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

STATE OF DELAWARE,	:	
	:	
v.	:	ID. No. 92003717DI
	:	
ROBERT W. JACKSON, III,	:	
	:	
Defendant.	:	

Submitted: September 4, 2008
Decided: November 25, 2008

On Defendant's Second Motion for Postconviction Relief.
DENIED.

MEMORANDUM OPINION

Loren C. Meyers, Esquire and Paul R. Wallace, Esquire, Deputy Attorneys General, Department of Justice, Wilmington, Delaware, Attorneys for the State.

Thomas A. Foley, Esquire and John S. Malik, Esquire, Wilmington, Delaware, Attorneys for Defendant.

COOCH, J.

I. INTRODUCTION

Robert W. Jackson, III ("Jackson") was convicted in 1993 of two counts of First Degree Murder (intentional murder and felony murder), Burglary Second Degree, Robbery First Degree, Conspiracy Second Degree, and three counts of Possession of a Deadly Weapon During the Commission of a Felony, and subsequently sentenced to death. This case has had a lengthy procedural history with various state and federal proceedings. Before the Court is Jackson's second motion for postconviction relief. In this motion, Jackson claims: (1) he is "actually innocent" because his original co-defendant, Anthony Lachette, was in fact the one who killed Elizabeth Girardi, because Jackson was and is a non-violent person, and because Jackson had a shoulder injury sustained shortly before the murder that would have physically prevented him from wielding the ax that caused the murder; (2) all of his pre-trial or trial counsel had various "conflicts of interest," including his pre-trial counsel who told the trial judge that his client was "guilty and he ought to die"; (3) the State withheld exculpatory evidence in violation of *Brady v. Maryland*[1]; (4) the sentencing judge improperly relied on a "secret" psychological/psychiatric report; (5) his trial counsel failed to properly investigate Jackson's brain damage; (6) the Court denied him of his right to an impartial jury; (7) the State suppressed evidence that a certain witness was a State agent; (8) the State made improper remarks during the examination of one of its witnesses and during its closing argument; (9) the State failed to comply with the Administrative Procedures Act when it promulgated Delaware's lethal injection execution policies; and (10) he is innocent of felony murder as a matter of law. Because all of his claims are either procedurally barred or otherwise do not entitle him to relief, Jackson's motion is **DENIED**.

II. FACTUAL HISTORY[2]

The following summary of the facts are taken from the Delaware Supreme Court's 1994 opinion affirming his conviction in this case:

> During the afternoon of April 3, 1992, Jackson and Anthony Lachette ("Lachette") decided to burglarize a house in order to obtain

[1] 373 U.S. 83 (1963) (holding that the State may not withhold from a defendant exculpatory evidence that is material either to guilt or punishment).

[2] Additional pertinent facts are set forth in the "Contentions" and "Discussion" sections of this opinion, *infra*.

money to buy marijuana. Lachette suggested they break into the home of Elizabeth Girardi. Lachette was familiar with the residence since he was acquainted with one of Mrs. Girardi's children. No one was at home when the two broke into the house through the back door. Jackson wore a pair of gardening gloves he had brought with him. Once inside, the two gathered property that included jewelry, rare coins, compact discs, firecrackers, and a camera. After placing the stolen property in paper bags, Jackson and Lachette left the house the way they entered. As they headed toward the driveway, where Jackson had parked the car, they saw Mrs. Girardi, who had arrived home and was walking towards Jackson's car. Lachette decided to flee despite Jackson's attempt to persuade him to stay. Lachette then dropped his bag and ran off, leaving Jackson behind.

After Lachette ran off, Jackson grabbed an ax from a shed and confronted Mrs. Girardi in the driveway. A struggle ensued, during which Mrs. Girardi fell to the ground, whereupon Jackson struck her several times in the face with the ax. Jackson then loaded his car with the stolen property. Before leaving, Jackson noticed that Mrs. Girardi was still alive. He struck her several more times in the face with the ax, killing her, and then left the scene. Shortly thereafter, Jackson found Lachette walking along the road and picked him up. Jackson then told Lachette that he had killed Mrs. Girardi. Lachette noticed blood on Jackson's gloves and pant legs. Over the course of the next week, Jackson watched television news reports and spoke with Lachette and James Burton (“Burton”), his roommate and longtime friend, about the Girardi murder. During that time, Jackson told Burton that he had killed Mrs. Girardi.

On April 9, 1992, Burton and Carl Roca (“Roca”), a friend, sold a bracelet stolen in the Girardi burglary to a pawn shop in Elsmere. Pawn shop owners in the area had been alerted by the police to be on the lookout for certain pieces of property stolen from the Girardi residence. The pawn shop owner contacted the police, who, following an investigation, obtained warrants authorizing the search of Burton's and Roca's residences and also authorizing the police to take Burton and Roca into custody to obtain clothing, fingerprints, and hair and blood samples from their persons.

When the police arrived at Burton's residence, they learned from his parents that he had moved out and was living with Jackson. Conducting surveillance in the area near Burton's and Jackson's apartment, police observed Burton and two companions enter a car and drive off. The police followed, eventually stopping the car for two motor vehicle violations. Lachette was driving, Jackson was in the front passenger seat, and Burton was in the rear seat. Upon opening the driver's door, the police observed a 14-inch metal pipe partially concealed between the driver's seat and door. After Lachette exited the vehicle, the police folded the driver's seat-back forward to allow Burton access to the door. Upon doing this, a plastic bag containing marijuana was discovered in the folding area where the seat-back and cushion meet. All three of the vehicle's occupants,

> including Jackson, were then arrested for carrying a concealed deadly weapon and possession of marijuana. Before placing Jackson in a holding cell, the police, pursuant to standard procedures, removed certain articles of property and clothing from his person, including his sneakers. Later that night, when police discovered that Lachette and Jackson were involved in the Girardi burglary/homicide, the sneakers were seized as evidence. The sole of one of Jackson's sneakers was later determined to be consistent with foot prints found at the murder scene.
>
> While in custody on the concealed weapon and marijuana charges, Lachette confessed to his role in the burglary and implicated Jackson in the Girardi murder. Subsequently, he gave a full statement to the police regarding the details of the burglary and Jackson's remarks regarding the murder. Additionally, Burton eventually gave a full statement to police, which included details of Jackson's remarks to him regarding the murder. Both Lachette and Burton testified for the State at trial. Following Lachette's initial confession, Jackson was arrested for the burglary/murder.[3]

III. PROCEDURAL HISTORY

After an eleven day jury trial which concluded in March 1993, Jackson was convicted (among other counts) on two counts of first degree murder (intentional murder and felony murder), and was sentenced to death. The Supreme Court affirmed Jackson's convictions on his first direct appeal; however, that Court vacated the death sentence, and remanded the case to this Court for a new penalty hearing.[4] This Court reimposed a sentence of death after a jury again recommended a death sentence. This second death sentence was affirmed on appeal to the Supreme Court.[5]

Jackson, through new counsel, filed his first motion for postconviction relief in August 1997 alleging: (1) his counsel was ineffective; (2) he was denied a fair trial because his conviction was based, in part, on the perjured

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[3] *Jackson v. State*, 643 A.2d 1360 (Del. 1994).

[4] *Id.*

[5] *Jackson v. State*, 684 A.2d 745 (Del. 1996). In affirming Jackson's sentence after his second penalty hearing, the Delaware Supreme Court rejected Jackson's claims that the trial court "(1) failed to provide him with an impartial jury by striking jurors for cause who held reservations about imposing the death penalty; (2) failed to preclude his sneakers, seized without a warrant at the time of his arrest, from being admitting into evidence; (3) failed to suppress other evidence collected by way of a warrant during a nighttime search of his residence; (4) failed to suppress the testimony of a State's witness, Anthony Lachette; (5) abused its discretion in permitting the testimony of Detective Scott McLaren; and (6) imposed the death penalty for felony murder contrary to his rights under the Eighth and Fourteenth Amendments." *Id*. at 748.

testimony of one Andre Johnson; and (3) the State failed to disclose a promise to Andre Johnson in exchange for his testimony in violation of *Brady*. This Court denied Jackson's motion after an evidentiary hearing, and the Supreme Court affirmed.[6]

In August 2001, Jackson filed a petition for writ of habeas corpus in the United States District Court for the District of Delaware. The District Court denied the petition.[7] The Court of Appeals for the Third Circuit denied relief on appeal,[8] and the United States Supreme Court denied certiorari in October 2006.[9]

On January 23, 2006, after the Court of Appeals for the Third Circuit had affirmed the denial by the United States District Court of his petition for writ of habeas corpus, this Court set an execution date of May 19, 2006. Jackson then filed a civil action on May 14, 2006 in the United States District Court for the District of Delaware, challenging the lethal injection execution procedures employed by the Delaware Department of Correction as "cruel and unusual punishment" in violation of the Eighth Amendment to the United States Constitution. On May 9, 2006, the United States District

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[6] *Jackson v. State*, 770 A.2d 506 (Del. 2001). On appeal from the trial court's denial of Jackson's first motion for postconviction relief, the Delaware Supreme Court rejected the two arguments that Jackson raised on appeal: (1) his conviction resulted from ineffective assistance of counsel; and (2) the State violated *Brady* when it failed to tell defense counsel about an agreement between the State and State witness Andre Johnson. *Id*. at 508. After the Supreme Court affirmed the denial of Jackson's first motion for postconviction relief, the undersigned judge was reassigned this case in February 2001 upon the retirement of the original trial judge.

[7] *Jackson v. Carroll*, 2004 WL 1192650 (D. Del.). Jackson asserted six claims for relief in his petition for habeas corpus, which were all rejected by the district court: "(1) that his trial counsel were presumptively ineffective because they were denied necessary time to prepare for his case; (2) that his trial counsel were ineffective for failing to utilize a private investigator to interview Derrick Johnson, a potential witness; (3) that his trial counsel were ineffective by failing to object to the unresponsive and prejudicial testimony of Anthony Lachette; (3) that his trial counsel were ineffective by failing to object to the testimony of the medical examiner; (5) that he was denied a fair trial by the State's failure to disclose certain favorable evidence; and (6) that Delaware's statutory scheme for the imposition of the death penalty violates the Sixth Amendment and the Due Process clause of the Fourteenth Amendment." *Id*. at *11.

[8] *Jackson v. Carroll*, 2005 WL 3477556 (3d Cir.). The Court of Appeals for the Third Circuit considered and rejected the following claims Jackson's raised on appeal: "his attorneys were ineffective at trial because they did not have enough time to adequately prepare a defense, and because they failed to object to certain trial testimony," and that "he was denied a fair trial as a result of the prosecution's failure to disclose an implicit promise of immunity to a prosecution witness." *Id*. at *1.

[9] *Jackson v. Carroll*, 127 S.Ct. 60 (2006).

Court for the District of Delaware granted a preliminary injunction against Jackson's May 19, 2006 execution, pending resolution of his action in the that court.[10] That case was subsequently certified as a class action suit on behalf of all defendants in Delaware sentenced to death.[11]

A trial in the District Court litigation was then postponed pending a decision of the United States Supreme Court in *Baze v. Rees*.[12] In that case, the United States Supreme Court had been asked to determine whether a specific method of lethal injection used to execute death-sentenced prisoners in Kentucky violated the Eighth Amendment's prohibition against "cruel and unusual" punishment. On April 16, 2008, the United States Supreme Court held that the Kentucky prisoner had failed to establish that the lethal injection execution method in that state presented a "'substantial' or 'objectively intolerable' risk of serious harm," and held that the prisoner was therefore not entitled to relief.[13] The Delaware District Court litigation remains pending.

Jackson filed the present motion for postconviction relief in this Court on October 19, 2006, and pursuant to Superior Court Criminal Rule 61(h) requested an evidentiary hearing. In September 2007, Jackson filed an amendment to his postconviction relief motion, adding a claim that Delaware's newly promulgated regulations for the procedure of lethal injection failed to comply with Delaware's Administrative Procedures Act in that the Department of Correction did not allow for their public review and comment alleged by Jackson to be an "unconstitutional" action by the State. In June 2008, Jackson filed a second amendment to the motion, alleging that he is innocent of felony murder as a matter of law pursuant to the Supreme Court's new interpretation of felony murder announced in *Williams v. State*[14] and subsequently held retroactive in *Chao v. State*.[15]

Both Jackson and the State have proffered the names of the potential witnesses and the issues as to which they would testify, in the event this

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[10] *Jackson v. Taylor*, 2006 WL 1237044 (D. Del.).
[11] *Jackson v. Danberg*, 240 F.R.D. 145 (D. Del. 2007).
[12] 128 S.Ct. 1520 (2008).
[13] *Id.*
[14] 818 A.2d 906 (Del. 2003) (holding that "the statutory language of the Delaware felony murder statute not only requires that the murder occur during the course of the felony but also that the murder occur to facilitate the commission of the felony).
[15] 931 A.2d 1000 (Del. 2007).

Court granted an evidentiary hearing. The State opposes an evidentiary hearing.[16] The extensive briefing is now complete.

IV. DEFENDANT'S CONTENTIONS AND SUMMARY OF DEFENDANT'S PROFFERED EVIDENCE IN SUPPORT THEREOF

A. Introduction

Jackson asserts ten claims for relief. Jackson requests an evidentiary hearing on claims one through eight, and he also requests that he be permitted to interview the jurors in connection with his sixth claim that the jury was not impartial.

B. Defendant's Contentions

1) *Actual Innocence*

(i) Anthony Lachette allegedly killed Mrs. Girardi

Jackson's first claim for relief alleges that he is "actually innocent" and that his original co-defendant, Anthony Lachette ("Lachette"), was the one who actually killed Mrs. Girardi. Jackson asserts that Lachette implicated Jackson in order to avoid being charged with murder himself. In connection with this claim, Jackson contends that because this Court did not give the jury an accomplice liability instruction, the jury necessarily found Jackson to be the killer.

Jackson supports his allegation that Lachette killed Mrs. Girardi with declarations signed in 2006 from three prisoners (all of whom have serious criminal records) who were in Gander Hill prison (now known as the Howard R. Young Correctional Institution) at the same time as Lachette.[17] According to these declarations, Lachette made incriminating statements about his own involvement in the murder. For example, Paul Weber's declaration states, in part:

> I was in Gander Hill Prison in 1992 and 1993. Anthony Lachette was on the same tier. . . When Lachette got on the tier, he told me that he as the one who killed the lady. It was very scary the way he said it. He seemed

[16] The names of all the potential evidentiary hearing witnesses and the issues identified as to which they would testify, are set forth *infra* at 21-22, 26-27.
[17] Def. Mot., D.I. 263, at Ex. 2-4.

