IN THE SUPREME COURT OF THE STATE OF DELAWARE

ISAIAH W. McCOY,	)	
	)	
Defendant Below-	)	**No. 558/595, 2012**
Appellant,	)	**[CONSOLIDATED]**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

STATE'S ANSWERING BRIEF

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DATE: May 1, 2014

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **Page**

STATUTES AND OTHER AUTHORITIES

NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in the April 14, 2014 Corrected Opening Brief of Appellant Isaiah W. McCoy. This is the State's Answering Brief in opposition to McCoy's direct appeal.

SUMMARY OF ARGUMENT

I. DENIED. The black pro se defendant committed a reverse Batson violation by repeatedly using peremptory challenges to remove potential white jurors. Isaiah McCoy utilized his first 14 peremptory strikes to remove only white potential jurors. (A-2062, 2123). When McCoy attempted to utilize a fifteenth peremptory challenge to remove another white potential juror (A-2151), the trial judge correctly found that McCoy's explanation for the challenge (the juror's wife retired as a prison counselor 5 years earlier) was not credible. (A-2151).

II. DENIED. The trial judge gave a modified Bland instruction. (A-1516). There was no evidentiary basis for finding Talon Bishop to be an accomplice to McCoy in the robbery and murder of James Munford. Bishop never intended to aid McCoy in the commission of any crime. (A-947).

III. DENIED. There was sufficient evidence, viewed in the light most favorable to the State, for a rational trier of fact to find McCoy guilty. (A-1431-34) Delaware does not require corroboration of accomplice testimony.

IV. DENIED. The prosecutor did not vouch for a witness (A-429), and his statement merely recapitulated the prior incriminatory testimony of the witness. (A-373). Second, at least 9 of the 11 allegedly disparaging remarks by the prosecutor about the accused did not occur in the jury's presence, and McCoy can demonstrate no prejudice. Third, there was a valid evidentiary basis to admit the three

statements McCoy challenges (A-858, 894, and 934), so the accused's pro se status was not being exploited. The gang retribution remark of the prosecutor was not made to McCoy, and, again, he can show no prejudice. Finally, the trial judge's admonition and criticism to the prosecutor during the penalty phase (A-1638) was heeded and no further judicial intervention was required.

V. DENIED. The noncapital decision in Alleyne v. United States, 133 S. Ct. 2151 (2013), dealing with the minimum mandatory sentencing for a federal firearms offense, does not render the Delaware death penalty statute [11 Del. C. § 4209] unconstitutional on its face. Alleyne is only relevant if a minimum mandatory sentence is increased by a fact not found beyond a reasonable doubt by a jury. The Delaware death penalty statute's minimum has been and remains life. Alleyne, 133 S. Ct. at 2163, specifically does not hold that "any fact that influences judicial discretion must be found by a jury."

VI. [This argument is not contained in the Opening Brief so it cannot be admitted or denied.]. The death sentence is not disproportionate. Other Delaware capital defendants who have committed murders during a robbery have also received death sentences.

STATEMENT OF FACTS

On May 4, 2010, James Munford and his girlfriend Rekeisha Williams drove from Salisbury, Maryland to Dover, Delaware in Munford's white Suburban SUV in order to conduct a contraband drug deal with Isaiah McCoy. (A-368). According to Williams' trial testimony and the statement she provided to the police, the deal agreed to was that Munford would provide McCoy 200 Ecstasy pills in exchange for $750 and two grams of crack cocaine. (A-361, 1137).

The illicit drug deal between Munford and McCoy was arranged by Williams, who had met McCoy one to two years earlier at the Sussex County work release program in Georgetown, Delaware. (A-357, 1258). On May 3, 2010, Williams contacted McCoy when Munford advised her that he had 200 Ecstasy pills that he wished to sell. (A-359). The parties ultimately planned to meet on the evening of May 4, 2010. (A-36).

On this date, Williams called McCoy several times to finalize plans for the deal. (A-367-68). These phone calls were memorialized in Williams' and McCoy's cell phone records. (A-367, 1170, State's Exhibit # 2 (Williams' phone records), State's Exhibit # 3 (McCoy's phone records)). When Williams and Munford left Salisbury that day, Munford brought a soft lunch container which Williams presumed contained the drugs. (A-367-68). According to Williams' testimony, Munford initially requested that the parties meet at a McDonald's in

Dover, but McCoy refused as he was concerned that there might be too much of a police presence at the McDonald's. (A-367-68, 461-62). Instead, McCoy suggested that they meet at the parking lot of the Brunswick bowling alley in the Rodney Village shopping center. (A-367). Upon arriving at the bowling alley, Munford parked his SUV in the front parking lot. (A-368). However, when Williams contacted McCoy to advise him that they had arrived, McCoy told Williams to have Munford move his vehicle to the less visible side parking lot of the bowling alley. (A-368).

Dashaun White, Isaiah McCoy's nephew, testified that on the evening of May 4, 2010, he was approached by McCoy while hanging out with friends at a local apartment complex. (A-613). McCoy asked White if he would like to accompany McCoy to a local shopping mall so that McCoy could purchase clothing for White. (A-613, 824). McCoy told White that they were meeting a friend at the bowling alley who would then take them to the mall. (A-613). White recalled that during their walk from the apartment complex to the bowling alley, McCoy received a phone call. (A-614). Although White could not hear what McCoy was saying, this phone call coincides with the call from Williams to McCoy in which McCoy told Williams to move to the side parking lot of the bowling alley. (A-366: State's Exhibits 2 and 3).

When White and McCoy arrived at the bowling alley, they approached Munford's Suburban from the rear passenger side. (A-368, 614). Williams testified that she immediately recognized McCoy but not White, who she had never seen prior to that evening. (A-368-69). Both White and Williams testified that McCoy was wearing a black hat with a red C on it at the time; this hat was later recovered from McCoy's bedroom during the execution of a search warrant. (A-369, 614, 1060). Shortly after arriving, McCoy got into the back passenger seat of the vehicle, while White remained outside. (A-369, 614). White testified that he approached the vehicle as if to get inside, and McCoy gestured for him to stay outside. (A-614).

Not long after getting into the car, McCoy pulled out a gun and pointed it at Munford between the two front seats. (A-370, 614). White recalled McCoy asking Munford to give him everything he had. (A-615). Williams then asked if she could leave the vehicle, and McCoy allowed her to run off. (A-370, 615). While she was exiting or shortly thereafter, White walked around to the driver side of the vehicle at McCoy's request so that Munford would not flee. (A-370, 615).

After reaching the driver side, White observed Munford give McCoy something, which he later determined were the Ecstasy pills. (A-615). White testified that Munford then attempted to exit the vehicle, at which time White heard a gunshot and Munford make a loud noise. (A-615). Munford fell out of the

vehicle then got up and began to run away. (A-615). White heard more shots come from within the vehicle as Munford attempted to flee. (A-615). While running away from the vehicle, Williams testified that she heard two gun shots. (A-371). She never saw White or Munford with a gun. (A-367, 371). Munford later died from a single gunshot wound to the chest. (A-909).

After the shooting, McCoy told White to get in the car and drive away. (A-616). At McCoy's request, White drove the car to a random house, and after parking began wiping the vehicle clean with White's shirt. (A-616-17). McCoy and White then ran back to the nearby home that they shared with McCoy's mother. (A-617). At the house, White observed McCoy with two bags of pills in a soft gray lunch box which had not been in the house earlier that day. (A-618).

In the meantime, after hearing the gun shots, Williams called McCoy several times in an attempt to find out what happened. (A-371). McCoy did not provide her a specific answer and during one conversation threatened to hurt her if she told anyone what happened. (A-371). Shortly thereafter, McCoy's sister, Darya White, approached Williams and told Williams that McCoy sent her to bring her to McCoy's house. (A-371-72). When Williams arrived at the house, McCoy and White were there; White appeared scared and asked McCoy why he had done that. (A-372, 617). Williams stayed at the home for approximately two days and while there overheard McCoy tell someone over the phone that he was responsible for the

bowling alley shooting. (A-373). Eventually, McCoy's mother drove Williams to her home in Seaford. (A-373, 619).

