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Case Number 692,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellant,	)	
	)	
v.	)	No. 692, 2015
	)	
DAMONE FLOWERS,	)	
	)	
Defendant-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S OPENING BRIEF

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DATE: March 7, 2016

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NATURE AND STAGE OF THE PROCEEDINGS

In April 2000, a Delaware grand jury indicted the appellee, Damone E. Flowers, for first degree murder, possession of a firearm during the commission of a felony, and possession of a firearm by a person prohibited, all in connection with an August 1, 1998 shooting. DI 4.[1] The person prohibited charge was severed, and, in October 2002, a Superior Court jury found Flowers guilty of first degree murder and the remaining weapon offense. DI 77. Flowers moved for a new trial, but that motion was denied by Superior Court in February 2003. *See* DI 86. On April 25, 2003, Flowers was sentenced to life in prison without the possibility of probation or parole for the murder and ten years in prison for the weapon offense. *See* DI 90. Flowers' convictions and sentence were affirmed on appeal.[2]

In May 2005, Flowers timely filed a *pro se* motion for postconviction relief under Superior Court Criminal Rule 61.[3] *See* DI 103. Superior Court denied the motion without prejudice on June 28, 2005, to allow Flowers to set forth his claims in summary form as required by the Rule. *See* DI 106. In September 2005, Flowers filed an amended motion for postconviction relief. *See* DI 108. The court denied the motion in December 2005. DI 110. This Court dismissed Flowers'

[1] "DI" refers to docket items on the Superior Court Criminal Docket in ID No. 9808000280A. A1-19.

[2] *Flowers v. State*, 858 A.2d 328 (Del. 2004).

[3] Flowers originally attempted to file his postconviction motion in April 2005, but it was rejected for lack of Flowers' original signature. *See* DI 102.

appeal as untimely on April 4, 2006.[4]

Flowers also sought relief in federal court, filing a federal habeas petition, dated May 24, 2006, in the Delaware District Court. On September 22, 2008, District Court denied the petition as untimely.[5]

On May 14, 2012, Flowers filed a second motion for postconviction relief. DI 119. On April 25, 2013, Flowers' counsel filed an amended and superseding motion for postconviction relief. DI 130. Flowers' trial counsel filed an affidavit in response to his claims of ineffective assistance of counsel (DI 139), the State responded to the claims in the motion (DI 145), and Flowers filed a reply to both (DI 147). The motion was referred to a Superior Court Commissioner, who, on April 23, 2015, issued a report recommending the court grant Flowers' motion for relief.[6] The State filed objections (DI 152), Flowers responded (DI 153), and the State replied (DI 155). After *de novo* review, Superior Court adopted in part and denied in part the Commissioner's Report and Recommendation, and granted Flowers relief.[7]

The State docketed a timely appeal from Superior Court's November 2015 Opinion, and this is the State's Opening Brief.

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[4] *Flowers v. State*, 2006 WL 889368 (Del. Apr. 4, 2006).

[5] *Flowers v. Phelps,* 2008 WL 4377704 (D. Del. Sept. 22, 2008).

[6] *State v. Flowers*, Del. Super., ID 980800280A, Manning, Cmm'r (April 23, 2015) (Rpt & Rec) (Ex. B).

[7] *State v. Flowers*, 2015 WL 7890623 (Del. Super. Ct. Nov. 20, 2015) (Ex. A).

SUMMARY OF THE ARGUMENT

I. Superior Court abused its discretion in granting Flowers postconviction relief. Because the motion was filed more than 10 years after his convictions became final, Flowers' claims were untimely. Flowers' claims were also all procedurally defaulted pursuant to Criminal Rule 61(i)(2) and (4). Superior Court misapplied the bars and the exception in Rule 61(i)(5). Further, Superior Court failed to properly address the claims Flowers raised. Superior Court created and granted relief on a Sixth Amendment Confrontation Clause violation Flowers had not raised as a freestanding claim. Even though Superior Court found *no fault* with trial counsel's strategic decision, the court nevertheless concluded that Flowers was entitled to relief on the ineffective assistance of trial counsel claim. Superior Court also granted relief on a claim of ineffective assistance of appellate counsel without conducting the required and appropriate analysis. Flowers' claims are untimely, procedurally defaulted and without merit. This Court should reverse the judgment below.

STATEMENT OF FACTS

On Friday evening, July 31, 1998, Alfred Smiley picked up James Howell and Howell's cousin, Lee Davis, and drove around Wilmington in Smiley's 1988 gray Honda Accord, stopping at Walt's Chicken (A22) in Wilmington and the Oasis Club on Vandever Ave. A25a. After leaving the Oasis Club, Smiley drove up West 22nd Street, a one-way street, near the intersection with Lamotte Street. A25b. A large crowd of people was gathered on the sidewalk, as well as in the street where Smiley was driving. A23, 26. The crowd had left the Oasis Club where there had been in a fight with another group of people earlier that evening. State's Ex. 24. Smiley had not been in the fight. State's Ex. 24.

Smiley saw someone in the crowd he knew and that person came to the car window and spoke to Smiley. A23. A woman reached through the car window and punched Smiley. State's Ex. 24. Smiley attempted to move down 22nd Street by blowing his car horn to disperse the crowd in the street. A23. The people in the street did not move and began yelling and telling Smiley to back up. A23. Howell, who was sitting in Smiley's front passenger seat, heard gunshots, and then noticed glass on his pants. A24. Howell saw people running and ducking, and then Smiley announced that he thought he had been shot. A24. Smiley gunned the engine and the Honda took off quickly before crashing into a telephone pole a

short distance down the street. A24. After the crash, Howell and Davis got out of Smiley's car and went to Howell's uncle's nearby house to call the police. A25.

The Wilmington police were notified about the shooting at 1:25 a.m. on August 1, 1998. A31a. When Wilmington Police Officer James Peiffer arrived at the scene, he noticed bullet holes in the Honda's windshield and Smiley slumped over on the driver's side. A32. Smiley was having difficulty breathing, and he was taken to Christiana Hospital where he was pronounced dead at 3:18 a.m. A33. An autopsy revealed that a bullet had entered Smiley's right upper armpit and then proceeded through his heart. A48.

Police recovered four casings on the north side of 22nd Street, which was the passenger side of Smiley's car. A34, 37. A bullet was recovered from inside the driver's side and one from Smiley's body. A35.

Detective Andrew Brock of the Wilmington Police Department interviewed numerous eyewitnesses to the 1998 fatal shooting. Based on those interviews, on August 2, 1998, police issued an arrest warrant for Damone Flowers. A66. According to Flowers' sister, Adrienne Dawson, Flowers lived with her prior to August 1, 1998, but he did not return home after that date. A63-64. In November 1999, the Wilmington Police Department located Flowers in Kingsville, North Carolina, and he was extradited back to Delaware in February 2000. A67.

Eyewitness testimony with prior statements admitted at trial

Vernon Mays lived around the corner from Vandever Avenue and was out walking late on the night of July 31, 1998. A26; State's Ex. 1. He stopped to talk to some people he knew. A26. He saw a group of people up the street, but that was not uncommon in the neighborhood. A27. At Flowers' October 2002 trial, Mays testified that there was more than one gun being fired (A31) and that he only caught a glance of the shooter, who was wearing shorts and a blue t-shirt. A27, 30.

In his August 2, 1998 interview with police, Mays identified Flowers from police mug shots as the person he saw fire the shots into Smiley's car. State's Ex. 1. In his videotaped statement that was played for the jury at trial, Mays maintained that he saw the shooter walking towards him on the sidewalk, had seen him around the neighborhood, and would recognize him if he saw him again. State's Ex. 1. Mays repeatedly told the police that the shooter was using his left hand (State's Ex. 1), but when he made the identification, he said, "now I know it was his right hand." State's Ex. 1.

In Mays' statement to police, provided soon after the fatal shooting, he described how the shooter was standing and holding a black 9mm gun. State's Ex. 1. Mays described the shooter as about 6'1", with a muscular, but not bulky build, wearing a blue t-shirt, baggy white shorts, and new model, black, gold and white sneakers. State's Ex. 1. Four years later at Flowers' trial, Mays testified that

Flowers looked like the person he selected as the shooter, but that he could not be positive that he was the actual shooter. A28.