> to me to be very devious and totally discompassionate. I recall that he somehow blamed the victim for the crime, like he was mad that he had to kill her because she came home . . . Lachette was a very scary guy . . . I remember Lachette's attitude was that he got [one] over on the police. The way he talked about what he did was like he was bragging about killing her and getting away with it.[18]

The declaration of Christopher Desmond states, in part:

> I was in Gander Hill Prison for all of 1992 and 1993. I knew Anthony Lachette while he was in jail awaiting trial. Lachette was a piece of crap and he'd blame his mother to get out of something if he could. I wouldn't believe a word he said . . . I remember a conversation with Lachette on the tier . . . Lachette was saying that he was the one who killed the woman.[19]

Derrick Johnson's declaration states, in part:

> I remember Lachette in prison. He was a big guy. He was very arrogant and aggressive. Everyone on the block had the impression that he was much more culpable in the case and was putting it all on Jackson for his own sake.[20]

Jackson also supports his claim with a declaration from Victor Abreu, an attorney with the Federal Community Defender Office for the Eastern District of Pennsylvania, who represents Jackson in his pending case in the United States District Court for the District of Delaware. According to that declaration, Lachette told Jonathan Freeman, a former cellmate, that Lachette killed Mrs. Girardi. Freeman, however, refused to sign a statement to that effect allegedly due to his fear of Lachette.[21]

(ii) Jackson was and is a non-violent person

Jackson presents declarations from friends testifying to his non-violent character, which assert in part: "I've known [Jackson] for a long time and I have never know him to be violent in any way."[22]; Jackson "was always someone you could count on and he was known to be very

[18] *Id*. at Ex. 2.
[19] *Id*. at Ex. 3.
[20] *Id*. at Ex. 4.
[21] *Id*. at Ex. 5.
[22] *Id*. at Ex. 10 (declaration of David Gerhardt).

respectful"[23]; Jackson "was always very respectful to people and had a reputation for being truthful and dependable"[24]; Jackson "was always so sweet and kind to everyone"[25]; Jackson "was never anything but kind hearted and generous"[26]; Jackson "was always kind and thoughtful to everyone"[27]; Jackson "was the type of person that everyone liked and he was the kind of friend that anyone would want to have."[28]

(iii) Jackson's shoulder injury

Jackson alleges through counsel in his petition that:

> Petitioner suffered from a debilitating shoulder dislocation injury that required surgery just months before the instant offense. This injury made it impossible for Petitioner to have wielded a heavy axe at all, as the State alleged, let alone to have swung it over his head numerous times at the victim's attacker must have done.[29]

Jackson further claims through his counsel's assertions that "[a]s the autopsy shows, the crime required a strength and agility of movement that Petitioner simply did not have."[30] Jackson also presents declarations from friends about his shoulder injury: "I know he hurt his shoulder real bad"[31]; Jackson "had an operation on his shoulder and wore a bandage for a long time"[32]; "The injury to his shoulder and arm was extremely serious"[33]; "He really couldn't do anything with his arm or shoulder after that"[34]; "I remember that he hurt his shoulder and arm real bad"[35]; "When we were in prison together it was obvious that Jackson had a fairly severe shoulder injury."[36]

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[23] *Id*. at Ex. 11 (declaration of Robert Ashley).
[24] *Id*. at Ex. 12 (declaration of Cathy Barrett).
[25] *Id*. at Ex. 13 (declaration of Sharon Montgomery).
[26] *Id*. at Ex. 14 (declaration of Melissa Pullak).
[27] *Id*. at Ex. 15 (declaration of Sandra Younker).
[28] *Id*. at Ex. 7 (declaration of George Gentry).
[29] Def. Mot., at 13.
[30] *Id*. at 35.
[31] *Id*. at Ex. 11 (declaration of Robert Ashley).
[32] *Id*. at Ex. 10 (declaration of David Gerhardt).
[33] *Id*. at Ex. 9 (declaration of Angeline Willen)
[34] *Id*. at Ex. 7 (declaration of George Gentry)
[35] *Id*. at Ex. 13 (declaration of Sharon Montgomery).
[36] *Id*. at Ex. 6 (declaration of Andre Johnson).

Jackson contends that "[n]o reasonable juror [in light of this "new evidence"] could find that Petitioner killed Mrs. Girardi, either intentionally or recklessly in the course of a burglary," and therefore, his "convictions and sentences should be vacated."[37]

2) *The Alleged Conflicts of Interest of All Counsel*

Jackson next claims that all of the lawyers who represented him or potentially represented him before or during the trial had conflicts of interest of varying natures that cumulatively "sabotage[d]" his case.[38] Specifically, Jackson alleges that Joseph A. Hurley, Nancy J. Perillo, Jerome M. Capone, Kevin J. O'Connell, and Laurence I. Levinson all had conflicts of interest that "adversely affected their performance."[39]

(i) Joseph A. Hurley

Mr. Hurley entered his appearance on July 6, 1992 and filed a motion to withdraw from the case on October 5, 1992. The motion to withdraw stated that "the flavor of the State's case is such that it is patently unreasonable to believe that counsel's representation could reasonably justify the tremendous financial strain that would be placed on the innocent relatives of the defendant."[40] At a hearing on the motion to withdraw on November 10, 1992, Mr. Hurley requested a sidebar conference to further state his reasons for wanting to withdraw from the case. At sidebar, in the presence of the trial judge, the prosecutor, and counsel for co-defendant Lachette, Mr. Hurley stated the following:

> Your Honor, I've been a defense attorney for seventeen years and I am able to divorce myself emotionally from what I hear in representing a client. There is one exception to that.
>
> During the proof-positive hearing when I heard for the first time the graphic details that were given with regard to the victim in this case grabbing on to the handle of the axe with both hands while the defendant punched her with his free hand and she dropped to the ground, and then while she was writhing or spasming on the ground, then he struck her numerous times, instantly it brought back a circumstance where during the

[37] Def. Mot., at 37-38.
[38] *Id*. at 12.
[39] *Id*. at 43.
[40] Mot. to Withdraw, D.I. 14, at 2.

> term of my marriage, my wife and I had a continual conversation regarding security at the house and the garage and her being in the garage.
>
> At that moment, I felt an absolute sense of revulsion toward the defendant. *I reached the conclusion in my mind he ought to die*. I identified I would not sit with him at the table for the remainder of the hearing.
>
> I met with him after that and I was supposed to meet with him that week and I delayed meeting with him because it was an emotional strain for me to have to meet with him.
>
> Finally, weeks after I was supposed to meet with him I met with him. I found him to be distasteful. I had a conversation with him about the state of the case. Without indicating what he said to me, the explanations that were given created emotional responses in me and I don't think that it is fair to him.
>
> I didn't put this in the motion because I thought it was prejudicial to him for an attorney to say in my estimation *he's guilty and he ought to die*. It's the only time it's happened in my life. But nonetheless, it is what it is.[41]

The trial judge ordered the transcript sealed.[42] Mr. Hurley's motion to withdraw as counsel was granted. None of Jackson's subsequent trial or post-trial attorneys were ever informed by the Court or by the State of these sidebar comments.

Jackson contends that Mr. Hurley's "remarkable display of disloyalty" and his "presentation of prejudicial information" to the trial judge violated Jackson's right to "loyal, effective counsel"[43] and that Mr. Hurley's remarks "violated every conceivable tenet of advocacy."[44] Jackson further

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[41] Tr. at 4-5 (November 10, 1992) (emphasis added).

[42] The transcript of this sidebar was placed in a sealed envelope which apparently was filed in the Prothonotary's Office on or about July 20, 1993 and marked "psychological/psychiatric report" (*see* pp. 45-46, *infra*). The envelope reads "Sealed per order of the Court." At some unknown point, and for reasons that are unclear from the record, the transcript of the sidebar at some later time became physically unsealed. Rebecca Blaskey of the Federal Community Defender Office for the Eastern District of Pennsylvania (which office the Court understands has been assisting Jackson's present Delaware counsel in connection with this motion) reviewed the file in this case in the Prothonotary's Office in April 2006. Her declaration states: "There was a transcript of a conference in which Attorney Hurley was allowed to withdraw from Mr. Jackson's case . . . The transcript was in an envelope that had "sealed" written on it. . . I later confirmed that the transcript had not been provided to counsel in prior proceedings." Def. Mot., at Ex 21. The undersigned judge was not aware of the existence of this transcript until the filing of this motion.

[43] Def. Mot., at 51.

[44] *Id*. at 12.

characterizes Mr. Hurley's remarks as "astounding."[45] Furthermore, he contends that this "blatant"[46] disloyalty "*tainted the entire proceedings* by unfairly biasing the judge."[47]

Jackson further alleges that he was denied his right to effective counsel when his subsequent counsel (being unaware of the sealed sidebar conference) failed to raise Mr. Hurley's violation of the duty of loyalty and failed to seek recusal of the trial judge.[48]

In addition, Jackson asserts that the trial judge should have *sua sponte* recused himself upon hearing Mr. Hurley's statements at the sidebar conference, and also should have "disclosed" these facts to subsequent trial counsel and also in some manner to the Delaware Supreme Court.[49] Jackson claims that he was denied the right to rebut Mr. Hurley's comments and that if the Supreme Court had known of Mr. Hurley's comments, "there is a reasonable probability that it would have granted a new trial before another judge or, at a minimum, remanded for a new penalty hearing before a different judge."[50] Jackson asserts that the failure of the trial judge to disclose the comments and to recuse himself violated Jackson's due process and Eight Amendment rights.[51]

(ii) Nancy J. Perillo

After Mr. Hurley filed his motion to withdraw, but before the motion was granted, the Office of the Public Defender opened a file in this case and tentatively assigned the case to Deputy Public Defender Nancy J. Perillo on October 28, 1992. Ms. Perillo then spoke to one of the prosecutors and asked him promptly to determine if the Office of the Public Defender would have a conflict of interest in representing Jackson due to its possible past representation of potential prosecution witnesses.

On November 4, 1992, the prosecutor advised Ms. Perillo that the Office of the Public Defender did have a conflict of interest. The trial judge referred the conflict issue to another judge, who determined, after an *ex*

[45] *Id*. at 45.
[46] *Id*. at 9.
[47] *Id*. at 53 (emphasis in original).
[48] *Id*. at 54.
[49] *Id*.
[50] Def. Reply to State's Second Supp. Ans., D.I. 288, at 21.
[51] Def. Mot., at 54.

parte meeting with the prosecutor, that there was in fact a conflict of interest disqualifying the Office of the Public Defender from representing Jackson.[52]

Although this conflict of interest has apparently never been identified on the record, Jackson alleges in the present motion that the Office of the Public Defender's conflict stemmed from its representation of Victor Talmo ("Talmo"), Jackson's cellmate and a "key" prosecution witness.

(iii) Jerome M. Capone

The Court appointed Mr. Capone to represent Jackson on November 16, 1992. He was permitted to withdraw from the representation on February 22, 1993. Jackson alleges that Mr. Capone had two conflicts of interest due to his representation of Andre Johnson ("Andre") and Derrick Johnson ("Derrick").

After representing Jackson for a few months, Mr. Capone undertook representation of Andre on his own pending charges and withdrew from representing Jackson. Jackson contends that during his trial, when Andre at first refused to testify on behalf of the State, that Mr. Capone then persuaded him to testify against Jackson.

Mr. Capone also represented Derrick, Andre's cousin, who was in custody with Jackson and Lachette at Gander Hill. Jackson alleges that Derrick heard Lachette make incriminating statements about his own involvement in the murder. Allegedly, Derrick told subsequent defense counsel Kevin O'Connell about these statements and Mr. O'Connell arranged for him to testify on Jackson's behalf. Derrick, however, refused to testify at trial. Jackson contends that Mr. Capone not only convinced Andre to testify against Jackson, but he also persuaded Derrick not to testify on behalf of Jackson.

(iv) Kevin J. O'Connell

Jackson also alleges that Mr. O'Connell, who was appointed by the Court on November 16, 1992 with Mr. Capone to represent Jackson, was "conflicted because of his perceived duty to the court 'not to make waves.'"[53] Mr. O'Connell had apparently never tried a capital murder case before but was appointed to represent Jackson as part of the Court's conflict attorneys program. Jackson's allegation seems to be that Mr. O'Connell,

[52] *Id*. at 46.
[53] *Id*. at 48; Tr. at 73 (July 16, 1999).

although uncomfortable with the assigned case due to his inexperience with trying a capital murder case, accepted the assignment in order to satisfy his duty to the Court.