No gun was recovered following Munford's homicide; however, there was trial testimony from witnesses indicating when and how McCoy obtained a gun and how that gun was consistent with the type used in the shooting. Loretta Williams, no relation to Rekeisha Williams, testified that her son Talon Bishop stole her gun in early May 2010 and gave it to someone her son referred to as Isaiah or Zay. (A-934). Bishop confirmed that he stole the gun and subsequently gave it to Isaiah McCoy on May 2, 2010. (A-946-47). The gun was loaded at the time and Bishop gave McCoy additional bullets. (A-946-47). Loretta Williams's gun was a .38 Taurus Revolver; McCoy never returned it to her or Bishop. (A-934).

Carl Rone, a member of the Delaware State police Forensic Firearms Service Unit, testified that he examined the spent projectiles recovered from the scene of Munford's murder and concluded that they were .38 caliber bullets which could have been fired from a .38 or .357 firearm. (A-1085, 1088). He found that the projectiles recovered were fired from one gun and had markings which could have been created by Loretta Williams' Taurus revolver. (A-1085, 1086).

The bowling alley which was the site of the murder had motion-sensitive surveillance cameras operating at the time of Munford's murder. (A-1128, 1167). In the video, two men are seen approaching Munford's SUV, after which, one can

be seen walking to the driver side door. (A-344). Munford can be seen getting out of the vehicle and falling to the ground (A-332, 345, 348, State's Exhibit # 78), and the man at the driver's side door can be seen getting into the car and driving away. (A-333, State's Exhibit # 78). Munford's white SUV was found that evening at an abandoned home in close proximity to McCoy's home at the time. (A-1014).

Isaiah McCoy testified to a very different set of events. (A-1191-1279, 1289-1307). McCoy claims that on May 4, 2010 at the exact time that James Munford was shot and killed, McCoy was at his home getting ready for an evening out, although no other witnesses, including McCoy's mother, could confirm this fact. (A-1193-94, 1304). McCoy testified that prior to May 4, 2010, he had dealt drugs with Rekeisha Williams on several occasions and this night was no different. (A-1192). According to McCoy, White introduced McCoy to Williams, and Williams had a sexual relationship with both men. (A-1192, 1259). In short, McCoy claims that White and Williams conspired to frame McCoy for Munford's murder. (A-1484-96).

McCoy testified that he conducted an event free drug deal with Williams at his home around 7:00 p.m. on May 4, 2010, and did not leave the house until close to 9:00 p.m. (A-1193-94). He stated that White left their home shortly before Munford was murdered, and not long thereafter, Williams contacted McCoy inquiring as to White's whereabouts as there were cops everywhere and White was

late picking her up at the local Burger King. (A-1194). According to McCoy, White confessed to murdering James Munford. (A-1304).

The only evidence which somewhat corroborated McCoy's version of events was the testimony of his sister, Darya White. Darya testified that in July of 2010, Dashaun White told her a vague story about "bagging a body" or killing a man. (A-1329). Darya testified that after White told her this, she told him not to tell her anything else and White cried on her shoulder. (A-1329). Darya did not offer this testimony on direct examination by the State and never told anyone else what White allegedly told her about the murder. (A-1329, 1332).

I. McCOY COMMITTED A REVERSE BATSON VIOLATION

QUESTION PRESENTED

After the State made a reverse Batson motion (A-1934-43), and the pro se black defendant utilized his first 13 peremptory jury challenges to remove only white potential jurors (A-2062), was the trial judge's factual finding that the accused's race-neutral explanation for attempting to peremptorily remove another subsequent white potential juror was not credible (A-2151) clearly erroneous?

STANDARD AND SCOPE OF REVIEW

The trial judge's determination that the pro se defendant committed a reverse Batson violation (A-1934-43, 2151) is subject to de novo appellate review. See Sykes v. State, 953 A.2d 261, 269 (Del. 2008); Jones v. State, 940 A.2d 1, 9 (Del. 2007); Burton v. State, 2007 WL 1417286 (Del. May 15, 2007) at * 1 (reverse Batson); Barrow v. State, 749 A.2d 1230, 1238 (Del. 2000). A factual finding that a race-neutral explanation for the exercise of a peremptory challenge is not credible (A-2151) is upheld on appeal unless clearly erroneous. See Sykes, 953 A.2d at 269; Jones, 940 A.2d at 9 ("The record of the trial court's credibility determinations . . . and the trial court's findings with respect to discriminatory intent will stand unless they are clearly erroneous."); Burton, supra at * 1.

MERITS OF THE ARGUMENT

It took 8 days to select Isaiah McCoy's death-qualified capital jury. (A-257-

311, 1741-2220). Near the end of the second day of jury selection (May 15, 2012), McCoy requested to represent himself at the murder trial. (A-307-10).

On the fifth day of jury selection (May 21, 2012), after McCoy utilized a peremptory challenge to remove another potential juror (A-1934), the State made a reverse Batson challenge. See Batson v. Kentucky, 476 U.S. 79, 91-100 (1985); Burton v. State, 2007 WL 1417286 (Del. May 15, 2007) at * 1 (reverse Batson challenge). The prosecutrix stated: "Your Honor, the State would like to make a reverse Batson challenge. The defendant struck eight people, all of which have been white, and we would like to hear some justification for the strikes, particularly the last juror." (A-1934). McCoy responded that he removed the last potential juror "because his son is a police officer," and then added, "His son is Caucasian, he's a police officer." (A-1934).

The prosecutrix replied to McCoy's explanation by noting: "That makes my point, Your Honor. He's looking at them for their race. He claims that it was because the prospective juror's son was a police officer, but he's obviously rolling in the race issue into his decision whether to strike the juror or not." (A-1934). An extended discussion of the question ensued (A-1934-43), but the trial judge did not find that a reverse Batson violation had occurred. (A-1942-43). Nonetheless, the trial judge informed the black accused, "And at this point in time, I'm just going to give you a warning that you must show that your challenges are non-purposeful in

terms of simply seeking the removal of a prospective juror on the basis of a racial classification . . . ." (A-1943).

During the sixth day of jury selection (May 22, 2012), McCoy used another peremptory challenge to remove Willie Bailey, a white male. (A-2062). The prosecutor then pointed out: "Your Honor, that makes 13 straight Caucasian." (A-2062). Later that day McCoy asserted his own Batson motion against the State (A-2083), and the prosecutor replied that half the jurors already selected are minorities. (A-2083). The trial judge reserved decision on McCoy's Batson challenge (A-2086), and shortly thereafter, Jordan Harris, a black make, was seated as the ninth juror. (A-2095-103).

The morning of May 23, 2012, the seventh day of jury selection, McCoy's Batson motion was denied (A-2107-09), and Paul S. Brassfield, a previously selected black male juror, asked to be excused and he was released from jury service. (A-2109-112). Following Brassfield's release from the jury, McCoy utilized a fourteenth peremptory challenge to remove potential juror Mary Frances Duncan, a white female whose two brothers are police officers. (A-2117-23). Later on the seventh day of jury selection, David Hickey appeared as a potential juror. (A-2147-52). Hickey informed the Court that his wife had retired 5 years earlier as a counselor at the Smyrna prison. (A-2147).

McCoy utilized a peremptory challenge to attempt to remove David Hickey, a white male, from his jury. (A-2151). In response, the trial judge asked, "Mr. McCoy, I'm going to need some justification because I can't think of a reason." (A-2151). McCoy offered two reasons: Hickey paused when answering whether he could find the accused not guilty, and "that coupled with the fact his wife is a counselor at DCC." (A-2151). The trial judge did not accept McCoy's explanation and first pointed out that "the juror's wife has been retired for five years." (A-2151). The judge concluded there was a reverse Batson violation in the defense strike of Hickey, and ruled:

> You haven't given the Court any reason that I can examine as a specific reason other than the fact that your sense is that this juror would not be able to do his duty in accordance with the law and fairly evaluate the evidence either for the State or for the defendant, would not take sides, and would have a bias.
>
> So I have to draw the conclusion that there's no legitimate reason why you would exclude the juror; therefore, your challenge has been exercised, however, the Court is not going to accept it. The juror will be seated.

(A-2151).

