

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	ID. No. 1002011017
	)	In and for Kent County
v.)	
	)	RK10-03-0781-01
JUAN C. RESTREPO-DUQUE,	)	Murder 2 nd LIO Murder 1 st (F)
	)	RK10-03-0782-01
	)	PDWDCF (F)
Defendant.	)	RK10-03-0783-01
	)	Theft MV (F)
	)	RK10-06-0458-01
	)	CCDI

COMMISSIONER'S REPORT AND RECOMMENDATION

**Upon Defendant's Motion for Postconviction Relief
Pursuant to Superior Court Criminal Rule 61**

Jason C. Cohee, Esquire, Deputy Attorney General, Department of Justice, for the State of Delaware.

Juan C. Restrepo-Duque, *Pro se*.

FREUD, Commissioner
April 16, 2019

The defendant, Juan C. Restrepo-Duque ("Restrepo-Duque") was found guilty, following a jury trial on November 26, 2014 of one count of Murder in the Second Degree, as a lesser-included offense of Murder in the First Degree, 11 *Del. C.* § 635;

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one count of Possession of a Deadly Weapon During the Commission of a Felony, 11 *Del. C.* § 1447; one count of Theft of a Motor Vehicle, 11 *Del. C.* § 841A; and one count of Carrying a Concealed Dangerous Instrument, 11 *Del. C.* § 1443. A presentence investigation was ordered by the Court. On December 9, 2014 through counsel, Restrepo-Duque filed a Motion for Judgment of Acquittal and Motion for a New Trial with a request for a *Franks* hearing. On January 15, 2015 the Superior Court denied Restrepo-Duque's motions and sentenced him to a total of sixty-eight years incarceration suspended after serving thirty years, fifteen of which were minimum mandatory followed by varying levels of probation.

A timely appeal was filed by Restrepo-Duque's counsel. The issues on appeal were noted by the Delaware Supreme Court as follows:

Restrepo appeals and argues that the Superior Court erred by (1) finding the nighttime search warrant of his residence and his subsequent arrest valid; (2) admitting into evidence Restrepo's statement made to police; and (3) admitting into evidence information found on Wolf's laptop computer and a social media profile and posts linking him to Wolf.¹

The Supreme Court, on December 17, 2015, affirmed Restrepo-Duque's conviction and sentence. The Supreme Court denied Restrepo-Duque's motion for reargument en banc on January 5, 2016 and the mandate issued.

On January 6, 2017, ten days prior to the expiration of the time allowed under Superior Court Criminal Rule 61 to file a Motion for Postconviction Relief, Restrepo-

¹ *Restrepo-Duque v. State*, 130 A.3d 340 (Table), 2015 WL 9268145 (Del.), at *1.

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Duque, through counsel, Leo John Ramuno, Esquire, filed a “First Motion for Postconviction Relief”. This “First Motion for Postconviction Relief” raised three grounds for relief but did not include any memoranda in support of the motion. The motion also included the following language “The defendant reserves the right to amend this argument to include specific reference to the numerous Err (sic) made by his attorney and to file a memorandum with specific references to the record and case law.” By order dated January 24, 2017, the Court gave Restrepo-Duque until April 28, 2017 to file an amended motion to include ALL grounds for relief or to notify the Court that he does not wish to file an amended motion.

On January 31, 2017, the Court was notified by Donna L. Culver, Esquire that Restrepo-Duque’s postconviction counsel Mr. Ramunno had been disbarred by the State Supreme Court pursuant to an order dated January 26, 2017, and that she had been appointed as Receiver of Mr. Ramunno’s practice. Ms. Culver – requested that Restrepo-Duque’s Postconviction Motion therefore be put on hold until Restrepo-Duque could secure new counsel.

On March 17, 2017, Ms. Culver informed the Court by letter that she had discussed the pending motion with Restrepo-Duque and that he was requesting that the Court appoint counsel to represent him in his motion for postconviction relief. On March 21, 2017, the Court granted the request and forwarded the matter to the Office of Conflicts Counsel to appoint counsel to represent Restrepo-Duque. Patrick J. Collins, Esquire was subsequently appointed to represent Restrepo-Duque. Mr. Collins notified the Court on May 8, 2017 that he was awaiting receipt of the file from the Office of Conflicts Counsel and requested permission to notify the Court

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when he had the file so the Court could then issue a briefing schedule. The Court granted the request.

