EFiled: Jul 08 2014 10:49AM EDT
Filing ID 55694869
Case Number 53,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMBROSE SYKES,	)	
	)	
Defendant Below-Appellant,	)	**No. 53, 2014**
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: July 8, 2014

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NATURE AND STAGE OF THE PROCEEDINGS

Following this Court's January 24, 2008 affirmance of Ambrose L. Sykes' Kent County Superior Court convictions and death sentence [Sykes v. State, 953 A.2d 261 (Del. 2008)], Sykes sought post-conviction relief in the trial court. On October 19, 2009, Sykes filed an amended motion for post-conviction relief containing 23 claims. (A-1733). Former defense counsel, Thomas Donovan (A-2766-76), and Christopher Tease (A-2762-65), filed responsive affidavits in February 2010. (A-1733-34).

In 2011 and 2012, the Superior Court held 11 days of evidentiary hearings on the post-conviction relief claims. State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) at * 1 (Exhibit A). After completion of the evidentiary hearings, Sykes in 2013 moved to amend his post-conviction motion a second time to add two additional claims. The Superior Court denied the 2013 motion to amend. State v. Sykes, 2013 WL 3834048 (Del. Super. July 12, 2013). Thereafter, the Superior Court denied the 2009 Rule 61 claims. State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) (Exhibit A).

On May 23, 2014, Sykes filed his Opening Brief in this Court in the appeal from the denial of post-conviction relief. This is the State's Answering Brief in opposition to Sykes' appeal. Sykes' Opening Brief addresses 5 of his post-conviction relief claims. The unbriefed claims are all waived. See Ploof v. State,

75 A.3d 811, 822-23 (Del. 2013); Somerville v. State, 703 A.2d 629, 631 (Del. 1997). See also Roca v. E. I. DuPont de Nemours & Co., 842 A.2d 1238, 1242 (Del. 2004).

SUMMARY OF ARGUMENT

I. DENIED. Trial counsel was not ineffective in failing to investigate and present additional mitigation evidence at the June 2006 penalty hearing. While additional mitigation evidence was offered at the 2011-2012 Rule 61 evidentiary hearing, this new mitigation evidence when combined with the original 2006 mitigation evidence was still outweighed by the strong aggravation evidence present in the case.

The Superior Court Judge did not abuse his discretion in denying post-conviction relief on the claim that former counsel was ineffective at the penalty phase. Regardless of any deficiencies of former counsel, Sykes still cannot demonstrate prejudice, a reasonable probability that he would not receive a death sentence.

Sykes fails to discuss the aggravation evidence that exists in his case.

II. DENIED. The trial judge's guilt phase mistaken reference to a defendant's right of allocution (A-3505-06) did not violate the accused's right to a fair trial before an impartial jury as guaranteed by the Sixth Amendment to the United States Constitution. The curative jury instruction [Sykes v. State, 953 A.2d 261, 268 (Del. 2008)] was sufficient to remedy any misunderstanding, and the defense mistrial motion (A-3680) was properly denied.

On direct appeal, Sykes made a similar complaint about the misplaced

allocution reference by arguing that the judicial comment violated the accused's Fifth Amendment right to remain silent. This Court correctly concluded that there was no reversible error in denying the mistrial motion. Sykes, 953 A.2d at 269. That prior direct appeal decision is now the law of the case, and Sykes' restatement of the contention as a Sixth Amendment claim is subject to the procedural bar of Del. Super. Ct. Crim. R. 61(i)(4) against previously adjudicated claims.

III. DENIED. A prior violent crime victim is not automatically disqualified from jury service. 10 Del. C. § 4509(b)(1-6). The trial judge's decision to seat the prospective juror and to allow her to remain on the jury through the guilt phase was not an abuse of discretion. The belated claim by the defendant's girlfriend, who had already testified twice as a witness, on the ninth day of trial that she knew juror No. 9 was not credible. The juror denied the majority of the witness' prior acquaintanceship claims, and a casual acquaintanceship is not a basis to remove an impaneled juror.

IV. DENIED. Trial counsel was not ineffective in failing to retain a forensic pathology expert. The medical expert retained for the Rule 61 evidentiary hearing added little new evidence that would have assisted the accused. A battle of medical experts over minor points does not call the ultimate trial result into question.

There was sufficient trial evidence for a rational trier of fact, viewing that

evidence in the light most favorable to the State, to find the accused guilty beyond a reasonable doubt of first degree rape, second degree burglary, and first degree kidnapping. The autopsy evidence of the victim's physical injuries and the DNA evidence of Sykes' semen inside the victim's vagina all pointed to rape. There was no trial evidence of a consensual sexual encounter or that the victim even knew her attacker. The accused unlawfully entered the victim's apartment with the intent to rape her and steal her property. The victim was bound, gagged and stuffed inside a suitcase as part of the kidnapping. She was strangled to death and was not released unharmed and at a safe location.

V. DENIED. After the victim was raped by Sykes, her legs were bound together by her pantyhose that had probably been removed along with other clothing prior to the sexual assault. Thus, the restraint of movement required for the kidnapping conviction occurred subsequent and not incidental to the burglary and rape.

STATEMENT OF FACTS

On direct appeal, the Delaware Supreme Court found the following operative facts:

> On November 8, 2004, sixty-eight year old Virginia Trimnell was scheduled to fly from Washington, D.C. to Detroit to visit her daughter. When Trimnell did not arrive as scheduled, her daughter contacted the Dover Police Department. Officer Jeffrey Gott went to check on Trimnell. Gott testified that when he arrived at Trimnell's apartment, it was tidy and undisturbed and observed no signs of forced entry. He also testified that he saw two shopping bags sitting on the bed. However, he could not locate Trimnell's car or purse.
>
> At approximately 3:30 a.m. on November 10, 2004, Dover Police Sergeant Timothy Mutter saw Trimnell's car traveling on Kings Highway in Dover. The driver, later identified as Sykes, got out of the vehicle, and Mutter asked him for his license and registration. Sykes initially complied but then fled after Mutter asked about Trimnell. The police could not apprehend Sykes that night.
>
> Police found Sykes's fingerprints on a shovel and a rubber glove inside Trimnell's car. The police also found three gas cans and women's clothing that matched what others saw Trimnell wearing on the day she disappeared. In the trunk of the vehicle, police found a large green suitcase with Trimnell's name and Trimnell's purse inside a green duffel bag. Police found Trimnell's body stuffed into the large green suitcase.
>
> An autopsy indicated that Trimnell died by strangulation. A sexual assault kit detected sperm in Trimnell's vagina. The autopsy did not, however, reveal any defense wounds on Trimnell. DNA testing was conducted. Sykes's saliva reference sample was ultimately determined to match all sixteen loci from Trimnell's vaginal swab. Sykes's DNA also matched the sperm located on a comforter found in Trimnell's truck. [Sic].

Police seized a computer during a search of Trimnell's apartment. An examination of that computer revealed that it had been used to access pornographic websites on November 7, 2004. Trimnell's credit cards had been used to access the website. That computer had not been previously used to visit similar websites. Police also seized two pornographic magazines and four computers from Sykes's mobile home. Files on two of those computers contained "similar images of adult pornography" to those found on Trimnell's computer. Additionally, police found a leather bag containing silver dollars in the home of Sykes's girlfriend, Jenny St. Jean. Trimnell's daughter later identified that bag as Trimnell's.

Trimnell's telephone records revealed that a cell phone registered to Sykes made three calls to her home on the morning of November 7, 2004. Sykes, a night shift restaurant custodian at Dover Downs, did not work on November 7, 2004. He quit this job on November 8, 2004 due to alleged transportation problems. After he quit his job, Dover Downs security cameras showed him leaving the parking lot on November 8, 2004 in Trimnell's car.

Police arrested Sykes on November 29, 2004 and the State later indicted him on two counts of Murder First Degree and other felony and misdemeanor charges. The State later re-indicted him and added two counts of Rape First Degree.

The case proceeded to trial on May 30, 2006. During jury selection, the State used four of its eight challenges to remove members of minority groups from the jury. [FN1] After three of the first five, and again when four out of the first six, challenges had been exercised against minority venirepersons, Sykes raised a Batson challenge. The trial judge found that the prosecutor had offered a race-neutral reason for each of the peremptory challenges. Consequently, the trial judge determined that the State had discharged its burden of proof as required under Batson. The empaneled jury found Sykes guilty on all charges.

FN1. After the State had exercised three of the first five peremptory challenges against minority veniremembers, Sykes raised a Batson claim. Sykes raised another Batson claim following the State's sixth peremptory challenge, against a fourth minority veniremember. When the State had announced it was content, it had used eight peremptory challenges in total, four of which were against minority veniremembers.

Following announcement of the verdict on June 27, 2006, the trial judge instructed the jury to return on June 29. During the evening of June 27, two of the jurors came into contact with St. Jean, Sykes's girlfriend, at a little league park. According to Juror No. 6, St. Jean approached him and asked if he could "donate to the Little League since you ruined my life today." Juror No. 9 also encountered St. Jean, but told her that "I can't talk to you" and walked away from her. No. 9 told the trial judge that St. Jean did not say anything to her. Both of the jurors notified the trial judge what had happened. St. Jean denied having any contact with the jurors. After interviewing both jurors, the trial judge concluded that No. 6 could remain fair and impartial and allowed him to remain on the jury. The trial judge dismissed No. 9 after she expressed her fear of St. Jean. At the penalty phase, the jury recommended a sentence of death by a unanimous vote. The trial judge sentenced Sykes to death by lethal injection. Sykes's automatic and direct appeals followed.

Sykes v. State, 953 A.2d 261, 264-66 (Del. 2008).

I. COUNSEL WAS NOT INEFFECTIVE IN FAILING TO PRESENT ADDITIONAL MITIGATION EVIDENCE AT THE CAPITAL PENALTY HEARING

QUESTION PRESENTED

Was former counsel ineffective for not investigating and presenting additional mitigation evidence at the June 2006 penalty hearing (A-1332-1642)?

STANDARD AND SCOPE OF REVIEW

The denial of a motion for post-conviction relief [State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) (Exhibit A)] is reviewed on appeal for an abuse of discretion. See Ploof v. State, 75 A.3d 840, 851 (Del. 2013); Norcross v. State, 36 A.3d 756, 765 (Del. 2011); Swan v. State, 28 A.3d 362, 382 (Del. 2011).

MERITS OF THE ARGUMENT

Ambrose Sykes argues that his trial counsel did an insufficient mitigation investigation and was ineffective for not presenting further mitigation evidence at the Kent County Superior Court penalty hearing on June 29 and 30, 2006. (A-1332-1642). In spite of the unanimous 12-0 jury recommendation that the aggravating circumstances outweigh the mitigating circumstances (A-1640-41), Sykes also contends that if the additional mitigation evidence offered at the 2011-2012 Rule 61 hearing had been presented in 2006, "a reasonable probability exists that the outcome would have been different." (Opening Brief at 27-28). See

Strickland v. Washington, 466 U.S. 668, 694 (1984). Sykes does not discuss the aggravation evidence that exists in his case or how it compares to his new mitigation evidence.

The Superior Court after conducting an 11 day evidentiary hearing did not abuse its discretion in denying this post-conviction relief allegation of ineffective assistance of counsel at the capital penalty hearing. State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) at * 24-28 (Exhibit A). The Superior Court Judge who denied Sykes' post-conviction relief in 2014 is the same judge who presided at the original 2006 penalty phase proceeding, and he correctly reweighed the totality of the 2006 mitigation evidence combined with the new post-conviction mitigation evidence against the substantial aggravating evidence in concluding that "the outcome of the original sentencing remains the same. Petitioner's crime was cruel, depraved and heinous, committed against a 68-year-old woman simply for pecuniary gain, sexual gratification and to cover up his crimes." Sykes, supra at * 28 (Exhibit A). While Sykes presented additional mitigation at the 2011-2012 Rule 61 Superior Court evidentiary hearing, the sum total of the original and the new mitigation evidence is still overwhelmed by the force of the powerful aggravating circumstances present in the case. Accordingly, the Superior Court in 2014 accurately concluded that "there is no reasonable probability, considering the totality of mitigating evidence now presented, that the outcome of the original

sentencing would have been different if this new evidence was presented. Thus, there is no prejudice under Strickland." Sykes, supra at * 28 (Exhibit A).

To succeed in this first appellate argument, Sykes must establish that his former counsel's legal representation at the June 2006 capital penalty hearing (A-1332-1642) fell below an objective standard of reasonableness; and, second, that there exists a reasonable probability that, but for counsel's professional deficiencies, the result of the penalty hearing would have been different and Sykes would not have received the death penalty. See Strickland v. Washington, 466 U.S. 668, 687-88, 693-94 (1984); Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011); Norcross v. State, 36 A.3d 756, 765-71 (Del. 2011); Swan v. State, 28 A.3d 362, 391-95 (Del. 2011).

If Sykes cannot prove both prongs of this two-part ineffective assistance of counsel test, his argument fails. As the United States Supreme Court has 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." Strickland, 466 U.S. at 697. See also Ploof v. State, 75 A.3d 811, 825 (Del. 2013); Norcross, 36 A.3d at 766; Swan, 28 A.3d at 391. In both Norcross, 36 A.3d at 766, and Swan, 28 A.3d at 391, this Court accepted "the United States Supreme Court's invitation to analyze the prejudice prong first." Norcross, 36 A.3d at 766. See also Ploof, 75 A.3d at 825 (". . . there is no need to examine whether an

attorney performed deficiently if the deficiency did not prejudice the defendant."). In fact, in this Court's consideration of the penalty phase performance of counsel in Ploof, 75 A.3d at 856, the majority did conclude that counsel's performance was deficient in "failing to further investigate signs of trouble in the Ploof foster home," but ultimately Ploof suffered no prejudice in another unanimous 12-0 jury recommendation capital case. Ploof, 75 A.3d at 867-68 ("there is no reasonable probability that a sentencing judge would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."). Such a reverse analysis of the prejudice prong first is also appropriate in analyzing Sykes' claim of ineffective assistance of counsel at his 2006 penalty phase hearing.

If Sykes cannot prove the second prejudice prong of the Strickland ineffective assistance test, his first appellate claim fails regardless of any alleged deficiencies in counsel's penalty phase performance. See Dawson v. State, 673 A.2d 1186, 1196 (Del. 1996) (". . . the defendant must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal."). Sykes has the burden of proof here, and possible or theoretical prejudice is insufficient. Neal v. State, 80 A.3d 935, 942 (Del. 2013); Ploof v. State, 75 A.3d 840, 867 (Del. 2013); Harrington v. Richter, 131 S. Ct. 770, 792 (2011). The errors or deficiencies of former counsel must be so serious as to deprive the defendant of a fair trial, "a trial whose result is reliable." Strickland, 466 U.S. at 687. While Sykes has produced

additional mitigation evidence at the 2011-2012 post-conviction relief evidentiary hearing in the Superior Court, he has still failed to show a reasonable probability of a different sentence. Sykes, supra at * 27 ("Assuming arguendo that the first prong of Strickland is satisfied, Petitioner cannot establish prejudice."). See also Swan, 28 A.3d at 391. This finding by the trial court of insufficient prejudice (the second Strickland prong) is not an abuse of discretion, and must be upheld on appeal.

"When a [movant] challenges a death sentence . . ., the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695 (quoted in Swan, 28 A.3d at 391). The trial judge in finding that "Petitioner cannot establish prejudice." [Sykes, supra at * 27 (Exhibit A)] applied the proper legal paradigm. That is, he reweighed the sum of the original 2006 mitigation evidence together with the new 2011-2012 post-conviction mitigation evidence against the evidence in aggravation. Sykes, supra at * 25 (Exhibit A). Utilizing the proper legal standard, the Superior Court Judge did not change his mind as to the propriety of Sykes' death sentence for the rape and murder of the elderly victim in her home, and the defendant's callous and cavalier attitude in stealing the victim's car and driving around for days with her dead body in the car trunk. Saying that "Petitioner's crime was cruel, depraved and heinous" is an apt description. Sykes, supra at * 28 (Exhibit A).

Not only can Sykes not establish sufficient prejudice to warrant a new capital penalty hearing, but former counsel's mitigation investigation and evidence presentation was not as dismissal as Sykes contends. Trial counsel was correct in concluding that there was a high probability that Sykes would be found guilty of murder and his case would proceed to a capital penalty hearing. In preparing for the likely penalty hearing, potential witnesses were interviewed, and Sykes was evaluated by a mental health professional, Mandell Much, Psy.D. In his February 3, 2010 Affidavit, defense attorney Christopher Tease points out: "Sykes and his family denied any sexual or physical abuse as a child. The defendant was evaluated by Dr. [Much] who found him to suffer from an anti-social personality disorder. A decision was made not to present this evidence because it would not be helpful to the defendant." (A-2763). Dr. Much's diagnosis of anti-social personality disorder is the same mental health diagnosis that Sykes received after a September 15, 1997 evaluation at a Pennsylvania prison where Sykes was then incarcerated. (A-900-04). The 1997 Pennsylvania prison psychological evaluation of Sykes also included administration of the MMPI1, a standard assessment tool, and a conclusion from that testing was that "He may be very self-centered." (A-903).

A murderer who drives around in the victim's stolen car with gasoline cans in the back seat intending to burn up the car with the victim's body inside (A-93-95, 564-65, 606, 641-43, 1217-18) is hardly an emphatic soul. It was a wise strategic

decision not to present mental health testimony at the penalty hearing from Dr. Much. Although the Rule 61 hearing featured testimony from some of the same family members who testified in 2006 and who now claim Sykes was subject to physical abuse from both his parents, that was not the story these family members told to defense counsel before the penalty hearing. (A-2763).

Mitigation evidence was presented by the defense on June 30, 2006. (A-1536-87). The Superior Court in the September 20, 2006 Findings After Penalty Hearing at pages 16-17 (Exhibit B), and this Court on direct appeal [Sykes v. State, 953 A.2d 261, 273 (Del. 2008)] found mitigation evidence to exist – lack of a father figure and guidance as a youth, and a positive relationship with his son Alex and girlfriend Jenny St. Jean. The trial court in 2006 also pointed out that Sykes adjusted well in a controlled environment, is not a danger to other inmates, and that "He has talent and potential." (Exhibit B at 16).

In contrast, there was powerful aggravation evidence in Sykes' case. (Exhibit A at * 28). Sykes' conduct was outrageous and heinous, and appeared to lack any remorse as he used the victim's credit card to access a porn site on Trimnell's home computer and drive around for days in the victim's stolen car with her body stuffed inside her own suitcase in the trunk of her car. Sykes also stole Trimnell's Silver Dollars, and those coins in the identifiable bank bag later appeared in St. Jean's trailer. With such offensive and grisly information being

presented at the guilt phase of the 2006 trial, a jury would be rightfully horrified and appalled by Sykes' conduct. The new Rule 61 information that Sykes was only minutes from setting Virginia Trimnell's car on fire and burning her body when Sykes was stopped by the police would have been even more distressing information if heard by the jury. (A-93-94, 564-65, 606, 641-44, 1217-18).

Given the weight of the aggravation evidence in this unsavory murder prosecution, there was very little that could be presented in terms of mitigation that could change revulsion to begrudging understanding. As pointed out by the sentencing judge in 2006, "Ambrose L. Sykes brutally raped and murdered Virginia Trimnell in her own home and thereafter drove her car with her body in the trunk along with a shovel and gas cans in preparation for disposal of the body. One could not describe a more heinous, diabolical crime." [9-20-06 Penalty Findings at 13 (Exhibit B)]. Humanizing a ghoul is not an easy task. Sykes committed a monstrous act and his penalty phase jury's unanimous 12-0 recommendation that the aggravating circumstances outweighed the mitigating circumstances was reasonable and appropriate. New Rule 61 evidence that Sykes was beaten as a child by both his parents and that the defendant's father, Jesse Sykes (who did not appear at the Rule 61 hearing) is also a criminal does little to transform a jury's understanding of Sykes and his murderous behavior. Even if presented with the new Rule 61 mitigation evidence, it is not reasonably probable that the jury's death

recommendation would change. It did not alter the sentencing judge's original opinion.

Sykes committed a purely evil act, and a death sentence is no surprise. Sykes is a stalker who preyed upon the elderly female victim and murdered her in a horrible manner in her home. Placing the victim's body in her own suitcase, and then putting that suitcase and the bed comforter with Sykes' semen in the trunk of the victim's car demonstrates the lengths Sykes was willing to go to hide evidence of his fatal attack. The new Rule 61 hearing revelation that Sykes was intending to burn up the victim's body to cover up the crime is equally shocking. (A-93-94, 564-65, 606, 641-44, 1217-18). Trial counsel acted reasonably in presenting what mitigation evidence there was, but the nature of Sykes' crime is so overwhelming that the resulting death sentence is hardly unexpected. Even with the new Rule 61 mitigation evidence, much of which was cumulative to the original 2006 evidence, the death sentence does not change because Sykes' conduct is simply too "cold-blooded and horrific." [9-20-06 Penalty Findings at 19 (Exhibit B)].

It is not enough to show that new mitigation evidence might have changed the mind of a single Delaware juror. Norcross v. State, 36 A.3d 756, 770 (Del. 2011). This is particularly the case here where the jury's recommendation was unanimous and the disturbing circumstances of Sykes' crime are aggravating evidence of overwhelming weight. Norcross, 36 A.3d at 767. In sentencing Sykes

to death, the trial judge pointed out:

> There is evidence that the Defendant did not know the victim and it does appear that he selected her at random for the purpose of committing the crimes of rape, burglary and murder. The actions of the Defendant were heartless, depraved, cruel and inhumane. The evidence shows the Defendant terrorized and abused the victim before murdering her. The act of tying up the victim and strangling her with her own clothes and thereafter depositing her in her own suitcase in her own car demonstrates a callousness depravity almost unheard of. This is a substantial aggravating circumstance.

[9-20-06 Penalty Findings at 14 (Exhibit B)].

The sentencing judge in 2006 concluded: "The aggravating factors in this case are serious and substantial. The factual record established by the evidence is overwhelming. The circumstances of the crimes are gruesome and shocking. While there are mitigating factors present, they are not substantial when compared to the aggravating factors." [9-20-06 Penalty Findings at 18 (Exhibit B)]. After the 2011-2012 Rule 61 evidentiary hearing, the original sentencing judge reweighed the totality of the old and new mitigation evidence against the "substantial" aggravation evidence, and concluded that Sykes still deserved a death sentence. State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) at * 25-28 (Exhibit A).

In Delaware the jury is not the ultimate capital sentencing authority. See Shelton v. State, 652 A.2d 1, 5-6 (Del. 1995). "The jury's recommendation shall not be binding upon the Court." 11 Del. C. § 4209(d)(1). "In Delaware, the trial judge has the sole discretion to determine whether to impose a death sentence, and

will give appropriate weight to the jury's recommendation depending on the facts of the particular case." Norcross, 36 A.3d at 771. Of course, in Sykes' prosecution all 12 of the jurors agreed that Sykes deserved to die. This has been the capital sentencing scheme in Delaware for over 20 years, and it has been repeatedly upheld by this Court. See State v. Cohen, 604 A.2d 846, 851-52 (Del. 1992) (". . . there is no federal right to the determination of punishment by a jury in a capital case.").

The same Superior Court Judge who sentenced Sykes to death in 2006 (Exhibit B) presided over the 11 days of the 2011-2012 Rule 61 hearing. He applied the correct legal standard in reweighing the totality of the old and new mitigation evidence against the aggravation evidence (Exhibit A at * 25), and he remained convinced that regardless of any possible shortcomings of defense counsel in 2006, Sykes' death sentence was appropriate. There was no abuse of discretion by the Superior Court Judge in concluding that "Tease's investigation, while not perfect, did not fall below an objective standard of reasonableness." (Exhibit A at * 26). More importantly, the Superior Court Judge's finding that "Petitioner cannot establish prejudice." (Exhibit A at * 27) is also correct.

II. THE ALLOCUTION REFERENCE IS A PREVIOUSLY ADJUDICATED CLAIM

QUESTION PRESENTED

Did the trial judge's guilt phase mistaken reference to a right of allocution (A-3505-06) violate the accused's Sixth Amendment right to a fair and impartial jury?

STANDARD AND SCOPE OF REVIEW

The denial of a motion for post-conviction relief is reviewed on appeal for an abuse of discretion. See Ploof v. State, 75 A.3d 811, 820 (Del. 2013); Norcross v. State, 36 A.3d 756, 765 (Del. 2011). Claims of constitutional error are reviewed de novo. See Panuski v. State, 41 A.3d 416, 419 (Del. 2012); Hoennicke v. State, 13 A.3d 744, 746-47 (Del. 2010).

MERITS OF ARGUMENT

Before closing arguments in the guilt phase of Ambrose L. Sykes' capital murder prosecution commenced, the Superior Court Judge briefly instructed the jury:

> All right. Members of the jury, at this time, the State and defense have rested their cases. It is typically the time at which you will hear closing arguments of counsel.
>
> We'll first begin by hearing from the prosecution. Then you'll hear from the defense. And as you know from earlier instructions that were given to you, the State has a further opportunity to respond to the defense's statements.

> You also may be hearing from the defendant if he chooses to do what we call an allocution. It's entirely up to the defendant, and you may hear about that as we proceed.

(A-3505-06).

There was no immediate defense objection to the trial judge's reference to a capital defendant's right of allocution, and the State proceeded with closing argument. (A-3506). After the prosecutor completed his remarks, counsel met with the presiding judge in chambers. There the Superior Court Judge made the following statement:

> I think I got a little ahead of myself. I realized after I said it that allocution doesn't take place until the penalty phase. I just got ahead of myself. I'll admit that. And judges should admit mistakes when we make them, so I made a mistake.
>
> Now, do you want me to issue any type of clarification?

(A-3678).

After a brief discussion of the issue with counsel (A-3678-80), the trial judge added: "I think I have to give a clarification here. I don't think there is any question about that." (A-3680). At that point defense counsel for Sykes moved for a mistrial. (A-3680). The prosecution requested that the trial judge give "a curative instruction." (A-3681). The Superior Court Judge denied the defense mistrial motion, but agreed to instruct "the jury that the defendant has no right to make any additional statement to the jury." (A-3681-82).

When the Superior Court proceeding reconvened, the trial judge informed Sykes' jury, "I want to clarify one thing because I misspoke." Thereafter, the trial judge advised the guilt phase jury:

> Anything else I said is not important for you to know other than the fact that you need to also understand that the defendant in this case has a right to testify or not testify as he chooses, and the defendant has chosen not to testify in the case-in-chief for the defense. And the fact that the defendant has elected not to testify must not be considered by you as indication that the defendant is guilty of the crime charged. . . .

Sykes v. State, 953 A.2d 261, 268 (Del. 2008).

On direct appeal, Sykes' former counsel argued that the brief "allocution" reference by the trial judge in his instructions to the guilt phase jury (A-3505-06) was an impermissible comment on the criminal accused's right to remain silent as recognized in Griffin v. California, 380 U.S. 609, 615 (1965). Sykes did not testify at the guilt phase of his 2006 Superior Court trial, and the reference to a right of allocution at that stage of the proceedings was misplaced.

This Court in 2008 noted that "A defendant has no right of allocution during closing arguments in the guilt phase," but found that the trial judge's subsequent curative instruction was a "meaningful and practical alternative" to granting the defense mistrial motion and concluded that there was no reversible error. Sykes, 953 A.2d at 269. The "law of the case" doctrine applies here. See generally Weedon v. State, 750 A.2d 521, 527-28 (Del. 2000); Brittingham v. State, 705 A.2d

577, 579 (Del. 1997) ("The 'law of the case' doctrine is well established in Delaware."); Kenton v. Kenton, 571 A.2d 778, 784 (Del. 1990). The prior adjudication procedural bar of Del. Super. Ct. Crim. R. 61(i)(4) is based upon the law of the case doctrine. See Hamilton v. State, 831 A.2d 881, 887 (Del. 2003); Weedon, 750 A.2d at 527; State v. Desmond, 2011 WL 91984 (Del. Super. Jan. 5, 2011) at * 16; State v. Slade, 2006 WL 1520574 (Del. Super. March 8, 2006) at * 3.

The allocution reference was previously adjudicated in this Court's 2008 direct appeal, and that contention is now procedurally barred by Del. Super. Ct. Crim. R. 61(i)(4). Sykes has made no showing that reconsideration of his allocution reference contention is warranted in the interest of justice. Del. Super. Ct. Crim. R. 61(i)(4). As the Superior Court noted in denying post-conviction relief for this claim, ". . . this claim is barred as formerly adjudicated under Rule 61(i)(4). Petitioner has failed to establish that the interest of justice exception applies, nor has Petitioner alleged a lack of jurisdiction or colorable claim of miscarriage of justice sufficient to invoke Rule 61(i)(5)." State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) at * 21 (Exhibit A).