Ronetta Sudler, another eyewitness to the 1998 shooting, claimed she could not remember the shooting or her 1998 interview with Detective Brock. A38-40. She remembered that the police came and got her husband Shawn McNeil, and then took her to the station. A39. She testified that she was with a lot of people that night on 22nd Street, and that she later heard that someone had been shot when she was at the Thunderguards Club. A40. After viewing her August 1998 videotaped statement (State's Ex. 24), Sudler continued to say that she knew nothing about the incident or about the area it took place or any of the people involved. A43-47.

In her lengthy August 11, 1998 statement to the police, Sudler first stated that she and Shawn McNeil left 22nd Street before 10:00 p.m. and were at her house at the time of the shooting, (State's Ex. 24), but later identified Flowers as the shooter. State's Ex. 24.

In the police interview, Sudler described a fight at the Oasis Club involving a group of people from 22nd Street that had occurred earlier in the day. State's Ex. 24. She told Detective Brock that everyone on 22nd Street that night was on edge because they were expecting someone to come in retaliation for that fight. State's Ex. 24. Sudler stated that the people were blocking cars as they came down the

street. State's Ex. 24. Smiley was in one of the cars and people on 22nd Street knew Smiley. State's Ex. 24. Sudler said that her friend "TT" reached into the car and punched Smiley on the arm, and then people on the street saw Smiley's reverse car lights come on and feared he was going to back up into them. State's Ex. 24. Sudler next saw Flowers walk into the street toward the passenger side of Smiley's car and start shooting. State's Ex. 24.

Matthew Chamblee was 16 years old on August 1, 1998, and lived on 22nd Street. A48a. He had just caught his dog that had gotten loose when he heard shots. A49-50. Chamblee said he caught a glimpse of the shooter who was wearing yellow shades and a black beanie style cap. A50. He saw a chrome gun. Chamblee identified Flowers as the shooter in the two sets of photographs the police had shown him, and at trial he again identified Flowers as the person who was shooting. A52-53; State's Ex. 30. Chamblee knew Flowers as a customer from the neighborhood sub shop where he worked. A53.

Tyshiak McDougall, like Sudler, claimed no memory of the 1998 shooting at trial. A56. She testified that she vaguely remembered talking to Detective Brock about the events on 22nd Street, but not what she said to him. A56-57. Her August 1998 videotaped statement to police was played for the jury. State's Ex. 34. In her statement, McDougall stated that she was sitting on her porch on 23rd Street and

saw Flowers cross in front of the alley with a gun wrapped in his shirt. State's Ex. 34.

A fifth eyewitness, Othello Predeoux identified Flowers as the shooter at trial. A58. He told the jury that on the night of the shooting he had been standing on the corner of 22nd and Lamotte Streets. A59. Predeoux saw a group of people in the street and then noticed a gray Honda attempt to get through the crowd. The driver blew the car horn a couple of times. A59-60. Predeoux heard shots and turned to see who was shooting. A60. After the shots, everyone left and Predeoux (A60) biked up 22nd Street where he saw the Honda crashed into a telephone pole. A60-61. In Predeoux's July 2002 videotaped statement to police (State's Ex. 33), he said he had seen Flowers standing on the passenger side of Smiley's car. State's Ex. 33. He stated that when Smiley revved the car engine, Flowers came out of the crowd with a gun. State's Ex. 33. Predeoux could not describe the color of the gun (State's Ex. 33), but said that Flowers did not have anything on his head and was wearing glasses. A62. Flowers had also made additional incriminating statements that tied him to the crime to Predeoux while they were both in prison. State's Ex. 33.

Flowers elected not to testify at trial and he presented no defense witnesses. A67-68.

I. SUPERIOR COURT ABUSED ITS DISCRETION BY GRANTING FLOWERS POSTCONVICTION RELIEF.

Question Presented

Whether the trial court abused its discretion by granting relief in An untimely and successive postconviction proceeding on a Sixth Amendment Confrontation Clause violation raised only as an ineffective assistance of trial and appellate counsel claim without conducting the proper *Strickland* analysis or properly applying the procedural bars of Criminal Rule 61.[8]

Standard and Scope of Review

Superior Court's grant or denial of postconviction relief is reviewed for abuse of discretion.[9] Nevertheless, this Court reviews the record to determine whether competent evidence supports Superior Court's findings of fact and whether its conclusions of law are not erroneous.[10] This Court ordinarily reviews claims alleging the infringement of a constitutionally protected right *de novo*.[11]

Merits

In his amended and superseding second motion for postconviction relief,

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[8] *State v. Flowers*, 2015 WL 7890623 (Del. Super. Ct. Nov. 20, 2015) (Ex. A).

[9] *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003).

[10] *Id.*; *Outten v. State*, 720 A.2d 547, 551 (Del. 1998); *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

[11] *Keyser v. State*, 893 A.2d 956, 961 (Del. 2006); *Capano v. State*, 781 A.2d 556, 607 (Del. 2001); *Seward v. State*, 723 A.2d 365, 375 (Del. 1999).

Flowers, through counsel, presented five claims of ineffective assistance of counsel. Flowers claimed that: (1) trial counsel failed to object to the admission of five videotaped statements admitted at trial pursuant 11 *Del. C.* § 3507 based on the State's failure to lay the proper foundation; (2) trial counsel failed to object to three of the section 3507 statements as cumulative; (3) trial counsel failed to object to the section 3507 videotaped statements going back to the jury during deliberations; (4) trial counsel failed to call four allegedly exculpatory witnesses; and (5) appellate counsel failed to raise the underlying claims on direct appeal. A69-107. A Superior Court Commissioner, after consideration of Flowers' claims, the trial counsel's affidavit,[12] the State's response, and Flowers' supplemental briefing, recommended granting relief as to the first claim, denying claims two through four, and did not reach claim five.[13] The State filed objections to the Commissioner's Report and Recommendation, to which Flowers responded and the State replied. Superior Court, after *de novo* review, adopted the Commissioner's Report and Recommendation in finding no claims to be procedurally barred and that claims two through four were without merit.[14] Superior Court granted relief on the first claim based on the Confrontation

[12] Trial counsel also filed the direct appeal.

[13] *State v. Flowers*, Del. Super., ID 980800280A, Manning, Cmm'r (April 23, 2015)(Rpt & Rec) (Ex. B).

[14] *Flowers*, 2015 WL 7890623, at *2 & *4.

Clause and granted relief on the fifth claim based on ineffective assistance of appellate counsel. The court erred.

A. Flowers' claims are untimely and procedurally defaulted.

Superior Court correctly recognized that Flowers' postconviction motion was untimely under Criminal Rule 61(i)(1),[15] as he filed the motion more than three years after his conviction became final with the issuance of the mandate from this Court in September 2004.[16] DI 101. The court also correctly noted that the claims in the motion were barred as repetitive under Rule 61(i)(2),[17] because the claims could have been, but were not, raised in Flowers' first motion for postconviction relief.[18] The court found that Flowers had not raised any of his claims "in the proceedings below, as required by Rule 61(i)(3)."[19] Rule 61(i)(3) is generally not applicable to claims of ineffective assistance of counsel, however, because such claims will not be considered for the first time on

[15] *Flowers*, 2015 WL 7890623, at *2.

[16] *See Jackson v. State*, 654 A.2d 829, 832-33 (Del. 1995); Del. Super. Ct. Crim. R. 61(i)(1) (2004) (motion for postconviction relief must be filed within 3 years after the judgment of conviction is made final).

[17] *Flowers*, 2015 WL 7890623, at *2.

[18] *See* Del. Super. Ct. Crim. R. 61(i)(2) (2013) ("Any ground for relief that was not asserted in a prior postconviction proceeding ... is thereafter barred, unless consideration of the claim is warranted in the interest of justice.").