On March 1, 2018 the Court issued a briefing order giving Mr. Collins, on behalf of Restrepo-Duque, until May 1, 2018 to file either an amended motion for postconviction relief or a statement that the motion will proceed as initially filed or to file or notice of intent to withdraw as counsel pursuant to Superior Court Criminal Rule 61(e)(7). Mr. Collins subsequently on April 16, 2018, requested an extension of time to file. The Court granted the request and issued a new briefing order. On June 27, 2018, Mr. Collins filed an Amended Motion for Postconviction Relief on behalf of Restrepo-Duque raising one ground for relief.

On July 6, 2018 Restrepo-Duque *pro se* filed a Motion to Discharge his Postconviction Counsel and to proceed *pro se*. The Court then scheduled a hearing to assure that Restrepo-Duque was knowingly, voluntarily and intelligently asking to proceed *pro se*.

A hearing was held by the Court on August 1, 2018 at which, Mr. Collins, Deputy Attorney General Jason C. Cohee, on behalf of the State and Restrepo-Duque were all present. Following a colloquy the Court determined that Restrepo-Duque knowingly, intelligently and voluntarily was seeking to proceed *pro se* without the benefit of counsel.

On August 23, 2018, the Court received the pending “Pro-se Amended Motion for Postconviction Relief” signed on August 5, 2018,² and received and docketed on

² Within a week from the hearing concerning his proceeding *pro se* when he had stated he
(continued...)

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August 23, 2018. The Court then issued yet another briefing order.³ The matter has completed briefing and is ready for decision.

FACTS

Following are the facts as set forth by the Delaware Supreme Court:

(1) On February 14, 2010, Kenton Wesley Wolf was shot with a BB gun and stabbed to death in his Smyrna residence. The police arrested Juan Restrepo Duque (“Restrepo”), an eighteen-year-old Colombian national who had been living in the U.S. for seven years, and charged him with Wolf’s murder. A Superior Court jury found Restrepo guilty of second degree murder, possession of a deadly weapon during the commission of a felony, motor vehicle theft, and carrying a concealed dangerous instrument. The Superior Court judge sentenced Restrepo to a lengthy jail term, followed by decreasing levels of supervision.⁴

(4) Restrepo, using the profile “purecolombianblood,” met Wolf on the internet. On January 29, 2010 Wolf picked up Restrepo at a Newark grocery store, and together they drove to Wolf’s home in Smyrna, Delaware. There they drank beer and watched television. On February 14, 2010, Wolf sent Restrepo an email asking to meet again in

²(...continued)
would file his amended motion within a week.

³ There were several other documents filed with the Court that turned out to have NOT been approved by Restrepo-Duque. Please see the Court Order dated September 26, 2018 for a complete explanation for the matter (D.I. 275).

⁴ *Restrepo-Duque*, 130 A.3d 340 (Table), 2015 WL 9268145 (Del.), at *1.

person. Wolf picked up Restrepo from the Newark library around 3:00 p. m., and the two bought beer before driving to Wolf's house. According to Restrepo, they went upstairs to Wolf's bedroom to watch television and drink beer. Eventually, as Wolf attempted to touch Restrepo sexually, Restrepo claimed that he noticed a nine-inch knife on the nightstand. Restrepo testified that Wolf reached for the knife when he rebuffed Wolf's advances, but Restrepo grabbed the knife first. Restrepo sliced Wolf across the throat. Wolf then chased Restrepo out of the room, yelling at him to get out.

(5) Fearful that Wolf would call the police, Restrepo testified that he returned to the upstairs bedroom and found the door locked. He kicked the door open, shot Wolf with a BB gun and stabbed him repeatedly. Once he was sure Wolf was dead, Restrepo pulled the bedding, the mattress and the dresser on top of Wolf. He opened the windows and turned off the heat, despite it being a cold February day. Restrepo then retrieved the beer from the kitchen and packed a box with some of Wolf's belongings, including CD's, cellphones, a beeper, Wolf's laptop and three sets of keys. Restrepo then left in Wolf's distinctive green 1994 Volkswagen Jetta. He stopped at a Kmart to buy new clothing and to dispose of his bloody clothes and shoes.

(6) On February 15, 2010, Restrepo drove Wolf's car to the Newark Farmers Market. He used Wolf's credit card to purchase two tasers and three knives. He then threw the knife that he used to stab Wolf and the BB gun in a creek near his home. He left Wolf's laptop buried in the snow in Deacons Walk Park. Finally, he abandoned Wolf's Jetta in Brook Haven Park.

