IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
	)	
v.	)	ID No. 1705016524A
	)	
DAI'YANN WHARTON,	)	
	)	
Defendant.	)	

Date Submitted: October 6, 2022
Date Decided: January 23, 2023

Upon Consideration of Defendant's Motion to Recuse – **DENIED**.

OPINION

Carolyn S. Hake, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware. *Attorney for the State of Delaware*.

Herbert W. Mondros, Esquire, Rigrodsky Law, Wilmington, Delaware and Stephen Patrizio, Esquire, Dranoff & Patrizio, Philadelphia, Pennsylvania (*pro hac vice*). *Attorneys for Defendant Dai'yann Wharton*.

JURDEN, P.J.

Before the Court is Defendant Dai'yann Wharton's ("Wharton") Motion to Recuse. Wharton was convicted of Murder First Degree and related charges following a bench trial before President Judge Jurden ("Trial Judge"). The Delaware Supreme Court affirmed this Court's discovery rulings and the subsequent verdict and judgment of the sentence. Wharton seeks postconviction relief, but preliminarily argues that the Trial Judge should recuse herself from presiding over his postconviction proceedings because she presided over the plea and sentencing of his codefendant, Benjamin Smith ("Smith"). For the reasons that follow, the Motion to Recuse is **DENIED**.

I. BACKGROUND

A. The Murder[1]

On March 28, 2017, Yaseem Powell ("Powell") was murdered. The perpetrators, Wharton and Smith, lurked outside the Wilmington Job Corps Center ("Job Corp"), waiting for Powell. When he exited Job Corps, the two followed him for eleven blocks, shot him, and then fled. Police arrived at the scene within minutes and began performing first aid, but Powell died from the gunshot wound. During

[1] This section, I.A., is taken from the Supreme Court's decision on direct appeal. *See Wharton v. State*, 246 A.3d 110 (Del. 2021). A more thorough recitation of the facts of the crime is set forth in that opinion. *See id.*

the incident, Powell's cell phone fell out of his pocket, which was recovered by police[2] along with nearby shell casings.

Later that night, Andrew Ervin ("Ervin") was shot in the foot. In the hospital, Ervin told police that he was the victim of an armed robbery and that the alleged attackers left a firearm behind. Ballistic evidence revealed the firearm from the Ervin shooting matched the firearm used to kill Powell. At Wharton's trial, Smith testified that Ervin fabricated his statement to police so Smith could "distance" himself from the murder weapon.[3] Smith testified that the actual order of events was as follows: after the murder, Smith went home, spent time with Ervin, gave Ervin the murder weapon before going to a friend's house, and then, as they were leaving the friend's house, they were attacked in retaliation for Powell's death.[4]

Hours after the Powell and Ervin shootings, Wharton sent self-incriminating messages ("Incriminating Messages") to Isaiah Baird ("Baird") using a cell phone messaging app.[5] Baird messaged Wharton to tell him that Ervin was shot, but Wharton already knew.[6] In response to Baird's message stating that a weapon was found at the scene, Wharton messaged back, stating there was "already a body on

[2] Among the recovered contents of the phone was a message Powell sent to a friend, stating that he was following Wharton and Smith; however, surveillance footage showed that it was Powell who was being followed.
[3] Trial Tr. 83:5, Wharton D.I. 82.
[4] *Id.* at 72:22 – 79:8.
[5] Like the Supreme Court, the Court refers to these messages as "Incriminating Messages." *See Wharton*, 246 A.3d at 113.
[6] Trial Tr. 70:13-14, Wharton D.I. 112.

[the gun]." Wharton messaged that he was scared,[7] and asked if Ervin was shot as an act of retaliation because Wharton "hit there folks?"[8] Two days later, Wharton and Baird messaged each other again, this time about someone telling people that Wharton "killed boul."[9] Baird asked how the person knew about the murder. Wharton replied, "before I did it we was all out [in] front of Twin crib [Ervin's home]."[10]

On May 30, 2017, Wharton and Smith were indicted for Murder First Degree and other charges.[11] The case was assigned to the Trial Judge on June 19, 2017.[12] On September 18, 2017, Wharton and Smith were reindicted for Murder First Degree, Conspiracy First Degree, and related firearm charges.[13] At an office conference on August 27, 2018, the parties agreed to sever the codefendants' charges and try each defendant separately.[14]

[7] Detective Fox testified that "Self" messaged this to Baird. Trial Tr. 30:15 – 31:10, Wharton D.I. 82. Detective Fox testified that through his investigations, he learned that Wharton went by "Self" and "Self-Made." Trial Tr. 47:20 – 48:1, Wharton D.I. 112.
[8] Detective Fox testified "Self" messaged this to Baird. Trial Tr. 21:10 – 22:9, Wharton D.I. 82.
[9] Smith testified that Wharton went by "Self-Made" and "boul" is a slang term akin to "dude." *Id.* at 49:5-20; 87:19-23.
[10] *Id.* at 23:18-20.
[11] Indict., Wharton D.I. 1. Two other individuals were also indicted for other offenses, but they are not pertinent to Powell's murder or the motion at issue. *See id.*
[12] Mem., Wharton D.I. 9. A Corrected Memorandum was issued on June 27, 2017, correcting a typo in the indictment date. *See* Corrected Mem., Wharton D.I. 13.
[13] Reindict., Wharton D.I. 17.
[14] Office Conference, Wharton D.I. 51.

B. Co-Defendant Smith's Plea Agreement

Smith pled guilty to Manslaughter and Conspiracy Second Degree on January 30, 2019 after being offered a plea by the State in exchange for his cooperation in Wharton's case.[15] The Plea Agreement contained a Cooperation Agreement, in which Smith agreed to provide his full cooperation, which included testifying against Wharton, and in turn the State would make a sentencing recommendation that reflected that cooperation.[16] In Smith's Plea Agreement, the State agreed to cap its sentence recommendation at 10 years at Level V in exchange for Smith's guilty plea to Manslaughter and Conspiracy Second Degree.[17] Although not stated in (and not part of) the Plea Agreement, the State told Smith that he would get additional consideration, such as a further reduction in the State's ultimate sentence recommendation, if he cooperated in a separate matter.[18] Smith faced a statutory penalty ranging from 2 to 27 years of Level V time for the offenses, which was reflected on his Truth-in-Sentencing ("TIS") Guilty Plea Form.[19] The TIS guidelines

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[15] Plea Agreement, Smith D.I. 39. The Cooperation Agreement was placed under seal and later unsealed. *See* Guilty Plea Tr. 2:10 – 3:19; Wharton D.I. 116.

[16] Cooperation Agreement, Smith D.I. 39.

[17] Plea Agreement, Smith D.I. 39; *see also* Guilty Plea Tr. 8:6-7, Smith D.I. 45.

[18] Guilty Plea Tr. 3:2-15, Smith D.I. 45. The prosecutor stated:

> This plea agreement only reflects his cooperation in State versus Dai'yann Wharton. I told Mr. Smith at the proffer, and Mr. Chapman, he would get additional consideration, either in the form of substantial assistance, or a reduction in our ultimate recommendation. Just to protect everyone here, I wanted to put that on the record somewhere. Even though it's not in the cooperation agreement, it is an understanding between the parties.

Id. at 3:6-15.

