4804 (D. Del. Jan. 16, 1998), *overruled on other grounds,* 277 F.3d 261 (3d Cir. 2001), supports the use of youth in aggravation. AB15. It does not. *Riley* nowhere addressed the constitutionality of considering youth as aggravation. Rather, *Riley* held that trial counsel's strategic decisions may be informed by his judgment that jurors'

"attitudes," "perception[s]" and "reaction[s]" might cause them to hold certain types of mitigation – none of which was youth – against a defendant. *Id.* at *71-72.

Good Prison Conduct: After *Skipper v. South Carolina,* 476 U.S. 1, 5 (1986), the State has to acknowledge that the sentencer must find it mitigating "that the defendant would not pose a danger if spared." So, in lieu of attempting to justify the Superior Court's finding as aggravating Defendant's lack of a "personality inventory [that] includes the resources necessary to develop a meaningful existence in prison," *Zebroski,* 1997 Del. Super. at *42, the State argues that Defendant had no *Skipper* evidence to offer. *See* AB17 ("Superior Court [] had ample evidence of Zebroski's misconduct in prison, not hypothetical 'good conduct' prognosticated by his mental health expert."). This argument is problematic because no evidence was presented that Defendant ever verbally or physically assaulted anyone in prison, uttered an unkind word to anyone in prison, or committed any prison infractions. Moreover, the State's suggestion of misconduct contradicts the Superior Court's factual finding that Defendant "continue[d] to exist [in prison] without being a risk to himself or anyone else." *Zebroski,* 1997 Del. Super. at *42.

Abusive Childhood: In attempting to justify the Superior Court's finding as aggravating Defendant's "pathetic background" (i.e., his horrific childhood and adolescence), the State references the Court's act of balancing the "sympathy" the

background evoked, as mitigating, with how it "explains" his criminal conduct, as aggravating. AB17; *Zebroski*, 1997 Del. Super. at *38. This balancing, which pervades the sentencing opinion, reveals the judge's misapprehension of mitigation and violated Defendant's Eighth and Fourteenth Amendment rights. Mere sympathy is never an appropriate mitigating consideration. *California v. Brown*, 479 U.S. 538, 542 (1987); *State v. Ferguson*, 1995 Del. Super. LEXIS 321 at *23-24 (Del. Super. Apr. 7, 1995). The mitigating evidence was not presented to evoke sympathy. It is the *explanation* – which the Superior Court found aggravating – of how the "pathetic background" impacts a defendant's life that is mitigating under the law. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("evidence about the defendant's background and character is relevant [because of the] belief, long held by this society that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse"). While it is certainly permissible for the sentencer to hold a capital defendant responsible for his criminal conduct; it is impermissible for the sentencer to find that the deprivation that may have led to that conduct should aggravate his sentence. This is exactly what the Superior Court did.

Argument III - Whether Trial Counsel's Ineffectiveness at the Guilt Phase Trial and Appellate and Post-Conviction Counsels' Failures to Raise these Claims, Violated Defendant's Constitutional Rights, Constituting a Miscarriage of Justice.

Firearms Evidence: The State does not contest that a ballistics expert would have conclusively proven that the trigger pull weight of the weapon as tested by the State's firearm examiner had no relation to the trigger pull weight at the time of the homicide. Such evidence would have enabled competent counsel to preclude as irrelevant the testimony of the firearm examiner. The State suggests that trial counsel's arguments in closing, challenging the trigger weight conclusion, eliminated the need for an expert. AB21-22. But "argument is not evidence," *State v. Cannon*, 2004 Del. Super. LEXIS 205 at *10 (Del. Super. June 16, 2004), and the State's wholly rebuttable evidence of heavy trigger pull went unrebutted.

The State also suggests that the firearm examiner's equivocation on cross-examination about the impact of the altered condition of the weapon made the same point that an expert would have made. AB21. The State is mistaken. In response to trial counsel's question, *in which trial counsel opined that the altered condition of the weapon would not affect trigger pull weight,* A190,[8] the firearms examiner agreed, testifying that he "d[idn't] think it would," but that he could not be "sure." *Id.* This is a far cry from expert testimony that would have precluded the test result altogether. Trial counsel's ultimate concession in closing that the trigger

[8] Trial counsel asked, "Did that affect the trigger pull? I assume not."

pull was "heavy," A214, speaks volumes about the effectiveness of his cross-examination on this issue, and left no doubt in the minds of the jury that the defense conceded the relevance and reliability of the test result.