Sykes attempts to avoid the previous adjudication procedural bar of Del. Super. Ct. Crim. R. 61(i)(4) by recasting this same complaint about the mistaken allocution reference (A-3505-06) as a Sixth Amendment denial of fair trial argument, rather than a Fifth Amendment impermissible comment on the

defendant's right to remain silent contention. In denying post-conviction relief, the Superior Court Judge stated: "Petitioner is simply attempting to refine and restate his first claim on direct appeal in the context of different constitutional rights." Sykes, supra at * 21 (Exhibit A).

A defendant is not entitled to reargue a previously adjudicated claim in a post-conviction relief petition merely by recasting the same basic legal complaint under a different label. See Riley v. State, 585 A.2d 719, 721 (Del. 1990), rev'd on other grounds, Riley v. Taylor, 277 F.3d 261 (3d Cir. 2001) ("Justice does not require that an issue that has been previously considered and rejected be revisited simply because the claim is refined or restated."); Garvey v. State, 2009 WL 2882873 (Del. Sept. 10, 2009) at * 1 (". . . Garvey has merely recast his previously-rejected claim as an attack on his indictment. As such, it is procedurally barred."); Locklear v. State, 1994 WL 632924 (Del. Nov. 23, 1994) at * 1; State v. McNally, 2011 WL 7144815 (Del. Super. Nov. 16, 2011) at * 3; State v. Hernandez, 2008 WL 5115066 (Del. Super. Dec. 3, 2008) at * 2 n. 23; State v. Dawson, 2001 WL 491182 (Del. Super. April 12, 2001) at * 1. See also Younger v. State, 580 A.2d 552, 556 (Del. 1990). Claiming that the allocution reference violates the Sixth Amendment right to a fair trial before an impartial jury adds little to the previously rejected Fifth Amendment argument about this same circumstance. There was no abuse of discretion in denying the repackaged claim.

As in his prior direct appeal to this Court, Sykes again makes a brief conclusory assertion that the trial judge's guilt phase allocution reference (A-3505-06) violated Del. Const. Art. I, § 7. (Opening Brief at 33). See Sykes v. State, 953 A.2d 261, 266 n. 5 (Del. 2008) ("Sykes's conclusory assertion that his rights under the Delaware Constitution have been violated results in his waiving the State constitutional law aspect of this argument."). A conclusory assertion that a defendant's rights as guaranteed by the Delaware Constitution of 1897 have been violated is insufficient to sustain his argument here and elsewhere in Sykes' May 23, 2014 Opening Brief in this Rule 61 appeal.

In 2005, this Court delineated the proper form for raising a State Constitutional contention. Ortiz v. State, 869 A.2d 285, 290-91 & n. 4 (Del. 2005). Not only did this Court in Ortiz lay out the proper form for presenting a State Constitutional violation claim, but this Court in footnote 4 expressly cautioned, "In the future, conclusory assertions that the Delaware Constitution has been violated will be considered to be waived on appeal." Ortiz, 869 A.2d at 291 n. 4. Citing Jones v. State, 745 A.2d 856, 864-65 (Del. 1999), this Court identified at least a partial list of criteria to utilize in determining whether a United States Constitution provision has an identical or similar meaning to an allegedly analogous provision in the 1897 Delaware State Constitution. Ortiz, 869 A.2d at 291 n. 4. These criteria include: textural language; legislative history; preexisting state law; structural

differences; matters of particular state interest or local concern; state traditions; and public attitudes. Id. A proper allegation of a State Constitutional violation should include a discussion and analysis of one or more of these enumerated criteria. Id. Sykes' 2014 Opening Brief fails to heed this 2005 stricture. Accordingly, the conclusory assertion in Argument II and elsewhere that Sykes' State Constitutional rights were violated has been waived and must be summarily denied. Sykes, 953 A.2d at 266 n. 5. See also Jackson v. State, 990 A.2d 1281, 1288 (Del. 2009); Betts v. State, 983 A.2d 75, 76 n. 3 (Del. 2009); Jenkins v. State, 970 A.2d 154, 158 (Del. 2009); Wallace v. State, 956 A.2d 630, 637-38 (Del. 2008).

III. IT WAS NOT ERROR TO PERMIT JUROR NO. 9 TO CONTINUE TO SERVE DURING THE GUILT PHASE AND DEFENSE COUNSEL WAS NOT INEFFECTIVE

QUESTION PRESENTED

Should the trial judge have removed a guilt phase juror when a prosecution witness claimed to be acquainted with the juror?

STANDARD AND SCOPE OF REVIEW

The trial judge's decision to retain an impaneled juror who is challenged for cause (A-1918-19) is reviewed on appeal for an abuse of discretion. See Schwan v. State, 65 A.3d 582, 589 (Del. 2013) (citing Parson v. State, 275 A.2d 777, 781-82 (Del. 1971)). The denial of a motion for post-conviction relief (Exhibit A at * 34-35) is also reviewed on appeal for an abuse of discretion. See Taylor v. State, 32 A.3d 374, 380 (Del. 2011); Swan v. State, 28 A.3d 362, 382 (Del. 2011).

MERITS OF ARGUMENT

Ambrose Sykes presents several related arguments concerning Katrina Bordley, an African American juror (A-309), who served as juror No. 9 during the guilt phase of the June 2006 Superior Court trial (A-196), but was excused prior to the penalty phase. (A-1387-90). Sykes, an African American criminal defendant (A-184), first argues that Katrina Bordley should have been excluded for cause by the trial judge when she disclosed during jury selection that she had been a rape

victim 10 years earlier in 1996. (A-3247). On June 22, 2006, the ninth day of Sykes' guilt phase proceeding, the defense raised a second belated challenge to juror Bordley's continued service. (A-3494-3502). At that point Jenny St. Jean, Sykes' girlfriend and the mother of his child, had already testified twice in the case. Witness St. Jean claimed that she had known juror Bordley since childhood. (A-3494, 3499). Sykes' second claim of judicial error is that the trial judge should have removed Katrina Bordley from the guilt phase jury after St. Jean claimed that she was previously acquainted with Bordley. These two complaints about the Superior Court Judge permitting a rape victim to be seated as a juror and to continue to serve during the remainder of the guilt phase proceeding were not raised on direct appeal to this Court, so both arguments are now barred in post-conviction relief proceedings as procedurally defaulted under Del. Super. Ct. Crim. R. 61(i)(3). Sykes has demonstrated neither cause nor prejudice sufficient to excuse this procedural default.

In addition to attacking the two judicial rulings in 2006 concerning juror No. 9, Sykes argues that ". . . trial counsel were ineffective for failing to voir dire juror Number 9 and objecting when the Court failed to dismiss her. Appellate counsel's performance was also ineffective because they failed to raise and litigate these claims on direct appeal." (Opening Brief at 40). Sykes cannot establish that his former defense counsel's performance was professionally deficient either at trial or

on direct appeal concerning juror Bordley, or that he suffered any ultimate prejudice. The ineffective assistance of counsel allegations also fail.

In 2006 Katrina Bordley was summoned as a prospective juror in Ambrose Sykes' murder prosecution. (A-3235-3258). Since this was a capital prosecution, Bordley was placed under oath (A-3235), and individually questioned by the Superior Court Judge. During the jury selection process Bordley was asked by the trial judge if she, a close friend, or relative had been the victim of or witness to a violent crime. (A-3247). Bordley responded: "I was raped back in '98." (A-3247). Bordley disclosed that her attacker had been imprisoned for a time, but was now released. (A-3248). The prospective juror stated that she had "No ill feelings at all." about the criminal justice system. (A-3248). Bordley agreed that a just result had been achieved in the prior rape prosecution. (A-3248-49).

When the initial questioning of prospective juror Katrina Bordley was completed, the defense requested additional questioning to "make sure that she knows there is a rape charge in this case." (A-3254). The trial judge agreed that additional questioning would be appropriate. (A-3255). When prospective juror Bordley reentered the courtroom (A-3255), she was asked by the trial judge: "And you realize that one of the charges in this case involved rape?" (A-3256). Bordley answered in the affirmative (A-3256), and also said that she harbored no ill will toward either side because of her personal experience 10 years earlier. (A-3256-

57). Neither side challenged Bordley for cause, and the trial judge ruled: "On balance, I don't see a basis from the Court's perspective to excuse the juror for cause." (A-3258). When neither side exercised a peremptory challenge to remove Bordley, she was seated as juror No. 9. (A-3258). At the 2011 Rule 61 hearing trial defense counsel testified that they were trying to get a "racially balanced "jury, and the defense was sensitive to the fact that the accused and juror No. 9 were both African-American and the murder victim was Caucasian. (A-180-89, 309-10).

In this appeal, Sykes faults both the trial judge for not excluding Bordley as a potential juror at the outset (A-3258), and defense counsel for not seeking to remove Bordley either for cause as a result of being a rape victim or peremptorily. (A-3258). Neither contention is meritorious.

Sykes argues: "Bordley was raped. To say her experience did not rise to the level of trauma necessary to exclude her from serving as a juror in a similar case, especially in a death penalty case, is error. It was far too dangerous to seat Bordley in a death penalty case as it is highly unlikely that she could actually remain impartial. There is no telling what she shared with her fellow jurors regarding her own traumatic experience in light of the evidence presented in this case." (Opening Brief at 45-46). In support of this broad assertion that a violent crime victim has to be removed for cause as a prospective juror, Sykes cites only this Court's 2003 decision in Banther v. State, 823 A.2d 467, 481 (Del. 2003). (Opening Brief at 46

n. 199).

The facts of Sykes' case are readily distinguishable from what occurred in Banther. In Banther, the eventual jury forelady was asked on individual voir dire, "'Have you or a close friend or relative been a victim or witness to a violent crime?'" Banther, 823 A.2d at 476-77. The Banther jury forelady, referred to as "Jane Smith," a pseudonym, responded incorrectly in the negative. Banther, 823 A.2d at 472, 477. This Court ruled that "During jury selection in a capital murder case, the answer to a question about being the victim of a violent crime is material." Id. at 484. While the response of a prospective juror to the violent crime victim voir dire inquiry is material, Sykes has no basis to complain about any incorrect or misleading response by juror No. 9 in his case. When asked a similar violent crime victim question on voir dire in Sykes' 2006 jury selection, Bordley gave a straight forward response that "I was raped back in '96." (A-3247). Thus, unlike Banther, the violent crime victim information for juror No. 9 in Sykes' case was revealed during initial jury selection.

A trial judge's decision to empanel a juror after a challenge for cause is reviewed on appeal for an abuse of discretion. See Schwan v. State, 65 A.3d 582, 589 (Del. 2013) (citing Parson v. State, 275 A.2d 777, 781-82 (Del. 1971)). The trial judge did not abuse his discretion in permitting a prospective juror, who was a rape victim 10 years earlier, disclosed this incident to the trial court and counsel,

had no bias against the criminal justice system as a result of that experience (A-3248), and was otherwise qualified to serve, to remain as a juror in Sykes' case. (A-3258). Compare Knox v. State, 29 A.3d 217, 220-25 (Del. 2011) (plain error to deny new trial motion where juror was a victim of a pending robbery prosecution being prosecuted by same State authority and trial judge had neglected to ask if any venire members were crime victims.

While Sykes appears to argue that a violent crime, or at least rape, victim has to be automatically disqualified as a prospective juror in a criminal proceeding involving a rape or capital murder prosecution, no such broad rule exists. 10 Del. C. § 4509(b)(1-6) says that all persons are qualified for jury service except for 6 defined categories. Violent crime victim is not among the 6 statutory categories of persons automatically ineligible for jury service. In denying post-conviction relief on this claim, the trial judge pointed out: "The rape occurred in 1996, a decade prior to the trial. Juror No. 9 stated that this did not create bias or prejudice for or against either the defendant or the State. The juror was informed that rape was one of the charges in the case, and answered 'yes' when asked whether she could remain fair and impartial." State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) at * 34 (Exhibit A).

The trial judge did not abuse his discretion either at trial in seating juror No. 9 (A-3258), or in denying post-conviction relief on this claim. (Exhibit A at * 34).

If juror No. 9 was not disqualified from jury service because she was a rape victim 10 years earlier, former defense counsel was not ineffective in failing to remove the prospective juror at trial in 2006, or in failing to raise this contention as a plain error claim on direct appeal.

Although Sykes urges that because his prosecution was a capital murder case juror No. 9 should have been disqualified as a prior violent crime victim, other courts have declined to disqualify an otherwise fair and impartial prospective juror in a murder prosecution simply on the basis that a relative of that juror was a homicide victim. See Tolbert v. State, 511 So. 2d 1368, 1376-78 (Miss. 1987) (father of murder trial juror murdered 2 years earlier); State v. Young, 701 S.W.2d 429, 432 (Mo. 1985) (brother of murder trial juror murdered 18 months earlier); Remeta v. State, 777 S.W.2d 833, 838-39 (Ark. 1989) (father-in-law and sister-in-law of capital murder trial juror murdered 5 years earlier); Nance v. State, 623 S.E.2d 470, 474 (Ga. 2005) (mother of murder trial juror murdered 14 years prior); State v. Allen, 653 N.E.2d 675, 680-81 (Ohio 1995) (brother of murder trial juror murdered and alleged killer acquitted); Williams v. State, 188 P.3d 208, 217-19 (Okla. Crim. App. 2008) (mother of murder trial juror strangled to death in home invasion 1 month before trial); Commonwealth v. Weiss, 776 A.2d 958, 965-66 (Pa. 2001) (sister of capital murder trial juror murdered 30 years prior). See also Annot., "Fact that juror in criminal case, or juror's relative or friend, has previously

been victim of criminal incident as ground of disqualification," 65 A.L.R. 4th 743, at § 3(a) (1988) (collecting cases). Being a violent crime victim (A-3247) raises the same type of concerns as a prospective juror whose friend or relative was a murder victim.

Sykes next argues that the trial judge erred and former defense counsel was ineffective because juror No. 9 was not removed when witness Jenny St. Jean belatedly claimed on the ninth day of trial that she had known juror No. 9 since childhood. (A-3494-35-2). This contention was also not raised on direct appeal. State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) at * 34 (Exhibit A).

At the Superior Court Rule 61 evidentiary hearing, Sykes' post-conviction counsel argued that "Juror No. 9 was biased based on her personal relationship with St. Jean." Sykes, supra at * 34 (Exhibit A). The trial judge did not abuse his discretion in not removing juror No. 9 at this late juncture in the guilt phase proceeding. Former defense was not ineffective for failing to raise this additional contention about juror No. 9 on direct appeal.

In denying post-conviction relief on this second complaint about juror No. 9's service, the Superior Court Judge summarized the pertinent 2006 trial and 2011-12 Rule 61 hearing evidence regarding this argument, as follows:

> On the ninth day of trial, St. Jean maintained that she had known juror No. 9 since childhood, and the juror denied this allegation. The Court held a hearing for further inquiry on the subject; St. Jean offered numerous instances of contact with juror No. 9, including a time when juror No. 9 held St. Jean's infant child. Juror No. 9 denied each of these instances. The Court was satisfied that juror No. 9 could remain impartial. At the evidentiary hearing, St. Jean maintained that she knew juror No. 9 very well, and repeated many of the same claims she made during the Court's earlier inquiry. Petitioner also offered the testimony of juror No. 9's ex-fiancé, Dallas Drummond, to establish a personal relationship between the two women. However, notwithstanding credibility issues with Drummond's testimony based on his status as an incarcerated felon and his prior convictions for several crimes of dishonesty, Drummond's testimony actually established that the two women were nothing more than "casual acquaintances," at best. Drummond stated he "never knew" if the two women knew each other while Drummond dated juror No. 9 and Drummond's brother dated St. Jean. According to Drummond, the only instance of specific interaction between the two women was when they were both pregnant and in the same hospital at the same time.

State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) at * 34 (Exhibit A).

A trial judge's determination that a juror can fairly and objectively render a verdict (A-1918-19) is reviewed on appeal for an abuse of discretion. See Schwan v. State, 65 A.3d 582, 589 (Del. 2013); Knox v. State, 29 A.3d 217, 220 (Del. 2011). Trial judges also have discretion to make credibility determinations limited by the essential demands of fairness. Knox, 29 A.3d at 220 (quoting Hughes v. State, 490 A.2d 1034, 1041 (Del. 1985)). "The deference given to such determinations on appeal is based upon the judge's ability to assess the veracity and credibility of the . . . juror." Schwan, 65 A.3d at 589. See also Morrisey v. State,

620 A.2d 207, 214 (Del. 1993); Skinner v. State, 575 A.2d 1108, 1120 (Del. 1990); Weber v. State, 547 A.2d 948, 953 (Del. 1988).

"The mere fact that a juror is a casual acquaintance of a witness is not a basis for automatic disqualification." Skinner, 575 A.2d at 1120 (citing Weber, 547 A.2d at 953; Holmes v. State, 422 A.2d 338, 342 (Del. 1980)). "The determination of a juror's impartiality is the responsibility of the trial judge who has the opportunity to question the juror, observe his or her demeanor and evaluate the ability of the juror to render a fair verdict." Skinner, 575 A.2d at 1120 (citing Weber, 547 A.2d at 953; Hughes, 490 A.2d at 1041).

The short answer to Sykes' continuing complaint about juror No. 9 remaining on the jury through the guilt phase is that juror No. 9 is more credible than Jenny St. Jean, the murder defendant's girlfriend and mother of his son, on the issue of prior acquaintanceship between the juror and St. Jean. St. Jean was a convicted felon with theft convictions and mental health hospitalizations. At the 2011 Rule 61 hearing, Sykes' post-conviction counsel quotes the earlier trial observations of Jenny St. Jean by defense counsel Christopher Tease by noting: "'Let's not lose focus that it is Ms. St. Jean who's trying to offer this information, so seriously, This is not independent information . . . . We have this is a woman who is walking around the courthouse giggling while her husband could be sentenced to death . . . ." (A-188-89).

It was also never explained why Jenny St. Jean, who had already testified twice during the 2006 trial, waited until the ninth day of trial to claim that she was acquainted with juror No. 9. The November 7, 2012 Rule 61 testimony of defense witness Dallas Drummond (A-1187-99) further undermined St. Jean's claims about the extent of her acquaintanceship with juror No. 9. Although the trial judge had already ruled that juror No. 9 could remain on the jury (A-1918-19), St. Jean's credibility was further questioned after the guilt phase verdict. Two jurors, nos. 6 and 9, testified before the commencement of the penalty phase that they had come into contact with St. Jean at a Marydel Little League baseball game the evening after the guilty verdict was returned. (A-1359-90). When St. Jean was instructed not to have any further juror contact (A-1409-10), St Jean denied having contact with the two jurors at the Little League baseball game. (A-1410). After being instructed by the trial judge to avoid any future jury contact (A-1410), St. Jean made a derogatory comment about the trial court as she exited the courtroom. (A-1411).

IV. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RETAIN A MEDICAL EXPERT

QUESTION PRESENTED

Was trial counsel ineffective for failing to retain a medical expert?

STANDARD AND SCOPE OF REVIEW

The denial of a motion for post-conviction relief is reviewed on appeal for an abuse of discretion. See Ploof v. State, 75 A.3d 811, 820 (Del. 2013); Norcross v. State, 36 A.3d 756, 765 (Del. 2011). The denial of a motion for judgment of acquittal (A-3479-89) is reviewed de novo. See Bethard v. State, 28 A.3d 395, 397-98 (Del. 2011); Winer v. State, 950 A.2d 642, 646 (Del. 2008).

MERITS OF ARGUMENT

In Argument IV of his Opening Brief, Ambrose Sykes makes two claims. First, trial counsel in 2006 was ineffective in not retaining a forensic pathology expert in order to challenge aspects of the trial testimony of the autopsy physician, Jennie Vershvovsky, M. D. (A-2784-2873). Second, the Superior Court erred in denying the defense trial motion for a judgment of acquittal as to the charges of rape, burglary and kidnapping. (A-58-62, 3479-89). The Superior Court correctly denied post-conviction relief as to both contentions. State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) at * 19-20, 35-36 (Exhibit A).

A. FORENSIC PATHOLOGY EXPERT

On November 10, 2004, Jennie Vershvovsky, M. D., a Delaware Assistant Medical Examiner (A-2785), conducted an autopsy of Virginia Trimnell, the 68 year old homicide victim. (A-2800, 2886). Dr. Vershvovsky's 4 page Report of Autopsy (A-2886-89) was admitted at trial without defense objection as State's Exhibit # 101. (A-2800). On June 19, 2006, Dr. Vershvovsky testified initially as a prosecution witness concerning her 2004 autopsy of Trimnell. (A-2784-2873). The autopsy physician was subject to both voir dire (A-2791-99), and extensive cross-examination at trial (A-2828-70) by defense counsel. Dr. Vershvovsky was also recalled at trial as a defense witness. During this second trial testimony the autopsy physician was asked by defense counsel if Trimnell could have been alive when she was placed inside her suitcase and subsequently suffocated to death inside the suitcase. (A-1146-49). The autopsy physician rejected the defense theory that Trimnell may still have been alive when placed inside the suitcase. No separate defense medical expert appeared at trial in 2006, but on February 8, 2012, Sykes' post-conviction counsel presented the Rule 61 hearing testimony of Jonathan L. Arden, M. D. (A-932-59). While Sykes complains about the cross-examination of Vershvovsky, he did not call her as a Rule 61 witness. See Flamer v. State, 585 A.2d 736, 755 (Del. 1990) ("Since there is no evidence as to what the witness's answers would have been, this Court will not speculate as to those answers.").

The Rule 61 2012 hearing testimony of Dr. Arden was similar in most respects to the 2006 trial testimony of the autopsy physician. The trial judge compared Arden's 2012 Rule 61 testimony with Vershvovsky's 2006 trial testimony and concluded:

> . . . the testimony of Dr. Arden at the evidentiary hearing reveals that the testimony of an expert such as Dr. Arden would not have been particularly helpful to the jury. Dr. Arden's testimony primarily focused on his conclusion that Trimnell was bound after death. Dr. Arden also testified that he believed the scalpine hemorrhages did not indicate blunt force trauma to the head, contrary to Dr. Vershvovsky's conclusion. Other than these distinctions, Dr. Arden agreed with the rest of Dr. Vershvovsky's findings, including the determination that Trimnell died as a result of asphyxiation by strangulation. The remaining differences between Dr. Arden's and Dr. Vershvovsky's conclusions, if presented at trial, would have been left for the jury to assess in a credibility determination. This cannot be said to rise to the level of a reasonable probability that the outcome of the trial would have been different had Dr. Arden or another expert testified.

State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) at * 19 (Exhibit A).

Following this comparison of the testimony of the two physicians, the trial judge correctly concluded that there was no ineffective assistance in not retaining a separate forensic pathology expert for trial because Sykes failed to demonstrate prejudice sufficient to undermine confidence in the outcome of the guilt phase proceeding. Sykes, supra at * 19. Both Vershvovsky and Arden agreed that Trimnell was not alive when placed into her suitcase. While Tease's trial attempt to get the autopsy physician to agree to that scenario failed, the lack of success was

not so devasting that it doomed the defense. There was substantial evidence of Sykes' guilt, and whether Trimnell died before or after being placed into the suitcase was not going to change the trial result. Presenting a competing expert witness at trial was only going to precipitate a battle of experts about more minor issues, and there is no reasonable probability that Sykes was going to be acquitted.

Irrespective of Dr. Arden's 2012 Rule 61 testimony (A-932-59), two unrebutted facts in this murder prosecution still remain – Sykes' sperm was found inside the victim's vagina, and Sykes was stopped driving the victim's car with gasoline cans and a shovel in the backseat and the bound, naked from the waist down victim was found inside a suitcase in the trunk of her own car. Dr. Arden was not able to explain away those two irrefutable facts. The autopsy report describes the appearance of the victim's body within the suitcase, and notes: "The legs are bound together at the ankles with pantyhose, forming a knot. The pantyhose then trail upward and wrap around the right wrist. The left hand and wrist are free. The body is naked from the waist down." (A-2886). Attempting to discredit these objective findings would be futile.

Sykes was guilty and he was about to set Trimnell's Buick on fire on November 10, 2004, in an attempt to destroy evidence of his crime. As the Rule 61 testimony of three witnesses makes plain, Sykes had every intent of burning Trimnell's car as the 3 gas cans and his own incriminatory admission to Jenny St.

Jean make clear. (A-93-95, 564-65, 606, 641-43, 1217-18). Even if Dr. Arden testified for the defense at trial in 2006, Sykes was still going to be found guilty. Sykes can establish no prejudice from his former counsel's alleged deficiencies concerning the autopsy physician's testimony or in not retaining a separate medical expert. The Superior Court Judge did not abuse his discretion in finding no ineffective assistance of counsel in this instance.

B. SUFFICIENCY OF EVIDENCE OF RAPE, BURGLARY AND KIDNAPPING

When the State rested on the morning of the seventh day of the guilty phase (June 20, 2006), the defense moved for a judgment of acquittal as to several of the charges in Ambrose Sykes' reindictment, including the counts alleging rape, burglary and kidnapping. (A-3479-89). The Superior Court in 2006 denied the defense motion for a judgment of acquittal, and the charges were submitted to the jury for consideration. The jury found beyond a reasonable doubt that the State had proven all elements of the charged offenses, and Sykes was found guilty of all the allegations. After the June 27, 2006 jury verdict, Counts 3 and 4 of the reindictment were merged into one conviction for first degree rape and Counts 6 and 8 were merged into one count of second degree burglary. State v. Sykes, Del. Super., I.D. No. 0411008300, Witham, R. J. (Sept. 20, 2006)(FINDINGS AFTER PENALTY HEARING) at 2 n. 1 (Exhibit B). Sykes was also convicted of one

count of first degree kidnapping. Id. at 2. Former counsel did not challenge the denial of the motion for judgment of acquittal on direct appeal. As a result of not pursuing the sufficiency of the evidence contention on direct appeal, the Superior Court in reviewing the contention again in the post-conviction proceeding concluded that the claim was now procedurally defaulted under Del. Super. Ct. Crim. R. 61(i)(3) unless Sykes could establish ineffective assistance of counsel. State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) at * 35 (Exhibit A).

Post-conviction counsel for Sykes reasserted the same insufficiency of the trial evidence in the amended Rule 61 motion. The Superior Court 2006 trial ruling on the defense motion for judgment of acquittal (A-3479-89) was the law of the case, and the trial court was not required to readdress the same contention. To avoid the prior adjudication bar of Del. Super. Ct. Crim. R. 61(i)(4), Sykes argued in the Superior Court that his prior defense counsel was ineffective for not raising the evidence sufficiency contention on direct appeal. (A-58-62). On the second day of the Rule 61 evidentiary hearing (October 11, 2011), the State during cross-examination of Thomas D. Donovan, Esquire, the trial attorney who presented the 2006 motion for judgment of acquittal, reviewed some of the trial evidence that supported the rape, burglary, and kidnapping allegations. (A-254-63).

The Superior Court's 2006 ruling denying the defense motion for judgment of acquittal (A-3479-89) at the conclusion of the State's case-in-chief was correct.

Likewise, there was no abuse of discretion by the Superior Court in denying this same contention reasserted as an ineffective assistance of counsel on direct appeal allegation. State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) at * 35-36 (Exhibit A). As long as any rational trier of fact, viewing the evidence in the light must favorable to the State, could have found the statutory elements of first degree rape, second degree burglary, and first degree kidnapping beyond a reasonable doubt, former counsel was not ineffective for not raising a meritless argument on direct appeal. See Bethard v. State, 28 A.3d 395, 397-98 (Del. 2011); Taylor v. State, 982 A.2d 279, 284 (Del. 2008); Winer v. State, 950 A.2d 642, 646 (Del. 2008); Williams v. State, 539 A.2d 164, 168 (Del.), cert. denied, 488 U.S. 969 (1988) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

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. The 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). The possibility of alternative explanations for objective facts does not make the evidence insufficient.

The DNA evidence presented in two written reports (State's Exhibits # 124 and 125), and the June 19, 2006 trial testimony of Sherri Fentress, the forensic DNA analyst (A-3391-3475), established that Ambrose Sykes' semen was found in the vagina of Virginia Trimnell and on a bed comforter and a blue washcloth. (A-3409-3431). The comforter and blue washcloth were found in the trunk of Trimnell's car along with the suitcase containing Trimnell's body. Patricia Doss, Virginia Trimnell's daughter, was present with her mother when she purchased the comforter and Doss said that the comforter was always on the victim's bed. (A-3521). Based on this forensic DNA evidence, the State in the June 26, 2006 closing argument to the guilt phase jury argued: ". . . the 5 foot 10, 220 – pound defendant was at some point in time, when he was in her apartment, on top of 5 foot 2, 132 – pound Virginia Trimnell, engaged in sexual intercourse in her bed, and then trace amounts of his semen got on the comforter, and afterwards, he cleaned himself up with the blue washcloth?" (A-3521).