[19] *Flowers*, 2015 WL 7890623, at *2.

appeal.[20] Superior Court then mistakenly found that none of the bars applied to Flowers because he had raised a colorable claim that there was a miscarriage of justice caused by a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.[21] The court found that Flowers had made a colorable claim to a mistaken waiver of important constitutional rights under the Sixth Amendment regarding the proper foundation for admitting a statement under 11 *Del. C.* § 3507, and thus *all* of his claims satisfied the Rule 61(i)(5) exception to the procedural bars.[22]

First and foremost, the procedural bars of Criminal Rule 61 and exceptions to those bars should be applied to individual claims, not to the motion as a whole.[23] Thus, finding a colorable claim of a Confrontation Clause violation (not raised by Flowers as a freestanding claim)[24] to invoke the exception of Rule 61(i)(5) to all of Flowers' claims was legal error. Flowers could have raised all of his ineffective assistance of counsel claims in his first motion for

[20] *See Desmond v. State*, 654 A.2d 821, 829 (Del. 1994) ("This Court has consistently held it will not consider a claim of ineffective assistance of counsel on direct appeal if that issue has not been decided on the merits in the trial court.").

[21] *Flowers*, 2015 WL 7890623, at *2; *see* Del. Super. Ct. Crim. R. 61(i)(5) (2013).

[22] *Flowers*, 2015 WL 7890623, at *2.

[23] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (applying the bars and exceptions separately to each claim).

[24] Flowers only presented claims of ineffective assistance of trial and appellate counsel in his motion for postconviction relief.

postconviction relief, and he has failed to meet the interest of justice exception to Rule 61(i)(2) to avoid procedural default because he has shown no change in facts or law retroactively applicable to his case.[25] Flowers has simply thought of a different angle to attack the same testimony he has been challenging since his conviction. Any failure of the prosecutor to ask a witness whether a prior statement was true, does not rise to a constitutional violation to meet the narrow exception of manifest injustice in Rule 61(i)(5).

Further, here Superior Court *sua sponte* found a Confrontation Clause violation based on the admission of several out-of-court statements of witnesses under 11 *Del. C.* § 3507. Moreover, the court found none of the bars applied due to this Confrontation violation. Specifically, Superior Court found that the Rule 61(i)(4) prior adjudication bar was not applicable to any of Flowers' claims. But, in denying Flowers' first postconviction motion in 2005, the court noted that Flowers' claim "that the State's case was presented through five eyewitnesses, include[d] three who claimed memory loss at trial, thus hindering effective cross-examination" had previously been considered and rejected in the trial court's decision denying Flowers' motion for new trial.[26] Thus, had Flowers

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[26] *State v. Flowers*, Del. Super., ID No. 9908026980, Johnston, J., Order at 8 (Dec. 13, 2005) (Ex. C) ("The Court held: 'Although some witnesses were less forthcoming on the stand, it was for the jury to weigh the evidence and make the decision.'").

raised a freestanding Confrontation Clause claim, it would have been barred by Rule 61(i)(4), because Superior Court had already adjudicated the issue. Because there was no Confrontation Clause violation, the procedural bars should be enforced, and the claims in Flowers' Amended and Superseding Second Motion for Postconviction Relief should be dismissed on that basis. Alternatively, the claims are without merit.

B. Section 3507 and the Sixth Amendment Confrontation Clause

This Court first considered the foundational requirements for admission of a prior out-of-court of a witness pursuant to 11 *Del. C.* § 3507 in *Keys v. State*.[27] In *Keys*, the declarant was present at trial, but not called to testify by the State. Over defense objection, the State introduced the declarant's written out-of-court statements through a police officer. The Court, based only on the statute, determined that the declarant must testify to what he or she had seen or perceived and be subjected to cross-examination. The direct examination should touch upon both the events and the out-of-court statement. *Keys* expressly did not decide the confrontation issue.[28]

A month later in *Hatcher v. State*, the Court supplemented *Keys* by adding a foundational requirement that "the offering party must show the statement was

[27] 337 A.2d 18 (Del. 1975).

[28] *Id.* at 21.

voluntarily made."[29] The Court found that the trial court must make an explicit determination of voluntariness before admitting the statement pursuant to section 3507.[30]

Three weeks after *Hatcher*, the Court, in *Johnson v. State*, again relying on the statute, found that there is no prohibition to "the admission of statements on the basis of limited courtroom recall."[31] *Johnson* addressed the Confrontation Clause implications for the first time, and concluded that "a case by case approach with emphasis on each case's particular facts is appropriate in determining whether there has been a violation of the Confrontation Clause due to a lack of effective cross examination."[32] Due to the rape victim's limited recall in *Johnson*, "[t]he requirement that the direct examination touch on the out-of-court statements was not expressly satisfied" and she was not asked a single question about any of the statements made during the period of limited recall.[33] Nevertheless, the Court concluded that "in effect, Keys was fully satisfied."[34] *Johnson* did not include any requirement that the witness be asked whether the statement was true. Rather, the Court noted:

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[29] 337 A.2d 30, 32 (Del. 1975).

[30] *Id.*

[31] 338 A.2d 124, 127 (Del. 1975).

[32] *Id.* at 128.

[33] *Id.* at 127.

[34] *Id.*

> The prosecution has physically produced the declarant in court and has thus done everything in its power to give the defendant the fullest opportunity to present his best defense. The jury can make a judgment in the light of all the circumstances presented, including any claim by the witness denying the prior statement, or denying memory of the prior statement or operating events, or changing his report of the facts.[35]

This language suggests that the Confrontation Clause is satisfied once the witness has been brought to trial and is presented by the prosecution for cross examination by the defense.

Almost ten years later in *Burke v. State*, the Court continued to list the foundational requirements for section 3507 as "the witness takes the stand and is questioned upon direct examination as to the events at issue and the out-of-court statement, itself, and is subject to cross examination."[36] *Burke* looked to *Johnson* regarding whether a statement admitted under section 3507 violates the Confrontation Clause, and reiterated the concept that the Confrontation Clause is "an 'availability rule, one that requires the production of a witness when he is available to testify.'"[37] *Burke* quoted with approval Justice Harlan's reasoning that "'[T]he Confrontation Clause of the Sixth Amendment reaches no further than to require the prosecution to *produce* any *available* witness whose

[35] *Id.* at 128 (citations omitted).

[36] 484 A.2d 490, 494 (Del. 1984) (citing *Keys*, 337 A.2d at 23).

[37] *Id.* at 495 (quoting *California v. Green*, 399 U.S. 149, 182 (1970) (Harlan, J., concurring)).

declarations it seeks to use in a criminal trial.'"[38] *Burke* clarified that *Johnson* adapted this reasoning in its holding quoted *supra*. *Burke* concluded that "It seems settled that Sixth Amendment Confrontation Clause rights are not offended so long as there are indicia of reliability sufficient to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement."[39] *Burke* explained that "[t]he genuineness of [the declarant's] limited recall was open to cross-examination and her demeanor on the stand was subject to the jury's scrutiny in weighing the truthfulness of her statements."[40] Thus, *Johnson* does not support the assertion that a declarant be asked a question regarding the truthfulness of a prior out-of-court statement before it can be admitted into evidence.

This Court addressed the Confrontation Clause issues related to section 3507 again in *Tucker v. State*,[41] noting that *Burke* had "enlarged on its earlier holding in *Johnson* in approving the admission of prior inculpatory statements of a witness who ... had no recollection of having made the prior statements."[42] The Court explained:

> The clear thrust of our decisional law on the constitutional

[38] *Id.* (quoting *Green*, 399 U.S. at 174 (Harlan, J., concurring)).

[39] *Id.* (citations and internal quotations omitted).

[40] *Id.* at 496.

[41] 564 A.2d 1110 (Del. 1989).

[42] *Id.* at 1121.

