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Case Number 660,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EMMETT TAYLOR, III, Defendant below, Appellant,	:	
v.	:	No.: 660, 2015
STATE OF DELAWARE, Plaintiff below, Appellee.	:	On appeal from the Superior Court of the State of Delaware in and for Sussex County

APPELLANT'S CORRECTED OPENING BRIEF

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Dated: February 2, 2016

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NATURE AND STAGE OF THE PROCEEDINGS

On October 22, 2007 Emmett Taylor, III was indicted in Sussex County on charges of First Degree Murder, Possession of a Deadly Weapon (a frying pan) During the Commission of a Felony and Abusing a Corpse[1] as a result of events occurring between August 13 and August 14, 2007. He was convicted of all three counts after a jury trial before the Honorable E. Scott Bradley in October, 2009. The jury unanimously found beyond a reasonable doubt, the sole statutory aggravating factor[2] and, by a vote of 11 to 1, that the non-statutory aggravating factors outweighed the mitigating factors presented. On March 12, 2010, Judge Bradley sentenced Taylor to death and imposed terms of imprisonment on the other charges. This Court affirmed the judgment and sentence of death.[3]

A Motion for Post-Conviction Relief (MPCR) was filed on September 10, 2012; An evidentiary hearing was held in February, 2014.

On November 23, 2015 Judge Bradley denied Taylor's MPCR. Taylor filed his Notice of Appeal to this Court on December 4, 2015 and an Amended Appeal was filed on December 7, 2015. This is Taylor's opening brief.

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1 A-036, Indictment dated October 22, 2007.

2 11 Del. C. § 4209(e)(1)(i), the "prior felony" aggravator.

3 *Taylor v. State*, 28 A.3d 399 (Del. 2011).

SUMMARY OF THE ARGUMENT

I. Taylor was denied the right to a fair trial secured by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, Section 7 of the Delaware Constitution of 1897 due to the ineffective assistance of trial counsel which in each instance prejudiced his right to a fair trial.

A. Trial counsel was ineffective because they failed to move to sever the charge of Abuse of a Corpse from the First Degree murder charge.

B. Trial counsel was ineffective because they failed to pursue exculpatory and impeachment evidence and to impeach Jung's trial testimony through use of her pre-trial statements, deposition testimony and her husband's pre-trial statement.

C. Trial counsel was ineffective because they failed to prevent the admission of an evidence bag mischaracterizing the alleged murder weapon as bloody.

D. Trial counsel was ineffective because they failed to consult with a forensic pathologist as to the cause and manner of Mumford's death.

E. Trial counsel was ineffective because they failed to consult with a cookware expert to determine the degree and nature of force sufficient to damage the pan.

F. Trial counsel was ineffective in plea negotiations because they failed to undertake any investigation into the cause and manner of Mumford's death.

G. Trial counsel's decision to pursue a misguided mental illness defense was unreasonable because it foreclosed all other investigation and did not support Taylor's chosen trial strategy.

H. Trial counsel was ineffective because they failed to object to prosecutorial misconduct.

I. Trial counsel was ineffective because they failed to prevent the admission of a crime scene video containing un-redacted pejorative commentary from the Delaware State Police speculating on material facts.

II. Taylor was denied the rights secured by the Sixth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 7 and 11 of the Delaware Constitution of 1897 due to ineffective assistance of counsel at the penalty phase.

A. Trial counsel failed to object to the use of a psychiatric evaluation in violation of Taylor's Fifth and Eighth Amendment rights and SCCR 12.2(e)

B. Trial counsel was ineffective for failing to object to certain aspects of Earline Harris' testimony.

C. Trial counsel was ineffective for failing to ask for an instruction on the nature of an *Alford* plea.

III. Appellate counsel failed to provide Taylor with effective assistance of counsel by failing to present claims which had a better likelihood of success than those they raised and which were grounded on his rights to due process, a fundamentally fair trial, right to have a jury determine each element of a capital crime and protection from cruel and unusual punishment.

A. Appellate counsel failed to appeal the trial court's denial of trial counsels' challenge to the constitutionality of the Delaware death penalty statute.

B. Appellate counsel failed to appeal the trial court's ruling holding that an *Alford* plea constitutes a conviction for purposes of the prior violent conviction statutory aggravator.

C. Appellate counsel failed to challenge on plain error grounds the State's *Brady* violation, admission of the evidence bag and crime scene video and prosecutorial misconduct.

D. Appellate counsel failed to challenge based on plain error use of a psychiatric evaluation in violation of Taylor's Fifth and Sixth Amendment rights and the admission of uncharged misconduct in the penalty phase.

STATEMENT OF FACTS

Emmett Taylor, III and Stephanie Mumford resided in Sussex County in August 2007 and were engaged to be married on the 18th of that month.[4] On August 13, Taylor came home from work accompanied by Carlton Gibbs and Victor Perez.[5] While the three men were drinking in the kitchen, Mumford came home and she and Taylor argued.[6] During the argument, Mumford called Luther "Pete" Mitchell to complain about Taylor and to tell him that Taylor had told her to get out. During her third phone call to Mitchell (around 9:45 p.m.), the phone "went dead."[7] Mitchell missed a fourth call from her at 1:50 a.m. the following morning.[8]

Mumford left for a short while; when she returned, it was as though the argument never happened.[9] The three men discussed going to a liquor store, but because the store closed at 10:00 p.m., decided they wouldn't arrive in time, so Perez and Gibbs left in Gibbs' 1999 green Acura.[10] While the men were in the

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4 A-251, TT Vol. N, 96-99 (References to the trial transcript consist of the designation 'TT', the Volume and page(s).

5 A-180, TT Vol. J, 110.

6 A-174, TT Vol. J, 90-93.

7 A-194, TT Vol. J, 169-173.

8 A-199, TT Vol. J, 174.

9 A-177, TT Vol. J, 93-94.

10 A-179, TT Vol. J, 95, 89.

parking lot, Perez saw a man pull into the parking lot and go into the house next door.[11]

After the men left, Taylor and Mumford became embroiled in a physical and verbal altercation loud enough for the homeowners in the adjoining townhome to overhear.[12] The commotion took place between 10:30 p.m. and midnight.[13]

On August 14, 2007, when neither Taylor or Mumford appeared at their wedding rehearsal, family members drove to the townhome and found Mumford's body in a second floor bathroom,[14] and signs of a struggle,[15] including smears and drops of blood, torn clothing and clumps of hair.[16] A dental appliance was lying at the foot of a set of stairs[17] and a large 'defect' described by one of the investigating officers as a "head print,"[18] adjacent to a landing at the foot of the same set of stairs. Both Taylor[19] and the couple's vehicle were gone.[20]

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11 A-413, Defense H Ex. 25, 7(A), Victor Perez' statement to Detective William Porter dated August 15, 2007. References to exhibits entered into evidence at the February 2014 evidentiary hearing consist of Defense 'H Ex. _____'.

12 A-182, TT Vol. J, 135-141.

13 A-396 Defense H Ex. 25, 1(A) Detective Kelly Wells' Supplemental Report, including hand written notes.

14 A-200, TT Vol. K, 27-31.

15 A-168,TT Vol. H, 119.

16 A-205, TT Vol. K, 48-51.

17 A-213, TT Vol. K, 130.

18 A-168, TT Vol. H, 119.

19 A-170, TT Vol. H, 149.

20 A-162, TT Vol. H, 103.

Delaware State Police investigated Mumford's death.[21] Detective Wells spoke to Mi Young Jung and her husband, neighbors whose home shared a common wall with the Taylor/Mumford residence.[22] Although she spoke to each of them, Wells only identified by name and formally interviewed Ms. Jung.[23] Wells' report reflects material contradictions between the spouses' accounts of what was heard and seen that evening. Mr. Jung arrived home at 10:10 p.m. and saw Gibbs, Perez and Taylor out in the parking lot huddled around a small dark green car. He spoke to Taylor. Later, he heard sounds like furniture moving, a dragging sound, a grunting sound like someone was being hit and 2 voices lasting until 12:00 a.m.;[24] Mrs. Jung told Wells that she heard a "big noise" between 10:30 p.m. and 12:00 a.m. which she described as banging sounds and only Taylor's voice yelling "get out, get out" and that a small dark car left the parking space in front of the Taylor/Mumford residence at 12:00 a.m. At 11:30 p.m., she told Wells, she saw two people, one tall, one short, at Mumford's car and heard the car door slam two times. She also heard furniture moving.[25]

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[21] A-164, TT Vol. H, 105.

[22] A-350, HT Vol. A, 25-27. References to the transcript of the February 2014 evidentiary hearing consist of the designation 'HT', the Volume and page(s).

[23] A-347, HT Vol. A, 19-21.

[24] A-396, Defense H. Ex. 25, 1(A), Detective Wells' Supplemental Report and hand written notes.

[25] *Id.*

On August 15, 2007, Sergeant Keith Marvel collected and bagged a frying pan found in the kitchen.[26] The pan was described by one of the investigating officers as "a Teflon-type frying pan … and it was sort of concaved shape, looking like it had hit something to warp it that way."[27] In an affidavit attached to a search warrant application, the pan's condition was described as "consistent with having been used as a bludgeon" and that it had field tested positive for human blood.[28] With no basis other than his subjective opinion, Marvel marked the evidence bag containing the pan "fry pan *w/blood*."[29] The pan did *not* field test positive for human blood;[30] at trial, a witness testified there was no blood on the frying pan,[31] but the pan and evidence bag were admitted into evidence as State's Exhibit 80. No knife was collected at this time.[32] On August 24, 2007 while cleaning the townhouse, Mumford's family found a large, apparently bloody knife on top of the refrigerator.[33]

On August 15, 2007 Dr. Judith Tobin, performed an autopsy[34] and concluded that Mumford died as a result of blunt force trauma to the head,[35] caused

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26 A-424, HT Vol. C, 16.

27 A-163, TT Vol. H, 104-105.

28 A-449, Affidavit of Detective Michael P. Maher attached in support of application for a search warrant dated August 21, 2007 attached to Defense H. Ex. 25, 2(B).

29 A-425, HT Vol. C, 17(emphasis supplied).

30 A-430, HT Vol. C, 25.

31 A-217, TT Vol. L, 70.

32 A-169, TT Vol. H, 128.

33 A-205, TT Vol. K, 52-53.

34 A-219, TT Vol. M, 17 (voir dire examination).

by multiple blows from a frying pan or fists.[36] The State supported her testimony with autopsy photographs showing the separation of the scalp from the skull.[37] Tobin testified that the photos showed multiple areas of hemorrhage between the scalp and the skull which had become separated.[38] She characterized these as the "main thing … the severe injuries to the soft tissues to the head …"[39] Tobin noted abrasions and swollen, bruised eyelids, both upper and lower, swollen lips and a laceration on Mumford's upper lip. Her whole face was swollen.[40] The State told the jury in its opening statement that Tobin would testify the cause of death was blunt force trauma from multiple blows to Mumford's head and face.[41] The only opinion Tobin expressly stated within the bounds of reasonable medical certainty was that the cause of death was homicide.[42]

Trial counsel produced no medical evidence at trial and conceded at the evidentiary hearing they did not consult with a forensic pathologist or undertake any investigation into the cause or manner of Mumford's death.[43] Mr. Callaway testified that he concluded, based on the hole in the wall and the crime scene

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35 A-232, TT Vol. M, 66.
36 A-229, TT Vol. M, 63.
37 State's Exhibits 121 and 122.
38 A-227, TT Vol. M, 61.
39 A-244, TT Vol. M, 78.
40 A-223, TT Vol. M, 50-51.
41 A-172, TT Vol. J-21.
42 A-232, TT Vol. M, 66.
43 A-456, HT Vol. D, 10-11.

photographs, the cause of death was contact between Mumford and the wall.[44] At trial, Tobin disputed even the existence of a hole in the wall.[45] When asked to assume that there was a hole in the wall, she continued to insist that the injuries could not have been caused by Mumford striking the wall.[46] She did concede that contact with a wall would constitute blunt force but refused to speculate that the injuries were caused by contact with drywall. She "guessed" if Mumford had been thrown against a wall the injuries could have resulted, but not if she just fell.[47] Trial counsel did not object to Tobin's rank speculation and presented no evidence to support their theory that the fatal injuries occurred as a result of Mumford's head striking the wall.

At the post-conviction evidentiary hearing, Dr. Ali Hameli, a world-renowned forensic pathologist and former Chief Medical Examiner for the State of Delaware[48] completely contradicted Tobin's testimony as to cause and manner of death, testifying that the separation of the skull and scalp did not represent multiple blows but occurred when Mumford's head struck the wall, and by virtue of velocity, glided down it, causing the surface (the scalp) to separate from the underlying structure (the skull.)[49] That separation caused the multiplicity of blood

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44 *Id.* at 11.
45 A-249, TT Vol. M, 83.
46 A-250, TT Vol. M, 84.
47 A-230, TT Vol. M, 64.
48 A-353, HT Vol. A, 60, Defense H Ex. 25, 4(A).
49 A-359, HT Vol. A, 82.

vessels in the scalp to rupture.[50] The skull/scalp separation was not the primary cause of death, although it was a contributing factor. Rather, a subdural hematoma at the base of the skull, an intracranial injury, was the primary and immediate cause of death and did not result from blunt force trauma; it was caused by a fall, as a consequence of the acceleration of the head and brain inside the skull while falling and deceleration upon contact with the wall which caused the brain to move and twist and, in turn, caused vessels to break and hemorrhage to occur.[51] In Hameli's opinion, there was no evidence of multiple blows to the head, and if there were some, they did not produce the fatal injuries which were located inside the skull.[52] Contrary to Tobin's testimony that bruising evident on Mumford's body contributed to her death,[53] Hameli testified that bruising on Mumford's body had nothing to do with her death[54] and that the facial injuries did not result from multiple blows from the pan, fists, feet or any other beating, but occurred when Mumford's head and face collided with the drywall and were not the cause of her death.[55]

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50 A-381, HT Vol. A, 138-139.
51 A-366, HT Vol. A, 95.
52 A-381, HT Vol. A, 138-140.
53 A-243, TT Vol. M, 77.
54 A-356, HT Vol. A, 77-79.
55 A-362, HT Vol. A, 89-91, 94.