The State also commends trial counsel for promising, in response to the trial court's concern about whether the firearms examiner had established that the trigger pull "today" was "similar or equivalent" to the trigger pull at the time of the incident, that he would be "on the balls of my feet, [] if I hear something [during closing arguments] that I don't believe is sustained by the evidence." AB21. Yet trial counsel stood silent when the prosecutor compared pulling the trigger with one's finger to lifting a ten-pound bag of potatoes with one's finger, and failed to respond to those arguments in his own closing.

The State points out that trial counsel "successfully argued against a jury request during deliberations to have the safety removed from the gun to test the trigger pull." AB22. Such an objection would have been unnecessary had trial counsel put on expert testimony establishing that the gun's trigger pull as it existed at trial had no relation to the trigger pull at the time of the homicide. Instead, the jury was left to imagine lifting a ten-pound bag of potatoes with one finger.

Finally, the State fails to address Defendant's argument that an expert would have corroborated the defense theory of accident by establishing that the manufacturing design of the particular firearm used in the incident created an

unacceptable risk of accidental discharge. OB23. The State's failure is significant because evidence of the firearm's defect would have rebutted a central tenet of the State's argument against accident, i.e., that there was "absolutely no testimony or evidence to support the theory that this handgun could discharge accidentally." A218. The weapon's risk of accidental discharge was a fact known to the ballistics community in 1997, yet never revealed to Defendant's jury. A443.

Stipulation to Sarro Statement: Citing trial counsel's Rule 61 testimony, the State offers one strategic rationale for counsel's stipulation to the statement of Michael Sarro: he "thought it was very important to get the piece of evidence in that corroborated what Defendant said about the happenings just prior to the gun going off." AB24. According to trial counsel, it was important that the "taped statement [] be played for the jury" because that statement "included references to Mr. Sarro striking Mr. Hammond." AR6. Trial counsel was incorrect. The statement contained no reference to Sarro striking the decedent. Instead, Sarro's taped statement contained only evidence that directly undercut Defendant's trial and penalty phase defenses, A376-78, 380, and the jury heard it in its entirety. Trial counsel's asserted "rationale" for stipulating was unreasonable, because it had no basis in fact. Rather than stipulate to the statement, trial counsel should have avoided its introduction at all costs.

None of the other factors cited by the State are relevant to an analysis of

reasonable trial strategy. Trial counsel's statement that "Sarro's refusal to testify 'hurt or undermine[d]' Zebroski's defense," AB23, is not proof that it did. It has never been demonstrated how Sarro's refusal to testify hurt Defendant's defense or how introduction of Sarro's statement could possibly have helped it. Defendant's alleged "personal desire that Sarro testify," AB23, divorced from any conceivable strategic basis, may not inform, let alone dictate, trial strategy. *See United States v. Romano*, 849 F.2d 812, 819 (3d Cir. 1988) ("[T]he defendant gives to the attorney the authority to make binding decisions as to . . . trial strategy for him."). And trial counsel's assurance to the court that he was motivated by his (unreasonable) belief that there were helpful as well as harmful portions of the recorded statement, AB23, does make counsel's reckless decision reasonable.

Prior Bad Act: The State does not respond to this argument. Defendant argued in the Opening Brief that the trial counsel was ineffective for *introducing* his client's devastatingly prejudicial prior bad act after the trial court had excluded it. OB27-29.

False Portrayal of Michael Sarro: The State does not address Defendant's argument that trial counsel was ineffective for allowing the prosecution to misrepresent the nature of Michael Sarro's cooperation and imply that he fulfilled the terms of his agreement. OB30. The prejudice resulting from counsel's error was compounded by events that occurred during and following the penalty phase.

At the State's request, the trial court cautioned trial counsel against telling the jury that Sarro would receive the bargained for 12-year sentence, A225, if trial counsel chose to make a comparative culpability argument (pursuant to *State v. Ferguson*, 642 A.2d 1267, 1268-69 (Del. Super. Nov. 13, 1992)).[9] Yet following the penalty phase the State asked that Sarro be sentenced in accordance with the plea agreement, AR4, and the sentencing judge complied. AR8. Thus, kept from the jury was the fact that although Sarro did not hold up his part of the bargain the State was still content with his 12-year sentence, while arguing for Defendant's execution. The jury's ignorance of these crucial facts prevented any meaningful comparative culpability analysis.