(7) On February 19, 2010, after Wolf failed to show up to work, two of his coworkers went to his home to check on him. They noticed the windows were open and saw his wallet and other personal belongings scattered on the front lawn. They called the police, who discovered Wolf's body upstairs.

(8) The police sent a desktop computer recovered from Wolf's home to the State Police High Tech Crimes Unit for analysis. Later that same day, a tree surgeon in Deacons Walk Park discovered Wolf's laptop under the snow. The police analyzed both of Wolf's computers and discovered that Wolf had communicated with someone using the screen name "purecolombianblood" on January 29 and February 14. An internet search of "purecolombianblood" led to pictures and online profiles that linked the screen name to Restrepo. The police also learned that Wolf's credit card had been used at the Newark Farmers Market on February 15. A February 15 surveillance video of the Farmers Market parking lot showed Wolf's distinctive green Jetta pulling in and leaving, though the driver and the license plate number could not be identified.

(9) The police secured a nighttime search warrant and went to Restrepo's house around midnight on February 22, 2010. The search warrant affidavit alleged that there was probable cause to suspect that Restrepo had stolen Wolf's car and used his credit card. At Restrepo's house, the police discovered the keys to Wolf's missing Jetta in the pocket of a pair of Restrepo's pants. The police brought Restrepo in for questioning in the early hours of February 23. After reading Restrepo his *Miranda* rights, Detective William Porter said, "Having these rights in mind, do you wish to talk to me about this case? Tell me your side of the

story.” Restrepo answered. “I don’t know. What would be better? If I talk to a lawyer.” The detective replied. “I mean it’s up to you I mean, it’s perfectly up to you I mean. It be nice to get your ahh side of the story out because if you don’t get your side of the story out we got to go with...you know what I’m saying?” Restrepo said he understood. The detective then said, “Okay. So you wish to tell me your side of the story?” Restrepo replied, “Yeah why not.”

(10) Restrepo then described the events of February 14 and 15. He also told the detective where Wolf’s Jetta was and where the police could find the knife he used to stab Wolf. The police subsequently located Wolf’s car in Brook Haven Park, where Restrepo said it would be, and the knife in the creek near his house.

(11) Restrepo was charged with murder in the first degree, possession of a deadly weapon during the commission of a felony, theft of a motor vehicle, second degree forgery, and carrying a concealed dangerous instrument. He was indicted on June 7, 2010. On November 13, 2012, Restrepo filed a morion in limine, a motion to suppress, a motion for a *Franks* hearing, and a motion to prohibit the death penalty. The Superior Court denied the motions on February 19, 2013. A jury trial was held from January 27 to February 4, 2014, and Restrepo was convicted of all charges except second degree forgery.

(12) On April 15, 2014, the Superior Court held an office conference regarding the transcripts of Restrepo’s police interview that were submitted to the jury during trial. The court found the submission of the transcripts to be conceivably prejudicial to Restrepo and granted a new trial

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on May 6, 2014. The second jury trial was held from November 17 to 26, 2014. Wolf's laptop and social media posts linking "purecolombianblood" to Restrepo were admitted into evidence. Restrepo was again convicted of second degree murder, possession of a deadly weapon during the commission of a felony, theft of a motor vehicle, and carrying a concealed dangerous instrument. He appeals his convictions and the denial of his motions to suppress and for a *Franks* hearing.⁵

RESTREPO-DUQUE'S CONTENTIONS

Restrepo-Duque filed the instant Motion for Postconviction Relief pursuant to Superior Court Rule 61. In his motion, he raises the following grounds for relief:

- Ground one: Ineffective Assistance of Counsel in violation of State and Federal law.
See Attachment: Ground one supporting facts.
- Ground two: There was insufficient evidence to support the conviction.
See Attachment: Ground two supporting facts.
- Ground three: There were numerous errs (sic) in the trial that were not raised on Appeal.
See Attachment: Ground three supporting facts.

Grounds not previously raised: See attachment.

In Restrepo-Duque's "attachment" to his motion he lists a number of alleged

⁵ *Restrepo-Duque*, 130 A.3d 340 (Table), 2015 WL 9268145 (Del.), at *1-3 (footnotes omitted).