On August 17, 2007, Taylor was located in Washington, D.C. where he was interviewed by Delaware State Police Detective William Porter.[56] Taylor acknowledged he had an altercation with Mumford on August 13 and that Mumford had a knife at the outset of it.[57] He repeatedly denied knowing what could have caused her to die.[58] He also made comments suggesting he had wrestled with split personality.[59] These statements along with comments Taylor made to trial counsel early in the relationship[60] prompted them to have Taylor evaluated by Dr. Joseph Zingaro, a psychologist.[61] In a March 21, 2008 report, Zingaro concluded that Taylor was suffering from dissociative identity disorder.[62] Trial counsel testified that for the most part, trial strategy was predicated on either a not guilty by reason of insanity or "a mental health defense … and we were off and running with the mental health defense from the very beginning and through a large part of the case" because they believed the evidence showed overwhelming evidence of Taylor's guilt.[63] Taylor, however, did not agree with the strategy and

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56 A-165, TT Vol. H, 106.

57 A-166, TT Vol. H, 111-112.

58 A-038, transcript of State's Exhibit 94 (video tape of Taylor's interview with Detective Porter, August 17, 2007). "I don't know what happened man … You asked me what happened and I can't tell you … there was nothing wrong you know." Pgs.9- 11

59 *Id*., pg. 17.

60 A-110, Dkt. No. 99, April 23, 2009 Ex Parte Hr., tr. pg. 12.

61 A-319, TT Vol. T, 94.

62 *Id.*

63 A-436, HT Vol. C, 55.

in April, 2009, filed a Motion to Disqualify Counsel.[64] Over the course of several months during several in camera hearings, trial counsel told Judge Bradley that they had a fundamental disagreement with Taylor over trial strategy: they wanted to pursue a guilty but mentally ill defense and Taylor did not.[65] In an effort to be removed as counsel for Taylor, trial counsel told the trial judge that they did not believe his rendition of the facts and could not ethically present it at trial.[66]

On August 21, 2007 Taylor was returned to Delaware.[67] Two cell phones, one Taylor's and one Mumford's were found in his vehicle. Taylor's cell phone contained pictures apparently taken on August 14, 2007 at approximately 12:30 a.m. depicting a naked Mumford on the floor in front of a set of steps while cucumbers are being placed in her vagina and anus.[68] The State contended that Mumford was deceased when the photos were taken. Tobin could not say whether the photographs depicted a deceased individual.[69] Hameli concluded that Mumford was not dead when the cucumber activity took place.[70] He testified to a reasonable degree of medical probability[71] that blood evidence in the bathroom supported the

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64 A-125, Dkt. Entry No. 96, Handwritten Motion to Disqualify Counsel filed April 29, 2009.

65 A-110, Dkt. Entry No. 99 (original), Transcript of Proceedings of April 23, 2009, sealed by order of Judge E. Scott Bradley (filed October 16, 2009), pgs. 12-16.

66 *Id.* pg. 25-26.

67 A-218, TT Vol. L, 98.

68 State's Exhibits 103-112.

69 A-238, TT Vol. M, 72 (voir dire).

70 A-384, HT Vol. A, 148.

71 A-389, HT Vol. A, 161.

proposition that Mumford died in the bathroom where she was found; accordingly, she was not dead when the photographs were taken.

Taylor testified that a physical altercation commenced when Mumford confronted him with a knife. He spontaneously grabbed a frying pan and struck at the knife and Mumford. The parties struggled over the knife.[72] After Taylor managed to wrest the knife from Mumford, he told her he was leaving.[73] As he descended the stairs Mumford jumped on his back.[74] Taylor spun around trying to extricate himself. While she clung to him, both tumbled down the stairs and collided with the wall adjacent to the foyer at the bottom. Mumford first struck the wall followed by Taylor colliding with her a microsecond later.[75] Taylor's defense at trial was not a mental illness defense, but that he was acting in self-defense while using the pan as a defensive tool and the injuries Mumford sustained from falling down the stairs and colliding with the wall were the result of an accident. He did not concede that he used deadly force against Mumford. He testified that the activities with the cucumbers were consensual and she was alive for some time afterward.[76]

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72 A-255, TT Vol. N, 155-158.
73 A-260, TT Vol. N, 160-161.
74 A-262, TT Vol. N, 162.
75 A-264, TT Vol. N, 164-165.
76 A-266, TT Vol. N, 174-176.

The jury found Taylor guilty. At a penalty hearing the defense introduced evidence that Taylor was suffering from dissociative identity disorder.[77] In rebuttal, the State produced testimony from Stephen Mechanick, a psychiatrist, who testified that Taylor was not suffering from dissociative identity disorder[78] based on a psychiatric evaluation which was ordered in response to trial counsels' intention to use a mental illness defense at trial.[79] The sole statutory aggravator alleged was an *Alford* plea Taylor accepted in Mississippi to a charge of aggravated assault.[80] The State also produced the testimony of the victim of the purported assault, Earlene Harris, who testified about the facts giving rise to the charge and to other acts of uncharged misconduct.[81] The jury found unanimously that the State had proved the statutory aggravator beyond a reasonable doubt and by a vote of 11-1 that the aggravating circumstances outweighed the mitigating circumstances.[82] Taylor was sentenced to death.[83]

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77 A-320, TT Vol. T, 96.

78 A-331, TT Vol. U, 13-15.

79 A-004, Dkt. No. 32 (Order granting the State's Motion for Psychiatric/Psychological Evaluation of the Defendant dated May 7, 2008.

80 A-312, TT, Vol. S, 73 (Certified copy of the plea, State's Exhibit 6).

81 A-284, TT Vol. S, 45-72.

82 A-339, TT Vol. V, 3.

83 A-341, Sentencing March 12, 2010.

ARGUMENT

I. TAYLOR WAS DENIED THE RIGHT TO A FAIR TRIAL SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION AND BY ARTICLE 1, SECTION 7 OF THE DELAWARE CONSTITUTION OF 1897 DUE TO THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHICH PREJUDICED HIS RIGHT TO A FAIR TRIAL.

A. Question presented

Did trial counsel provide Taylor ineffective assistance of counsel by failing to: 1) move to severe the charge of Abuse of a Corpse from Murder in the First Degree; 2) identify and obtain *Brady* material from Mi Young Jung's husband and effectively cross-examine Jung; 3) prevent admission of materially false evidence in the form of an evidence bag mischaracterizing the murder weapon as bloody; 4) consult with a forensic pathologist or to undertake any investigation into the manner and cause of Mumford's death; 5) consult with a cookware expert to determine the degree and nature of force necessary to damage the fry pan; 6) effectively negotiate a plea to a lesser charge because they failed to undertake a reasonable investigation into the facts; 7) pursue a reasonable trial strategy rather than a misguided mental illness defense; 8) object to prosecutorial misconduct in closing argument; and 9) object to the jury having access to a crime scene video containing pejorative commentary by the Delaware State Police speculating on material facts? (A-483-502, MPCR, 9/10/2012; A-510-513, First Amendment to MPCR, 6/7/2013; A-517-530, 539-542, Reply to State's Response, 12/12/2014).

B. Scope of review

A Superior Court's decision on a motion for post-conviction relief, including its factual determinations, is reviewed for abuse of discretion.[84] Ineffective assistance of counsel claims are reviewed *de novo*.[85]

C. Merits of Argument

In order to substantiate his claims Taylor must demonstrate that: 1) trial counsels' professional performance was so deficient that they were not "functioning as the 'counsel' guaranteed … by the Sixth Amendment;" and 2) "the deficient performance prejudiced the defense."[86] Under *Strickland*, the Court must first analyze whether counsel's professional conduct fell below an objective standard of what is reasonably expected of trial counsel. If so, the Court considers whether there is a "reasonable probability that, but for counsels' unprofessional errors, the result of the proceeding would be different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[87]

The Superior Court found that, although in some instances, there were 'errors,' Taylor suffered no prejudice and that he received a fair trial. Rather than consider whether trial counsels' unprofessional errors were sufficient to undermine

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84 *Wright v. State*, 91 A.3d 972, 982 (Del. 2014).
85 *Starling v. State*, 2015 Del. Lexis 665, *15 (Del. Oct. 7, 2015).
86 *Strickland v. Washington*, 466 U.S. 668, 687 (1984).
87 *Id*., at 694.

confidence in the verdict, the Court concluded that there was sufficient evidence to support it. Whether there was sufficient evidence to support the verdict is not the proper standard to apply to *Strickland* claims. The Superior Court was wrong in so far as it determined that trial counsels' performance met the standard guaranteed by the Sixth Amendment and wrong in finding that Taylor received a fair trial.

1. Failure to move to sever the charge of Abuse of a Corpse from the charge of Murder in the First Degree.

Trial counsel did not move to sever the first degree murder and abuse charges for two reasons: 1) they did not think such a motion would succeed; and 2) the photos were convincing evidence of a mental defect.[88] Counsels' justification for their failure to move for severance is untenable: 1) there was undoubtedly a basis to move to sever under Superior Court Criminal Rule 14 but counsel did not because their strategy was predicated on *inviting* the jury to conclude that Taylor was depraved;[89] 2) Counsel had nothing to lose by filing the motion which they concede;[90] 3) they did not raise a mental illness defense; and 4) Taylor wanted the motion filed.[91]

a. The Superior Court erred by ruling that the charges were properly joined.

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88 A-434, HT Vol. C, 52, A-459,Vol. D, 19-22.

89 A-435, HT Vol. C, 54.

90 A-437, HT Vol. C, 58-59.

91 A-160, Dkt. No. 114, Ex Parte Hearing, May 19, 2009, tr. pg. 35 on Dkt. No. 96, Taylor's Motion to Disqualify Counsel (since Mr. Taylor did not want to pursue a guilty but mentally ill defense, it was incumbent on them to file the motion to sever).

The first question is whether joinder was proper. It was not. Superior Court Criminal Rule 8(a) permits joinder if the charges are of the same or similar character, based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Murder in the first degree and abusing a corpse are clearly not of the same or of similar character. Intentional murder requires evidence of a conscious object or purpose to cause death. Abusing a corpse is a misdemeanor and has nothing to do with the manner or cause of death. Nor can it logically be argued that each offense is based on the same act or transaction. Proving the elements of one offense is not dependent on proving the elements of the other nor was there any allegation that Taylor murdered Mumford in order to abuse her corpse. The only possible basis for joinder is that the murder and abuse constituted two or more acts or transactions connected together. Other than Taylor, the only connection between the two offenses is that they allegedly occurred within a relatively brief time span. This Court has determined that a defendants' constitutionally protected right to the presumption of innocence is infringed when charges of sexual assault against a convicted sex offender are joined with charges of Unlawful Conduct by a Sex Offender.[92] *Drummond* and *Monceaux* demonstrate that temporal and geographic proximity and the fact that the same defendant is alleged to have performed each

[92] *Drummond v. State,* 56 A.3d 1038 (Del. 2012), citing *Monceaux v. State*, 51 A. 3d 474 (Del. 2012).

act does not determine joinder. Here, the Superior Court's finding of a connection between the charges is that they are part of the whole "tragic story."[93] The purpose of a criminal trial is not to tell a "tragic story;" its purpose is to litigate culpability for the crimes alleged. The Superior Court's argument identifies no connection between the two charges other than Taylor. The evidence produced in support of the murder charge required none of the evidence supporting the abuse charge. The Superior Court seems to have argued that both acts were connected by the same motive: Taylor's supposed motive to kill Mumford because she disrespected him and his supposed motive to abuse Mumford body for the same reason. There is simply no basis in Taylor's statement to Porter to support such a connection. The charges do not meet the requirements of Superior Court Criminal Rule 8(a) and the Superior Court's decision to the contrary is wrong.

Assuming *arguendo* that the charges were properly joined, Superior Court Criminal Rule 14 allows charges to be severed if joinder will unfairly prejudice the defendant. The Superior Court held that it would not have severed the charges had trial counsel moved it do so because the photos purportedly proving the abuse charge had probative value in proving the murder charge, were not unduly prejudicial and that the proof of each was inextricably intertwined.[94] The Superior Court's analysis is incorrect because it considers not whether Taylor would be

93 *State v. Taylor*, 2015 Del. Super. LEXIS 993, * 20 (Del. Super. Ct. Nov. 23, 2015).

94 *State v. Taylor*, 2015 Del. Super. 993, at *22.

unfairly prejudiced, but whether the State would find the charge of abuse useful in prosecuting the murder charge. A motion to sever should be granted if "there is a reasonable probability that substantial prejudice" will result from a joint trial on the charges.[95] Here, joinder manifestly prejudiced Taylor because it was the predicate for admission of the obscene and highly inflammatory cucumber photos. The trial court found the photos to be as disturbing as autopsy photos,[96] *regardless of whether they depicted a living or dead person.*[97] They portrayed Taylor as perverted. Irrespective of the Superior Court's instruction to the jury that it must consider each offense charged separately, it is impossible to believe that the jury would not be predisposed against Taylor because he had these patently offensive photos of Mumford on his phone,[98] juxtaposed with the crime scene photos showing her dead, bloody body and the autopsy photographs. By joining the charges, the State encouraged the jurors to view Taylor as a disgusting cold killer. Any judicial economy was clearly outweighed by the prejudice to Taylor by

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95 *Wiest v. State*, 542 A.2d 1193, 1195 (Del.1988).

96 A-221, TT, Vol. M, 39.

97 A-095, Dkt. Entry No. 92, Pre-trial hearing April 16, 2009, pg. 18, where the trial court states: "I don't know which is worse, if it was done when she was alive or dead."