The State argues that evidence of Sarro's bad character and violent criminal background would have prejudiced rather than assisted Defendant by creating "additional jury antipathy" toward him. AB25. The State's guilt by association argument is contrary to Delaware law. Relevant evidence that casts only the co-perpetrator in a negative light does "not implicate" a defendant, and a trial court's instruction that the evidence is not to be used against the defendant "cure[s] any potential prejudice to [him]." *Johnson v. State*, 878 A.2d 422, 426 (Del. 2005).

Although in post-conviction the State now contends that revealing the extent of Sarro's criminality would have been prejudicial to the defense, this position is

[9] This was obviously in recognition of Sarro's failure to abide by the terms of his agreement.

contradicted by the earlier efforts of the trial prosecutors to paint Sarro in as favorable a light as possible. These efforts included portraying him as the follower, misrepresenting the nature of his cooperation, and thereafter urging the jury to credit his "cooperation" without telling the jury that he had reneged on his cooperation agreement. OB30-31. Evidence of Sarro's violent criminal background would have fairly and effectively rebutted these efforts and, contrary to the State's argument, would have been relevant to the crucial questions of comparative culpability that were raised at trial. Trial counsel's guilt phase ineffectiveness not only prejudiced Defendant at trial, but at penalty as well, where comparative culpability and punishment are relevant considerations. *See, e.g., Ferguson,* 642 A.2d at 1268-69 (co-defendant's fifteen year prison sentence was relevant and admissible mitigation in death case); *United States v. Krohn*, 700 F.2d 1033, 1039 (5th Cir. 1983) (trial court's appraisal of defendant's "comparative culpability" with that of his co-defendants in re-sentencing defendant deemed appropriate); *United States v. Bunker,* 1989 U.S. Dist. LEXIS 13275 at *2 (N.D. Ill. Nov. 3, 1989) (sentencing court takes into consideration defendant's "comparative culpability" with that of his co-defendants).

Kaufman Letter: The State argues that the trial court's reliance on Defendant's specific comment in the letter had nothing to do with the jury's decision to convict Defendant of the charged offenses. AB26. The State's

argument assumes, without any basis, that a post-conviction claim of guilt phase error may prevail only if the resulting prejudice applies to guilt or innocence, and not to penalty. This position is unsupported by logic or law. *See, e.g.*, *Cargle v. Mullin*, 317 F.3d 1196, 1208 (10th Cir. 2003) ("[C]ommonsense notion that sentencing proceedings may be affected by errors in the preceding guilt phase is not novel."); *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999), *superseded on other grounds by Hernandez v. Thaler*, 463 Fed. App'x. 349 (5th Cir. Mar. 1, 2012) (ineffective assistance of counsel at guilt phase prejudiced penalty phase); *Jackson v. Brown*, 513 F.3d 1057, 1076-77, 1079 (9th Cir. 2006) (guilt phase *Brady* violation mandated penalty phase, not guilt phase, relief); *Buehl v. Vaughn*, 1996 U.S. Dist. Lexis 19509 at *118 (E.D. Pa. Dec. 31, 1996) (new penalty phase granted in part due to trial counsel's guilt phase errors). Accordingly, Defendant properly asserted in his Opening Brief that trial counsel's ineffectiveness during the guilt phase deprived him, *inter alia*, of a fair and impartial determination of penalty and his right to be free from cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

PCP Intoxication: The State argues that use of a PCP expert during the guilt phase would have "made little sense" because the trial defense was accident. AB28. Expert testimony on PCP intoxication, however, would have supported the defense theory of accident because a person under the influence of PCP is more