> implications of the admission of prior statements of declarants as affirmative evidence is entirely consistent with United States Supreme Court rulings on the meaning of "availability" of defendants for cross-examination in a Sixth Amendment context. Indeed, our Court has closely followed the decisional law of our highest Court from *Keys* through *Burke.* In *Keys,* this Court held the receipt into evidence of out-of-court statements made by a declarant before his examination in chief violated what is now section 3507 and therefore did not require analysis on constitutional grounds. In *Johnson,* this Court rejected a Sixth Amendment contention that defendant's right of cross-examination was constitutionally impinged by declarant's inability to testify concerning her out-of-court statement. We premised our decision on the rationale of *United States v. Payne,* 4th Cir., 492 F.2d 449 (1974), *cert. denied,* 419 U.S. 876, 95 S.Ct. 138, 42 L.Ed.2d 115 (1974); and *California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). In *Green,* Justice Harlan, in a concurring opinion, stated, "[T]he Confrontation Clause of the Sixth Amendment reaches no further than to require the prosecution to *produce* any *available* witness whose declarations it seeks to use in a criminal trial.["][43]

Tucker adopted the holding of *United States v. Owens*[44] that "the availability of declarant for cross-examination, notwithstanding his memory loss, dispensed with the need for reliability" and that the "'traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness's demeanor satisfy the constitutional requirements.'"[45]

Not until *Ray v. State*, did the Court introduce a foundational requirement for admission under section 3507 that the prosecution ask a witness whether his

[43] *Id.* at 1122 (internal citations omitted).

[44] 484 U.S. 554 (1988).

[45] *Tucker*, 564 A.2d at 1123 (quoting *Owens*, 484 U.S. at 560).

or her prior statement and testimony are true.[46] Specifically, *Ray* states:

> In *Keys v. State,* Del.Supr., 337 A.2d 18, 20 n. 1 (1975), this Court stated that: 'In order to offer the out-of-court statement of a witness, the statute requires the direct examination of the declarant by the party offering the statement, as to both the events perceived or heard and the out-of-court statement itself.' Thus, a witness' statement may be introduced only if the two-part foundation is first established: the witness testifies about both the events and whether or not they are true. Finally, in order to conform to the Sixth Amendment's guarantee of an accused's right to confront witnesses against him, the victim must also be subject to cross-examination on the content of the statement as well as its truthfulness. *Johnson v. State,* 338 A.2d at 127.[47]

But neither *Keys*, which specifically declined to address the Confrontation Clause claim, nor *Johnson* and *Tucker*, which both found no Confrontation Clause violation where the witness would not or could not respond to cross-examination, support *Ray*'s conclusion that a witness must testify on direct examination regarding truthfulness. Notably, the issue in *Ray* was not that the witness did not "verify" her out-of-court statements, but rather that she refused to testify about the events perceived. Thus, any truthfulness requirement is merely dictum. Moreover, it is axiomatic that a witness can be cross-examined regarding any inconsistencies between trial testimony and a prior statement without having the witness testify on direct whether or not the prior statement is true. *Ray*, to the extent it is read to require the prosecutor to ask the witness

[46] 587 A.2d 439, 443 (Del. 1991).

[47] *Id.*

about truthfulness as a foundational requirement, cannot be reconciled with prior decisions of this Court –such as cases like *Burke* and *Johnson*, where the declarant simply had limited or no memory of the prior statement.

Two years later, in *Feleke v. State*, this Court cited to *Ray* for the two foundational requirements that the witness must testify to the truthfulness of the out-of-court statement and touch on the events perceived.[48] Yet, *Feleke* also found that the Confrontation Clauses of both the United States and Delaware Constitutions "'guarantee[] only an "*opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."'"[49] *Feleke* cited to *Burke* and *Johnson* for support of this proposition.[50] Moreover, as the Court noted, "the issue is not how an appellate court would evaluate the reliability of the witness's testimony. The issue is whether the trial judge could, in the exercise of his discretion, have found that the [witness] at least touch[ed] on the events perceived in compliance with the foundational requirements of § 3507...."[51] The Court performed a separate, different analysis regarding the foundational requirements to satisfy the statute and the minimal requirements to satisfy the Confrontation Clause.

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[48] 620 A.2d 222, 225 (Del. 1993).

[49] *Id.* at 228 (quoting *Owens*, 484 U.S. at 559 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987))).

[50] *Id.*

[51] *Id.* at 227 (internal quotations omitted).

In 2001, less than a year before Flowers' trial, this Court, in *Hall v. State*, discussed Confrontation Clause rights in relation to the admission of pre-trial statements of a witness with limited recall.[52] The Court in *Hall* noted that *Johnson* held "that the issue [of whether limited recall implicated the Confrontation Clause] was a matter of weight for the jury, not a constitutional violation."[53] *Hall* cited to *Owens*[54] as support for the holding in *Johnson*.[55] As previously stated, *Owens* makes clear that when a witness testifies as to his current belief, the basis for which he cannot recall, there is no Confrontation Clause violation as long as the witness is available for cross-examination.[56]

> "[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" As [*Delaware v.*] *Fensterer*[, 474 U.S. 15, 20 (1985)] demonstrates, that opportunity is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief. It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination, see 3A J. Wigmore, Evidence § 995, pp. 931–932 (J. Chadbourn rev. 1970)) the very fact that he has a bad memory. If the ability to inquire into these matters suffices to establish the constitutionally requisite opportunity for cross-examination when a

[52] 788 A.2d 118, 122-25 (Del. 2001).

[53] *Id.* at 124 (citing *Johnson*, 338 A.2d at 127).

[54] 484 U.S. 554, 560 (1988).

[55] 788 A.2d at 125.

[56] 484 U.S. at 559-60. *See also Johnson v. State*, 878 A.2d 422, 428-9 (Del. 2005) (finding no Confrontation Clause violation where the witness claimed she could not recall making a prior out-of-court statement to police and citing *Owens*).

> witness testifies as to his current belief, the basis for which he cannot recall, we see no reason why it should not suffice when the witness' past belief is introduced and he is unable to recollect the reason for that past belief.[57]

Thus, regardless of later decisions of this Court, at the time of Flowers' trial in October 2002, the state of the law regarding the parameters of a Confrontation Clause violation was clear – the State need only present the witness for cross-examination without restriction to comply with the Sixth Amendment.

As to the evidentiary foundational requirements, the law was not as clear. Even after *Ray*, in *Smith v. State*,[58] this Court explained that the witness cannot be excused prior to the admission of the section 3507 statement because this would deprive the defense of the ability to cross-examine the witness about the statement.[59] In *Smith*, "the proper foundation had been laid" where the witness had not been explicitly asked about the veracity of her out-of-court statement.[60]

Here, Superior Court relies only on *Blake v. State*,[61] in which this Court wrote that *Johnson* required the witness to testify whether or not the prior statement was true in order to comply with the Confrontation Clause.[62] *Blake*

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[57] *Id.* at 559 (citations omitted).

[58] 669 A.2d 1 (Del. 1995).

[59] *See id.* at 7.

[60] *Id.*

[61] 3 A.3d 1077 (Del. 2010).

[62] *Id.* at 1082.

also stated that "[t]he foundational requirement that the witness indicate whether or not the prior statement is true is one reason why the substantive operation of section 3507 does not violate the Sixth Amendment."[63] But there is no Sixth Amendment requirement that a witness indicate whether or not a prior statement is true. Nothing in *Owens* requires a witness do anything more than take the stand, submit to direct examination and be subject to cross-examination.[64] There is no requirement that the prosecutor ask any particular question or elicit any particular testimony.[65] The ability to cross-examine a witness about the veracity of their out-of-court statement is not dependent upon the witness having specifically testified whether the statement was true. Moreover, at the time of Flowers' trial, this Court had not stated that the Confrontation Clause required "an entirely proper foundation" as set forth in *Blake*.[66] In fact, the Court had found an "adequate foundation" in several cases where the declarant did not touch on the out-of-court statements or was not asked whether or not the prior

[63] *Id.*

[64] *See Owens*, 484 U.S. at 559.

[65] Of note, to the State's knowledge, there are no state or federal evidentiary rules (other than section 3507 as interpreted by *Ray* and *Blake*) that require a specific question be asked by the offering party as a foundational prerequisite for admission of a statement into evidence, where the response to the answer has no bearing upon the admissibility of the statement at trial.