98 *State v. McGraw*, 2002 Del. Super. LEXIS 339, * 7 (Del. Super. Ct., May 16, 2002) Motion to sever charges of dealing in child pornography from charges of unlawful sexual contact; defendant successfully argued that "the offensive nature of the child pornography charges would lead the jury to impermissibly and automatically find him guilty of unlawful sexual contact." Here, the photographs depicting Mumford in such an offensive manner tended to lead the jury to automatically conclude that Taylor thought so little of her that he would intentionally kill her.

joinder of the charges.[99] Trial counsel should have moved for severance and the motion should have been granted.

The photographs have no probative value vis-à-vis the murder charge. Taylor's interview with Porter shows clearly that Taylor knew Mumford was dead when he left the townhouse and went to Washington, D.C.[100] The photos lend nothing to the facts surrounding Mumford's death, regardless of whether Taylor told Porter about the sexual encounter. He did not flee because of the photographs but because he panicked when he found Mumford dead. The fact that he found her dead was never in dispute.

The Superior Court contends that the photographs were useful in attacking Taylor's credibility because it is preposterous to believe that Mumford would engage in consensual sex play after Taylor beat hear. This analysis is flawed for two reasons: 1) it is predicated on speculation about how Mumford would have acted with no basis for making that determination; and 2) it considers not the prejudice to Taylor, but how the photographs would affect his credibility on matters about which he testified at trial, matters unknown at the time the Motion to Sever would have been considered had trial counsel made it. The latter flaw

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[99] *Weist v. State*, 542 A.2d 1193, 1196 (Del.1988); *State v. McGraw*, 2002 Del. Super. LEXIS 339, at *7 (Del. Super. Ct., May 16, 2002).

[100] State's Exhibit 94, video- taped interview.

applies equally to the Superior Court's analysis with respect to state of mind and motive.

The Superior Court appears to focus on relevancy. Even if there were some remotely relevant aspect of the photos to the murder charge, any relevance is clearly outweighed by unfair prejudice to Taylor and should have been excluded.[101] The doctrine of "inextricably intertwined" evidence[102] is inapposite; it applies to evidence of crimes or other bad acts which, if excluded, would create a "chronological and conceptual void" in the State's case and *may not be considered for any substantive purpose* or to suggest that the defendant is a bad person.[103] The photos added nothing to the State's case on the murder charge and only impugned Taylor's character. By failing to move to sever the charges, trial counsel chose to forgo basic advocacy in exchange for the opportunity to have Taylor viewed as a monster. Their decision resulted in extreme prejudice to Taylor because it deprived him of the presumption of innocence; elimination of the unfairly prejudicial photos would have made acquittal on the murder charge substantially more likely.

2. Failure to pursue exculpatory and impeachment evidence by failing to identify and question Mi Young Jung's husband and to impeach Jung's trial testimony through use of

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101 Delaware Rule of Evidence 403.

102 *Ruiz v. State*, 820 A. 2d 372 (Del. 2003).

103 *Pope v. State*, 632 A.2d 73, 76-77 (Del. 1993).

her pre-trial statements, deposition testimony and her husband's pre-trial statement.

"Counsel … has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."[104] Requisite knowledge includes identification of exculpatory or impeachment evidence and holding the State to its responsibility to produce any such evidence of which it has knowledge. Trial counsel failed to identify, locate and secure the testimony of a witness they knew or should have known could both corroborate Taylor's account and impeach a witness who testified for the State. The Superior Court concluded that the evidence the witness would have produced was neither useful for impeachment or corroboration of Taylor's testimony and was accordingly not *Brady*[105] material.[106] The Superior Court mistakenly determined what was said by whom and accordingly erred in determining that the evidence was not *Brady* material. Both the State and trial counsels' conduct deprived Taylor of his right to due process.[107]

The State produced Detective Wells' report on February 12, 2008;[108] it contained a statement by neighbor Mi Young Jung's husband (who was not identified by name), which was both exculpatory and useful to impeach his wife, whose trial testimony purportedly established the time frame for the alleged

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104 *Strickland v. Washington*, 466 U. S. at 688 (1984).
105 *Brady v. Maryland*, 373 U.S.83 (1963).
106 *State v. Taylor*, 2015 Del. Super. LEXIS 993 at *71 (Del. Super. Ct. Nov. 23, 2015).
107 *See Starling v. State*, 2015 Del. LEXIS 665 (Del. Dec. 14, 2015).
108 A-002, Dkt. Entry No. 16 (State's discovery response and reciprocal discovery request).

murder and abuse. Wells' notes taken contemporaneously with her conversation with the man[109] reflect that on the night of the Mumford/Taylor altercation, he came home at 10:10 p.m.[110] and saw Taylor and two smaller black males in the parking lot outside a small dark, green, older car. Later he heard movement, sounds like moving furniture, a dragging sound, 2-3 men talking and a grunting sound like someone hit someone at 12:00 a.m. Wells' Supplemental Report reflects what is in her notes with the exception of the time the man arrived at home which she states as 20:10.[111] The Superior Court concluded, based on Wells' Report that the man came home at 8:10 p.m.[112] The handwritten notes are corroborated by Victor Perez' pre-trial statement in which he tells Porter that while he, Gibbs and Taylor were out in the parking lot considering a trip to the liquor store just after 10:00 p.m., he saw a white man wearing glasses pull into the lot and go into the house next door.[113] Wells' notes and Perez' statement confirm that the husband arrived at home just as Perez and Gibbs were leaving the town house after the initial Taylor/Mumford argument had ended and that he heard two male voices.[114]That statement conflicts with the statement Jung gave Detective Wells,[115]

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109 A-347, HT Vol. A, 19.

110 A-404, Defense H Ex. 25, 1(A), last page.

111 *Id.*, top of pg. 2. Wells uses a 12 hr. clock in her notes and 24 hr. clock in her report.

112 *State v. Taylor*, 2015 Del. Super. LEXIS 993 * 53 (Del. Super. Ct. Nov. 23, 2015.

113 A-419, Defense H Ex. 25, 7(A), pg. 6.

114 A-410, Defense H Ex 25, 6(A) Dep. Tr. pg. 26, A-181,TT Vol. J, 131 and 135. The State provided a Korean language interpreter for Ms. Jung during her testimony both via deposition

her testimony at her deposition[116] and at trial[117] that she only heard Taylor's voice. Jung's contention formed the basis for the State's argument it was only Taylor who was angry.[118] This is the first conflict.

The husband said the dragging, punching noise ended at 12:00 a.m. but did not say when they began. Jung told Wells' that she, Jung, had told Mumford's niece (Samantha) that she heard "big noise last night around 2230 hours until 2400 hours."[119] In her taped statement Jung told Wells the sound started at 10:30 p.m. and ended, she thought, before 12:00 a.m.[120] At her deposition, Jung testified that the banging noise started a little bit after 10:00 p.m. and lasted during one hour or more.[121] At trial she testified she heard banging that started between 10:00 p.m. and 10:30 p.m. and the time frame during which she heard the banging was more than 30 minutes.[122] Jung's trial testimony formed the basis for the State's argument that the "vicious attack" on Mumford was over around 11:00 and that the cucumber pictures were taken an hour and a half after the beating ended,[123] but

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and at trial. In each instance, the interpreter pointed out that in the Korean language gender is not specified; the voices could have been those of a male and a female.

115 A-396, Defense H Ex. 25, 1(A).

116 A-406, Defense H Ex, 25, 6(A) Dep. Tr. Pg. 8.

117 A-189, TT Vol. J, 142.

118 A-272, TT Vol. Q, 45-46.

119 A-396, Defense H Ex 25, 1(A)(Wells' Supplemental report and handwritten notes).

120 A-412, Defense H Ex 1, 25 (A), 6(B).

121 A-406, Defense H Ex 25, 6(A), pg. 6-7.

122 A-186, TT Vol. J, 139-140.

123 A-274, TT Vol. Q, 51-52.

trial counsel did not challenge her. This is the second conflict between the spouses' statements.

Jung told Wells (reflected in her Report) that at 2330 hours she heard Mumford's car door[124] slam and saw two people one tall and one short. Wells records this same information in her notes as "11:30 pm heard slamming door of Stef's car, Emit is tall, another male, shorter, or Steff, slammed the door 2 times." In her taped statement, Jung told Wells that she heard Mumford's car door slam and she saw two people, one small who she assumed was Mumford.[125] Jung testified at her deposition that it was not she but her husband who saw two people at Mumford's car and that it was *after* she spoke to Wells that he told her he did so.[126] Trial counsel did not challenge her on this disparity, the third conflict between husband and wife.

Although it concluded that failure to identify the husband was an 'error,'[127] the Superior Court appears to contest Taylor's assertion that the missing evidence was material saying it didn't matter that Jung only heard one voice,[128]ignoring the importance the State placed on Jung's testimony that only Taylor was yelling. The

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124 A-192, TT Vol. J, 145-146 (Mumford's car was a white Tahoe).
125 A-412, Defense H Ex 25, 6(B).
126 A-410, Defense H Ex 25, 1(A), deposition tr. pgs. 26-27.
127 *Taylor v. State*, 2015 Del. Super. LEXIS 993 at *160 (Del. Super. Nov. 23, 2015).
128 *Taylor v. State*, 2015 Del. Super. LEXIS 993 at *58 (Del. Super., Nov. 23, 2015).

husband's statement would have undercut that argument but trial counsel did not pursue it.

The husband put the altercation ending around 12:00 a.m.; Jung's time frame morphed from it ending at 12:00 a.m. to ending (according to the State) around 11:00 p.m. The Superior Court says the longer time from conflicts with Taylor's statement to Porter. The longer time frame is consistent with Taylor's statement to Porter and his trial testimony that Mumford was alive after the altercation over the knife during which the pan was used to strike at Mumford and that the fall down the stairs occurred after that altercation ended. Taylor did not establish any time lines in his statement. The time line established by Gibbs, Perez and the husband demonstrate that Mumford was alive and unharmed at least until after 10:10 p.m. The time line ultimately provided by Jung has the commotion ending possibly as early as 11:00 p.m., but her trial testimony conflicted not only with her own previous statements but with what her husband told Wells.

The Superior Court disputes the clear evidence that Jung told Wells she saw two people, one of whom she assumed was Mumford, outside at 11:30 p.m. in both of her statements.[129] Even if it was the husband who made this observation it would be important corroborating evidence to support Taylor's statement to Porter that Mumford was alive after the fight over the knife ended. The State boxed in

[129] *Id,* at *68.

the alleged time of death solely to argue that the cucumber photos were taken after Mumford died; when Mumford died was otherwise irrelevant to the murder and weapon charge. The husband's statement conflicted materially with Jung's trial testimony regarding the unilateral nature of the argument and the time line and corroborated Taylor's account. Moreover, either it was he or Jung, one of them saw two people outside Mumford's car (one of whom was Mumford according to Jung's statements to Wells) long after the time at which the State alleged the "attack" was over. The husband's identity was necessary to secure evidence which was *Brady* material and the Superior Court's conclusion to the contrary is wrong.

The Superior Court erred in concluding that trial counsels' failure to pursue evidence from the witness whose identity the State withheld did not constitute ineffective assistance of counsel and did not prejudice Taylor's right to a fair trial.

The utility of the husband's statement for both corroboration and impeachment purposes has been made patently clear. The State Police failed to follow through with either identification or further interviews. The State was in contact with Jung from the time her statement was made, through the taking of her deposition in June 2008 and up until trial. Neither the State nor trial counsel even asked Jung her husband's name or whereabouts. The Superior Court characterizes

the State's failure to identify the husband as an "error."[130] It was inexcusable; it deprived Taylor of his right to due process and the effective assistance of counsel by preventing him from challenging material evidence. Trial counsel failed to take any action to ameliorate the State's failure and failed in their professional obligation to Taylor to effectively advocate for his cause and protect his constitutional right of access to *Brady* material. Had the missing *Brady* material been provided, and Jung effectively cross-examined, there is a reasonable probability that the outcome of the trial would have been different because the evidence would have provided independent corroboration of Taylor's account of what occurred in the hours before Mumford's death. The Superior Court's conclusion to the contrary is not supported by the facts or the law and must be reversed.

3. Failure to prevent admission of an evidence bag mischaracterizing the murder weapon as bloody.

False material evidence was used to convict Taylor of both murder and the weapon charges and trial counsel failed to object to the admission of that evidence because they were unaware of it. Had they noticed the erroneous evidence they concede they would have objected.[131] The Superior Court also conceded that the

130 *Taylor v.* State, 2015 Del. Super. LEXIS 993 at *160 (Del. Super. Ct., Nov. 23, 2015).

131 A-463,HT Vol. D, 25.

evidence bag should not have been submitted to the jury[132] but contends it was not evidence and its admission was therefore harmless. The Superior Court's conclusion is wrong as a matter of law and fact. The pan alleged to have been used as a murder weapon was admitted into evidence in an evidence bag marked as State's Exhibit 80. On the evidence bag was the notation "fry pan w/blood."[133] That representation was false. At the Rule 61 evidentiary hearing, Sergeant Marvel testified that he observed the pan at the scene, and in his subjective opinion, it had blood on it,[134] so he marked the evidence bag into which he placed the pan "fry pan with/blood." He was informed by a report dated September 16, 2008 (more than a year before trial) from the Medical Examiner's Office that there was no human blood on the pan.[135] At trial, a State's witness from the Medical Examiner's Forensic DNA lab testified that no human blood was found on the pan.[136] Despite no evidence that the pan was bloody, neither the State nor trial counsel took any action to correct the false statement[137] and presented it to the jury as such. The evidence bag was the subject of testimony at trial, marked as an exhibit and entered

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132 *Taylor v. State*, 2015 Del. Super. LEXIS 993 at *160 (Del. Super., Nov. 23, 2015).
133 A-215,TT Vol. K, 160-161 and A- , HT Vol. C., 25-26.
134 A-425, HT, Vol. C., 17.
135 A-426, HT Vol. C, 19-20.
136 A-217, TT Vol. L, 70.
137 A-428, HT Vol. C, 21-22 and 25-26.

into evidence.[138] It was undoubtedly evidence; it was not, however, admissible evidence because of the false characterization that it contained a bloody fry pan.

