

OPINION

After a joint Superior Court trial, a jury found Michael Manley (“Manley”) and David Stevenson (“Stevenson”) guilty of First Degree Murder and related charges. At the first penalty phase, the Superior Court followed the jury’s recommendations and sentenced both defendants to death.¹ Both of the defendants’ sentences were affirmed on direct appeal.² On November 2, 1998, the United States Supreme Court denied *certiorari*.³

On January 25, 1999, Manley filed a Motion for Postconviction Relief pursuant to Superior Court Rule 61, which this Court denied.⁴ On February 8, 1999, Stevenson filed a Motion for Postconviction Relief pursuant to Superior Court Rule 61, which this Court denied.⁵ On appeal, however, the Delaware Supreme Court vacated both defendants’ death sentences and ordered a new penalty hearing.⁶ The Delaware Supreme Court ordered that the new penalty hearing be held before a Superior Court Judge different from the judge that presided over the trial and first penalty hearing. This judge was also to re-consider the defendants’ Motions for Postconviction Relief

¹ *State v. Manley & Stevenson*, 1997 WL 27094 (Del. Super. Jan. 10, 1997).

² *Stevenson v. State*, 709 A.2d 619 (Del. 1998); *Manley v. State*, 709 A.2d 643 (Del. 1998).

³ *Manley v. Delaware*, 525 U.S. 893 (1998); *Stevenson v. Delaware*, 525 U.S. 967 (1998).

⁴ *State v. Manley*, 2000 WL 703812 (Del. Super. Apr. 27, 2000).

⁵ *State v. Stevenson*, 1999 WL 1568333 (Del. Super. Dec. 21, 1999).

⁶ *Stevenson & Manley v. State*, 782 A.2d 249 (Del. 2001).

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and any amendments thereto.

On September 7, 2001, Manley filed an Amended Motion for Postconviction Relief before a new Superior Court Judge. On March 26, 2003, Manley also filed a Motion to Preclude a New Penalty Hearing. On October 2, 2003, this Court denied both defendants' Motions for Postconviction relief and Manley's Motion to Preclude a New Penalty Hearing.⁷ The Delaware Supreme Court affirmed these rulings on October 18, 2004.⁸

On December 6, 2005, after a new penalty hearing was held, the jury recommended death for both defendants. On February 3, 2006, this Court sentenced both defendants to death. On January 3, 2007, the Delaware Supreme Court affirmed both defendants' death sentences.⁹ On May 29, 2008, the United States Supreme Court denied *certiorari*.¹⁰

This is Stevenson's second Motion for Postconviction Relief, originally filed on November 28, 2007.

FACTS

The following facts are set forth by the Delaware Supreme Court in its 2007 opinion:

⁷ *State v. Manley & Stevenson*, 2003 WL 23511875 (Del. Super. Oct. 2, 2003).

⁸ *Manley v. State*, 846 A.2d 238 (Del. 2004); *Stevenson v. State*, 846 A.2d 239 (Del. 2004).

⁹ *Manley & Stevenson v. State*, 918 A.2d 321 (Del. 2007).

¹⁰ *Stevenson v. Delaware*, 550 U.S. 971 (2007); *Manley v. Delaware*, 550 U.S. 971 (2007).

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In 1994, Stevenson was employed by Macy's Department Store in the Christiana Mall. While employed at Macy's, Stevenson used customers' credit card information to issue false gift certificates. Macy's Security department employees, Parminder Chona ("Chona") and Kristopher Heath ("Heath") investigated the matter. Stevenson was subsequently charged with theft and the matter was scheduled for trial in the Superior Court.

On the evening prior to Stevenson's scheduled court date, a black male wearing a long puffy black jacket knocked on the door to Heath's residence. His fiancée, Deborah Dorsey, answered. Dorsey informed the male that Heath was not home and the individual departed. Dorsey called Heath to tell him about the incident and that she was frightened. She also noted that the individual was not Stevenson, as she would have recognized him from her employment at Macy's.

On the morning of November 13, 1995, Heath was murdered in the parking lot of his residence at the Cavalier Country Club Apartments. Heath was shot in the back five times with a nine-millimeter handgun. The murder occurred on the same morning that Heath was to testify against Stevenson at his criminal trial. Upon hearing the gunfire, several residents at the apartment complex called police.