[19] TIS Guilty Plea Form, Smith D.I. 39.

recommend a sentence between 2 to 5 years of Level V time for Manslaughter, and up to 12 months of Level III probation for Conspiracy Second Degree.[20]

C. Smith's Sentencing

Smith's sentencing hearing occurred on February 28, 2019.[21] In preparation for the sentencing hearing, the Trial Judge reviewed the record[22] which included, among other things, a mitigation report and numerous letters from family and community members in support of Smith.[23] At sentencing, the State recommended a sentence of 5 to 6 years of unsuspended Level V time.[24] The State based its recommendation on Smith's limited criminal history, his acceptance of responsibility for the crime, and his level of involvement in the crime.[25]

Smith's counsel argued that the appropriate sentence was 2 to 5 years of unsuspended Level V time.[26] In support of that argument, he cited several mitigating

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[20] *Id.* During the plea colloquy, the Trial Judge advised Smith that Manslaughter carries a sentence of up to 25 years of Level V time, with the first 2 years of that sentence being mandatory, and Conspiracy Second Degree carries a sentence of up to 2 years of Level V time. Guilty Plea Tr. 17:22 – 18:6, Smith D.I. 45. The Trial Judge advised him that by pleading guilty to Manslaughter and Conspiracy Second Degree, his consecutive maximum penalty for the two offenses was 27 years of unsuspended Level V time. Guilty Plea Tr. 18:8-13, Smith D.I. 45; *see also* TIS Guilty Plea Form, Smith D.I. 39.

[21] Sentence Order, Smith D.I. 41.

[22] Def.'s Mot. to Recuse, Ex. A (Smith Sent'g Tr.) 6:9-17, Wharton D.I. 97

[23] The mitigation report was conducted by Taunya Batista, M.A., a mitigation specialist. In addition, the Court reviewed an updated mitigation report, also conducted by Taunya Batista, M.D. through Delaware Mitigation Services.

[24] Def.'s Mot. to Recuse, Ex. A (Smith's Sent'g Tr.) 8:11 – 9:2, Wharton D.I. 97.

[25] *Id.* at 8:13-17. In the State's perspective, Smith, although a co-conspirator, was not the shooter, stating "although he was more than a mere spectator to the death of Yaseem Powell, he was not the shooter." *Id.* at 7:8-9.

[26] *Id.* at 11:21 – 12:3.

factors, including the character reference letters supporting Smith from family and community members; his youth; his minimal criminal history; and his accountability and remorse for the crime.[27] Smith's counsel stated:

> I believe you will hear in his comments to Your Honor that he has an appreciation for what happened. He is remorseful. And I have known Benjamin for almost two years. And I have seen him mature over that period of time. I think recently the holidays being away again from mother, sister and other family members have kind of really hit home with him. And I have seen a changed person since 2019, a mature person. Someone who is – he's got goals. He has things he wants to do. He's focused. He's matured. One of the things he has always said is he has the desire to get his GED while he is incarcerated. And I think he has long-term goals in terms of knowing there's some steps he has to take so that when he does get out, he can be a productive member of society. As I mentioned, he has family support. I will also note, with the new SENTAC guidelines, there [are] mitigation factors that apply for juveniles. And my client is 20. But I think there is the parlaying off of what Mr. McBride said. There is a peer pressure mitigating factor that's probably for juveniles, but I think the Court should also consider that in the sense that this was a case where my client did not shoot a firearm.[28]

Smith then addressed the Court, taking responsibility for his actions and apologizing to Powell's family and friends:

> Throughout my life I've made many negative decisions that have put me on the path that led me here today. Before I continue, I would like to give my deepest apologies to the family and friends of Yaseem Powell that I may have directly or indirectly affected through my poor decisions made . . . I know the hurt of losing a son is unimaginable and I will never be able to understand the pain that I have caused Yaseem's family . . . I come to you not as a man asking for a lighter sentence, but as a young man asking for [a] second chance to show that I can be a

[27] *Id.* at 10:4 – 12:3.
[28] *Id.* at 10:7 – 11:8.

> law-abiding citizen and productive part of society . . . Once again, Your Honor, I would like to give my deepest and sincerest apologies to the family and friends of Yaseem. I hope you can recognize the sincerity of the sorrow and regret that I feel. Thank you, Your Honor. Have a blessed day.[29]

The Trial Judge found Smith's apology and statement of remorse sincere.[30] The Trial Judge referred to the mitigation report, noting that Smith's upbringing had been permeated by paternal abandonment; poverty; instability; exposure to violence and criminality within the community; familial criminality; significant mental health and substance abuse issues; victimization; and the sudden and unresolved killing of his best friend.[31] The Trial Judge also acknowledged that she received many letters from members of Smith's family and community in support of him.[32] She found Smith's remorse, acceptance of responsibility, need for mental health treatment, need for substance abuse treatment, and need for counseling due to Post Traumatic Stress Disorder to be mitigating factors.[33] The Trial Judge emphasized that the mitigators did not excuse "any of [Smith's] conduct."[34] After acknowledging the

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[29] *Id.* at 12:17 – 14:6.
[30] *Id.* at 14:11-14.
[31] *Id.* at 15:11-18.
[32] *Id.* at 18:6 – 20:13. The Court received input from the following people: Smith's mother, his sister, his uncle, his friend, his football coach, and his former track coach.
[33] Sentence Order, Smith D.I. 41.
[34] Def.'s Mot. to Recuse, Ex. A (Smith Sent'g Tr.) 16:18 – 17:1, Wharton D.I. 97. The Trial Judge stated:

> That's not to excuse any of your conduct. Please understand the Court is not doing that. I'm merely citing some factors which I do think should and rightly be considered mitigating factors. And I'm required as the judge imposing the sentence to consider the aggravating factors and the mitigating factors, so that's why I'm running through this.

mitigating factors, the Trial Judge turned to the aggravating factors and noted that the seriousness of the crime was an aggravating factor.[35] The Trial Judge then sentenced Smith, effective June 10, 2017, to 5 years of unsuspended Level V time.[36] The Trial Judge solemnly reminded him, "you participated in something that ended up in someone dying and you should think about that every single day of your life."[37]

D. Defendant Wharton's Motion *in Limine* to Exclude Certain Evidence

On the morning of Wharton's trial, June 17, 2019, Trial Counsel filed a motion *in limine* to exclude evidence.[38] He argued that the State failed to tell him about the Incriminating Messages between Baird and Wharton until June 5, 2019 and June 14, 2019, even though he had filed a "Motion to Identify Evidence" over a year earlier.[39] According to Trial Counsel, had he known the State planned to introduce this evidence, he may have altered his trial strategy and retained a social media expert.[40] At the hearing on the motion *in limine* on June 18, 2019, Trial Counsel argued he would have interviewed the people mentioned in the Incriminating Messages before

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Id.

[35] Sentence Order, Smith D.I. 41.

[36] *Id.* Smith was sentenced as follows: for Manslaughter, 10 years at Level V, suspended after 5 years for 1 year of Level III probation; and for Conspiracy Second Degree, 2 years at Level V, suspended for 1 year at Level III. *See id.*

[37] Def.'s Mot. to Recuse, Ex. A (Smith's Sent'g Tr.) 22:5-7, Wharton D.I. 97.