In addition, Jackson contends that Derrick, who allegedly heard Lachette make incriminating statements about his own involvement in the murder, told Mr. O'Connell about those statements.[54] Jackson further asserts that Mr. O'Connell did not call Derrick as a witness, nor did he testify himself, thereby keeping these alleged statements from the jury.[55]

(v) Laurence I. Levinson

After Mr. Capone withdrew as counsel, the Court appointed Mr. Levinson on February 22, 1993 as co-counsel with Mr. O'Connell. Jackson claims that Mr. Levinson revealed to the press that Derrick would testify about Lachette's alleged statements of guilt, and that it was the press accounts that caused Derrick not to testify, thus prejudicing Jackson.[56]

3) *The Alleged* Brady *Violations*

Defendant's next claim for relief is that prosecution suppressed exculpatory evidence in violation of *Brady v. Maryland*.[57]

(i) Andre Johnson

Andre testified at trial that Jackson sent him a coded letter, requesting that Andre kill State's witness James Burton ("Burton"). Burton testified that the State did not promise him anything in exchange for his testimony. The Delaware Supreme Court has previously found that the State's failure to disclose the existence of an implied bargain in exchange for Andre's testimony was a *Brady* violation, but that the *Brady* violation did not "undermine confidence in the verdict."[58] Jackson, however, contends that there is now additional evidence of this *Brady* violation not previously considered by any court, the new evidence being Andre's motion for specific

[54] Def. Mot.,. at 49.
[55] *Id*.
[56] *Id*.
[57] 373 U.S. 83 (1963).
[58] *Jackson*, 770 A.2d at 514.

performance of his plea deal with State.[59] Jackson asserts that "[t]he Courts have not before addressed the full extent of the constitutional errors relating to the testimony of Andre Johnson."[60] Jackson relies on Andre's *pro se* motion for specific performance filed in July 1993, in which Andre alleged that the State assured him that it would dispose of his charges in exchange for his testimony against Jackson. Andre further alleged in that pleading that the prosecutor could not put the deal in writing, or it could be used to destroy Johnson's credibility as a witness. Therefore, Jackson asserts that "there was an implied deal in exchange for testimony if not an explicit one."[61] Relatedly, Jackson contends that Andre told prosecutors that he did not think that Jackson killed Mrs. Girardi, but that the State also suppressed that evidence.[62]

(ii) Victor Talmo

Talmo testified in the first penalty hearing that Jackson asked him to kill Burton. At the time he testified, Talmo was facing sentencing as a habitual offender for a string of burglaries. Talmo testified that the State had not offered him any deal in exchange for his testimony; however, Jackson claims that Talmo was "coached to testify falsely in this regard by the prosecution."[63]

Talmo also testified in the second penalty hearing after he had been sentenced on the burglary charges. After he testified, his attorney filed a motion for modification of sentence, which was unopposed by the State. Jackson now claims that "it appears that the assurance from the prosecution to not oppose this motion was received *prior* to Mr. Talmo's testimony."[64] In support of his contention, Jackson provided an affidavit from Talmo's then-attorney Joseph E. Funk[65], which states, "I filed a motion for modification of sentence . . . The state did not oppose it, because of Mr. Talmo's cooperation, and the court granted it."[66]

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[59] Def. Mot., at 58; *Id*. at Ex. 16.
[60] Def. Mot., at 61.
[61] *Id*. at 60.
[62] *Id*. at 60-61.
[63] *Id*. at 61-62.
[64] *Id*. at 63.
[65] *Id*. at Ex. 17. Mr. Funk has since been disbarred due to an unrelated matter. *In re Funk*, 742 A.2d 851 (Del. 1999).
[66] Def. Mot., at Ex. 17.

In addition, Jackson alleges that Talmo told the police and prosecutors that Jackson always denied killing Mrs. Girardi; however, Jackson contends that this evidence was never turned over to the defense.[67]

(iii) James Burton

Jackson alleges that the State withheld evidence of bias of Burton, who testified that Jackson confessed to him on the day of the murder that he had killed Mrs. Girardi. Weeks before Jackson's second penalty hearing, Burton was scheduled to go to trial on the charge of Possession of Marijuana; however, he pled guilty in a plea bargain to Disorderly Conduct and received a fine of fifty dollars. Jackson claims that this plea bargain was not disclosed to defense counsel.[68]

(iv) Angeline Willen

Jackson also contends that the State suppressed statements made by Angeline Willen to prosecutors that Jackson was non-violent and had a shoulder injury.[69]

4) *The Alleged Improper Reliance Upon and Sealing of a "Psychological/Psychiatric Report" by the Trial Judge*

Jackson's next claim for relief is that the judge improperly relied on a "psychological/psychiatric report" that was not disclosed to defense counsel at either the first or second sentencing proceedings. The basis for Jackson's claim is an entry on the docket sheet from July 20, 1993, which states "PSYCHOLOGICAL/PSYCHIATRIC REPORT SEALED BY ORDER OF THE COURT."[70] Jackson asserts that he had been unaware of the existence

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[67] *Id*. at 63-64.
[68] *Id*. at 65.
[69] Jackson also claims that "[i]t appears that Carl Roca, another State witness, also received some benefit on a drug charge prior to his testimony in the second penalty phase. Counsel has requested the file from the Court of Common Pleas, but it has not yet been located." *Id*. at 65-66 n. 26. Because Jackson has not pursued this claim since the motion for postconviction relief was filed, the Court considers it abandoned. *See Truluck v. State*, 2004 WL 3354224, at *2 n. 12 (Del. Super.) (considering claims not briefed to be abandoned).
[70] D.I. 85.

of this report, and that the Court's failure to have disclosed this "secret" report "violated due process and denied [Jackson] his Eight Amendment rights against the arbitrary imposition of the death penalty."[71]

5) *Trial Counsel's Alleged Failure to Investigate Mitigating Factors in Connection with the Penalty Hearing*

Jackson asserts that if defense counsel had conducted a proper investigation, they would have discovered that Jackson was brain damaged.[72] He further alleges that "[e]ffective counsel would then have been able to present mental health expert mitigating evidence concerning Mr. Jackson's brain damage and other cognitive and emotional impairments, the interrelationship between his brain damage and his substance abuse problems, and the mitigating significance of all of these factors."[73] In support of this contention, Jackson has provided a declaration from neuropsychologist Dr. Carol Armstrong, which states that "the neuropsychological test results, as corroborated by the history, indicate that Mr. Jackson suffers from neurocognitive impairments, i.e., brain damage. The evidence of his brain dysfunction could have been presented at his original trial and resentencing."[74] Jackson contends that he was prejudiced as a result of this alleged failure to investigate because evidence of his brain damage would have been a compelling additional mitigating factor at sentencing.[75]

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[71] Def. Mot., at 80.
[72] *Id*. at 86.
[73] *Id*.
[74] *Id*. at Ex. 37.
[75] Jackson also alleges that he has been denied access to a full evaluation of the extent of his brain damage because Dr. Armstrong was prevented from conducting a complete evaluation during the preparation of this motion and because Jackson has been denied access to his prison medical reports. According to Dr. Armstrong's declaration, prison personnel only permitted the evaluation to take place with Jackson's hands shackled, thus limiting the types and numbers of tests that Dr. Armstrong could administer. Jackson also claims that he has been denied access to his prison medical records; however, the court understands from the State (without contradiction from Jackson) that Jackson has since obtained the sought records. State Ans., D.I. 274, at 11 n. 4. No further evidence of Jackson's physical condition from the Department of Corrections medical records has since been submitted by Jackson. Accordingly, the Court need not address this claim.

6) *The Alleged Juror Misconduct Issues*

(i) The emotional juror

Jackson identifies two incidents that he alleges violated his right to a fair trial before an impartial jury. The first incident occurred during the testimony of the medical examiner, when graphic slides of the victim were shown and one of the jurors became "hysterical" and left the courtroom. The Court took a recess and then ultimately excused that juror, during which recess the upset juror was in the same room as the other jurors. Jackson alleges that this situation must have affected the impartiality of the remaining jurors.[76]

(ii) The newspaper article

The second incident occurred during the second penalty hearing when it came to the Court's attention that one of the jurors had read an article in the paper about the case. The juror told the Court that the article worried him "about his family . . . the fact that someone offered money for a witness."[77] Jackson alleges that the Court should have excused this juror. Although Jackson claims that these two occurrences require a new trial in and of themselves, Jackson requests an opportunity to interview the jurors "in order to further develop the prejudice related to this claim."[78]

7) *Victor Talmo as a State Agent*

Talmo was Jackson's cellmate at Gander Hill. Talmo testified at the first penalty hearing that as early as September 8, 1992 Jackson offered to help Talmo obtain money to make bail. He further testified that two days later, Jackson told Talmo that he was attempting to arrange bail for Talmo because he wanted him to kill Burton. Talmo met with Detective Scott McLaren of the New Castle County Police on September 21, 1992. In addition, Talmo recorded his telephone conversations with Jackson in March 1993.

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[76] Def. Mot., at 93.
[77] Tr. at 6 (Sept. 15, 1995).
[78] Def. Mot., at 94. Although not clearly stated in the motion, it appears that Jackson seeks to interview all of the jurors.

The recorded telephone conversations between Talmo and Jackson were played to the jury during the first penalty hearing. On appeal, the Supreme Court held that Talmo was acting as a State agent during March 1993 when he recorded the telephone conversations and therefore, that the tapes were inadmissible. The Supreme Court also held that Talmo was not acting as a State agent as of September 8, 1992. Because the tapes were held to have been improperly admitted into evidence, the Supreme Court vacated Jackson's death sentence and remanded the case for a new penalty hearing. Talmo testified again at the second penalty hearing that Jackson solicited him to kill Burton.

Jackson now asserts again that Talmo was a State agent as early as September 21, 1992 when he first met with Detective McLaren. In support of his contention he cites to a declaration from Talmo which states "McLaren basically said to me anything you can up [sic] with let me know."[79] In addition, Jackson restates the claim that the Office of the Public Defender had a conflict of interest in representing Jackson because of its representation of potential State witnesses. Jackson states that "[a]t least one of the witnesses clearly was Talmo" and therefore, Jackson asserts, Talmo was a State agent in the fall of 1992.[80]

Furthermore, Jackson alleges that the State gave Talmo an "implied deal" in exchange for his testimony. Talmo's declaration states that "I was certainly led to believe they [the State] would help me out [on his pending burglary charge]."[81] Therefore, Jackson claims that Talmo lied when he testified that he was not promised anything for his testimony.

8) *The Alleged Prosecutorial Misconduct*

Jackson alleges that the "prosecution's conduct during Petitioner's trial violated due process by unfairly destroying his presumption of innocence."[82] Jackson contends that the prosecutor's questioning of Detective McLaren unfairly implied that because of the "massive scope of the State's investigation," that Jackson must be guilty.[83] Furthermore, Jackson asserts that the prosecutor compounded the prejudicial effect of his questioning during his closing argument, where he led the jury to believe

[79] *Id*. at Ex. 8.
[80] Def. Mot., at 98.
[81] *Id*.
[82] *Id*. at 101.
[83] *Id*.

that such an in-depth investigation must have resulted in the arrest of the right person.[84] In addition, he claims that his counsel was ineffective for failing to object to the prosecutor's alleged misconduct.[85]

9) *The State's Alleged Failure to Comply with the Administrative Procedures Act in Establishing the Protocol for Lethal Injection*

In his September 2007 amendment to this pending Rule 61 petition, Jackson claims that Delaware's lethal injection execution policies and procedures are invalid because the Department of Correction did not allow for their public review and comment, purportedly required by the Delaware APA. Therefore, Jackson claims that his pending execution is "unconstitutional."[86]

10) *Felony Murder Allegedly Inapplicable to this Case*

In his June 2008 amendment to this pending petition, Jackson claims that his "conviction for felony murder should be vacated, along with the felony murder aggravating factor and the resulting death sentence, in accordance with *Chao* and state and federal due process principles" because "the burglary was completed before the victim was killed." [87]

In *Chao v. State*, the Delaware Supreme Court in 1992 had interpreted the "in furtherance" language of Delaware's felony murder statute as follows: "[F]or felony murder liability to attach, a killing need only accompany the commission of an underlying felony. Thus, if the 'in furtherance' language has any limiting effect, it is solely to require that the killing be done by the felon, him or herself."[88] However, in *Williams v.*

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[84] *Id*. at 104.
[85] *Id*. at 105.
[86] Def. First Amendment to Mot., D.I. 277, at 3. On the same day that Jackson amended this motion to add his APA claim, Jackson also filed a declaratory judgment action in this Court asserting the same claim. This Court has dismissed the declaratory judgment action, and the Supreme Court affirmed that decision. *Jackson v. Danberg*, 2008 WL 185058 (Del. Super.) (holding that "the Department of Correction is not required to promulgate its execution policies and procedures under the APA because they are 'confidential'"), *aff'd*, 2008 WL 4717426 (Del. Supr.).
[87] Def. Second Amendment to Mot., D.I. 289, at 4-5.
[88] 604 A.2d 1351, 1363 (Del. 1992).

State, the Delaware Supreme Court in 2003 reinterpreted the "in furtherance" language to "not only require[] that the murder occur during the course of the felony but also that the murder occur to facilitate commission of the felony."[89] In a subsequent *Chao* opinion (*Chao II*), the Supreme Court held in 2007 that *Williams'* interpretation must be applied retroactively.[90]

In further support of this claim, Jackson alleges that "the jury was inadequately instructed on the 'in furtherance' element" of felony murder.[91] The instructions stated, in relevant part:

> In order to find the defendant guilty of [felony murder], you must find the following elements have been established beyond a reasonable doubt:
>
> The first element is that the defendant caused the death of Elizabeth P. Girardi . . . The second element is that the defendant acted recklessly . . . The third element is that the killing occurred during the commission of a felony or immediate flight therefrom. In this case, the felony is burglary in the second degree. Fourth, the killing was in furtherance of, or was intended to assist in, the commission of the felony or immediate flight therefrom.

Jackson states that "the jury instruction failed to explain, as required under *Williams* and *Chao*, that the death must be a consequence of the underlying felony of burglary."[92] As such, Jackson claims that his "conviction should accordingly be vacated under *Williams/Chao* as well as federal due process guarantees."[93]

C. Defendant's Proffered Witnesses at the Requested Evidentiary Hearing

Jackson contends that he is entitled to an evidentiary hearing and has provided the Court with the names of witnesses he would call at such a hearing, and has identified the issues on which those witnesses would testify. In support of his actual innocence claim, Jackson states that he would call the following witnesses: Paul Weber, Christopher Desmond, Derrick Johnson, and Jonathan Freeman to testify about Lachette's admissions to his

[89] 818 A.2d 906, 913 (Del. 2003).
[90] 931 A.2d 1000, 1002 (Del. 2007).
[91] Def. Second Amendment to Mot., at 5.
[92] *Id*. at 6
[93] *Id*.

involvement in the murder; George Gentry and Angeline Willen to testify that Lachette was a violent drug addict; Cathy Barrett to testify that Burton had a poor reputation for truthfulness; Robert Ashley, David Gerhardt, Angeline Willen, George Gentry, Sharon Montgomery, and Andre Johnson to testify about Jackson's shoulder injury; Sharon Montgomery, Melissa Pullak, Angeline Willen, Robert Ashley, Cathy Barrett, and Sandra Yonker to testify regarding Jackson's non-violent nature.

Jackson states that his claims against various defense counsel alleging conflicts of interest, including his claim regarding Joseph Hurley, are, for the most part, record based claims. Jackson, however, has advised that he may call Rebecca Blaskey, Kevin O'Connell, Andre Johnson, and Derrick Johnson in support of those claims.

In support of his *Brady* violation claims, Jackson asserts that he would call Andre Johnson, Victor Talmo, Joseph Funk, and Angeline Willen. Jackson says that he would also call Mr. O'Connell and Dr. Armstrong in support of his claim regarding the alleged sealed "psychological/psychiatric report."

With respect to Jackson's claim that he was denied a fair trial before an impartial jury, Jackson states he cannot proffer any specific evidence until the Court permits him to interview the jurors.