In Batson v. Kentucky, 476 U.S. 79, 96-98 (1985), the United States Supreme Court established a 3 step process to analyze claims that a party utilized peremptory challenges in violation of the Equal Protection Clause. Hernandez v. New York, 500 U.S. 352, 358 (1991); Barrow v. State, 749 A.2d 1230, 1238 (Del. 2000); Robertson v. State, 630 A.2d 1084, 1089 (Del. 1993). The 3 part paradigm

to establish a prima facie case of purposeful discrimination in selection of a petit jury solely on the basis of the exercise of peremptory challenges is: (1) the defendant is a member of a cognizable racial group; (2) the opposition used peremptory challenges to remove from the venire members of the accused's race; and (3) the facts and any other relevant circumstances raise an inference that prospective jurors were excluded on the basis of race. Batson, 476 U.S. at 96-97.

When the defendant has made the requisite prima facie showing, "the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question." Hernandez, 500 U.S. at 358-59. Thereafter, the trial court decides "whether the defendant has carried his burden of proving purposeful discrimination." Id. at 359. See Peterkin v. Horn, 988 F. Supp. 534, 538 (E.D. Pa. 1997) (among 5 factors considered in evaluating whether a prima facie showing was made include the race of the defendant and any pattern of strikes against another racial group). To rebut a prima facie showing of discrimination, a party must provide a "clear and reasonably specific explanation of legitimate reasons for his use of the challenges." Dixon v. State, 673 A.2d 1220, 1224 (Del. 1996) (quoted in Guy v. State, 999 A.2d 863, 868 (Del. 2010)). Even before Batson, Delaware recognized a similar right to a fair and impartial jury under Del. Const. Art. I, § 7. Riley v. State, 496 A.2d 997, 1009-13 (Del. 1985), cert. denied, 478 U.S. 1022 (1986).

The Equal Protection Clause of the U.S. Constitution Fourteenth Amendment forbids a defendant from exercising peremptory challenges to strike jurors based upon their race. Georgia v. McCollum, 505 U.S. 42, 55, 59 (1992). When it is the criminal defendant, as in this case, who is suspected of using peremptory jury strikes in a racially discriminatory manner, the prosecution may challenge the conduct with a reverse Batson motion. (A-1934). See Burton v. State, 2007 WL 1417286 (Del. May 15, 2007) at * 1.

The trial judge's determination that McCoy committed such a reverse Batson violation during the May 2012 jury selection (A-2151) is a finding of historical fact accorded deference on appeal. See Barrow, 749 A.2d at 1238; Baynard v. State, 518 A.2d 682, 688 (Del. 1986); Hernandez, 500 U.S. at 372 ("Whether a prosecutor intended to discriminate on the basis of race in challenging potential jurors is, as Batson recognized, a question of historical fact."). As this Court has also noted, "The record of the trial court's credibility determinations . . . and the trial court's findings with respect to discriminatory intent will stand unless they are clearly erroneous." Jones v. State, 940 A.2d 1, 9 (Del. 2007) (quoted in Sykes v. State, 953 A.2d 261, 269 (Del. 2008)). Likewise, "Because a trial judge's acceptance or rejection of a party's reason for striking a juror is almost solely based on the credibility of that party's counsel, [this Court] accord[s] great deference to the findings of the trial judge." Wilson v. State, 2002 WL 1159714 (Del. May 31,

2002) at * 1. A trial judge is free to discard a party's race-neutral explanation if it is merely pretextural. Burton, supra at * 2. Accordingly, ". . . merely accepting any purportedly race-neutral reason that a skilled attorney can conjure up in response to a Batson challenge would reduce the process of resolving Batson challenges to a farcical ritual." Coombs v. Diguglielmo, 616 F.3d 255, 262 n. 5 (3d Cir. 2010).

The trial judge's factual finding that McCoy's explanation for attempting to remove Hickey from the jury was not credible (A-2151) is not clearly erroneous and is entitled to deference on appeal. On the first day of jury selection when McCoy was still represented by counsel, Kevin Michael Gerardi, a white male with two relatives employed at the Department of Corrections (A-1748-49), was not challenged by the defense (A-1751), and was seated as the first juror. (A-1758). Also, on the first day of jury selection, Rodney Abrams, a black male whose wife was a retired Correctional officer (A-1767), was not challenged by the defense even though McCoy's counsel gave him contrary advice to challenge Abrams. (A-1772). Given the absence of defense peremptory challenges to jurors Gerardi and Abrams on the first day of jury selection (A-1751, 1772), McCoy's explanation for wanting to remove Hickey because his wife had retired from DOC as a counselor 5 years earlier (A-2151) was illogical and not credible.

II. THE TRIAL COURT GAVE A MODIFIED BLAND ACCOMPLICE CREDIBILITY JURY INSTRUCTION

QUESTION PRESENTED

Are McCoy's factual assertions that the trial judge failed to give a modified Bland accomplice credibility jury instruction (A-610, 1516), and that prosecution witness Talon "Bishop self-identified himself as an accomplice" accurate?

STANDARD AND SCOPE OF REVIEW

The pro se defendant's failure to note any exceptions to the guilt phase jury instructions (A-1520) constitutes a waiver of any objection to the accomplice credibility instruction given (A-1516), and any belated complaint about the instruction may now only be reviewed on appeal for plain error. Del. Supr. Ct. R. 8; Brooks v. State, 40 A.3d 346, 351 (Del. 2012); Wainwright v. State, 504 A.2d 1096, 1100 (Del.), cert. denied, 479 U.S. 869 (1986).

MERITS OF ARGUMENT

In his second appellate claim Isaiah McCoy makes two contentions: the Superior Court Judge failed to give a modified Bland accomplice credibility jury instruction prior to guilt phase deliberations; and juvenile prosecution witness Talon "Bishop self-identified himself as an accomplice." (Corrected Opening Brief at 30). Neither argument is supported by the record, and the claims are factually inaccurate.

First, on June 27, 2012, prior to commencement of guilt phase deliberations, the Superior Court Judge gave McCoy's jury the following instruction:

> Accomplice testimony. A portion of the evidence presented by the State is the testimony of admitted participants in the crime with which this defendant is charged. For obvious reasons, the testimony of an alleged accomplice should be examined by you with more care and caution than the testimony of a witness who did not participate in the crime charged. This rule becomes particularly important when there's nothing in the evidence, either direct or circumstantial, to corroborate the alleged accomplice's accusation that the defendant participated in this crime.
>
> Without such corroboration, you should not find the defendant guilty unless, after careful examination of the alleged accomplice's testimony, you are satisfied beyond a reasonable doubt that it is true and that you may safely rely upon it. Of course, if you're so satisfied, you would be justified in relying upon it, despite the lack of corroboration, in finding the defendant guilty.

(A-1516). [See also A-610 (Dashaun White)].

This is what is referred to as a modified Bland instruction updating language in Bland v. State, 263 A.2d 286, 288-90 (Del. 1970). The accomplice credibility instruction given to McCoy's guilty phase jury (A-610, 1516) appears to track almost verbatim the modified Bland instruction this Court set forth in Brooks v. State, 40 A.3d 346, 350 (Del. 2012). See also State v. Purnell, 2013 WL 4017401 (Del. Super. May 31, 2013) at * 5; State v. Sierra, 2012 WL 3893532 (Del. Super. Sept. 6, 2012) at * 6; State v. Garden, 2011 WL 1887110 (Del. Super. May 16, 2011) at * 4. In 1970, this Court in Bland, 263 A.2d at 288, required that a trial judge instruct the jury to examine the testimony of an alleged accomplice "with

suspicion and great caution." Torrence v. State, 2012 WL 2106219 (Del. June 11, 2012) at * 2 n. 8. The slightly different language employed in Brooks, 40 A.3d at 350, is the reason that the newer version is denominated a "modified Bland" jury instruction. See Guy v. State, 82 A.3d 710, 712 (Del. 2013). See also Neal v. State, 80 A.3d 935, 942-43 (Del. 2013).