[38] Def.'s Mot. *in Limine* to Exclude Certain Evidence, Wharton D.I. 60.

[39] *Id.* ¶¶ 8, 13–14. Trial Counsel filed the Motion to Identify Evidence in May 2018 following the State's production of "voluminous amounts of discovery" in January 2018. *Id.* ¶ 8. In the Motion to Identify Evidence, Trial Counsel asked the State to specify what evidence from discovery it intended to present at trial. *Id.* ¶¶ 6–10. It is undisputed that the Incriminating Messages were produced in discovery by the State in January 2018.

[40] *Id.* ¶¶ 15–16.

trial had they been timely produced.[41] Finally, he argued that in a letter dated May 15, 2019, the State represented it would not use any messages from Wharton at trial.[42] The State advised the Court that it provided Trial Counsel with the Incriminating Messages during discovery in January 2018, and that it went beyond its discovery requirements by notifying Trial Counsel it intended to use the Incriminating Messages the day after finding them, considering Trial Counsel had access to the Incriminating Messages since January 2018.[43] At the hearing, the State explained that its letter, which was in response to an "improper discovery request," had a misplaced apostrophe, and Trial Counsel knew the State might use the same evidence from a co-defendant's phone.[44] It also argued that Wharton was not prejudiced because the issue was not one of social media, and therefore, a social media expert's testimony would not be relevant.[45]

Trial Counsel also argued that the second set of Incriminating Messages might pertain to a different murder and therefore should be excluded.[46] The State noted

[41] Trial Tr. 25:7 – 27:7, Wharton D.I. 80.
[42] *Id.* at 8:2-10. At the hearing, Trial Counsel argued that the State's letter represented that "information obtained from cellular extractions of defendants['], with the apostrophe after the S, phones will not be used." *Id.* at 8:4-6.
[43] State's Response to Def.'s Mot. *in Limine* to Exclude Certain Evidence, Wharton D.I. 66.
[44] Trial Tr. 13:19 – 16:23, Wharton D.I. 80. At the hearing, the State noted that it told Trial Counsel that "the same evidence can be found on the other social-media mediums or cellphone extractions" and therefore "whatever [the State] wanted to use from Wharton's cellphone dump, [the State] can get off of . . . someone else." *Id.* at 16:15-19.
[45] *Id.* at 20:15-20.
[46] Def.'s Mot. *in Limine* to Exclude Certain Evidence ¶ 17, Wharton D.I. 60.

that the second set of Incriminating Messages were a continuation of the first set, and therefore would have been easy to locate after the State's notification of its intention to use the first set of Incriminating Messages on June 5, 2019.[47] The State additionally pointed out that the second set of Incriminating Messages were exchanged three days after Powell's murder and, and when read in context of the messages surrounding those at issue, likely referred to the Powell murder.[48]

The Trial Judge denied the motion *in limine*[49] after hearing counsels' arguments and reviewing the Incriminating Messages, because she did not find "overwhelming prejudice or substantial prejudice sufficient to exclude the evidence," and gave Trial Counsel time to speak to the two individuals mentioned in the messages in order to cure any claimed prejudice.[50]

E. Wharton's Rejection of Plea Offer, Waiver of Jury Trial, and Subsequent Bench Trial

On the first day of Wharton's scheduled jury trial, Wharton declined the State's plea offer,[51] waived his right to a jury trial, and agreed to have the Trial Judge

[47] State's Response to Def.'s Mot. *in Limine* to Exclude Certain Evidence, Wharton D.I. 66.
[48] Trial Tr. 22:1 – 24:7, Wharton D.I. 80.
[49] Order Denying Motion to Exclude the Text Conversation, Wharton D.I. 67.
[50] Trial Tr. 33:5 – 35:10, Wharton D.I. 80. The Trial Judge gave Trial Counsel the remainder of the day to interview the two individuals. *Id.*
[51] Trial Tr. 16:5 – 17:7, Wharton D.I. 79. The State extended a plea offer to Wharton several weeks prior to trial, whereby Wharton would plead guilty to Murder Second Degree and Possession of a Firearm During Commission of a Felony ("PFDCF"), which together carry a statutory penalty range of 18 years to life plus 25 years of unsuspended Level V time, in exchange for the State's agreement to cap its sentence recommendation at 30 years of unsuspended Level V time. *Id.* Wharton faced a statutory penalty range of 28 years to life plus 46 years of unsuspended Level V time if convicted on all the charges he faced. *See* Sent'g Tr. 8:6-11, Wharton D.I. 78.

sit as the finder of fact.[52] Both in an email dated June 16, 2019, and before the plea colloquy, Trial Counsel advised the Court that Wharton had been consistent about wanting a bench trial, which the Court then confirmed with Wharton.[53] The Trial Judge conducted a thorough colloquy to ensure Wharton was knowingly, intelligently, and voluntarily rejecting the plea offer and waiving his right to a jury trial.[54] The Court warned Wharton that, "once you give up your right to a trial jury, you can't change your mind in the middle of trial" and asked if Wharton had adequate time to consider the pros and cons of a jury trial versus a bench trial and whether he discussed those pros and cons with counsel.[55] Wharton affirmed that he had.[56] Following the colloquy, the Court accepted Wharton's waiver.[57] The bench trial commenced June 19, 2019.[58] It took place over the course of five days.[59] At the conclusion of trial, the Trial Judge found Wharton guilty of Murder First Degree, Possession of a Firearm During Commission of a Felony ("PFDCF"), Conspiracy

[52] Trial Tr. 11:10 – 14:4, Wharton D.I. 79; Stipulation of Waiver of Jury Trial, Wharton D.I. 61.
[53] Wharton D.I. 68; Trial Tr. 11:10 – 12:8, Wharton D.I. 79. In the email, Trial Counsel wrote, "[a]lthough I have not spoken to my client today **he has consistently asked me to try to get the State to agree to a non[-]jury trial** so I'm confident that this news will meet with his approval." Wharton D.I. 68 (emphasis added).
[54] Trial Tr. 17:21 – 20:8, 12:4 – 14:4, Wharton D.I. 79.
[55] *Id.* at 13:5-17.
[56] *Id.*
[57] Stipulation of Waiver of Jury Trial, Wharton D.I. 61.
[58] Trial Tr., Wharton D.I. 81.
[59] *See* Non-Jury Trial, Wharton D.I. 69.