Admission of the evidence bag containing the fry pan was reversible error. The State argued that Taylor beat Mumford with it and that her death was caused by the beating. In the State's opening statement, the prosecutor described the scene, referring to damage in the room, broken drywall, a broken flower pot and a dented frying pan.[139] In closing, the State argued to the jury that the deadly weapon used in the course of beating Mumford to death was the frying pan. The indictment charged Taylor with possession of a deadly weapon during the commission of a felony and identified the weapon as the frying pan. Although the State tried to minimize the importance of the fry pan by asserting that the jury need not find the fry pan caused the fatal injuries,[140] it necessarily had to prove it was used in a lethal manner or in a way significant enough to cause serious physical injury. By definition, the frying pan could only be a deadly weapon if used to cause death or serious physical injury.[141] Characterizing the pan as bloody constituted material support for the State's case[142] because it (impermissibly) supplied a nexus among

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138 A-215, TT Vol. K, 160-161.

139 A-171, TT Vol. J, 20.

140 A-276, TT Vol. Q, 103-104.

141 11 Del. C. §222 (4) & (5).

142 At the evidentiary hearing Dr. Hameli testified that if the frying pan had caused the injuries to Ms. Mumford's face and lips it would have had blood on it (A-364, HT Vol. A, 92), proving that the false description was material and tending to prove that the pan was not a deadly weapon. This also shows additional relevance and importance of Dr. Hameli's testimony.

the frying pan, the blood found at the scene and the injuries Mumford sustained. The error was compounded by the fact that the pan's deformed condition made it look like it had been used as a weapon; it caused one investigator to surmise that it appeared have hit something to warp it[143] and its condition was used to obtain a search warrant based on the representation that it appeared "consistent with having been used as a bludgeon."[144] The error in admitting it in the evidence bag declaring it bloody cannot be viewed as harmless. Moreover, the characterization that the pan was bloody was the product of rank speculation.[145] "Evidence that is speculative . . . carries the potential for permitting the jury to draw unwarranted inferences . . . (and) admissibility is barred because speculation creates prejudice . . . ."[146] Here, the evidence was not only a reflection of Marvel's speculation, it was just plain wrong. Trial counsel did not know that the evidence bag characterized the pan as bloody; accordingly, no curative instruction was requested or given to direct the jury to ignore the statement on the evidence bag. Where there is no meaningful or practical alternative to a curative instruction to remedy the error, and where prejudice is manifest, a new trial must be ordered.[147]

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143 A-163, TT Vol. H, 104-105.

144 A-449, Defense H. Ex. 25, 2(B), affidavit of Detective Maher attached to application for a search warrant dated August 15, 2007.

145 A-425, HT Vol. C, 17.

146 *Farmer v. State*, 698 A.2d 946, 949 (Del. 1997).

147 *Cf, Gomez v. State*, 25 A.3d 786, 793-794 (Del. 2011)(reversible error to deny a motion for a mistrial upon jury hearing inadmissible evidence which permitted the jury to infer that the defendant had committed the offense for which he was on trial).

Trial counsel acknowledge that because of their failure to object, regardless of trial testimony to the contrary, the jury would have been free to accept the false characterization because the jury is entitled to accept or reject evidence, especially conflicting evidence, as it sees fit.[148]

By failing to object to the admission of the bag into evidence, trial counsel deprived of Taylor effective assistance of counsel and of his right to a fair trial. The Superior Court recognized that the bag with the false material information on it should not have been in the jury's hands,[149] but in rejecting the claim the Court noted that the jury was given the usual instruction to base their verdict only upon the evidence and would know the bag wasn't evidence, even though it was the bag that was marked as an exhibit. The basis for this belief is not articulated and in fact no evidence exists to confirm it.[150] The true answer to the question of what the jury considered is: no one knows. Consider, however, an alternative hypothetical. If someone aligned with the prosecution had written on the bag: "We know the defendant is a serial killer and must be convicted and sentenced to death" it would not be "evidence" as defined by the Court. But it would be an impermissible communication with the jury. Here the impermissible communication went to the

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148 A-463, HT Vol. D, 25-26.

149 *Taylor v. State*, 2015 Del. Super. LEXIS 993 at *160 (Del. Super. Ct., Nov. 23, 2015)

150 *Compare, Longfellow v. State*, 2015 Del. LEXIS 156 (Del., March 23, 2015)(during jury deliberations, the jury sent out a note asking what "3rd" hand written in the margins of an information alleging driving under the influence meant; a curative instruction telling them "it means nothing" was sufficient to cure any error in jurors having seen the notation).

heart of the charges against Taylor. His right to a fair trial was significantly compromised by trial counsel's unreasonable failure to look at the evidence before it was admitted and object, because their failure permitted false material evidence to be considered by the jury.

4. Failure to consult with a forensic pathologist as to the cause and manner of Mumford's death.

In *Strickland*, the Court recognized that the Due Process clauses of the Constitution guarantee criminal defendants the right to a fair trial via the Sixth Amendment, including the right to counsel.[151] Trial counsel is afforded the presumption that he or she engaged in reasonable decision making and was accordingly reasonably effective. The presumption of reasonable professional decision making, however, can only endure if the professional decisions counsel makes are informed decisions.[152]

Here, trial counsel undertook *no* investigation of the medical evidence; their decision making it unnecessary was not reasonable. Callaway testified that he sent the autopsy and medical records to Ms. Fernandez, a psycho-forensic nurse in his

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[151] *Strickland v. Washington*, 466 U.S. 668 at 685-686 (1984) (citations omitted, emphasis supplied): 'Thus, a fair trial is one in which evidence *subject to adversarial testing* is presented to an impartial tribunal for resolution of issues *defined in advance of the proceeding*. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the *ample opportunity to meet the case of the prosecution to which they are entitled* . . .The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result."

[152] *Id.* at 691. . "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

office;[153] the file he produced containing documentation of his correspondence with her, however, is bereft of any evidence that he did so. He acknowledged standard operating procedure required him to consult with the forensic nurse on medical issues.[154] Trial counsel did not consult with a forensic pathologist because he did not think it was necessary because he believed (based on the crime scene photos) the fatal injury was caused by a collision between Mumford and the wall.[155] Callaway's uninformed belief is not a rational basis to forego any investigation into the cause of death. The mechanism of an injury resulting from intentional, multiple blows as alleged by the State, and that occasioned by a collision with the wall (not alleged to have been caused by Taylor in the indictment) are fundamentally dissimilar,[156] a fact of which Callaway was unaware.[157] Had he consulted with an expert he would have learned of this determinative distinction and been able to produce evidence to support his belief.

Mr. Johnson testified to the more likely reason an investigation into the cause of death was deemed superfluous: trial counsel believed there was overwhelming evidence that Taylor was guilty as charged[158] and believed him to

153 A-451, HT Vol. D, 4.
154 A-452, HT Vol. D, 5-8.
155 A-456, HT Vol. D, 10-11.
156 A-370, HT Vol. A, 101.
157 A-458, HT Vol. D, 16.
158 A-435, HT Vol. C, 54-55.

be.[159] Forgoing even the minimal investigation called for by standard operating procedure because a lawyer believes his client is guilty is not reasonable or even defensible professional conduct in a capital murder case.[160] Trial counsel's subjective belief that he might be able to undermine the State's forensic evidence on cause of death in a highly equivocal case without consulting a forensic expert who could supply expert evidence is patently unreasonable.

The Superior Court acknowledged that trial counsel should have retained a forensic pathologist to determine the cause of Mumford's death.[161] It found, however, that the forensic evidence produced at the evidentiary hearing was "irrelevant because, (it) would, if believed, absolve (Taylor) of any responsibility for Mumford's death …"[162] If the forensic evidence produced at the evidentiary hearing absolved Taylor of any responsibility for Mumford's death, without a doubt, the outcome of the trial would have been different and prejudice is clear. The Superior Court's holding that Taylor was not prejudiced by trial counsels' failure to retain a forensic pathologist, however, is based on the contention that there was evidence in the record to support the conclusion that Taylor beat

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159 A-090, Dkt. No. 92, Ex Parte Hearing, April 16, 2009, Tr. pg. 13.

160 The text accompanying *ABA Guideline 10.7* "Duty to Investigate" points out that among other things, flawed forensic evidence has contributed to the 110 people released from death row between 1976 and 2003 due to wrongful convictions, hence the obligation to undertake an independent and thorough examination of the forensic evidence. *ABA Guidelines*, pg. 1017.

161 *State v. Taylor*, 2015 Super. Ct. LEXIS 993, at *85 (Del. Super. Ct., Nov. 23, 2015).

162 *Id.*, at *86.

Mumford to death in some manner by forcing her head into the wall.[163] This holding is fatally flawed for several reasons: 1) there was no medical evidence produced at trial to support the conclusion that the cause of death was a collision with the wall; 2) the indictment charged Taylor with intentionally causing Mumford's death by beating her; and 3) the issue before the Court was not whether there was evidence to support the verdict irrespective of defense forensic evidence, but whether there is a reasonable probability that had trial counsel produced the evidence that the cause of death was the result of a fall and collision, not just a collision, the outcome of the trial would have been different. It is immaterial whether Taylor told Porter about the fall or about any of the myriad other facts Taylor left out of his interview; the sole question is cause of death and the extent to which causation supported Taylor's denial that he beat Mumford to death or used a fry pan to cause death or serious physical injury.

The Superior Court provided no explanation for why it concluded that trial counsel "should have retained a forensic pathologist to determine Mumford's cause of death"[164] but we cannot quarrel with this conclusion. The most consequential question in any murder case is the cause of death because it influences the determination of the manner of death; no proper defense can be mounted without an in depth understanding of what caused the purported victim to

163 *Id.*

164 *Id.*, at *85.

die. Here, the intent required to establish first degree murder was inferential based on the number, location and severity of the injuries. The trial court told the jury as much.[165] Accordingly, it was incumbent upon trial counsel to inform themselves with a medical opinion on what caused Mumford to die. The Superior Court says that Hameli's testimony would not have been useful to the defense because it did not support the so-called trial strategy of self-defense and accidental fall. This suggestion ignores the fundamental purpose of a pre-trial investigation by the defense: to inform the trial strategy, to understand what happened in order to be prepared to defend the client against the allegations brought by the State. Moreover, the so-called strategy was based on Taylor's steadfast contention that he only used the pan to get the knife away from Mumford and that he did nothing intentionally that would have caused her to die. The medical evidence supplied by Hameli fully supports that contention, not because it is based on anything Taylor told him, but because of the nature, location and severity of the injuries. According to him, the somatic bruises found on Mumford's arms, legs and torso were minor, caused by blunt force either from the pan, bumping into the furniture or walls during the knife altercation or by falling in the stairwell[166] and did not cause or contribute to her death. The separation of skull and scalp, which Tobin characterized as the result of multiple severe blows to the head, and as the cause of

165 A-222, TT Vol. M, 42.

166 A-357, HT Vol. A, 78, A-420, HT Vol. B, 120.

death,[167] were, in the Superior Court's view, "very probative of the defendant's intent in this case,"[168] but were *not*, according to Hameli, caused by multiple blows to the head. The separation occurred when the head struck the wall and slid down causing the surface to separate from the underlying structure. Severity is undetermined, according to Hameli, because the scalp can very easily separate from the skull.[169]

Had trial counsel undertaken an investigation into the cause of Mumford's death, which they concede is standard operating procedure, they would have substantially improved their ability to meet the State's medical evidence. The Superior Court was correct in concluding they should have done so.

The Superior Court erred as a matter of law in concluding that Taylor was not prejudiced by trial counsels' ineffective representation because it determined that the verdict was supported by the evidence rather than whether there was a reasonable probability that the outcome of the trial would have been different had counsel retained a forensic pathologist. The only medical evidence produced at trial, none of which was stated with a reasonable degree of medical certainty or probability[170] pertaining to the cause of Mumford's death, was Tobin's testimony that the skull and scalp were separated due to multiple blows to the head caused by

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167 A-227, TT Vol. M, 61, 78.
168 A-220, TT Vol. M, 37.
169 A-360, HT Vol. A, 83.
170 A-232, TT Vol. M, 66.

fists or the pan. Tobin couldn't say whether the injury could have been caused by contact with the dry wall but speculated that if Mumford had been thrown against the wall it could have been, she *guessed*, but not if Mumford 'just fell.'[171] Trial counsel asked her if Mumford's head had gone through the dry wall whether that would have caused the injuries to which she had testified and she said no because, she contended, Mumford had multiple separate as well as overall general hemorrhage.[172] She insisted during her cross-examination that if Mumford's head had hit the wall, "it wouldn't produce ecchymosis everywhere else … the multiple to the head it was all over the head … possibly one, but I certainly wouldn't say all of them …wouldn't have any effect on the number of traumas."[173]

Taylor was not charged with causing Mumford's death by throwing her down the stairs. The indictment alleged that Taylor intentionally caused Mumford's death by beating her. Superior Court Criminal Rule 7(c)(1) requires that the indictment be a "plain, concise and definite written statement of the essential facts constituting the offense charged" and it must allege whether "the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means." "Beating" is not defined

171 A-227, TT Vol. M, 61-64.
172 A-250, TT Vol. M, 84.
173 *Id*. 85-86.

by statute so its meaning is to be given its commonly accepted meaning.[174] The Merriam-Webster Dictionary defines "beating" as "an act of striking with repeated blows so as to injure or damage." The essential aspect of a beating is that it consists of multiple blows by a person against another person. Had the State intended to charge Taylor with intentional murder by a means other than beating, such as by throwing Mumford down the stairs, it was free to do so; it could have even requested that the indictment be amended after Tobin's testimony but before the verdict,[175] but it did not. If, as the Superior Court now suggests, jurors may have concluded that Taylor caused Mumford's death by throwing her down the stairs, his conviction must be overturned because we cannot know whether some jurors accepted the State's allegation that Mumford was beaten to death, and others believed that she was thrown down the stairs. "The Sixth Amendment to the United States Constitution requires that there be a conviction by a jury that is unanimous as to the defendant's *specific* illegal action."[176]

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174 11 Del. C. § 221(c).