[66] *See Blake*, 3 A.3d at 1083.

statement was true,[67] and has continued to do so post-*Blake*.[68] *Ray*'s requirement that the witness be asked and testify to the veracity of the out-of-court statement is simply without support in Confrontation Clause jurisprudence.

In sum, because the foundational requirements are not synonymous with Sixth Amendment Confrontation rights, failure to comply with this Court's interpretation of the statutory requisites for admission of an out-of-court statement under section 3507 does not necessarily result in a constitutional violation. Here, because the declarants were produced at trial, testified and were subject to cross-examination, there was no violation of the Sixth Amendment Confrontation Clause. This is especially true because the section 3507 statements were all voluntary videotaped statements, which allowed the jury to evaluate the witnesses' demeanor at trial and when making the prior statement. In turn, because there was no constitutional violation, Flowers' untimely and successive postconviction claims are procedurally defaulted and should be dismissed on that basis.

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[67] *E.g., Smith*, 669 A.2d at 7; *Feleke*, 620 A.2d at 227; *Burke*, 484 A.2d at 496; *Johnson*, 338 A.2d at 127.

[68] *E.g., Turner v. State*, 5 A.3d 612, 615-17 (Del. 2010) (witness denied making out-of-court statement and was not asked about its truthfulness, but this Court held that the foundation requirements were satisfied as reaffirmed in *Woodlin v. State*, 3 A.3d 1084, 1087 (Del. 2010)); *State v. Bohan*, 2011 WL 6225262, at *8 (Del. Super. Ct. Nov. 23, 2011) (accuracy of prior out-of-court statement foundation requirement satisfied by witness stating he did remember the substance of his statement), *aff'd*, 2012 WL 2226608, at *2 (Del. June 15, 2012) (finding the prosecutor established the proper foundation).

C. Flowers' postconviction claims

Claim 1 – Ineffective assistance of trial counsel for failure to object to the State's failure to lay a proper foundation for admission of the prior out-of-court statements of five witnesses pursuant to 11 *Del. C.* § 3507.

Flowers' first claim for relief below was that trial counsel provided deficient representation because he failed to object to the admission of the section 3507 statements of five witnesses who had not been explicitly asked whether or not their prior out-of-court statements were true and that this alleged deficiency resulted in actual prejudice by depriving him of his Sixth Amendment confrontation rights. The Superior Court Commissioner found trial counsel was ineffective under *Strickland*[69] and recommended granting relief on this claim.[70] Superior Court, however, did not adopt the Commissioner's rational as to this claim, even though the court "agree[d] that relief should be granted for Defendant's first claim."[71] Rather than apply the *Strickland* standard to this ineffective assistance of trial counsel claim, Superior Court decided to address a freestanding Confrontation Clause claim that Flowers did not present in his postconviction motion. Then, in considering Flowers' claim of ineffective of *appellate* counsel (the same attorney), Superior Court chose to address the ineffective assistance of *trial* counsel claim, finding no deficient performance of

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

[70] *Flowers*, Rpt & Rec at 9-24 (Ex. B).

[71] *Flowers*, 2015 WL 789063, at *2.

trial counsel, and not addressing the second *Strickland* prong.[72] In the end, Superior Court granted relief on Flowers' ineffective assistance of trial counsel claim by creating a separate freestanding claim for relief based on the prejudice alleged in Flowers' *Strickland* claim. This was legal error.

In order to establish that he received constitutionally ineffective assistance of counsel, Flowers was required to demonstrate that: 1) trial counsel's representation fell below an objective standard of reasonableness; and 2) there exists a reasonable probability that, but for his counsel's unprofessional errors, the outcome of the trial or appeal would have been different.[73] Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.[74] There is a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.[75] Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.[76] In evaluating an attorney's performance, a reviewing court should also "eliminate the distorting effects of hindsight," "reconstruct the

[72] *Id.* at *5.

[73] *See Strickland*, 466 U.S. at 687; *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003); *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

[74] *See Zebroski*, 822 A.2d at 1043; *Gattis v. State*, 697 A.2d 1174, 1178-79 (Del. 1997); *Younger*, 580 A.2d 552, 556 (Del. 1990).

[75] *See Strickland*, 466 U.S. at 689; *Gattis*, 697 A.2d at 1184.

[76] *See Strickland*, 466 U.S. at 689; *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990).

circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's perspective at the time."[77]

Further, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment."[78] To establish prejudice, the defendant must actually show a reasonable probability of a different result but for trial counsel's alleged errors.[79] "[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice."[80] "It is not enough to 'show that the errors had some conceivable effect on the outcome of the proceeding.'"[81] The defendant must identify the particular defects in counsel's performance and specifically allege prejudice (and substantiate the allegation).[82]

"'Surmounting *Strickland*'s high bar is never an easy task.'"[83] Because ineffective assistance of counsel claims "can function as a way to escape rules of

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[77] *See Strickland*, 466 U.S. at 689; *Gattis*, 697 A.2d at 1184.

[78] *Strickland*, 466 U.S. at 691.

[79] *Id*. at 694; *Reese v. Fulcomer*, 946 F.2d 247, 256-57 (3d Cir. 1991).

[80] *Strickland*, 466 U.S. at 693. *See id.* at 696 (court "must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors").

[81] *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (quoting *Strickland*, 466 U.S. at 693).

[82] *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

[83] *Richter*, 131 S. Ct. at 788 (2011) (quoting *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010)).

waiver and forfeiture, ... the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve."[84]

a. Trial counsel's performance did not fall outside the wide range of professionally reasonable representation.

Superior Court properly found no deficient performance of trial counsel, but then inexplicably concluded that counsel's failure to object resulted in a constitutional violation. Trial counsel filed an affidavit responding to Flowers' claims of ineffective assistance of counsel. Trial counsel explained that:

> Counsel felt at the time that the other foundational requirements for the admissibility of the statements had been met and counsel was intent on effectively cross-examining the witnesses. Some of the witnesses either did not remember speaking to the police officer or, in fact, refused to even acknowledge the statements. For example, if the witness was asked if the statement was true, in all likelihood the answer would have been that the witness did not even remember making it. To cure the deficiency and the interposing of such an objection could have potentially undermined counsel's credibility with the jury. Counsel did not expect that the presiding Judge was going to keep these statements out of evidence on that basis.[85]

Counsel's explanation for not objecting was professionally reasonable. Had he objected, the trial judge would have required the prosecutor to ask the question and the taped statement would have been admitted. The answer would have no effect on trial counsel's ability to effectively cross-examine the witness. Relying

[84] *Id*. at 788 (citing *Strickland*, 466 U.S. at 689-90).

[85] Affidavit at 1-2 (A108).

on *Blake*, the Superior Court Commissioner found deficient performance of trial counsel on this point.[86] Although *Blake* stated that there was no reason for confusion regarding the foundational requirements after *Ray*, the courts remain confused even now.[87] Whether or not trial counsel knew that *Ray* had held that the prosecutor had to ask the witness about the veracity of the out-of-court statement, trial counsel effectively and thoroughly cross-examined each witness.

Trial counsel discussed the out-of-court statements of the witnesses in his opening statement at trial, and pointed to inconsistencies the jury would hear both within and between certain statements. A20-21. Trial counsel previewed that the witnesses might say something different at trial, four years later. A A20-21. Trial counsel had previously viewed all of the videotaped statements and was well prepared to cross-examine the declarants on them. Trial counsel objected to the admission of Ronetta Sudler's out-of-court statement on voluntariness grounds, but the request to suppress the statement was denied. A42. On cross-examination, trial counsel was able to get concessions that some of the statements contained inaccuracies and that other information could have been inaccurate. *See, e.g.*, A54. In fact, trail counsel effectively used the prior

[86] *Flowers*, 2015 WL 1881036, at *9.