First Degree, Possession of a Firearm by a Prohibited Juvenile ("PFBPJ"), and Carrying a Concealed Deadly Weapon ("CCDW").[60]

F. Wharton's Sentencing

Wharton was sentenced on December 5, 2019.[61] In preparation for the sentencing hearing, the Trial Judge reviewed the record, which included a presentence investigation.[62] At the sentencing hearing, the State asked the Court to sentence Wharton to a total of 60 years of unsuspended Level V time for Wharton's aggregate offenses.[63] In support of its sentence recommendation, the State argued that although Wharton had no criminal history, he was only fifty days shy of his eighteenth birthday at the time of the murder, and emphasized the excessive cruelty and callousness of the crime.[64] Trial Counsel requested "a sentence near the minimum."[65] He emphasized Wharton's youth[66] and lack of criminal history,[67] and stated, "one could argue that there is some mental health treatment that would be

[60] *Id.*
[61] Sentence Order, Wharton D.I. 75.
[62] Sent'g Tr. 6:18-20, 25:23 – 26:3, Wharton D.I. 78. The presentence investigation included, among other materials, an evaluation from Aim Therapeutic Services LLC and an Anger Management for Substance Abuse and Mental Health Certificate of Completion.
[63] *Id.* at 11:8-13, 12:5-9.
[64] *Id.* at 13:8 – 15:4, 8:23 – 10:4.
[65] *Id.* at 21:10-14. The minimum mandatory sentence for Wharton's offenses was 28 years of unsuspended Level V time. *Id.*
[66] *Id.* at 20:1-19, 21:11-14, 22:21.
[67] *Id.* at 23:1-2.

necessary."[68] Trial Counsel said that Wharton was a "very intelligent young man" who was "very insightful about his situation."[69] He also reiterated the Trial Judge's observation that the surveillance footage did not establish Wharton as the shooter.[70] Trial Counsel called the disparity between the State's sentence recommendations for Wharton and Smith "wildly disproportionate."[71] He stated that while Wharton did not take responsibility for Powell's death, he expressed remorse for Powell's family.[72] Wharton addressed the Court, stating that he was "still in the process of proving [his] innocence" and thanked his family and friends.[73] The Trial Judge noted Wharton's youth and lack of criminal history as mitigating factors.[74] The Trial Judge then sentenced Wharton, effective June 14, 2017, to 29 years of unsuspended Level V time,[75] which is one year more than the total minimum mandatory sentence he faced and thirty-one years less than the State's recommendation.[76]

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[68] *Id.* at 22:22 – 23:1. *See also id.* at 19:17-22 ("[T]here is no significant mental illness. He does have some mental health issues as were outlined by her in terms of his ADHD and in terms of oppositional defiant disorder, but other than that, nothing really in – all that bad.").
[69] *Id.* at 19:9-15.
[70] *Id.* at 21:15-17.
[71] *Id.* at 21:3-9.
[72] *Id.* at 23:2-6.
[73] *Id.* at 23:13-18.
[74] Sentence Order, Wharton D.I. 75.
[75] Wharton was sentenced as follows: for Murder First Degree, 25 years at Level V; for PFDCF, 4 years at Level V; for CCDW, 8 years at Level V, suspended for 6 months at Level IV, followed by decreasing levels of supervision; for PFBPJ, 8 years at Level V, suspended for 1 year at Level III; and for Conspiracy First Degree, 5 years at Level V, suspended for 1 year at Level III. *Id.*
[76] Wharton faced a minimum mandatory sentence of 28 years. *See* 11 *Del. C.* § 4209A; 11 *Del. C.* § 1447A(b); *see supra* note 65.

G. Wharton's Direct Appeal

Wharton raised one issue on appeal. He argued that the Court abused its discretion by denying his motion to exclude the Incriminating Messages.[77] Wharton argued that the "State's belated identification of the Incriminating Messages was contrary to the Superior Court's instructions" and that "the Superior Court should have held the State to its statement . . . that it would not use cell phone extractions at trial."[78] On January 19, 2021, the Delaware Supreme Court affirmed the Trial Court's discovery rulings and the subsequent verdict and judgment of the sentence.[79] The Supreme Court held that the State did not violate the Trial Judge's instructions and the Trial Judge did not otherwise abuse her discretion by allowing the Incriminating Messages to be introduced, especially considering that Trial Counsel was provided additional time to prepare for trial in light of the messages.[80] When evaluating the closeness of the case, the Delaware Supreme Court stated:

> [T]his case was not close in our view. Security camera footage showed Powell being followed for approximately eleven blocks and then slain by two individuals. In electronic messages, the victim himself specifically identified those individuals as Wharton and Smith. The footage does not make clear who fired the fatal shot, and so absent the Incriminating Messages, the State needed to rely on Smith's testimony and on circumstantial evidence to establish Wharton as the shooter. Although the State concedes that, without the Incriminating Messages, distinguishing whether Wharton was the shooter or the shooter's

[77] *Wharton v. State*, 246 A.3d 110, 116 (Del. 2021).
[78] *Id.*
[79] *Id.* at 121.
[80] *Id.* at 117–21.

> companion was a 'fairly close' question, Delaware law recognizes that Wharton and Smith were both culpable because they were charged as co-conspirators. Although the State's main theory was that Wharton was the shooter, there was ample evidence supporting the conspiracy theory. Thus, even without the Incriminating Messages, proof of Wharton's guilt was overwhelming.[81]

H. The Instant Motion to Recuse

Wharton, through new counsel ("Rule 61 Counsel"),[82] filed a Motion for Postconviction Relief ("Rule 61 Motion") on February 9, 2022.[83] His Rule 61 Motion alleges that Trial Counsel was ineffective for failing to move for the Trial Judge's recusal.[84] The Court held a teleconference on May 3, 2022, and after a discussion with Rule 61 Counsel and the State, decided that, as a preliminary matter, Wharton should file a motion asking the Trial Judge to recuse herself from presiding over his postconviction proceeding.[85]

Wharton filed his Motion to Recuse ("Recusal Motion") on June 6, 2022.[86] He filed an Opening Brief in support of the Recusal Motion on July 29, 2022.[87] The Recusal Motion is premised on Delaware Judges' Code of Judicial Conduct ("Code of Judicial Conduct") Rule 2.11(A)(1), which states:

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[81] *Id.* at 120.
[82] Wharton retained Herbert W. Mondros and Stephen Patrizio to represent him in the postconviction proceedings. Mr. Mondros entered his appearance on January 20, 2022. Wharton D.I. 115.
[83] Def.'s Mot. for Postconviction Relief, Wharton D.I. 92.
[84] *Id.* at 12–17.
[85] Wharton D.I. 95.
[86] Def.'s Mot. to Recuse, Wharton D.I. 97.
[87] Def.'s Opening Br., Wharton D.I. 106.

> A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (1) [t]he judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.[88]

Wharton argues that the Trial Judge should recuse herself because she "took on the role of advocate for the co-defendant Benjamin Smith and is no longer an impartial arbitrator in the matter,"[89] and that an objective observer could find an "absence of impartiality in appearance and in fact."[90] In support of his claim, Wharton points to the following: (1) the Trial Judge's acceptance of Smith's plea, which included a Cooperation Agreement to testify against Defendant, (2) the Trial Judge's statements regarding Smith's mitigating factors, and (3) Smith's sentence.[91]

The State filed its Answering Brief Opposing Defendant's Motion to Recuse on September 23, 2022.[92] It argues that Wharton's allegations are not a valid basis for recusal for two reasons. First, it argues that accepting a co-defendant's plea and presiding over co-defendant's sentencing are not grounds for recusal.[93] Second, it argues that the Trial Judge did not display "deep-seated favoritism."[94]

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[88] Del. Judges' Code Judicial Conduct R. 2.11(A)(1).
[89] Def.'s Opening Br. at 15, Wharton D.I. 106.
[90] *Id.* at 26.
[91] *Id.* at 15–16.
[92] State's Answering Br., Wharton D.I. 110.
[93] *Id.* at 25–30.
[94] *Id.* at 30–34.