Jackson states that he will present the testimony of Victor Talmo in support of his claim that Talmo was acting as a State agent during the fall of 1992. Jackson asserts that his claim of prosecutorial misconduct is a record based claim; however, he may call Mr. O'Connell to testify regarding the ineffective assistance of counsel part of that claim.

V. THE STATE'S RESPONSE TO DEFENDANT'S CONTENTIONS

A. Introduction

The State contends that all of Jackson's claims are procedurally barred and that the Court should deny the motion without further proceedings.[94]

[94] The State, with the Court's consent, did not respond to Jackson's added claim that Delaware's lethal injection procedure was invalidly adopted because, at the same time Jackson filed the amendment to the motion containing that claim, his counsel filed a letter stating that "it doesn't make sense for neither the Court nor the State to take any action at this junction, until the civil suit for declaratory judgment plays out." Def. Sept. 28, 2007 Letter, D.I. 278. As previously noted, this Court has dismissed the declaratory judgment action and the Supreme Court has affirmed that decision.

B. The State's Response

1) *Actual Innocence*

The State contends that Jackson's "actual innocence" claim is time barred pursuant to Rule 61(i)(1). In addition, the State asserts that this claim is barred by Rule 61(i)(2) because it was not raised in his first postconviction motion in 1997. Furthermore, the State contends that his actual innocence claim should not be considered pursuant to Rule 61(i)(5) because it does not set forth a colorable claim of a constitutional violation.[95]

2) *The Alleged Conflicts of Interest of All Counsel*

The State claims that Jackson's allegations of conflicts of interest of his counsel are time barred by Rule 61(i)(1). The State also contends that these claims are barred by Rule 61(i)(2) because they were not raised in his previous postconviction motion. In addition, the State asserts that Jackson's conflict allegation based on Mr. O'Connell's interview of Derrick Johnson is barred by Rule 61(i)(4) because that claim was litigated in the 1997 postconviction proceedings as well as in the federal habeas proceedings in the federal courts. Furthermore, the State contends that there is no basis to consider these claims pursuant to Rule 61(i)(5) because Jackson does not demonstrate that the conflicts "adversely affected counsel's performance."[96]

3) *The Alleged* Brady *Violations*

The State contends that Jackson's *Brady* violation claims are procedurally barred, although it does not specifically state on which bar(s) it relies. The State further contends that review of Jackson's *Brady* claims is not warranted under 61(i)(5).[97]

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[95] State Ans., at 5-6.
[96] *Id*. at 6-8.
[97] *Id*. at 8-9.

(i) Andre Johnson

In response to Jackson's claim that the State had an implicit deal with Andre, the State asserts that the claim was litigated in Jackson's first postconviction motion and therefore barred by Rule 61(i)(4). The State does not address Jackson's contention that there is "new evidence" in support of this claim. The State further contends that consideration of this claim is not warranted under Rule 61(i)(5).

(ii) Victor Talmo

The State contends that Jackson's claim that the State did not disclose deals it had with Talmo in exchange for his testimony in the 1993 penalty hearing is "moot" because Jackson was given a new penalty hearing. Furthermore, the State asserts that any alleged undisclosed deal between Talmo and the State in connection with the 1995 penalty hearings "would make little difference in the jury's assessment of him in light of the impeachment that did occur on the question of his criminal convictions and latest sentence."[98] Thus, the State asserts that this claim does not warrant consideration pursuant to Rule 61(i)(5).

(iii) James Burton

With respect to Jackson's claim that the State failed to disclose a deal it made with Burton just weeks before he was scheduled to testify in Jackson's second penalty hearing, the State contends that "[i]mpeaching Burton on the basis of a possession of marijuana charge, reduced to disorderly conduct, was hardly likely to change the result of the penalty hearing."[99] Accordingly, the State asserts that this claim does not warrant consideration pursuant to Rule 61(i)(5).

(iv) Angeline Willen

In response to Jackson's claim that the State withheld statements by Willen about Jackson's shoulder injury and his character, the State contends that "[i]t is hardly obvious how the prosecution can conceal from the defense the defendant's own medical condition."[100] Furthermore, the State asserts

[98] *Id*. at 9.
[99] *Id*. at 10.
[100] *Id*.

that "if Willen knew Jackson well enough to have an opinion about his character, it follows her existence was known to Jackson."[101] Therefore, the State asserts that this claim does not warrant consideration pursuant to Rule 61(i)(5).

4) *The Alleged Improper Reliance Upon and Sealing of a "Psychological/Psychiatric Report" by the Trial Judge*

The State asserts that Jackson's claim that the sentencing judge improperly relied on a psychological report is barred by Rule 61(i)(1) because it is untimely and by Rule 61(i)(2) because he did not raise the claim in his first motion for postconviction relief. In addition, the State contends that "any [claim of] reliance by the trial judge on the report is simply speculative, insufficient to satisfy the standard of Rule 61(i)(5)."[102]

5) *Trial Counsel's Alleged Failure to Investigate Mitigating Factors in Connection with the Penalty Hearing*

The State asserts that Jackson's claim that defense counsel failed to adequately investigate mitigation evidence is barred by Rule 61(i)(1) because it is untimely and by Rule 61(i)(2) because he did not raise the claim in his first motion for postconviction relief. Furthermore, the State contends that "given the psychiatric evidence that was adduced at the 1995 penalty hearing, there is not reason to believe that the result of the penalty hearing would have been different."[103]

6) *The Alleged Juror Misconduct Issues*

The State contends that Jackson's claim that the jury was impartial is time barred pursuant to Rule 61(i)(1). Additionally, the State contends that this claim is barred by Rule 61(i)(2) because it was not raised in Jackson's previous postconviction motion. Moreover, the State contends that this claim is barred by Rule 61(i)(3) because it was not raised on direct appeal.

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[101] *Id.*
[102] *Id.* at 11.
[103] *Id.*

7) *Victor Talmo as a State Agent*

The State asserts that Jackson's claim that Victor Talmo was a State agent in the fall of 1992 is barred by Rule 61(i)(1) because it is untimely and by Rule 61(i)(2) because he did not raise the issue in his first motion for postconviction relief. The State further contends that "there is no reason to give any credence to the version of events now put forth by Talmo, 15 years after the fact and now that he is serving a life sentence."[104]

8) *The Alleged Prosecutorial Misconduct*

The State contends that Jackson's prosecutorial misconduct claim is barred by Rule 61(i)(1) because it is untimely and by Rule 61(i)(2) because he did not raise the issue in his first motion for postconviction relief.

9) *Felony Murder Allegedly Inapplicable to this Case*

In response to Jackson's claim that he is innocent as a matter of law of felony murder, the State alleges that his claim is time barred pursuant to Rule 61(i)(1). The State also contends that his felony murder claim is barred pursuant to Rule 61(i)(2) because Jackson failed to raise the claim in his first motion for postconviction relief. Furthermore, the State contends Jackson was properly convicted of felony murder because the evidence "surely establishes that the death of [Mrs.] Girardi occurred in Jackson's immediate flight from the burglary."[105]

C. The State's Proffered Witnesses at the Requested Evidentiary Hearing

The State opposes an evidentiary hearing. If such a hearing were held, however, in response to Jackson's claim of actual innocence, the State has stated that it would call Jacqueline Pickel, Jackson's mother (the State

[104] *Id*. at 12. Talmo was sentenced as an habitual offender to life in prison following a subsequent1998 burglary conviction. *See Talmo v. State*, 2003 WL 723993, at *1 (Del. Supr.) (affirming the trial court's denial of Talmo's motion for postconviction relief).
[105] State Ans. to Def. Second Amendment to Mot., D.I. 295, at 11.

does not say why). In addition, the State would seek to introduce excerpts from Jackson's deposition taken on August 8, 2007, as well as an exhibit introduced during the deposition,[106] in order to impeach Jackson's claim that he did not kill Mrs. Girardi. With regard to Jackson's conflict of interest claim, the State would call Mr. Capone, Mr. Foley, and Mr. Malik to testify. The State would also call Detective Scott McLaren to testify regarding Jackson's *Brady* claim and his claim that Talmo was a State agent in the fall of 1992. In response to Jackson's claim of prosecutorial misconduct, the State would call Mr. O'Connell.

VI. DISCUSSION

When considering a motion for postconviction relief, the Court must first apply the procedural bars of Superior Court Criminal Rule 61.[107] If a potential bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.[108] Rule 61(i) (as applied to Jackson's 1993 conviction) will bar (1) a motion filed more than three years after a final judgment of conviction, unless the motion asserts a "retroactively applicable right,"[109] (2) any ground for relief that was not asserted in a prior postconviction proceeding, unless consideration is warranted in the "interest of justice," (3) any ground for relief that was not asserted at trial or on direct appeal, unless the defendant can show "cause" and "prejudice," (4) any ground for relief that was formerly adjudicated, unless reconsideration is warranted in the "interest of justice."[110]

A claimant can avoid the first three of these procedural bars, if under 61(i)(5) the claimant can show: a) that the court lacked jurisdiction or b) "a colorable claim that there was a miscarriage of justice because of a

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[106] The exhibit is a classification report prepared by the Department of Correction Multi-Disciplinary Team that interviewed Jackson for classification purposes.

[107] *Bailey v. State*, 588 A.2d 1121, 1127 (Del.1991); *Younger v. State*, 580 A.2d 552, 554 (Del.1990) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).

[108] *Saunders v. State*, 1995 WL 24888 (Del. Supr.); *Hicks v. State*, 1992 WL 115178 (Del. Supr.); *State v. Gattis*, 1995 WL 790961 (Del. Super.) (citing *Younger*, 580 A.2d at 554).

[109] A 2005 amendment changed the time limit in Rule 61(i)(1) to one year; however, this amendment applies only to cases where the judgment of conviction became final after July 1, 2005. *See* Revisor's note to Super. Ct. Crim. R. 61.

[110] *See Flamer v. State*, 585 A.2d 736, 746 (Del. 1990) (holding that "[i]n order to invoke the 'interest of justice' provision of Rule 61(i)(4) to obtain relitigation of a previously resolved claim a movant must show that subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him").

constitutional violation." This exception, often referred to as the "fundamental fairness" exception, is narrow and is "applied only in limited circumstances, such as when the right relied upon has been recognized for the first time after the direct appeal."[111] This exception may also apply when a petitioner makes a colorable claim to a mistaken waiver of important constitutional rights.[112]

The "interest of justice" exception under Rule 61(i)(4) and the "miscarriage of justice" exception under Rule 61(i)(5) have "different and distinct meanings under Rule 61."[113] "While Rule 61(i)(4) allows for consideration of certain issues which have been previously litigated in the 'interest of justice,' Rule 61(i)(5) provides for postconviction consideration of issues which have not been previously litigated and may entail a 'miscarriage of justice.'"[114]

When applying these bars to Jackson's motion, it is clear that his motion, filed over six years after his conviction became final, is untimely under Rule 61(i)(1) unless his motion asserts a "retroactively applicable right."[115] In addition, because this is Jackson's second motion for postconviction relief, his claims will be barred under Rule 61(i)(2) unless consideration is "warranted in the interest of justice." Otherwise, Jackson can only avoid these procedural bars if he asserts a "colorable claim that there was a miscarriage of justice" pursuant to Rule 61(i)(5). Moreover, Supreme Court Administrative Directive 131 provides that "[i]f the

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[111] *Younger*, 580 A.2d at 555.

[112] *Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992) (holding that colorable claim of improper plea colloquy warranted consideration pursuant to Rule 61(i)(5)).

[113] *Bailey*, 588 A.2d at 1127 n.6.

[114] *State v. Rosa*, 1992 WL 302295, at *7 (Del. Super.). The Court notes that Jackson relies only on the "miscarriage of justice" exception of Rule 61(i)(5) for all of his claims in this second motion for postconviction relief. The Court will not separately address the "interest of justice" exception for each of Jackson's claims; however, the Court finds that none of Jackson's claims otherwise procedurally barred warrant consideration under the "interest of justice" exception for the reasons explained *infra* in the Court's consideration of each of Jackson's claims. The Court does in this opinion consider two of Jackson's claims under the "miscarriage of justice" exception: the claim regarding Mr. Hurley's sidebar comments to the trial judge and the claim that Jackson is innocent as a matter of law of felony murder.

[115] Jackson's conviction became final on April 14, 1997 when the United States Supreme Court denied his petition for a writ of certiorari. Super. Ct. Crim. R. 61(m)(3). Therefore, he had until April 14, 2000 to file a timely motion for postconviction relief. Super. Ct. Crim. R. 61(i)(1).

defendant was represented by counsel in a prior postconviction proceeding under Rule 61, the bars enumerated in Rule 61 shall be strictly enforced."[116]

Moreover, "[a]fter considering the motion for postconviction relief . . . the judge shall determine whether an evidentiary hearing is desirable."[117] This Court has broad discretion in determining whether or not an evidentiary hearing is necessary on a motion for postconviction relief.[118]

A. Actual Innocence

Jackson claims that newly discovered evidence demonstrates that he is actually innocent and that he is therefore entitled to a new trial. The "new evidence" Jackson presents consists of declarations from cellmates and friends of Jackson which, in general, state that 1) Lachette is a bad person who boasted in jail that he killed Mrs. Girardi and that 2) Jackson is a good person who maintained his innocence.[119]

Thirdly, some of the declarations allege that Jackson physically could not have killed Mrs. Girardi because of a shoulder injury. Jackson offers no reason why he did not advise his trial counsel of this supposedly critical medical fact. Jackson also does not explain why statements from his friends and cellmates have only recently become available, thirteen years after his trial and nine years after his first motion for postconviction relief.[120]

Notably, Jackson himself has not submitted a declaration or affidavit himself averring the particulars of his "actual innocence," but has relied entirely on the statements of others that Lachette killed Mrs. Girardi, that Jackson was non-violent, and that Jackson was physically incapable of killing Mrs. Girardi due to a shoulder injury. None of the declarants are medical experts.[121]

Moreover, the Court is not convinced that this evidence would have any effect on the result of the trial given the questionable credibility of this

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[116] Admin. Dir. 131 (Del. July 11, 2001).
[117] Super. Ct. Crim. R. 61(h)(1).
[118] *Morla v. State*, 2008 WL 2809156 (Del. Supr.) (holding that there was no evidence that the trial court abused its discretion in determining that an evidentiary hearing in connection with the defendant's postconviction motion was not necessary).
[119] *See supra* at 7-9.
[120] *Gattis v. State*, 2008 WL 2842127 (Del. Supr.) (holding that trial court properly barred defendant's claim of new evidence under Rule 61(i)(1) and (2) where the defendant could have discovered the new evidence earlier by the exercise of due diligence).
[121] The declaration of neuropsychologist Dr. Armstrong, while discussing his shoulder injury, does not offer an opinion that the shoulder injury would have prevented Jackson from killing Mrs. Girardi.