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faults of his various counsel in a rambling format. I have condensed his arguments into the following areas:

Ground one:

A. Restrepo-Duque alleges that his counsel were ineffective for failing to investigate the case fully and not obtaining an expert.⁶

B. Restrepo-Duque alleges his counsel failed to give him sufficient advice on whether or not to testify at trial.⁷

C. Restrepo-Duque complains multiple places that his attorney failed to argue errors in the search warrant both at trial and on appeal.⁸

D. Restrepo-Duque complains his counsel did not object sufficiently to what Restrepo-Duque claims was Detective Porter's "fabrications," "lies" and "perjury."⁹

E. Restrepo-Duque alleges his counsel failed to file adequate motions to suppress his statement to the police.¹⁰

F. Restrepo-Duque claims counsel should have moved to

⁶ *State v. Restrepo-Duque*, Del. Super., ID No. 1002011017, DI 263 (See Paragraph 1 of the Attachment).

⁷ *Id.*

⁸ *Id.* (See Paragraphs 2, 3, 4 and 5 of the Attachment).

⁹ *Id.* (See Paragraphs 6, 10, 15 and 18 of the Attachment).

¹⁰ *Id.* (See Paragraph 7, 8 and 9 of the Attachment).

suppress an “impossible murder weapon.”¹¹

G. Restrepo-Duque alleges his counsel should have moved to sever the Carrying a Concealed Dangerous Instrument from the Theft of a Motor Vehicle charge.¹²

H. Restrepo-Duque claims he was subject to double jeopardy because he was acquitted of Forgery in the Second Degree during his first trial.¹³

I. Restrepo-Duque claims his Counsel was ineffective for allowing continuances.¹⁴

J. Restrepo-Duque claims his Counsel failed to file a motion to dismiss.¹⁵

K. Restrepo-Duque claims his sentence was excessive.¹⁶

Ground 2: Essentially restates some of the above claims and he claims he is innocent.

Ground 3: Restrepo-Duque alleges he should have had an interpreter.

¹¹ *State v. Restrepo*, Del. Super., ID No. 1002011017, D.I. 263 (See Paragraph 11 of the Attachment).

¹² *Id.* (See Paragraph 12 of the Attachment).

¹³ *Id.* (See Paragraph 13 of the Attachment).

¹⁴ *Id.* (See Paragraph 14 of the Attachment).

¹⁵ *Id.* (See Paragraph 17 of the Attachment).

¹⁶ *Id.* (See Paragraph 19 of the Attachment).

Ground 4: Restrepo-Duque re-states claims made in Ground one concerning appellate counsel.

DISCUSSION

Under Delaware Law the Court must first determine whether Restrepo-Duque has met the procedural requirements of Superior Court Criminal Rule 61(I) before it may consider the merits of the postconviction relief claims.¹⁷ Under Rule 61, postconviction claims for relief must be brought within one year of the conviction becoming final.¹⁸ Restrepo-Duque's motion was filed in a timely fashion, thus the bar of Rule 61(i)(1) does not apply to the motion. As this is Restrepo-Duque's initial motion for postconviction relief, the bar of Rule 61(i)(2), which prevents consideration of any claim not previously asserted in a postconviction motion, does not apply either.

Grounds for relief not asserted in the proceedings leading to judgment of conviction are thereafter barred unless the movant demonstrates: (1) cause for the procedural fault and (2) prejudice from a violation of the movant's rights.¹⁹ The bars to relief are inapplicable to a jurisdictional challenge or to a colorable claim or miscarriage of justice stemming from a constitutional violation that "undermines the fundamental legality, reliability, integrity or fairness of the proceeding leading to the

¹⁷ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

¹⁸ Super. Ct. Crim. R. 61(i)(1).

¹⁹ Super. Ct. Crim. R. 61(i)(3).

judgment of conviction.”²⁰

Restrepo-Duque’s grounds for relief concerning the search warrant and his statement to the police²¹ are simply restatements of the arguments he previously raised in his direct appeal. Superior Court Criminal Rule 61(i)(4) bars any ground for relief that was formerly adjudicated unless reconsideration of the claim is warranted in the interest of justice.²² Restrepo-Duque raised these claims before the Supreme Court and the Supreme Court found them meritless. Restrepo-Duque has made no attempt to argue why reconsideration of these claims are warranted in the interest of justice. The interest of justice exception of Rule 61(i)(4) has been narrowly defined to require that the movant show that “subsequent legal developments have revealed that the trial court lacked the authority to convict or punish” him.²³ Restrepo-Duque has made no attempt to demonstrate why this claim should be revisited. This Court is not required to reconsider Restrepo-Duque’s claims simply because they are “refined or restated.”²⁴ For this reason, these grounds for relief should be dismissed as previously adjudicated under Rule 61(i)(4).