In his Reply Brief in Support of Defendant's Motion to Recuse, filed on October 6, 2022, Wharton stressed there is an appearance of bias and the Trial Judge should have not accepted Wharton's jury waiver.[95]

II. STANDARD OF REVIEW

A. Recusal is Rooted in Due Process and Judicial Ethics

As noted by the United States Supreme Court:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'[96]

As noted by the Supreme Court of Delaware, "[a]s a matter of due process, a litigant is entitled to neutrality on the part of the presiding judge but the standards governing disqualification also require the appearance of impartiality."[97] This rule is codified in Code of Judicial Conduct Rule 2.11(A)(1),[98] which states:

> A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might *reasonably* be questioned, including but not limited to instances where: (1) [t]he judge has personal bias or

[95] Def.'s Reply Br., Wharton D.I. 111.
[96] *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).
[97] *Los v. Los*, 595 A.2d 381, 383 (Del. 1991).
[98] *Id.* at 384 (citing *Weber v. State*, 547 A.2d 948, 951–52 (Del. Super. 1988)).

> prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.[99]

A judge is presumed to be impartial, and the party seeking disqualification "bears the *substantial burden* of proving otherwise."[100] The Code of Judicial Conduct also sets out a "Responsibility to Decide" in Code of Judicial Conduct Rule 2.7, which states a judge "should hear and decide matters assigned, unless disqualified."[101] Reading Rules 2.11 and 2.7 together, a judge has a duty to preside over a case unless they are genuinely convinced of the need for recusal or disqualification.[102]

B. Delaware Applies a Two-Part Test When Evaluating Recusal Based on Bias or the Appearance of Bias

When faced with a motion for recusal due to bias, the Court applies the test set forth in the seminal case of *Los v. Los*.[103] *Los* states "[t]o be disqualified[,] the alleged bias or prejudice of the judge 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'"[104] *Los* requires a judge to undergo a two-step analysis:

> First, he must, as a matter of subjective belief, be satisfied that he can proceed to hear the cause free of bias or prejudice concerning that party. Second, even if the judge believes that he has no bias, situations may

[99] Del. Judges' Code Judicial Conduct R. 2.11(A)(1) (emphasis added).
[100] *State v. Charbonneau*, 2006 WL 2588151, at *21 (Del. Super. Sept. 8, 2006) (citing *State v. Freeman*, 478 F. Supp. 33, 35 (D. Ida. 1979)) (emphasis in original).
[101] Del. Judges' Code Judicial Conduct R. 2.7(A).
[102] *Desmond v. State*, 2011 WL 91984, at *9–12 (Del. Super. Jan. 5, 2011).
[103] *Los*, 595 A.2d at 384-85.
[104] *Id.* at 384 (citing *U.S. v. Grinnell Corp.*, 384 U.S. 563, 583) (1966)).

> arise where, actual bias aside, there is the appearance of bias sufficient to cause doubt as to the judge's impartiality.[105]

When determining if there is an appearance of bias sufficient to cause doubt as to the judge's impartiality, the test is whether "an objective observer viewing the circumstances would conclude that a fair or impartial hearing is unlikely."[106] The "'objective observer' is one who is fully informed about the facts and circumstances of the case."[107]

III. DISCUSSION

A. Wharton's Contentions Fail to Satisfy the *Los* Test, Therefore Recusal is Not Warranted.

1. Wharton's claim fails the subjective prong of the *Los* Test.

The first prong of the *Los* test requires that, as a matter of subjective belief, the judge is satisfied that they can proceed free from bias.[108] Wharton's claim stems solely from the fact that the Trial Judge accepted the plea of, and sentenced, Wharton's co-defendant. Had the Trial Judge had any doubt about her ability to be impartial, she would have recused herself *sua sponte*.[109] The Trial Judge was, and

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[105] *Id.* at 384–85.
[106] *Fritzinger v. State*, 10 A.3d 603, 611 (Del. 2010) (citing *Gattis v. State*, 955 A.2d 1276, 1285 (Del. 2008)).
[107] *State v. Wright*, 2014 WL 7465795, at *4 (Del. Super. Dec. 16, 2014).
[108] *Los*, 595 A.2d at 384–85.
[109] The Trial Judge adhered to the same instruction given to juries:

> Your verdict must be based solely and exclusively on the evidence in the case. You cannot be affected by passion, prejudice, bias, or sympathy. You must fairly and impartially consider all of the evidence. You must not, under any circumstances, allow any sympathy you might have for anyone to influence you in any degree

remains, satisfied she could sit as the finder of fact in Wharton's trial free from bias. After carefully considering all the evidence, the Trial Judge was firmly convinced of Wharton's guilt strictly from the evidence presented at trial.[110] Furthermore, the Trial Judge is satisfied that she presided over Wharton's sentencing free from bias. She based Wharton's sentence on the record, the presentence investigation, the mitigating and aggravating factors presented, the State and Trial Counsel's sentence recommendations, and the TIS guidelines.[111] The Trial Judge is subjectively satisfied that she will continue to remain unbiased and impartial in Wharton's

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> whatsoever in arriving at your verdict. You must determine whether the defendant is guilty or not guilty solely from the evidence presented during the trial. If your recollection of that evidence disagrees with anything said, either by counsel [or by the Court], you should be guided entirely by your own recollection. It is your decision, and only your decision, to determine the true facts and any inferences from the proven facts.

Del. Super. P.J.I. Crim. § 2.2 (2022).

[110] In finding that Wharton was guilty beyond a reasonable doubt, the Trial Judge adhered to the same instruction given to juries:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. Therefore, based upon your conscientious consideration of the evidence, if you are firmly convinced that the defendant is guilty of the crime charged, you should find the defendant guilty. If, on the other hand, you think there is a reasonable doubt that the defendant is guilty, you must give the defendant the benefit of the doubt by finding the defendant not guilty.

Del. Super. P.J.I. Crim. § 2.6 (2022).

[111] *See Windsor v. State*, 100 A.3d 1022, 2014 WL 4264915, at *4 (Del. Aug. 28, 2014) (TABLE) (affirming a sentence that was based on the record, the presentence investigation, materials submitted by relatives, and hearing statements from defendant, his counsel, his family, the State, and the victims); *see also Bryant v. State*, 901 A.2d 119, 2006 WL 1640177, at *2 (Del. June 12, 2006) (TABLE) (holding the trial judge did not abuse his discretion at sentencing by considering defendant's expected release date in another state, his heroin addiction, his history of committing violent crimes, the devastating impact on the victim, and the fact that the robbery was part of a string of robberies).

postconviction proceedings. She "bears no ill-will or harbors any animosity"[112] toward Wharton and believes, as with Wharton's trial and sentencing, "all future proceedings will be actually unbiased and have the outward appearance of impartiality."[113] Accordingly, Wharton's claim fails the subjective prong of the *Los* test.

2. Wharton's Claim Fails the Objective Prong of the *Los* Test.

a. The alleged bias does not stem from an extrajudicial source.