"new evidence" and the fact that the evidence presented against Jackson at trial was "overwhelming."[122] As the Supreme Court stated in its 2001 opinion affirming this Court's denial of Jackson's first motion for postconviction relief:

> Here overwhelming evidence established Jackson's guilt . . . the fact that Jackson presented no alibi for his whereabouts on the day of the murder; several witnesses stated that Jackson bragged about killing Girardi; several witnesses saw the fruits of the burglary in Jackson's apartment; and, a witness stated that he saw Jackson place a bloody glove in a garbage can. In fact, trial counsel admitted, after consulting a shoe print expert in the hope of negating the State's sneaker print evidence of Jackson's presence at the scene, that the results were not favorable to Jackson. Further, and perhaps more importantly, evidence independent of [Andre] Johnson's oral recitation of Jackson's request that he kill Burton corroborated his testimony. The State presented independent evidence establishing that Jackson's handwriting matched the handwriting on the letter Johnson presented to the prosecutors and that Jackson's fingerprints were on both the letter to Johnson with information about Burton and the map to Burton's residence. It is difficult to imagine a more powerfully persuasive set of corroborating circumstances . . . Jackson's trial, we conclude, resulted in a "verdict worthy of confidence."[123]

As such, his claim for a new trial based on the proffered "new evidence" is barred pursuant to Rule 61(i)(1) and (i)(2) because it is untimely and was not raised in his first motion for postconviction relief. Moreover, this claim does not set forth "a colorable claim that there was a miscarriage of justice because of a constitutional violation" and therefore it does not warrant further consideration under Rule 61(i)(5).

B. The Alleged Conflicts of Interest of All Counsel

Jackson contends that all five of the lawyers who represented him throughout this case had various conflicts of interest which "adversely affected" their performances.

1) *Joseph A. Hurley*

Of all of the issues raised in this second motion for postconviction relief, this issue concerns the Court the most. Although the State contends

[122] *Jackson*, 770 A.2d at 517.
[123] *Id*.

that this claim is procedurally barred by Rule 61(i)(1) and (2) because it is untimely and was not raised in Jackson's previous motion for postconviction relief, the Court finds that this claim does raise a colorable claim that there was a miscarriage of justice due to a constitutional violation. Therefore, the Court will consider the merits of this claim pursuant to Rule 61(i)(5).

(i) Mr. Hurley's comments at the November 10, 1992 sidebar

Jackson's first lawyer, Mr. Hurley, moved to withdraw from the case on October 5, 1992. At a sidebar during a hearing on November 10, 1992 on his motion to withdraw, he stated to the judge, among other things, that he felt a "sense of revulsion toward the defendant" and "he's guilty and he ought to die." The trial judge sealed the transcript of the sidebar conference and later presided over pre-trial proceedings, the trial, the first and second sentencing hearings, and the proceedings on Jackson's first motion for postconviction relief, which included an evidentiary hearing. Jackson contends that Mr. Hurley's comments violated his right to loyal, effective counsel and that this disloyalty tainted all of the proceedings by biasing the judge against Jackson. Jackson further claims that subsequent counsel should have been informed of this sidebar so that they could have sought recusal of the trial judge. In addition, Jackson asserts that the trial judge should have *sua sponte* recused himself.

The United States Supreme Court, in *Strickland v. Washington*, considered the "proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because of counsel's assistance at the trial or sentencing was ineffective."[124]

The *Strickland* Court announced a two-prong test to apply in such situations. First, the defendant must show that "counsel's representation fell below an objective standard of reasonableness."[125] Objective unreasonabless can result from counsel's failure to uphold "basic duties" such as a "duty of loyalty," which is derived from "the overarching duty to advocate the defendant's cause and the more particular duties to consult with the

[124] 466 U.S. 668, 671 (1984). The analysis described in *Strickland* also applies to pre-trial issues. *See, e.g., Johnson v. State*, 2008 WL 4809428 (Del. Supr.) (applying Strickland to the defendant's claim that counsel conducted an inadequate pre-trial investigation).
[125] *Id*. at 688.

defendant on important decisions and keep the defendant informed of important developments in the course of the prosecution."[126]

Second, the defendant must show "that there is a real probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different."[127] The *Strickland* Court held that in rare circumstances where there is an"[a]ctual or constructive denial of the assistance of counsel altogether," a court should, in those circumstances, simply "presume prejudice."[128] The United States Supreme Court subsequently elaborated on when a court should presume prejudice in *U.S. v. Cronic*.[129] The *Cronic* Court explained that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."[130] Apart from that narrow exception, however, "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt."[131] The purpose to this exception is "to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel."[132] Here, Jackson asks this Court to "presume prejudice" from Mr. Hurley's comments at sidebar.

The statements made by Mr. Hurley, regrettable and unfortunate as they were,[133] coupled with their non-disclosure to Jackson's subsequent counsel nevertheless do not require the Court to presume prejudice.[134] This Court finds that Mr. Hurley's comments, made at his motion to withdraw four months before Jackson's trial, did not result in an actual or constructive "complete" denial of counsel.

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[126] *Id*.
[127] *Id*. at 694.
[128] *Id*. at 692.
[129] 466 U.S. 648 (1984).
[130] *Id*. at 659. *See also Cuyler v. Sullivan*, 446 U.S. 335 (1980) (stating where that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief").
[131] *Cronic*, 466 U.S. at 659 n. 26.
[132] *Mickens v. Taylor*, 535 U.S. 162 (2002) (noting that prejudice has been presumed in multiple concurrent representation cases because of "the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice" but that "[n]ot all attorney conflicts present comparable difficulties").
[133] *See infra*, at 37-38.
[134] *Jackson*, 2005 WL 3477556, at *2 (stating that "before we will presume prejudice under *Cronic*, there must be a complete failure of counsel").

The cases Jackson cites in support of his claim are distinguishable. For example, in *Fisher v. Gibson*, a capital murder case, the Tenth Circuit Court of Appeals found that defense counsel at trial "failed to adhere to his duties of loyalty to his client and of fulfilling his adversarial role in the trial process."[135] The *Fisher* Court held that defense counsel's representation was deficient where he "both elicited new damaging testimony and frequently reiterated damaging testimony or evidence that, even without adequate investigation, [he] must have known would harm his client's case."[136] Moreover the *Fisher* Court held that defense counsel, who also failed to make a closing argument or present a theory of defense, prejudiced the defendant. Specifically, the Court stated:

> The prosecution's case against Mr. Fisher was not overwhelming. The state produced no physical evidence linking Mr. Fisher to the murder despite obtaining allegedly bloody clothing from him and fingerprints from the victim's car and apartment. That the only evidence tending to suggest a physical link between Mr. Fisher and the murder was brought out by [defense counsel's] examination is simply the first example of how [defense counsel] undermined his own client's case.[137]

Unlike the *Fisher* case, however, where the evidence against the defendant was characterized as "not overwhelming," Jackson's case was not a close one. Furthermore, Mr. Hurley's comments made four months before trial are not comparable to the conduct of the defense counsel in *Fisher*, which consisted of ineffective assistance throughout trial.

Similarly, in *Rickman v. Bell*, another case relied upon by Jackson, the Sixth Circuit Court of Appeals found that defense counsel, who represented the defendant at trial and at the penalty hearing, "combined a total failure to actively advocate his client's cause with repeated expressions of contempt for his client for his alleged actions. The effect of all this was to provide [the defendant] not with a defense counsel, but with a second prosecutor."[138] Again, Mr. Hurley's comments made months before trial do not rise to the level of conduct in *Rickman*, which was a "total failure" of counsel who had represented the defendant throughout the trial.

In general, the other cases Jackson relies on are examples of egregious conduct by defense counsel who were blatantly unprepared or biased at

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[135] 282 F.3d 1283, 1305 (10th Cir. 2002).
[136] *Id*. at 1297.
[137] *Id*. at 1308.
[138] 131 F.3d 1150 (6th Cir. 1997).

critical stages of the trial, resulting in obvious prejudice to the defendant.[139] In contrast, Mr. Hurley was allowed to withdraw moments after making his comments and about four months before trial began and, of course, Mr. Hurley was not Jackson's counsel at trial. Mr. Hurley's references to his client's guilt and his expression of the opinion that his client "ought to die" may well have been uttered because Mr. Hurley believed that the trial judge would be all the more inclined to grant his motion to withdraw. The conduct occurred before an experienced judge, not a jury. Mr. Hurley's comments also appear motivated in part by personal reasons (his allusions to numerous discussions that he and his wife had had about her own personal security at their home and garage). Even assuming that Mr. Hurley's comments were a flagrant act of disloyalty, it is simply too much to conclude that they impermissibly tainted all subsequent events and decisions in the course of this criminal proceeding. There is no evidence that Mr. Hurley's comments had any effect on these proceedings, including the death sentence that followed an 11-1 jury recommendation for same, and therefore Jackson cannot demonstrate that Mr. Hurley's conduct prejudiced him. Furthermore, as previously stated, the Court will not presume prejudice.[140]

(ii) Subsequent counsel was not ineffective for failing to seek recusal

The Court does not agree with Jackson that subsequent counsel, who had no knowledge of Mr. Hurley's comments, were constructively "ineffective" for failing to seek recusal. Having not been informed of the sidebar, counsel's failure to file a motion to recuse was not objectively unreasonable. Although the trial judge was correct to have sealed the transcript in order to avoid prejudice to Jackson from any pretrial publicity about the sidebar comments, Mr. Hurley's comments should have

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[139] *See also Blaco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991) (holding in a capital murder case that counsel's failure to present any mitigating evidence at sentencing was ineffective assistance of counsel); *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988) (holding in a capital murder case that counsel was ineffective at the guilty plea and sentencing stages where he "did not simply make poor strategic choices; he acted with reckless disregard for his client's best interests and, at times, apparently with the intention to weaken his client's case").

[140] *See Bell v. Cone*, 535 U.S. 685, 697 (2002) (refusing to presume prejudice where "respondent's argument is not that counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points").

nevertheless been disclosed to subsequent counsel.[141] The non-disclosure of the comments, however, was harmless. No adequate showing has been made that trial counsel, upon being informed of the sidebar conference, would have either filed such motion and/or that such motion would have been granted.

Jackson contends that the Supreme Court would have reversed his conviction and death sentence and ordered that a new judge hear the case had the Supreme Court known of Mr. Hurley's comments. He also asserts that the trial judge should have in some manner "disclosed" the comments to the Supreme Court. If the Supreme Court had reversed the conviction on the basis of Mr. Hurley's comments and the failure of the trial judge to have *sua sponte* recused himself, however, presumably all Superior Court judges would have been aware of Mr. Hurley's comments from the Supreme Court's opinion that reversed the conviction and/or sentence, and thus no newly-assigned Superior Court judge would have been any differently situated than the original trial judge in terms of that judge's knowledge about Mr. Hurley's comments at sidebar.

(iii) The trial judge was not required to *sua sponte* recuse himself

Jackson contends that Mr. Hurley's comments tainted all subsequent proceedings and that the trial judge should have *sua sponte* recused himself. Jackson appears implicitly to assert that the trial judge would not be able to disclose to any newly-assigned judge the reason for the original trial judge's recusal. The trial judge, however, was not required to have recused himself. The cases Jackson cites in support of his proposition that the trial judge should have recused himself are factually distinguishable. Some of the cases Jackson cites discuss the necessity of recusal in circumstances where counsel made statements damaging to the defendant's credibility to the judge who was sitting as the ultimate fact-finder, for example in a bench trial.[142] In Jackson's case, however, the jury was the trier of fact in both the

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[141] *See Stevenson v. State*, 782 A.2d 249 (Del. 2001) (stating that when "a judge knows, or as soon as a judge discovers, facts that would lead a reasonable person to question his or her impartiality in a particular matter, it is essential that he or she promptly disclose that information").

[142] *See United States v. Roberts*, 20 M.J. 689 (U.S.A.C.M.R. 1985) (holding that a military judge should have "denied appellant's request for a judge alone trial, or transferred the case to another military judge" where defense counsel told the judge that his client would commit perjury); *Scott v. State*, 2008 WL 711879 (Miss. App.) (holding that trial judge should have recused herself after counsel told "the trier of fact, who was

trial and penalty hearing phases, although in Delaware's capital punishment scheme the trial judge does of course make the ultimate determination of whether to impose the death penalty. Moreover, Mr. Hurley's comments are not comparable to those made in the cited cases, such as unequivocal statements that the defendant intended to commit perjury.

Jackson also cites to *Stevenson v. State*, where the Delaware Supreme Court found that the defendants were entitled to a new penalty hearing before a different judge where the trial judge had originally requested the assignment of a specific murder case after having had previous contact with the victim.[143] The Court held that "the trial judge's contact with the victim in this case, coupled with the judge's request for assignment of the murder cases—a request apparently made before indictment and not disclosed on the record of the proceedings in the Superior Court—created unacceptable appearance of impropriety."[144] This case, however, is readily distinguishable because the trial judge did not have any contact with the victim nor did he specifically request this murder case. The trial judge's unsought knowledge of Mr. Hurley's opinions did not create an "unacceptable appearance of impropriety" as the Supreme Court found was the case in *Stevenson*.

Jackson made a similar argument on appeal to the Delaware Supreme Court after his resentencing. There, Jackson alleged that because the trial judge had heard, during the first penalty hearing tape recordings of telephone conversations between Talmo and Jackson concerning the murder of Burton, which the Supreme Court later ruled was inadmissible, the judge should have recused himself from the second penalty hearing. The Supreme Court explained that a trial judge's recusal decision is governed by the two step analysis articulated in *Los v. Los*: "(i) whether, as a matter of subjective belief, the judge was satisfied that he or she could proceed to hear the case free of bias or prejudice concerning a party; and (ii) whether objectively

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charged with determining the admissibility of the defendant's alleged confession, that the defendant confessed to committing the crime"); *Ferguson v. State*, 507 So. 2d 94 (Miss. 1987) (holding that the trial judge presiding over a bench trial should have declared a mistrial where a "lawyer denounced his client in open court as a liar"); *Butler v. U.S.*, 414 A.2d 844 (D.C. App. 1980) (holding that the judge who presided over the defendant's bench trial should have recused himself after the defense counsel told him that "the government's case can be proved beyond a reasonable doubt and that the defendant intends to commit perjury").