One resident, Lance Thompson, informed the police that he observed a black male run to and enter a mid-sized blue vehicle with faded and peeling paint. Thompson saw the license plate number and gave it to police. At this time, Patrolman Daniel Meadows of the New Castle County Police broadcasted the license plate number and vehicle

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description over the police radio. It was soon discovered that the license plate was registered to Stevenson and his mother at 206 West 20th Street in Wilmington, Delaware.

Wilmington Police arrived in two squad cars at 206 W. 20th Street. The officers saw a car fitting the description given by Meadows arrive at the same time with two black men inside. The passengers started to exit the vehicle but reentered after observing the approaching officers. The suspects drove away with patrol cars in pursuit. After a short chase, the suspects fled on foot and were taken into custody.

The occupants of the vehicle were Manley and Stevenson. Manley matched the description of the shooter given by eyewitnesses. After Stevenson was apprehended and brought to police headquarters, police searched the patrol car used to transport him. On the floor was a slip of paper with the name, address and phone number of Chona, the other Macy's employee who investigated Stevenson for the theft along with Heath.

STEVENSON'S CONTENTIONS

_____Stevenson has filed a motion, amended motion, and a second amended motion. In his motion as amended, Stevenson raises the following grounds for relief:

_____ *Ground One:* the defendant's trial counsel was ineffective during the 2005 penalty phase because counsel failed to present to the jury that at the time of the offense, the defendant was only 21 years old—an age that has been recognized as a constitutionally relevant mitigating circumstance; that the defendant was entitled

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to the jury's and the Court's full recognition and consideration of any and all mitigating factors; that counsel failed to even develop age as a mitigating factor; if age had been presented to the jury, there is a reasonable probability that the jury would have accorded significant weight to that mitigating circumstance and recommended a life sentence without parole; and counsel was ineffective for failing to raise this issue on appeal.

_____ *Ground Two*: the defendant's death sentence from the 2005 penalty phase is unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution due to infirmities in the sentencing procedure in the defendant's case; that under *Ring v. Arizona*,¹¹ at a capital sentencing proceeding any fact that increases the maximum penalty must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt; that the aggravating circumstances that the State sought were not charged through an indictment; that the jury did not unanimously find that the aggravating circumstances outweighed the mitigating circumstances; that the trial judge relied on non-statutory aggravating circumstances in his sentencing decision; that the jury determined that aggravating circumstances outweighed the mitigating circumstances by a preponderance of the evidence, not the required standard of beyond a reasonable doubt; that trial counsel was deficient for failing to raise objections to these errors; these errors prejudiced the defendant; and counsel was ineffective for failing to raise these issues on appeal.

¹¹ 536 U.S. 584 (2002).

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_____ *Ground Three:* the death penalty is unconstitutional, facially and applied, because the statutory scheme fails to genuinely narrow the class of persons eligible for it, which is a violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Article One, Sections Seven and Eleven of the Delaware Constitution; that the twenty-two aggravating factors in Delaware's death penalty statute are so broad that the class of persons eligible is not narrowed; that the statute is unconstitutionally vague because it permits the sentencing jury and judge to consider non-statutory aggravating factors without requiring proof beyond a reasonable doubt, jury unanimity, or an express jury finding; that counsel was ineffective for failing to raise the issue of the statute's constitutionality.

Ground Four: the defendant's trial counsel provided ineffective assistance at the 2005 penalty phase; that counsel should have known that simply repeating the presentation made at the first penalty hearing was unlikely to produce a different result in the second penalty hearing; that counsel failed to develop and present available life history and mental health evidence as mitigation evidence; this evidence would have demonstrated that the defendant's traumatic life history resulted in adverse mental and emotional effects; and had counsel developed and presented the compelling mitigation that was available, it is reasonably likely that the defendant would not have been sentenced to death.

Ground Five: there were errors in the instructions given to the jury in the defendant's 2005 penalty phase that precluded the jury from giving full effect to mitigating evidence; counsel was ineffective for failing to raise these issues; these errors violated the defendant's rights under the Sixth, Eighth, and Fourteenth

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Amendments of the United States Constitution, and his rights under Article One, Sections Four, Seven, and Eleven of the Delaware Constitution; that it is reasonably likely that the jury understood the instructions to allow the non-unanimous finding of a statutory aggravating circumstance; that the Court instructed the jury that individual jurors could consider any aggravating circumstance even if it was not found by a unanimous jury; that the instructions improperly defined mitigating circumstances; and counsel was ineffective for failing to seek proper instructions and for failing to litigate the issue on appeal.