"Under the objective portion of the test, for the judge to be disqualified, 'the alleged bias or prejudice must stem from an *extrajudicial source* and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'"[114] Delaware law does not address whether presiding over a co-defendant's proceeding is "extrajudicial" for the purposes of the *Los* test. The Delaware Supreme Court has, however, addressed extrajudicial sources in cases involving inadmissible evidence. In *Jackson v. State*, the Delaware Supreme Court held that no appearance of bias existed in sentencing where a judge previously heard audiotapes of telephone conversations that were later found inadmissible by the Delaware Supreme Court.[115] There, after the defendant's sentence was vacated and

[112] *See Los*, 595 A.2d at 385.
[113] *Hester v. State*, 2012 WL 5944419, at *1 (Del. Super. Nov. 26, 2012).
[114] *Gattis v. State*, 955 A.2d 1276, 1282 (Del. 2008) (quoting *Los*, 595 A.2d at 384) (emphasis in original).
[115] 684 A.2d 745, 753 (Del. 1996).

remanded for a new penalty hearing, he was again sentenced to death in a second penalty hearing before a new jury, which he appealed.[116] The Supreme Court rejected defendant's argument that the trial judge's impartiality could reasonably be questioned because of his exposure to the tapes during the first penalty hearing, explaining that "[k]nowledge of the content of these tapes alone does not create the appearance of bias."[117] It reasoned that hearing upon the admissibility of contested evidence is within the judge's "normal role" and judges are learned in the practice of excluding such evidence from later decision-making.[118]

In *State v. Charbonneau*, the Court held that denying a motion *in limine* and making statements in a Findings After Penalty Hearing regarding facts from the trial did not create an appearance of impartiality.[119] There, the Court rejected the defendant's argument that an appearance of bias could be found because the trial judge addressed issues that would likely come up on retrial, including the issue of defendant's culpability.[120] The Court reasoned that because all facts known to the trial judge stemmed from his participation in the case and were a matter of record,

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[116] *Id.* at 747–48.
[117] *Id.* at 753. The Court also noted that there was testimony introduced at the second penalty hearing regarding the same information contained in the audiotapes that was "equally as condemning." *Id.*
[118] *Id.*
[119] 2006 WL 2588151, at *6, 22 (Del. Super. Sept. 8, 2006).
[120] *Id.* at *7–22.

he was acting within his judicial role and the facts did not stem from an extrajudicial source.[121]

Federal recusal jurisprudence is instructive on this issue. When evaluating the federal recusal statute,[122] which mirrors Code of Judicial Conduct Rule 2.11(A)(1), federal courts have held that presiding over a co-defendant's plea and sentencing is not "extrajudicial" and therefore trial judges can sit as the finder of fact at the defendant's bench trial.[123] Here, the alleged bias or appearance of bias stems from judicial sources within the judicial context: Smith's plea and sentencing. The source of the alleged bias or appearance of bias is not extrajudicial and therefore Wharton's claim fails the *Los* test.

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[121] *Id.* at *6, 22.

[122] 28 U.S.C.A § 455 (requiring disqualification where a judge's "impartiality might reasonably be questioned . . . also . . . in the following circumstances: (b)(1) [w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding").

[123] *See U.S. v. Mason*, 118 F. App'x 544, 546 (2d Cir. 2004) (stating that the act of presiding over the plea of a co-defendant who later testified against defendant in bench trial was in the course of judicial proceedings); *U.S v. Hartsel*, 199 F.3d 812, 820–21 (6th Cir. 1999) (holding that any information learned about defendant while presiding over co-defendant's plea was not extrajudicial, therefore the judge was not disqualified from presiding over defendant's bench trial); *Horacek v. White*, 2007 WL 3275077, at *6 (E.D. Mich. Nov. 5, 2007) (holding that opinions formed from facts introduced during co-defendant's plea do not indicate bias and therefore trial judge's recusal from defendant's bench trial was not warranted). *See cf. U.S. v. Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988) (holding that a trial judge making statements about defendant while sentencing a co-defendant was not extrajudicial and therefore the trial judge did not need to recuse himself from sentencing defendant); *U.S. v. Partin*, 552 F.2d 621, 637–39 (5th Cir. 1977) (rejecting the argument that presiding over co-defendant's plea required the trial judge to recuse himself from defendant's jury trial); *U.S. v. Bernstein*, 533 F.2d 775, 784 (2d Cir. 1976) (stating that what a judge learns in his judicial capacity by way of guilty pleas of co-defendants is a proper basis for judicial observations, therefore the judge did not need to recuse himself from defendant's jury trial).

b. No objective observer, upon reviewing the record, would find an appearance of bias sufficient to cause doubt as to the judge's impartiality.

i. Presiding over Smith's plea and sentencing did not create bias or the appearance of bias.

To satisfy the second prong of *Los*, an objective observer viewing the circumstances must find that a fair and impartial hearing would be unlikely for the defendant.[124] Wharton argues that when sentencing Smith, the Trial Judge "embrac[ed] Smith's minor role" and "wholly empathized with Smith's asserted position as a bystander.[125] He contends that the Trial Judge's comments at Smith's sentencing "were indicative of partiality towards Smith and bias against [Wharton]."[126] According to Wharton, the Trial Judge's impartiality could be questioned because it "heard specific representations to the ultimate facts" of Wharton's case, from which, he alleges, the Trial Judge determined Smith was less culpable.[127]

Under Delaware law, as a co-conspirator, Smith is equally responsible for Powell's death.[128] The transcript of Smith's sentencing hearing shows that the Trial Judge did not suggest Smith played a minor role in the crime. The Court said to

[124] *See Fritzinger v. State*, 10 A.3d 603, 611 (Del. 2010) (quoting *Gattis v. State*, 955 A.2d 1276, 1285 (Del. 2008)).
[125] Def.'s Mot. to Recuse ¶ 14, Wharton D.I. 97.
[126] Def.'s Opening Br. at 15, Wharton D.I. 106.
[127] *Id.* at 22.
[128] *See* 11 *Del. C.* § 271(2)(b).

Smith, "you participated in something that ended up in someone dying and you should think about that every single day of your life,"[129] and identified the seriousness of the crime as an aggravating factor.[130] Trial judges routinely decide important evidentiary issues, particularly motions to exclude evidence and motions to suppress, before and during trial. In order to rule on the admissibility or inadmissibility of evidence, the Court necessarily has to hear or see the evidence sought to be excluded or suppressed. That is a normal role for a trial judge and trial judges are learned and experienced in the practice of remaining impartial.[131] The Delaware Supreme Court has held that a trial judge's exposure to adverse evidence does not raise a question as to the judge's impartiality.[132] In *Baxter v. State*, the Delaware Supreme Court rejected defendant's argument that by denying his motion to suppress evidence, the trial judge had made a credibility determination against him and therefore should have recused herself from presiding over his bench trial.[133] The Court held that "bias is not established simply because the trial judge 'has made adverse rulings during the course of a prior proceeding.'"[134]

[129] Def.'s Mot. to Recuse, Ex. A (Smith Sent'g Tr.) 22:5-7, Wharton D.I. 97.
[130] Sentence Order, Smith D.I. 41.
[131] *See Jackson v. State*, 684 A.2d 745, 753 (Del. 1996).
[132] *See id.* (holding trial judge's exposure to adverse, inadmissible audiotapes did not create an appearance of bias).
[133] *See Baxter v. State*, 788 A.2d 130, 2002 WL 27435, at *1 (Del. Jan. 3, 2002) (TABLE).
[134] *Id.* (citing *Weber v. State*, 547 A.2d 948, 952 (Del. 1988)).