likely to engage in an inadvertent physical action than a person who is not under its influence. OB35. The State also notes the trial court's instruction that "voluntary intoxication is not a defense to criminal culpability." AB28. Application of this principle bars a defendant from claiming that, due to his intoxication, he was incapable of forming the intent to commit a crime. *See Wyant v. State,* 519 A.2d 649, 651 (Del. 1986) (finding irrelevant and inadmissible "any testimony, expert or lay, as to the effect of defendant's intoxication upon the issue of intent and proof of the required state of mind for conviction of the charged."); *See also Davis v. State,* 522 A.2d 342, 346 (Del. 1987) (rejecting defense argument that voluntary intoxication can negate intent element required for first degree murder); *Raiford v. State,* 1995 Del. LEXIS 287 at *5 (Del. July 28, 1995) (defendant's failure to recollect raping and robbing the victim due to his intoxication not a defense). Defendant however has never claimed that his PCP ingestion negated his intent, nor would this have been the purpose of calling a PCP expert. Although PCP intoxication does impact mental functioning (a fact that would *not* forward a defense), its impact on psychomotor functioning increases the likelihood of purely accidental (i.e., inadvertent) conduct. OB35. Evidence to this effect would have been relevant, admissible and helpful to Defendant's defense. There is no basis to preclude expert testimony on this issue, which does not implicate the question of intent. Trial counsel was ineffective for failing to consult with and call an expert.

Argument IV - Whether the Prosecutors' 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.

Lance Lawson: The State does not contest that it failed to disclose that Lance Lawson was the police's initial suspect in the case, that he only cooperated under threat of prosecution, and that he received favorable consideration for his testimony. AB30-31. Instead the State argues that this information is not *Brady* material because Defendant has not demonstrated that the substance of whatever information Lawson provided exculpated Defendant. *Id.* at 31-33. The State's analysis is off the mark. *Brady* material also encompasses impeachment evidence disclosing motive, bias or interest. *Giglio v. United States*, 405 U.S. 150, 154 (1972). Lawson's status as a suspect, his contacts with law enforcement in this case, and the consideration he received in exchange for his cooperation informed his motive. *See, e.g., Gilmore v. Henderson,* 825 F.2d 663, 665 (2d Cir. 1987) (fact of a witness's status as a suspect presents a "motive to fabricate a story"). *Brady* compels that such information be disclosed to a defendant to allow for effective confrontation and cross-examination. *See, e.g., United States v. Bagley,* 473 U.S. 667, 676 (1985) (remanded to determine if government's failure to disclose inducement to witness prejudiced defendant); *United States v. Smith,* 77 F.3d 511, 517 (D.C. Cir. 1996) (*Brady* reversal founded on government's failure to disclose

full extent of consideration offered cooperating witness). Lawson's penalty phase testimony was devastating, OB37, as was the State's false assurances to the penalty phase jury that Lawson testified of his own free will. *Id.* But for the State's failure to disclose, there is a reasonable probability that the jury would have recommended, and the Court would have imposed, a life sentence. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

Lisa Klenk: The State does not contest its failure to disclose to trial counsel the fact that Ms. Klenk gave a statement to police. Rather, the State characterizes as "uncorroborated and cumulative hearsay" Ms. Klenk's assertions that: (1) Brian Morris told her that immediately following the shooting Defendant appeared visibly shaken and white as a ghost; (2) Morris told her that Defendant stated that the shooting was an accident; and (3) Morris never suggested that Defendant laughed after the shooting, or used a racial epithet. AB35. *Brady* evidence need not be corroborated. Indeed, corroboration weighs against both a finding of prejudice and a defendant's claim that the evidence was withheld. *See, e.g., Alvarez v. City of Los Angeles,* 177 Fed. Appx. 742 at *4 (9th Cir. Apr. 26, 2006) (*Brady* claim rejected where defense had evidence corroborating fact of witness's entire criminal record). Nor must the *Brady* evidence – in this case Ms. Klenk's police statement – be independently admissible, as the State implies by calling it "hearsay." "The government should [] disclose all evidence relating to guilt or punishment which

might reasonably be considered favorable to the defendant's case, even if the evidence is not admissible so long as it is reasonably likely to lead to admissible evidence." *United States v. Price*, 566 F.3d 900, 913 (9th Cir. 2009).

Disclosure of Ms. Klenk's statement would have led to admissible evidence, namely her testimony. As a defense witness she would have provided trial counsel with the proper foundation pursuant to D.R.E. 613(a) to confront Morris on his prejudicial testimony and statements introduced substantively in the State's case in chief, as well as with relevant and admissible extrinsic evidence of his prior inconsistent statements as provided by D.R.E. 613(b). Morris's accusations that Defendant was laughing shortly after the incident, AR1, that his firing of the gun was not accidental, AR2, 17, and that he used the racial epithet "nigger" to describe the victim, A187, were as damning as they could be, as to both guilt and penalty. Ms. Klenk's testimony would have directly contradicted each of Morris's accusations. This Court should reject the State's apparent position that withholding Ms. Klenk's statement does not warrant *Brady* relief because it could have been used only for impeachment purposes. *See Breakiron v. Horn*, 642 F.3d 126, 135 (3rd Cir. 2011) (robbery conviction reversed because impeachment evidence, withheld by the government, satisfied *Brady* materiality standard).