Ground Six: in the jury selection for the 2005 penalty phase, the State used peremptory strikes on the basis of gender and race in violation of the defendant's rights under Article One, Section Seven of the Delaware Constitution, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; that after counsel raised an objection pursuant to *Batson v. Kentucky*,¹² the Court improperly failed to find that a prima facie case had been shown because there was no demonstrated pattern; that there is no bright-line rule requiring a pattern to be shown; and counsel was ineffective for failing to fully raise *Batson* objections and for failing to litigate this issue on appeal.

Ground Seven: the joinder of the defendant's 2005 penalty phase with his co-defendant's, Manley, violated the defendant's right to a fair sentencing and his right to individualized consideration of aggravation and mitigating circumstances; the joinder violated the defendant's right to Due Process, his rights under the

¹² 476 U.S. 79 (1986).

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Eighth Amendment to the United States Constitution, and his rights guaranteed by Article One, Sections Four, Seven, and Eleven of the Delaware Constitution; that evidence submitted against Manley prejudiced the defendant; that Manley's mitigation evidence aggravated the defendant's case; that Manley exercised his right to allocution by stating that he did not shoot the victim, which in turn, only inferred that the defendant shot the victim; and counsel was ineffective for failing to fully litigate this issue and for failing to raise it on appeal.

Ground Eight: there were errors with the jury instructions in the defendant's 2005 penalty phase hearing, which resulted in the defendant's rights being violated under the Due Process Clause, the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under Article One, Sections Four, Seven, and Eleven of the Delaware Constitution; that the Court's instructions to the jury defined "reasonable doubt" in a way that unconstitutionally diminished the prosecution's burden of proof and infringed upon the presumption of innocence as to the aggravating factors; that the instruction regarding whether the State met its burden was vague and confusing; and counsel was ineffective for failing to object to these instructions for failing to raise the issue on appeal.

Ground Nine: the jury and the Court considered aggravating circumstances that were not proven beyond a reasonable doubt or to a unanimous jury in the defendant's 2005 penalty phase hearing, which violated the defendant's right to Due Process and his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under Article One, Sections Four, Seven, and Eleven to the Delaware Constitution; that there was no evidence to support the

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aggravating factor that the defendant caused or directed Manley to commit the murder, that the murder was premeditated and the result of substantial planning, or that the killing was in retaliation for the victim's providing information to police; and prior counsel was ineffective for failing to raise these issues at the trial level and on appeal.

Ground Ten: the defendant's death sentence from the 2005 penalty phase is invalid under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under Article One, Sections Four, Seven, and Eleven of the Delaware Constitution because state courts have never made a reliable determination as to whether the defendant is subject to the death penalty as one who has killed, attempted to kill, intended that a killing take place, or that lethal force be used; that the jury never made the constitutionally-mandated determination that the defendant is eligible for the death penalty; that the Court's failure to make this finding is prejudicial *per se*; that trial counsel requested that the Court instruct the jury consistent with United States Supreme Court precedent in this regard, and the Court failed to do so; and the Delaware Supreme Court denied the claim of error on appeal, which was contrary to or an unreasonable application of settled law.

Ground Eleven: the defendant's right to a fair sentencing was violated during the 2005 penalty phase when the prosecution was improperly permitted to read prior testimony of witnesses who were not unavailable and where counsel failed to object; that this violated the defendant's right to confrontation; and trial counsel was ineffective for failing to fully preserve these issues and for failing to

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raise this issue on appeal.

Ground Twelve: the defendant was denied a fair penalty hearing before an impartial tribunal during the 2005 penalty phase because the re-sentencing court denied the defendant's motion for recusal; that this violated the defendant's Due Process Rights and his rights under the Eighth Amendment to the United States Constitution, and under Article One, Sections Four, Seven, and Eleven of the Delaware Constitution; that in this Court's 2003 opinion that denied the defendant's first postconviction claims the Court displayed a predisposition regarding the evidence and against the defendant; that this lack of an impartial tribunal was *per se* prejudicial; that the State cannot show that this Court's bias did not substantially and injuriously affect or influence the jury's recommendation and this Court's ultimate death sentence; and even though trial counsel raised this issue in a motion, which this Court denied, counsel was ineffective by failing to raise the issue on appeal.