While the Trial Judge heard the State's representation that Wharton was the shooter at Smith's sentencing, Wharton overlooks the important fact that at no point during Smith's sentencing or during Wharton's trial or sentencing did the Trial Judge make any comparisons between Wharton and Smith's culpability. The Trial Judge was the trier of fact. Based on the evidence presented at trial, including the Incriminating Messages, the Trial Judge found beyond a reasonable doubt that Wharton was guilty of First Degree Murder. At Wharton's sentencing, the Trial Judge noted twice that there was no surveillance footage showing who pulled the trigger,[135] and stated that Wharton and Smith were "equally culpable because they were charged as co-conspirators."[136] The facts here are completely distinguishable from those in the case Wharton relies upon, *State v. Wright*.[137] In *Wright*, the trial judge announced that he had "virtually no confidence in the State's evidence."[138] Because of this "and other comments of record," the Delaware Supreme Court instructed the Superior Court to reassign the case on remand.[139] The Court in *Wright* did not address recusal, specifically stating it did "not consider the Superior Court's denial of the State's motion for recusal, or express any opinion thereon."[140]

[135] Sent'g Tr. 13:1-7, 17:6-13, Wharton D.I. 78. The Court notes that it was the State, not the Trial Judge, that stated Wharton was the shooter.
[136] *Id.* at 22:5-8; *see also id.* at 17:6-13.
[137] *State v. Wright*, 131 A.3d 310, 324 (Del. 2016).
[138] *Id.*
[139] *Id.*
[140] *Id.*

The Superior Court has broad discretion to consider "information pertaining to a defendant's personal history and behavior which is not confined exclusively to conduct for which that defendant was convicted."[141] The Superior Court routinely considers mitigating and aggravating factors when sentencing defendants.[142] The Delaware Sentencing Accountability Commission Benchbook contains examples of mitigating and aggravating factors.[143] Examples of mitigating factors include mental impairment, assistance to prosecution, and lack of prior convictions, and examples of aggravating factors include lack of remorse and excessive cruelty.[144] Before a sentence is imposed, defense counsel and the State are afforded opportunities to file sentencing memoranda, mitigation reports, and character letters, as well as make comments regarding the sentence.[145] In doing so, they routinely address the relevant mitigators and aggravators. In addition, every defendant is afforded an opportunity to address the Court and present any information in mitigation of the sentence.[146]

The Trial Judge's analysis of Smith's mitigating factors is supported by the record and aligns with standard practice. Smith's presentence investigation, which includes two thorough mitigation reports submitted by Smith's counsel, indicates

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[141] *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992) (citing *Lake v. State*, 494 A.2d 166, 1984 WL 180900 (Del. Oct. 29, 1984) (TABLE)).
[142] *See generally* Super. Ct. Crim. R. 32.
[143] Delaware Sent'g Accountability Comm'n, The Benchbook, 132 (2019). The Court cites to this edition of the Benchbook because it was the edition used at the time of Wharton's sentencing.
[144] *Id.* at 132.
[145] *See* Super. Ct. Crim. R. 32(a)(1).
[146] Super. Ct. Crim. R. 32(a)(1)(C).

that Smith's upbringing was permeated by paternal abandonment; poverty; instability; exposure to violence and criminality within the community; familial criminality; significant mental health and substance abuse issues; victimization; and the sudden and unresolved killing of his best friend.[147] These were discussed by the parties at sentencing and in the letters from community members and family. Smith accepted responsibility for his actions and apologized to the victim's family.[148] As the State correctly notes, remarking on Smith's mitigating factors and accepting his statement of remorse do not equate to findings of fact underlying the crimes or go to the credibility of future testimony.[149] Such a discussion of mitigating and aggravating factors is standard in sentencing, particularly in a crime this serious.

The Trial Judge similarly considered mitigating factors before sentencing Wharton.[150] While the State recommended a 60-year sentence and noted only one mitigating factor, the Trial Judge pointed out two additional mitigators: Wharton's youth and the exposure to gang violence surrounding him.[151] And as noted on the Sentence Order, the Trial Judge found Wharton's youth and lack of criminal history to be mitigators.[152] As with all defendants, the Trial Judge evaluated the relevant

[147] Def.'s Mot. to Recuse, Ex. A (Smith Sent'g Tr.) 15:11-18, Wharton D.I. 97.
[148] *Id.* at 12:12 – 14:6.
[149] State's Answering Br. at 20–21, Wharton D.I. 110.
[150] Sent'g Tr. 23:19-23, 25:13 – 26:3, Wharton D.I. 78.
[151] *Id.* at 12:10-22.
[152] Sentence Order, Wharton D.I. 75.

mitigating factors before imposing the sentence.[153] The Trial Judge's consideration of Smith's mitigating factors in no way constitutes a pre-determination of Wharton's guilt or an appearance of bias.

Although no Delaware court has directly addressed the issue, federal courts have uniformly held that a trial judge is not *per se* disqualified from presiding over a separate disposition of a co-defendant's case.[154] In federal courts, under similar facts and a recusal statute virtually identical to Code of Judicial Conduct Rule 2.11(A),[155] recusal is only required if the movant proves there is deep-seated favoritism or antagonism.[156] Deep-seated favoritism or antagonism is a high bar.[157] Wharton has failed to point to any evidence suggesting the Trial Judge acted with

[153] Sent'g Tr. 23:19-23, 25:13 – 26:3, Wharton D.I. 78.

[154] *See U.S. v. Mason*, 118 F. App'x 544, 546 (2d Cir. 2004) (holding recusal from defendant's bench trial not warranted where the source of the alleged bias stemmed from co-defendant's plea and did not demonstrate deep-seated favoritism or antagonism); *U.S. v. Hartsel*, 199 F.3d 812, 820–21 (1999) (holding that defendant did not point to specific facts that would raise a question as the judge's impartiality after presiding over codefendant's plea and sentencing prior to defendant's bench trial). *See c.f. U.S. v. Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988) (finding recusal was not warranted where the judge's statements regarding defendant made at co-defendant's sentencing were not extrajudicial and did not display pervasive bias or prejudice); *U.S. v. Partin*, 552 F.2d 621, 637–39 (5th Cir. 1977) (rejecting a *per se* rule that would require trial judge to recuse himself from defendant's jury trial after presiding over co-defendant's plea because there was no evidence the judge "harbored a personal bias that would disqualify him"); *U.S. ex rel. Bennett v. Myers*, 381 F.2d 814, 817–18 (3d Cir. 1967) ("It is everyday practice for a judge to accept a plea of guilty of one or more defendants and proceed with the trial of a codefendant.").

[155] *See supra* note 122.

[156] *See Mason*, 118 F. App'x at 546 (holding recusal was not warranted under analogous facts because no deep-seated favoritism or antagonism existed); *see also Monaco*, 852 F.2d at 1147 (holding no need for recusal where no pervasive bias was shown under analogous facts).

[157] *See Liteky v. U.S.*, 510 U.S. 540, 555 (1994) (quoting *Berger v. U.S.*, 255 U.S. 22, 41 (1921)) (noting there was deep-seated bias where the judge allegedly stated that the defendants' hearts were "reeking with disloyalty").

bias, much less deep-seated favoritism or antagonism, and the record is devoid of evidence suggesting such. Based on the record, no objective observer viewing the circumstances would find bias, or an appearance of bias, against Wharton sufficient to cause doubt about the Trial Judge's impartiality.

ii. Wharton and Smith's lawful and individualized sentences do not show bias or an appearance of bias.