The materiality of this evidence mandated its disclosure. *Simmons v. Beard*, 590 F.3d 223, 228 (3d Cir. 2009); *Slutzker v. Johnson*, 393 F.3d 373, 386 (2004).

Argument V – 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.

Penalty Phase: The State argues that introduction at penalty of Defendant's use of the racial epithet "nigger" to describe the decedent, *two years prior to the instant crime,* was proper. The State first cites the need to disprove Defendant's accident theory. AB40. But the jury rejected the accident theory when it convicted Defendant of intentional murder. The State next suggests that the epithet was relevant and admissible because Defendant had previously discussed "plans to rob" the service station where the decedent worked.[10] AB40-41. That discussion, however, was devoid of any language or action evincing racial animus or hatred, beyond the use of the epithet. Its prejudicial impact at penalty outweighed its probative value, violating Defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution, and the corollary provisions of the Delaware Constitution.

In *Barclay v. Florida,* 563 U.S. 939, 1143 (1983), the United States Supreme Court held that in a capital case, race evidence is admissible at penalty when the evidence proves "elements of racial hatred in [the] murder." A review of the factual circumstances warranting consideration of race in *Barclay* and its progeny reveals a lack of any basis, consistent with the Constitution, for the introduction of

[10] The State concedes that Defendant later abandoned any such plan. *Id.*

Defendant's two-year-old use of the epithet. In *Barclay* the evidence of racial hatred included, but was not limited to, the defendant's desire to start a race war, a lurid, racially charged note left on the body of victim, and vile tape recordings mailed to the victim's mother and others, describing the savage killing of the white teenager as retaliation for the oppression of "black people." *Id.* at 943-44. Cases following *Barclay* have also required affirmative proof that the evidence demonstrated racial hatred at the time of the crime – beyond the use of an epithet – let alone two years earlier. *See, e.g., Monschke v. Warner,* 2012 U.S. Dist. LEXIS 92188 at *41-43 (W.D. Wash. June 11, 2012) (evidence included, *inter alia,* possession of white supremacist literature, membership in white supremacy group, attendance at "skinhead" gatherings, and postings of racist messages on the internet); *Fults v. Upton,* 2012 U.S. Dist. LEXIS 34150 at *44-46 (N.D. Ga. Mar. 14, 2012) (allowing use of defendant's affiliation with racist prison gang because it was directly related to the murder, as evidenced by, *inter alia,* his boastful letter after the murder written in gang code and his attempts to continue to direct the gang after the murder).

As discussed in the Opening Brief, OB41, the D.C. Circuit has held that an informant's repeated use of the term "nigger" does not necessarily suggest racial bias. *United States v. Mitchell,* 49 F.3d 769, 780 (D.C. Cir. 1995). Surely then, introducing a single two-year-old reference to the same epithet to prove *racial*

hatred as a reason to execute Defendant cannot be squared with the Eighth and Fourteenth Amendments. As to death eligibility and selection, "[t]he State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." *Tuilaepa v. California*, 512 U.S. 967, 973 (1994). The introduction of an isolated epithet uttered two years earlier violated the *Tuilaepa* principle. The epithet is highly inflammatory even in a proceeding in which the life or death determination is not being made. *See, e.g., United States v. Bartos*, 417 F.3d 34, 35-36 (1st Cir. 2005) (in firearm possession prosecution the government and the court found that defendant's use of term "nigger" was so inflammatory as to warrant the term's redaction). Here it was employed so that the penalty jury would brand Defendant a racist, not worthy of life. Had it not been introduced, it is more than reasonably probable that the jury would have recommended a life sentence, and the judge would have followed that recommendation.

Failure to Hold the State to Its Guilt Phase Proffer: The State reminds this Court that it has already ruled on direct appeal that the introduction of Defendant's use of the word "nigger" at the guilt phase of his trial did not violate his constitutional rights. AB38-39. However, Defendant does not seek to relitigate that issue in this Court; nor is Defendant's claim a mere refinement of the earlier argument, as the State alleges. AB38.