[87] *See, e.g., Gomez v. State*, 25 A.3d 786, 795 n.17 (Del. 2011) ("Our precedents have held that an out-of-court statement may be admitted pursuant to section 3507 so long as the declarant voluntarily made the statement, **the declarant testifies that the statement was truthful,** and the declarant testifies about the events and the out-of-court statement itself. *Blake v. State*, 3 A.3d 1077, 1081 (Del. 2010) (citing *Ray v. State*, 587 A.2d 439, 444 (Del. 1991)) (emphasis added)).

statements to attack the credibility of the witnesses at trial.[88] Moreover, had trial counsel objected to the admission of the prior statements on the basis that the state had failed to ask the witnesses (some of whom had no memory of their prior statements) whether their statements were true, the trial court would simply have directed the State to ask the question. Trial counsel's failure to ask a question that had certainly not been routinely required in all criminal cases and that would not have prevented the admission of the statements into evidence, was not objectively unreasonable. Flowers failed to establish the first prong of *Strickland*.

b. Flowers suffered no prejudice from trial counsel's failure to object to the admission of the witnesses' prior statements for lack of foundation.

Even if trial counsel should have objected to the admission of the section 3507 statements based on an inadequate foundation, Flowers cannot establish prejudice. Trial counsel's ability to cross-examine each of the declarants was not limited in any way. Counsel used the inconsistencies and memory problems to cast doubt on the witnesses' credibility and the accuracy of their prior statements. For example, as Superior Court noted, Matthew Chamblee identified Flowers as the shooter at trial. A52. [("And could you see the person holding

[88] *See Guy v. State*, 999 A.2d 863, 870-71 (Del. 2010) (finding counsel was not objectively unreasonable in agreeing to introduction of out-of-court statements because "[a]lthough the State used the statements to prove the charges against Guy, defense counsel used the statements to undermine the credibility of the witnesses who gave those statements.").

the gun? A. Yes.). Using his prior statement, trial counsel was able to have Chamblee admit that he could not really see the shooter and could not be sure of his identification. A55.[("You specifically say I didn't see his face. Do you remember saying that? A. No.")]. Trial counsel replayed portions of Chamblee's statement as he cross-examined him. Given trial counsel's effective use of the prior statements, any error in establishing a proper foundation was harmless.

In rejecting a similar claim of ineffective assistance of counsel for failure to comply with the technical foundational requirements under section 3507, in *Hoskins v. State*, this Court found no prejudice:

> Although trial counsel failed to object to the prosecutor's perhaps awkward attempt to comply with his obligation under § 3507, trial counsel may well have recognized that a technical objection was unlikely to help his client. Hoskins argues that his trial counsel should have objected because the prosecutor's questions were not precise enough, and did not focus on whether West's prior testimony was truthful, not just when given, but whether it remained truthful. Had his trial counsel objected to the prosecutor's awkward but harmless form of questioning on this basis, as Hoskins claims he should have done, West would presumably have affirmed that his prior statements were still truthful, both because he took an oath to tell the truth before he testified at trial, and because his current testimony was consistent with his prior testimony. Thus, Hoskins has not shown that trial counsel's failure to object constituted a *Strickland* violation at all, and, in any event, has not demonstrated prejudice. And absent any prejudice to the defendant, we will not reverse as an abuse of discretion a trial court's decision to admit evidence based upon the technical requirements of § 3507. In sum, there are insufficient grounds in the record to overcome the

presumption of trial counsel's reasonableness.[89]

Moreover, the prior statements in this case were admissible under Delaware Uniform Rule of Evidence ("DRE") 613, which permits the admission of prior inconsistent statements of a witness who does not clearly admit to making the statement or who is afforded an opportunity to explain or deny that statement and is subject to cross-examination regarding the statement. All the witnesses here were provided an opportunity to admit or deny their prior statements, even without being directly asked if the statement was true. All the witnesses were cross-examined about their prior statements. Thus, any failure to adhere to the requirement that a witness be directly asked if his or her prior statement is true, could not have prejudiced Flowers because the statements were in any case admissible pursuant to the DRE 613 without that prerequisite.[90]

Claims 2-4 – Ineffective assistance of trial counsel for failing to: object to the admission of section 3507 statements as cumulative; object to the jury having the section 3507 videotaped statements available during deliberations; call five allegedly exculpatory witnesses at trial.

Superior Court adopted the Commissioner's findings as to claims two, three and four.[91] Although the claims were untimely and procedurally defaulted

[89] 102 A.3d 724, 734-35 (Del. 2014).

[90] DRE 802(d) also provides for the admission of prior statements of testifying declarants under a variety of circumstances and the Rule does not require and attempt by the offering party to question the witness regarding the veracity of the prior statement.

[91] *Flowers*, 2015 WL 7890623, at *4; *see Flowers*, Rpt & Rec at 24-28 (Ex. B) (Commissioner's reasoning for denying claims 2-4).

under Rule 61(i)(2), the Commissioner considered and rejected the claims on the merits. Superior Court should have applied the Rule 61 bars to these claims, because Flowers offered no new facts or retroactively applicable law to overcome the bars. Alternatively, the Commissioner properly found no merit to the claims and recommended denial of these claims of ineffective assistance of trial counsel.

Claim 5 – Ineffective assistance of appellate counsel for failure to raise claims of plain error regarding error in the admission of the prior out-out-of-court statements of five witnesses pursuant to 11 *Del. C.* § 3507 and the provision of those statements to the jury for deliberations.

Superior Court found Claim 5 to be barred under Rule 61(i)(3) for failure to raise the claim at trial or on appeal, unless Flowers could show cause for his default and actual prejudice. But because Flowers could not have raised an ineffective assistance of appellate counsel claim at trial or on direct appeal, the claim was not barred by Rule 61(i)(3). Instead, the claim was untimely under Rule 61(i)(1) and repetitive under Rule 61(i)(2) for failure to present the claim in his first motion for postconviction relief. Flowers did not demonstrate that the court was required to consider his claim in the interest of justice; nor did he establish manifest injustice under Rule 61(i)(5) to avoid the procedural default of his claim. Superior Court, after announcing the claim to be barred under the incorrect rule, proceeded to consider the claim on the merits and granted relief. Superior Court was legally wrong in applying the law and abused its discretion

in granting relief.

After failing to find trial counsel ineffective for not objecting to the admission of the section 3507 statements at trial or the provision of the videotapes to the jury for deliberations, Superior Court then found the same counsel to be ineffective for failing to raise the claims under a plain error standard of review on direct appeal. By finding that counsel acted reasonably in failing to object at trial, but objectively unreasonable for the same behavior on appeal, Superior Court has set the stage for defense counsel to withhold trial objections and hope for an acquittal, and save claims for potential success on appeal.

"The failure to object at trial usually constitutes a waiver of a defendant's right to raise the issue on appeal unless the error is plain."[92] Claims of error not raised below can only be reviewed, if reviewed in the interest of justice, for plain error.[93] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a

[92] *Rybicki v. State*, 119 A.3d 663, 673 (Del. 2015) (quoting *Probst v. State*, 547 A.2d 114, 119 (Del. 1988) (internal quotations omitted)).

[93] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

substantial right, or which clearly show manifest injustice."[94]

Superior Court explained its rationale:

> When evaluating Trial Counsel's conduct, this Court "should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Therefore, at the trial level, the Court will not criticize Trial Counsel's decision to not object to the improper foundation for the five section 3507 statements. However, the same rationale cannot be applied at the appellate level. The admission of the five section 3507 statements—without inquiring into truthfulness—directly violates the language of the statute. Therefore, the Court finds that failure to raise this issue is conduct falling below an objective standard of reasonableness, and constitutes error on appeal.[95]

The court's rationale is legally wrong. Appellate counsel, just like trial counsel, is expected to use reasonable professional judgment. Once a trial attorney has made a strategic decision not to raise an objection to the admission of evidence at trial, any claim of error regarding the admission of that evidence has been waived for appeal. Superior Court found that trial counsel made a reasonable strategic decision not to object to the prosecutors' failure to explicitly ask each witness whether his or her out-of-court statement was truthful.[96] Trial counsel, as appellate counsel, could not then change his mind and seek review of a claim

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[94] *Morse v. State*, 120 A.3d 1, 14 (Del. 2015) (quoting *Wainwright*, 504 A.2d at 1100) (internal quotations omitted)).

[95] *Flowers*, 2015 WL 7890623, at *5 (citation to *Strickland* omitted).