Wharton contends that Smith's sentence departed from the State's original recommendation of 10 years of Level V time, and therefore illustrates the Trial Judge's "belief in Smith's story and [] bias towards the Defendant."[158] A sentence is lawful if it is within the statutory limits established by the legislature.[159] When imposing a sentence, the Court has broad discretion to weigh various relevant factors, such as the impact on the victim, the context of the crime, and information pertaining to the defendant.[160] This includes "information pertaining to a defendant's personal history and behavior which is not confined exclusively to conduct for which that defendant was convicted" when reaching an appropriate

[158] Def.'s Opening Br. at 16, Wharton D.I. 106.
[159] *See Ward v. State*, 567 A.2d 1296, 1297 (Del. 1989) (citing *Seeney v. State*, 211 A.2d 908 (Del. 1965)).
[160] *See Windsor v. State*, 100 A.3d 1022, 2014 WL 4264915, at *4 (Del. Aug. 28, 2014) (TABLE) (affirming a sentence that was based on the record, the presentence investigation, materials submitted by relatives, and hearing statements from defendant, his counsel, his family, the State, and the victims); *see also Bryant v. State*, 901 A.2d 119, 2006 WL 1640177, at *2 (Del. June 12, 2006) (TABLE) (holding the trial judge did not abuse his discretion at sentencing by considering defendant's expected release date in another state, his heroin addiction, his history of committing violent crimes, the devastating impact on the victim, and the fact that the robbery was part of a string of robberies).

sentence.[161] There is no constitutional right for a defendant to be given a sentence equal in duration to that of a co-defendant.[162]

As discussed earlier, it was clear that, depending on Smith's cooperation, the State's sentencing recommendation might ultimately be less than 10 years.[163] The State's reduction in its sentence recommendation is not a "downward departure" on the part of the Court. Moreover, Smith was sentenced for Manslaughter, not Murder First Degree.[164] Both defendants were sentenced within the respective statutory ranges for their offenses after the Court reviewed the record, heard the arguments of counsel, and weighed the relevant mitigating and aggravating factors. Perhaps most notably, Wharton received a sentence thirty-one years less than what the State recommended and only one year above the statutory minimum mandatory, even though the Court could have lawfully sentenced him to life imprisonment plus 46 years.[165] Contrary to Wharton's claim, the only recommendation the Trial Judge "departed" from was the State's recommendation of 60 years of unsuspended Level

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[161] *Mayes v. State*, 604 A.2d 839, 842 (Del. 1992).
[162] *U.S. v. Hart*, 273 F.3d 363, 379 (3d Cir. 2001) (citing *U.S. v. Smith*, 839 F.2d 175, 179 (3d Cir. 1988)).
[163] Guilty Plea Tr. 2:19 – 3:15, Smith D.I. 45.
[164] Manslaughter carries a sentence of 2 to 25 years at Level V. 11 *Del. C.* § 632; 11 *Del. C.* § 4205(b)(2). Murder First Degree, when committed by someone before their eighteenth birthday, carries a sentence of 25 years to life imprisonment. 11 *Del. C.* § 4209A.
[165] Murder First Degree, when committed by a juvenile, carries a sentence of 25 years to life imprisonment. 11 *Del. C.* §4209A. PFDCF carries a sentence of 3 to 25 years at Level V. 11 *Del. C.* § 1447A(b); 11 *Del. C.* § 4205(b)(2). Conspiracy First Degree carries a sentence of up to 5 years at Level V. 11 *Del. C.* § 513; 11 *Del. C.* § 4205(b)(5). PFBPJ carries a sentence of up to 8 years at Level V. 11 *Del. C.* § 1448(a)(5) (2018-2021); 11 *Del. C.* § 4205(b)(4). CCDW carries a sentence of up to 8 years at Level V. 11 *Del. C.* § 1442; 11 *Del. C.* § 4205(b)(4).

V time for Wharton. From this record, no objective observer could reasonably conclude Wharton's sentence shows bias or the appearance of bias by the Trial Judge.

iii. No facts illustrate bias or an appearance of bias in Wharton's trial.

The abundance of evidence introduced at trial firmly convinced the Trial Judge that Wharton was guilty beyond a reasonable doubt.[166] On direct appeal, the Delaware Supreme Court noted that "the case was not close" and that "proof of Wharton's guilt was overwhelming."[167]

B. Because There is No Appearance of Bias or Prejudice, the Court Has a Responsibility to Decide.

Code of Judicial Conduct Rule 2.7(A) imposes a "Responsibility to Decide" absent reason for disqualification.[168] The "inherent 'duty to sit' [] is integral to the role of a judge."[169] The decision "must not be made lightly, because to do so is contrary to the Delaware Judges' Code of Judicial Conduct,"[170] burdens fellow

[166] *See supra* note 110.
[167] *Wharton v. State*, 246 A.3d 110, 120 (Del. 2021).
[168] Del. Judges' Code Judicial Conduct R. 2.7(A).
[169] *State v. Desmond*, 2011 WL 91984, at *9 (Del. Super. Jan. 5, 2011) ("The decision to recuse or disqualify must not be made lightly, because to do so is contrary to the Delaware Judges' Code of Judicial Conduct and inevitably '[leaves the] case as one of [the recused or disqualified judge's] colleague's problems to deal with, thereby invariably impinging on [his or her] ability to address the many other matters already pending on [his or her] docket.'") (quoting *Reeder v. Del. Dept. of Ins.*, 2006 WL 510067, at *23 (Del. Ch. Feb. 24, 2006)). *See also Matter of Will of Stotlar*, 1985 WL 4782, at *1–2 (Del. Ch. Dec. 19, 1985).
[170] *Desmond*, 2011 WL 91984, at *9.

judges,[171] and could result in judge-shopping.[172] A judge should recuse oneself only where there is a bona fide reason to do so under Code of Judicial Conduct Rule 2.11.[173]

After a thorough review of the record, the relevant statutory and decisional law, and the Code of Judicial Conduct, no bona fide reason for recusal existed before Wharton's trial, and there is no bona fide reason for the Trial Judge to recuse herself from Wharton's postconviction proceedings. The Court had the responsibility to preside over Wharton's trial and now has the responsibility to preside over Wharton's postconviction proceedings. To not do so would burden a fellow judge who would then be tasked with researching a new record and writing an additional opinion, in addition to the matters already pending on their docket.[174]

IV. CONCLUSION

Because the Trial Judge is subjectively satisfied that she has and will continue to participate in this case free from bias, and because no objective observer viewing the circumstances would conclude that an appearance of bias exists, Wharton has failed to prove that the Trial Judge's impartiality could reasonably be questioned. Accordingly, his Motion to Recuse is **DENIED**.

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[171] *Id.*
[172] *Id.* at *11; *see also Reeder v. Del. Dept. of Ins.*, 2006 WL 510067, at *17 (Del. Ch. Feb. 24, 2006); *Matter of Will of Stotlar*, 1985 WL 4782, at *1.
[173] *Desmond*, 2011 WL 91984, at *8, 10.
[174] *See Desmond*, 2011 WL 91984, at *9.

IT IS SO ORDERED.

/s/ Jan R. Jurden
Jan R. Jurden, President Judge