²⁰ Super. Ct. Crim. R. 61(i)(5).

²¹ *State v. Restrepo-Duque*, Del. Super., ID No. 1002011017, DI 263 (Ground one C and E, see paragraphs 2, 3, 4, 7, 8, 9 and 18 of the Attachment).

²² Super. Ct. Crim. R. 61(i)(4).

²³ *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996) (quoting *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990)).

²⁴ *Riley v. State*, 585 A.2d 719, 721 (Del. 1990) rev’d on other grounds, *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001).

Restrepo-Duque's remaining grounds for relief are premised to some degree, on allegations of ineffective assistance of counsel. These types of claims are not normally subject to the procedural default rule, in part because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal. For this reason, many defendants, including Restrepo-Duque, allege ineffective assistance of counsel in order to overcome the procedural default.

However, this path creates confusion if the defendant does not understand that the test for ineffective assistance of counsel and the test for cause and prejudice are distinct, albeit similar, standards.²⁵ The United States Supreme Court has held that:

[i]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not "[conduct] trials at which persons who face incarceration must defend themselves without adequate legal assistance"[;] [i]neffective assistance of counsel, then, is cause for a procedural default.²⁶

A movant who interprets the final sentence of the quoted passage to mean that he can simply assert ineffectiveness and thereby meet the cause requirement will miss the mark. Rather, to succeed on a claim of ineffective assistance of counsel, a movant must engage in the two part analysis enunciated in *Strickland v. Washington*²⁷ and

²⁵ *State v. Gattis*, 1995 Del. Super. LEXIS 399, at *13.

²⁶ *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

²⁷ 466 U.S. 668 (1984).

adopted by the Delaware Supreme Court in *Albury v. State*.²⁸

The *Strickland* test requires the movant show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.²⁹ Second, under *Strickland* the movant must show there is a reasonable degree of probability that but for counsel's unprofessional error the outcome of the proceedings would have been different, that is, actual prejudice.³⁰ In setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.³¹

Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established.³² However, the showing of prejudice is so central to this claim that the *Strickland* court stated "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect

²⁸ 551 A.2d 53, 58 (Del. 1988).

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

³⁰ 466 U.S. at 694; see *Dawson*, 673 A.2d at 1190; *Accord*, e.g., *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003); *Ayers v. State*, 802 A.2d 278, 281 (Del. 2002); *Steckel v. State*, 795 A.2d 651, 652 (Del. 2002); *Johnson v. State*, 813 A.2d 161, 167 (Del. 2001); *Bialach v. State*, 773 A.2d 383, 387 (Del. 2001); *Outten v. State*, 720 A.2d 547, 552 (Del. 1998); *Skinner v. State*, 607 A.2d 1170, 1172 (Del. 1992); *Flamer v. State*, 585 A.2d 736, 753-754 (Del. 1990).

³¹ See, e.g., *Outten v. State*, 720 A.2d 547, 552 (Del. 1998); *Righter v. State*, 704 A.2d 262, 263 (Del. 1997); *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997); *Skinner v. State*, 1994 Del. LEXIS 84; *Brawley v. State*, 1992 Del. LEXIS 417; *Younger v. State*, 580 A.2d 552, 556 (Del. 1990); *Robinson v. State*, 562 A.2d 1184, 1185 (Del. 1989). *Accord Wells v. Petsock*, 941 F.2d 253, 259-60 (3d Cir. 1991).

³² 466 U.S. at 687.

will often be so, that course should be followed.”³³ In other words, if the Court finds that there is no possibility of prejudice even if a defendant's allegations regarding counsel's representation were true, the Court may dispose of the claim on this basis alone.³⁴ Furthermore, the defendant must rebut a “strong presumption” that trial counsel’s representation fell within the “wide range of reasonable professional assistance,” and this Court must eliminate from its consideration the “distorting effects of hindsight when viewing that representation.”³⁵

In the case at bar, Restrepo-Duque attempts to show cause for his procedural default by making merely conclusory assertions of ineffectiveness of counsel. In regards to prejudice, Restrepo-Duque makes little attempt to show counsel’s actions harmed him. Under the circumstances of this case, Restrepo-Duque’s claims are meritless. The Supreme Court found no error in the trial. The record indicates that Restrepo-Duque’s trial attorneys did in fact adequately prepare for the trial and that the trial was fair.³⁶ Restrepo-Duque has utterly failed to demonstrate prejudice as a result of his Trial Counsel’s alleged failures. This failure is fatal to Restrepo-

³³ *Id.* at 697.