[96] *Flowers*, 2015 WL 7890623, at *5. *But cf. id.* ("Trial Counsel's failure to object to the improper foundation for admission of the five section 3507 statements resulted in a violation of Defendant's Sixth Amendment right to confrontation.").

he clearly abandoned.[97] To allow otherwise would be "to encourage the practice of 'sandbagging': suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later - if the outcome is unfavorable - claiming that the course followed was reversible error.'"[98] On direct appeal, this Court would have likely deemed this claim waived. Certainly, Superior Court's postconviction decision, twelve years after Flowers' conviction, is in error.

This Court's "analysis of a claim of ineffective assistance of appellate counsel follows the standard *Strickland* framework."[99] Appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal."[100] "A strategy, which structures appellate arguments on 'those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.'"[101] "Nevertheless, '[i]t is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to

[97] *See MacDonald v. State*, 816 A.2d 750, 756 (Del. 2003) ("because MacDonald waived his right to object to the "slips," or to strike these references to his first trial, he is precluded from any claim of plain error on appeal"). *See also Reed v. Ross*, 468 U.S. 1, 13-14 (1984) (defense counsel may not make a tactical decision to forego a procedural opportunity, and, when the strategy proves unsuccessful, later pursue an alternate strategy).

[98] *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 895 (1991) (Scalia, J., concurring).

[99] *Purnell v. State*, 106 A.3d 337, 351 (Del. 2014).

[100] *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (discussing the holding in *Jones v. Barnes*, 463 U.S. 745 (1983)).

[101] *Zebroski v. State*, 822 A.2d 1038, 1051 (Del. 2003) (quoting *Flamer v. State*, 585 A.2d 736, 758 (Del. 1990)).

demonstrate that counsel was incompetent.'"[102] Whether or not Flowers would have prevailed on the omitted claim is not the primary issue in the analysis. That point is only relevant if Flowers first established that the omitted claims he espouses were "clearly stronger" than the other claims presented on direct appeal.[103]

On direct appeal, counsel raised the following claims for relief: (1) Ronetta Sudler's section 3507 statement was not voluntarily obtained and thus was improperly admitted; (2) prosecutorial misconduct in opening by referencing a "code of silence" among the witnesses; (3) the trial court erred by denying a motion for mistrial based on the prosecutor recklessly eliciting testimony about Flowers' recent release from prison;[104] (4) the trial court erred by denying a motion for mistrial based on Othello Predeoux's nonresponsive answer that trial counsel had represented him in a prior case. These appellate issues were not clearly weaker than a plain error claim that the prosecutors had failed to explicitly ask the witnesses about the veracity of their prior statements.[105] Although Flowers' claim

[102] *Purnell*, 106 A.3d at 351 (quoting *Neal v. State*, 80 A.3d 935, 946 (Del. 2013) (quoting *Robbins*, 528 U.S. at 288)).

[103] *See Robbins*, 528 U.S. at 288 (citing with approval to *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.").

[104] This claim was also litigated in a motion for new trial. *See Flowers v. State*, 858 A.2d 328, 332 (Del. 2004).

[105] *See Woodlin*, 3 A.3d at 1089 (no plain error where truthfulness addressed "implicitly").

of ineffective assistance of appellate counsel also asserted that counsel should have raised a claim regarding the videotaped statements being provided to the jury for deliberations, Superior Court did not specifically address that claim in granting relief. That claim was also not clearly stronger than the claims raised on appeal.

Moreover, Flowers' plain error claims, if considered, would not have provided relief. Trial counsel used the section 3507 statements to Flowers' advantage. The Confrontation Clause was not violated by the admission of the out-of-court statements because the prosecution presented the declarants as trial witnesses, examined them about their perceptions and their prior statements, played the prior videotaped statements for the jury, and then presented the witnesses for cross-examination.[106] Any failure by the prosecutors to specifically ask the witnesses whether their prior statements were true is *de minimis* in this case.

Vernon Mays, the first eyewitness to testify at trial, was asked if he spoke to Detective Brock and after the witness agreed that he had, the prosecutor asked "And you told him what you had seen happen?" A27. Just as in *Burke*, this

[106] *See Morse*, 120 A.3d at 16 (where defendant "was afforded an opportunity to cross-examine both [witnesses] extensively during trial and 'probe and expose any infirmities' in both their in court and out-of-court testimony ... no Confrontation Clause violation occurred.").

question was sufficient to satisfy the foundational requirements.[107] Ronetta Sudler professed a lack of memory about the events and about her statement to police. She eventually acknowledged that she remembered speaking to Detective Brock, but testified that she "would have said anything." A41. This too was sufficient.[108] Matthew Chamblee testified about the events perceived, including a description of the shooter, and he identified Flowers as the person holding the gun. A50-52. Chamblee spoke about his interview with Detective Brock and his identification of Flowers in a photo array. A53. Although not asked whether he was truthful during his interview, the witness's responses to questions about the interview implicitly showed that Chamblee believed he had described the events with candor. That was sufficient. Tysheik McDougall testified that she did not see anything and only admitted to a recollection of speaking to Detective Brock, but not what they spoke about. A56-57. Othello Predeoux testified that he recalled speaking with the detective about the 1998 incident. A58. He testified about where he was standing at the time of the shooting and about seeing the car beeping its horn in the middle of the street. A59. He testified to a make and color of the car. A59. He could hear that the driver was male and said that he heard the shots. A60. He saw someone

[107] *See Burke*, 484 A.2d at 494.

[108] *See Woodlin*, 3 A.3d at 1089 (finding "implicit" affirmation of truthfulness sufficient to satisfy the foundational requirements of section 3507).

shooting, but not who it was. A60. He testified about the car crashing into a pole or tree and a person was slumped over in the driver's seat. A60. Predeoux testified about making a statement to the police: "I just told you what I – what I – I just told you what I told him. Q. That's what you remember saying? A. Yeah." A61. After viewing the videotaped statement, the prosecutor continued to question Predeoux, who denied having any memory of what he had said or the events beyond his original testimony. Finally, the prosecutor asked: "That is you on the tape that we just saw? A. Yes. Q. Okay. And – is that a true and correct copy of the tape, I mean, is that what you said? A. I mean, that's what the tapes says, I guess so. ... Q. And you don't remember if that's what happened in 1998? A. No. Q. If you said it on the tape and you didn't remember in 1998, is there some reason why you would have said that on the tape? A. I don't know." A62. That was also sufficient.

The witnesses at Flowers' trial were called to testify four years after the homicide and were generally uncooperative. They provided ample testimony both about the events perceived and their prior statements to satisfy the foundational requirements of 11 *Del. C.* § 3507 and the minimal requirements of the Confrontation Clause. Consequently, appellate counsel acted well within the bounds of objectively reasonable representation in deciding not to raise a challenge to the admission of the statements based on a failure of the prosecutors

to ask a single question. Flowers suffered no prejudice from his counsel's professional representation both at trial and on appeal. Superior Court erred in granting relief on this claim.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be reversed and remanded with directions to summarily deny Flowers' Amended and Superseding Second Motion for Postconviction Relief.

/s/ Elizabeth R. McFarlan
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DATE: March 7, 2016

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	
	)	
DAMONE FLOWERS,	)	
	)	Cr. ID. No. 9808000280A
Defendant.	)	
	)	

Submitted: August 18, 2015
Decided: November 20, 2015

Upon Commissioner's Report and Recommendation that Defendant's Motion for Postconviction Relief Should be Granted

ADOPTED IN PART
DENIED IN PART

OPINION

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Michael W. Modica, Esquire, 715 N. King Street, Suite 300, P.O. Box 437, Wilmington, Delaware, Attorney for Defendant.

JOHNSTON, J.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Damone Flowers was convicted of Murder in the First Degree and Possession of a Firearm During the Commission of a Felony on October 30, 2002. He was sentenced to life in prison, plus ten years. The Delaware Supreme Court affirmed Defendant's convictions on August 31, 2004. On May 3, 2005, Defendant filed a *pro se* Motion for Postconviction Relief. Defendant submitted a hand written, 133-page memorandum of law, alleging eleven separate grounds for relief. On June 27, 2005, the Court denied Defendant's lengthy Motion without evaluating its merits. The Court dismissed the Motion without prejudice and stated that Defendant may amend the Motion to comply with the restrictions set forth in Rule 61(b)(6).