Trial defense counsel Tease conceded at the Rule 61 hearing when asked if there was any trial evidence of a possible consensual sexual relationship by noting: "Only in the most vague way and the fact that supposedly while he was at her apartment, she was free to go out and take trash to the trash can and came back, that he was able to access her computer." (A-1164). This slim argument hinged on the accuracy of an apartment building neighbor's recollection that she thought she saw

Trimnell taking out her trash about the time Sykes was using Trimnell's credit card to access a pornographic website on the victim's computer inside Trimnell's apartment.

The State's response to the suggestion that the sexual intercourse between Sykes and Trimnell could have been consensual was to challenge the accuracy of the neighbor's time estimate and to point out in closing argument:

> . . . there is absolutely, absolutely no evidence to support the notion that Virginia Trimnell willingly had sex with Ambrose Sykes on that day or any other day. . . . .
>
> She was hit in the head. She was tied up with knotted stockings. She was strangled to death by a scarf around her neck. Are those actions indicative of consensual sex?

(A-3520).

While the defense attempted to argue that there was a lack of proof of a rape (A-254-55), there was little supportive evidence since Sykes did not want to testify at trial. (A-1275-77). The initial DNA Analysis Report by Sherri Fentress is dated August 16, 2005. (A-1265). Prior to the DNA analysis, Sykes told his defense attorneys that he did even know Virginia Trimnell. (A-1269). Sykes only knew that Trimnell was going to Michigan, but he learned that information at the proof positive hearing. (A-1267-68). Sykes knew nothing else about Trimnell's past, why she was in Dover, or her family. (A-1268.

At the Rule 61 hearing attorney Tease testified that he was the one who told

Sykes that the August 16, 2005 DNA Analysis Report revealed that Sykes' semen was found in Trimnell's vagina. (A-1155-56, 1263-66). According to Tease, when he informed Sykes of the DNA analysis, "this ashen look came over his face." (A-1156, 1264). After Sykes learned about the DNA Report, he changed his story and then advised his defense counsel that he and Trimnell were involved in a "secret" consensual sexual relationship. (A-1155-56, 1202-06).

Tease testified that Sykes changed his story about knowing Trimnell on September 14, 2005, approximately one month after the initial August 16, 2005 DNA Analysis Report. (A-1142-44). There was never any evidence presented at trial in 2006, or at the 2011-2012 Rule 61 from Ambrose Sykes or any other source to confirm Sykes' belated September 14, 2005 claim to Tease that he was involved in a prior consensual sexual relationship with the 68 year old retired school teacher. (A-1270). Sykes in 2005 claimed that he met Trimnell at Dover Downs where Sykes worked as a janitor. (A-1144). A logical inference here is that Sykes simply concocted a story about a prior secret relationship in an effort to explain how his semen was found in the victim's vagina. The unlikely scenario could never be confirmed by any evidence. (A-1270).

Against this backdrop, the trial judge after the Rule 61 hearing again rejected Sykes' challenge to the sufficiency of the evidence for the first degree rape conviction. State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) at * 36

(Exhibit A). The trial judge in 2014 first noted that in the Rule 61 post-hearing briefing, Sykes "completely fails to address the burglary charge . . . ." Id. at * 36. Next, in denying the post-conviction claim that there was insufficient evidence of rape, the Superior Court Judge ruled:

> Petitioner focuses on the stockings which bound Trimnell's wrists, and argues that because Dr. Vershvovsky could untie them, that there was no indication of lack of consent. However, there was ample other evidence to establish lack of consent, including: the presence of Petitioner's semen in the victim; the reddening of her vaginal area; the lack of a prior relationship between the victim and Petitioner; the fact that the victim was strangled to death; the injuries inflicted upon the victim in regards to the trauma and hemorrhages to her head and scalp; and the fact that the victim's body was naked from the waist down. This evidence, considered collectively and viewed in the light most favorable to the State, supports the conclusion that a rational trier of fact could find lack of consent to be established, and accordingly find Petitioner guilty of rape beyond a reasonable doubt.

State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) at * 36 (Exhibit A).

The autopsy evidence of Trimnell's physical injuries as related at trial by Jennie Vershvovsky, M. D. (A-3264-3353), and the DNA evidence presented at trial by Sherri Fentress (A-3391-3475) was sufficient for a rational trier of fact, viewing that evidence in the light most favorable to the State, to conclude beyond a reasonable doubt that Sykes was guilty of first degree rape. The autopsy report indicated that the victim was nude from the waist down when extracted from her suitcase on November 10, 2004. (A-1800). The 1973 commentary to the Delaware Criminal Code in discussing the rape offense in former § 763 points out, "The

Court often instructed the jury to take account of all of the circumstances of the case, such as the disarray of the victim's clothing shortly after the act and the state of her body upon physical examination, in determining whether corroboration existed." Delaware Criminal Code With Commentary at p. 210 (1973) (discussing law prior to adoption of Model Penal Code definition of rape). Here, the victim had physical injuries and half her clothing was missing.

The fact that Trimnell was struck in the head, gagged, bound with pantyhose, and strangled to death, coupled with the bottom portion of her clothing being removed, all points to coercion of the elderly victim and sexual intercourse without consent. See Bright v. State, 490 A.2d 564, 567 (Del. 1985) ("the existence of coercion is a factor in establishing the victim's lack of consent"); Tyre v. State, 412 A.2d 326, 328 (Del. 1980) (sexual assault victim testified that defendant threatened to kill her and cut her lip, and examining physician noted bruising and stratches).

When a sexual assault victim survives, the statutory element of sexual intercourse "without consent" may be established by direct in-court testimony of the victim. See Clark v. State, 2008 WL 3906890 (Del. Aug. 26, 2008) at * 3; Johnson v. State, 2007 WL 1575229 (Del. May 31, 2007) at * 3. A rape victim who has been strangled to death is unavailable to provide such in-court eyewitness testimony; thus, the rape allegation and the "without consent" element of that charge must be established by other evidence. See Parson v. State, 222 A.2d 326,

328-30 (Del. 1966) (evidence of homicide victim's attempted rape consisted of pubic hair combings, nude body, blood, scrapes, abrasions, bruises and lacerations). Just as the sexual assault upon the 15 year old victim in Parson, 222 A.2d at 328-30 (prosecution for murder committed in perpetration of rape) could be established by evidence other than the victim's direct trial testimony, so could the rape of Virginia Trimnell be proven by evidence of her physical injuries and the partially nude body.

As pointed out by the Superior Court Judge, in the Rule 61 post-hearing briefing, Sykes "completely fails to address the burglary charge . . . ." State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) at * 36. In this appeal, Sykes does little more. He merely argues: "The State's failure to prove rape also means the State did not prove Burglary Second Degree. There was also no evidence presented that . . . Mr. Sykes unlawfully entered or remained in Ms. Trimnell's apartment. There was no sign of forced entry. As such, the State failed to meet its burden of proof." (Opening Brief at 49-50).

To prove second degree burglary the State had to establish beyond a reasonable doubt that Ambrose Sykes knowingly entered or remained unlawfully in Virginia Trimnell's dwelling with the intent to commit a crime therein. 11 Del. C. § 825(a)(1). The crime was rape for Count 6 and theft for Count 8. (A-1745). Sykes' presence in Trimnell's apartment was established in several ways. First, his semen was found on the comforter (A-3425-29), that Patricia Doss said was always

on her mother's bed. (A-3521). The comforter was removed from the apartment and was discovered in the trunk of Trimnell's car that Sykes was driving. (A-3522-23). Second, the bag of Silver Dollars also identified by the victim's daughter later turned up at Jenny St. Jean's Hartly trailer where Sykes lived. Third, the porn site visited on Trimnell's computer was the same or similar to sites visited by Sykes on his or St. Jean's home computer. Fourth, the two toothpicks while containing only the victim's DNA were, nonetheless, circumstantial evidence of Sykes' presence inside the apartment. Jenny St. Jean testified that Sykes was always chewing on toothpicks and she would find toothpicks in his pockets. Fifth, the spare key to the victim's apartment was missing from its basement hiding space in Trimnell's storage area. Finally, Sykes had the keys to Trimnell's car and was observed driving the vehicle in the Dover Downs parking lot and later when stopped by a Dover Police Officer. All of this evidence pointed to Sykes' presence in Trimnell's apartment, and coupled with the rape evidence was sufficient to prove second degree burglary.

The first degree kidnapping allegation required proof that Sykes unlawfully retrained Trimnell with the intent to facilitate the commission of first degree rape and Sykes did not voluntarily release Trimnell unharmed and in a safe place prior to trial. (A-1744). See 11 Del. C. § 783A(3). Trimnell was restrained by being bound and gagged, and later placed inside a suitcase inside her car trunk. (A-3538-

40). Trimnell was found dead inside her suitcase. She was not voluntarily released unharmed and in a safe place. This physical evidence was sufficient to prove the first degree kidnapping allegation.

The trial judge also observed in relation to the kidnapping charge: "Here, the victim's wrists were bound together by stockings, and her legs were tied together with pantyhose. The victim's body, while still bound, was placed inside a suitcase which was then inserted inside the trunk of the victim's own vehicle, which Petitioner was driving when he was originally stopped by Sergeant Mutter." State v. Sykes, 2014 WL 619503. (Del. Super. Jan. 21, 2014) at * 37 (Exhibit A).

V. THE KIDNAPPING WAS INDEPENDENT OF AND NOT INCIDENTAL TO THE RAPE

QUESTION PRESENTED

Was the kidnapping of the victim independent of and not incident to her sexual assault by the accused?

STANDARD AND SCOPE OF REVIEW

The denial of a motion for post-conviction relief is reviewed on appeal for an abuse of discretion. See Ploof v. State, 75 A.3d 811, 820 (Del. 2013); Norcross v. State, 36 A.3d 756, 765 (Del. 2011). Whether a kidnapping is independent of and not incident to another criminal offense is a mixed question of law and fact. See Burrell v. State, 953 A.2d 957, 960 (Del. 2008) ("A deferential standard of review is applied to factual findings by a trial judge."). See also City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc., 1 A.3d 281, 287 (Del. 2010). Questions of law are reviewed de novo. See Brown v. State, 897 A.2d 748, 750 (Del. 2006).

MERITS OF ARGUMENT

In Claim XX of his 2009 first amended motion for post-conviction relief, Ambrose Sykes argued that his first degree kidnapping conviction should be vacated because there was insufficient evidence that the kidnapping of Virginia Trimnell was independent of and not incident to her sexual assault by Sykes. See

Weber v. State, 547 A.2d 948, 959 (Del. 1988) (evidence of restraint for a separate kidnapping conviction must establish more interference with the victim's liberty than is ordinarily incident to the underlying crime); Kornegay v. State, 596 A.2d 481, 486 (Del. 1991) (relevant inquiry is whether the movement and / or restraint required for a kidnapping conviction is independent of and not merely incidental to the commission of the underlying offense). This was not the argument defense counsel made at trial in moving for a judgment of acquittal on the kidnapping charge at the conclusion of the State's case-in-chief. (A-3488).

Since the new post-conviction argument on the sufficiency of the evidence to support the kidnapping conviction was never presented to the Superior Court at trial in 2006, or as a plain error claim on the prior direct appeal to this Court, this species of argument concerning only the kidnapping conviction is procedurally defaulted under Del. Super. Ct. Crim. R. 61(i)(3), and Sykes was required to demonstrate cause and prejudice sufficient to excuse that procedural default.

The Superior Court did not abuse its discretion in finding this new kidnapping sufficiency of the evidence claim to be procedurally barred by Del. Super. Ct. Crim. R. 61(i)(3). State v. Sykes, 2014 WL 619503 (Del. Super. Jan. 21, 2014) at * 36-37 (Exhibit A). In denying post-conviction relief, the Superior Court ruled:

> Here, the victim's wrists were bound together by stockings, and her legs were tied together with pantyhose. The victim's body, while still bound, was placed inside a suitcase which was then inserted inside the trunk of the victim's own vehicle, which Petitioner was driving when he was originally stopped by Sergeant Mutter. This evidence is clearly independent from the physical injuries and other evidence . . . [of] Petitioner's rape conviction. Specifically, the binding of the victim's legs and transporting her inside a suitcase inside the trunk of a vehicle constitutes "much more" interference with her liberty than would have been required for rape. Thus, this claim is without merit, and it was not ineffective assistance for counsel to not raise it on appeal. It is procedurally barred under Rule 61(i)(3), and is hereby denied.

Sykes, 2014 WL 619503 at * 37. As noted by the Superior Court in denying post-conviction relief, trial counsel was not ineffective for failing to make this contention because the argument is legally meritless under the particular facts of this prosecution.

In addition to these factual findings and legal conclusion by the Superior Court Judge in denying post-conviction relief, the guilt phase jury in convicting Sykes of first degree kidnapping in 2006 also had to make a similar factual finding that "the restraint was independent of and not incidental to the offense of rape in the first degree." (A-3618). Sykes' guilt phase jury was correctly instructed on the six elements they had to find beyond a reasonable doubt to convict the accused of first degree kidnapping. (A-3618-19). A Weber jury instruction on kidnapping is mandatory. See Allen v. State, 970 A.2d 203, 219 (Del. 2009). The second of these six required elements of proof was that "the restraint was independent of and

not incidental to the offense of rape in the first degree." (A-3618). These factual findings by the guilt phase jury in 2006, and the trial judge in his 2014 Rule 61 decision are entitled to deference on appeal. See Burrell v. State, 953 A.2d 957, 960 (Del. 2008) ("A deferential standard of review is applied to factual findings by a trial judge. Those factual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous.") (citing Albury v. State, 551 A.2d 53, 60 (Del. 1988); Ornelas v. United States, 517 U.S. 690, 696-97 (1996) (finding of historical fact)); City of Westland Police & Fire Retirement System v. Axcelis Technologies, Inc., 1 A.3d 281, 287 (Del. 2010) ("a mixed finding of fact and law . . . is entitled to considerable deference.") (citing First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 567 (Del. 1997)).

The logical interpretation of the physical evidence is that the murder victim was disrobed from the waist down, including removal of her pantyhose, prior to the rape by Sykes whose semen was found in the victim's vagina. After the rape Trimnell's legs were bound with the pantyhose, she was stuffed in her own suitcase, the suitcase containing Trimnell was removed from the Dover apartment and placed in the trunk of Trimnell's car, and Sykes drove away in the victim's car. All of these actions appear to have occurred after Sykes unlawfully entered Trimnell's apartment and sexually assaulted her. The November 10, 2004 autopsy report (A-1800) documents that when the nude from the waist down body of Virginia

Trimnell was removed from her suitcase her legs were tied together with pantyhose. There is no reason to conclude that the restraint of Trimnell by having her legs tied together occurred prior to or incidental to the rape offense. A person who has been sexually assaulted cannot run away after her legs are tied together.

The timing of Sykes' actions, especially the tying together of Trimnell's legs, demonstrates that Trimnell's eventual kidnapping occurred after and was independent of both the burglary and the rape. Compare Wright v. State, 980 A.2d 372, 376-79 (Del. 2009); Douglas v. State, 879 A.2d 594, 599-601 (Del. 2005); Williams v. State, 2003 WL 1869606 (Del. April 9, 2003) at * 3-5. A rational trier of fact could conclude that there was substantial interference with Trimnell's liberty by movement or confinement (her legs were tied together with pantyhose that were probably removed prior to her rape), and that all this occurred without the victim's consent. (A-3618-19). See Wright, 980 A.2d at 375. There was sufficient evidence to support Syke's first degree kidnapping jury conviction, and the trial judge could properly consider the kidnapping conviction in the subsequent penalty phase proceeding.

CONCLUSION

The judgment of the Kent County Superior Court denying post-conviction relief should be affirmed.

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Dated: July 8, 2014

Not Reported in A.3d, 2014 WL 619503 (Del.Super.)
(Cite as: 2014 WL 619503 (Del.Super.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware
State of **Delaware**,
v.
Ambrose L. Sykes, Defendant.

I.D. No. 0411008300Submitted: October 16, 2013.
Decided: January 21, 2014.

Upon Defendant's Amended Motion for Post–Conviction Relief. *Denied.*
John Williams, Esquire of State of Delaware, Department of Justice, Dover, Delaware; attorney for the State.

Patrick J. Collins, Esquire and Albert J. Roop, V, Esquire of Collins & Roop, Wilmington, Delaware; attorneys for the Defendant.

ORDER

WITHAM, R.J.

INTRODUCTION

***1** Before the Court is Petitioner Ambrose Sykes' (hereinafter "Petitioner") extensive Amended Motion for Postconviction Relief. Petitioner raises twenty-three grounds for relief [FN1] from his 2006 conviction for Murder in the First Degree, Rape in the First Degree, and other related offenses, and relief from this Court's subsequent imposition of the death sentence. The majority of Petitioner's claims for relief are based on allegations of ineffective assistance of counsel against Petitioner's two trial attorneys, Thomas Donovan (hereinafter "Donovan") and Christopher Tease (hereinafter "Tease") (collectively "Trial Counsel"). Petitioner also alleges a host of additional constitutional violations under the U.S. Constitution and Delaware Constitution.

FN1. Petitioner only addresses twenty-two claims in his Post–Hearing Opening Brief, and addresses them in an order different from his Amended Motion. Petitioner's Post–Hearing Brief omits Claim VI of Petitioner's Amended Motion, which alleges that this Court improperly commented on Petitioner's right to remain silent. In order to address the merits of this claim, the Court will analyze each of Petitioner's twenty-three claims in the order utilized in his Amended Motion. Reference to a claim by its number refers to its number in the Amended Motion, not the Post–Hearing Brief.

In 2011 and 2012, this Court held an evidentiary hearing on Petitioner's Motion over the course of eleven days. After careful consideration of the parties' filings, the affidavits of Trial Counsel, the trial record, the evidence and testimony presented at the evidentiary hearing, and the post-hearing briefs of both Petitioner and the State, the Court concludes that Petitioner's Amended Motion for Postconviction Relief must be DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

On November 8, 2004 sixty-eight-year-old Virginia Trimnell (hereinafter "Trimnell"), of Dover, failed to arrive as scheduled to visit her daughter in Detroit, Michigan. Trimnell's daughter reported Trimnell as missing. The Dover Police Department sent an officer to Trimnell's apartment to check on her, but the apartment appeared undisturbed and showed no signs of forced entry. Trimnell's car and purse could not be located.

At approximately 3:30 a.m. on November 10, 2004, Sergeant Timothy Mutter (hereinafter "Sergeant Mutter") of the Dover Police Department saw Trimnell's vehicle traveling in downtown Dover. As Sergeant Mutter began to follow the

Exhibit A

vehicle, the car pulled over across from Trimnell's apartment complex and the driver exited the car. The driver was later identified as Petitioner. Upon seeing Trimnell's name on the vehicle's registration, Sergeant Mutter questioned Petitioner as to Trimnell's whereabouts, at which point Petitioner fled on foot. Sergeant Mutter was unable to apprehend Petitioner that night.

Detective Todd Case (hereinafter "Detective Case") of the Dover Police Department's criminal investigation unit was assigned to investigate Trimnell's disappearance. Detective Case searched the vehicle and found a shovel, gas cans, rubber gloves, a blood-stained pillow, and women's clothing inside the car. In the trunk, police found Trimnell's purse inside a duffel bag, and a large suitcase with Trimnell's name on it. Inside the suit case, police discovered Trimnell's body. Petitioner's fingerprints were later found on the car frame, gas tank, shovel, and one of the gloves.

***2** Assistant Medical Examiner Jennie Vershvovsky (hereinafter "Dr. Vershvovsky") conducted Trimnell's autopsy, and determined that Trimnell died as a result of asphyxiation by strangulation. Semen was found in Trimnell's vagina, and later DNA testing matched the semen to Petitioner.[FN2] Dr. Vershvovsky found no defensive wounds on Trimnell, nor could Dr. Vershvovsky conclude when sexual intercourse occurred relative to Trimnell's death.

> FN2. Semen was also found on a comforter found in Trimnell's vehicle, which was also confirmed by DNA testing to be Petitioner's.

A search of Trimnell's apartment revealed two toothpicks which were matched to Petitioner's DNA. Additionally, a search of Trimnell's computer uncovered that the computer had been used to access pornographic websites on November 7, 2004. Access to the sites was paid for with Trimnell's credit cards. Trimnell's computer had never been used to access pornography prior to November 7. Police later seized several computers and magazines from the mobile home in Hartly where Petitioner resided with Jenny St. Jean (hereinafter "St. Jean"), Petitioner's girlfriend and the mother of his child, A.S.[FN3] Pornographic images found on those computers were similar to the pornography found on Trimnell's computer. Police also discovered a bag of silver dollars on St. Jean's dresser. Trimnell's daughter later identified those coins as belonging to her mother. A search of Trimnell's phone records revealed that a cell phone registered to Petitioner made three phone calls to Trimnell's home on the morning November 7, 2004. Petitioner was employed at the time as a night custodian at Dover Downs, and did not arrive for his scheduled shift on November 7. On November 8, Petitioner informed his supervisor that he quit, citing problems with his vehicle. Dover Downs surveillance footage captured Petitioner leaving the parking lot in Trimnell's vehicle following his resignation.

> FN3. Due to the child's age at all times relevant to this case, the Court declines to give the child's full name.

Following Petitioner's flight from Sergeant Mutter on November 10, Petitioner was not seen again until November 29, 2004, when police arrested Petitioner in the vicinity of his home. Based on the foregoing, Petitioner was indicted for: one count of Murder in the First Degree (Intentional Murder), one count of Murder in the First Degree (Felony Murder), one count of Rape in the First Degree (Physical Injury), one count of Rape in the First Degree (During Commission of a Felony), one count of Kidnapping in the First Degree, two counts of Burglary in the Second Degree, one count of Theft of a Senior, one count of Unlawful Use of a Credit Card, one count of Unauthorized Access to a Computer System, and one count of Resisting Arrest. The rape charges were ultimately merged into one count of Rape in the First Degree, and the burglary charges were ultimately merged into one count of Burglary in the Second Degree.

Trial and Sentence

Donovan was appointed to represent Petitioner in December of 2004 on the basis of conflict, because the Public Defender's Office already represented St. Jean at the time. In March of 2005, Donovan challenged his appointment on the basis that no actual conflict existed. Donovan requested that Petitioner be referred back to the Public Defender.[FN4] This Court found merit to Donovan's argument and concluded that no actual conflict existed, but held that Donovan must continue to represent Petitioner based on the appearance of impropriety that may be created by the Public Defender's representation.[FN5]

FN4. At the time, the Office of Conflicts Counsel had not yet been established.

FN5. *State v. Sykes,* 2005 WL 1177567, at *3 (Del.Super. May 2, 2005). The Court held that Donovan could be relieved from his appointment if both Petitioner and St. Jean executed waivers, which ultimately did not occur. *Id.*

***3** Tease joined the defense team in June of 2005. Donovan was lead counsel and primarily responsible for the guilt phase of Petitioner's trial. Tease was responsible for the penalty phase, but also participated in aspects of the guilt phase, including the cross-examination of several witnesses.

Jury selection began on May 30, 2006 and continued until June 7, 2006. The guilt phase of the trial proceeded from June 9, 2006 through June 26, 2006. On June 27, following deliberations, the jury found Petitioner guilty on all counts.

The penalty phase of the trial began on June 29, 2006 and lasted through June 30. Tease presented the testimony of four witnesses: St. Jean (who also testified at the guilt phase of trial as both a State witness and a defense witness); Petitioner's mother, Debora Sykes; and two of Petitioner's sisters, Debray Sykes and Creshenda Jacobs. Petitioner did not allocute. On June 30, 2006, the jury unanimously found beyond a reasonable doubt the existence of a statutory aggravating factor: that Trimnell was murdered while Petitioner was engaged in the commission of, or during his flight after committing, Burglary in the Second Degree. This Court found that two additional statutory aggravating factors—the murder was committed while the defendant was engaged in the commission of, or during his flight after committing, Rape in the First Degree; and the murder was committed while the defendant was engaged in the commission of, or during his flight after committing, Kidnapping in the First Degree—were established beyond a reasonable doubt by virtue of the jury's guilty verdict. The Court also found the following statutory and non-statutory aggravating factors were established by a preponderance of the evidence: the victim was 62 years of age or older; the murder was committed for pecuniary gain; the victim was targeted and the murder was planned in advance; the murder was heartless, depraved, cruel and inhuman; Petitioner terrorized and abused the victim before murdering her; the murder had an adverse impact upon the victim's family; and Petitioner is potentially dangerous in the future.

The Court found that Petitioner failed to establish the mitigating factor of residual doubt, based on the strength of the State's evidence. The Court found the existence of several mitigating factors, including: Petitioner's relationships with A.S., St. Jean, his siblings, and his mother; the negative impact his execution would have on his family; his lack of guidance as a youth; the lack of intervention by his parents during a troubled childhood; and his ability to adjust well in a controlled environment. The jury, in balancing the aggravating and mitigating factors, unanimously recommended the death penalty. This Court agreed with the jury's recommendation and sentenced Petitioner to death by lethal injection.[FN6]

FN6. *State v. Sykes,* No. 0411008300, at 17 (Del.Super. Aug. 15, 2006).

Direct Appeal

Trial Counsel also represented Petitioner on ap-

peal. The Delaware Supreme Court initially remanded this case to this Court for further factual findings on whether there was discriminatory intent behind the State's peremptory challenges.[FN7] This Court concluded that the State had provided credible race-neutral reasons for each of its challenges, and these reasons were not a pretext for racial discrimination.[FN8] Petitioner raised six claims on direct appeal to the Delaware Supreme Court: (1) the trial judge infringed upon Petitioner's Fifth Amendment right to remain silent when he erroneously instructed the jury during the guilt phase that Petitioner would have the opportunity to allocute following closing arguments; (2) the State improperly exercised its peremptory challenges on the basis of race, violating *Batson* by denying Petitioner his right to an impartial jury; (3) the trial judge improperly denied Petitioner's motion for a change of venue; (4) the trial judge failed to order a new trial after St. Jean improperly contacted two jurors after the guilt phase of trial but before the penalty phase; (5) death by lethal injection violates the Eighth Amendment's prohibition against cruel and unusual punishment; and (6) Petitioner's death sentence is disproportionately severe compared to other similar cases.[FN9] The Supreme Court declined to address Petitioner's fifth claim because it was not properly preserved below and was more appropriate for a motion for postconviction relief.[FN10] The Supreme Court found no error in Petitioner's remaining claims and affirmed Petitioner's sentence.

FN7. *Sykes v. State,* No. 516 & 566, 2006 (Del. Aug. 30, 2007).

FN8. *State v. Sykes,* No. 0411008300, (Del.Super.Oct. 30, 2007).

FN9. *Sykes v. State,* 953 A.2d 261, 264 (Del.2008).

FN10. *Id.*

***4** As to the allocution comment claim, this Court mistakenly informed the jury during the guilt phase of trial that Petitioner would have an opportunity to allocute. This Court immediately recognized its error and called the attorneys to chambers. Trial Counsel moved for a mistrial. This Court denied the motion and instead promptly issued a curative instruction to the jury. The Supreme Court found that the curative instruction "was a meaningful and practical alternative" to a mistrial and rejected this claim.[FN11]

FN11. *Id.* at 269.

As to Petitioner's *Batson* claim, the Supreme Court closely examined this Court's findings on remand, and determined that while Petitioner made a *prima facie* showing under *Batson,* this Court's analysis showed there was no constitutional violation.[FN12] As to the change of venue claim, the Supreme Court determined that the pre-trial publicity surrounding Petitioner's case was insufficient for this Court to presume prejudice, and Petitioner had failed to demonstrate actual prejudice justifying a change of venue.[FN13] As to Petitioner's death penalty claim, the Supreme Court found Petitioner's sentence to be proportional to similar cases.[FN14]

FN12. *Id.* at 271.

FN13. *Id.* at 272.

FN14. *Id.* at 273.

Finally, as to the improper juror contact claim, Petitioner argued that prejudice should have been presumed on the basis of St. Jean's contact with Juror No. 6 and Juror No. 9 during a little league game. This Court interviewed both jurors about the incident, and allowed Juror No. 6 to remain on the jury, but dismissed Juror No. 9 based on her fear of St. Jean following the incident. The Supreme Court concluded that Petitioner failed to establish identifiable prejudice or egregious circumstances warranting a new penalty hearing.[FN15]

FN15. *Sykes,* 953 A.2d at 272–73.