175 Superior Court Criminal Rule 7(e).

176 *Probst v. State*, 547 A. 2d 114, 121 (Del. 1986), citing *United States v. Beros*, 833 F. 2d 455, 462 (3rd Cir. 1987)(emphasis added); In *Schad v. Arizona*, 501 U.S. 624, n. 5 (1991); the Court questioned whether the right is grounded on the Sixth Amendment or on due process grounds.

The important point here is that there was no medical evidence introduced at trial to support the contention that Mumford was thrown down the stairs.[177] The medical evidence provided by Hameli demonstrates that there was one fatal injury, not multiple severe blows, and it was not the result of a beating with fists or the pan. The evidence supports Taylor's defense in two material ways: 1) it supports his contention that he did not beat Mumford to death and or use the pan to cause death or serious physical injury; and 2) because a subdural hematoma is not only rare[178] but takes some time to form and ultimately cause death,[179] its role as the cause of death supports Taylor's contention that he did not know what caused Mumford to die and that she was alive for a considerable amount of time after, not only the altercation over the knife, but after she fell down the stairs and the cucumber photos were taken. Similarly, the swelling and bruised appearance of the eye lids develops over time[180] which supports Taylor's testimony that he did not see swelling until sometime during or at the end of the cucumber activity.[181]

In preparing to testify at the evidentiary hearing, Hameli had reviewed a number of sources to determine whether he agreed with the conclusions Tobin

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177 It is highly unlikely that an allegation that Mumford was thrown down a set of 6 carpeted stair steps could support an indictment for first degree murder. *See* State's Exhibit 26 which depicts the steps.

178 A-373, HT Vol. A, 118, 121, 128, 129-130. Hameli testified than in his half a century of experience he has only seen a subdural hematoma around the brainstem a few times.

179 A-375, HT Vol. A, 122.

180 A-376, HT Vol. A, 125.

181 A-270, TT, Vol. O

reached regarding cause and manner of death.[182] He concluded the external injuries to Mumford's extremities and her torso, including bruising and abrasions, were minor and neither singly or in combination had anything to do with Mumford's death, and were caused by blunt force from either a blunt object hitting the body, the body striking a blunt object, or in a fall.[183] He concluded that the extra-cranial injuries Mumford sustained, including the separation of the scalp from the skull and the resulting hemorrhage, were primarily caused by striking her head *after a fall* and secondarily to the gliding effect which occurred after the head struck the wall which caused the scalp and skull to separate. Because the tissue connecting the skull and scalp is very vascular, when it tears, many vessels break and bleed causing multiple hemorrhages (as opposed to multiple blows).[184] He testified that the injuries to the face, the obvious swelling and apparent bruising of all four eyelids, the lacerations to the lips and abrasions to the nose were caused when Ms. Mumford's fell down the stairs and hit her forehead against the wall, and then broke through it.[185] None of these injuries, including skull/scalp separation were the cause of death, although they contributed.[186]

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182 A-354, HT Vol. A, 75-76.
183 A-356, HT Vol. A, 77-78.
184 A-359, HT Vol. A, 82-83.
185 A-362, HT Vol. A, 89.
186 A-365, HT Vol. A, 94.

The cause of death, in Hameli's opinion, within a reasonable degree of forensic medical certainty,[187] was the subdural hematoma found inside the skull, around the brain which compressed the brainstem and was caused by the fall. The injury was caused by the brain accelerating through the fall and decelerating when it hit the solid wall. The brain rotates during such an event causing vessels to break and bleed. The blood accumulates and becomes a mass or hematoma.[188] The hematoma in this case formed around the brainstem, the point from which vital functions such as respiration and heart-beat are controlled.[189] The speed with which the hematoma forms determines how long a person survives subsequent to the event which causes the injury.[190] In this case, Mumford lived for a few hours after she hit the wall.[191] This injury does not occur because the head is struck by an object or is pushed into an object. A fall, causing the head and brain with in it to accelerate and then decelerate upon contact, causes this type of injury, even if you simply stumble on the steps and fall.[192] Hameli went to great lengths to explain that injuries caused by direct blows to a head differ greatly from injuries caused by a moving head hitting a stationary object.[193] Based on Hameli's opinion, nothing Taylor was charged with doing either caused or contributed to Mumford's death;

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187 A-477, Defense H Exs. 3 and 25, 4(B).
188 A-365, HT Vol. A, 94-98, 117.
189 A-374,HT Vol. A, 121.
190 A-375, HT Vol. A, 122.
191 A-379, HT Vol. A, 130.
192 A-361, HT Vol. A, 87.
193 A-370, HT Vol. A, 101-102.

Tobin provided no evidence that there were contusions on the surface of the scalp or on the brain which would be evident if she had been struck with a blunt object with sufficient force to cause the injuries Mumford sustained.[194] The State offered no evidence in rebuttal of Hameli's testimony which completely rebutted Tobin's opinion as to cause of death.

Hameli could not express an opinion as to manner of death; he would have ruled the manner of Mumford's death undetermined.[195] His rationale was that the medical injuries did not evidence any particular involvement of another person or indicate motivation.[196] Tobin determined Mumford died as a result of a homicide, because of what she saw as multiple direct blows from a frying pan or fists. The contrast between these two opinions could not be starker. Hameli's testimony would have provided powerful evidence that not only did Mumford not die by the means alleged by the State, but would have also corroborated Taylor's assertion that he did not beat Mumford to death and that she was alive after the struggle over the knife, after the fall down the stairs and when the cucumber photos were taken. Had the jury been given Hameli's evidence, there is more than a reasonable probability that the outcome of the trial would have been different on each count in the indictment.

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194 A-380, HT Vol. A, 137-138.
195 A-395, HT Vol. A, 167.
196 A-393, HT Vol. A, 165-167.

The Superior Court abused its discretion in holding that Hameli was not qualified to give an opinion with respect to whether Mumford was alive when the cucumber photographs were taken. Hameli testified that, within a reasonable degree of medical probability[197] Mumford died in the bathroom where she was found, permitting the inference she was alive when the cucumber photos were taken. His opinion was based on assessing the blood coming from Mumford's mouth, blood smears, the position of the body and the timing and effect of rigor mortis. He concluded based on blood evidence that she was alive and moving in the bathroom and that she died in the position in which she was found.[198] The Superior Court found that Hameli's testimony was nothing more than speculation, a lay opinion, inadmissible and unpersuasive.[199] The Court disqualified Hameli's opinion based on its view that the role of a forensic pathologist is limited to examining a body to determine the cause and manner of death.[200] The Court's authority for that proposition[201] does not support the limitation that a forensic pathologist looks only at a body in determining cause and manner of death and states that "the very essence of forensic pathology is investigative."

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197 *See, Moses v. Drake*, 2014 Del. Super. LEXIS 251, *8-9, (Del. Super., May 13, 2014; re-argument denied, *Moses v. Drake*, 2014 Del. Super. Lexis 705 (Del. Super., June 10, 2014) (a reasonable degree of medical certainty or a reasonable degree of medical probability is the same standard for stating a medical opinion).

198 A-385, HT Vol. A, 157-164.

199 *Taylor v. State*, 2015 Del. Super. LEXIS 993, *113-116 (Del. Super. Nov. 23, 2015).

200 *Id.* at *115.

201 *United States v. Vega-Penarete,* 1992 U.S. App. LEXIS 21060 at *6 (U.S. Ct. of Appeals 4th Cir., Sept. 1, 1992).

Hameli[202] is clearly qualified to render a medical opinion based on the appearance of Mumford's body, blood smears found under, around and on her, the source of that blood, and the manner in which rigor mortis would have affected the body, including its position at and after death, that Mumford died where she was found. The jury could have properly inferred that if Mumford died in the bathroom where she was found, she was not dead at the foot of the stairs where the cucumber photos were taken. In the bathroom, blood smears were found at the base of both the bi-fold doors on one wall and on the lower portion of the entry door, as well as on the floor underneath Mumford.[203] There was a relatively wide line of blood running from Mumford's mouth to her ear which could have been present both pre- and post-mortem.[204] The floor on which Mumford lay when the cucumber photos were taken did not have blood on it nor did the stair step adjacent to Mumford's head in the photos.[205] Where a witness is qualified as an expert by virtue of his or her knowledge, skill, experience, training or education and states an opinion using those qualifications to opine on relevant issues based on reliable evidence which would assist the jury in determining a fact in issue, the opinion is admissible.[206] The Superior Court abused its discretion in ruling that Hameli was not qualified to

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202 A-422, Defense Hearing Ex. 25, 4 (A): Hameli was Delaware's Chief Medical Examiner (1964-1997) and the Director of the Forensic Sciences Laboratory (1970-1997).

203 Defense Hearing Ex. 25, 4(E).

204 A-390, HT Vol. A, 162-163, Defense Ex. 25, 4(E).

205 A-432, HT Vol. C, 39-40.

206 *Mumford v. Paris*, 2002 Del. Super. LEXIS 69, *4-8 (Del. Super., Jan. 25, 2002)(citing D.R.E. 702 and *Cunningham v. McDonald*, 689 A. 2d 1190, 1193 (Del. 1997).

render his opinion that Mumford died in the bathroom and the wrong standard in evaluating the reliability and relevance of his testimony. Taylor's right to a fair trial was seriously prejudiced by trial counsels' failure to retain a forensic pathologist because had they done so there is a reasonable probability that the outcome of the trial would have been different as to all three counts in the indictment.

5. Failure to consult with an appropriate expert to determine the degree and nature of force necessary to damage the pan.

The Superior Court's response to this argument, as with respect to the evidence bag improperly characterizing the pan as bloody, minimizes the importance of the fry pan with respect to the State's theory regarding the manner of Mumford's death. The Superior Court's position ignores the indictment which charged that the pan was used as a deadly weapon. The appearance of the pan, along with the false claim that it had human blood on it, fit hand in glove to support the charge in the indictment. The appearance of the pan as a basis for supporting the State's claim could have and should have been rebutted by evidence which would have demonstrated that the damage to the pan was not caused by Taylor hitting Mumford with it, eliminating its appearance as a basis to infer that it was used to cause death or serious physical injury.

Trial counsel did not consult with a cookware expert because he apparently did not believe it was necessary. Callaway testified at the evidentiary hearing that he did not believe the pan had been used to cause death or serious physical injury; he assumed it became warped due to overheating.[207] His assumption ignored how jurors might perceive the pan as evidenced by Porter's comment that "it looked like it hit something to make it warp that way"[208] and the inference Tobin drew from its appearance that the pan could have been capable of causing the scalp and skull separation.[209] The frying pan was viewed as the murder weapon because of its appearance, because the autopsy report indicated that Mumford died from blunt force trauma to the head and Taylor conceded to Porter that he hit Mumford with it. It was professionally unreasonable for trial counsel to think it needn't be analyzed.

Dean Kleinhans, an expert in cookware manufacturing, was retained by post-conviction counsel; to determine the likelihood that the pan's apparent deformities were caused by it striking either a human body or head. His affidavit and report were accepted into evidence at the evidentiary hearing with no objection.[210] After conducting a series of tests on comparable pans, Kleinhans was

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207 A-465, HT Vol. D, 30.

208 A-163, TT Vol. H, 104-105.

209 A-248, TT Vol. M, 82.

210 A-421, HT Vol. B, 124, (Defense H Exs. 23 and 25 5(A)).

able to state with a reasonable degree of engineering mechanics certainty that the deformities in the pan were not caused by striking either a human head or body.

Objectively reasonable standards of professional conduct dictated that trial counsel investigate the condition of the pan.[211] The prejudice resulting from the failure to do so was the unwarranted inference the jury drew that the pan was used as a deadly weapon.

6. Failure to effectively negotiate a plea to a lesser charge because trial failed to undertake a reasonable investigation into the facts.

In August, 2008, the State offered Taylor a plea to guilty but mentally ill to first degree murder which he rejected;[212] the State refused to offer any other plea.[213] The two-part *Strickland* test applies to ineffective assistance of counsel claims in the context of negotiating a plea for a criminal defendant.[214] Had trial counsel been prepared with evidence that Mumford's death was caused by a fall, not by a beating, and evidence that the frying pan was not used in a lethal manner, counsel would have been far more persuasive in negotiating a plea to something less than first degree murder, freeing Taylor from life in prison or death. Hameli's

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211 The notes to *ABA Guideline* 10.7 point out that the "Duty to Investigate" Guideline is predicated on the notion that reasonable professional action requires counsel to "conduct thorough and independent investigations relating to both guilt and penalty issues regardless of overwhelming evidence of guilt (or) client statements concerning the facts of the alleged crimes."

212 A-068, Dkt. No. 52, September 3, 2008 office conference, tr. pg. 3.

213 A-161, (letter dated June 9, 2009 from Paula Ryan to E. Stephen Callaway).

214 *Missouri v. Fry*, No. 10-444, 566 U. S. at _____ , 132 S. Ct. 1399, 82 L. Ed. 2d 379, 2012 LEXIS 2321, (March 21, 2012).

testimony that any kind of fall down the stairs, not a push, a shove or a throw,[215] could have caused the kind of damage to the drywall caused by Mumford's collision coupled with his conclusion that the subdural hematoma which caused her death was the result of acceleration and deceleration of the brain inside the skull, would have opened the possibility of a not guilty verdict on all counts. With the risk of a possible acquittal, the State would have had an incentive to offer something less than first degree murder.