[143] 782 A.2d 249 (Del. 2001).

[144] *Id*. at 251.

there is an appearance of personal bias."[145] The Supreme Court further explained that under *Los*, "the alleged bias or prejudice of the judge 'must stem from an extrajudicial source and result in an opinion on the merits on some other basis other than what the judge learned from his participation in the case.'"[146] Conversely, "[w]hen not flowing from an extrajudicial source, bias or prejudice will not necessitate disqualification unless it is so egregious as to destroy all semblance of fairness."[147]

The Supreme Court, in its decision following Jackson's re-sentencing, held that the trial judge properly engaged in the subjective analysis and he determined he could be fair and impartial. The Supreme Court further held that that there was "no objective appearance of bias or prejudice," specifically stating that:

> It is part of a trial judge's normal role to rule upon the admissibility of contested evidence. In the event a judge declares certain evidence inadmissible, the judge is expected to exclude that evidence as a factor in any further decision making process. . . Knowledge of the content of these tapes alone does not create the appearance of bias and we find no basis to conclude that the trial judge should have recused himself from further participation in the sentencing process.[148]

By analogy, just as the trial judge here was not objectively partial for his knowledge of inadmissible evidence relating to Jackson's plot to kill a State witness, the judge was not objectively partial for his knowledge of Mr. Hurley's opinions.[149] This situation was unexpectedly forced upon the trial judge. Recusal of a judge in a capital murder case because of actions not taken by the trial judge is a significant action not lightly taken, and was not required here.

* * *

Having found that Mr. Hurley's comments at the sidebar do not constitute sufficient constitutional grounds to vacate either the conviction or

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[145] *Jackson*, 684 A.2d at 753 (citing *Los v. Los*, 595 A.2d 381, 384-85 (1991)).
[146] *Id*. (citing *Los*, 595 A.2d at 384).
[147] James J. Alfini, *et al.*, *Judicial Conduct and Ethics*, § 4.05A (4th ed. 2007).
[148] *Id*.
[149] *See Schreiber v. Kellogg*, 838 F. Supp. 998 (E.D. Pa. 1993) (holding that derogatory comments made by defense counsel about his client were not basis for recusal where those remarks were made during a telephone conference on counsel's motion to withdraw).

the sentence, this Court is obliged to observe that Mr. Hurley's statements to the trial judge that his then-client was "guilty" and "ought to die," coupled with his other sidebar comments, were improper, unprofessional, unbecoming a member of the Delaware Bar, and most troubling to this Court. Mr. Hurley knew that under Delaware's capital punishment law the trial judge ultimately would decide (assuming a conviction for murder) whether a life sentence or a death sentence was the appropriate sentence. The Court agrees with Jackson that the comments constitute a "remarkable display of disloyalty" to his client. As the ABA Criminal Justice Standards provide:

> Counsel for the accused is an essential component of the administration of criminal justice . . . The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.[150]

Those standards further provide that a "defense counsel's entire loyalty is due the accused."[151] In addition, the Delaware Lawyers' Rules of Professional Conduct provide that "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted by these Rules."[152] Jackson did not receive Mr. Hurley's loyalty at the sidebar conference. As stated, however, under the particular circumstances of this case, the Court will not presume prejudice from the utterance of these particular statements.

The evidence in this case has been held to be "overwhelming" and the "verdict worthy of confidence." Although Mr. Hurley's comments were improper, and surprising in that they came from a highly-regarded member of the criminal defense bar in Delaware, they do not ultimately "undermine the reliability of the finding of guilt" or the sentence imposed. Consequently, Jackson's claim regarding Mr. Hurley's statements at the sidebar conference does not entitle him to relief.

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[150] ABA Criminal Justice Standards, Defense Function, Standard 4-1.2(a, b), *available at* http://www.abanet.org/crimjust/standards/dfunc_toc.html.
[151] *Id.* at 4-3.5(e).
[152] Del. Lawyers' Rules of Prof'l Conduct R. 1.8(b).

2) *Jackson's Other Defense Counsel*

Jackson also claims that Ms. Perillo had a conflict of interest, but when the Office of the Public Defender learned of its potential conflict of interest, it promptly and appropriately sought to withdraw from the case. Jackson offers no explanation how this conflict adversely affected his representation.[153] Therefore, this claim is barred pursuant to Rule 61(i)(1) and (2) because it is untimely and because it was not raised in Jackson's first postconviction relief motion. Moreover, this claim does not warrant consideration under Rule 61(i)(5) because it does not assert a colorable claim of a constitutional violation.

Jackson further alleges that Mr. Capone had two conflicts of interest due to his representation of Andre Johnson and Derrick Johnson. Although this claim was not specifically raised by Jackson in his first motion for postconviction relief, the circumstances regarding Mr. Capone's representation of Andre Johnson (but not Derrick Johnson) were raised in connection with Jackson's first postconviction proceedings. The Supreme Court noted in its 2001 decision that "[w]hile there is no evidence that Mr. Capone actually completed any work for Jackson, and there is no evidence that Mr. Capone compromised Jackson in any way, although that possibility should not be minimized given the relationship between Jackson and [Andre] Johnson, the Court strongly suggests that counsel avoid this practice."[154] Jackson's claim with regard to Mr. Capone's representation of Andre Johnson is time barred by Rule 61(i)(1). It is also barred by Rule 61(i)(2) because it was not raised during Jackson's first postconviction proceedings. Furthermore, the claim does not require consideration under Rule 61(i)(5) because it does not set forth a colorable claim of a constitutional violation.

Jackson's claim with regard to Mr. Capone's representation of Derrick Johnson is also procedurally barred by Rule 61(i)(1) and (2). Jackson offers no support for his claim that Capone persuaded Derrick Johnson not to testify. Such an allegation is not even included in Derrick Johnson's declaration submitted in connection with this motion. Consideration of this claim is not warranted pursuant to Rule 61(i)(5).

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[153] *State v. Ward*, 1991 WL 302635 (Del. Super.) (stating that "[i]n an application for postconviction relief alleging conflict of interest, the defendant bears the burden to (1) specifically identify the nature of the alleged conflict, and (2) make a concrete showing of actual prejudice").

[154] *Jackson*, 770 A.2d at 512, n. 11.

Jackson also claims that Mr. O'Connell had a conflict based on his interview with Derrick Johnson. In Jackson's first postconviction motion he claimed that Mr. O'Connell was ineffective for failing to hire a private investigator to accompany him during the interview. This Court stated:

> Jackson contends his counsel were ineffective because they did not hire a private investigator to accompany Mr. O'Connell during a prison interview with Derrick Johnson ("Derrick"). During this interview, Derrick stated that he overheard Lachette confess to the Girardi murder. However, Derrick subsequently contacted State prosecutors, admitting that he lied to defense counsel in retaliation for an altercation with Lachette. Ultimately, Derrick disavowed this statement, under oath, during *voir dire* examination. As a result, [defense] counsel decided not to call Derrick as a witness. . . the Court is satisfied that the presence of a private investigator would have made no difference here . . . the problem was that Derrick admitted that he lied to get back at Lachette. With or without an investigator, Lachette's alleged admission would have been inadmissible as hearsay within hearsay. And, even if Lachette's dubious statement was introduced, it simply strains credulity to suggest that the jury would have believe that Lachette actually admitted to the crime given the fact that Derrick later admitted to making the whole thing up.[155]

While Jackson's claim in this second motion is not worded exactly the same, it is still in essence the same claim that has already been litigated and rejected.[156] This claim is therefore barred pursuant to Rule 61(i)(4).

Jackson further alleges that Mr. O'Connell was "conflicted" due to his inexperience with death penalty cases. Black's Law Dictionary defines a "conflict of interest" as either "[a] real or seeming incompatibility between one's private interests and one's public or fiduciary duties" or "[a] real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent."[157] The fact that this was Mr. O'Connell's first death penalty case does not create a "conflict" as defined. Moreover, if such a "conflict" existed, there is no evidence to suggest that it in any way affected Mr.

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[155] *State v. Jackson*, ID No. 92003717DI (Del. Super. August 25, 1999) (denying Jackson's first motion for postconviction relief), *aff'd*, 770 A.2d at 506 (Del. 2001).
[156] *Gattis v. State*, 1995 WL 562254 (Del. Supr.) (stating that if a claim is one that is "in essence the same claim" that has previously been raised, the claim is barred by Rule 61(i)(4)).
[157] Black's Law Dictionary (8th ed. 2004).

O'Connell's representation of Jackson.[158] This claim, which is probably more accurately characterized as a due process or ineffective assistance of counsel claim, is barred by Rule 61(i)(1) and (i)(2) because it is untimely and not raised in his first motion for postconviction relief, and it does not require review under Rule 61(i)(5).

In Jackson's first postconviction motion, he claimed that Mr. Levinson rendered ineffective assistance of counsel because he was appointed only 16 days before the trial. The Supreme Court, the United States District Court for the District of Delaware, and the Court of Appeals for the Third Circuit all rejected this contention.[159] Jackson now claims that Levinson prejudiced Jackson by allegedly telling the media that Derrick Johnson would testify, thus allegedly causing him not to testify. This tenuous claim is barred pursuant to Rule 61(i)(1) and (i)(2) because it is untimely and was not raised in his prior postconviction motion. Moreover, this claim is does not warrant consideration under Rule 61(i)(5).

C. The Alleged *Brady* Violations

Jackson alleges several instances of *Brady* violations. He first claims that the State failed to disclose the existence of an implied bargain for Andre Johnson's testimony; however, this claim was previously litigated in Jackson's prior postconviction proceedings. The Supreme Court found that the State did in fact implicitly promise Andre leniency on his pending charges and that the State failed to inform Jackson's counsel of that promise in violation of *Brady*. Despite "the State's offensive policy of eschewing plea agreements to avoid damage to witness credibility in favor of 'implicit' future leniency," the Supreme Court affirmed the trial court's denial of Jackson's first motion for postconviction relief because "both the evidence corroborating Johnson's testimony and the circumstantial evidence supporting Jackson's presence at the scene and participation in the crime overwhelms any perceived lack of 'confidence in the outcome of the trial.'"[160]

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[158] *Ward*, 1991 WL 302635 (holding that the defendant's claim of a conflict of interest was without merit where he "failed to make a concrete showing of actual prejudice").
[159] *Jackson*, 770 A.2d at 512; *Jackson*, 2004 WL 1192650, at *12-14; *Jackson*, 2005 WL 3477556, at *2-3.
[160] *Id.* at 517.

Jackson now claims that "significant additional evidence in support of this claim has recently been developed."[161] In support of this assertion, Jackson states that Andre filed a *pro se* motion for specific performance of this implicit deal with the State, which describes the promises the State allegedly made to him. Andre has also submitted a declaration stating that "I was led to believe I would get a very good deal."[162] The import of this new evidence, however, is minimal. Jackson has already litigated this claim (albeit without the "additional evidence") and the Supreme Court has already held there was a *Brady* violation. Moreover, the essence of this claim was also reviewed by the United States District Court for the District of Delaware[163] and the Court of Appeals for the Third Circuit.[164] The alleged "significant additional evidence" is essentially cumulative evidence. Therefore, this claim is barred by Rule 61(i)(4).

Furthermore, Jackson's claim that the State withheld Andre's alleged statement that Andre allegedly didn't think Jackson killed Mrs. Girardi is barred by Rule 61(i)(1) and (2) because it is untimely and was not raised in his first motion for postconviction relief. Moreover, the claim does not warrant consideration pursuant to Rule 61(i)(5).

Jackson also alleges that the State failed to disclose deals it made with Victor Talmo in exchange for his testimony in both the first and second penalty hearings. Any challenge to the first penalty hearing is moot because Jackson was subsequently given a new penalty hearing. With respect to the second penalty hearing, Jackson contends that, in exchange for Talmo's testimony, the State agreed to modify the Level 4 probation work release portion of his sentence to home confinement. The Court agrees with the State, however, that evidence of this alleged deal would have made "little difference" in the jury's assessment of Talmo.

Defense counsel's closing argument at the second penalty hearing contained the following assertions about Talmo:

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[161] Def. Mot., at 58 n. 21.

[162] *Id*. at Ex. 6.

[163] *Jackson*, 2004 WL 1192650, at *16 (holding that "[w]hile the undisclosed evidence may have reinforced trial counsel's impeachment of [Andre] Johnson, the Delaware Supreme Court reasonably concluded that it would not have placed Johnson's testimony in a new light.").

[164] *Jackson*, 2005 WL 347756, at *4 (stating that "Jackson has simply not satisfied his burden of showing that a different outcome would have been likely had the jury had more information about [Andre Johnson's] motive to lie").

> Let's [l]ook at Victor Talmo. Who is Victor Talmo? He's career criminal. A heroin addict. He spent a majority of his adult like behind bars . . . Victor Talmo is a burglar. He steals from people to pay for his habit. It's a sickness. It's a disease, but that's who he is.
>
> And he is in one peck of trouble. Victor Talmo is facing what we have here in Delaware . . . career criminal status; he's an habitual offender . . . And facing that, Victor Talmo knew he had to do something to get himself out of trouble. What was that anything? Help the State. Help them in any way I can. If I got to lie, cheat, steal, whatever I have to do, I got to please the State. I got to please the State.
>
> . . .
>
> This is a gentleman who was facing 20 burglaries. Facing life imprisonment. For those felonies, he could have gotten eight years on each burglary . . . But what did he get? . . . Ladies and gentlemen, he got about six weeks on each burglary. He got 30 months.
>
> Agreement. You'll see the agreement, it is in the evidence, between his attorney and the attorneys for the State. You get out in 30 months. There was no deal? So as you sit in the jury room and you scrutinize the testimony of Victor Talmo, think about what he stood to gain, his bias, his interest, and what kind of a person he is.[165]

Even assuming there was such a deal and that a *Brady* violation occurred, given the extensive impeachment evidence offered against Talmo during the second penalty hearing, this claim cannot reasonably be taken to undermine confidence in the verdict.[166] Therefore, this claim is barred by Rule 61(i)(1) and (i)(2) because it is untimely and was not raised in his first motion for postconviction relief. Furthermore, this claim does not establish a colorable claim of a constitutional violation to warrant review under Rule 61(i)(5).