Petitioner next filed a petition for a writ of *certiorari* with the United States Supreme Court in

June of 2008. The petition was denied.[FN16]

FN16. *Sykes v. Delaware,* 555 U.S. 969 (2008).

Motion for Postconviction Relief

On October 24, 2008, Petitioner, represented by new counsel, timely filed his original Motion for Postconviction Relief as well as Motion for Stay of Execution, which this Court granted on December 15, 2008. On October 19, 2009, Petitioner filed his Amended Motion for Postconviction Relief in which Petitioner raises twenty-three separate claims for relief. The State subsequently filed its response, to which Petitioner filed a reply. Donovan and Tease each filed sworn affidavits responding to the allegations in the Amended Motion.

Beginning October 10, 2011 and concluding November 7, 2012, the Court held an evidentiary hearing over the course of eleven days. Over 40 exhibits were admitted into evidence, and 21 witnesses, including Trial Counsel, testified during the hearing. An additional three witnesses who did not testify were deposed. Both parties submitted briefs in support of their arguments following the hearing.

On April 12, 2013, Petitioner filed a Motion to Amend to add two additional claims to his Amended Motion for Postconviction Relief. By Order dated July 12, 2013, this Court denied Petitioner's Motion to Amend on the grounds that the amendments would be futile.[FN17]

FN17. *State v. Sykes,* 2013 WL 3834048, at *3 (Del.Super. July 12, 2013).

Evidentiary Hearing

Given the breadth of Petitioner's claims, this Court shall briefly summarize the testimony presented at the evidentiary hearing before conducting its legal analysis.

a. Thomas Donovan

Donovan testified over the course of two days. Petitioner's questioning of Donovan attempted to portray Donovan as having a single-minded focus on escaping his appointment as Petitioner's attorney, and as a result did not begin investigating Petitioner's case as early as he should have. Donovan acknowledged that approximately sixteen months elapsed between Petitioner's proof positive hearing in June of 2005 and Donovan's next face-to-face meeting with Petitioner in April of 2006. Petitioner had previously mailed Donovan a letter that month expressing Petitioner's "utter alarm" that Donovan had not visited him at prison.

***5** Donovan testified that he chose Tease as his co-counsel based on Donovan's mistaken belief that Tease had considerable experience in capital cases. Donovan also failed to hire a forensic expert to rebut Dr. Vershvovsky's testimony, which Donovan acknowledged to be a mistake on his part because, at the time, Donovan believed he or Tease could effectively cross-examine Dr. Vershvovsky without the aid of a forensic expert. Much of Petitioner's questioning also focused on Donovan's supposed failures to either obtain certain evidence, object to comments made by the State during closing arguments, or to call specific witnesses.

On cross-examination, Donovan described the defense's trial strategy as twofold: (1) to implicate St. Jean in Trimnell's murder, on the theory that Petitioner had a consensual sexual relationship with Trimnell which St. Jean found out about; and (2) to show there was a lack of evidence implicating Petitioner. Donovan acknowledged there were difficulties in pursuing both strategies. Donovan testified that as of December of 2004, Petitioner initially denied knowing Trimnell, and once Petitioner told Trial Counsel in June of 2005 that he had a sexual relationship with Trimnell, there was not enough information to prove the relationship existed. Further, Petitioner specifically told Trial Counsel not to attempt to implicate St. Jean, and it was not until halfway through the trial that Petitioner changed his mind, leaving Donovan little time to prepare the strategy. Trial Counsel were also concerned that if they pursued St. Jean too aggressively, St. Jean could provide damaging testimony

against Petitioner. Still, Donovan chose to not prepare St. Jean for her testimony for Petitioner, in order to potentially implicate her in Trimnell's death. Finally, Donovan testified that the strength of the State's evidence against Petitioner made his lack of evidence strategy difficult to pursue.

Donovan acknowledged that there were issues which he failed to raise on appeal, including the argument that Juror No. 9 was improperly allowed to remain on the jury despite being an alleged acquaintance of St. Jean. Donovan claimed he only raised arguments on appeal which he believed were most likely to result in a reversal of conviction.

b. Christopher Tease

Tease testified over the course of three separate days. Tease was primarily responsible for the penalty phase of trial, but did not retain a mitigation specialist, nor did he obtain any records pertaining to Petitioner such as school records, medical records or family records. Tease did not admit that this was error, but conceded that there was no tactical or strategic reason for doing so. Tease justified his decision to not hire a mitigation specialist on the basis that before representing Petitioner, Tease had worked on another capital case with an experienced attorney, and had not retained a mitigation specialist in that case. Tease also testified that he was working on three separate murder trials at the same time when he was working on Petitioner's case, which hampered his ability to fully prepare Petitioner's case. Additionally, at this point in Tease's career, Tease did not have much experience in murder trials.

At the outset of the case, Tease had his law clerk interview several of Petitioner's family members as preparation for the penalty phase of trial. Tease claimed he also conducted interviews, and stated that he interviewed Petitioner on numerous occasions. Tease believed early on in the case that, due to the strength of the State's evidence, Petitioner "had no shot" in the guilt phase. Thus, Tease testified that he began prepping several of the mitigation witnesses during the guilt phase of trial. Tease's strategy for the penalty phase was to present the testimony of Petitioner's family to focus on Petitioner's then-ten-year-old son, and the need for the son to have a father figure because Petitioner's own father, Jesse Sykes (hereinafter "Jesse") was a negative influence on Petitioner's upbringing. However, Petitioner was "adamant" that he wanted neither A.S. nor Jesse to testify at his penalty hearing. Petitioner was also adamant in not wanting to allocute. Petitioner's questioning at the evidentiary hearing focused on Tease's alleged failure to focus on the physical abuse Jesse inflicted on Petitioner and Petitioner's exposure to Jesse's substance abuse as potential mitigators.

*6 Tease had Petitioner evaluated by a psychologist, Dr. Mandell Much (hereinafter "Dr. Much"). [FN18] Tease claims that Petitioner was not very cooperative during Dr. Much's evaluation, and that Dr. Much's evaluation would not have been helpful during the penalty phase because Dr. Much's only conclusion was that Petitioner suffered from an anti-social personality disorder, which would not be a helpful mitigating factor. Tease's testimony also referred to a Dr. Dougherty; it appears that this psychologist, whom Tease had worked with on another case, may have initially been retained as well, but ultimately an evaluation was never scheduled with Dr. Dougherty.

> FN18. Tease's affidavit, as well as the State's briefings, refer to a Dr. Mensch as conducting this evaluation. However, Tease's testimony clarified that it was Dr. Much who performed the evaluation, and Tease was mistaken when he referred to the psychologist by the wrong name. Transcript of Rule 61 Hearing, at 199, *State v. Sykes,* No. 0411008300 (Oct. 11, 2011).

Tease cross-examined several key witnesses during the guilt phase, including Dr. Vershvovsky and Detective Case. Tease acknowledged that his cross-examination of Dr. Vershvovsky might have been benefitted if Trial Counsel had retained their own medical expert or pathologist. Tease defended

his decision to not challenge Detective Case's lay testimony that drag marks on the floor of the basement in Trimnell's apartment complex matched the suitcase in which Trimnell's body was discovered. Tease stated that the drag marks suggested that a second person may have been involved in moving the suitcase, and thus Detective Case's testimony was helpful to the defense.

Finally, Tease indicated that communication between himself and Donovan was not as effective as it could have been. Tease also disagreed with several of Donovan's tactical decisions, especially Donovan's decision to not prepare St. Jean for her testimony during the guilt phase. Tease acknowledged that not preparing St. Jean was a tactical decision by Donovan, in order to potentially "blind-side" her and implicate her in Trimnell's death, but Tease did not believe the strategy paid off. Tease did prepare St. Jean for the penalty phase. Tease also formulated his own strategy during the guilt phase which he presented during the penalty phase: a "residual doubt" theory that Trimnell accidentally suffocated to death once she was bound, and that there was not enough evidence that she was intentionally strangled to death.

c. other members of the defense team

Tease's law clerk [FN19] during the early stages of Petitioner's trial also testified at the evidentiary hearing. The law clerk testified that Tease prepared a questionnaire for the law clerk to use in interviewing Petitioner's family members in preparation for the penalty phase. The law clerk interviewed Petitioner's mother and two of Petitioner's sisters, and prepared a memorandum on his findings. Other than the interviews, the clerk did not perform any other task related to the Sykes' case, and left Tease's employment shortly thereafter.

> FN19. The Court declines to name the law clerk as he was not a Delaware barred attorney at all times relevant to this case.

Gary Marshall (hereinafter "Marshall") was a private investigator hired by Donovan to work on Petitioner's case, which was the first murder case Marshall had worked on. Prior to becoming a private investigator, Marshall had approximately 10 years of experience as a police officer in Virginia and Maryland and had also worked as an internal investigator for Wal–Mart. Marshall interviewed Sykes at prison approximately six weeks before trial, worked closely with Donovan in participating in meetings and interviews with potential witnesses, and reviewed phone records and Trimnell's bank records in an attempt to establish a prior relationship between Petitioner and Trimnell. Marshall also interviewed Trimnell's neighbors and St. Jean's employer to investigate whether there was a link between St. Jean and Trimnell.

*7 Marshall testified that he believed that St. Jean was involved in some way in Trimnell's death, but that petitioner did not want the defense team to explore that route. Marshall also testified that despite his efforts, there was not enough information to establish a pre-existing relationship between Trimnell and Petitioner or St. Jean. Petitioner asked a series of questions in an attempt to show that Marshall cut his investigation short based on a lack of funds, but Marshall adamantly denied these allegations and testified that lack of funds was not an issue that affected the investigation.

Philip Malmstrom (hereinafter "Malmstrom") is the owner of Diamond Computer Incorporated, which provides a variety of computer-related services including data recovery. Donovan hired Malmstrom to retrieve data from Trimnell's and Petitioner's computers and compare the data on both computers. Malmstrom's findings validated the accuracy of the police's findings. Malmstrom testified that Donovan never asked Malmstrom to be a witness in the case. Prior to Petitioner's case, Malmstrom had not done data recovery for any other court case.

d. David Bruner

David Bruner (hereinafter "Bruner") knew St. Jean because Bruner's aunt had employed St. Jean as a home care nurse in late 2003 and early 2004.

Bruner had a positive impression of St. Jean, but eventually Bruner noticed unauthorized charges on his aunt's credit card and checking account. Bruner contacted the police, St. Jean ceased working for Bruner's Aunt, and Bruner had no further contact with St. Jean. Bruner was socially acquainted with Donovan and met with Donovan and Marshall to discuss his knowledge of St. Jean. Donovan told Bruner that Bruner would be called as a witness at trial. Despite being subpoenaed and arriving at trial prepared to testify, Bruner was never called as a witness. Bruner was told he would not be called, but never received an explanation as to why.

e. Mike McClements

Floyd "Mike" McClements (hereinafter "McClements") was St. Jean's former fiancé. While Petitioner was incarcerated in Pennsylvania for an unrelated crime, McClements lived with St. Jean and her son at the Hartly mobile home for approximately ten months. McClements was "sure" that while he lived at the mobile home, he used the computer to access pornographic websites. McClements could not recall the specific sites he accessed, but testified he did not view pornography frequently and that he did not pay for the sites he visited. McClements recalled one occasion where his bank account was overdrawn due to access to a paid website; McClements later confronted St. Jean about this, who according to McClements admitted she had used his account to access a pornographic site.

f. Jenny St. Jean

St. Jean testified that in June of 2004 she was laid off from her job as a home care nurse as a result of the incident involving Bruner's aunt. St. Jean subsequently pled guilty to one count of unauthorized use of a credit card and one count of felony theft; she also pled guilty to one count of hindering prosecution in regards to Petitioner's case. St. Jean was also arrested in May of 2004 for offensive touching when St. Jean punched a female coworker whom St. Jean believed was flirting with petitioner.

St. Jean regularly saw a psychiatrist, and testified that she had a long history of having "nasty moods," which included mood swings, explosive bursts of anger, and impulsive behavior. In July of 2004 St. Jean was hospitalized after taking an overly large amount of Prozac, and was diagnosed with bipolar disorder. St. Jean took medication for her condition, but testified that she did not always remember to take her medication if Petitioner did not remind her. She stopped taking her medication in October of 2005.

***8** St. Jean testified that it was her decision to not bring A.S. to the penalty hearing because the child had been "troubled" ever since Petitioner's arrest, and St. Jean believed it would be inappropriate. St. Jean also claimed that she only had one meeting with Donovan before she testified at the guilt phase of trial, and that she did not confer with Tease at all before the penalty hearing except for a brief conversation in the hallway before St. Jean took the stand.

Perhaps the most important testimony given by St. Jean at the evidentiary hearing concerned a statement St. Jean made to Trial Counsel during the guilt phase. St. Jean testified that during the guilt phase of the trial, St. Jean informed both Donovan and Tease that on the night Petitioner was arrested, nineteen days after his flight from Sergeant Mutter, Petitioner told St. Jean: "[i]f they had been 30 seconds later it would have been on fire." [FN20] St. Jean testified that "they" meant police, and "it" meant Trimnell's vehicle that Petitioner was driving on November 10, 2004. St. Jean claimed she did not tell police about Petitioner's statement because she was not certain if she remembered the statement correctly. St. Jean never testified about that statement at Petitioner's trial, and the revelation of that statement at the evidentiary hearing was the first time that statement was introduced into the record in this case.

FN20. Transcript of Rule 61 Hearing, Volume D, at D–105, *State v. Sykes,* No. 0411008300 (Oct. 17, 2011).

g. Petitioner's family

Petitioner's mother, Debora Sykes (hereinafter "Debora") and Petitioner's sister, Debray Sykes (hereinafter "Debray"), both of whom testified at the penalty hearing, also testified at the evidentiary hearing. Petitioner's other sister who testified at the penalty hearing, Creshenda Jacobs (hereinafter "Jacobs") was deposed, but did not testify. Petitioner's older sister, Richelle Herriott (hereinafter "Herriott"), and Petitioner's younger sister, Jania Watkins (hereinafter "Watkins") also testified at the evidentiary hearing. Neither Herriott nor Watkins testified at the penalty hearing; both stated that they were never contacted by Trial Counsel for an interview or asked to testify in the penalty hearing, but would have agreed to testify if asked.

Debora, Debray and Jacobs all testified that they had little to no contact with Trial Counsel prior to the penalty hearing and were either not prepared by Tease before they testified or received only minimal preparation. Debray claimed she was never interviewed about Petitioner's life growing up or her family's background in general. However, on cross-examination, Debray acknowledged that Trial Counsel may have contacted her towards the beginning of Petitioner's case to interview her, but Debray declined to share any information because she did not know who the attorneys were.

All of these witnesses testified that Petitioner had a loving relationship with A.S. Watkins further testified that she had a loving relationship with Petitioner. The testimony of Debora, Debray, Jacobs, and Herriott was largely consistent and can best be summarized as follows: Petitioner's household when he was a child was one of little to no means and no real parental presence, particularly by Petitioner's father, Jesse. The neighborhood where the family lived was one infested with crime and high drug use. Debora attempted to maintain a strict household and often inflicted corporeal punishment upon her children that at times could be considered harsh; Petitioner would often receive the worst of this punishment. Jesse was verbally and physically abusive to Debora, and made no attempts to conceal his dalliances with other women before ultimately abandoning the marriage. Despite this, Petitioner adored Jesse as a child, and ultimately Debora allowed Petitioner to live with Jesse for approximately two years. While living with Jesse, Petitioner continued to be exposed to his father's sexual relationships and substance abuse, and Petitioner was physically abused by his father.

h. Dawn Hawkins

***9** Dawn Hawkins (hereinafter "Hawkins") testified via video deposition. Hawkins was Jesse Sykes' girlfriend for a number of years, and shared a house with him. Hawkins testified that Jesse was physically abusive towards her, and that Jesse once violently threatened Hawkins with a gun. Petitioner lived in Jesse and Hawkins' home as a teenager for approximately two years. Hawkins' young son and younger sister also lived in the house during that time. Hawkins testified that Jesse physically abused Petitioner on a frequent basis, and Jesse would smoke marijuana in Petitioner's presence. Hawkins stated that Jesse often stole items from his job as a moving van driver, and would force Hawkins and Petitioner to accompany him on his thefts. Hawkins stated that Trial Counsel never contacted her about testifying at the penalty hearing.

i. Tara Whittlesay

Tara Whittlesay (hereinafter "Whittlesay") also testified via video deposition. Whittlesay is Hawkins' younger sister, and as a teenager lived in the house Hawkins shared with Jesse and Petitioner. Whittlesay testified that Petitioner longed for Jesse's affection, despite the physical abuse that Jesse would often inflict upon Petitioner. Whittlesay testified that Jesse frequently smoked marijuana, and was uncertain whether Jesse used other drugs. Whittlesay also testified that Jesse sexually abused her, and that Petitioner was likely aware the sexual abuse was occurring. Whittlesay was never contacted by Trial Counsel to testify at Petitioner's penalty hearing, but stated she would have testified if asked.

j. Yolanda Jones

Yolanda Jones (hereinafter "Jones") was Petitioner's teacher during Petitioner's childhood in Virginia. Jones was a "homebound teacher," meaning that she would visit children at their homes to teach them if they were unable to attend school. Jones testified that she often taught Petitioner at his home due to a number of chronic illnesses he suffered from as a child. Jones described Petitioner's neighborhood as one with a high poverty and crime rate, and described the Sykes household as being kept in very poor condition. Jones testified that Petitioner struggled as a student, and had to repeat first grade and fifth grade.

k. Douglas Dyer

Douglas Dyer (hereinafter "Dyer") was the facility manager of the Jiffy Lube in Dover in 2004, and had hired Petitioner that year as a lube technician. Dyer described Petitioner as a hard worker and testified that he and Petitioner were friends outside of work. Dyer also testified that Petitioner had a positive relationship with A.S. According to Dyer, Petitioner stopped showing up for work one day without explanation, and Dyer had no further contact with Petitioner since then.

l. Dana Cook

Dana Cook (hereinafter "Cook") is the Deputy Director of the Atlantic Center for Capital Representation in Philadelphia. Cook works as a mitigation specialist and has consulted on other capital cases in conducting mitigation investigations; however, Cook has never testified as a mitigation expert. Cook was retained by Petitioner and reviewed the mitigation evidence Tease compiled in presenting Petitioner's case at the penalty phase, as well as the hearing testimony of Donovan, Tease and other witnesses including Petitioner's family members.

Cook described the typical process of a mitigation investigation, and stressed that it was important for an attorney to develop a relationship with the client at the outset of representation. Cook testified that it is good practice to gather all records pertaining to a client and to interview all members of a client's family as well as third parties such as friends and teachers. Cook stated that there were a number of "red flags" in the evidence and interviews compiled by Trial Counsel that warranted further investigation, though none was conducted. Cook stated that the questionnaires used by his law clerk in early interviews were not comprehensive enough. Cook also found the testimony of Hawkins and Whittlesay significant in portraying an abusive atmosphere in Jesse Sykes' household that should have been presented at the penalty phase. Cook also focused on medical records that showed that Petitioner was hospitalized shortly after his birth due to a lack of oxygen. Cook testified that this should have signaled to Trial Counsel that a medical expert should have been retained to diagnose Petitioner for brain damage, another mitigator. Cook concluded that Trial Counsel's mitigation investigation was not a reasonable one, based on the failure to collect life history records, the limited number of interviews, and lack of further investigation into multiple red flags.

***10** On cross-examination, Cook admitted that while the American Bar Association (hereinafter "ABA") Guidelines recommend retaining a mitigation specialist, there is no actual requirement to hire one. Cook's testimony was inconclusive on whether retaining a mitigation specialist was commonplace at the time of Petitioner's trial. Cook stated that testimony on the physical abuse Petitioner was exposed to in Jesse's home would have supplemented the testimony that was presented at the penalty hearing. However, Cook admitted that there was no direct link between physical abuse and why a person would commit murder.

m. Dr. Carol Armstrong

Dr. Carol Armstrong (hereinafter "Dr. Armstrong") is the director of the neuropsychology lab for the Children's Hospital of Philadelphia and was accepted by the Court as Petitioner's expert in neuropsychology. In July of 2009, Dr. Armstrong evaluated Petitioner over the course of six hours.

Dr. Armstrong found that Petitioner's abilities meet the range of someone his age, but Petitioner scored statistically lower on memory tests compared to the rest of his evaluation. Dr. Armstrong concluded that Petitioner suffered from brain damage in the form of associative memory impairment, which would cause Petitioner to be unable to remember new information or learn new things beyond his normal effort. Dr. Armstrong speculated that the physical abuse Petitioner suffered as a child was a possible cause of his memory impairment, but could not conclusively state this. In response to cross-examination, Dr. Armstrong testified this type of brain damage would not compel Petitioner to commit murder.

n. Dr. Jonathan Arden

Dr. Jonathan Arden (hereinafter "Dr. Arden") is a forensic consultant retained by Petitioner and was accepted by the Court as an expert in forensic pathology. Dr. Arden reviewed Dr. Vershvovsky's autopsy report of Trimnell, autopsy photographs, and transcripts of Dr. Vershvovsky's trial testimony. Dr. Arden concluded, contrary to remarks made by the State during closing arguments at trial, that Trimnell was bound by stockings after her death, not before; Dr. Arden also found that there was no evidence she had been gagged. Dr. Arden based his conclusions on the absence of marks or injuries indicating the victim had been alive when she was bound and no evidence that a gag was ever used. Dr. Arden's findings were otherwise consistent with Dr. Vershvovsky's report: Dr. Arden found scattered scalpine hemorrhages (but did not believe them to be as severe as Dr. Vershvovsky did), found no defensive wounds on the body just as Vershvovsky did, agreed with Dr. Vershvovsky that the cause of death was asphyxiation by strangulation, and also agreed with Dr. Vershvovsky that it could not be determined whether the sexual activity that occurred before the victim's death was consensual or nonconsensual.

o. Dr. Craig Haney

Dr. Craig Haney (hereinafter "Dr. Haney") is a psychology professor and Director of the Legal Studies Program at the University of California at Santa Cruz. Dr. Haney was retained by Petitioner and accepted by the Court as an expert in the narrow field of the correlation between the circumstances of a crime committed outside of prison and the offender's future dangerousness while in prison. Dr. Haney testified that Petitioner would not be a future danger in prison if sentenced to life imprisonment instead of death. Dr. Haney based his conclusion on his study that the correlation between violent crimes and a criminal's future dangerousness in prison is low to nonexistent. Dr. Haney testified that individuals who commit violent crimes often become acquainted with prison life, no longer represent a danger to the rest of the prison community, and that individuals sentenced to life in prison tend to behave better. He also testified that older inmates are less likely to cause issues. Dr. Haney stressed that Petitioner's past criminal history and chaotic and abusive childhood had no relevance on his future dangerousness in prison. However, Dr. Haney admitted on cross examination that he is personally opposed to the death penalty in all cases.

p. Andrew Lash

***11** Andrew Lash (hereinafter "Lash") is a computer forensic investigator retained by Petitioner. Lash analyzed the hard drives of Trimnell's computer and Petitioner's computers. Lash's review included a comparison of the internet searches conducted on the computers. Lash testified that between April 1, 2004 and November 29, 2004, there was no internet search utilizing pornography-related search terms conducted on Petitioner's computers. However, Lash testified that the same pornographic website that was visited on Trimnell's computer on November 7 was previously visited several times on Petitioner's computers.

q. Dr. Robert Nobilini

Dr. Robert Nobilini (hereinafter "Dr. Nobilini") was retained by Petitioner and accepted by the Court as an expert in mechanical engineering and biomechanics. Dr. Nobilini reviewed the in-

vestigation and trial testimony of Detective Case concerning the drag marks on the floor of the basement in Trimnell's apartment complex; he also conducted his own investigation of the basement floor. Dr. Nobilini testified that there were hundreds of marks on the floor that could have been caused by any number of sources other than the suitcase in which Trimnell's body was found. Dr. Nobilini further testified that there was no scientific evidence to support Detective Case's testimony that the suitcase caused the drag marks.

r. Dallas Drummond

Dallas Drummond (hereinafter "Drummond") was incarcerated based on a conviction for Rape in the First Degree at the time of his testimony. Drummond was formerly engaged to be married to Juror No. 9, and testified that while dating Juror No. 9, Drummond's brother was dating St. Jean. Drummond stated he "never knew" if Juror No. 9 and St. Jean knew each other while they were dating Drummond and Drummond's brother. Drummond testified that the two women became casual acquaintances when both were pregnant at the same time in the same hospital. Drummond testified that while St. Jean went to the same high school as Juror No. 9, St. Jean was several grades ahead of Juror No. 9. Other than the time when Juror No. 9 and St. Jean were in the hospital together, Drummond testified he was not aware of any other interaction or relationship between the women. On cross-examination, Drummond admitted he had prior convictions for several crimes involving dishonesty, including Criminal Impersonation and Theft by False Pretenses.

LEGAL STANDARD

Based on the number of claims asserted by Petitioner, the Court finds it helpful at the outset to discuss Rule 61's procedural requirements and the standard for ineffective assistance of counsel.

Procedural Requirements of Rule 61

Superior Court Criminal Rule 61 provides that a defendant convicted of an offense may collaterally attack his conviction following exhaustion of his direct appeal by filing a motion for postconviction relief that shall specify all available grounds for relief.[FN21] Rule 61 sets forth several procedural requirements which the Court must consider these requirements before addressing the merits of the underlying motion.[FN22] Rule 61(h)(3) allows the Court to summarily dispose of a motion "as justice dictates." [FN23]

FN21. Del. Super. Ct. Crim. R. 61(b)(2); *Flamer v. State,* 585 A.2d 736, 745 (Del.1990).

FN22. *Younger v. State,* 580 A.2d 552, 554 (Del.1990). The Court will not discuss the time bar of Rule 61(i)(1) because Petitioner's original motion was timely filed. *See Ploof v. State,* 75 A.3d 811, 821–22 (Del. June 4, 2013). The repetitive motion bar of Rule 61(i)(2) is also inapplicable as this is Petitioner's first motion for postconviction relief.

FN23. Del. Super. Ct. Crim. R. 61(h)(3).

***12** Rule 61(i)(3) provides that a defendant is procedurally barred from raising any ground for relief in a postconviction motion that was not asserted in the proceedings leading to a judgment of conviction.[FN24] A defendant may raise a procedurally barred claim if the defendant can establish (A) cause for relief from the procedural default and (B) prejudice from violation of the defendant's rights. [FN25] Both prongs must be established in order for the Court to consider the claim.[FN26] The procedural bar applies to claims not asserted during trial as well as claims not raised on direct appeal, though establishing cause for the default in the latter instance "ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim." [FN27] However, claims of ineffective assistance of counsel are appropriately raised in the first instance in a motion for postconviction relief.[FN28] Attorney error short of ineffective assistance of counsel does not constitute cause sufficient to excuse procedural default.

[FN29] The defendant must make concrete and substantiated allegations of cause and actual prejudice in order for the exception to apply. [FN30]

FN24. Del. Super. Ct. Crim. R. 61(i)(3).

FN25. Del. Super. Ct. Crim R. 61(i)(3)(A)-(B).

FN26. *See Shelton v. State,* 744 A.2d 465, 478 (Del.2000) (dismissing procedurally barred claim for failure to establish cause, without considering prejudice prong).

FN27. *Younger,* 580 A.2d at 556 (citing *Murray v. Carrier,* 477 U.S. 478, 492 (1986)).

FN28. *Flamer,* 585 A.2d at 753 (citing *DuRoss v. State,* 494 A.2d 1265, 1267–68 (Del.1985)).

FN29. *Id.*

FN30. *Id.*

Rule 61(i)(4) provides that any ground for relief that was formerly adjudicated in the proceedings leading to conviction, direct appeal, a prior postconviction proceeding, or a federal habeas proceeding is barred.[FN31] This rule is based on the "law of the case" doctrine.[FN32] The Court will only reconsider formerly adjudicated claims if reconsideration "is warranted in the interest of justice." [FN33] This exception applies when a defendant shows that "subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him." [FN34] The "interest of justice" exception may also apply when the previous ruling was clearly in error, there is an "important change in circumstances, in particular, the factual basis for issues previously posed," or when the equitable concern of preventing injustice is otherwise implicated such that the concern trumps the law of the case doctrine.[FN35] A defendant cannot evade the former adjudication bar simply by refining or restating a formerly adjudicated claim. [FN36] Such claims will be dismissed.[FN37]

FN31. Del. Super. Ct. Crim. R. 61(i)(4).

FN32. *Weedon v. State,* 750 A.2d 521, 527 (Del.2000).

FN33. Rule 61(i)(4).

FN34. *Flamer,* 585 A.2d at 746.

FN35. *Weedon,* 750 A.2d at 527–28 (citations omitted).