Not only did the pro se defendant at trial not note any exception to the modified Bland jury instruction given (A-610, 1516, 1520), McCoy in his earlier closing argument quoted the instruction later given (A-1516) in its entirety. (A-1484-85). After quoting the upcoming instruction (A-1484-85), McCoy next argued to the guilt phase jury, "Now, Rakeisha Williams and Dashawn White are both – everything they stated is accomplice testimony." (A-1485). The accused in closing argument did not claim that Talon Bishop was an accomplice, a prerequisite for a modified Bland instruction. (A-1484-96).

In rebuttal closing, the State also briefly quoted a portion of the upcoming modified Bland accomplice credibility jury instruction. (A-1497). Thus, not only did McCoy's jury receive a modified Bland accomplice credibility jury instruction (A-1516), but both parties in their earlier closing arguments informed the jury that such an instruction would be forthcoming. (A-1484-85, 1497). A review of the guilt phase jury instructions (A-610, 1516), and the respective closing arguments of the parties (A-1484-85, 1497) does not support the first appellate claim that the trial

court failed to give a modified Bland accomplice credibility instruction.

Second, the related appellate argument that a modified Bland instruction was required because juvenile prosecution witness Talon "Bishop identified himself as an accomplice." (Corrected Opening Brief at 30) is also unsupported by the 2012 trial record. To qualify as an accomplice under 11 Del. C. § 271(2)b, Talon Bishop, intending to promote or facilitate the robbery of James Munford, had to aid, counsel or agree or attempt to aid Isaiah McCoy in committing the robbery of Munford. See Kane v. State, 1995 WL 449342 (Del. July 26, 1995) at * 3 (accomplice liability may "be imposed as long as the actor intended to promote or facilitate the offense committed by the principal . . . ."). Accomplice liability may be imposed if the actor aided others in committing the offense, and unlike conspiracy no explicit agreement is necessary. Turner v. State, 25 A.3d 774, 776 (Del. 2011). While an agreement is unnecessary for accomplice liability, there must still be a specific intent to aid in the commission of an offense. "The jury instruction must be adapted to the factual situation of each trial and conform to the evidence." Dixon v. State, 673 A.2d 1220, 1227 (Del. 1996) (citing Probst v. State, 547 A.2d 114, 120 (Del. 1988), and Johnson v. State, 550 A.2d 903, 907 (Del. 1988)).

The June 2012 Superior Court trial evidence did not support any factual finding that Talon Bishop was an accomplice to Isaiah McCoy in the robbery and murder of James Munford. Likewise, Bishop in his June 11, 2012 trial testimony

did not self-identify himself as an accomplice to McCoy for the crimes McCoy committed on May 4, 2010. (A-945-66). Accordingly, there was no factual basis for classifying Bishop as an accomplice or giving a modified Bland jury instruction relating to Bishop's trial testimony.

On May 2, 2010, then 15 year old Talon Bishop lived in Camden, Delaware with his mother Loretta Williams, (A-946, 953). He observed that his mother kept a gun, a revolver, under her mattress. (A-946). The gun had a locking device, and there was a bag of bullets next to his mother's bed. (A-946). On May 2, 2010, Bishop was going to play basketball at Rodney Village with his 18 year old friend Abdul Bumbrey. (A-946, 953). That day Bishop took his mother's revolver and the key to unlock the firearm. (A-946). Bishop claimed that he took the gun to protect his friend Bumbrey because "We were going to play basketball at Rodney Village on Mayfair; and there were these boys that didn't like my friend, and I took it to make sure nothing happened because there was a bunch of them." (A-946). Bishop acknowledged that the gun was loaded when he took it. (A-046-47).

Bumbrey played basketball on May 2, while Bishop watched on the sideline. (A-947). After the game ended, Bumbrey's girlfriend Chastity had her baby in the car, and "She didn't want the gun in the car with her baby." (A-947, 954). Unable to ride in the car with his mother's gun, Bishop gave the gun to Isaiah McCoy "to hold, and he – he said he'd bring it back." (A-947). Bishop was in McCoy's

basement when he gave McCoy the gun. (A-948).

The next day, May 3, 2010, Bishop called McCoy to get the gun back. (A-948). Bishop testified: "I called him and told him to bring it over, and he said he would." (A-948). When McCoy did not return the gun as promised, Bishop telephoned his mother and informed her that he had taken her gun. (A-948). Bishop eventually spoke with McCoy about the gun, but at the point McCoy claimed that he no longer had the revolver. (A-948). Bishop, who was 17 years old by the time of trial in 2012 (A-946), stated: "He told me something that the cops – the cops thought there was something – he said, like, he threw it in a bush and walked away or something." (A-948). Bishop searched unsuccessfully where McCoy claimed to have discarded the weapon, and he telephoned McCoy several times. (A-948).

Contrary to Bishop's June 11, 2012 trial testimony about his mother's gun, McCoy in his cross-examination testimony on June 19, 2012, denied that Bishop came over to his house on May 2, 2010, and gave him a gun. (A-1262). McCoy also denied receiving bullets and the key to unlock the gun's trigger. (A-1262). The following day at trial, June 20, 2012, McCoy explained further about the gun during his redirect testimony. (A-1313). The defendant testified:

> Pertaining to the Talon Bishop, he did in fact call me trying to get the weapon back; but the way he said it was wrong. He brought the firearm out to Rodney Village to show off and some people took it from him. Being that he knows I am from the area; I know the people,

> he came to me and asking me could I try to get it back. I attempted to try to get it back; and I wasn't able to. I was pretty much his go-between to try to get it back. He told me pretty much they couldn't use it anyway because it was locked and the key was at his mom's house. And that was pretty much the situation with Talon. I guess he tried to get himself out of trouble even though he stole it from his mother's house – try to get himself out of trouble by saying something other than that.

(A-1313).

Not only did McCoy deny ever having possession of Loretta L. Williams' revolver, but he accused Talon Bishop of concocting a story to avoid responsibility for the missing firearm. (A-1313). Given this trial record, there is no evidentiary basis to infer that Bishop gave McCoy his mother's gun in order to aid in the commission of any crime. McCoy denies ever having possession of the revolver. (A-1262, 1313). Bishop says he only gave McCoy the gun to hold two days before Munford's shooting because he was not allowed to ride in Chastity's car with the weapon. (A-947, 954). On the basis of this record, it cannot be argued that Talon Bishop was an accomplice to McCoy's May 4 crimes. Thus, there was no reason for a modified Bland instruction as to Bishop's limited trial testimony.

McCoy has not carried his burden of persuasion in demonstrating plain error in this instance. See United States v. Olano, 507 U.S. 725, 734 (1993); Brown v. State, 897 A.2d 748, 753 (Del. 2006).

III. THERE WAS SUFFICIENT EVIDENCE FOR ALL THE CONVICTIONS

QUESTION PRESENTED

Did the State present sufficient evidence to convict Isaiah McCoy of six offenses?

STANDARD AND SCOPE OF REVIEW

Appellate review of a trial judge's denial of a defense motion for judgment of acquittal [A-1431-34; State v. McCoy, 2012 WL 2835052 (Del. Super. June 26, 2012)] is de novo to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the statutory elements of each of the offenses charged beyond a reasonable doubt. See Bethard v. State, 28 A.3d 395, 397-98 (Del. 2011).

MERITS OF ARGUMENT

On the twelfth day of trial (June 18, 2012), the State rested after the completion of its case-in-chief. (A-1183). The pro se defendant moved for a judgment of acquittal (A-1183), and both parties presented argument to the Superior Court. (A-1183-86). The trial judge then ruled: "The Court, pursuant to Rule 29, will reserve decision on the motion until the close of all the evidence at this point." (A-1186). A week later after the conclusion of all the evidence on June 25, 2012, the trial judge denied McCoy's motion for judgment of acquittal. (A-1431-34). The next day the Superior Court issued a written Opinion on the defense

motion. State v. McCoy, 2012 WL 2835052 (Del. Super. June 26, 2012).