The Superior Court's response to this argument is no more defensible than its response to the contention that the outcome of the trial would have been different had trial counsel produced the testimony Hameli provided. The State never argued, and certainly did not prove through medical evidence, that the cause of death was the result of any kind of collision with the wall. The State argued that Mumford was beaten to death.[216] The Court's reliance on "the undisputed evidence"[217] to negate this claim wholly misses the point: had trial counsel developed evidence with which to dispute the State's evidence he would have had substantially better bargaining power.

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215 A-361, HT Vol. A, 87.

216 A-276, TT, Vol. Q, 104: The State argued in its closing: "Multiple blunt force trauma could have been anything that caused blunt force trauma to Stephanie Mumford's head, all over her head, her face, her mouth, her ears; head to toe … all of that, the State submits, is the beating that Stephanie Mumford took that day from Emmett Taylor." The indictment required that such blunt force had to be from a beating. Hameli testified that it was not such blunt force that caused her death; it was the acceleration and deceleration of her brain inside her skull because she fell and struck her head that caused her death.

217 *Taylor v. State*, 2015 Del. Super. LEXIS 993, *123 (Del. Super., Nov. 23, 2015).

Trial counsel unreasonably failed to undertake an investigation into the cause and manner of death (which the Superior Court did not dispute) and of the pan thereby depriving Taylor of the leverage necessary to negotiate a plea to something less than first degree murder. The prejudice to Taylor could not be greater as he has been sentenced to death.

7. Trial counsels' decision to pursue a mental illness defense was unreasonable and prejudiced Mr. Taylor's right to a fair trial because it foreclosed all other reasonable investigation and did not support his chosen trial strategy.

We have no quarrel with trial counsels' decision to have Taylor undergo a psychological/psychiatric evaluation. The Duty to Investigate outlined in the *ABA Guidelines* Section 10.7 suggests no less.[218] In a capital case, trial counsel cannot wait to investigate mitigating circumstances until the outcome of the guilt/innocence phase. Here, however, as trial counsel acknowledged at the evidentiary hearing, for most of the two years between indictment and trial, counsel was focused *only* on a mental illness defense which, counsel conceded, Taylor did not want.[219] Trial counsels' chosen defense, mental illness based on

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[218] "In capital cases, the mental vulnerabilities of a large portion of the client population compound the possibilities of error … and underscores the importance of defense counsel's duty to take seriously the possibility of the client's innocence, to scrutinize carefully the quality of the State's case, and to investigate and re-investigate all possible defenses. *ABA Guidelines,* The Duty to Investigate, Section 10.7, *pgs.* 1017-1018.

[219] A-435, HT, Vol. C, 54-55.

dissociative identity disorder, was untenable from the outset and their failure to recognize that fatal defect was professionally unreasonable.

Trial counsel initially concluded that it was necessary to pursue a 'defense' based on mental illness for two reasons: 1) Taylor's statement in an early interview with trial counsel at which he wanted to know what was going on with him (but denied intentionally killing Mumford and insisted that he would not plead guilty to doing so);[220] and 2) their belief that the evidence against their client was overwhelming.[221] The initial diagnosis they received from Zingaro of dissociative identity disorder told trial counsel early on they had a tough row to hoe.[222] Nearly a year later, they did not have a diagnosis of dissociative identity disorder from a qualified expert,[223] and Taylor had resoundingly rejected a plea of guilty but mentally ill to first degree murder.[224] Instead of questioning the wisdom of continuing to pursue a diagnosis of an exotic disorder (which Zingaro was not qualified to give)[225] trial counsel sought an expert who could testify during the

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220 A-110, Dkt. No. 99, Ex Parte Hearing, April 23, 2009, tr. pg. 12.

221 A-436, HT Vol. C-55.

222 A-063, Dkt. No. 9, December 7, 2007 pretrial office conference, tr. pg. 11.

223 A-070, Dkt. No. 64, December 4, 2008 office conference, tr. pg. 10.

224 A-065, Dkt. No. 52, August 18, 2008 office conference, tr. pg. 3.

225 Callaway told the Court at the December 4, 2008 office conference that Zingaro told him he needed a psychiatrist as an expert and that he, Johnson and their psycho-forensic staff agreed. He made the comment at an office conference attended by the prosecutors. (A-071, Dkt. No. 64, office conference, tr. pgs. 11-12, Dec. 4, 2008). His representation is borne out by the inability of a psychiatrist to diagnose dissociative identity disorder without substantial medical testing. (A-159, Dkt. No. 114, Ex Parte Hearing, May 19, 2009, tr. pg. 30).

guilt phase that Taylor was guilty but mentally ill.[226] Taylor did not agree to the strategy. Trial counsel had no justifiable basis, consistent with Taylor's interest, to pursue a guilty but mentally ill verdict or to produce evidence at the guilt/innocence phase that Taylor was suffering from dissociative identity disorder. They conceded at the evidentiary hearing that dissociative identity disorder, even if proven, would not relieve Taylor of criminal liability. They planned, however, to argue to the jury that it should not hold Taylor, the man sitting in the courtroom, responsible for the acts of one of his other persona.[227] Trial counsels' strategy was based on a plan to ask the jury to ignore the law on the determinative issue, intent. Jury nullification cannot be a reasonable trial strategy because it asks jurors to violate their sworn oath and prevents it from fulfilling its constitutional role.[228] Trial counsel pursued mental illness evidence in pursuit of their own objective and at the expense of investigating the medical evidence and the frying pan despite Taylor's insistence that he wanted an investigation into the facts of the case. [229] As previously noted, *ABA Guideline* 10.7 establishes the expectation that reasonably effective assistance of counsel contemplates a thorough investigation into the facts of the case, not just possible defenses. Trial counsels' preoccupation with the

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226 *Id.*

227 A-466, HT Vol. D, 33-34.

228 *See United States v. Adderly,* 2010 U.S. Dist. Lexis 27371 (E. Dist. PA, March 19, 2010).

229 A-105, Dkt. No. 92, Ex Parte Hearing April 16, 2009, tr. pg. 28-31.

mental illness aspect of this case blinded them to the need to conduct a basic investigation into fundamental matters such as the cause of death.

Most troubling were the representations made to the Court that trial counsel did not believe Taylor was telling the truth and expressed concern for their ethical obligation to not present perjured testimony.[230] The statements counsel made went far beyond what was necessary to identify a conflict and permit the Court to "determine whether there is indeed a conflict between attorney and client" as envisioned by *Cooke v. State.*[231] Counsels' conduct created just the sort of risks the U. S. Supreme Court cautioned against in *Holloway v. Arkansas,*[232] There, as in *Cooke,* the Court discussed a trial court's obligation to inquire into the nature of an alleged conflict due to dual representation, cautioning that compelled disclosure of the nature of a conflict which reveals confidential communications creates "significant risks of unfair prejudice, especially when the disclosure is to a judge who may later be called on to impose sentence …"

Here, trial counsel was not compelled to disclose client confidences, they volunteered them.[233] Moreover, trial counsels' assertions regarding their perceived ethical obligations were grounded on their personal uninformed view of the evidence, (as they had undertaken no independent investigation to determine

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230 A-114, Dkt. No. 99, Ex Parte Hearing, April 23, 2009, tr. pgs. 16-25.

231 977 A.2d 803 at 842 (Del 2009).

232 435 U.S. 475, 487, *n.* 11 (1978).

233 *Compare Riley v. State,* 867 A.2d 902 (Del. Supr. 2004).

whether there was support for Taylor's account), at best, and were self-serving at worst.[234] Where trial counsel disparages their client's credibility and discloses confidential communications to the trial judge in order to be relieved from their responsibility to represent the client, their conduct falls so far below reasonable professional norms as to amount to a complete denial of the right to counsel and prejudice is presumed.[235]

Even if, *arguendo*, prejudice is not presumed, the prejudice Taylor suffered as a result of the two year struggle over mental illness evidence is patently clear. Trial counsel disparaged Taylor's account of the facts and disclosed to the Court a devastating, albeit tentative, diagnosis from Dr. Fink[236] characterizing Taylor as a "violent man."[237] This disclosure is particularly shattering in light of the mitigating circumstances which the Court was called upon to consider in sentencing, including Zingaro's diagnosis of dissociative identity disorder. In the Court's "Findings After Penalty Hearing,"[238] the Court acknowledged the importance of

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234 A-439, HT, Vol. C, 84-88. At the evidentiary hearing, Johnson suggested that counsel was justified in revealing client confidences and disparaging Taylor's credibility because they wanted to get out of representing him.

235 *State v. Sahin*, 7 A3d 450, 452 (Del. Supr. 2010) citing *United States v. Cronic*, 466 U.S. 648, 659 (1984).

236 Dr. Fink, a psychiatrist, was retained by trial counsel after Taylor rejected a guilty but mentally ill plea to first degree murder in an effort to substantiate Zingaro's diagnosis of dissociative identity disorder. (A086, Dkt. No. 93, in camera hearing, April 9, 2009, tr. pgs. 19-20) but was unable to do so.

237 A-074, Dkt. No. 93, In Camera hearing, April 9, 2009, tr. pgs. 7-14.

238 A-021, Dkt. No. 213, March 12, 2010, Findings pg. 14: "Dissociative Identity Disorder is an important mitigating factor because, given its nature, it would help to explain Taylor's actions and, to a certain degree, mitigate his actions more than Taylor's other psychological problems."

Dissociative Identity Disorder as a mitigating factor. The State offered Mechanick's opinion to challenge Zingaro's diagnosis. He characterized Taylor as "simply a violent man with a short fuse."[239] The Court accepted Mechanick's testimony over that of Zingaro.[240] It is impossible to believe, in hearing this testimony, the Court was not mindful of trial counsel's revelation to the Court that its own potential expert, Dr. Fink, came to precisely the same conclusion. Unfair prejudice to Taylor's constitutional rights under both the U. S. and Delaware Constitutions in both the guilt/innocence and penalty phases of the trial clearly occurred due to the professionally unreasonable manner in which trial counsel handled the psychological/psychiatric evidence.

The Superior Court's decision on this issue re-stated certain facts[241] and concluded that Taylor's statement upon his arrest to Porter "…buried his trial strategy." What this ignores is the tremendous fight between client and counsel, including repeated *ex parte* hearings with the Court in which Taylor's positions were disparage by counsel. Had counsel fully investigate the cause of death, Taylor's statement to Porter and at trial would have been harmonized not contradicted, and both the Court and the jury would have seen the true medical facts. Those facts corroborated Taylor's continuing assertion that he did nothing

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239 *Id.*, pg. 17.

240 *Id.*

241 *Taylor v. State*, 2015 Del. Super. LEXIS 993, *1-7-112 (Del. Super., Nov. 23, 2015).

that should have caused Mumford to die, he did not want her dead or intend to kill her, that after she fell there was nothing wrong and he did not know why she died. He admitted he was angry and could only explain what he saw when he found Mumford dead that, without knowing how, he was to blame and he was terrified. The prejudice is potent.

8. Failure to object to prosecutorial misconduct.

In its closing argument, the State stated that Luther "Pete" Mitchell testified that he missed a telephone call from Mumford around 10:00 p.m. on the evening of the altercation.[242] The State used this argument to bolster Jung's testimony that she heard sounds of an altercation from the Taylor/Mumford residence at between 10:00 and 10:30 p.m., heard only Taylor, and that the "vicious attack was completed around 11:00 p.m."[243] Those arguments supported the State's position that Mumford was deceased when the cucumber pictures were taken. In fact, Mitchell testified that he missed a call from Mumford at 1:50 a.m. on August 14[244] hours after the State contended Mumford was dead. Trial counsel did not object to the State's mischaracterization of Mitchell's testimony or correct it in its own closing argument.

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242 A-271, TT, Vol. Q, 44.

243 *Id*., pg. 51.

244 A-199, TT, Vol. J, 174.

This Court has repeatedly admonished prosecutors for misrepresenting trial testimony in closing arguments.[245] Although *Hunter* involved multiple misrepresentations and other objectionable argument, the blatant misstatement of evidence used here to support a wholly inferred time frame similarly compromised the integrity of the judicial process. Defense counsel should have objected to the argument.

In its rebuttal argument, the State challenged Taylor's testimony regarding the fall down the stairs and suggested that the defense had the burden to provide scientific evidence to explain the hole in the dry wall and how Mumford returned to the second floor of the townhouse after the hole was made. It argued that if scientific evidence existed, the Defense would have produced it.[246] The argument was an improper suggestion that the defense had the burden of proof in explaining those circumstances. Trial counsel did not object to the argument or ask for a cautionary instruction. The burden of proof rests with the State to prove every element of the offenses charged beyond a reasonable doubt[247] and must never be shifted to the defendant. Here, by suggesting that the defense had an obligation to produce scientific evidence to support Taylor's account of what happened in the time before Mumford's death, the State impermissibly impugned the presumption

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245 *Hunter v. State*, 815 A.2d 730, 732 (Del. 2002).

246 A-277, TT, Vol. Q, 108- 109.

247 *Crosby v. Delaware*, 346 F. Supp. 213 (D. Del. 1972), 11 Del C. § 301.

of innocence afforded all defendants by both the U.S. and Delaware Constitutions. It was incumbent upon trial counsel to object to the State's impermissible argument.

The Superior Court, in rejecting this argument, analyzed other evidence which purportedly supported the prosecution's theory that Mumford was dead by 11:00 p.m. (misstating the conflicting testimony of Jung), and concluded that the prosecutor simply misspoke. The purported "misspeak" was a plainly wrong statement of a fact essential to the entire case – when Mumford died. While the Court gave its normal instruction that counsel's arguments are not evidence, this bell should have been "un-rung," and the failure to object was unreasonable. The issue concerning "scientific fact" is also telling and objectionable. While the use of the phrase originated with Taylor, the prosecutor's use of it put the burden on him. The Superior Court rejected this argument again by referring to other evidence which supported the State's case. The point here is not the weight of the evidence, but its quality – and that what the prosecutor said was improper. Combined with trial counsels' errors in failing to locate Jung's husband and effectively cross-examine her as well as to obtain the very same scientific evidence to which the State referred compels this Court to reverse the Superior Court.