Ground Thirteen: the defendant's right to Due Process and his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article One, Sections Four and Seven of the Delaware Constitution were violated due to the trial judge's, Judge Barron, bias and/or conflict of interest; that Judge Barron's bias affected both the guilt and penalty phases of trial equally; and that all counsel involved were ineffective for failing to recuse Judge Barron, failing to raise the issue on appeal, or to litigate the issue fully.

Ground Fourteen: the defendant's right to a fair trial was violated when the defendant was tried jointly with Manley in the 1996 trial; and counsel was

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ineffective to the extent that they failed to fully litigate this issue.

Ground Fifteen: the defendant's rights to a fair jury and Due Process were violated in the 1996 trial when the Court erroneously instructed the jury regarding reasonable doubt, prior inconsistent statements, and accomplice liability; and to the extent that counsel failed to object to these issues and fully raise the issues on appeal, counsel was ineffective.

Ground Sixteen: the defendant's right to a fair and impartial trial was violated when the prosecution made inflammatory, prejudicial, and improper remarks to the jury during the 1996 trial; and to the extent that counsel failed to object to these issues and fully raise the issues on appeal, counsel was ineffective.

Ground Seventeen: the defendant's counsel were ineffective during the 1996 trial by failing to present exculpatory evidence in violation of the defendant's constitutional rights; and counsel was ineffective for failing to fully develop this issue on appeal.

Ground Eighteen: the defendant's rights to a fair trial and Due Process were violated in the 1996 trial when the prosecution submitted evidence of other crimes to the jury and was permitted to read the defendant's statement to the jury regarding the underlying theft charge; and to the extent that counsel failed to object to these issues and fully raise the issues on appeal, counsel was ineffective.

Ground Nineteen: the defendant's rights to a fair sentencing hearing and Due Process were violated in the 2005 penalty phase because the Court and counsel failed to question jurors to determine racial attitudes during the jury selection; and to the extent that counsel failed to object to these issues and fully

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raise the issues on appeal, counsel was ineffective.

Ground Twenty: the defendant's death sentence is unconstitutional because the jury recommendation was not unanimous; that counsel was ineffective for failing to raise and preserve this claim; that the jury's recommendation for death was a 10-2 vote, meaning ten in favor of death and two opposed; and the fact that only four states allow for death sentences in a situation where the jury has not unanimously found that the aggravating factors outweigh the mitigating factors is persuasive in showing that the evolving standards of decency now require juror unanimity in the recommendation of a death sentence.

Ground Twenty-One: the defendant's death sentence was the result of racial discrimination in violation of the defendant's constitutional rights; and that newly published data confirms that Delaware has dramatic differences in death sentencing rates by rates.

DISCUSSION

Under Delaware law, before this Court addresses the merits of Stevenson's claims for postconviction relief pursuant to Superior Court Criminal Rule 61, it will apply the procedural requirements of Rule 61(I).¹³ This will be Stevenson's second postconviction motion decided by this Court.¹⁴ This second postconviction motion

¹³ See *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

¹⁴ Technically, this is Stevenson's third postconviction motion, however, this Court reconsidered Stevenson's postconviction motion that was filed after his 1996 trial as a result of the Delaware Supreme Court's remand. *State v. Manley & Stevenson*, 2003 WL 23511875 (Del. Super. Oct. 2, 2003).

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stems from Stevenson’s second penalty hearing, the decision of which became final on May 29, 2007 after the United States Supreme Court denied *certiorari*. Stevenson filed the motion on November 28, 2007. Thus, the bar of Rule 61(i)(1) does not apply to this motion because it was timely filed.

The bar of Rule 61(i)(2) prevents consideration of any claim not asserted in a prior postconviction motion. The Court may consider such claim if it is warranted in the “interest of justice.”

The bar of Rule 61(i)(3) prevents consideration of any claim not asserted in the proceedings leading to the judgment of conviction. A movant avoids this bar by demonstrating (1) cause for relief from the procedural default; and (2) prejudice from a violation of the movant’s rights.

The bar of Rule 61(i)(4) prevents consideration of any claim that was formally adjudicated in the proceedings leading to the judgment of conviction or in an appeal. The Court may reconsider such claim if it is warranted in the “interest of justice.”

Lastly, the procedural bars of Rule 61(i)(1), (2), and (3) are inapplicable to a jurisdictional claim or to a “colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.”¹⁵

Grounds Two, Three, Nine, Ten, Thirteen through Eighteen, and Twenty raise issues concerning the constitutionality of the death penalty, the court and jury’s

¹⁵ Superior Court Criminal Rule 61(i)(5).