³⁴ *State v. Gattis*, 1995 Del. Super. LEXIS 399, at *13.

³⁵ 466 U.S. at 689; *Dawson*, 673 A.2d at 1190; *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

³⁶ See Affidavits of Trial Counsel for a complete overview of their preparations for trial. *State v. Restrepo-Duque*, Del. Super., ID No. 1002011017, D.I. 279, 280, 281, 283.

Duque's motion. His motion is therefore procedurally barred.³⁷ Furthermore, as persuasively noted by Restrepo-Duque's Trial Counsel in their detailed affidavits, all the actions Restrepo-Duque complains about were made for strategic and well founded reasons under the circumstances of the case. I find no error in Trial Counsels' actions nor any prejudice to Restrepo-Duque as a result. Clearly as the Delaware Supreme court noted the case against Restrepo-Duque was exceptionally strong and any alleged errors of counsel did not result in any prejudice.

For the record I will briefly address Restrepo-Duque's grounds for relief.

Ground one:

A. Restrepo-Duque alleges that his counsel were ineffective for failing to investigate the case fully and not obtaining an expert.

I first note that several attorneys have represented Restrepo-Duque in this matter. A review of the docket details Restrepo-Duque's contentious relationship with most if not all of his attorneys. He claims that his attorneys did not adequately investigate a defense in this matter. Mr. Funk, in December 2012, informed the State of the identities of several expert witnesses for the defense. They were: Dr. John Arden for forensic analysis (pathology) and opinion; Robert Tress from Investigative Services for forensic analysis and opinion; Steve Eichel, PhD for psychological analysis and opinion; and John Simek and Michael Maschke of Sensei Enterprises,

³⁷ See, e.g. *Wright*, 671 A. 2d at 1356; *Wright v. State*, 1992 Del LEXIS 62; *Brawley v. State*, 1992 Del. LEXIS 417.

Inc. to provide computer forensic analysis and opinion.

Additionally, Mr. Funk and Mr. Stiller attempted to persuade an extreme emotional distress claim based on childhood trauma. Restrepo-Duque expressly rejected this defense on April 11, 2013 after a hearing was held on the potential extreme emotional distress defense. It was also at this hearing that Restrepo-Duque asked to discharge Mr. Funk and Mr. Stiller as his attorneys. I also note that numerous pretrial motions were filed on behalf of Restrepo-Duque by his counsel. This argument is meritless.

B. Restrepo-Duque alleges his counsel failed to give him sufficient advice on whether or not to testify at trial.

As to Restrepo-Duque's claim that he was inadequately advised whether he should testify, Mr. Lesniewski reports that he spoke with Restrepo-Duque on at least two occasions about his right to testify.³⁸ The Court engaged in a colloquy with Restrepo-Duque regarding his choice not to testify. He also clearly stated that it was his choice not to testify.³⁹ The claim is meritless.

C. Restrepo-Duque complains multiple places that his attorney failed to argue errors in the search warrant both at trial and on appeal.

³⁸ *Restrepo-Duque*, Del. Super., ID No. 1002011017, D.I. 281, Lesniewski Affidavit Page 3.

³⁹ *Id.*, (Nov. 21, 2016), Trial Transcript E-27 to E-29,

Restrepo-Duque alleges various problems with the search warrant. These claims were formerly adjudicated during the direct appeal in this matter.⁴⁰ The Supreme Court found that the search warrant met probable cause even when the inaccurate statements were omitted.⁴¹ Furthermore, Mr. Lesniewski states in his affidavit that the issues and discrepancies further mentioned by Restrepo-Duque were raised at trial.⁴² Superior Court Criminal Rule 61(i)(4) bars any relief since the issue was previously decided. This argument is meritless

D. Restrepo-Duque complains his counsel did not object sufficiently to what Restrepo-Duque claims was Detective Porter's "fabrications," "lies" and "perjury."