The Superior Court correctly denied the defense trial motion for a judgment of acquittal (A-1431-34) because viewing the prosecution's case, including all reasonable inferences from that evidence, in the light most favorable to the State, a rational trier of fact could have found each of the statutory elements of the crimes charged beyond a reasonable doubt. See Bethard v. State, 28 A.3d 395, 397-98 (Del. 2011); Winer v. State, 950 A.2d 642, 646 (Del. 2008). In ruling on such a motion a court does not distinguish between direct and circumstantial evidence. See Vincent v. State, 996 A.2d 777, 779 (Del. 2010); Skinner v. State, 575 A.2d 1108, 1121 (Del. 1990). While McCoy, testifying in his own defense (A-1191-1279, 1289-1307), claimed to be at home on May 4, 2010, and not at the crime scene, no other witnesses confirmed this explanation. (A-1193-94, 1304). The jury as the trier of fact and the sole judge of witness credibility was free to reject the testimony of McCoy, who had prior criminal convictions for motor vehicle theft in 2007, and criminal impersonation for lying to the police in 2009, as well as juvenile convictions for attempted first degree robbery and a weapon offense (A-1255), and accept the testimony of eyewitnesses Dashaun White and Rekeisha Williams. See Knight v. State, 690 A.2d 929, 932 (Del. 1996) (trier of fact sole judge of witness credibility); Quarles v. State, 696 A.2d 1334, 1340 (Del. 1997); Robertson v. State, 630 A.2d 1084, 1095 (Del. 1993); Pryor v. State, 453 A.2d 98, 100 (Del. 1982);

Tyre v. State, 412 A.2d 326, 330 (Del. 1980).

A jury verdict will not be set aside merely because it is based upon conflicting evidence. Zutz v. State, 160 A.2d 727, 729 (Del. 1960). An appellate court does not weigh competing evidence since that is the function of the jury. Rather, an appellate court only determines if competent evidence exists in the record upon which the guilty verdict may reasonably be based. Zutz, 160 A.2d at 729. The evidence presented by the State at trial need not compel a finding of guilt in order to be sufficient to support the verdict. See generally Chao v. State, 604 A.2d 1351, 1363 (Del. 1992).

Dashaun White testified at trial that he and his uncle, Isaiah McCoy, walked over to the Brunswick bowling alley at the Rodney Village Shopping Center south of Dover. (A-614). When the two arrived, they approached James Munford's white Suburban SUV from the rear. (A-614). McCoy got in the back seat of the vehicle occupied by Munford and Rekeisha Williams while White remained outside. (A-368-69, 614).

After entering Munford's vehicle, McCoy pulled out a gun and pointed it at Munford between the two front seats. (A-370, 614). White said that McCoy then asked Munford to give him everything he had. (A-615). Williams requested to leave the SUV, and McCoy allowed her to exit. (A-370, 615). McCoy then asked his nephew White to go around to the driver's side of the SUV so that Munford

could not flee. (A-370, 615).

White observed Munford give McCoy what was later determined to be contraband Ecstasy pills. (A-615). Next, as Munford attempted to leave his vehicle, White heard a gunshot and Munford made a loud noise. (A-615). Williams also testified that while she was running from the SUV, she heard two gun shots. (A-371). According to White, Munford fell out of his SUV, got up, and started to run away. (A-615). White heard additional shots from within the SUV as Munford was attempting to flee. (A-615). White, who was 21 years old at the time of trial in 2012 (A-610), described McCoy's actions by stating, "Being in the back seat, he leaned over in between the middle of the two seats to the driver's side and began to shoot out the driver's side." (A-616).

After the shooting, McCoy told White to get into Munford's SUV and drive away. (A-616). When White got to the house he shared with McCoy's mother (A-617), he observed McCoy with two bags of pills in a soft lunch box that was not present in the home earlier. (A-618). Later Williams also ended up at the McCoy house, and she testified that approximately two days after the crime she overheard McCoy tell someone over the phone that he was responsible for the bowling alley shooting. (A-373).

The bowling alley surveillance video does show two men approaching Munford's SUV, and one of the men then walks to the driver's side door. (A-344).

The video also shows Munford leaving his vehicle and falling to the ground. (A-332, 345, 348). The man on the driver's side then enters the vehicle and drives away. (A-333). Munford's SUV was recovered near McCoy's home. (A-1014).

Based upon this trial evidence, a rational trier of fact could convict McCoy of the six crimes charged. The trial judge also heard this same evidence and his denial of McCoy's motion for a judgment of acquittal was correct. (A-1431-34). In his opinion, the judge discusses the statutory elements of the crimes alleged and the evidence establishing those elements. State v. McCoy, 2012 WL 2835052 (Del. Super. June 26, 2012) at * 1-4. This legal analysis is correct.

In his Corrected Opening Brief at 33, McCoy cites two State court decisions from Arkansas for the proposition that the trial testimony of White and Williams required corroboration since the two were arguably accomplices. While some states require accomplice testimony to be corroborated for a criminal conviction, that was not a requirement at common law. See Sparkman v. State, 133 N.W.2d 776, 778 (Wisc. 1965) (at common law the "uncorroborated testimony of an accomplice could be accepted by the jury unless it was bald perjury, preposterous or self-contradictory."); 29 Am. Jur.2d Evidence § 1408 (2014). Likewise, "Delaware law does not require the testimony of an accomplice to be corroborated . . . ." Smith v. State, 991 A.2d 1169, 1178 (Del. 2010). See also Bland v. State, 263 A.2d 286, 288 (Del. 1970); O'Neal v. State, 247 A.2d 207, 210 (Del. 1968) ("It is settled in

this State that a conviction may stand upon the uncorroborated testimony of an accomplice if the jury is satisfied beyond a reasonable doubt that the testimony is true."). The contrary Arkansas law cited by McCoy is not the rule in Delaware. Nor is this the "rare case" like Washington v. State, 4 A.3d 375, 378 (Del. 2010), where even the victim said there were two, not three, crime participants.

There is also no rule in Delaware that a capital murder conviction requires any "heightened reliability" beyond the normal proof beyond a reasonable doubt standard. (Corrected Opening Brief at 38-39). This is not the law in Delaware, and McCoy's contrary argument is unpersuasive.

Finally, McCoy's conclusory assertion that his convictions violate the Delaware State Constitution may be summarily rejected for failure to follow the strictures of Ortiz v. State, 869 A.2d 285, 290-91 & n. 4 (Del. 2005 ("In the future, conclusory assertions that the Delaware Constitution has been violated will be considered to be waived on appeal."). See Jackson v. State, 990 A.2d 1281, 1288 (Del. 2009); Betts v. State, 983 A.2d 75, 76 n. 3 (Del. 2009); Sykes v. State, 953 A.2d 261, 266 n. 5 (Del. 2008).

IV. THERE WAS NO PROSECUTORIAL MISCONDUCT

QUESTION PRESENTED

Did the trial prosecutor's statements and conduct during trial constitute prosecutorial misconduct?

STANDARD AND SCOPE OF REVIEW

Unobjected to statements and conduct of the trial prosecutor claimed to constitute prosecutorial misconduct are waived and may only be reviewed on appeal for plain error. Del. Supr. Ct. R. 8; Whittle v. State, 77 A.3d 239, 243 (Del. 2013). Claims of constitutional violations are reviewed de novo. See Panuski v. State, 41 A.3d 416, 419 (Del. 2012); Norman v. State, 976 A.2d 843, 857 (Del. 2009).

MERITS OF ARGUMENT

On direct appeal, McCoy makes three claims of prosecutorial misconduct at the 2012 Superior Court jury trial: (1) improper vouching for a State witness (A-429, 432, 453-54); (2) disparaging the accused's pro se status; and (3) exploiting and threatening the accused. (Corrected Opening Brief at 40-52). The trial conduct of the prosecutor did not constitute prejudicial error. The conclusory allegations of State Constitutional violations may be summarily rejected for failure to comply with the requirements of Ortiz v. State, 869 A.2d 285, 290-91 & n. 4 (Del. 2005). See Sykes v. State, 953 A.2d 261, 266 n. 5 (Del. 2008).