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consideration of aggravating factors, the impartiality of the 1996 trial court judge, improper joinder with the co-defendant in the 1996 trial, errors with jury instructions, prosecutorial misconduct, and the failure to present exculpatory evidence in the 1996 trial. These issues were fully litigated in the trial court proceedings, direct appeals, and/or the defendant's first Motion for Postconviction Relief. Therefore, I find that these issues are barred by Rule 61(i)(4). I also find that reconsideration of these issues is not warranted in the interest of justice. Additionally, *Grounds Thirteen* through *Eighteen* all concern the defendant's 1996 trial. To the extent that the instant postconviction motion raises issues from the 1996 trial that were not included in the defendant's first postconviction motion, I find that those issues are barred by Rule 61(i)(2). I also find that reconsideration of those issues is not warranted in the interest of justice.

Grounds One, Four through *Eight, Eleven, Twelve, Nineteen, and Twenty-one* raise issues concerning counsel's failure to develop mitigation evidence, errors in jury instructions, errors in jury selection, improper joinder with the co-defendant in the second penalty phase, admission of prior testimony, the impartiality of this Court, questioning during *voir dire*, the constitutionality of the death penalty, and ineffective assistance of counsel. I find that the issues raised by these grounds are barred by Rule 61(i)(3) because apart from the claims of ineffective assistance of counsel, these issues could have been raised in the trial court proceedings or in the defendant's direct appeal. Therefore, I find that the only cause of relief from the procedural bar of Rule 61(i)(3) is the alleged ineffective assistance of counsel.

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Ineffective Assistance of Counsel

The defendant's ineffective assistance of counsel claims are not subject to the procedural bar default rule, in part, because the Delaware Supreme Court will not generally hear such claims for the first time on direct appeal.¹⁶ For this reason, many defendants 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."¹⁷ According to the United States Supreme Court:

[i]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that the responsibility for the default be imputed to the State, which may not 'conduc[t] trials at which persons who face incarceration must defend themselves without adequate legal assistance.' Ineffective assistance of counsel, then, is cause for a procedural default.¹⁸

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*¹⁹ and

¹⁶ *Wing v. State*, 690 A.2d 921, 923 (Del. 1996).

¹⁷ *State v. Gattis*, 1995 WL 790961, at *3 (Del. Super. Dec. 28, 1995).

¹⁸ *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (internal citations omitted).

¹⁹ 466 U.S. 668 (1984).

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adopted by the Delaware Supreme Court in *Albury v. State*.²⁰

The *Strickland* test requires that the movant show that counsel's errors were so grievous that his performance fell below an objective standard of reasonableness.²¹ 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.²² In setting forth a claim of ineffective assistance of counsel, a defendant must make and substitute concrete allegations of actual prejudice or risk summary dismissal.

Generally, a claim for ineffective assistance of counsel fails unless both prongs of the test have been established. 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 will often be so, that course should be followed."²³ 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. 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 will eliminate from its consideration the "distorting effects

²⁰ 551 A.2d 53, 58 (Del. 1988).

²¹ *Albury*, 551 A.2d at 58 (citing *Strickland*, 466 U.S. at 688).

²² *Id.* (citing *Strickland*, 466 U.S. at 694).

²³ *Strickland*, 466 U.S. at 697.

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of hindsight” when viewing that representation.²⁴

Grounds One and Four, failure to develop mitigation evidence: The defendant contends that counsel could have hired an expert to present persuasive testimony in support of the mitigating factor concerning the defendant’s youth at the time of the crime; that one of the aggravating factors found unanimously by the jury was that the murder resulted in substantial planning, and such mitigation evidence would have undermined this aggravating factor; and counsel failed to investigate and present other mitigation evidence relevant to the defendant’s background, including that of the defendant’s abusive childhood.

The State contends that the defendant has failed to establish any prejudice as a result of counsel’s failure to present such evidence; that it presented overwhelming evidence regarding aggravating factors and had the defense presented such expert testimony concerning these mitigation factors, the jury would have likely questioned the credibility of the expert.

After considering the parties’ submissions concerning this motion and the post-evidentiary hearing memorandum filings, I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test.

Grounds Five and Eight, errors with jury instructions: the defendant contends that there were errors with the jury instructions as follows: that the jury instructions were confusing and it is reasonably likely that the jury understood the instructions to allow the non-unanimous finding of statutory aggravating factors; that the jury was not informed of the appropriate burden of proof that applied to mitigation factors,

²⁴ *Id.* at 689.