Jackson also claims that the State failed to disclose alleged statements made by Talmo to the State that Jackson denied killing Mrs. Girardi. This supposed exculpatory evidence would likely have been inadmissible hearsay if offered by Talmo and consequently would not have had any effect on the verdict.[167] Even if this statement was admissible, due to limited credibility

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[165] Tr. at 148-150 (Sept. 25-27, 1995).

[166] *Jackson*, 770 A.2d at 516 ("In order to reverse a conviction based upon a *Brady* violation, one must 'show that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict'" (quoting *Kyles v. Whitley*, 514 U.S. 433 (1995)). *See also Stokes v. State*, 402 A.2d 376, 380 (Del. 1979) (noting that the cumulative nature of the evidence is a factor to consider when determining whether evidence is material under *Brady*).

[167] *Jackson*, 770 A.2d at 516 (providing that "'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial"). *See also Stokes*, 402 A.2d at 380 (noting that the

of Talmo, this statement still would likely not have had any effect on the verdict. Therefore, this claim is barred by Rule 61(i)(1) and (i)(2) because it is untimely and not raised in his first motion for postconviction relief. Furthermore, Jackson has not made the requisite showing of a colorable claim of a miscarriage of justice because of a constitutional violation to warrant application of the Rule 61(i)(5).

Defendant's next *Brady* claim is that the State withheld evidence that could have been used to attack Burton's credibility at the second penalty hearing. Specifically, Jackson alleges the State failed to tell defense counsel about a plea bargain offered to Burton on unrelated misdemeanor marijuana charge. The jury, however, did hear that the State did not bring any charges against Burton in connection with the burglary and murder of Mrs. Girardi. In addition, defense counsel's closing argument at the second penalty hearing suggested that there was a deal between Burton and the State not to press charges against him. Defense counsel stated:

> What does that tell you about James Burton? It should tell you that he's doing whatever he can whenever he can to help the State. And why is he doing that, ladies and gentlemen? He's doing it because he himself was in trouble, or at least he's lead to believe he's in trouble.[168]

Evidence about Burton's unrelated drug charge would not have likely changed the result of the second penalty hearing.[169] Therefore, this claim is barred by Rule 61(i)(1) and (i)(2) because it is untimely and not raised in his first motion for postconviction relief. Furthermore, this claim does not articulate an adequate basis for relief under the "fundamental fairness" exception of Rule 61(i)(5).

Jackson's final *Brady* claim is that the State withheld statements made by Jackson's ex-girlfriend Angela Willen that Jackson was non-violent and

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admissibility is a factor to consider when determining whether evidence is material under *Brady*). *Cf.* D.R.E. 804(b)(3) (providing that statements "so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true" are not excluded from the hearsay rule).

[168] Tr. at 154-155 (Sept. 25-27, 1995).

[169] *Jackson*, 770 A.2d at 516 (noting that "overwhelming evidence established Jackson's guilt"). *See also Stokes*, 402 A.2d at 380 (providing that the probative value of the evidence is a factor to consider when determining whether evidence is material under *Brady*).

had a shoulder injury. The fact that Jackson had a shoulder injury was information that was obviously known to Jackson. Furthermore, this new testimony of an ex-girlfriend that Jackson was non-violent, in light of the overwhelming evidence against him, cannot reasonably be taken to undermine the confidence in the verdict. As the Supreme Court stated on appeal from Jackson's first postconviction motion, "Jackson's trial, we conclude, resulted in a 'verdict worthy of confidence.'"[170] Therefore, this claim is barred by Rule 61(i)(1) and (i)(2) because it is untimely and not raised in his first motion for postconviction relief. This claim also fails to invoke the "fundamental fairness" exception of Rule 61(i)(5).

D. The Alleged Improper Reliance Upon and Sealing of the Psychological/Psychiatric Report by the Trial Judge

Jackson claims that, in connection with the sentence of death imposed, the sentencing judge improperly relied on a sealed psychological report, as indicated on the docket at #85, that had never been disclosed to Jackson. The docket entry dated July 20, 1993 reads:

> PSYCHOLOGICAL/PSYCHIATRIC REPORT SEALED BY ORDER OF THE COURT.[171]

However, both State and defense counsel have indicated that they know nothing about any such psychological/psychiatric report and there is no reference to same anywhere else in the Prothonotary file, the Investigative Services file, or in either of the trial judge's sentencing decisions.[172] The Court asked the Prothonotary to investigate this matter.

The Prothonotary has advised the Court that, based on her investigation, it is her opinion that the "psychological/psychiatric report" indicated at docket #85 "never existed."[173] This Court has reached the same

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[170] *Jackson*, 770 A.2d at 517.

[171] D.I. 85.

[172] Counsel and the Court were of course aware at the penalty hearings of testimony of Dr. Stephen Mechanick, a defense psychiatrist, who testified *inter alia* that Jackson "suffer[ed] from a mixed personality disorder, impulsive control disorder, and substance abuse." Sentencing Decision, D.I. 124, at 11 (Oct. 26, 1995).

[173] After initially reviewing Jackson's Second Motion for Postconviction Relief, the Court asked the Prothonotary to attempt to locate any psychological/psychiatric report listed on the docket as #85. The Prothonotary located an envelope marked #85, which was docketed on July 20, 1993. The front of the envelope contains Jackson's case name

conclusion. Rather, it seems that the November 10, 1992 transcript was sealed and docketed in error as a "psychological/psychiatric report."[174] While it is understandable why Jackson would make this claim based on the wording of docket entry #85, his claim that the sentencing judge improperly relied on a "secret" report is nevertheless barred by Rule 61(i)(1) because it is untimely and by Rule 61(i)(2) because it was not raised in Jackson's first postconviction motion. The docket entry, which forms the basis of Jackson's claim, has been in existence since July 1993. Additionally, for the reasons explained, this claim does not raise a colorable claim of a miscarriage of justice due to a constitutional violation and therefore does not warrant further consideration under Rule 61(i)(5).

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and number, and both sides state "Sealed per order of the Court." The reverse side of the envelope also contains a notation "Opened by Joseph Asher, Law Clerk, Supreme Court of Delaware – taped and stapled by same." The Clerk of the Supreme Court has advised the Prothonotary that Mr. Asher was in fact a law clerk in the Supreme Court from August 16, 1993 to August 15, 1994. Jackson's file was sent to the Supreme Court on August 5, 1993 for his first appeal and returned to the Prothonotary on August 15, 1994. The tape and staples were still on the top of the envelope; however, the flap of the envelope was not sealed. Inside the envelope, however, was the transcript of the November 10, 1992 hearing on Mr. Hurley's motion to withdraw referenced in Ms. Blaskey's declaration.

The Prothonotary spoke to the clerk who docketed the envelope marked #85 in July 1993 who is still employed by the Prothonotary. That clerk was in charge of docketing all sealed documents in 1993. She has explained to the Prothonotary that she understood her instructions in 1993 to be that if there was no indication on the outside of the envelope as to the nature of its contents, she was simply to docket the sealed document, noting it on the docket as a "Psychological/Psychiatric Report." That is no longer the practice of the Prothonotary.

The Prothonotary also spoke to Diane Stachowski, MSN, RN, CS, at the Delaware Psychiatric Center who worked closely in 1993 with the Prothonotary on issues pertaining to psychological reports generated by the Delaware Psychiatric Center. Ms. Stachowski reviewed the Delaware Psychiatric Center records but was unable to find any record of a psychological/ psychiatric report being done on Jackson.

None of the other sealed envelopes filed before or during trial in Jackson's file contained a psychological or psychiatric report. All such sealed documents are now unsealed.

This Court has today docketed the April 25, 2008 report by the Prothonotary to the undersigned judge at D.I. 299.

[174] There is no explanation in the record as to when the Prothonotary received from chambers the sealed sidebar transcript to be docketed; presumably it was on or about the date it was docketed.

E. Defense Counsel's Alleged Failure to Investigate Mitigating Factors in Connection with the Penalty Hearing

Jackson claims that defense counsel failed to adequately investigate mitigation evidence. Specifically, Jackson contends that defense counsel should have discovered and presented evidence of his brain damage. Dr. Armstrong, in her declaration, concluded after performing neuropsychological tests that Jackson "suffers from neurocognitive impairments, i.e., brain damage."[175] Dr. Armstrong further stated that "his brain damage undermines cognitive function, impairs his ability to think clearly and makes him susceptible to manipulation and pressure."[176]

In *Rompilla v. Beard*, the United States Supreme Court explained defense counsel's duty to investigate mitigation evidence as follows:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.[177]

The *Rompilla* Court held, in that case, that defense counsel's performance "fell below the line of reasonable practice" where "they failed to make reasonable efforts to review the prior conviction file, despite knowing that the prosecution intended to introduce [the defendant's] prior conviction not merely by entering a notice of conviction into evidence but by quoting damaging testimony of the rape victim in that case."[178]

The second penalty hearing in this case lasted eight days. The defense offered the testimony of Dr. Mechanick, a psychiatrist, who had met with Jackson five times over a two year period, reviewed school records, including his school health records, some police records, and interviewed Jackson's mother and sister in the course of his evaluation.[179] Dr. Mechanick testified that Jackson suffered from "impulsive control disorder," which refers to a "difficulty controlling his impulses . . . where he would

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[175] Def. Mot., at Ex. 37.
[176] *Id*.
[177] 545 U.S. 374, 387 (2005).
[178] *Id*. at 389-90.
[179] Tr. 93-94 (Sept. 22, 1995).

have difficulty controlling himself or would react in response to things that upset him and have difficulty sort of controlling those action."[180] Dr. Mechanick also testified that Jackson suffered from "mixed personality disorder," a diagnosis used to describe "long-term patterns of problems with behavior," such as "narcissistic features, borderline personality disorder, and antisocial features."[181] In addition, Dr. Mechanick testified that Jackson suffered from substance abuse.[182] In total, the defense offered testimony and evidence as to the following eight enumerated mitigating circumstances:

> 1. The defendant's age;
> 2. The defendant's dysfunctional social history, including, but not limited to, a history of mental abuse;
> 3. The defendant suffers from treatable mental illness(es) which caused and/or contributed to the commission of the offenses which the defendant has been convicted;
> 4. The defendant's relatively minimal and non-violent criminal record prior to the offenses here, and the absence of any significant history of violence as a child or adolescent;
> 5. The defendant possesses redeeming personality traits;
> 6. The defendant would benefit from programs within the prison environment and could assist other inmates; furthermore, the defendant's loved ones would continue to benefit from their relationship with the defendant even though he is incarcerated;
> 7. If the defendant is executed, his loved ones will suffer a great loss; and
> 8. Killing Robert W. Jackson, III will not change the loss of Elizabeth P. Girardi; nor will it lessen the pain of her loved ones.[183]

The jury returned a verdict, indicating by a vote of 12-0 that they found the statutory aggravating factors had been proven beyond a reasonable doubt and further, by a vote of 11-1, that the proven aggravating factors outweighed the proven mitigating evidence. The testimony of Dr. Mechanick, along with all of the other mitigating factors that defense counsel presented at Jackson's sentencing hearing, contradicts Jackson's claim that defense counsel were constitutionally deficient. Therefore, his claim that defense counsel failed investigate mitigating factors is barred pursuant to Rule 61(i)(1) and (2). Moreover, based on this record, the Court does not find that

[180] *Id*. at 95.
[181] *Id*. at 95-96.
[182] *Id*. at 97.
[183] Sentencing Decision, at 11 (Oct. 26, 1995).

Jackson has presented a colorable claim of a constitutional violation under Rule 61(i)(5).

F. The Alleged Juror Misconduct Issues

1) The Emotional Juror

Jackson alleges that an emotional juror, who became upset when graphic slides of the victim were shown, affected the impartiality of the remaining jurors during the guilt/innocence phase of the 1993 trial because after her outburst she was placed in the jury room with the other jurors. The Court notes that at the time of trial defense counsel did not even want to excuse the emotional juror herself; rather, he stated "I'd like to keep her as a juror."[184] Now, Jackson claims that her emotional outburst impermissibly affected all the jurors. The transcript, however, directly contradicts Jackson's assertion. After the Court excused the emotional juror, defense counsel asked the trial judge to "inquire of the jury if they have been in any way affected – viewing her outbursts, would have any affect on their ability to judge this case impartially." The Court then asked the jurors if the outburst had "any effect on you in your ability to continue to view the slides or judge this case." All jurors responded in the negative.[185]

2) The Newspaper Article

Jackson also alleges that the Court should have excused a juror who read a newspaper article about the case during the second penalty hearing. After noting that the information in the article was going to come out during the course of the hearing, the Court questioned that juror as follows:

> COURT: The point is that reading this article, would that in any way prevent you from listening to the evidence with an open mind and not deciding any issue in this case until you've heard all of the evidence, the argument of counsel and the instructions of law?
> JUROR: No, sir.
> COURT: It hasn't changed your position since the last time we interviewed you as a prospective juror?

[184] Tr. at 523 (Mar. 22-25, 1993).
[185] *Id*. at 526.

JUROR: No sir.[186]

In addition, defense counsel requested that the Court inquire "whether or not based on his reading the article he has formulated an opinion as to the appropriate sentence?" The juror responded that he had not.[187]

Therefore, both of these claims are barred by Rule 61(i)(1) and (2) because they are untimely and were not previously raised in his first motion for postconviction relief. Jackson's claims regarding the jury do not meet the "fundamental fairness" exception of Rule 61(i)(5).

G. Victor Talmo as a State Agent

Jackson alleges that Talmo was a State agent as early as September 1992 when Talmo first met with Detective McLaren. The Supreme Court, however, on appeal after Jackson's second penalty hearing, held to the contrary and ruled that Talmo was not a State agent in September 1992. Specifically the Supreme Court stated:

> During the first meetings between Talmo and police in late September 1992, the detectives did not offer a deal to Talmo nor did they provide him with any directives . . . While these meetings may have served to cast Talmo as an informant, a police informant is not necessarily a state agent for all purposes. Detective McLaren . . . testified that no agreement of any kind was reached between himself and Talmo. This lack of agreement is evidenced by the fact that, subsequent to the meeting with McLaren, Talmo remained incarcerated until he was able to post bail in February 1993, six months after his last contact with police. Moreover the record fails to reflect any contact between Talmo and police after the September 21, 1991 meeting, until his attorney contacted the police with the letter received from Jackson.[188]

Jackson, however, contends that the Supreme Court's holding was in error due to newly-discovered "suppressed" evidence by the State. He cites to an April 18, 2006 declaration of Talmo, which states (somewhat unclearly) that the detective "basically said to me anything you can up [sic] with let me know." Jackson also concludes from the fact that the Office of the Public Defender had a conflict in the fall of 1992 due to its

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[186] Tr. at 6-7 (Sept. 15, 1995).
[187] *Id*. at 7.
[188] *Jackson*, 684 A.2d at 752.

representation of potential witnesses, that "one of the witnesses clearly was Talmo," and therefore that Talmo was a State agent in the fall of 1992.