The standard of review utilized by this Court on direct appeal in reviewing

prosecutorial misconduct claims depends upon how the issue was presented in the trial court. Kirkley v. State, 41 A.3d 372, 376 (Del. 2012) (citing Baker v. State, 906 A.2d 139, 148 (Del. 2006)). "If defense counsel raised a timely objection to the conduct at trial, or if the trial judge considered the issue sua sponte, then the conduct is reviewed for harmless error. Otherwise, the conduct is reviewed for plain error." Kirkley, 41 A.3d at 376. In McCoy's case the three specific claims he raises were unobjected to by the pro se defendant, so a plain error analysis is utilized. The one exception appears to be the trial judge's comment to the prosecutor on the third day of the penalty hearing (July 5, 2012). (A-1638). Since the trial judge did raise that matter sua sponte during the penalty hearing, a harmless error analysis should be employed. See Kirkley, 41 A.3d at 376.

In the introductory section of Argument IV of his Opening Brief, McCoy does quote the trial judge's pointed comments to one of the prosecutors. (A-1638). To evaluate the trial judge's remarks for harmless error, it is important to place the occurrence in context. The remarks by the trial judge were made outside the presence of the jury (A-1637) on the third day of the penalty hearing. (A-1600-52). By this time the jury had already convicted McCoy at the guilt phase and rejected the accused's prior testimony that he was at home when the bowling alley shooting occurred. During the second day of the penalty hearing, "At approximately 2:30 p.m. on July 3, 2012, McCoy voluntarily absented himself from the proceedings

despite the best efforts of the Court to persuade him to stay." State v. McCoy, 2012 WL 5552033 (Del. Super. Oct. 11, 2012) at * 1. This was the first of three occasions when McCoy chose not to attend portions of his penalty hearing. Id. at * 1.

The trial judge's July 5 comments to one of the prosecutors (A-1638) occurred when Dover Police Department Lieutenant Jason Pires (A-1621) was testifying about papers seized from McCoy's prison cell relating to Blood gang activity. Pires was interpreting language in a letter, State's Exhibit # 12, when McCoy noted an objection. (A-1635-37). The jury was removed to hear McCoy's evidentiary objection. (A-1637). The document was part of several items, State's Exhibits # 7-19, that were introduced through Detective Ryde the previous day when McCoy was not present. (A-1637-38).

The trial judge stated that he was asking the prosecutor how the author of the seized items was being established "because Mr. McCoy was not here yesterday." (A-1638). After the prosecutor replied, "That's his choice," the trial judge added: "Listen, I'm reaching a level which I am very upset." (A-1638). When the prosecutor next asked, "About what?," that is when the quoted remarks of the trial judge occurred. (A-1638). The trial judge's comments that McCoy quotes at pages 42-43 of his Corrected Opening Brief are actually only the first portion of the remarks. (A-1638). The remainder of the trial judge's comments were addressed to

whether or not the handwriting on the document at issue could be established as McCoy's. (A-1638). When the trial judge concluded, McCoy stated that his objection to State's Exhibit # 12 is that it is "not in my handwriting." (A-1638).

While McCoy argues on appeal that the trial judge should have declared a mistrial or given a curative instruction (Corrected Opening Brief at 43), neither of those suggested remedies was required. Any unprofessional comments of the one prosecutor appeared to have ceased after the trial judge's rebuke (A-1638), and the penalty hearing proceeded until the State's closing argument on July 10, 2012. Any error in the prosecutor's conduct was corrected by the trial judge, and, as a consequence, any error is harmless beyond a reasonable doubt. Del. Super. Ct. Crim. R. 52(a); Chapman v California, 386 U.S. 18, 24 (1967); Drummond v. State, 51 A.3d 436, 441 (Del. 2012). The difficulties noted by the trial judge (A-1638) do not reappear in the remainder of the penalty hearing, so the admonitions were heeded. As long as the conduct was corrected, there was no need for "a curative instruction," especially since the most pertinent remarks all occurred outside the jury's presence. (A-1637-39).

A mistrial was unnecessary, and that remedy is "appropriate only when there are no meaningful or practical alternatives to that remedy . . . ." Justice v. State, 947 A.2d 1097, 1100 (Del. 2008). See Gomez v. State, 25 A.3d 786, 793-94 (Del. 2011). "A trial judge should grant a mistrial only where there is a 'manifest

necessity' or the 'ends of public justice would be otherwise defeated.'" Steckel v. State, 711 A.2d 5, 11 (Del. 1998) (quoting Fanning v. Superior Court, 320 A.2d 343, 345 (Del. 1974)). Whether a mistrial should be granted lies within the trial judge's discretion. See McNair v. State, 990 A.2d 398, 403 (Del. 2010). This grant of discretion recognizes that the trial judge is in the best position to assess the risk of any prejudice resulting from trial events. See Sykes v. State, 953 A.2d 261, 267 (Del. 2008). No similar subsequent incident occurred, so the trial judge was apparently satisfied that his warning to counsel was taken to heart. No mistrial this late in the proceeding was required.

A. IMPROPER VOUCHING

On the second day of the guilt phase proceeding (May 30, 2012), Rekeisha Williams testified on direct examination that while she was in the basement of Isaiah McCoy's home she overheard McCoy speaking on the telephone. (A-373). According to Williams, McCoy stated: "Did you hear that shooting. That was me." (A-373). The following day at trial (May 31, 2012), Williams was being cross-examined by McCoy when the prosecutor objected to a question about whether Dashaun White spoke to her. (A-429). The prosecutor stated: "She didn't talk to him. She obviously hasn't spoken to the defendant since he shot her boyfriend." (A-429). McCoy did object to the second sentence in the prosecutor's objection. (A-432). Although the trial judge said he did not hear the prosecutor's remark, the

judge said if it was made, it is inappropriate and should not have been made. (A-432). The prosecutor's explanation was that he was merely repeating Williams' earlier testimony. (A-454).

On appeal, McCoy argues that the prosecutor's statement was improper vouching. (Corrected Opening Brief at 43-46). "Improper vouching occurs when one witness bolsters the credibility of another witness by testifying that the other witness is telling the truth." Quintero v. State, 2006 WL 3392915 (Del. Nov. 22, 2006) at * 2 (citing Capano v. State, 781 A.2d 556, 595 (Del. 2001)). A prosecutor may also commit improper vouching if "the prosecutor implies personal superior knowledge beyond what is logically inferred from the evidence at trial." Kirkley v. State, 41 A.3d 372, 377 (Del. 2012). See also Whittle v. State, 77 A.3d 239, 243-48 (Del. 2013).

No improper vouching occurred in McCoy's case because the challenged statement of the prosecutor (A-429) was accurate and based upon Williams' own prior direct testimony a day earlier. (A-373). According to Williams' prior testimony, McCoy admitted over the phone that he shot Munford. (A-373). Based on this trial record, there was no improper vouching in the flamboyant remark. (A-429). The prosecutor was not attempting to testify, and the jury was previously instructed that the only evidence in the case is what you will hear from the witness stand. (A-325).

B. DISPARAGING RIGHT OF SELF-REPRESENTATION

During the preliminary jury instructions on the first day of the guilt phase proceeding (May 29, 2012), McCoy's jury was instructed: "A defendant has an absolute right to representation by counsel . . . . He also has the right of self-representation. In this case, the defendant, Isaiah McCoy, has made that choice and is representing himself." (A-324). Thus, the jury was informed at the outset that McCoy was acting as his own attorney in the trial and that he had a right to do so. (A-324).

In this direct appeal, McCoy argues that various comments by the prosecutor disparaged the defendant and his right to self-representation. (Corrected Opening Brief at 46-49). Of the 11 specific remarks McCoy cites in his Opening Brief, only one reference to a single sentence uttered by the prosecutor on June 20, 2012, during the defense case (A-1347), appears to have occurred in the presence of the jury. One other reference to A-935 at 14 appears to be an incorrect citation, and it cannot be located to determine whether or not the jury was present. The other 9 remaining citations by McCoy are all to comments occurring when the jury was not present. (A-232, 937, 939, 940, 1344, and 1573). For example, the first challenged prosecutorial remark (A-232) occurred at a pretrial office conference on May 10, 2012, over 2 weeks before trial commenced.