FN36. *See Duhadaway v. State,* 877 A.2d 52, 2005 WL 1469365, at *1 (Del. June 20, 2005) (TABLE) (citing *Collingwood v. State,* 2000 WL 1177630, at *2 (Del. Aug. 11, 2000)); *Garvey v. State,* 979 A.2d 1110, 2009 WL 2882873, at *1 (Del. Sept. 10, 2009) (citation omitted).

FN37. *Id.*

Rule 61(i)(5) provides an exception to the rule's procedural requirements for claims that "the court lacked jurisdiction 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." [FN38] This "fundamental fairness" exception is a narrow one, and has only been applied in "limited circumstances," such as when the right relied upon has been recognized for the first time after direct appeal.[FN39] The defendant has the burden of proof to show that he was deprived of a "substantial constitutional right" before he is entitled to relief under this exception.[FN40]

FN38. Del. Super. Ct. Crim. R. 61(i)(5).

FN39. *Younger,* 580 A.2d at 555.

FN40. *Id.*

Ineffective Assistance of Counsel

Claims of ineffective assistance of counsel are

evaluated under the well established and "highly demanding" two-pronged standard set forth by the United States Supreme Court in *Strickland v. Washington.*[FN41] A defendant asserting ineffective assistance counsel claims must establish both (1) deficient performance by trial counsel and (2) prejudice suffered as a result of the deficient performance.[FN42] This inquiry may be undertaken in any order, and if the defendant fails to establish either prong, then the entire claim must fail.[FN43]

FN41. *Flamer,* 585 A.2d at 754 (citing *Kimmelman v. Morrison,* 477 U.S. 365, 382 (1986)).

FN42. *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

FN43. *See id.* at 697.

***13** As to the first prong, the defendant must show that the trial attorney's conduct "fell below an objective standard of reasonableness." [FN44] There is no strict standard for what constitutes reasonably effective assistance of counsel; prevailing norms of practice such as standards promulgated by the ABA "are guides to determining what is reasonable, but they are only guides." [FN45] Trial attorneys have "wide latitude" in making tactical decisions, thus there is a "strong presumption" that the challenged conduct falls within "the wide range of reasonable professional assistance;" *i.e.,* that the challenged action "might be considered sound trial strategy." [FN46] Accordingly, judicial review of an attorney's performance is "highly deferential," and entails: judging the reasonableness of the attorney's conduct based on the facts of the particular case at the time of the challenged conduct; requiring the defendant to identify the acts or omissions of the attorney that "are alleged not to not have been the result of reasonable professional judgment;" and determining whether, in the light of all the circumstances, the identified conduct falls outside the "wide range of professionally competent assistance." [FN47] Examples of tactical decisions entitled to deference include whether or not to call a witness and how to cross-examine that witness.[FN48] Conclusory and unsubstantiated assertions that defense counsel acted unreasonably will not be accepted. [FN49]

FN44. *Id.* at 688.

FN45. *Id.*

FN46. *Id.* at 689.

FN47. *Id.* at 689–690.

FN48. *Outten v. State,* 720 A.2d 547, 557 (Del.1998).

FN49. *See Dawson v. State,* 673 A.2d 1186, 1196 (Del.1996).

As to the second prong, the defendant must affirmatively prove that counsel's unreasonably deficient performance had a prejudicial effect on the judgment; *i.e.,* that the attorney's mistakes had an actual adverse effect on the proceedings.[FN50] The defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [FN51] Reasonable probability means "a probability sufficient to undermine confidence in the outcome." [FN52] The totality of the evidence presented before the judge or jury must be considered in making the prejudice determination. [FN53] When a conviction is challenged, the analysis is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." [FN54] When a death sentence is challenged, "the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." [FN55] If the defendant fails to "state with particularity the nature of the prejudice experienced," such failure is "fatal to a claim of ineffective assistance of counsel." [FN56]

FN50. *Strickland,* 466 U.S. at 693.

FN51. *Id.* at 694.

FN52. *Id.*

FN53. *Id.* at 695.

FN54. *Id.*

FN55. *Id.*

FN56. *Dawson,* 673 A.2d at 1196.

The Delaware Supreme Court, in summarizing the holding of the United States Supreme Court in *United States v. Cronic,* has explained that in certain contexts that analysis under the second prong of the *Strickland* test is unnecessary "because prejudice is presumed." [FN57] There are three scenarios when prejudice is presumed under *Cronic*: (1) when there is a "complete denial of counsel"; (2) defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) if the attorney is asked to provide assistance under circumstances where "competent counsel likely could not." [FN58] In order to presume prejudice under the second scenario, the defendant must allege a defect in the proceedings as a whole rather than at specific points in the trial, and "the attorney's failure must be complete." [FN59] Stated differently, if there is no "structural defect" in the adversarial process that is "so inherently prejudicial to the adversarial process and a fair trial," prejudice is not presumed under the second scenario of *Cronic* and the two-pronged test of *Strickland* applies instead.[FN60]

FN57. *Cooke v. State,* 977 A.2d 803, 848 (Del.2009) (citing *United States v. Cronic,* 466 U.S. 648, 659–62 (1984)).

FN58. *Sahin v. State,* 72 A.3d 111, 114 (Del. July 26, 2013) (citing *Cooke,* 977 A.2d at 848).

FN59. *Cooke,* 977 A.2d at 849 (citing *Bell v. Cone,* 535 U.S. 685, 696–97 (2002)).

FN60. *See Sahin,* 72 A.3d at 115; *Cooke,* 977 A.2d at 852.

DISCUSSION

Claim I: Trial Counsel were ineffective in failing to conduct an investigation that would have uncovered readily available evidence of Petitioner's innocence

***14** Petitioner first argues that Trial Counsel were ineffective by failing to conduct a reasonable investigation into evidence that would have demonstrated his innocence. This claim was not asserted in the proceedings leading to Petitioner's conviction, and thus is procedurally barred unless Petitioner can establish both prongs of *Strickland.* In his Amended Motion, Petitioner cites to *Cronic,* but fails to establish that any of the three *Cronic* scenarios apply; accordingly, *Strickland* is the appropriate standard for this claim.

Petitioner also alleges a variety of constitutional violations arising from this alleged failure to investigate, including the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and Article I, §§ 4, 7, 9, 11, 12, and 13 of the Delaware Constitution. Petitioner merely mentions these provisions in his section headings and otherwise provides no citation to these sections nor any actual analysis as to how Petitioner's rights under these provisions were violated. Accordingly, these claims, to the extent they can be considered distinct from Petitioner's ineffective assistance claim, are denied pursuant to Rule 61(h)(3).

The *Strickland* Court explained that an attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." [FN61] Decisions not to investigate "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." [FN62] The defendant's own statements and actions are critical in determining the reasonableness of investigation decisions, because the attorney's actions "are usually based, quite properly, on informed strategic choices made by the defendant and on in-

formation provided by the defendant." [FN63] The need for further investigation "may be considerably diminished or eliminated altogether" when counsel are generally aware of facts that support a potential line of defense.[FN64] Additionally, "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." [FN65]

FN61. *Strickland,* 466 U.S. at 691.

FN62. *Id.*

FN63. *Id.*

FN64. *Id.*

FN65. *Id.*

a. general lack of investigation

Petitioner's Post–Hearing Opening Brief makes much of the fact that Donovan initially attempted to be excused from his appointment as Petitioner's counsel. Petitioner characterizes Donovan's efforts from the time of his appointment in January of 2005 until May of 2005 as a needless delay in the investigation. However, as noted *supra,* this Court found merit to Donovan's argument that the PDO had no conflict of interest preventing it from representing Petitioner. Even though the matter was ultimately resolved so that Donovan stayed on as Petitioner's counsel, Donovan's time and effort spent in attempting to be excused from the appointment cannot be said to fall below an objective standard of reasonableness given the merit of his position. Petitioner argues that the investigation was deficient in other ways: Donovan did not visit Petitioner in prison until sixteen months had elapsed from the time of his appointment; Donovan failed to maintain an ongoing dialogue with Petitioner; and Marshall did not actively investigate the case. Notwithstanding his initial efforts to be excused from his appointment, it is troubling that Donovan did not keep Petitioner actively updated on the status of his case; Donovan acknowledged as much during the evidentiary hearing. Petitioner correctly points out that the ABA Guidelines for the Performance of Counsel in Death Penalty Cases recommend interviewing a client within 24 hours of the attorney's appearance, [FN66] and maintaining an active dialogue with the client regarding factual investigation.[FN67] Nonetheless, as noted in *Strickland,* the guidelines are just that: guidelines. They are not binding law. Failure to comply with them does not automatically establish unreasonable performance.

FN66. ABA Guideline for the Performance of Counsel in Death Penalty Cases 10.5(B)(2).

FN67. ABA Guideline for the Performance of Counsel in Death Penalty Cases 10.5(C)(1). 37

***15** Donovan was only one member of a two-man team: the record reflects that Tease met with Petitioner numerous times throughout the case and spoke with Petitioner about potential leads to investigate. Additionally, even though Donovan did not visit Petitioner in prison until April of 2006, Donovan had met with Petitioner in person on two prior occasions, at the preliminary hearing and proof positive hearing, and held extended conversations with Petitioner at both proceedings. Additionally, the record reflects that Marshall also pursued leads as directed by Donovan, canvassed Trimnell's apartment building, and conducted further investigation in an attempt to link Trimnell to St. Jean. Petitioner indicates that Marshall should have done more work on his own initiative, but fails to allege what it is exactly that Marshall should have done. Finally, Petitioner fails to specifically allege prejudice: even if a more thorough investigation were conducted, Petitioner fails to argue what evidence such investigation would have uncovered that could have possibly rebutted the overwhelming amount of evidence presented by the State. Thus, even if Donovan's lack of communication with Petitioner can be said to be unreasonable, there is no reasonable probability of prejudice based on the efforts of

Tease and Marshall and the overwhelming evidence presented by the State.

b. prior relationship between Trimnell and Petitioner

Petitioner also argues that Trial Counsel failed to gather evidence of a prior sexual relationship between Trimnell and Petitioner. Petitioner also argues that had Trial Counsel interviewed Dyer and Dyer's wife, Trial Counsel would have learned that Petitioner had driven Trimnell's car on several occasions prior to her murder, indicating that Petitioner had permission to use the vehicle. Both of these claims are raised in Petitioner's Amended Motion, but are noticeably absent from his Post–Hearing Opening Brief. This is likely because the testimony of Donovan, Tease and Marshall at the evidentiary hearing established that Petitioner did not tell Trial Counsel that he had a prior relationship with Trimnell until September of 2005. Prior to that, Petitioner had in fact denied any prior knowledge of Trimnell. Further, Trial Counsel and Marshall testified that they did in fact attempt to investigate the existence of a prior relationship, but could uncover no evidence that one existed. Finally, even though Dyer testified at the hearing, Dyer gave no testimony whatsoever concerning Petitioner's use of Trimnell's vehicle. This claim is clearly without merit and must be denied.

c. failure to interview James Thomas

Petitioner also alleges that Trial Counsel were ineffective in failing to interview James Thomas (hereinafter "Thomas"), who stayed at the Hartly mobile home during the weeks before Trimnell's murder. Petitioner indicates that such interview may have revealed that Thomas was somehow involved in the murder. Petitioner asserts this claim in his Amended Motion but fails to raise it again in his Post–Hearing Brief. Tease testified that he spoke with Petitioner about investigating Thomas' involvement in the murder, but Petitioner "laughed off" Tease's suggestion that Thomas could have been involved. Given that Petitioner indicated to Tease that this line of investigation was pointless, failure to pursue it cannot be said to be unreasonable.

d. failure to investigate and subsequent mishandling of St. Jean

Petitioner's other primary argument relating to failure to investigate focuses on St. Jean. St. Jean testified as a witness for both the State and Petitioner during the guilt phase of trial. Petitioner argues that Trial Counsel were ineffective in failing to fully investigate and present evidence on St. Jean's bipolar disorder and other mental issues as well as St. Jean's history of violent jealousy. Petitioner argues that Trial Counsel should have made better attempts to admit evidence of St. Jean's prior conviction for offensive touching for assaulting a woman who was allegedly flirting with Petitioner, should have made further investigation into other individuals such as a former fellow mental patient, as well as a former lover of Petitioner's, and should have made better use of St. Jean's diary once it was admitted into evidence to show her obsessive jealousy. Petitioner also makes much of Trial Counsel's failure to call Bruner as a witness to establish St. Jean's credit card theft of Bruner's aunt.[FN68] Finally, Petitioner argues that Trial Counsel was ineffective in failing to adequately investigate the pornography found on Petitioner's computers. Petitioner contends that had Trial Counsel interviewed McClements and either better utilized Malmstrom or hired an additional expert besides Malmstrom, Trial Counsel would have been more likely to establish that St. Jean had accessed the pornographic websites on Petitioner's computers and accessed similar websites on Trimnell's computer in an effort to frame him for Petitioner's murder.

> FN68. In his Amended Motion, Petitioner specifically argues that Donovan should have investigated allegations he made in a letter to this Court referencing two witnesses who would have testified that St. Jean worked for Trimnell as a maid. At the evidentiary hearing, Donovan testified that one of these witnesses was Bruner, and he

was not certain of the identity of the other witness. This argument was not pursued by Petitioner in his Post–Hearing Opening Brief. Given the lack of argument and evidence surrounding this claim, as it was most likely speculation by Donovan rather than actual evidence, it will not be discussed further.

***16** The Court finds this latter argument farfetched, unsupported by the evidence, and unlikely to change the outcome of the trial if presented due to the abundance of evidence presented by the State. As for the other arguments, there are three reasons why they too must fail. First, because St. Jean was a witness for both the State and Petitioner, Trial Counsel had good reason to not impeach St. Jean's credibility to a great extent. Thus, failing to call Bruner to testify at trial, despite Donovan's statement that not calling Bruner was not a strategic decision, was not unreasonable. The record and testimony from the hearing indicates that Donovan still made attempts to implicate St. Jean at trial, such as by admitting the diary into evidence. Second, Donovan testified that "it was hard to paint [St. Jean] as a participant in the crime without also implicating [Petitioner] ... [t]hat was my—that was a difficulty." [FN69] Trial Counsel were concerned that if they pursued St. Jean too aggressively, that St. Jean could provide testimony that would be damaging to Petitioner. This was why Donovan made the strategic decision to not prepare St. Jean to any great extent prior to her trial testimony; such decision falls within the wide range of reasonableness. This concern was also validated by St. Jean's testimony that she had told Trial Counsel that Petitioner had told St. Jean he intended to burn Trimnell's vehicle before Sergeant Mutter stopped him. It should be noted that St. Jean never actually testified to this statement at trial.

FN69. Transcript of Rule 61 Hearing, Volume A, at 79, *State v. Sykes,* No. 0411008300 (Oct. 10, 2011).

Petitioner expressly told Trial Counsel to not attempt to implicate St. Jean. Trial Counsel still pursued several avenues of investigation, such as attempting to establish a link between Trimnell and St. Jean, but it was not until halfway through trial that Petitioner relented and told Trial Counsel to attempt to implicate St. Jean. Marshall testified that Trial Counsel suspected that St. Jean had greater involvement in the crime than Petitioner let on, but that Petitioner's requests that St. Jean not be investigated prevented Trial Counsel from fully pursuing this lead. As with Petitioner's initial denials of a relationship with Trimnell and Petitioner's indication to Tease that investigating James Thomas would have been fruitless, Petitioner cannot now argue it was unreasonable to not investigate St. Jean further when Petitioner originally insisted that St. Jean not be implicated.

Lastly, Petitioner alleges for the first time in his Post–Hearing Brief that Trial Counsel should have asserted a *Jencks* violation on appeal in reference to the State's comments during a trial conference that St. Jean had made statements during an interview with the State regarding a woman with whom Petitioner had an affair. Petitioner does not assert this claim in his original Amended Motion. The Court notes that even if this somehow violated the *Jencks* rule, such violation constituted harmless error in light of the overwhelming untainted evidence presented by the State.[FN70]

FN70. *See Lance v. State,* 600 A.2d 337, 342–43 (Del.1991) ("violations of the *Jencks* rule are subject to a harmless error analysis.").

Based on the foregoing, Trial Counsel's failure to more fully investigate and attempt to implicate St. Jean did not fall below an objective standard of reasonableness, nor did it create actual prejudice.

e. Susan Carden's potential alibi testimony

Petitioner also argues that Trial Counsel was ineffective in not presenting a memorandum prepared by Susan Carden (hereinafter "Carden"), the Dover Downs employee whom Petitioner had in-

formed of his resignation on November 8, 2004. Carden prepared a memorandum of her interaction with Petitioner, which stated that Petitioner had told Carden that Petitioner had missed work due to car trouble, and had stayed at a Wilmington motel on November 7 in order to retrieve his car from a local impound lot. Petitioner contends that Carden's memorandum could have been utilized to establish a timeline that would provide an alibi for the time of Trimnell's murder. However, the State correctly points out that even if the memorandum were introduced into evidence, the timeline described in Carden's memorandum still includes a substantial amount of unaccounted time during which Petitioner could have still traveled back to Dover and committed the murder. Petitioner has failed to establish actual prejudice, *i.e.,* that the jury would not have found Petitioner guilty beyond a reasonable doubt if this purported alibi were presented. Thus, this claim also fails.

f. Trimnell's answering machine

***17** In his Amended Motion but not his Post–Hearing Brief, Petitioner argues that Trial Counsel should have obtained access to Trimnell's answering machine in order to determine if there were any messages from Petitioner for Trimnell in order to establish a prior relationship between the two. Petitioner merely argues that there "could" have been messages on the machine; this is hardly enough to establish prejudice under *Strickland.* Thus, this claim too must fail.

g. investigation was not ineffective assistance

Based on the foregoing, Donovan may have been unreasonable in not maintaining a more communicative relationship with Petitioner. But such lack of communication does not satisfy the prejudice prong of *Strickland.* Petitioner's own limitations that he imposed on the investigation are responsible for many of the alleged deficiencies that Petitioner now argues. Further, none of the foregoing would have established Petitioner's innocence or rebutted the State's evidence. Thus, Trial Counsel's investigation of evidence of Petitioner's innocence does not amount to ineffective assistance of counsel under *Strickland.*

Petitioner has also failed to otherwise establish cause and prejudice under Rule 61(i)(3) nor has Petitioner established that the fundamental fairness exception of Rule 61(i)(5) should apply. Accordingly, this claim is procedurally barred under Rule 61(i)(3).

Claim II: Trial Counsel were ineffective in failing to seek disclosure of several Brady violations committed by the State

Petitioner alleges that the State committed three *Brady* violations by failing to disclose certain information, and that Trial Counsel was ineffective in failing to seek disclosure of this information and in failing to assert these violations on appeal. As with Claim I, Petitioner asserts violations of his rights under numerous provisions of the U.S. Constitution and Delaware Constitution in conclusory fashion, and fails to elaborate upon these arguments. They therefore are denied.[FN71] Petitioner did not raise this claim in the former proceedings, thus it is procedurally barred under Rule 61(i)(3) unless Petitioner establishes ineffective assistance of counsel or establishes that the exception of Rule 61(i)(5) applies based on the *Brady* violations.

FN71. *See* Del. Super. Ct. Crim. R. 61(h)(3).

In *Brady v. Maryland* the United States Supreme Court held that when the prosecution fails to disclose evidence requested by the defendant, such failure to disclose "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." [FN72] To establish a *Brady* violation, the defendant must establish: (1) that the evidence is favorable to the defendant in that it is either exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. [FN73] The State has no obligation to disclose purely speculative or preliminary information.[FN74] To estab-

lish the third prong of prejudice— *i.e.,* materiality—the defendant must show that there is a reasonable probability that, had the evidence been disclosed, the result of the trial would have been different.[FN75] In other words, the suppressed evidence must "undermine ... confidence in the outcome of the trial." [FN76] However, when the State's "untainted evidence of guilt [is] overwhelming," the State's nondisclosure amounts only to harmless error.[FN77]

FN72. *Brady v. Maryland,* 373 U.S. 83, 87 (1963).

FN73. *Atkinson v. State,* 778 A.2d 1058, 1063 (Del.2001) (citing *Strickler v. Greene,* 527 U.S. 263, 281–82 (1999)).

FN74. *Burke v. State,* 692 A.2d 411, 1997 WL 139813, at *2 (Del. Mar. 19, 1997) (citing *United States v. Agur,* 427 U.S. 97, 109 n. 16 (1976)).

FN75. *Atkinson,* 778 A.2d at 1063 (citing *Kyles v. Whitley,* 514 U.S. 419, 434 (1995)).

FN76. *Id.*

FN77. *Michael v. State,* 529 A.2d 752, 757 (Del.1987).

a. promises of financial assistance

***18** Petitioner alleges three *Brady* violations. First, Petitioner argues that the State failed to disclose the nature of promises of financial assistance made by Detective Case to St. Jean in exchange for her testimony. Petitioner points to a sidebar conversation during St. Jean's testimony in which the State admitted there were discussions between the detective and St. Jean concerning her finances, and an entry in St. Jean's diary listing Detective Case's contact information in an entry related to her financial situation. This claim is meritless: during the guilt phase, St. Jean did in fact testify about Detective Case's offer of assistance to help prevent St. Jean from losing her home. Further, during the evidentiary hearing, St. Jean elaborated upon her trial testimony by explaining that Detective Case provided her with information to contact Delaware Social Services about assistance with paying her rent. St. Jean testified that she did not understand this gesture to mean that Detective Case was offering to pay St. Jean's rent with his own money.

Thus, this evidence was not favorable to Petitioner in that the nature of the alleged "promises" had little to no impeachment value. Even if it was favorable impeachment evidence, such evidence cannot be said to be material in that there is no reasonable probability the outcome of the trial would have been different had these conversations been disclosed to the jury.

b. seizure of physical evidence from the Hartly mobile home

Second, Petitioner alleges that the State failed to disclose the seizure of several pieces of physical evidence from the Hartly mobile home. According to St. Jean, there was a third pornographic magazine seized from the mobile home in addition to the two other magazines. This third magazine contained pornographic content that differed from the content of the other two magazines, and was different from the type of content accessed on the computers as well. Petitioner argues that this third magazine was somehow an "important opportunity to impeach Detective Case's credibility," because the material differed in content from the other two magazines which Detective Case said illustrated Petitioner's penchant for a particular kind of woman. The State argues that this third magazine was never seized from the mobile home, nor was the magazine's existence proven at the evidentiary hearing. Given the questionable existence of this evidence, it cannot be said that the State suppressed it. Further, had the magazine been disclosed at trial, there is no reasonable probability that the outcome would have been different.

In his original Amended Motion, Petitioner also argued that the police failed to disclose the seizure of two additional items: bus ticket stubs for

Atlantic City, New Jersey during the week of November 1 through 7, 2004; and a key ring, which Petitioner claims included a spare key to Trimnell's apartment. Petitioner raises neither of these claims in his Post–Hearing Brief. Neither of these pieces of evidence can be said to be exculpatory for Petitioner; the bus tickets fall far short of establishing an alibi, as Petitioner still could have easily had time to murder Trimnell during that time. As for the key ring, Petitioner argues that the spare key establishes that Petitioner was well known to Trimnell and thus had been given a spare key. The obvious argument that Petitioner misses, however, is that his possession of the key could also be used to establish that Petitioner had stolen the key while at Trimnell's apartment complex. Thus, collectively, the nondisclosure of these pieces of physical evidence does not amount to a *Brady* violation.

c. Detective Case's knowledge of the bag of coins

Third, Petitioner argues that the State failed to disclose how Detective Case knew about the bag of silver coins being discovered by St. Jean at the Hartly mobile home. This bag of coins was later identified as belonging to Trimnell. Petitioner argues that had the State provided Trial Counsel with information on how Detective Case knew of the coins, Trial Counsel could have impeached the detective's credibility. What this argument overlooks is that Detective Case testified at trial that St. Jean had told him about the coins on her dresser. St. Jean denied this at trial, and testified she had not told Detective Case about the coins and found it odd that he knew about them. This was merely a credibility determination for the jury to resolve. It does not fall within the scope of *Brady*.

d. no ineffective assistance of counsel

***19** Individually and collectively, the alleged nondisclosure of the foregoing evidence fails to amount to a *Brady* violation, because such nondisclosure does not undermine confidence in the outcome of the trial. Because there is no *Brady* violation, it follows that it was not ineffective assistance for Trial Counsel to fail to request disclosure of this evidence, nor was it ineffective assistance to not assert these claims on appeal. Petitioner has otherwise failed to establish an exception to the procedural bar under Rule 61(i)(3) nor has Petitioner established the application of the fundamental fairness exception of Rule 61(i)(5). Claim II of Petitioner's Amended Motion is therefore dismissed.

Claim III: Trial Counsel were ineffective in failing to rebut the testimony of the Assistant Medical Examiner and other witnesses

In his original Amended Motion, Petitioner raised three arguments in regards to this claim. Petitioner argued that Trial Counsel were ineffective in failing to investigate and presenting any rebuttal evidence or testimony pertaining to: (1) the testimony of Assistant Medical Examiner Vershvovsky; (2) the testimony of Detective Steven Whalen (hereinafter "Detective Whalen"), the investigator who uncovered evidence from Trimnell's and Petitioner's computers; and (3) the testimony of the State's fingerprint examiner, Rodney Hegman (hereinafter "Hegman"). In his Post-hearing Brief, Petitioner only raises this claim in regards to Dr. Vershvovsky, and makes no mention of Detective Whalen or Hegman.

This ineffective assistance of counsel claim was not asserted previously in the proceedings, and is procedurally barred if ineffective assistance is not established. In his Amended Motion, Petitioner cites to both *Strickland* and *Cronic* as applying to this claim. However, Petitioner has failed to allege a defect in the trial proceedings as a whole, and instead only asserts this claim in regards to the testimony of three specific witnesses. Thus, *Strickland* is the appropriate standard.

a. Dr. Vershvovsky

Petitioner first contends that Trial Counsel failed to adequately prepare for and effectively challenge Dr. Vershvovsky's testimony at trial. Petitioner argues that Trial Counsel were ineffective in failing to object to the introduction of "very gruesome" autopsy photos into evidence prior to Dr. Vershvovsky's testimony. Petitioner also argues

that Trial Counsel were ineffective in failing to retain their own forensic pathologist to rebut Dr. Vershvovsky's findings. Tease cross-examined Dr. Vershvovsky, and also called Dr. Vershvovsky as a defense witness to question the medical examiner about a medical article that Tease believed would have supported his theory that Trimnell died as a result of suffocation as opposed to strangulation.

The "gruesome or unpleasant" nature of an autopsy photograph of a victim does not render the photograph inadmissible.[FN78] Here, the Court issued a cautionary instruction to the jury warning them of the nature of these photos. Petitioner argues this instruction highlighted the gruesome nature of these photos. But that alone, if true, is not enough to render the photos inadmissible or the instruction invalid. The photos were relevant to Dr. Vershvovsky's testimony about her findings from the autopsy. Thus, Trial Counsel were not ineffective in failing to object to the photos.

FN78. *Keperling v. State,* 699 A.2d 317, 319 (Del.1997).