9. Failure to object to the jury having access to a crime scene video with un-redacted pejorative commentary from the Delaware State Police speculating on material facts.

State's Exhibit 12, the crime scene video, was entered into evidence with commentary from unidentified individuals speculating that Mumford was "thrown here and all the way down to there, definitely impacted hard." Nether the State or trial counsel dispute what is audible. Trial counsel concedes that had they heard the commentary they would have objected to it.[248] The Superior Court agreed it should not have been admitted.[249] The video was produced to trial counsel pre-trial, and neither explained why no objection was raised.[250] At trial, the State asked that the volume on the tape be turned down so that background noise would not be audible[251] so the State knew that the video had captured speculation and commentary but had the video admitted as a State Exhibit. The comments in issue, made by investigating officers, speculated that Mumford was thrown down the stairs by Taylor. That speculation was echoed by Tobin during her trial testimony. In closing argument, the State echoed the speculation from the crime scene investigators and Tobin when it argued that the fatal injury was the result of multiple injuries which could have been caused not only by the frying pan but

248 A-468, HT Vol. D, 37.
249 *Taylor v. State*, 2015 Del. Super. LEXIS, 993, at *161 (Del. Super. Nov. 23, 2015).
250 A-444, HT, Vol. C. 97-98.
251 A-210, TT, Vol. K, 87-89.

maybe drywall "if someone threw her into it."[252] Trial counsel also did not object to the State's argument.

Admitting State's Exhibit 12 into evidence and leaving it with the jury constituted admission of inadmissible testimonial statements made against Taylor in a manner which violated his Sixth Amendment right to confront witnesses against him because the speakers were unidentified and necessarily not subject to cross-examination.[253] Moreover, the comments in issue, particularly in light of Tobin's admittedly speculative and unchallenged comments and the State's closing argument invited the jury to speculate that Taylor threw Mumford down the stairs. Such speculation creates prejudice to Taylor's right to a fair trial. The Superior Court found no prejudice to Taylor, because the evidence speculating that Mumford was thrown or pushed down the stairs was consistent with the State's theory of the case; it was neither consistent with the State's allegations nor supported by any evidence.

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252 A-276, TT, Vol. Q, 104.

253 *See, Sanabria v. State,* 974 A.2d 107, 120 (Del. Super. 2009): "(T)o permit (an investigating officer) to narrate the course of his investigation and 'spread before the jury damning information that is not subject to cross-examination' abrogates both the rule against hearsay and (the defendant's) Sixth Amendment right under the Confrontation Clause."

II. TAYLOR WAS DENIED THE RIGHTS SECURED BY THE SIXTH, FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND BY ARTICLE I, SECTIONS 7 AND 11 OF THE DELAWARE CONSTITUTION OF 1897 DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

A. Question presented

Whether trial counsel provided ineffective assistance of counsel by failing to: 1) object to the State's use of a psychiatric evaluation in violation of Superior Court Criminal Rule 12.29(e) and in violation of Taylor's Fifth and Eighth Amendment rights; 2) failing to object to certain aspects of Earline Harris' testimony; and 3) failing to ask for an instruction on the nature of an *Alford* plea as a conviction. (A-502-505, MPCR, 9/10/2012; A-530-534, Reply to State's Response, 12/12/2013).

B. Scope of review

See supra, Section I(B).

C. Merits of Argument

In order to substantiate his claims Taylor must demonstrate that: 1) trial counsels' professional performance was so deficient that they were not "functioning as the 'counsel' guaranteed … by the Sixth Amendment;" and 2) "the deficient performance prejudiced the defense."[254] The professional errors

[254] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

committed by trial counsel in the penalty phase resulted in violation of Taylor's Fifth Amendment right against self-incrimination, his right to due process and to be free from cruel and unusual punishment afforded by both the United States and Delaware Constitutions.

1. Trial counsel failed to object to the State's use of a psychiatric evaluation in violation of Superior Court Criminal Rule 12.2(e) and in violation of Taylor's Fifth and Eighth Amendment rights.

Trial counsel initially decided to use a mental illness defense at trial based on Zingaro's evaluation. By virtue of Superior Court Criminal Rule 12.2(c), Taylor was obligated to undergo a psychiatric exam at the State's request. He did so and was questioned about the facts surrounding the events which caused him to be indicted. He made incriminating statements to Mechanick.[255] Taylor was not advised of his Fifth Amendment rights prior to the evaluation and could not have refused to be evaluated if he intended to pursue a mental illness defense as to the issue of guilt.[256] He subsequently withdrew his intention to rely on expert testimony regarding his mental condition at the guilt/innocence phase of the trial.[257]

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255 A-337, TT Vol. U, 27.

256 Superior Court Criminal Rule 12.2(d).

257 A-269, TT, Vol. N, 197.

Trial counsel notified the State that it intended to use Zingaro's testimony regarding his diagnosis of dissociative disorder as a mitigating factor militating against imposition of the death penalty; he testified at the penalty phase.[258] Taylor did not testify at the penalty hearing. The State called Stephen Mechanick to 'rebut' Zingaro's testimony, using information he acquired from Taylor during the compulsory evaluation and submitted his two reports into evidence as State's Exhibits 12 and 13 without objection.[259] Once trial counsel chose to forego its planned mental illness defense at trial, Mechanick's evaluation became irrelevant.[260] Any waiver of his Fifth Amendment right was vitiated. Use of Mechanick's evaluation during his testimony at the penalty phase violated Taylor's Fifth Amendment right against self-incrimination.

The Superior Court erred in ruling that Taylor knew what he told Mechanic would not be confidential.[261] The issue was not confidentiality but the right to remain silent. The Superior Court erred as a matter of law because it used the wrong standard in denying this claim.

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258 A-318, TT, Vol. T, 89-189.

259 A-322, TT, Vol. U, 4-12.

260 See *Estelle v. Smith*, 451 U.S. 454, 462 (1981); *Norman v. State*, 976 A.2d 843, 861 (Del. Supr. 2009); Superior Court Criminal 12.2(e): *Inadmissibility of withdrawn intention.* Evidence of an intention as to which notice was given under subdivision (a) or (b) [intention to rely on mental illness upon the issue of *guilt*], later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

261 *Taylor v. State*, 2015 Del. Super. LEXIS 993, *149-151 (Del. Super., Nov. 23, 2015).

In addition to being irrelevant and in contravention of Taylor's constitutional right against self-incrimination, use of Mechanick's testimony to rebut his claim of mental illness as a mitigating factor violated his right secured by the Eighth Amendment of the United States Constitution to present independent mitigation circumstances,[262] and the provisions of 11 Del. C. 4209(c) which do not contemplate the consideration of rebuttal evidence contesting a defendant's mitigating circumstances. Title 11 Del. C. § 4209(c)(1) mandates that notice of aggravating and mitigating circumstances be given in writing "prior to the punishment hearing and after the verdict of guilt." Rebuttal evidence necessarily will not be on such a list. Section 4209(c)(2) provides that each party shall be permitted argument on the punishment to be imposed. The "argument shall consist of opening statements by each, unless waived, opening summation by the State, rebuttal summation by the defendant . . . and closing summation by the State." This statutory structure does not contemplate rebuttal evidence against mitigating circumstances.[263] Trial counsel failed to provide Taylor reasonably effective assistance of counsel by failing to object to the State's use of Mechanick's testimony at the penalty phase of the trial.

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262 *See Norman v. State*, 976 A2d at 872.

263 Compare the provisions of 11 Del. C. §4209(d)(3)(b) which permits the State to present its own evidence as well as rebuttal evidence of serious mental retardation.

The Superior Court provided no justification for concluding that 11 Del. C. § 4209(c) permits the State to use rebuttal evidence to undercut a defendant's mitigation case other than to say that the statute "does not state that only the defendant can offer evidence on mitigating circumstances."[264] The point here is that Taylor had no choice but to be evaluated by Mechanic because of trial counsels' plan to use a mental illness defense as to guilt. The State did not use Mechanic to support mitigation in any way and did not use the evaluation for the limited purpose for which it was obtained.[265] Because use of Mechanick's testimony and introduction of his reports into evidence violated Taylor's constitutionally guaranteed rights under the Fifth and Eight Amendments of the U.S. Constitution and the corollary rights under Article I, Sections 7 and 11 of the Delaware Constitution, the death penalty imposed here may not be allowed to stand. Moreover, because Taylor was subjected to the examination performed by Mechanick due to trial counsels' misguided plan to use a mental illness "defense" over Taylor's objection, counsels' unreasonable professional conduct prejudiced Taylor's right to a fair penalty hearing.

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[264] *Taylor v. State*, 2015 Del. Super. LEXIS 993 *148 (Del. Super., Nov. 23, 2015).

[265] *See Hittson v. Humphrey,* 2012 U.S. Dist. LEXIS 161727, *88-136 (M.D. Ga., Nov. 13, 2012); *rev'd on other grounds*, *Hittson v. GDCP Warden*, 759 F.3d 1210 (U.S. Ct. of Appeals, 11th Cir. 2014).

2. Trial counsel was ineffective for failing to object to certain aspects of Earline Harris's testimony.

At the penalty phase, Earline Harris testified about three specific instances during which, she contended, Taylor subjected her to beatings, one of which led to Taylor being charged in the State of Mississippi with aggravated assault.[266] He entered an "*Alford*" plea to the charge in October, 2006 after spending 26 months in prison awaiting trial on the charge. The Plea was used as the sole statutory aggravating circumstance to justify imposition of the death penalty.[267] A certified record of the plea was entered into evidence as State's Exhibit 6.[268]

In connection with one of the instances in which Harris claimed Taylor beat her, she also alleged he anally raped her after beating her.[269] Although she lodged a complaint with the police after the incident, she did not report her allegation of rape.[270] Trial counsel did not object to her testimony regarding the alleged rape or with respect to the beatings she claimed in addition to the incident which gave rise to Taylor's "*Alford*" plea. While uncharged allegations of criminal conduct are admissible in a penalty hearing, it is incumbent on defense counsel to object to such allegations to give the Court an opportunity to determine whether the allegations are admissible just as it would in light of an objection to any evidence

266 A-283, TT, Vol. S, 44-77.
267 11 Del. C. § 4209(e)(1)(i)(the "prior felony" aggravator).
268 A-312, TT, Vol. S, 73.
269 A-290,TT, Vol. S, 51.
270 A-291, TT Vol. S, 52.

proffered at trial. In *State v. Cohen*,[271] the Court construed 11 Del. C. § 4209(c)'s reference to "the presentation of evidence 'as to any matter that the Court deems relevant and admissible to the penalty to be imposed'" to mean that it is incumbent on the State to demonstrate the same threshold of reliability regarding unadjudicated criminal activity as with any other evidence regardless of the inherent relevance of bad acts in a death penalty hearing: "[T]he admissibility of conduct which would be criminal in nature would also be governed by the rules of evidence and/or constitutional requirements, if any."[272] Trial counsel failed to protect Taylor's right to due process by failing to object to any of Harris' testimony.

The Superior Court's response to this argument is that eye witness testimony constitutes clear and convincing evidence sufficient for admission evidence of uncharged crimes. Earline Harris was not an eyewitness within the meaning of cases such as *Johnson v. State*,[273] where the witness in question testified at a death penalty hearing about the defendant's actions with respect to an alleged shooting. The Superior Court used the wrong standard in evaluating this claim; it offers no support for the proposition that a victim's allegation of unreported, uncharged criminal acts constitutes clear and convincing evidence. Because trial counsel

271 634 A. 2d 380 (Del. 1992).
272 *Id.*, at 385.
273 983 A.2d 904, 931-934 (Del. 2009).

failed to demand a determination prior to Harris' testimony that what she intended to say would meet the clear and convincing standard required under D.R.E. 404(b) they were ineffective; the prejudice to Taylor is that he was sentenced to death.

3. Failure to ask for an instruction on the nature of an "*Alford*" plea to the sole statutory aggravator.

The State gave notice that it intended to introduce evidence of Taylor's 2006 "*Alford*" plea to a charge of aggravated assault in Mississippi. Trial counsel filed a Motion in Limine[274] challenging its use as the sole statutory aggravating circumstances by arguing that a plea under *Alford v. North Carolina*,[275] is not a conviction for purposes of the statute because it allows a defendant to maintain his innocence to the charge. The trial court denied the Motion.[276]

Nevertheless, it was incumbent on trial counsel to either introduce evidence of the nature of an "*Alford*" plea as a plea under which a defendant continues to maintain his innocence as a matter of record or, at a minimum, ask for an instruction to inform the jury that Taylor was not 'convicted after a jury trial,' because the State must prove its alleged statutory aggravator beyond a reasonable doubt.[277] In *Norman*, the defendant allegedly shot and killed two individuals, one in Delaware and one in Maryland, during a shooting spree which traversed both

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274 A-018, Dkt. No. 178, Motion dated October 20, 2009.
275 400 U. S. 25 (1970).
276 A-279, TT, Vol. S, 6.
277 *See, Norman v.* State, 976 A2d. at 871.

states. Norman was not prosecuted by the State of Maryland for the death that occurred there because he was suffering from a mental disease or defect, relieving him of criminal responsibility under Maryland law, a defense not available to him under Delaware law.[278] Norman argued that the State should not be permitted to use an unadjudicated charge in another State to act as a statutory aggravating circumstance. While holding that the State could use the unadjudicated Maryland charge as one of two killings required, the fact that Norman lacked criminal responsibility under Maryland law was considered to be a mitigating factor which must be considered by the sentencing judge and jury.[279] Here, Taylor was entitled to have the jury know that the Mississippi "conviction" which formed the basis of the sole *statutory* aggravating circumstance was not a conviction after a jury trial, but a plea in which he maintained his innocence to the charge. Had the jury been informed as to the nature of an "*Alford*" plea, there is a good probability that it would not have found the existence of a statutory aggravator beyond a reasonable doubt. Indeed, the manner in which the State presented Harris' testimony blurred the important distinctions between the statutory and non-statutory aggravating circumstances. Counsels' failure to present any evidence as to the nature of the plea or to ask for an instruction distinguishing between a conviction after trial by jury and an "*Alford*" plea, jeopardized Taylor's right to be free from cruel and

278 *Id.* at 852.