If at least 9 of the 11 contested remarks occurred outside the jury's presence,

it is not apparent how McCoy suffered any prejudice. The one prosecutorial remark ("That's what happens when you call a State's witness.") referring to McCoy recalling Dashaun White as a defense witness and then complaining that the State's cross-examination of White was turning into another direct examination appears both accurate and not particularly negative. Given the fact that virtually all of the remarks cited by McCoy were never heard by his jury, any possible error is at worst harmless beyond a reasonable doubt. Del. Super. Ct. Crim. R. 52(a); Chapman v. California, 386 U.S. 18, 24 (1967). If any prosecutorial remarks were unduly critical of McCoy, the statements did not deter the accused from presenting his intended defense and taking the witness stand himself.

C. EXPLOITING AND THREATENING THE DEFENDANT

Lastly, McCoy argues that the State took unfair advantage of the accused's pro se status by presenting otherwise inadmissible evidence and by making a threatening remark about gang retribution (A-1631-33) during the penalty phase. The three examples McCoy gives of inadmissible evidence (A-858, 894, and 934) are certainly debatable. Two witnesses said McCoy had Ecstasy. Individuals who are acquainted with a contraband drug such as Ecstasy can identify the substance as such. (A-858, 894). This is simply permissible lay opinion evidence. D.R.E. 701; Campbell v. State, 974 A.2d 156, 164 (Del. 2009) (veteran drug user could testify that substance he ingested was methamphetamine). Loretta Williams could also

testify that what she heard over the telephone was a statement of a party opponent (McCoy) that was admissible as a hearsay exception under D.R.E. 801(d)(2). Williams' son, Talon Bishop, had been attempting to retrieve her gun from McCoy prior to May 4 by means of a series of calls to McCoy. Williams had the phone number from her son, and there was at least circumstantial evidence that the person she spoke to was McCoy. Since Bishop testified to a similar statement made to him by McCoy about the loss of the gun, Williams' testimony was merely cumulative evidence. Even experienced counsel sometimes neglect to note an evidentiary objection. If a pro se defendant missed only three arguable objections in a lengthy murder trial, it is not obvious that the State was exploiting his lack of knowledge.

McCoy's final complaint about the prosecutor making a threatening comment about gang retribution (A-1631-33) is also not a basis for relief. The prosecutor said the admitted remark was not addressed to McCoy, but to the co-prosecutor and the investigating police officer. (A-1631). McCoy has made no showing how the remark adversely affected the presentation of his defense. In the absence of any discernible prejudice, any possible error is again at worst harmless beyond a reasonable doubt. Del. Super. Ct. Crim. R. 52(a).

V. THE DELAWARE DEATH PENALTY STATUTE IS CONSTITUTIONAL

QUESTION PRESENTED

Does Alleyne v. United States, 133 S. Ct. 2151 (2013) render the Delaware death penalty statute, 11 Del. C. § 4209, unconstitutional?

STANDARD AND SCOPE OF REVIEW

A claim of a constitutional violation is reviewed de novo. See Ploof v. State, 75 A.3d 840, 851 (Del. 2013); Panuski v. State, 41 A.3d 416, 419 (Del. 2012).

MERITS OF ARGUMENT

Lastly, McCoy argues that "Delaware's capital punishment statute is unconstitutional." (Corrected Opening Brief at 53-54). Based upon his reading of the June 17, 2013 United States Supreme Court decision in Alleyne v. United States, 133 S. Ct. 2151 (2013), McCoy claims that 11 Del. C. § 4209 "violates the Due Process Clause and the Sixth Amendment to the United States Constitution by authorizing a judge to determine (1) mitigating circumstances and (2) whether aggravation outweighs mitigation." (A-1673-87). (Corrected Opening Brief at 53).

Alleyne v. United States, 133 S. Ct. 2151 (2013) is not a capital case. Its' holding is that any fact that increases the mandatory minimum for a sentence is an "element" of the offense that has to be found by the jury. Alleyne, 133 S. Ct. at 2161-63. At issue in Alleyne, 133 S. Ct. at 2155-56 was a federal statute defining minimum mandatory sentences for using or carrying a firearm in relation to a crime

of violence. The standard sentence for the crime is not less than 5 years. If the firearm is brandished, the sentence is not less than 7 years. Finally, if the firearm is discharged, the sentence is not less than 10 years. The factual question in Alleyne was whether Alleyne's accomplice "brandished" a gun when he robbed a store manager of daily deposits the manager was taking to a bank. Alleyne's 5 year minimum mandatory sentence was raised to 7 years minimum based on the sentencing judge's finding that the gun was brandished during the robbery. Id. at 2156. The U.S. Supreme Court in Alleyne reasoned that "because the fact of brandishing aggravates the legally prescribed range of allowable sentences, it constitutes an element of a separate, aggravated offense that must be found by the jury . . . ." Id. at 2162.

On the basis of the noncapital decision in Alleyne, where the defendant received a 7 year, rather than a 5 year, minimum mandatory firearm sentence, McCoy broadly argues that "it is impossible to dissociate non-statutory aggravators and mitigating factors that are 'part of the total mix' in weighing whether to impose death." (Corrected Opening Brief at 54). What McCoy ignores is the limiting language in Alleyne, 133 S. Ct. at 2163, where the U.S. Supreme Court noted: "In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our holding today does not mean that any fact that influences judicial discretion must be found by a

jury."

The 2013 noncapital sentencing decision in Alleyne does not expand Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000) to render the Delaware death penalty sentencing statute, 11 Del. C. § 4209, amended after the Ring decision, unconstitutional on its face. Alleyne is only relevant for situations where the minimum possible sentence is increased by a fact not found beyond a reasonable doubt by the finder of fact, the jury. That is not the circumstance with 11 Del. C. § 4209. The minimum sentence has been and remains life.

After the 2002 decision in Ring, 11 Del. C. § 4209(e) was amended, and the amended statute was found constitutional by this Court in Brice v. State, 815 A.2d 314 (Del. 2003). "The Delaware Supreme Court has not deviated from this position." State v. Small, 2011 WL 1326372 (Del. Super. Jan. 20, 2011) at * 1. In Brice, 815 A.2d at 322, this Court pointed out that "Ring does not, however, require that the jury find every fact relied upon by the sentencing judge in the imposition of the sentence." As further explained in Swan v. State, 820 A.2d 342, 359 (Del. 2003), "Once a jury finds unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance the defendant becomes death eligible and Ring's constitutional requirement of jury fact-finding is satisfied." The constitutionality of Delaware's hybrid capital sentencing scheme

was further affirmed in Ortiz v. State, 869 A.2d 285, 305 (Del. 2005) ("Once again, we adhere to our holding in Brice that Delaware's hybrid form of sentencing, allowing the jury to find the defendant death eligible and then allowing a judge to impose the death penalty once the defendant is found to be death eligible, is not contrary to the Sixth Amendment of the United States Constitution, as construed in Apprendi and Ring.").

Just as this Court found in Ortiz v. State, 869 A.2d 285, 306 (Del. 2005), that a then recent U.S. Supreme Court decision in another noncapital case, Blakely v. Washington, 542 U.S. 296 (2004), did not affect the constitutionality of Delaware's death penalty statute, the noncapital decision in Alleyne is of similar nonapplication. Alleyne is concerned with the jury fact finding necessary to increase the minimum mandatory sentence for a federal firearms offense. It does not extend so far as to render the Delaware death penalty statute [11 Del. C. § 4209] facially invalid.

VI. THE DEATH SENTENCE IS NOT DISPROPORTINATE

QUESTION PRESENTED

Is the death sentence imposed upon McCoy disproportionate?

STANDARD AND SCOPE OF REVIEW

Under 11 Del. C. § 4209(g)(2)a, this Court must automatically review a death sentence to determine whether the sentence is "disproportionate to the penalty recommended or imposed in similar cases . . . ." See Sykes v. State, 953 A.2d 261, 273 (Del. 2008); Ortiz v. State, 869 A.2d 285, 306-07 (Del. 2005); Swan v. State, 820 A.2d 342, 359 (Del. 2003).