The question of whether evidence is admissible under the Constitution is a different one than whether, due solely to counsel's deficient performance, evidence was introduced that meets the *Strickland* prejudice standard. Constitutional claims of ineffective assistance often challenge trial counsel's actions that resulted in the admission of harmful evidence, even if the admission of that evidence did not otherwise violate the Constitution. Defendant's claim fits squarely within that paradigm: At trial, in support of its attempt to introduce the Defendant's use of the word "nigger," the State proffered that it would prove the Defendant's longstanding desire to shoot the victim, A184-87; the trial court ruled that it would permit the epithet conditioned on the State meeting its proffer, A186; the State failed to do so, yet when the epithet was elicited Defense counsel stood silent. A187.

The State contests none of this. Nor does the State contest that the prosecution's failure to satisfy its proffer would have resulted in the exclusion of the racial epithet. Instead, the State argues that the epithet was relevant at guilt. But that issue was decided by this Court on direct appeal, and Defendant does not here seek to relitigate it (nor could he).[11]

[11] Defendant does not concede the admissibility of the epithet under the United States Constitution, and has challenged it in federal habeas corpus proceedings.

Argument VI - Whether Trial Counsel's Conflict Adversely Affected Defendant's Representation, and Prior Rule 61 Counsel's Failure to Raise the Issue Violated the Constitution and Constituted a Miscarriage of Justice.

The State first cites to the Superior Court's analysis of this claim. AB42-43. Defendant responded to this analysis in his Opening Brief. OB49. The State then notes that the Superior Court appointed conflict counsel seven months before trial, AB 44, but fails to acknowledge that, despite the appointment, it was the Public Defender and not conflict counsel who represented Lawson at his *capias* hearing *only two months* before Defendant's trial. A482. This is an important fact, which guards against the scenario the State contends would occur if public defenders "had to conduct a conflict check before the preliminary hearing stage." AB 44. Here, Lawson was already appointed conflict counsel. The appropriate course of action was for Lawson's counsel to appear on Lawson's behalf at the *capias* hearing.

Significantly, the State also fails to acknowledge the actual impact and/or prejudice to Defendant from the conflict. Lawson's testimony was extremely prejudicial at the penalty hearing. *See* OB41; A226-230. The State specifically relied upon it in urging that Defendant be sentenced to death. AR4. Trial counsel's ineffectual questioning of Lawson as to the possibility that "[y]ou can lose your liberty" if convicted of pending charges, A230, underscores the impact of the conflict. Had the Public Defender not successfully "[sought] a reduction of

Lawson's bail," AB44, Lawson would likely have been incarcerated at the time of his testimony, in lieu of the mere specter of his possible incarceration. A witness's incarceration is a powerful motivating factor. *See, e.g., United States v. Lee,* 506 F.2d 111, 117 (D.C. Cir. 1974) (custodial status may reveal, *inter alia,* expectation of "favor growing out of [] detention"). The State emphasized what trial counsel knew during the course of the trial, AB45, but what trial counsel knew is irrelevant. The conflict created by the Public Defender's successful advocacy for Lawson had already adversely impacted Defendant. This is the key distinguishing factor between all of the cases cited by the State, including *State v. Pettiford,* 2011 Del. Super. LEXIS 59 at *4-8 (Del. Super. Feb. 15, 2011), AB45-46, and the instant case. In each of the cited cases the courts found no adverse impact. Here, when the Public Defender argued successfully for Lawson's release, he robbed his own client of powerful impeachment evidence. Lawson's protestations that he expected nothing in return for his testimony, A230, would have been received quite differently had he been in jail at the time of his testimony and motivated to be freed.

Whether this Court analyzes this issue as a conflict of interest requiring adverse impact, or ineffective assistance requiring deficient performance and prejudice, Defendant is constitutionally entitled to penalty phase relief.

Conclusion

For the reasons and authorities discussed above and in Defendant's Opening Brief, Defendant requests that this Court reverse the Superior Court's order denying Rule 61 relief, and order a new trial or penalty hearing, or further post-conviction proceedings.

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Dated: February 24, 2014

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 twenty-fourth day of February, 2014, undersigned counsel caused copy of Defendant's Reply Brief to be served electronically upon the following attorney:

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