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which was beyond a preponderance as opposed to beyond a reasonable doubt; mitigating circumstances was improperly defined; and reasonable doubt was improperly defined. The defendant contends that the court's definition of reasonable doubt was as follows, "beyond a reasonable doubt is proof that leaves you firmly convinced." The defendant contends that firmly convinced is a standard of proof by clear and convincing evidence and therefore, is a lesser standard than required by the Constitution. The defendant contends that these errors in the jury instructions prejudiced the defendant because the State's burden of proof was diminished.

In the evidentiary hearing, counsel testified that there was no strategic or tactical reason for these failures.

After reviewing the jury instructions and the contentions set forth by the defendant in the defendant's submissions, the State's responses thereto, and the submissions following the evidentiary hearing, I find that all of the defendant's contentions regarding the jury instructions are without merit. I find that the jury instructions were a correct recitation of the law and therefore, the defendant has failed to show actual prejudice under the second prong of the *Strickland* test as a result of counsel's conduct.

Ground Six, errors with jury selection: the defendant contends that the State used a total of eight peremptory strikes against women, three of whom were African-American; that the first six of the State's peremptory strikes were against women; that of the nine African-Americans not excused for cause from the venire, the State used peremptory strikes to exclude five; that this pattern clearly demonstrated gender and race discrimination in violation of the Constitution; and counsel was ineffective for

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failing to object.

After reviewing the parties' submissions, I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test. During jury selection, the State offered race and gender neutral reasons for exercising its peremptory strikes. Had counsel objected, the Court likely would have allowed these jurors to be excused.

Ground Seven, improper joinder with the co-defendant: the defendant contends that the Court erred in failing to grant the severance of this joint penalty phase because mitigation on behalf of Manley necessarily resulted in aggravation for the defendant; that non-statutory aggravating factors were admitted that otherwise would not have been admitted; that Manley exercised his right to allocution, stating that he did not shoot the victim, which created the inference that the defendant shot the victim; and counsel was ineffective for failing to fully litigate the severance of the sentencing hearings.

The issue of severance has been addressed many times in the proceedings below and is only being addressed here because the defendant contends that he failed to raise the severance in his most recent direct appeal as a result of ineffective assistance of counsel. At the conclusion of the penalty hearing, the jury was instructed to consider the evidence for and against each defendant separately. After reviewing the parties' submissions, I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test as a result of counsel's conduct.

Ground Eleven, admission of prior testimony: the defendant contends that

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counsel was ineffective in that counsel did not object to the State introducing witnesses' prior testimonies from the 1996 trial due to witness unavailability. The defendant's contentions on this ground are without merit. This 2005 penalty hearing was conducted nearly nine years after the first penalty hearing. It is understandable that some of the witnesses that testified in the first penalty hearing would be unavailable and therefore, prior testimony would be used. I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test as a result of counsel's conduct.

Ground Twelve, impartiality of the sentencing court: the defendant contends that the judge who presided over the second penalty hearing should have recused himself because this judge denied the defendant's first Motion for Postconviction Relief; and counsel was ineffective for failing to continue raising this issue. The fact that the same judge denied the defendant's first Motion for Postconviction Relief does not automatically render that judge bias in all subsequent proceedings. Therefore, I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test as a result of counsel's conduct.

Ground Nineteen, questioning during voir dire: the defendant contends that counsel was ineffective for failing to inquire into racial biases of potential jurors. The Court held an evidentiary hearing and questioned jurors regarding this issue. Two jurors could not be located at the time of the evidentiary hearing and ten jurors testified that race played no factor in their deliberations. I find that the defendant has failed to show actual prejudice under the second prong of the *Strickland* test as a result of counsel's conduct.

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Ground Twenty-One, constitutionality of the death penalty: the defendant contends that his death sentence is unconstitutional because he was sentenced to death as a result of racial discrimination. To support his claim, the defendant cites a study of race and Delaware's death penalty, which is authored by Sheri Johnson, John Blume, Theodore Eisenberg, and Valerie Hans. I find that the defendant's contentions on this issue have no merit.

I further find as to all grounds that there is no jurisdictional claim and no colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

CONCLUSION

For the foregoing reasons, the defendant's Motion for Postconviction Relief is *denied*.

IT IS SO ORDERED.

President Judge

oc: Prothonotary
cc: File