Donovan testified that he did not believe retaining a forensic expert was necessary for him or Tease to effectively cross-examine Dr. Vershvovsky. Thus, the decision to not retain a forensic expert falls within the presumption of sound trial strategy. Further, the testimony of Dr. Arden at the evidentiary hearing reveals that the testimony of an expert such as Dr. Arden would not have been particularly helpful to the jury. Dr. Arden's testimony primarily focused on his conclusion that Trimnell was bound after death. Dr. Arden also testified that he believed the scalpine hemorrhages did not indicate blunt force trauma to the head, contrary to Dr. Vershvovsky's conclusion. Other than these distinctions, Dr. Arden agreed with the rest of Dr. Vershvovsky's findings, including the determination that Trimnell died as a result of asphyxiation by strangulation. The remaining differences between Dr. Arden's and Dr. Vershvovsky's conclusions, if presented at trial, would have been left for the jury to assess in a credibility determination. This cannot be said to rise to the level of a reasonable probability that the outcome of the trial would have been different had Dr. Arden or another expert testified. Thus, this portion of the claim fails the prejudice prong of *Strickland.*

***20** The remainder of this claim concerning Tease's handling of Dr. Vershvovsky falls within the range of sound trial strategy. Such presumption applies to decisions as to what witnesses to call and how to cross-examine them. Petitioner thus fails to establish how Tease's handling of Dr. Vershvovsky falls below an objective standard of reasonableness.

b. Detective Whalen

In his original Amended Motion but not in his Post–Hearing Opening Brief, Petitioner argues that Trial Counsel were ineffective in failing to challenge the computer forensic evidence gathered by Detective Whalen, who also testified about his findings. Petitioner contends that Trial Counsel should have retained their own computer forensic expert. This argument fails, as Trial Counsel retained their own computer forensic investigator, Malmstrom, who testified at the evidentiary hearing that his findings confirmed all of Detective Whalen's findings. Further, the testimony of Andrew Lash only revealed that different pornographic search terms were used on Petitioner's computers during a particular time. Lash also confirmed that a certain pornographic site was accessed on Petitioner's computers and on Trimnell's computer. Thus, were Lash's testimony presented at trial, it would not have been particularly helpful to the jury, and at best would have left the jury with a credibility determination to make. This fails to establish prejudice under *Strickland.*

c. Hegman

At great length in his Amended Motion, Petitioner attacks Trial Counsel for not raising a *Daubert* challenge to Hegman's testimony about the fingerprints found in Trimnell's vehicle and several items therein that were linked to Petitioner. Petitioner does not assert any of these arguments in his Post–Hearing Opening Brief. In his affidavit, Tease

states that there was no reason to challenge the fingerprint testimony because the fingerprints in Trimnell's vehicle supported the defense theory that Petitioner had a preexisting consensual relationship with Petitioner. Further, Sergeant Mutter saw Petitioner driving the vehicle. Thus, it was a strategic decision to not challenge the fingerprint testimony, and challenging it would be cross purpose to the defense's theory. This claim also fails.

d. no ineffective assistance

Trial Counsel were not ineffective in their handling of the three foregoing witnesses under either *Strickland* or *Cronic*. Petitioner has also failed to otherwise establish cause and prejudice under Rule 61(i)(3) and has also failed to show why the exception of Rule 61(i)(5) should apply. Accordingly, Claim III of Petitioner's Amended Motion is denied.

Claim IV: Trial Counsel was ineffective in including an unauthorized admission to burglary in his opening statement

Petitioner next contends that Donovan made comments that were tantamount to an admission of burglary in his opening statement. These comments included:

> the State says they don't know how he entered the apartment, but he entered the apartment. That fact should not go unnoticed. Those facts should be looked into.... We don't know when or how he got into the building.... We don't know how or when Mr. Sykes got into that apartment.... Steps were taken to cover up whatever happened inside that apartment. So the State, I am sure, intends to show what happened inside that apartment.... We don't know how or when it was committed, or why it was committed, or why Mr. Sykes would return two days later to the scene of the crime which he had apparently gotten away with.

***21** Petitioner argues that Donovan never consulted with Petitioner before making the above statements. Petitioner contends that the "fair reading" of these statements is that Donovan was admitting that Petitioner was inside Trimnell's apartment. Thus, Petitioner argues, these statements amount to an admission to the burglary charges, which also constitutes an admission to a statutory aggravating factor.[FN79] Donovan concedes in his affidavit that there was no strategic or tactical reason for these remarks. Petitioner argues that these comments amount to a lack of meaningful adversarial testing under *Cronic*, and this comment, as well as the failure to address this argument on direct appeal, amounts to ineffective assistance of counsel. This claim was not raised in the proceedings below and is procedurally barred unless ineffective assistance is established.

> FN79. Petitioner also inexplicably raises his insufficiency of the evidence argument pertaining to the Burglary, Rape, and Kidnapping charges when discussing this claim in his Post–Hearing Opening Brief. The Court shall discuss that argument when addressing Claims XIX and XX of the Amended Motion.

Burglary in the Second Degree does not merely require entry into a victim's dwelling; it also requires, *inter alia*, that the entry be made "knowingly" and "unlawfully." [FN80] While Donovan's remarks, when viewed objectively, do seem to convey that Petitioner entered Trimnell's apartment, they hardly establish that Petitioner knowingly or unlawfully entered the apartment. Thus, it cannot be said that these remarks amount to an admission to burglary.

> FN80. 11 *Del. C.* § 825(a).

Prejudice cannot be presumed under *Cronic* because Petitioner only alleges one instance during the proceedings of lack of meaningful adversarial testing—the opening statements. This falls far short of a pervasive structural defect in the proceedings. *Strickland* is the appropriate standard.

This claim fails to satisfy either prong of *Strickland*. One of Trial Counsel's strategies was to

establish a prior relationship between Petitioner and Trimnell; Petitioner's presence in Trimnell's apartment is consistent with that strategy. Thus, notwithstanding Donovan's concession in his affidavit, such remarks are not objectively unreasonable. Additionally, independent evidence, including Petitioner's DNA on two toothpicks found inside Trimnell's apartment, places Petitioner inside the apartment. Thus, even if Donovan's remarks are objectively unreasonable, there is no prejudice. It follows that since the opening statement did not constitute ineffective assistance of counsel, it was not ineffective for Trial Counsel to not pursue this claim on appeal. Because Petitioner has failed to establish ineffective assistance of counsel, this claim is procedurally barred pursuant to Rule 61(i)(3). Petitioner has failed to establish that there is otherwise cause and prejudice excusing the procedural default under Rule 61(i)(3). Petitioner has also failed to raise a colorable claim of a miscarriage of justice under Rule 61(i)(5). Claim IV is therefore denied.

Claim V: the Court's improper comment on allocution compromised Petitioner's right to a fair trial before an impartial jury

Petitioner argues that the Court's reference to allocution during the guilt phase violated Petitioner's right to an impartial jury under the Sixth and Fourteenth Amendments of the U.S. Constitution and Article I, §§ 4 and 7 of the Delaware Constitution. On direct appeal, Petitioner asserted this same claim but in the context of a violation of Petitioner's Fifth Amendment right to remain silent. The Supreme Court thoroughly analyzed and rejected Petitioner's argument.

Petitioner is simply attempting to refine and restate his first claim on direct appeal in the context of different constitutional rights. Thus, this claim is barred as formerly adjudicated under Rule 61(i)(4). Petitioner has failed to establish that the interest of justice exception applies, nor has Petitioner alleged a lack of jurisdiction or colorable claim of miscarriage of justice sufficient to invoke Rule 61(i)(5). Claim V is therefore rejected and will not be considered further.

Claim VI: Petitioner is entitled to a new trial because the Court's allocution comment violated Petitioner's right to remain silent

***22** In his Amended Motion, Petitioner argues that the Court's allocution comment violated his right to remain silent under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution as well as Article I, § § 4 and 7 of the Delaware Constitution. Petitioner fails to raise this claim in his Post–Hearing Opening Brief. Even moreso than the previous claim, this is merely a restatement of Petitioner's first claim on direct appeal. For the same reasons as with Claim V, this claim is barred as formerly adjudicated under Rule 61(i)(4). Neither the interest of justice exception of Rule 61(i)(4) nor the fundamental fairness exception of Rule 61(i)(5) applies. This claim is denied.

Claim VII: Trial Counsel failed to subject the State's case to meaningful adversarial testing

Petitioner raises several different ways in which Trial Counsel failed to subject the State's case to meaningful adversarial testing. These claims were not raised during trial or on direct appeal; accordingly, they are procedurally barred under Rule 61(i)(3) unless Petitioner can establish ineffective assistance of counsel or otherwise establish an exception to procedural default under Rule 61(i)(3) or Rule 61(i)(5).

Petitioner's claim falls within the second scenario of *Cronic*. However, each of the six instances of lack of meaningful adversarial testing are specific and particular–Petitioner does not allege a structural defect in the proceedings as a whole. Accordingly, prejudice will not be presumed under *Cronic* and this Court will analyze each of the alleged errors individually under the two-pronged test of *Strickland*.

a. Detective Case's drag mark testimony

Tease cross-examined Detective Case during the guilt phase of trial. At the evidentiary hearing, Petitioner presented the testimony of Dr. Nobilini,

who testified as to several alleged defects in Detective Case's testimony describing the process of matching drag marks found on the basement floor of Trimnell's apartment complex to the suitcase in which her body was discovered. Petitioner now claims that it was ineffective assistance for Tease to not raise a *Daubert* challenge. However, Tease testified that it was a strategic decision to not challenge Detective Case's testimony regarding the drag marks, because Tease believed such testimony established that the suitcase was too heavy for Petitioner to move by himself, indicating the involvement of at least one other person. Such strategic decision falls within the wide latitude accorded attorneys under the first prong of *Strickland.* Accordingly, Tease's decision to not challenge the drag mark testimony did not fall below an objective standard of reasonableness and does not constitute ineffective assistance.

b. remarks made during the State's closing argument

Petitioner contends that Trial Counsel were ineffective in failing to object to several improper remarks made by the prosecutor during the State's closing argument. The Delaware Supreme Court has observed that "[t]he test is not whether the statements were improper but whether they were so prejudicial as to compromise the fairness of the trial process." [FN81] It follows that there is no ineffective assistance if the prosecutor's remarks did not rise to a level of prejudice that compromised the trial's fairness. In determining whether a prosecutor's remarks during closing arguments rises to the level of prosecutorial misconduct, three factors are examined: (1) the closeness of the case; (2) the centrality of the issue affected by the alleged error; and (3) the steps taken to mitigate it.[FN82]

FN81. *Black v. State,* 616 A.2d 320, 324 (Del.1992) (citing *Brokenbrough v. State,* 522 A.2d 851, 864 (Del.1987)).

FN82. *Id.*

***23** Petitioner raises two specific challenges to the State's closing arguments: that the prosecutor improperly commented on facts not in evidence, and made racially charged statements to the jury. These comments include: that force was used to enter Trimnell's apartment; the scalpine hemorrhages suffered by Trimnell were contemporaneous with her death; and that Trimnell was bound and gagged before her death. The prosecutor also remarked that Sergeant Mutter "immediately picked out the defendant" in a photo lineup, when in fact the officer originally picked out two photos, one of the Petitioner, as the driver of the vehicle he stopped.

The prosecutor's comment regarding force used to enter the apartment was in fact that Petitioner gained entry to the apartment "either by cunning or by force." This alone cannot be said to be prejudicial, as two toothpicks with Petitioner's DNA established that he was in the apartment, and the prosecutor was merely suggesting fair inferences to be drawn from the evidence. While Sergeant Mutter in fact picked out two photos from the lineup and the comment was inaccurate, the case still was not a close one, as other evidence including fingerprints established that Petitioner was driving the vehicle and Sergeant Mutter also promptly picked out Petitioner in an in-court identification. The scalpine hemorrhages and bound and gagged comment both also fail under the closeness and centrality prongs of the prosecutorial misconduct. In sum, the untainted evidence against Petitioner was so great, that there was no prejudice under *Strickland* created by these comments, assuming *arguendo* that it was objectively unreasonable to not object to these remarks.

As to the allegedly racially charged comments made by the prosecutor, Petitioner contends that there were "implicit, but unmistakable and highly improper, racial overtones" in the prosecutor's description of Petitioner's rape of the victim. There is no express reference to race whatsoever, and viewed objectively the prosecutor's closing remarks contain no racial overtones of any kind.

Based on the foregoing, no prejudice resulted from Trial Counsel's failure to object to these remarks. This claim also fails under *Strickland.*

c. failure to exclude irrelevant and prejudicial evidence

Petitioner also argues that Trial Counsel were ineffective in failing to move to exclude several pieces of evidence Petitioner calls irrelevant and prejudicial: an electronic key card reader for the Dover Ramada Inn; a steak knife found near Trimnell's apartment and a photograph of a knife set in the Hartly mobile home; photographs of a gun lockbox and handgun taken from the mobile home; the autopsy photos; and two pornographic magazines seized from the mobile home.

As noted *supra* in regards to Claim III, admission of the autopsy photos was not error. All of the other photos were relevant under D.R.E. 403 —the admission of the Ramada Inn key card had nothing to do with attempting to access Trimnell's apartment, but rather was a piece of evidence found in Trimnell's car that established that Petitioner was inside the vehicle. Similarly, the steak knife was found in the parking lot near Trimnell's apartment, and the knife set at the mobile home where Petitioner lived contained a similar set of knives. No handgun was used in the commission of the crime in this case, thus any prejudice created by admission of the photos of the lockbox and gun was minimal. Further, the gun and lockbox were relevant to substantiating St. Jean's reason for attempting to call Petitioner during his disappearance: their housemate was allegedly showing the gun to St. Jean's and Petitioner's child, A.S. In other words, admission of these photos showed a legitimate, non-criminal reason for St. Jean's attempts to contact Petitioner while he was evading police custody following his flight from Sergeant Mutter. This rebutted Trial Counsel's theory that St. Jean was somehow involved in the crime, thus this evidence was relevant.

***24** Finally, the two pornographic magazines seized from the mobile home were similar in substance to pornography found on Petitioner's computers and on Trimnell's computer. Thus, they were relevant as circumstantial evidence that Petitioner was present inside Trimnell's apartment and using her computer on the day of her disappearance. It follows that the failure to object to the foregoing relevant evidence was not ineffective assistance of counsel.

d. failure to challenge improperly seized evidence

In his Amended Motion but not his Post–Hearing Opening Brief, Petitioner argues that Trial counsel were ineffective in challenging the seizure of several pieces of evidence, including the handgun and lockbox as well as a steak knife from the Hartly mobile home. As noted *supra,* these items were relevant, and Petitioner fails to allege any details as to how the seizure of these items was improper. Thus, it was not ineffective assistance for Trial Counsel to not attempt to challenge the seizure of this evidence.

e. no *Getz* instruction given regarding Petitioner's access of pornography

Upon agreement by the parties, the Court had agreed to deliver a jury instruction pursuant to *Getz v. State* pertaining to St. Jean's testimony that Petitioner had previously used their computer at the mobile home to access pornography. This instruction was ultimately not given. Petitioner only raises this argument in his Amended Motion and not his Post–Hearing Brief. The State contends that the lack of such instruction, which would have instructed the jury that an adult viewing pornographic images of other adults is not a crime, is merely an oversight by the court of no magnitude. In fact, if given, the instruction would have highlighted a collateral fact in the case. This Court concludes that failure to deliver the *Getz* instruction constituted harmless error in light of the overwhelming evidence presented by the State. Accordingly, no prejudice resulted from Trial Counsel's failure to object to the lack of a *Getz* instruction. Thus, this argument also fails.

f. failure to obtain a 609 instruction for St. Jean

Lastly, Petitioner contends it was error for Trial Counsel to belatedly request a jury instruction pursuant to D.R.E. 609 that would have instructed the jury that they could consider St. Jean's testimony regarding her prior criminal convictions in assessing St. Jean's credibility. The jury returned a verdict before the instruction could be issued.

The first prong of *Strickland* assesses counsel's performance by an objective standard of reasonableness. Even though Trial Counsel specifically sought an instruction pursuant to D.R.E. 609, it was not objectively unreasonable to not obtain one. St. Jean was a witness for both the State and Petitioner. Thus, any damage to St. Jean's credibility would impeach the value of her testimony for Petitioner as well. It was not unreasonable to fail to obtain such an instruction. Further, the jury still heard testimony about St. Jean's prior convictions; it cannot be said that there is a reasonable probability the trial's outcome would have been different had the instruction been requested. Thus, both prongs of *Strickland* are not met.

g. no ineffective assistance of counsel

Based on the foregoing, none of these alleged errors amount to ineffective assistance of counsel. It follows that this claim in its entirety is procedurally barred pursuant to Rule 61(i)(3). Petitioner has failed to establish that an exception to the procedural bar applies. Accordingly, this claim is denied.

Claim VIII: Trial Counsel were ineffective in failing to investigate and present available mitigating evidence at the penalty phase of trial

***25** Petitioner's next claim is that Tease was ineffective in failing to conduct a thorough mitigation investigation for the penalty phase of trial. This claim was not raised on direct appeal and is procedurally barred pursuant to Rule 61(i)(3) unless Petitioner establishes the two-pronged test of *Strickland* or an exception to the procedural bar under Rule 61(i)(3) or 61(i)(5).

The reasonableness prong of *Strickland,* when applied to a claim of ineffective mitigation investigation in a capital case, entails a determination as to whether counsel's "decision not to introduce mitigating evidence ... was itself reasonable." [FN83] The prejudice prong of *Strickland* in the death penalty context asks "whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." [FN84] In making this determination, the Court must "reweigh the evidence in aggravation against the totality of available mitigating evidence," which includes mitigators established through a postconviction evidentiary hearing, and anti-mitigation evidence the State would have presented to rebut the new mitigation evidence. [FN85]

FN83. *Wiggins v. Smith,* 539 U.S. 510, 523 (2003).

FN84. *Swan v. State,* 28 A.3d 362, 391 (Del. 2011) (citing *Strickland,* 466 U.S. at 695).

FN85. *Id.* (citing *Wiggins,* 539 U.S. at 534).

There is no absolute duty on the part of defense counsel to pursue all lines of investigation about mitigating evidence for potential use at the penalty stage.[FN86] Further, counsel need not present all mitigating evidence the investigation uncovered, nor need the attorney present cumulative evidence or every witness who can offer testimony.[FN87] The ABA Standards on mitigation investigations, while instructive on reasonableness, are merely guidelines, not legal mandates.[FN88]

FN86. *Flamer,* 585 A.2d at 756 (citing *Burger v. Kemp,* 483 U.S. 776, 794–95 (1987)).

FN87. *Id.* at 757 (citations omitted); *see also Rompilla v. Beard,* 545 U.S. 374, 389 (2005) ("[q]uestioning a few more family

members and searching for old records can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there.").

FN88. *See Ploof,* 75 A.3d at 821 (citing *Strickland,* 466 U.S. at 690–91); *see also Taylor v. State,* 2010 WL 3511272, at *17 (Del.Super.Aug. 6, 2010) ("[n]either the United States Supreme Court nor the Delaware Supreme Court has held that failure to meet the ABA Guidelines is legally tantamount to ineffective assistance of counsel.").

Petitioner argues that Tease was inexperienced and overwhelmed at the time when he handled Petitioner's mitigation investigation. Drawing on the testimony and evidence presented at the evidentiary hearing, Petitioner argues that there was numerous mitigating evidence that was not presented to the jury. This includes: health issues at birth and in childhood; parental separation at an early age; early childhood exposure to domestic violence; early exposure to substance abuse; extreme economic deprivation; dangerous community environment; malnourishment; brain damage; inconsistent parenting by mother; inconsistent parenting by father; rejection of affection by both parents; abandonment by both parents; family conflict and management problems; exposure to and impact of father's infidelity; physical and verbal abuse as a child; history of early emotional problems; substance abuse; multiple periods of fulltime employment; lack of consistent father figure and role model; lack of mental health evaluation and intervention; history of positively adjusting to prison environment; family history of substance abuse; family history of criminal behavior; lack of danger to others while incarcerated; forced participation in father's criminal activity; exposure to father's physical and sexual abuse of loved ones; role as a father; role as a brother and son; and mercy.

***26** In addition to the foregoing mitigating circumstances, Petitioner relies on the Third Circuit's holding in *Outten v. Kearney* [FN89] in support of his claim. In *Outten,* the attorney's primary strategy at sentencing was to reargue the defendant's innocence, and the attorney also failed to focus on the positive aspects of the defendant's character.[FN90] The jury reached a close vote of 7 to 5 in favor of the death penalty. [FN91] The Third Circuit found that counsel's cursory investigation and failure to obtain any records relating to the defendant constituted an unreasonable investigation, given that there was "easily accessible evidence" of mitigators such as: neurological damage, poor school performance and learning disabilities, low IQ, placement in foster homes, and sexual abuse. [FN92] The court further found that had the jury been presented with all available mitigating evidence, there was "a reasonable probability that at least one juror [or more] would have struck a different balance." [FN93]

FN89. 464 F.3d 401 (3d Cir.2006).

FN90. *Id.* at 415–16.

FN91. *Id.* at 422.

FN92. *Id.* at 420.

FN93. *Id.* at 422 (citing *Wiggins,* 539 U.S. at 537).

a. *Outten* does not apply

The Court finds *Outten* sufficiently distinguishable from this case. Tease's "residual doubt" argument was only an ancillary strategy of his at the penalty hearing, in contrast to the attorney in *Outten.* Tease's primary strategy was Petitioner's relationship with his child, A.S., and "breaking the chain" of a childhood without a strong father figure that Petitioner had as a child. The positive aspects of Petitioner's character and relationships with A.S. and other members of his family, including St. Jean, Petitioner's mother and Petitioner's siblings, were found to be mitigating factors. This stands in stark contrast to *Outten,* in which the defendant's positive characteristics were not focused on by the attorney. Additionally, unlike the "close" 7 to 5

vote in *Outten,* the jurors here voted unanimously in favor of the death penalty. Finally, several of the mitigating circumstances revealed in the postconviction investigation in *Outten,* including learning disabilities, foster home placement and sexual abuse, are not present here. The instant case is thus sufficiently distinct from *Outten.*

Further, the Delaware Supreme Court has noted that the *Outten* court's reference to "at least one juror" in its prejudice analysis was incorrect under Delaware's statutory death penalty scheme.[FN94] The Supreme Court found that the "one juror" rationale did not satisfy *Strickland's* prejudice prong under Delaware's death penalty statute because the trial judge ultimately determines the sentence and has discretion whether to follow the jury's recommendation.[FN95] Thus, even if the new mitigating evidence uncovered during postconviction proceedings may create a reasonable probability that one juror's mind would have been changed, that is still not enough to create a reasonable probability of a different sentencing outcome under *Strickland,* at least in Delaware.[FN96] For these reasons, Petitioner's reliance on *Outten* is misplaced and unavailing.

FN94. *Norcross v. State,* 36 A.3d 756, 770–71 (Del.2011).

FN95. *Id.* at 771.

FN96. *Id.*

b. Viewed in its totality, Tease's investigation was not unreasonable

Turning now to the merits of Petitioner's claim, the Court finds that Tease's investigation, while not perfect, did not fall below an objective standard of reasonableness. As noted *supra,* there is no absolute duty to investigate every possible piece of potentially mitigating evidence, nor does every ABA Standard have to be followed to the strictest letter. The record reflects that Tease commenced his investigation early on in his representation of Petitioner, based on his opinion that the guilt phase would likely end in a conviction. To that end, Tease had his law clerk conduct interviews of several members of Petitioner's family. While Tease did not follow up on every lead noted by the clerk, the record reflects that Tease continued to meet with Petitioner on an ongoing basis, and to also conduct his own interviews of Petitioner's family, including during the guilt phase of trial. Family members not interviewed by Tease, including Herriott and Watkins, had little to offer in terms of new information.

***27** Tease also had Petitioner evaluated by at least one expert, Dr. Much. Dr. Much's evaluation only revealed an anti-social personality. Based on this, Petitioner made the decision to not pursue any further investigation because he determined such information would not have been helpful at the penalty hearing. Tease testified that Petitioner himself was not cooperative during Dr. Much's evaluation.

Tease developed his "breaking the chain" theory that focused on Petitioner's relationship with his child, A.S., early on in the representation. Tease discussed calling A.S. and Petitioner's father, Jesse, as witnesses at the hearing, but Petitioner was adamant that they would not be called. While the record is unclear as to what steps Tease took after these discussions, it appears that Tease still attempted to locate Jesse to no avail. Petitioner cannot now fault Tease for decisions that were his in the first place. In any event, as a result of Tease's strategy, multiple mitigating factors focusing on Petitioner's good character, his troubled childhood and his relationship with his child and family were found by this Court.

While it is true that Tease did not retain a mitigation specialist and failed to get any records relating to Petitioner, that alone does not result in his investigation being unreasonable. Further, while Dana Cook testified that Dawn Hawkins and Tara Whittlesay could have testified to the abuse that Petitioner was exposed to while living with Jesse, Cook also acknowledged that such abuse has no direct link to why someone would commit murder.

Based on the totality of the evidence, Tease got an early start on the investigation, developed a reasonable strategy focusing on Petitioner's family and his troubled childhood, and had to manage a busy trial schedule and an uncooperative client at the time of the penalty phase. Thus, Tease's investigation, while far from perfect, did not fall below an objective standard of reasonableness.

c. Even if the investigation was unreasonable, there was no prejudice

Assuming *arguendo* that the first prong of *Strickland* is satisfied, Petitioner cannot establish prejudice. The Court has restated the aggravating factors and mitigating factors found during the penalty phase *supra* and shall not restate all of them again here. To summarize, the Court found the aggravating factors—particularly the heinous and cruel nature of the crime—to be overwhelming compared to the mitigating factors, all of which focused to some extent on Petitioner's relationships with his family, his troubled childhood, is ability to readjust well in controlled environments, and the effect his death would have on his family.

Many of the so-called new mitigating factors are merely more specific restatements of the mitigating factors already found by this Court, such as his lack of guidance as a youth and the lack of intervention by his parents during a troubled childhood. Testimony by Petitioner's family members and his teacher, Yolanda Jones, as well as Dawn Hawkins and Tara Whittlesay, established the new mitigators of a dangerous community environment, malnourishment, extreme economic deprivation, substance abuse, history of early emotional problems, and physical abuse by his father and mother—particularly his father. The video testimony of Hawkins and Whittlesay also establish Petitioner's exposure to his father's substance abuse and his forced participation in his father's criminal activity. The Court rejects the remainder of Petitioner's proposed new mitigating factors as either subsumed by the mitigators already found by this Court or not established during the evidentiary hearing.

***28** Petitioner's troubled relationship with his parents and his home life, apart from the physical abuse, was already established at the original sentencing. Further, Petitioner's relationship with A.S., the focus of the testimony of Petitioner's family as well as his former coworker, Doug Dyer, was established at the original sentencing as well. The Court further notes that it does not find Dyer's claims that he was close friends with Petitioner to be particularly credible, as Dyer admitted he made no effort whatsoever to contact Petitioner after Petitioner stopped arriving for work. The Court also finds that "multiple periods of fulltime employment" was not established as a mitigating factor based on the evidence presented. Further, the testimony of Hawkins and Whittlesay does not establish that Petitioner was exposed to the sexual abuse allegedly suffered by Whittlesay at the hands of Jesse. Both only testified that Petitioner was "likely" exposed, but neither woman could say for sure whether Petitioner knew about the abuse.

The testimony of Dr. Armstrong and Dr. Haney was also unavailing. Dr. Armstrong testified that Petitioner was "brain damaged," but this brain damage consisted only of associative memory impairment. Dr. Armstrong also was unable to conclusively state the cause of Petitioner's memory issues, and admitted that this condition would not compel Petitioner to commit murder. Thus, no valid mitigating evidence can be drawn from her testimony. As to Dr. Haney, while the Court does not doubt the validity of Dr. Haney's report on a general scale, the Court finds that Dr. Haney failed to specifically apply his report to Petitioner. The expert only testified as to his report and study on the likelihood of prisoners incarcerated for life reoffending in general terms and failed to specifically apply his study to Petitioner's characteristics. Further, the Court had already found Petitioner's ability to adjust well to a controlled environment at the original sentencing. Thus, no valid mitigator can be drawn from his testimony as well.

It is unfortunate that Petitioner had such a

troubled childhood and experienced abuse, both physical and emotional, at the hands of those he trusted most. However, in weighing these and the other new mitigating factors against the aggravating factors, the Court finds that the outcome of the original sentencing remains the same. Petitioner's crime was cruel, depraved and heinous, committed against a 68–year–old woman simply for pecuniary gain, sexual gratification and to cover up his crimes. The abuse Petitioner suffered as a child neither compels nor excuses his criminal actions. Thus, there is no reasonable probability, considering the totality of mitigating evidence now presented, that the outcome of the original sentencing would have been different if this new evidence was presented. Thus, there is no prejudice under *Strickland.*

d. no ineffective assistance

Based on the foregoing, Petitioner has failed to establish ineffective assistance under *Strickland.* This claim is therefore procedurally barred under Rule 61(i)(3), and no exception applies. This claim must be denied.

Claim IX: Trial Counsel were ineffective in failing to challenge the presentation of duplicative, vague and irrelevant non-statutory aggravating factors

Petitioner argues that his constitutional rights to a fair sentencing hearing were violated by the Court's consideration of duplicative, vague and irrelevant aggravating factors. Petitioner further contends that Trial Counsel were ineffective in failing to raise this objection during the penalty phase and failing to assert this claim on direct appeal. This claim is procedurally barred pursuant to Rule 61(i)(3) unless Petitioner establishes ineffective assistance or an exception to the procedural bar.

Petitioner first argues that three non-statutory aggravators relied upon by the Court were duplicative with three statutory aggravators. Specifically, Petitioner argues that the following non-statutory factors: Petitioner terrorized and abused the victim before murdering her; selected her at random for the purpose of rape and murder; and murdered her in an effort to destroy or conceal evidence, "substantially overlapped" with the following statutory factors: the murder was committed during the course of Burglary in the Second Degree, Rape in the First Degree, and Kidnapping in the First Degree, respectively. Petitioner relies on the Tenth Circuit's opinion in *United States v. McCullah* for the proposition that statutory and non-statutory aggravating factors cannot be so duplicative as to "substantially overlap" with each other.[FN97] The Tenth Circuit stated that relying upon duplicative aggravating factors results in "double counting" that creates an arbitrary sentencing process.[FN98]

FN97. *United States v. McCullah,* 76 F.3d 1087, 1111 (10th Cir.1996).