279 *Id.* at 869-870.

unusual punishment under the Eighth Amendment to the U.S. Constitution and Article I, Section 11 of the Delaware Constitution.[280]

The Superior Court denied this claim with no rationale, only that its denial of the Motion in Limine ended the issue. Its ruling in response to the initial Motion in Limine was based on an error of law and was wrong.[281] Although the legislature specified in 11 Del. C. § 4209(c)(1) that convictions and pleas of guilty or of nolo contendere are admissible in a penalty hearing, § 4209(e)(1)(i) does not include pleas of any sort as "convictions." While pleas to criminal conduct may be admitted as non-statutory aggravators, if a plea is to constitute a conviction as a necessary predicate for imposition of the death penalty, the legislature must say so. It has not.

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[280] *See Norman v. State*, 976 A.2d at 872: "Where the sentencer in a capital case is prevented from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation, there is a 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eight and Fourteenth Amendments."

[281] *See* Section III(B), *infra.*

III. APPELLATE COUNSEL FAILED TO PROVIDE TAYLOR WITH EFFECTIVE ASSISTANCE OF COUNSEL IN HIS DIRECT APPEAL BY FAILING TO PRESENT CLAIMS WHICH HAD A BETTER LIKELIHOOD OF SUCCESS THAN THOSE THEY RAISED AND WHICH WERE GROUNDED ON HIS RIGHTS TO DUE PROCESS, A FUNDAMENTALLY FAIR TRIAL, A RIGHT TO HAVE ALL THE ELEMENTS OF A CAPITAL CRIME FOUND BY A JURY, AND PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT.

A. Question presented

Did appellate counsel provide Taylor ineffective assistance of counsel by failing to present constitutional claims including: 1) an appeal of the trial court's denial of trial counsels' challenge to the constitutionality of the Delaware death penalty statute; 2) an appeal of the trial court's ruling that an *Alford* plea constitutes a conviction under 11 Del. C. §4209(e)(l)(i); 3) a challenge to the State's Brady violation, admission of the evidence bag and crime scene video, and prosecutorial misconduct on the basis of plain error; and 4) a challenge to the State's use of psychiatric evidence in violation of Taylor's Fifth and Sixth Amendment rights and the admission of uncharged misconduct in the penalty phase? (A-505-507, MPCR, 9/10/2012; A-535-539, Reply to State's Response, 12/12/2013; A-548-561, Second Amendment to MPCR, 6/16/2015; A-565-576 Reply to State's Response, 7/31/2015).

B. Scope of review

In reviewing appellate counsels' effectiveness, the Court must consider the merits of the arguments to determine whether those issues had a greater likelihood of success than those raised by appellate counsel[282]

C. Merits of Argument

Appellate counsel raised four grounds in Taylor's direct appeal.[283] The convictions and sentences were affirmed.[284] Taylor argued before the Superior Court that the grounds he asserted for post-conviction relief had a better likelihood of success on direct appeal than those raised by appellate counsel. The Superior Court summarily dismissed the claims against appellate counsel by concluding that his resolution of all the claims against trial counsel permitted him to conclude that appellate counsel was not ineffective.[285] For all of the reasons trial counsel was ineffective and prejudice resulted, appellate counsel was ineffective for failing to challenge issues affecting Taylor's constitutional rights which were far more compelling than those raised including the unconstitutionality of Delaware's death

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282 *Ploof v. State*, 75 A.3d 811, 832 (Del. 2012).

283 *Taylor v. State*, 977 A.3d 399 (Del. 2011): 1) The trial court denied Taylor effective assistance of counsel by preventing them from pursuing a guilty but mentally ill verdict over Taylor's objection; 2) If the trial court properly prevented trial counsel from pursuing a guilty but mentally ill under *Cook v. State* it should be overruled; 3) trial counsel's motion for judgment of acquittal on the abuse charge should have been granted; and 4) the trial court arbitrarily and capriciously imposed a death sentence effectively preventing a reasonable proportionality review.

284 *Id.*

285 *Taylor v. State*, 2015 Del. Super. LEXIS 993, *159-160 (Del. Super., Nov. 23, 2015).

penalty statute, the error of law committed the trial court by its determination that an *Alford* plea constitutes a conviction for purposes of the prior violent felony aggravator and other grounds set out above.

1. Appellate counsel failed to challenge the trial court's denial of trial counsels' Motion in Limine to have Delaware's death penalty statute ruled unconstitutional.

Trial counsel filed a motion to have the Delaware death penalty statute held unconstitutional;[286] the motion was denied based on the Delaware Supreme Court's long standing decisions construing Delaware's statute[287] in light of *Ring v. Arizona.*[288] Appellate counsel did not challenge the denial on appeal, although it did challenge Taylor's death sentence on the grounds of proportionality.

The basis for trial counsels' motion are found in *Apprendi v. New Jersey*[289], and *Ring*. In *Ring*, the United States Supreme Court found that facts which constitute aggravating circumstances sufficient to justify a penalty higher than that authorized by the jury's verdict on the underlying crime are the "functional equivalent of an element of a greater offense…" and accordingly must be found to exist by a unanimous jury beyond a reasonable doubt in order to comply with Sixth

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286 A-003, Docket Entry No. 21, Motion dated March 25, 2008.

287 *Starling v. State*, 882, 747, 757 (Del. 2005), *Ortiz v. State*, 869 A.2d 285, 306 (Del. 2005) and *Brice v. State*, 815 A.2d 314, 321-322 (Del. 2003).

288 536 U.S. 584 (2002).

289 530 U.S. 466 (2000).

Amendment protections.[290] This Court has consistently ruled that it is the jury's unanimous finding of a statutory aggravator beyond a reasonable doubt which constitutes the finding of the element necessary to make murder a capital crime. The sentencing judge's role is to ensure that the imposition of a death sentence is proportional.[291] The underpinnings for this Court's jurisprudence on the distinction between the jury's role in determining eligibility for a death sentence as opposed to the predicate fact finding necessary for its imposition has eroded. Recently, the United States Supreme Court struck down Florida's death penalty statute because it permitted a judge, rather than a jury, "make the critical findings *necessary* to impose the death penalty."[292]

Under 11 Del. C. §4309 (d)(1), it is the trial court's function of weighing aggravating facts versus mitigating facts upon which a death sentence is contingent. Absent a finding that the facts in aggravation outweigh those in mitigation the death penalty cannot be imposed. Accordingly, the sentencing judge's act of weighing aggravation against mitigation exposes the defendant to a greater punishment than the jury verdict or its determination that the defendant is death eligible and must therefore be performed by the jury compelled to make a unanimous decision beyond a reasonable doubt. As *Hurst* instructs, it is not the

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290 536 U. S. at 609, citing *Apprendi*, *id.* at 494, n. 19.

291 *Ortiz v. State*, 869 A. 2d 285, 305 (Del. 2005).

292 *Hurst v. Florida*, 2016 U.S. LEXIS 619, at*11 (United States Supr. Ct., Jan. 12, 2016)(emphasis added).

jury's finding of a statutory aggravator that makes a defendant eligible for the death penalty, it is the "findings *by the court*" that are the necessary predicate for imposition of a death sentence.[293] Appellate counsel failed to challenge the trial court's determination that the Delaware death penalty statute is unconstitutional and accordingly deprived Taylor of his right to effective assistance of counsel. The Superior Court concluded that if the rationale for upholding Delaware's death penalty statute is no longer sound, as Taylor argued, it is for this Court to determine.[294] We implore it to do so and vacate Taylor's death sentence.

2. Appellate counsel failed to challenge the trial court's ruling holding that an *Alford* plea constitutes a conviction for purposes of the prior violent conviction statutory aggravator.

In 2006, Taylor entered an *Alford* plea to a charge of aggravated assault in Mississippi.[295] The State used this 'prior felony'[296] as the only statutory aggravator to support its intention to seek the death penalty. Trial counsel filed a Motion in Limine seeking to preclude use of the plea as insufficient to meet the requirements of 11 Del C. §4209(e)(1)(i) arguing that such a plea does not constitute a

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293 *Id*, at *12. *See also, Woodward v. Alabama*, 134 S. Ct. 405, 410-411 (2013), Sotomajor, dissenting from majority's decision not to grant cert.:"The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is therefore necessary to impose the death penalty…and must be made by a jury."

294 *Taylor v. State*, 2015 Del. Super. LEXIS 993, at*156 (Del. Super. Nov. 23, 2015).

295 State's Exhibit 7, A -312,TT Vol. S, 73.

296 11 Del C. § 4209(e)(1)(i).

conviction.[297] The Motion was denied.[298] The Court's decision to deny the Motion should have been challenged on appeal as it affected Taylor's fundamental rights under the Sixth Amendment to have a jury find every element of an alleged capital crime beyond a reasonable doubt because the Superior Court's decision foreclosed any meaningful way in which the jury could determine the "fact" of the conviction necessary to make Taylor's first degree murder conviction a capital crime.

An "*Alford*" plea does not constitute a conviction under 11 Del. C. §4209(e)(1)(i). Although the legislature saw fit to specify in §4209(c)(1) that "criminal convictions, and pleas of guilty or pleas of nolo contendere" shall be admissible, it did not refer to pleas of any sort in §4209(e)(1)(i). Had the legislature intended that a disposition of a criminal case in a manner other than by conviction by a judge or jury constitute a statutory aggravator it clearly would have said so.[299] The Court's ruling for purposes of direct appeal was a conclusion of law; it should have been challenged to permit this Court to decide the issue *de novo*. Because Taylor's rights under the Eighth Amendment to the U. S. Constitution and Article I, Section 11 of the Delaware Constitution were

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297 A-018, Dkt. No. 178.

298 A-280, TT, Vol. S, 9.

299 *See, Norman v. State, supra,* at 864. There, the Court analyzed other state statutory aggravators and stated: "Other states have *even* allowed a guilty plea from another state proceeding (as opposed to a jury conviction) to be admitted in the sentencing phase of a criminal trial."(emphasis added). The *Norman* court's language strongly supports the conclusion that under Delaware law, a conviction under the "prior felony" statute means conviction, not a plea.

substantially prejudiced by allowing the State to use the "prior felony" conviction as its sole statutory aggravating circumstance, his death sentence may not stand.

There is a second reason why appellate counsel was ineffective because they failed to challenge the trial court's ruling that an *Alford* plea constitutes a conviction for purposes of the prior felony statutory aggravator. Because the trial court's decision precluded trial counsel from requesting an instruction on the nature of an *Alford* plea, as the Superior Court conceded,[300] it was the court, not the jury which determined whether an essential element of the statutory aggravator, a conviction, had been proved.

Since 2002, the Delaware death penalty statute has required that a jury unanimously find beyond a reasonable doubt at least one statutory aggravator in order for a defendant to be eligible for the death penalty. That requirement is necessary for compliance with the Sixth and Eighth Amendments. Here, the trial court, not the jury, determined that an *Alford* plea constituted the conviction. Appellate counsel failed to challenge the trial court's determination that an *Alford* plea was a conviction and accordingly failed to provide Taylor with effective assistance of counsel. The fact that he was sentenced to death is patent prejudice.

[300] *Taylor v. State*, 2015 Del. Super. LEXIS 993, at*155 (Del. Super., Nov. 23, 2015)

3. Failure to challenge on plain error grounds, the State's Brady violation, admission of the evidence bag and crime scene video and prosecutorial misconduct.

Trial counsel failed to object to the State's *Brady* violation, admission of the "fry pan with blood" evidence bag, the crime scene video and prosecutorial misconduct. Taylor has argued above how each of these things fundamentally affected the integrity of his trial. The facts underlying the claim on each are "material defects …apparent on the face of the record … which clearly deprived (Taylor) of a substantial right (and) clearly show manifest injustice." Appellate counsel could have raised each issue for this Court's review under the plain error standard.[301]

4. Failure to challenge the State's use of a psychiatric evaluation in violation of Taylor's Fifth and Sixth Amendment rights and to the admission of uncharged misconduct in the penalty phase.

During the penalty phase, trial counsel failed to protect Taylor's right to a fundamentally fair trial by unreasonably failing to object to the State's use of Mechanic's psychiatric evaluation when doing so infringed on Taylor's right against self-incrimination. Appellate counsel similarly failed Taylor by not raising the issue on appeal. Trial counsel failed to object to the admission of uncharged misconduct evidence in the penalty hearing as more fully set forth above.

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301 *Wainwright v. State*, 504 A.2d 1096, 1100 (1983).

Appellate counsel should have raised it on appeal for the same reasons and on the same authority as has been argued in II (4).

CONCLUSION

The Superior Court characterized Taylor's trial as remarkably fair and uneventful. At this trial, materially false and speculative evidence was admitted, major witnesses were not effectively cross examined, the cause and manner of death was not subjected to adversarial testing, client confidences were revealed, and the State misstated material evidence. Those things and other violations of rights deemed sacred under the federal and state constitutions are sufficient to undermine anyone's confidence in the outcome. This was not a fair trial. For these and the forgoing reasons, the Superior Court must be reversed and the matter remanded for a new trial.

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Dated: February 2, 2016

CERTIFICATE OF SERVICE

I, Craig A. Karsnitz, Esquire, hereby certify that on February 2, 2016, I caused to be served a true and correct copy of the foregoing document upon the following counsel of record in the manner indicated below:

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