This claim is barred by Rule 61(i)(1), (2), and (4) because it is untimely, was not raised in Jackson's 1997 motion for postconviction relief, and was previously litigated in his direct appeal. Moreover, a declaration, written fifteen years after the fact by Jackson's former cellmate, and a vague reference to a conflict of interest are not persuasive enough to set forth a colorable claim of a miscarriage of justice due to a constitutional violation under Rule 61(i)(5).

H. The Alleged Prosecutorial Misconduct

Jackson claims that his conviction is invalid due to prosecutorial misconduct during his 1993 trial. In general, he claims that the prosecution unfairly destroyed his presumption of innocence. Specifically, Jackson contends that the prosecutor's following questioning of Detective McLaren was improper:

> Q: Okay. During the course of your investigation, how may officers, approximately, lended [sic] some assistance in this entire investigation?
> A: It was over forty criminal investigative unit personnel that were actively involved, and also approximately fifty uniform personnel who were also specially assigned to this investigation.
> Q: So somewhere around ninety?
> A: That's correct, sir.
> Q: Do you have any estimate as to how many man-hours were actually logged pursuant to this investigation?
> A: I can't give you an exact number, but literally thousands.
> Q: How many persons, approximately, were interviewed between the time of April 3rd, 1992, and the conclusion of the investigation?
> A: Approximately two hundred and fifty to three hundred people were interviewed for this.
> Q: Now, your detective supplemental report, Detective McLaren, some ninety-five pages in length, I believe—
> A: Yes, sir.
> Q: --indicates the extensive scope of the investigation. Prior to the arrest of the defendant and the arrest of Anthony Lachette, had the police developed any other suspects?
> A: Not at that time.[189]

[189] Tr. at 249 (Mar. 22, 1993).

In addition, he claims that the prosecutor compounded the prejudicial effect of his questioning during his closing argument, where he stated:

> Detective McLaren was the chief investigating officer in this case who was orchestrating the investigation. He testified that thousands of manhours were logged. We know that evidence was flown to the FBI. Hundreds of witnesses were interviewed.[190]

Jackson's claim of prosecutorial misconduct is procedurally barred by Rule 61(i)(1) because it is untimely and by 61(i)(2) because it was not raised in his 1997 postconviction motion. Furthermore, after a review of the transcript of the challenged comments during cross-examination and closing, in light of the entire trial, Jackson's claim does not set forth an adequate basis for consideration under Rule 61(i)(5).

To the extent that Jackson alleges his counsel is ineffective for failing to raise the issue of prosecutorial misconduct, this claim is also procedurally barred by Rule 61(i)(1) and (i)(2) because the claim is untimely and was not raised in his first motion for postconviction relief. Additionally, this claim does not warrant consideration pursuant to Rule 61(i)(5).

I. The State's Alleged Failure to Comply with the APA

Jackson asserts that Delaware's lethal injection procedures are invalid because they were not promulgated in accordance with the APA. It follows, Jackson claims, that any execution based on that alleged flawed process is "unconstitutional."

Jackson also filed a separate declaratory judgment action in this Court based on the same claim. The Court dismissed the complaint holding that the Department of Corrections was not required to promulgate its execution policies under the APA, and the Supreme Court has affirmed that decision.[191] Therefore, this claim has already been litigated and is barred by Rule 61(i)(4).

J. Felony Murder Allegedly Inapplicable to this Case

Jackson alleges that he is innocent as a matter of law of felony murder because "the factual circumstances of this case . . . do not establish that

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[190] Tr. at 77 (Mar. 30, 1993).

[191] *Jackson v. Danberg*, 2008 WL 185058 (Del. Super.), *aff'd*, 2008 WL 4717426 (Del. Supr.).

Petitioner killed Mrs. Girardi 'in the course and furtherance of the commission . . . of a felony or immediate flight therefrom.'"[192] Jackson further claims that the Court improperly instructed the jury on felony murder.

The felony murder statute, at the time of Jackson's conviction, provided that a defendant could be convicted of felony murder in the first degree if:

> [i]n the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, he recklessly causes the death of another person.

In 1992, in *Chao v. State*, the Supreme Court interpreted the "in furtherance" language of the felony murder statute as follows: "for felony murder liability to attach, a killing need only accompany the commission of an underlying felony. Thus, if the 'in furtherance' language has any limiting effect, it is solely to require that the killing be done by the felon, him or herself."[193]

Then, in the 2003 opinion *Williams v. State*, the Supreme Court expressly overruled that part of its 1992 opinion in *Chao*, interpreting the "in furtherance of" language to "not only require[] that the murder occur during the course of the felony but also that the murder facilitate commission of the felony . . . [and that the murder must] . . . "help[] to move the felony forward."[194] In a subsequent *Chao* opinion (*Chao II*), the Supreme Court in 2007 held that the *Williams* holding must be applied retroactively.[195]

In apparent reaction to *Williams*, the General Assembly amended Delaware's felony murder statute in 2004 by eliminating the "in the course and in furtherance of" phrase. The statute has provided since then that a person is guilty of felony murder when:

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[192] Def. Reply to State Ans. to Def. Amendment, D.I. 297, at 4 (quoting 11 Del. C. § 636(a)(2)).
[193] 604 A.2d 1351, 1363 (Del. 1992).
[194] 818 A.2d 906, 913 (Del. 2003). *See also State v. Outten*, 2008 WL100117, at *3 (Del. Super.) (vacating the defendant's conviction and death penalty sentence where there was evidence that the murder did not "move [the robbery] forward (whatever that means)").
[195] *Chao v. State*, 931 A.2d 1000 (Del. 2007). In *Chao II*, the State identified Jackson's case as one of many murder cases that may potentially be affected by the retroactive application of the *Williams* holding. *Id.*

> [w]hile engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any felony, the person recklessly causes the death of another person.[196]

The State first contends that Jackson's felony murder claim should be time barred by Rule 61(i)(1). Pursuant to a recent decision of the Delaware Supreme Court, however, Jackson's *Williams* claim warrants consideration pursuant to Rule 61(i)(5).[197] Therefore, the Court will address the merits of the claim.

Despite Jackson's contention that "the burglary was completed before the victim was killed,"[198] and that therefore the felony murder statute (as interpreted in *Williams*) is inapplicable, there was sufficient evidence to support Jackson's felony murder conviction and its use as a statutory aggravating factor in the penalty hearings in this case. As one prominent commentator has explained:

> [E]ven if it is clear beyond question that the crime was completed before the killing, the felony-murder rule might still apply. The most common case is that in which the killing occurs during the defendant's flight. A great many of the modern statutes contain language—typically the phrase 'or in immediate flight therefrom'—making this absolutely clear.[199]

Neither *Chao II* nor *Williams* directly addressed the "immediate flight therefrom" language in the felony murder statute; those cases focused on the "in furtherance of" language in 11 *Del. C.* § 636(a)(2).[200] The Supreme

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[196] 11 *Del. C.* § 636(a)(2).

[197] *State v. Claudio*, 2008 WL 4511590, at *4 (Del. Supr.) (holding the defendant's *Willaims* claim stated a colorable claim that there was a miscarriage of justice under Rule 61(i)(5)).

[198] Def. Second Amendment to Mot., at 4.

[199] 2 Wayne R. LaFave, *Substantive Criminal Law* § 14.5(f), at 464 (2003) (citing Delaware's felony murder statute as one of the "modern statutes" that contains "immediate flight therefrom language," thus making it "absolutely clear" that felony murder may be applicable even when the murder occurs after the completion of the crime).

[200] The Court also notes that the "immediate flight" concept is not unique to the felony murder statute. For example, one of the statutory aggravators used in Jackson's case provides that the "murder was committed while the defendant was engaged in the commission of, or attempt to commit, or *flight after committing or attempting to commit any degree of . . . burglary*." 11 *Del. C.* § 4209(e)(1)(j) (emphasis added). *See also* 11 *Del. C.* § 826(a) ("A person is guilty of burglary in the first degree when the person

Court has, however, in *Williamson v. State*, explained the "immediate flight therefrom" language in the felony murder statute as follows:

> The statutory language is clear and ambiguous. The term "immediate" is defined as meaning: "occurring or accomplished without delay; instant . . . following or preceding without a lapse of time." The term flight is similarly unambiguous. "Flight" is defined as "an act or instance of fleeing or running away." Taken together, the import of the statue is clear: The death must have occurred as the accused fled the scene of the predicate felony and immediately after the commission of that felony.
>
> The statutory language, therefore, suggests a situation where the accused is actively fleeing the scene of the crime and causes the death of another in furtherance of or by virtue of escape.[201]

The issue, therefore, is whether Jackson, while "actively fleeing" the scene of the burglary caused the death of Mrs. Girardi "in furtherance of or by virtue of escape."[202] The evidence presented at trial was that immediately upon exiting the house with their bags filled with property from the house, Jackson and Lachette saw Mrs. Girardi in the driveway walking toward Jackson's parked vehicle. Lachette dropped his bags and fled. At that point, as the State said in its closing argument, Jackson "was faced with a decision . . . whether or not to run with Lachette and leave his car in the driveway knowing that it would link him to burglary, or he could stay there and he could silence Mrs. Girardi forever."[203] The evidence showed that Jackson then dropped his bags, picked up the ax, and attacked Mrs. Girardi. It was not until after he struck her repeatedly with the ax that he began loading his bags into the car. Before leaving, Jackson noticed that Mrs. Girardi was still alive and then struck her several more times with the ax,

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knowingly enters or remains unlawfully in a dwelling at night with intent to commit a crime therein, and when, in effecting entry or when in the dwelling or *in immediate flight therefrom . . . .*" (emphasis added)); 11 *Del. C.* § 832(a) ("A person is guilty of robbery in the first degree when the person commits the crime of robbery in the second degree and when, in the course of the commission of the crime or *of immediate flight therefrom . . .*" (emphasis added)).

[201] 669 A.2d 95, 98 (Del. 1995) (reversing the defendant's felony murder conviction where the victim's death "clearly did not occur in furtherance of or by virtue of an escape attempt"). *See also* Delaware Criminal Code with Commentary, § 636 (1973) (stating that 636(a)(2) "penalizes reckless killing in the course of and in furtherance of the commission of a felony or immediate flight therefrom").

[202] *Williamson*, 669 A.2d at 98.

[203] Tr. at 68 (Mar. 29-30, 1993).

killing her. After Jackson left the Girardi house and picked up Lachette in his car, Jackson told Lachette, "Don't worry . . . She won't be talking any more . . . I killed her."[204] From this evidence, a reasonable juror could conclude that Jackson was "actively fleeing" the burglary and killed Mrs. Girardi "in furtherance of or by virtue" his escape.[205]

Furthermore, the instruction given to the jury at Jackson's trial provided that:

> In order to find the defendant guilty of murder in the first degree . . . you must find the following elements have been established beyond a reasonable doubt:
>
> The first element is that the defendant caused the death of Elizabeth P. Girardi . . . The second element is that the defendant acted recklessly . . . The third element is that the killing occurred during the commission of a felony or immediate flight therefrom. In this case, the felony is burglary second degree. Fourth, the killing was in furtherance of, or was intended to assist in, the commission of the felony or immediate flight therefrom.[206]

This instruction is essentially the same as the felony murder instruction given in *Burrell v. State*, which instruction also stated that "the killing was in furtherance of or was intended to assist in the commission of the felony of robbery in the first degree."[207] The only difference between the felony murder instruction in *Burrell* and the one in this case is that the instruction in *Burrell* did not contain the "immediate flight therefrom" language because the defendant's flight was not at issue in that case; the murder took place during the robbery. In *Burrell*, the Supreme Court rejected the defendant's argument that this instruction was legally deficient under *Williams* and held that "the felony murder instruction given at Burrell's trial was reasonably informative and not misleading," and not violative of *Williams*.[208] As in *Burrell*, the instruction given in this case was a correct statement of the law under *Williams*, and therefore, Jackson's claim with regard to the jury

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[204] Tr. at 135 (Mar. 22-25, 1993).
[205] *Williamson*, 669 A.2d at 98.
[206] Tr. at 176-77 (Mar. 30, 1993).
[207] 953 A.2d 957 (Del. Supr.).
[208] *Id*. at 963. *See also Claudio*, 2008 WL 4511590, at *4 (holding that trial court properly instructed the jury on felony murder where the instruction included that the killing must be "in furtherance of, or was intended to assist in the commission of the felony").

instruction is without merit.[209] Accordingly, Jackson is not entitled to relief on this ground.

K. Defendant Is Not Entitled to an Evidentiary Hearing

This Court has broad discretion when determining whether to hold an evidentiary hearing in connection with a postconviction motion. After careful review of the record, the Court finds that the requested evidentiary hearing in connection with this motion is not, in the words of the rule, "desirable"[210] because it is not necessary to a thorough resolution of the issues raised in Jackson's second motion for postconviction relief.[211]

VII. CONCLUSION

As the Delaware Supreme Court has stated, "Jackson's trial . . . resulted in a 'verdict worthy of confidence.'"[212] Jackson's claims for relief, which are all procedurally barred or otherwise do not entitle him to relief, do not undermine this Court's confidence in that verdict. For the reasons stated above, Jackson's Second Motion for Postconviction Relief is **DENIED**.

IT IS SO ORDERED.

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oc: Prothonotary

[209] *See Claudio*, 2008 WL 4511590, at *4 (stating that a defendant is entitled to have the jury instructed on a correct statement of the substantive law, but he is not entitled to receive the statement in a particular form).
[210] Super. Ct. Crim. R. 61(h)(1).
[211] *See Morla*, 2008 WL 2809156, at *1 (affirming the trial court's determination that a hearing pursuant to Rule 61(h) was not necessary); *Washington v. State*, 2007 WL 4110636 (Del. Supr.) (holding that "it was within the Superior Court's discretion to decide his postconviction motion without an evidentiary hearing").
[212] Jackson, 770 A.2d at 517.