The State categorically denied it presented any perjured testimony. Restrepo-Duque presents no facts that would lead me to conclude that there was any false testimony. He merely speculates. Restrepo-Duque's confession details specifically how he shot Wolf a number of times with a BB gun and how he stabbed him several times until Wolf fell to the floor. Restrepo-Duque said he thought Wolf was dead. Restrepo-Duque said this took place on February 14, 2010. The death certificate states the February 19, 2010 date because that is when the body was found. There was no prosecutorial misconduct in this case. All closing comments were grounded

⁴⁰ *State v. Restrepo-Duque*, 130 A.3d 340 (Table), 2015 WL 9268145 (Del.), at *3-4.

⁴¹ *Id.* at *4.

⁴² *State v. Restrepo-Duque*, Del. Super., ID No. 1002011017, D.I. 281, p. 4.

solidly in the evidence presented. Mr. Lesniewski noted on page 5 of his affidavit that he did not believe any prosecutorial misconduct occurred. This claim is also vague, misleading and contains no support for its premise. There was no prosecutorial misconduct and there is no evidence that Det. Porter committed perjury when he testified. Mr. Lesniewski noted on page 5 of his affidavit that he did not believe any prosecutorial misconduct occurred and he did not believe Det. Porter committed perjury.⁴³ This allegation is meritless.

E. Restrepo-Duque alleges his counsel failed to file adequate motions to suppress his statement to the police.

A *Franks* motion was filed and denied by the Superior Court. The Superior Court's decision was analyzed by the Supreme Court.⁴⁴ Therefore, this claim was formerly adjudicated during the direct appeal in this matter.⁴⁵ A motion to suppress Restrepo-Duque's statement was filed, a hearing held and denied by Superior Court. This claim was also considered and rejected by the Supreme Court.⁴⁶ Superior Court Criminal Rule 61(i)(4) bars any relief since the issue was previously decided. This argument is meritless.

⁴³ *State v. Restrepo-Duque*, Del. Super., ID No. 1002011017, DI 281.

⁴⁴ *State v. Restrepo-Duque*, 130 A.3d 340 (Table), 2015 WL 9268145 (Del.), *3-4.

⁴⁵ *Id.*

⁴⁶ *Id.* at *4-5.

F. Restrepo-Duque claims counsel should have moved to suppress an “impossible murder weapon.”

Restrepo-Duque claims the length of Wolf’s wound depth was longer than the blade of the murder weapon. The Medical Examiner testified that this happens when a decedent’s body is compressed when he/she suffers a stab wound. The knife was located on the bank of the creek where Restrepo-Duque said he threw the knife after he stabbed Wolf with it. The DNA analysis of the knife produced a partial DNA profile consistent with Wolf’s DNA. The knife was capable of making that wound and a motion to suppress based on this assertion would have been baseless. This ground is meritless.

G. Restrepo-Duque alleges his counsel should have moved to sever the Carrying a Concealed Dangerous Instrument from the Theft of a Motor Vehicle charge.

Restrepo-Duque raises issues with the admission of the BB gun. Some time after the initial search for the BB gun, after Restrepo-Duque told the police where he threw it to dispose of it, a retired law enforcement officer found a BB gun pistol in the creek near Restrepo-Duque’s home. The State attempted to introduce this into evidence and the defense objected. The Court sustained the objection essentially ruling that BB guns are fungible and the timing was too remote to link it to this crime. However, Restrepo-Duque confessed to having a BB gun on him for protection when he killed Wolf in this case. He further confessed to shooting Wolf several times with

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BBs during the killing. These two admissions and the presence of BB gun wounds on Wolf formed the basis for the Carrying a Concealed Deadly Instrument conviction. Restrepo-Duque also confessed to taking Wolf's car and parking it in a park near his house. The car was located in the park where Restrepo-Duque told them he parked it. Those two facts formed the basis of the Theft of a Motor Vehicle conviction. There were no other motions that should have been filed in this circumstance. This argument is meritless.

H. Restrepo-Duque claims he was subject to double jeopardy because he was acquitted of Forgery in the Second Degree during his first trial.

Restrepo-Duque was acquitted of Forgery in the Second Degree in the first trial. He was not tried for Forgery in the Second Degree in the second trial. There was no double jeopardy in this case. The acquittal of the Forgery count in the first trial would not preclude the State from presenting evidence from the overlapping facts that are relevant to the remaining charges. This claim is meritless.

I. Restrepo-Duque claims his Counsel was ineffective for allowing continuances.

Restrepo-Duque complains about continuances of the trial. Mr. Lesniewski states in his affidavit that he was prepared for trial and did not believe the denial of

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the continuance request was a ground for appeal.⁴⁷ Mr. Lesniewski was present for and participated in the defense in the first and second trials. The denial of the continuance request did not prejudice Restrepo-Duque. This claim is meritless.