FN98. *Id.*

***29** The Tenth Circuit's decision is not binding authority on this Court. Further, the "substantially overlap" analysis of *McCullah* has been rejected by the Pennsylvania Supreme Court,[FN99] and the United States Supreme Court has declined to adopt it.[FN100] Even the Tenth Circuit has later clarified that *McCullah* "does not stand, however, for the proposition that any time evidence supports more than one aggravating circumstance, those circumstances impermissibly overlap, *per se.*" [FN101] Given that the foregoing cases illustrate that *McCullah* lacks any persuasive authority, and based on Petitioner's failure to cite to any binding authority for his "double counting" argument, the Court rejects this argument as meritless.

FN99. *Commonwealth v. Lesko,* 15 A.3d 345, 403 (Pa.2011)

FN100. *Jones v. United States,* 527 U.S. 373, 398 (1999)

FN101. *Cooks v. Ward,* 165 F.3d 1283, 1289 (10th Cir.1998).

Petitioner next argues that the non-statutory aggravating factor that Trimnell's murder was heartless, depraved, cruel and inhuman is unconstitution-

ally vague. The United States Supreme Court has held that aggravating factors cannot be unconstitutionally vague; *i.e.,* the factor must have "some common-sense core of meaning that juries should be capable of understanding." [FN102] The challenged non-statutory factor easily satisfies this broad standard. This argument is meritless on its face and need not be discussed further. Finally, Petitioner also fails to establish how any of the statutory or non-statutory aggravators were irrelevant.

FN102. *Tuilaepa v. California,* 512 U.S. 967, 973 (1994) (citing *Jurek v. Texas,* 428 U.S. 262, 279 (1976) (internal quotations omitted)).

Because this claim lacks merit, it follows that it was not ineffective assistance for Trial Counsel to not raise this claim via objection or on direct appeal. Petitioner has also failed to establish an exception to the procedural bar; thus, this claim is procedurally defaulted under Rule 61(i)(3) and must be denied.

Claim X: Petitioner is entitled to a new sentencing proceeding because the Court gave several improper instructions to the jury

Petitioner raises four distinct arguments as to how the Court's jury instructions delivered at the penalty phase of trial violated Petitioner's rights under the Sixth, Eighth, and Fourteen Amendments of the U.S. Constitution and Article I, § 4, 7 and 11 of the Delaware Constitution. Petitioner further contends that it was ineffective assistance for Trial Counsel to not object to these instructions or assert this claim on direct appeal. This claim is procedurally barred under Rule 61(i)(3) if Petitioner fails to meet the two-pronged test of *Strickland* or otherwise establish an exception to the procedural bar.

Each of Petitioner's four arguments are meritless. First, Petitioner challenges the Court's anti-sympathy instruction as preventing the jury from fully considering the mitigating factors. The Delaware Supreme Court has clearly held that anti-sympathy instructions are required under Delaware law and have been upheld by the United States Supreme Court.[FN103] Thus, it was not ineffective assistance of counsel to not raise this claim.

FN103. *Taylor v. State,* 32 A.3d 374, 388 (Del.2011) (citing *California v. Brown,* 479 U.S. 538, 542 (1987)).

Second, Petitioner argues that the Court's instructions improperly defined mitigating circumstances and precluded the jury from considering Petitioner's background based on the following sentence: "which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender." Jury instructions are viewed as a whole; isolated statements are not reviewed in a vacuum.[FN104] A jury instruction is valid so long as it is "reasonably informative and not misleading, judged by common practices and standards of verbal communication." [FN105] The instructions fully define aggravating and mitigating circumstances in the following sentence. Further, viewing the instructions as a whole, the challenged sentence does not restrict the jury's consideration of Petitioner's background–so long as that background is relevant to the character and propensities of Petitioner. Accordingly, this instruction did not improperly define mitigating circumstances.

FN104. *Floray v. State,* 720 A.2d 1132, 1138 (Del.1998) (citing *Flamer,* 490 A.2d at 128).

FN105. *Id.* at 1137.

***30** Third, Petitioner argues that the instruction impermissibly allows jurors to consider aggravating circumstances in their weighing process that have not been found unanimously or beyond a reasonable doubt. However, such instruction complies with Delaware's death penalty statute,[FN106] and this procedure has been upheld by the Delaware Supreme Court.[FN107] This claim is without merit.

FN106. 11 *Del. C.* § 4209(d)(1).

FN107. *Brice v. State,* 815 A.2d 314, 322 (Del.2003).

Fourth, Petitioner argues that the following instruction created an improper presumption of death: "which factual circumstances require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." Petitioner cites to no legal authority for this argument, and as with Petitioner's second argument, this is merely an isolated sentence of the jury instructions. Viewed as a whole, the instructions cannot be said to create an improper presumption of death. This argument also fails.

Because all of these arguments lack merit, it was not ineffective assistance to not raise these claims on objection or direct appeal. Thus, this claim is procedurally barred pursuant to Rule 61(i)(3). Petitioner has failed to establish the application of an exception under Rule 61(i)(3) or Rule 61(i)(5).

Claim XI: Petitioner is entitled to imposition of a life sentence or to a new sentencing proceeding because the Court improperly discharged the jury prior to the start of the penalty phase of trial

Petitioner next contends that he is entitled to a life sentence or in the alternative a new sentencing proceeding because the Court improperly released the jury from its admonitions at the close of the guilt phase, but prior to the commencement of the penalty phase. Trial Counsel subsequently moved for imposition of a life sentence, on the basis that this error allegedly violated Petitioner's double jeopardy rights. Petitioner now alleges that Trial Counsel was ineffective in failing to contemporaneously object, and in failing to pursue this claim on appeal. This claim was not raised in the proceedings leading to conviction.

This Court immediately recognized its error when it released the jury from its admonitions following the announcement of the verdict. The Court immediately had the bailiff bring the jury back into the courtroom and issued a curative instruction that informed the jury it was not released from its admonitions and that the admonitions remained in effect. The Court repeated the admonitions. Approximately one minute had passed between the jury's earlier release and the Court's curative instruction. In addressing Petitioner's motion for a life sentence, the Court held a hearing in which the bailiff testified that the jurors held no discussions about the verdict or case in the time following their release and prior to the curative instruction. This Court subsequently denied Petitioner's motion for a life sentence on the basis that no prejudice had occurred.

Jurors are presumed to follow curative instructions that are immediately given following an error or introduction of inadmissible evidence.[FN108] The Third Circuit, in a recent case involving analogous circumstances, stated that "the pivotal inquiry is whether the jurors became susceptible to outside influences," and found no error when the court immediately reconvened the jury after prematurely discharging it.[FN109] The Third Circuit reasoned that the lower court "retained control of the jury at all times after it informed the jurors they were released" and "[t]he jurors did not disperse and interact with any outside individuals, ideas, or coverage of the proceedings." [FN110]

FN108. *See Guy v. State,* 913 A.2d 558, 565–66 (Del.2006) (citing *Dawson,* 637 A.2d 57, 62 (Del.1994)); *Hendricks v. State,* 871 A.2d 1118, 1123 (Del.2005) (citing *Capano v. State,* 781 A.2d 556, 589 (Del.2001)).

FN109. *United States v. Figueroa,* 683 F.3d 69, 73 (3d Cir.2012).

FN110. *Id.*

***31** In the instant case, this Court immediately realized it prematurely released the jury from its admonitions and promptly gave a curative instruction. The jurors were not exposed to outside influences at any time. Thus, the curative instruction immedi-

ately cured any error that may have resulted. It follows that it was not ineffective assistance of counsel to not contemporaneously object or to not raise this claim on appeal. Thus, this claim is procedurally barred pursuant to Rule 61(i)(3). Petitioner has failed to establish that cause and prejudice otherwise exists under Rule 61(i)(3), or that the fundamental fairness exception of Rule 61(i)(5) should apply. Accordingly, this claim is denied.

Claim XII: the sentencing procedure used at the penalty phase violated Petitioner's constitutional rights

Petitioner alleges that the sentencing procedure used at the penalty phase of trial violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and the United States Supreme Court's holding in *Ring v. Arizona.*[FN111] Petitioner's claim consists of four distinct arguments. This claim was not asserted in the proceedings leading to Petitioner's conviction and is procedurally barred pursuant to Rule 61(i)(3) . However, Petitioner further argues that Trial Counsel's failure to object to the sentencing procedure or to raise this claim on appeal constitutes ineffective assistance of counsel; if established, this would provide an exception to the procedural bar.

FN111. 536 U.S. 584, 609 (2002).

Each of these arguments can quickly be disposed of, as they are clearly meritless on their face. First, Petitioner states in conclusory fashion that because the State did not charge the aggravating factors through an indictment, his constitutional rights were violated. Petitioner provides no case law for this assertion. The Superior Court in *Manley v. State* specifically rejected this argument, [FN112] and the Delaware Supreme Court affirmed. [FN113] This argument is therefore without merit.

FN112. *Manley v. State,* 2003 WL 23511875, at *41 (Del.Super.Oct. 2, 2003) (finding the indictment requirement of both the Delaware Constitution and U.S. Constitution has never been interpreted so broadly).

FN113. *Manley v. State,* 846 A.2d 238, 2004 WL 771659, at *1 (Del. Apr. 7, 2004) (TABLE) (adopting the reasoning of the Superior court).

Petitioner's second argument is that the U.S. Supreme Court's holding in *Ring* was violated when the mitigating circumstances were found by a preponderance of the evidence rather than beyond a reasonable doubt. *Ring* held that it was unconstitutional for a sentencing judge, sitting without a jury, to find the existence of an aggravating circumstance necessary for the death penalty to be imposed. [FN114] Delaware's death penalty statute addresses the holding in *Ring* by requiring a jury to unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt. [FN115] However, the statute also expressly provides that the balancing determination of whether the aggravating circumstances outweigh the mitigating circumstances shall be made by a preponderance of the evidence.[FN116] In *Brice v. State,* the Delaware Supreme Court upheld this statutory scheme, and explained that " *Ring* does not ... require that the jury find every fact relied upon by the sentencing judge in the imposition of the sentence." [FN117] The statutory requirement that the balancing of mitigating and aggravating circumstances be determined by a preponderance of the evidence is therefore consistent with *Ring* and has been upheld by the Delaware Supreme Court.

FN114. *Ring,* 536 U.S. at 609.

FN115. 11 *Del. C.* § 4209(c)(3)(b)(1); (d)(1).

FN116. 11 *Del. C.* § 4209(c)(3)(b)(2); (d)(1).

FN117. *Brice,* 815 A.2d at 322.

***32** Petitioner's third argument—that Petitioner's constitutional rights were violated because the Court, and not the jury, found Petitioner eligible for

the death petition—also fails under *Brice*. The Delaware Supreme Court explained in *Brice* that under Delaware's death penalty statute, "the sentencing judge retains exclusive responsibility for weighing the aggravating and mitigating factors, and for the ultimate sentencing decision." FN118 Thus, this argument also lacks merits.

FN118. *Id.*

Petitioner's fourth and final argument also fails under *Brice*. Petitioner argues that *Ring* was violated when this Court, rather than the jury, found the existence of several statutory and non-statutory aggravating factors by a preponderance of the evidence. The statute clearly states that the jury must first find "the existence *of at least 1* statutory aggravating circumstance" unanimously and beyond a reasonable doubt before proceeding to the balancing determination.FN119 *Brice* states that "[o]nce the jury determines that *a* statutory aggravating factor exists, the defendant becomes death eligible." FN120 Thus, based on this authority, it clearly follows that the jury must only find the existence of one statutory aggravator before the sentencing judge commences his role as the ultimate decision-maker as to whether to impose the death penalty. Based on this exclusive responsibility for the ultimate decision, the sentencing judge can consider further aggravators, both statutory and non-statutory, by the preponderance of the evidence as part of "the total mix" the judge must consider in reaching his decision.FN121 Thus, this argument is also meritless.

FN119. 11 *Del. C.* § 4209(d)(1) (emphasis added).

FN120. *Brice,* 815 A.2d at 322 (emphasis added).

FN121. *See id.*

Based on the foregoing, all four of Petitioner's alleged *Ring* violations are without merit. It follows that failure to assert these arguments on appeal was not ineffective assistance of counsel, and thus this claim is procedurally barred. Petitioner has also failed to establish an exception to the procedural bar. This claim is therefore denied.

Claim XIII: Delaware's statutory death penalty scheme is unconstitutional on its face and as applied to Petitioner

Petitioner argues that his rights under the Eighth and Fourteenth Amendments of the U.S. Constitution, as well as Article I, §§ 7 and 11 of the Delaware Constitution were violated by Delaware's death penalty statute, both facially and as applied to Petitioner. Specifically, Petitioner argues that the twenty-two aggravating factors contained in 11 *Del. C.* § 4209(e) are "so numerous, broadly drafted, and expansively interpreted that the statutory scheme fails to genuinely narrow the class of persons eligible for the death penalty." Petitioner also argues that the statute is impermissibly and unconstitutionally vague in that the statute permits the consideration of non-statutory aggravating factors, and does not enumerate mitigating factors. This claim was not raised in the proceedings leading to Petitioner's conviction; Petitioner alleges that Trial Counsel were ineffective in failing to raise this constitutional claim on direct appeal.

Petitioner's claim regarding the statutory aggravating factors has been specifically rejected in other cases by the Delaware Supreme Court.FN122 The Superior Court has also specifically rejected Petitioner's vagueness argument.FN123 For those same reasons, Petitioner's constitutional arguments must be rejected here. Because Petitioner has failed to raise a valid constitutional claim, Trial Counsel were not ineffective in failing to raise it on appeal. Thus, this claim is procedurally barred under Rule 61(i)(3), and the exceptions of Rule 61(i)(3) and Rule 61(i)(5) do not apply.

FN122. *Steckel v. State,* 711 A.2d 5, 13 (Del.1998); *Stevenson v. State,* 709 A.2d 619, 636 (Del. 1998).

FN123. *Taylor,* 2010 WL 3511272, at *30

("Delaware's courts have not found that the statute is unconstitutionally vague or broad....")

Claim XIV: the Court improperly denied Petitioner's motion for a change of venue in violation of his rights to an impartial jury and due process

*33 Petitioner raised this claim on direct appeal, and the Delaware Supreme Court thoroughly analyzed and rejected it. Petitioner concedes in his Post–Hearing Opening Brief that Trial Counsel raised this claim on direct appeal, but attempts to restate this as an ineffective assistance of counsel claim based on Trial Counsel's "failing to properly litigate this issue on direct appeal." Petitioner does little to expand upon this statement. Because Petitioner is merely restating his third claim raised on direct appeal, this claim is barred as formerly adjudicated pursuant to Rule 61(i)(4). Petitioner fails to show why the interest of justice exception of Rule 61(i)(4) or the fundamental fairness exception of Rule 61(i)(5) should apply. This claim must be denied.

Claim XV: the State discriminatorily exercised its peremptory challenges in violation of Petitioner's constitutional rights

As with the preceding claim, Petitioner raised this claim on direct appeal as well. The Delaware Supreme Court initially remanded so that this Court could perform a thorough *Batson* analysis. This Court found that the State's proffered reasons for the challenges were not mere pretext for racial discrimination. The Supreme Court affirmed this Court's findings on remand and rejected Petitioner's claims. Petitioner now merely attempts to refine this same claim and argues that Trial Counsel was ineffective in failing to properly litigate this claim on direct appeal. Because Petitioner is attempting to relitigate his second claim raised on direct appeal, this claim is barred as formerly adjudicated pursuant to Rule 61(i)(4). The exceptions of Rule 61(i)(4) and Rule 61(i)(5) do not apply.

Claim XVI: Trial Counsel were ineffective in failing to request individual voir dire on racial prejudice

During group *voir dire,* the Court asked the jury panel whether the fact that Petitioner was a black male and Trimnell was a white female gave rise to any prejudice that may have affected the juror's ability to render a fair and impartial verdict. Petitioner now contends that Trial Counsel were ineffective in failing to request individual *voir dire* on racial prejudice. This claim was not raised in the proceedings leading to conviction, and is procedurally barred pursuant to Rule 61(i)(3) if ineffective assistance of counsel is not established.

It is well settled that "the trial judge has broad discretion in determining how and to what extent to conduct *voir dire.* " [FN124] There is no constitutionally prescribed protocol for conducting *voir dire.* [FN125] However, the Delaware Supreme Court has held that trial judges are required to question prospective jurors about prospective racial prejudice when the charges involve a violent crime, the victim and defendant are from different racial groups, and the defense attorney specifically requests questions on potential racial prejudice.[FN126] This precedent does not delineate what form questions on potential racial prejudice must take; *i.e.,* whether the question must be asked in group *voir dire* or individual *voir dire.* However, both of the above-cited cases involved questions posed (or proposed to be posed) in group *voir dire.*[FN127]

FN124. *Ortiz v. State,* 869 A.2d 285, 291 (Del.2005) (citing *Rosales–Lopez v. United States,* 451 U.S. 182, 189 (1981)).

FN125. *Id.* (citing *Morgan v. Illinois,* 504 U.S. 719, 729 (1981)).

FN126. *Filmore v. State,* 813 A.2d 1112, 1117 (Del.2003); *Feddiman v. State,* 558 A.2d 278, 283 (Del.1989).

FN127. *Id.*

Petitioner provides no authority for his argument that Trial Counsel were ineffective in failing

to request *individual voir dire.* Nothing in the above-cited Delaware Supreme Court precedent requires questions on potential racial prejudice to be asked individually rather than in group *voir dire.* Additionally, Petitioner fails to allege how the question being asked to the panel at large resulted in prejudice under *Strickland.* Thus, Trial Counsel's failure to request individual *voir dire* on racial prejudice was not ineffective assistance of counsel. This claim is procedurally barred pursuant to Rule 61(i)(3), and the exceptions of Rule 61(i)(3) and Rule 61(i)(5) do not apply. This claim is denied.

Claim XVII: Due to Court error and ineffective assistance of Trial Counsel, biased jurors were not dismissed in violation of Petitioner's constitutional rights

***34** Petitioner next contends that as a result of court error and ineffective assistance of counsel, two jurors, Juror No. 6 and Juror No. 9, were allowed to remain on the jury despite being biased and incapable of rendering a fair and impartial verdict. Petitioner argues that this resulted in a violation of his constitutional rights under the Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and Article I, § 7 of the Delaware Constitution.

Petitioner's claims regarding Juror No. 6's contact with St. Jean at the little league game were already raised on direct appeal, and are also raised again in Claim XVIII. The Delaware Supreme Court thoroughly considered and rejected Petitioner's arguments regarding Juror No. 6. Accordingly, the aspects of this claim pertaining to Juror No. 6 are barred as formerly adjudicated pursuant to Rule 61(i)(4). Petitioner fails to establish why the interest of justice exception of Rule 61(i)(4) or the fundamental fairness exception of Rule 61(i)(5) should apply. To the extent that this claim also addresses St. Jean's contact with Juror No. 9 at the little league game, those aspects of the claim are also barred as formerly adjudicated pursuant to Rule 61(i)(4), for the same reasons.

Petitioner also raises two additional arguments regarding Juror No. 9 that were not raised on direct appeal. As to the first argument, Petitioner contends that Juror No. 9 was biased based on her personal relationship with St. Jean. On the ninth day of trial, St. Jean maintained that she had known Juror No. 9 since childhood, and the juror denied this allegation. The Court held a hearing for further inquiry on the subject: St. Jean offered numerous instances of contact with Juror No. 9, including a time when Juror No. 9 held St. Jean's infant child. Juror No. 9 denied each of these instances. The Court was satisfied that Juror No. 9 could remain impartial. At the evidentiary hearing, St. Jean maintained that she knew Juror No. 9 very well, and repeated many of the same claims she made during the Court's earlier inquiry. Petitioner also offered the testimony of Juror No. 9's ex-fiancé, Dallas Drummond, to establish a personal relationship between the two women. However, notwithstanding credibility issues with Drummond's testimony based on his status as an incarcerated felon and his prior convictions for several crimes of dishonesty, Drummond's testimony actually established that the two women were nothing more than "casual acquaintances," at best. Drummond stated he "never knew" if the two women knew each other while Drummond dated Juror No. 9 and Drummond's brother dated St. Jean. According to Drummond, the only instance of specific interaction between the two women was when they were both pregnant and in the same hospital at the same time.

Second, Petitioner also argues that Juror No. 9 was biased based on the juror's acknowledgment to the Court that she was a victim of rape. Juror No. 9 revealed this during jury selection. The rape occurred in 1996, a decade prior to the trial. Juror No. 9 stated that this did not create bias or prejudice for or against either the defendant or the State. The juror was informed that rape was one of the charges in the case, and answered "yes" when asked whether she could remain fair and impartial. Trial Counsel ultimately declined to exercise a peremptory challenge nor raised a challenge for cause to remove Juror No. 9 based on her status as a rape victim.

***35** The Delaware Supreme Court has stressed the importance of an impartial jury, and has held that actual or apparent bias on the part of a juror "undermines society's confidence in its judicial system" and violates the defendant's right to an impartial jury.[FN128] Trial judges are normally accorded discretion in determining whether a juror can fairly and objectively render a verdict.[FN129] In *Banther v. State,* the Supreme Court found that the trial court's failure to remove a juror who had untruthfully answered a question during *voir dire* as to whether she had been the victim of a violent crime violated the defendant's right to an impartial jury.[FN130] Conversely, in *Caldwell v. State,* the Supreme Court found no juror misconduct when it was revealed after the trial had started that an impaneled juror was a social acquaintance of a member of the Attorney General's Office.[FN131] The juror in *Caldwell* did not intentionally conceal this relationship, because no question pertaining to this kind of relationship was asked during *voir dire.*[FN132]

FN128. *Banther v. State,* 823 A.2d 467, 482 (Del.2003) (citations omitted).

FN129. *Knox v. State,* 29 A.3d 217, 220 (Del.2011).

FN130. *Banther,* 823 A.2d at 484.

FN131. *Caldwell v. State,* 780 A.2d 1037, 1058 (Del.2001).

FN132. *Id.*

Based on the foregoing, both of Petitioner's claims pertaining to Juror No. 9 are without merit. Following St. Jean's revelation that she knew Juror No. 9, the Court held an extensive inquiry on the nature of the women's relationship. This Court was satisfied that Juror No. 9's testimony was more credible that she truly did not have any sort of personal relationship with St. Jean, contrary to St. Jean's assertions. This conclusion is bolstered by Drummond's testimony at the evidentiary hearing: Drummond "never knew" if the two women actually knew each other while he dated Juror No. 9 and St. Jean dated Drummond's brother. Drummond's testimony, at best, establishes that Juror No. 9 and St. Jean may have been nothing more than casual acquaintances, based on their time spent at the same hospital, and based on the fact that they attended the same high school several years apart. This type of "casual acquaintance" relationship—to use Drummond's words—falls far short of even the social relationship that was found to have been acceptable in *Caldwell.* This conduct falls far short of the juror misconduct in *Banther* : there was no active concealment on the part of Juror No. 9 as to either her status as a rape victim or her prior relationship with St. Jean. The Court was satisfied—and remains satisfied—that in both instances Juror No. 9 could remain fair and impartial. These arguments are without merit.

Based on the foregoing, there was no Court error in regards to Juror No. 9. Petitioner's other arguments are barred as formerly adjudicated pursuant to Rule 61(i)(4), and neither the interest of justice exception nor the fundamental fairness exception applies. It follows that it was not ineffective assistance of counsel for Trial Counsel to fail to assert these claims on appeal. This claim is denied.

Claim XVIII: Petitioner's rights to an impartial jury and due process were violated by St. Jean's improper contact with two of the jurors

Petitioner raised this claim on direct appeal, and also addressed these arguments in his preceding claim. In contrast to Claim XVII, Petitioner instills no new arguments into this claim, and merely rehashes and restates the fourth claim he originally asserted in his direct appeal. The Delaware Supreme Court thoroughly examined and rejected this claim. Thus, this claim is barred as formerly adjudicated pursuant to Rule 61(i)(4). The interest of justice exception of Rule 61(i)(4) and the fundamental fairness exception of Rule 61(i)(5) do not apply.

Claim XIX: Trial Counsel were ineffective in fail-

ing to argue that there was insufficient evidence for the Burglary, Rape and Kidnapping charges on appeal

Petitioner next argues that Trial Counsel were ineffective in failing to assert on appeal that there was insufficient evidence to support Petitioner's convictions for burglary, rape and kidnapping. Petitioner argues that his due process rights were violated because his convictions were based on insufficient evidence. Trial Counsel argued insufficiency of the evidence for these charges in a motion for a judgment of acquittal during the guilt phase, which this Court denied. Given Petitioner's failure to challenge this Court's ruling on appeal, this Claim is procedurally barred under Rule 61(i)(3) unless Petitioner can establish ineffective assistance of counsel.

***36** In determining whether to grant a motion for a judgment of acquittal, the Court must consider whether "any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt of all the elements of a crime." [FN133] During the evidentiary hearing, Donovan indicated that he did not raise insufficiency of the evidence on appeal despite properly preserving the issue because Donovan believed the claim would be unsuccessful in light of the overwhelming amount of State evidence. Additionally, despite the heading for this claim, Petitioner only addresses the rape charge in his briefs. He completely fails to address the burglary charge, and the kidnapping charge is addressed in Petitioner's next claim.

> FN133. *Winer v. State,* 950 A.2d 642, 646 (Del.2008) (citing *Flonnory v. State,* 893 A.2d 507, 537 (Del.2006)).

Petitioner's only real argument under this claim is that there was insufficient evidence of lack of consent for the rape conviction. Petitioner focuses on the stockings which bound Trimnell's wrists, and argues that because Dr. Vershvovsky could untie them, that there was no indication of lack of consent. However, there was ample other evidence to establish lack of consent, including: the presence of Petitioner's semen in the victim; the reddening of her vaginal area; the lack of a prior relationship between the victim and Petitioner; the fact that the victim was strangled to death; the injuries inflicted upon the victim in regards to the trauma and hemorrhages to her head and scalp; and the fact that the victim's body was naked from the waist down. This evidence, considered collectively and viewed in the light most favorable to the State, supports the conclusion that a rational trier of fact could find lack of consent to be established, and accordingly find Petitioner guilty of rape beyond a reasonable doubt. The Court also finds that a rational trier of fact could find

Petitioner guilty of burglary beyond a reasonable doubt, based on the evidence establishing Petitioner's presence in the victim's apartment, the circumstances of the crimes committed therein, and the lack of a prior relationship between the victim and Petitioner. The Court addresses the kidnapping conviction in the following claim; for the reasons stated below, the Court also finds there was sufficient evidence to support the kidnapping conviction as well.

Based on the foregoing, there was sufficient evidence to support Petitioner's conviction for burglary, rape and kidnapping. It follows that it was not ineffective for Trial Counsel to not pursue this claim on appeal. This claim is therefore procedurally barred under Rule 61(i)(3). Petitioner has otherwise failed to establish cause and prejudice, and the fundamental fairness exception of Rule 61(i)(5) does not apply. Claim XIX is hereby denied.

Claim XX: Trial Counsel was ineffective in failing to argue that the evidence underlying the Kidnapping conviction was incident to the evidence underlying the Rape conviction

Similarly to his preceding claim, Petitioner argues that there was insufficient evidence to support his conviction for kidnapping. Specifically, Petitioner argues that the evidence supporting his kidnapping conviction was merely incident to, and not

independent of, the evidence supporting his underlying conviction for rape. This claim was not raised in the proceedings leading to Petitioner's conviction; thus, it is procedurally barred under Rule 61(i)(3) unless ineffective assistance of counsel is established.

A defendant is not guilty of kidnapping every time he commits the crime of rape.[FN134] Kidnapping in the First Degree is statutorily defined as when the defendant "unlawfully restrains another person" with one of any of six enumerated purposes, including "[t]o facilitate the commission of any felony or flight thereafter." [FN135] "Restrain" is defined as "restrict[ing] another person's movements intentionally in such a manner as to interfere substantially with the person's liberty." [FN136] It is well settled that the restraint requirement must be independent of, and not merely incidental to an underlying offense.[FN137] This requires a determination that there is much more interference with the victim's liberty "than is ordinarily incidental to the underlying crime." [FN138] The infliction of physical force upon the victim, alone, is not enough to establish restraint in the kidnapping context.[FN139]

FN134. *Burton v. State,* 426 A.2d 829, 833 (Del.1981).