MERITS OF ARGUMENT

There were three statutory aggravating circumstances alleged at McCoy's July 2012 penalty hearing. (A-1701). First, the defendant was previously convicted of a felony involving the use of or threat of force or violence upon another person. 11 Del. C. § 4209(e)(1)i. Second, the murder was committed while the defendant was engaged in the commission of a robbery. 11 Del. C. § 4209(e)(1)j. This second allegation related to the intentional murder count. Third, relating to the felony murder count, the murder was committed while the defendant was engaged in the commission of, or attempt to commit, a flight after committing or attempting to commit robbery in the first degree. 11 Del. C. § 4209(e)(2). The third statutory aggravating circumstance was established by the jury's guilty verdict

for the felony murder charge. State v. McCoy, 2012 WL 5552033 (Del. Super. Oct. 11, 2012) at * 2.

On July 11, 2012, the penalty phase jury unanimously found beyond a reasonable doubt the two statutory aggravating circumstances submitted for their deliberation. (A-1708). The prior violent felony conviction was McCoy's February 3, 2004 conviction for attempted first degree robbery. (A-1701, 1708). The penalty phase jury by a vote of 10 to 2 also found that the aggravating circumstances outweighed the mitigating circumstances. (A-1708). The Superior Court Judge on October 11, 2012 sentenced McCoy to death. State v. McCoy, 2012 WL 5552033 (Del. Super. Oct. 11, 2012) at * 5-10.

The sentencing judge noted that 25 year old McCoy "has shown a propensity for violent conduct," was on bail at the time of the murder, and "has shown no remorse or acceptance of responsibility for the offenses . . . ." McCoy, supra at * 6. McCoy's adult criminal record consisted of 7 felony and 3 misdemeanor convictions, and his juvenile criminal history included 11 delinquency adjudications, including 2 felonies. Id. The Superior Court Judge also observed that McCoy "seems to relish the fact that he is a successful drug dealer. In fact he smiled during testimony related to his drug selling activity and seems to demonstrate to a large degree of defiance to conforming to the law." Id.

Pursuant to the statutory review required by 11 Del. C. § 4209(g)(2)a, this

Court must determine if McCoy's death sentence is disproportionate to the penalty imposed in similar cases. This statutory inquiry involves a review of the "universe" of other first degree murder cases that proceeded to a penalty hearing in Delaware. See Sykes v. State, 953 A.2d 261, 273 (Del. 2008) (citing Starling v. State, 903 A.2d 758, 765 (Del. 2006)). See also Ortiz v. State, 869 A.2d 285, 310 (Del. 2005); Swan v. State, 820 A.2d 342, 361 (Del. 2003); Norcross v. State, 816 A.2d 757, 769 (Del. 2003). In truth, McCoy actually received two death sentences [Cr. A. Nos. IK10-06-0526 and IK10-07-0084], one for the intentional murder conviction and a second for his felony murder conviction.

Although a definitive comparison of the cases is "almost impossible," Clark v. State, 672 A.2d 1004, 1010 (Del. 1996), this Court considers the factual background of the particular sentence. E.g., Ortiz, 869 A.2d at 311; Dawson, 637 A.2d at 68; Sullivan v. State, 636 A.2d 931, 950 (Del. 1994). Thus, "a review of some objective factors, including the gravity of the offense, the circumstances surrounding the crime, and the harshness of the penalty is helpful in reaching a determination of whether or not this case fits within a pattern of Delaware death sentence precedent." Zebroski v. State, 715 A.2d 75, 84 (Del. 1998).

This inquiry is intended to eliminate the possibility that a death sentence in any given case may be an aberration. This Court's function in the calculus is not to search for proof that a particular defendant's death sentence is perfectly

symmetrical to that imposed in another case, but to identify the sentence that markedly diverges from the norm. See Flamer v. State, 490 A.2d 104, 144 (Del. 1983). Even if a defendant receives a death sentence when the circumstances are similar to those of an offense where a life sentence was imposed, the death sentence is not disproportionate when there is a discernible basis for the lesser sentence. See Zebroski, 715 A.2d at 84; Flamer, 490 A.2d at 144. Even when there is no discernible distinction between the cases, a death sentence is not necessarily disproportionate. Cf. Gregg v. Georgia, 428 U.S. 153, 203 (1976).

McCoy presents no argument in his Corrected Opening Brief that his two death sentences are disproportionate. A review of the applicable "universe" of Delaware death penalty prosecutions reveals no disproportionality in McCoy's case. McCoy's May 4, 2010 murder of James Munford was "unnecessary and avoidable" [State v. McCoy, 2012 WL 5552033 (Del. Super. Oct. 11, 2012) at * 10], and was perpetrated in connection with a robbery of an apparently defenseless individual. In the robbery McCoy took 200 Ecstasy pills and victim's vehicle. Like several other Delaware cases where a death sentence has been imposed for a murder occurring during the commission or attempted commission of first degree robbery, McCoy's death sentence is not an anomaly. See Swan v. State, 820 A.2d 342 (Del. 2003); Norcross v. State, 816 A.2d 757 (Del. 2003); Zebroski v. State, 715 A.2d 75 (Del. 1998) (attempted first degree robbery); Dawson v. State, 637 A.2d 57 (Del. 1994);

Sullivan v. State, 636 A.2d 931 (Del. 1994). Even prior to the November 4, 1991 amendment of 11 Del. C. § 4209, when the jury, not the judge, decided the appropriate sentence, the death penalty was imposed in Delaware murder cases involving a first degree robbery. See Deputy v. State, 500 A.2d 581 (Del. 1985); Riley v. State, 496 A.2d 997 (Del. 1985); Flamer v. State, 490 A.2d 104 (Del. 1983).

In sentencing McCoy in 2012, the Superior Court Judge wrote: ". . . I am struck by McCoy's churlish acceptance of what one is willing to do to promote illegal drug activity." State v. McCoy, 2012 WL 5552033 (Del. Super. Oct. 11, 2012) at * 6. The sentencing judge added: "McCoy has shown a lack of amenability to lesser sanctions. He continues to engage in unlawful activity. If released, I have no doubt he will return to the streets as a drug dealer and engage in conduct endangering the citizens of Delaware." McCoy, supra at * 6. Furthermore, "McCoy is an escape risk. McCoy has been convicted twice of Escape After Conviction, including a conviction that involved walking away from a work release program and remaining at large for three months." Id. at * 7.

McCoy is also not a good candidate for a sentence of life in prison. The sentencing judge pointed out:

> McCoy has shown an inability to conform his behavior to the rules and regulations of the Department of Correction. He engaged in an assault against a Correctional Officer the day after his arrest on these charges. This includes a threat toward a Correctional Officer in

> which he stated, "I have a body." He also punched a Correctional Officer in the face. It took four correctional officers to subdue him after the battery. The Department of Corrections has documented a number of other incidents involving anger, threats, verbal abuse, and sexual misconduct. Evidence was developed by the State as to McCoy's association with and his promoting or being a member of the "Bloods" criminal gang. Such gang activity within the prison poses a significant threat to others and does not bode well for his future success as a prisoner if he receives a life sentence.

McCoy, supra at * 7.

McCoy did not put on a mitigation case or allocute at the penalty hearing. McCoy, supra at * 7. No family member spoke on McCoy's behalf at the penalty hearing. Id. at * 10. Of course, McCoy did try to blame the murder on his nephew, so that may explain the reluctance of other family members. While McCoy presented no evidence at the penalty hearing, the sentencing judge did review a mitigation notebook prepared by the Public Defender prior to their discharge by McCoy as his counsel. Id. at * 7-9. In conclusion, the sentencing judge wrote: "McCoy has not been a productive member of society at any stage and he presents a real danger in the confined environment of a prison. He is not likely to be rehabilitated . . . ." Id. at * 10. His death sentence is not an aberration.

CONCLUSION

The judgment of the Kent County Superior Court should be affirmed.

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Dated: May 1, 2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ISAIAH W. McCOY,	)	
	)	
Defendant Below-	)	**No. 558/595, 2012**
Appellant,	)	**[CONSOLIDATED]**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 1st day of May 2014, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on May 1, 2014, she did electronically serve the attached State's Answering Brief properly addressed to:

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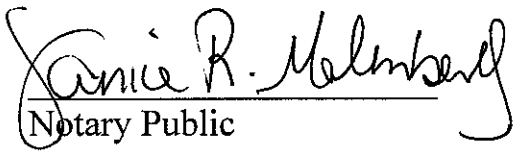
Mary T. Corkell

Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.



Notary Public