J. Restrepo-Duque claims his Counsel failed to file a motion to dismiss.

Restrepo-Duque argues the State failed to produce a video which it never had possessed. This claim is vague and does not support its premise with facts. The State categorically affirmed that it did not destroy evidence in this case and Restrepo-Duque presents no proof of wrongdoing. There were hairs found on Restrepo-Duque when he was found. The State did not analyze these hairs. The defense was given the opportunity to inspect the hairs and chose not to analyze them. The State noted that the hairs held no forensic value once Restrepo-Duque confessed to shooting and stabbing Wolf until Restrepo-Duque believed him to be dead. This claim is meritless.

K. Restrepo-Duque claims his Sentence was excessive.

Restrepo-Duque claims his sentence is excessive. The range of punishment for the crimes for which Restrepo-Duque was convicted is up to life in prison. The sentencing judge saw fit to give him less than life for this horrific crime. The sentence was within the statutory range for these crimes. Therefore, there was nothing to appeal. Consequently this allegation is meritless.

⁴⁷ *State v. Restrepo-Duque*, Del. Super., ID No. 1002011017, D.I. 281, Lesniewski Affidavit, p. 5.

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Ground two: Essentially restates some of the above claims and Restrepo-Duque claims he is innocent.

Restrepo-Duque claims innocence. There is no claim of ineffective assistance of counsel in this ground. Restrepo-Duque confessed to killing Wolf. He gave the police the location of Wolf's car which he stole. He told the police where he hid Wolf's laptop. The laptop was found where Restrepo-Duque said he had hid it. Restrepo-Duque told the police where he threw the knife. A knife with a partial DNA hit for Wolf's blood was found where Restrepo-Duque said he threw it. The knife was found within walking distance from Restrepo-Duque's residence many miles away from the crime scene. This is but a small sample of Restrepo-Duque's confession that was corroborated through investigation. This was not a close case and this ground for relief is meritless.

Ground three: Restrepo-Duque alleges he was incompetent and should have had an interpreter.

The defense attorneys in their respective affidavits put forth that they raised all appellate issues that they believed had merit. Restrepo-Duque now mentions not having a competency hearing. Restrepo-Duque has been very diligent in his defense. He fired four attorneys during the trial and appellate phase. He also "fired" his Rule 61 attorney. One set of those attorneys wanted to present an extreme emotional distress claim that Restrepo-Duque expressly rejected. It is disingenuous to now say that competency is an issue. Competency was never an issue. Additionally, a review of all the attorney affidavits in this case fail to raise competency as a concern.

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It is also interesting that Restrepo-Duque now is claiming he needs an interpreter. A review of his recorded confession demonstrates that he has a good command of English and is careful to make sure he understands. His dealings with the Court show the same thing. When he does not understand he asks for clarification. Additionally, his brother Victor Restrepo-Duque testified during the first trial that Restrepo-Duque did well in public school in Delaware. Restrepo-Duque moved to Delaware in 2003 from Columbia. At that time Restrepo-Duque enrolled in middle school. When cross-examined by the State on this topic Restrepo-Duque's brother told the jury that his brother spoke English in school. This claim is disingenuous.

Further in regard to Ground three the Trial Court did not err in admitting evidence of the folding knives and taser. This is a weight and sufficiency argument. The State presented relevant evidence and the jury was able to give it whatever weight they saw fit to give it. It also appears that this claim was formerly adjudicated when the defense raised an objection and the Superior Court previously ruled against the defense. Therefore, Superior Court Criminal Rule 61(i)(4) bars any relief since the issue was previously decided.

**Ground four: Restrepo-Duque re-states claims made in
Ground one concerning appellate counsel.**

Here Restrepo-Duque claims Appellate Counsel should have raised additional arguments on appeal. However his claims are vague and unspecific to the extent he claims actual innocence the weight of evidence presented is overwhelmingly against

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him.

CONCLUSION

After reviewing the record in this case, it is clear that Restrepo-Duque has failed to avoid the procedural bars of Rule 61(i). Consequently, I recommend that Restrepo-Duque's postconviction motion be *denied* as procedurally barred by Rule 61(i)(3) for failure to prove cause and prejudice and Rule 61(i)(4) as previously adjudicated on direct appeal and as utterly meritless.

/s/ Andrea M. Freud
Commissioner

AMF/dsc

oc: Prothonotary

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