FN135. 11 *Del. C.* § 783A(3).

FN136. 11 *Del. C.* § 786(c).

FN137. *Weber v. State,* 547 A.2d 948, 958 (Del.1988).

FN138. *Id.* at 959.

FN139. *Kornegay v. State,* 596 A.2d 481, 486 (Del.1991) (citing *Burton,* 426 A.2d at 833–34). 93

***37** Here, the victim's wrists were bound together by stockings, and her legs were tied together with pantyhose. The victim's body, while still bound, was placed inside a suitcase which was then inserted inside the trunk of the victim's own vehicle, which Petitioner was driving when he was originally stopped by Sergeant Mutter. This evidence is clearly independent from the physical injuries and other evidence discussed *supra* concerning Claim XIX and Petitioner's rape conviction. Specifically, the binding of the victim's legs and transporting her inside a suitcase inside the trunk of a vehicle constitutes "much more" interference with her liberty than would have been required for rape. Thus, this claim is without merit, and it was not ineffective assistance for counsel to not raise it on appeal. It is procedurally barred under Rule 61(i)(3), and is hereby denied.

Claim XXI: Petitioner is entitled to a new trial based on the Court's improper reasonable doubt instruction

Petitioner next argues that the Court's reasonable doubt instruction given to the jury at the conclusion of the guilt phase: (1) improperly shifted the burden of proof to the defense by using the term "firmly convinced," and (2) lessened the State's burden of proof by using the term "a real possibility." This claim was not asserted in the proceedings leading to Petitioner's conviction; Petitioner argues that it was ineffective assistance of counsel for Trial Counsel to not raise this claim on appeal. This claim is procedurally barred pursuant to Rule 61(i)(3) if Petitioner cannot establish ineffective assistance.

Jury instructions are reviewed as a whole; isolated statements will not be viewed in a vacuum. [FN140] A jury instruction is not erroneous so long as it is "reasonably informative and not misleading, judged by common practices and standards of verbal communication." [FN141] The Court's instruction on the beyond a reasonable doubt standard was modeled after the Delaware Pattern Instruction. The Pattern Instruction, including the "firmly convinced" language and language closely similar to "a real possibility," has been upheld by the Delaware Supreme Court on numerous occasions.[FN142]

FN140. *Floray v. State,* 720 A.2d at 1138 (citing *Flamer,* 490 A.2d at 128).

FN141. *Id.* at 1137.

FN142. *See, e.g., McNally v. State,* 980 A.2d 364, 368 (Del.2009). The *McNally* Court, despite upholding this language, urged the Superior Court to change the "real possibility" language in the pattern instructions to "prevent any potential confusion." *Id.* However, the *McNally* Court did not invalidate use of this phrase. Further, this Court notes that *McNally* 's questioning of the "real possibility" language was three years after the trial in the instant case.

Petitioner takes issue with two particular and isolated statements from the reasonable doubt instruction given to the jury. Viewed as a whole, the instruction was reasonably informative and not misleading. The Delaware Supreme Court has upheld identical or similar language in the past. Thus, this claim lacks merit because the instruction was not erroneous, and it follows that it was not ineffective assistance for Trial counsel to not raise this claim on appeal. This claim is procedurally barred pursuant to Rule 61(i)(3); cause and prejudice have not otherwise been established under Rule 61(i)(3), and the fundamental fairness exception of Rule 61(i)(5) does not apply. This claim is denied.

Claim XXII: Petitioner is entitled to a new sentencing proceeding because the Court failed to give a reasonable doubt instruction prior to the penalty phase of trial

Petitioner next contends that it was error for the Court to only define reasonable doubt during the guilt phase of trial, and to not redefine it at the conclusion of the penalty phase of trial. Petitioner further alleges that it was ineffective assistance of counsel for Trial Counsel to not assert this claim on direct appeal. This claim is procedurally barred pursuant to Rule 61(i)(3) if ineffective assistance is not established.

***38** Petitioner provides no specific case law for his contention that he was entitled to a new reasonable doubt instruction at the penalty phase, let alone at the conclusion of the penalty phase. The Court specifically instructed the jury that their guilty verdict as to Burglary in the Second Degree established the existence of a statutory aggravating factor beyond a reasonable doubt. Petitioner fails to establish how this was error or why anything further was necessary. Thus, this claim lacks merit and is procedurally barred pursuant to Rule 61(i)(3). Petitioner has also failed to establish cause and prejudice pursuant to Rule 61(i)(3) or a colorable claim of a miscarriage of justice pursuant to Rule 61(i)(5) . This claim is denied.

Claim XXIII: Petitioner is entitled to relief based on the cumulative prejudicial effect of the foregoing errors

Petitioner's final claim for relief is that the cumulative prejudicial effect of the errors raised in his Amended Motion provide an independent basis for postconviction relief. The State correctly cites to federal authority for the rule that a claim of cumulative error, in order to succeed, must involve "matters determined to be error; not the cumulative effect of non-errors." [FN143] Just as the harmless error doctrine implies the weighing of actual individual errors, the cumulative error doctrine requires "two or more individually harmless errors" in order to apply.[FN144]

FN143. *United States v. Rivera,* 900 F.2d 1462, 1471 (10th Cir.1990)

FN144. *Id.* at 1470.

The Court has concluded that none of the foregoing 22 claims, individually, amount to ineffective assistance of counsel or otherwise establish a meritorious claim for postconviction relief. It follows that Petitioner cannot claim cumulative error based on individual non-errors. There are only three individual errors involved in this case: (1) Petitioner's allegation of a *Jencks* violation by the State by failing to disclose an interview with St. Jean; (2) the lack of delivery of the agreed-upon *Getz* instruction pertaining to Petitioner's access of pornography;

and (3) the Court's comment regarding allocution at the conclusion of the guilt phase of trial. However, this third error is not part of the cumulative error analysis, because it is barred as formerly adjudicated under Rule 61(i)(4) and cannot be considered by this Court. That leaves the alleged *Jencks* violation and the lack of a *Getz* instruction pertaining to the pornography; even considered cumulatively, these two errors are still harmless. They fall far short, in light of the overwhelming evidence presented by the State, of creating a reasonable probability of a different outcome at trial. Accordingly, there is no cumulative error. Thus, this claim is procedurally barred pursuant to Rule 61(i)(3); no exception applies. This claim, as with all of Petitioner's other claims, must be denied.

CONCLUSION

Based on the foregoing, Petitioner has failed to establish any ineffective assistance of counsel claim against Trial Counsel, nor has he otherwise established a meritorious claim for postconviction relief. All of his claims are either procedurally barred under Rule 61(i)(3) or barred as formerly adjudicated under Rule 61(i)(4), and must be dismissed. Accordingly, Petitioner's Amended Motion for Postconviction Relief is ***DENIED.***

IT IS SO ORDERED.

Del.Super., 2014
State v. Sykes
Not Reported in A.3d, 2014 WL 619503 (Del.Super.)

END OF DOCUMENT

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	
	:	I.D. No. 0411008300
v.	:	
	:	
AMBROSE L. SYKES,	:	
	:	
Defendant.	:	

FINDINGS AFTER PENALTY HEARING

Penalty Hearing Commenced: June 29, 2006
Penalty Hearing Concluded: June 30, 2006
Jury Recommendation: June 30, 2006
Decided: September 20, 2006

Stephen R. Welch, Jr., Esquire and R. David Favata, Esquire, Department of Justice; attorneys for the State.

Thomas D. Donovan, Esquire and Christopher D. Tease, Esquire, attorneys for the Defendant.

Exhibit B

WITHAM, Resident Judge

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State v. Ambrose L. Sykes
I.D. No. 0411008300
September 20, 2006

The Defendant, Ambrose L. Sykes, was charged with one count of Murder in the First Degree (Intentional Murder), one count of Murder in the First Degree (Felony Murder), one count of Rape in the First Degree (Physical Injury), one count of Rape in the First Degree (During Commission of a Felony), one count of Kidnapping First Degree, two counts of Burglary Second Degree, one count of Theft of a Senior, one count of Unlawful Use of a Credit Card, one count of Unauthorized Access to a Computer System, and one count of Resisting Arrest.[1]

Jury selection began on May 30, 2006[2], and continued until June 7, 2006. The trial commenced on June 9, 2006, and the guilty phase lasted until June 26, 2006. The jury returned on June 27, 2006 for deliberations and delivered a verdict of guilty on all counts on June 27, 2006.

Between June 29, 2006 and June 30,2006, a capital murder penalty hearing was held as required by 11 *Del. C.* § 4209(b). The jury that determined the guilt phase of the trial was the same jury which heard the evidence at the penalty hearing, with the exception of one juror who was replaced. The evidence and summations were completed on June 30, 2006. The Defendant did not allocute. The Court then instructed the jury in the law and provided a Penalty Phase Interrogatory Form for the

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[1] The following counts were merged by reason of the jury's verdict on June 27, 2006; Counts 3 and 4 are merged into one count of Rape First Degree and Counts 6 and 8 are merged into one count of Burglary Second Degree.

[2] The delay between the original arrest and trial relates to the reindictment of the Defendant and issues that developed in determining that a conflict did exist, requiring the appointment of conflict counsel for the Defendant.

jury to use in reporting its findings and recommendation.

On June 30, 2006, after deliberation, the jury unanimously found that the evidence showed beyond a reasonable doubt the existence of the following statutory aggravating circumstances: that the murder was committed while Defendant was engaged in the commission of, or during his flight after committing, Burglary Second Degree. Because the jury unanimously concluded that the evidence showed beyond a reasonable doubt the existence of a statutory aggravating circumstance, the Defendant is eligible for the death penalty. Further, after weighing all relevant evidence in aggravation and mitigation bearing upon the particular circumstances or details of the commission of the offenses and the character and propensities of the offender, the jury found unanimously that the aggravating circumstances outweigh the mitigating circumstances.

The law provides that if a jury has found the existence of at lease one statutory aggravating circumstance beyond a reasonable doubt, the Court is to consider the findings and recommendations of the jury without hearing or reviewing any additional evidence. A sentence of death shall be imposed if the Court finds by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found to exist by the Court. Otherwise, the Court shall impose a sentence of imprisonment for the remainder of the Defendant's life without benefit

of probation or any other reduction.

The Court also notes that the findings must be made following a careful, conscientious and considered weighing process given the aggravating and mitigating circumstances of this case. Then the Court will give appropriate consideration to the jury's sentencing recommendation as required by law.

THE NATURE AND CIRCUMSTANCES OF THE OFFENSE

On November 8, 2004, 68 year-old Virginia Trimnell was reported missing by her daughter after failing to arrive in Michigan for a trip to visit her family. No one had seen or heard from her since the previous day. As a result of the missing persons report, Dover police officers were instructed to look for a white 1999 Buick Century belonging to Ms. Trimnell. They were also provided with the license plate number. At approximately 3:30 a.m. on the morning of November 10, 2004, Sergeant Tim Mutter was on-duty when he spotted a vehicle matching the description of Ms. Trimnell's automobile. As Sergeant Mutter began following the vehicle, the driver, Ambrose Sykes,[3] stopped the car on King's Highway across from Ms. Trimnell's apartment complex, exited and proceeded to cross the street. At that point, Sergeant Mutter asked Sykes for his license and registration. Sykes retrieved the registration information from the car and when Sergeant Mutter observed Ms. Trimnell's name on the registration card, he asked Sykes about Ms. Trimnell's whereabouts. Sykes

[3]Ambrose Sykes was identified by Sergeant Mutter from a photograph line-up. Sergeant Mutter testified that he identified the driver of the vehicle as the man in photograph number 1, but also said photograph number 6 was a possibility. The man in photograph number 1 was Ambrose Sykes.

subsequently fled the area. Sergeant Mutter chased Sykes for approximately two minutes without success before returning to the automobile and calling for assistance.

Detective Todd Case, a member of the criminal investigation unit, was assigned to investigate Ms. Trimnell's disappearance. When her car was located, he was called to the scene. From there, the Buick was towed back to the station and placed in the investigation bay. Detective Case commenced searching the vehicle, where he found, among other things, gas cans and a shovel. In the trunk, Detective Case observed a green suitcase, a pillow case with blood on it, a trash bag with women's clothes in it and a green duffel bag, which contained a comforter, nylons that had been knotted and cut, latex gloves, a wash cloth, a scarf, socks, sheets, a Gatorade bottle with cigarette butts in it and Ms. Trimnell's purse. Detective Case attempted to lift the suitcase out of the trunk, but realized that it was too heavy. He suspected that it contained a body, so he looked inside where part of the zipper was not completely closed and saw skin and a hand. Consequently, Detective Case contacted the medical examiner's office. When the medical examiner arrived, he bagged Ms. Trimnell's hands, then he and Detective Case removed the suitcase from the trunk and placed the suitcase in the transport vehicle. When the suitcase was removed, the body shifted and a sock with tape fell from the area of Ms. Trimnell's head. The medical examiner's office later determined that Ms. Trimnell's cause of death was strangulation and that sexual activity had occurred.

Detective Case and Mr. Hegman also fingerprinted the car and its contents, specifically the shovel and latex gloves. Four fingerprints matched those of Sykes,

including one on the car frame, one on the gas tank, one on the shovel and one on the latex gloves.

After Sykes was identified by Sergeant Mutter, the Dover Police Department began looking for him. They went to the mobile home he shared with his girlfriend, Jenny St. Jean. She was apprised of the situation, but said he was not at home and she did not know where he was. On November 10, 2004, Ms. St. Jean discovered a bag of silver dollars in her home that did not belong to her and subsequently contacted Detective Case. Ms. Trimnell's daughter then identified those coins as belonging to her mother.

The police also searched both Ms. Trimnell's computer and Sykes' computer. Based on the observation of similar search terms, they determined that Sykes had used the computer in Ms. Trimnell's home and had used her credit card to access a pornographic website. Notably, the police also checked Ms. Trimnell's phone records and determined that Sykes called her apartment three times on the morning of November 7, 2004.

On November 29, 2004, police officers observed Sykes in the area of his home, where he was subsequently arrested.

The aggravating circumstances of which the State gave written notice are as follows:

> Statutory aggravating circumstances pursuant to 11 *Del. C.* § 4209(e)j., r. and o.:
>
> The murder was committed while the defendant was engaged in

the commission of, or during his flight after committing, Burglary Second Degree.

The murder was committed while the defendant was engaged in the commission of, or during his flight after committing, Rape First Degree.

The murder was committed while the defendant was engaged in the commission of, or during his flight after committing, Kidnapping First Degree.

The victim of the murder was 62 years of age or older.

The murder was committed for pecuniary gain.

Non-statutory aggravating factors:

The defendant targeted the victim and planned the murder in advance.

There is no evidence that the defendant knew the victim, and it appears that he selected her at random for the purpose of raping and murdering her.

The murder was heartless, depraved, cruel and inhuman.

The defendant terrorized and abused the victim before murdering her.

The defendant murdered the victim in an effort to destroy or conceal evidence that he had burglarized her apartment and raped her.

The victim was defenseless when she was murdered.

The murder has had an adverse impact upon the victim's family.

The defendant has previously been convicted of criminal offenses.

The defendant has a history of disciplinary problems and infractions in prison.

The defendant is potentially dangerous in the future.

The mitigating circumstances of which the defendant gave written notice are as follows:

Residual doubt.

Lack of premeditation.

No pecuniary gain.

The defendant's relationship to his son, Alex.

The defendant's relationship to Jenny St. Jean.

The defendant's relationship to his siblings.

The defendant's relationship to his parents.

Lack of guidance as a youth.

Lack of intervention by parents during a troubled childhood.

Lack of any psychological treatment in the past.

No danger to other inmates.

Adjusts well to a controlled environment.

Ability to assist other inmates in making a successful return to community.

Enrolled in National Guard in 1993.

History of corporal punishment, running away from home because of that.

Put out on street by his father as a teenager.

Impact on family if executed.

At the close of the guilt phase, Defendant filed a motion requesting a new trial and based such motion on the fact that this Court made a comment to the jury regarding allocution. Defendant asserts that commentary on his failure to testify violates the Fifth and Fourteenth Amendments, which protect against self-incrimination. Defendant cites *State v. Yoder*[4] for the two-prong *Stuart-Caballero*[5] test requiring this Court to determine "'that (1) the prosecutor manifestly intended to comment on the defendant's silence, or (2)the character of the comment was such that a jury would naturally and necessarily construe it as a comment on the defendant's silence.'"[6] Defendant contends that the comments made by the Court speak to his Fifth Amendment right to remain silent and, therefore, require a new trial. Additionally, Defendant argues that because he would allocute only after he was convicted, it factored into the jury's decision-making process.

Superior Court Criminal Rule 33 governs motions for a new trial. Rule 33

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[4]541 A.2d 141 (Del. Super. 1987).

[5]*United States v. Stuart-Caballero*, 686 F.2d 890, 892 (11th Cir. 1982)

[6]*Id.* at 143 (citing *United States v. Griggs*, 735 F.2d 1318, 1322 (11th Cir. 1984)).

states, in pertinent part, "[t]he court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." In *State v. Brown*,[7] the Supreme Court addressed when a new trial should be granted. The Supreme Court stated:

> Whether a mistrial should be declared is a matter entrusted to the trial judge's discretion. The trial judge is in the best position to assess the risk of any prejudice resulting from trial events. "A trial judge should grant a mistrial only where there is 'manifest necessity' or the 'ends of public justice would be otherwise defeated.'" The remedy of a mistrial is "mandated only when there are 'no meaningful and practical alternatives' to that remedy."

In the case *sub judice*, manifest necessity does not exist. Nor would the ends of public justice otherwise be defeated if a new trial is not granted. While a comment regarding allocution was made to the jury by this Court, I quickly issued a curative instruction, wherein I stated:

> I just want to clarify one thing because I misspoke. I want to make sure you understand where we are in these proceedings. I actually told you the State would make closing remarks, which Mr. Favata did on behalf of the State, that you next would hear from Mr. Donovan who would speak on behalf of the defendant, and then, of course, we'll have another opportunity for the State, according to our rules, the State would have a right to add any rebuttal they wish to make. And then the matter will close at that point, and then I will give you the instructions that you will follow for this case at this stage of the proceedings. Anything else I said is not important for you to know other than the fact that you need to also understand that the defendant in this case has a right to testify or not

[7] 897 A.2d 748 (Del. 2006).

> testify as he chooses, and the defendant has chosen not to testify in the case-in-chief for the defense. And the fact that the defendant has elected not to testify must not be considered by you as an indication that the defendant is guilty of the crime charged. I gave you this instruction already, I'm going to give it to you, and you'll hear it again when I do the full-blown instructions which I'll give to you after the State has had an opportunity to do its rebuttal. And the fact that the defendant has chosen not to testify will not be considered by you as an indication that the defendant is guilty of the crime charged of any applicable related offense or for any other purpose, for that matter, and you must not discuss it or consider it during your deliberations. I specifically instruct you that you may not consider the defendant's election not to testify in determining whether the State has established an element or offense beyond a reasonable doubt. Normally, you would speculate as to what the defendant might have said had he exercised his right to testify during the trial. Like any other person charged with an offense, this defendant is presumed innocent until proven guilty beyond a reasonable doubt.

The justification for declaring a mistrial when the prosecution makes comments regarding a defendant's failure to testify is to protect the defendant from the implication that his silence implies guilt.[8] As for the two-prong test, the first prong clearly does not apply to this situation. The second inquiry is, however, relevant and will be addressed. In *Yoder*, the Court went on to state that "[t]he standard for decision under the second prong of the *Stuart-Caballero* test is not whether the 'jury possibly or even probably would view the challenged remark in this manner but

[8]*See Yoder*, 541 A.2d at 142.

whether the jury *necessarily* would have done so."[9] The Court proceeded to observe, "we can hold these remarks to be error only if we deem them 'so grossly prejudicial that the harm could not be removed by the objections or instructions.'"[10]

Here, there is no indication that the jury would have *necessarily* viewed the Court's comment regarding allocution as a comment on Defendant's failure to testify. The jury was previously aware that Defendant had the right to testify, but had chosen not to do so. Significantly, the jury had already been instructed not to draw an adverse inference from Defendant's decision not to testify.

Moreover, the comment could not be considered so grossly prejudicial that the harm could not be removed, especially in light of this Court's extensive curative instruction given promptly after conferring with counsel. I also note that the Court decided not to mention allocution again so as not to draw to the jury additional attention to the word, since it is a word of "legal art," and the jury would most likely not be familiar with the term. Consequently, I am *denying* Defendant's Motion for a New Trial.

THE AGGRAVATING CIRCUMSTANCES

At the completion of the evidence in the Penalty Phase, the Court instructed the jury regarding the statutory framework of the Delaware death penalty statute and how their deliberations should be conducted. The jury returned its sentencing

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[9] *Id.* at 143 (emphasis in the original).

[10] *Id.*

recommendation on June 30, 2006, and found (1) that the State had established beyond a reasonable doubt that the existence of a statutory aggravating circumstance exists by the verdict on the felony murder count, and (2) that the aggravating circumstances outweigh the mitigating circumstances by a vote of 12 to none. Therefore, the Defendant qualified for the death penalty.

The nature of this crime has already been described. Ambrose L. Sykes brutally raped and murdered Virginia Trimnell in her own home and thereafter drove her car with her body in the trunk along with a shovel and gas cans in preparation for disposal of the body. One could not describe a more heinous, diabolical crime.

It is now appropriate for the Court to conduct its own independent inquiry in consideration of the jury's findings as to the two interrogatories to the jury. I therefore make the following findings in this case. The Court acknowledges the jury's finding of guilt as to Rape First Degree, Kidnapping First Degree, as well as convicting the Defendant under Count 2 of Felony Murder. I find that some of the additional statutory and non-statutory aggravating factors have been established by a preponderance of the evidence.

In particular, I find that the victim was 62 years of age or older and defenseless. There is uncontroverted testimony that the victim was 68 years of age and living alone. The murder was committed for pecuniary gain. The Defendant accessed and used the victim's computer along with her credit card to view a pornographic website. He also removed a bag containing silver dollars from her home. The evidence introduced shows a series of phone calls made to the victim's residence by the

Defendant. This presents evidence of pre-planning with the focus on Mrs. Trimnell as the target. These are substantial aggravating circumstances.

As described above, the act of secreting the body out of the apartment with evidence of the crimes of murder, rape and burglary coupled with the shovel and gas cans provide ample evidence of an effort to destroy or conceal evidence. This is a substantial aggravating circumstance.

There is evidence that the Defendant did not know the victim and it does appear that he selected her at random for the purpose of committing the crimes of rape, burglary and murder. The actions of the Defendant were heartless, depraved, cruel and inhuman. The evidence shows that Defendant terrorized and abused the victim before murdering her. The act of tying up the victim and strangling her with her own clothes and thereafter depositing her in her own suitcase in her own car demonstrates a callousness depravity almost unheard of. This is a substantial aggravating circumstance.

Leisl Trimnell, the victim's eldest daughter, testified on behalf of her family describing her mother as a widow with thirty-five years of service as a teacher in New Jersey. Mrs. Trimnell also had a younger daughter who testified in the guilt phase. The family was very close, maintaining contact through the internet, several phone calls per week, and visits and vacations together. She was a grandmother with three grandchildren. Her uniqueness was evidenced in many ways. Leisl Trimnell pointed out that her name is one indication since her mother named her after the eldest daughter in the *Sound of Music*. She saved her school teacher money so she could

travel and enjoy a long retirement with her children, friends and adopted community here in Dover. She was an active member of the Century Club, involved in the arts, and was a mentor to children at the Dover Library. She enriched the lives of her friends. The son of one of her close friends, Michael Petris, called her "Aunt Ginny". She obviously touched and enriched the lives of her children and friends and will be remembered as an involved member of the Dover community. There is no doubt that her loss and the manner of her death will have a substantial, adverse impact on her family and friends.

The Defendant has previously been convicted of criminal offenses from 1993 through 2005. While the record is significant because of the number, the offenses are not overly serious, nor do they qualify him as a habitual offender. I do not find this to be a substantial aggravating circumstance.

The Defendant has a history of disciplinary problems and infractions in prison. Many of the writeups are minor in nature. The infractions vary from failure to obey an order to possession of a non-dangerous contraband. The evidence indicates that these violations are fairly common. I do not find that this factor has been established as an aggravating circumstance.

The final aggravating circumstance alleged by the State is that the Defendant is potentially dangerous in the future. Other than the evidence submitted in the guilt phase, no additional evidence was introduced with the exception of the Defendant's criminal record and history of writeups. The Court, however, cannot ignore the viciousness of the rape and murder and, for this reason, I find that the Defendant is

potentially dangerous in the future.

THE MITIGATING FACTORS

The mitigating circumstances presented by the defense which directly relate to the particular circumstances or details of the commission of the offenses are the lack of residual doubt, lack of premeditation and no pecuniary gain at the time of commission of the offenses. Given the findings of the Court that the Defendant targeted the victim, planned the murder in advance and in doing so selected her at random, as well as seeking pecuniary gain, I find by a preponderance of the evidence that Defendant has not shown residual doubt in these circumstances. The proof of the crime, given the weight of the evidence, is too great to show otherwise. The DNA evidence along with the body discovered in the victim's car being driven by the Defendant, coupled with the Defendant's escape therefrom is too much to ignore.

The following mitigating circumstances were established. The defendant clearly lacked guidance as a youth, in that the lack of a fatherly presence at critical times of his life were a major factor. He did not receive timely intervention by his parents during these times, although the Court would note that he had indeed a loving and nurturing mother and sisters who care about him a great deal. He has talent and potential. His mother related the fact that as a young man he could take a battery with some wiring and make a radio from scratch. He does adjust well in a controlled environment and does not pose any obvious danger to other inmates. In joining his father to live as a youth, despite his mother's justified protesting, he lacked parental guidance and suffered a lack of parental care evidenced by a rambling existence with

his father. This experience created a psychological maladjustment for a young man. While no evidence was presented that he was actually put out in the street, nor is there strong evidence of the effect of corporal punishment and running away from home, his placement by his father at each household where he hung his hat can be equated with a vagabond existence similar to being abandoned as a child.

His relationship with his siblings is certainly strong and loving. His mother is especially close to him and he to her. His cards, letters and close contact with his son and his involvement in his life is important and meaningful for his son, Alex. His son admires and looks up to his Dad. He remains in a loving relationship with his wife, Jenny St. Jean. She obviously cares and loves him despite his faults. His death would negatively impact his mother, son, family and Jenny. They all want to continue their relationship with him.

Of the remaining mitigating circumstances, I do not find that they were established, in part as mitigating by a preponderance of the evidence. The concept of the Defendant assisting other inmates in making a successful return to the community has not been established by the evidence. There was no evidence submitted. His record in the Pennsylvania National Guard was only mentioned in passing and it is assumed that he was honorably discharged after a short stint in 1993. The Court notes that prior to the crimes for which he has been found guilty, Defendant was gainfully employed.

CONCLUSION

The Court should give the jury's recommendation such consideration as it

deems appropriate in light of the particular circumstances or details of the commission of the offense and the character and propensities of the offender as found by the Court to exist. In this case, on June 30, 2006, the jury unanimously found that the evidence showed beyond a reasonable doubt the existence of the following aggravating circumstances: that the murder was committed while Defendant was engaged in the commission of, or during his flight after committing, Burglary Second Degree. This finding of a statutory aggravating circumstance makes the Defendant eligible for the death penalty.

The same jury determined by a preponderance of the evidence that the aggravating circumstances outweighed the mitigating circumstances and recommended the death penalty by a vote of 12 to 0. The law provides that the Court must give appropriate weight to the jury's recommendation. I do so recognizing that I am not bound by the jury's recommendation if the evidence leads me to a different conclusion.

The aggravating factors in this case are serious and substantial. The factual record established by the evidence is overwhelming. The circumstances of the crimes are gruesome and shocking. While there are mitigating factors present, they are not substantial when compared to the aggravating factors.

After carefully weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offenses and the character and propensities of the offender, I must agree with all twelve jurors and find that the aggravating circumstances found to exist outweigh the

mitigating circumstances found to exist. Defendant engaged knowingly and consciously in conduct which was premeditated resulting in a murder which was cold-blooded and horrific. Accordingly, I will impose a sentence of death.

IT IS SO ORDERED.

Hon. William L. Witham, Jr.

WLW/dmh
oc: Prothonotary
xc: Order Distribution

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMBROSE SYKES,	)	
	)	
Defendant Below-	)	**No. 53, 2014**
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 8th day of July 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 July 8, 2014, she did electronically serve the attached State's Answering Brief properly addressed to:

Patrick J. Collins, Esquire
Albert J. Roop, V, Esquire
Collins & Roop
8 East 13th Street
Wilmington, DE 19801

Mary T. Corkell
Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

Notary Public