On May 14, 2012, Defendant filed a second *pro se* Motion for Postconviction Relief. Subsequently, Defendant obtained counsel ("Rule 61 Counsel"). On April 25, 2013, Rule 61 Counsel filed an Amended and Superseding Motion for Postconviction Relief. Defendant's counsel in the 2003 trial ("Trial Counsel") filed an Affidavit of Counsel on November 13, 2013. On March 18, 2014, the State filed its Response to Defendant's Motion for Postconviction Relief. Defendant filed a Reply Brief in Support of His Motion for Postconviction Relief on December 18, 2014.

The motions were referred to a Superior Court Commissioner in accordance with 10 *Del. C.* § 512(b) and Superior Court Criminal Rule 62[1] for proposed findings of fact and conclusions of law. The Commissioner issued the Report and Recommendation on April 23, 2015. The Commissioner recommended that Defendant's Motion for Postconviction Relief be granted.

"Within ten days after filing of a Commissioner's proposed findings of fact and recommendations . . . any party may serve and file written objections."[2] On May 4, 2015, the State filed Objections to the Commissioner's Report and Recommendation. On May 14, 2015, Defendant filed a Response to the State's Objections to Commissioner's Report and Recommendation. The Court has considered the Commissioner's Report and Recommendation, as well as the State's Objection and Defendant's Response.

ANALYSIS

Upon *de novo* review, for the reasons set forth below, the Court holds that the Commissioner's Report and Recommendation dated April 23, 2015, should be adopted in part and denied in part.

Defendant's Motion for Postconviction Relief asserts five claims, each alleging that his Sixth Amendment right to effective assistance of counsel was violated. Defendant claims: (1) Trial Counsel was ineffective by failing to object

[1] All "Rules" referred to hereinafter will be the Superior Court Criminal Rules.
[2] Super. Ct. Crim. R. 62(a)(5)(ii).

to the admission of five section 3507 statements based on inadequate foundation; (2) Trial Counsel was ineffective by failing to object to the admission of the section 3507 statements as cumulative to the respective witnesses' live in-court testimony; (3) Trial Counsel was ineffective by failing to object to allowing the jury to have copies of the section 3507 statements in the jury room during deliberations; (4) Trial Counsel was ineffective by failing to investigate and/or present the exculpatory evidence of five different witnesses; and (5) Appellate Counsel was ineffective by not raising claims of plain error on appeal to the erroneous admissions of the section 3507 statements during trial and as evidence given to the jury during its deliberations.

Procedural Bars

The Commissioner determined, and the Court agrees, that no procedural bars exist to prevent the Court from considering the merits of Defendant's claims.[3] Rule 61(i)(4) is inapplicable because none of Defendant's five claims were formerly adjudicated. The Court recognizes that Defendant's claims fall outside the time limits for filing under Rule 61(i)(1), and are repetitive under Rule 61(i)(2). Further, Defendant did not assert any of the current claims in the proceedings below, as is required by Rule 61(i)(3). However, the bars to relief in Rule

[3] Defendant filed his Motion for Postconviction Relief prior to the most recent amendment to Superior Court Criminal Rule 61. Therefore, Defendant's claims will be evaluated under Rule 61 as it existed on April 25, 2013.

61(i)(1)–(3) are inapplicable because Defendant has raised a colorable claim that there was a miscarriage of justice caused by a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.[4]

The Delaware Supreme Court has held: "The Sixth Amendment requires an entirely proper foundation, if the prior statement of a witness is to be admitted under section 3507 as independent substantive evidence against an accused."[5] "[W]hen a petitioner makes a colorable claim to a mistaken waiver of important constitutional rights Rule 61(i)(5) is available to him."[6] Therefore, Defendant's claims satisfy the requirements of Rule 61(i)(5) and the Court will address the merits.

Claim 1: Failure to Object to Section 3507 Statements

The Commissioner granted relief on Defendant's first claim, finding that Defendant's Sixth Amendment right to effective assistance of counsel was violated due to Trial Counsel's failure to object to the improper foundation laid for the

[4] *See State v. Taylor*, 2000 WL 33113935, at *2 (Del. Super.) ("[I]n order to invoke Rule 61(i)(5) and by-pass Rule 61(i)(3)'s procedural bars, Taylor not only must raise a colorable claim that there was a miscarriage of justice, he also must show that the miscarriage of justice was caused by a constitutional violation. Further, he must demonstrate that the constitutional violation involved not only a mistake, but Taylor also must show that the mistake undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to his conviction. While the thresholds imposed by Rules 61(i)(3),(4) and (5) are not insurmountable, they are substantial and they are enforced.").
[5] *Blake v. State*, 3 A.3d 1077, 1083 (Del. 2010).
[6] *Webster v. State*, 605 A.2d 1364, 1366 (Del. 1992).

admission of five statements in accordance with section 3507 of Title 11 of the Delaware Code. The Commissioner's well-reasoned analysis concluded that Trial Counsel's failure to object was objectively unreasonable and resulted in prejudice to Defendant. While the Court agrees that relief should be granted for Defendant's first claim, the Court grounds its decision in Defendant's Sixth Amendment right to confront witnesses against him.

11 *Del. C.* § 3507 states in pertinent part:

> (a) In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.
>
> (b) The rule in subsection (a) of this section shall apply regardless of whether the witness' in-court testimony is consistent with the prior statement or not. The rule shall likewise apply with or without a showing of surprise by the introducing party.

In order for an out-of-court statement to be admitted, the proper two-part foundation first must be laid: (1) the witness must testify about "the events perceived and the out-of-court statement;"[7] and (2) whether or not the events are true.[8]

In the present case, the State has acknowledged that it did not lay the proper foundation for the five section 3507 statements because it did not ask the witnesses

[7] *Johnson v. State*, 338 A.2d 124, 127 (Del. 1975).
[8] *Ray v. State*, 587 A.2d 439, 443 (Del. 1991).

whether or not the events discussed in their out-of-court statements were true. However, the State relies on the Delaware Supreme Court's holding in *Moore v. State*, [9] and argues that at the time of Defendant's trial, section 3507 did not require "that the witness either affirm the truthfulness of the out-of-court statement or offer consistent testimony."[10]

The State's reliance on *Moore* is misplaced. The foundational requirements of section 3507 are well-settled. While the case law discussing section 3507 has evolved over the years, the language of section 3507 has not changed. With respect to the truthfulness prong, the *Moore* Court held: "[T]here is no requirement that the witness either affirm the truthfulness of the out-of-court statement, or offer consistent trial testimony."[11] In so finding, the *Moore* Court relied on the holding in *Ray v. State*.[12] In *Ray*, the Delaware Supreme Court held that the witness must testify as to whether or not the events discussed in the out-of-court-statement are true. A witness is not required to affirm that the prior out-of-court statement is true. Rather, testimony must be elicited inquiring whether or not the prior statement was true.[13]

The actual answer from the witness has no bearing on the foundation that must be established for the prior statement to be admitted under section 3507.

[9] 1995 WL 67104 (Del. Super.).
[10] *Id*. at *2.
[11] *Moore v. State*, 1995 WL 67104, at *2 (Del.).
[12] 587 A.2d 439 (Del. 1991).
[13] *Id*. at 443.

Inquiry into truthfulness is essential because the jury or trier of fact must be given the ability to evaluate the witness' credibility.[14] The declarant's credibility must be assessed "in the light of all the circumstances presented, including any claim by the witness denying the prior statement, or denying memory of the prior statement or operating events, or changing his report of the facts."[15]

Further, the Supreme Court has held: "[I]n order to conform to the Sixth Amendment's guarantee of an accused's right to confront witnesses against him, the [witness] must also be subject to cross-examination on the content of the statement *as well as its truthfulness*."[16] Because the State failed to inquire into the truthfulness of each of the five out-of-court statements, the proper foundation was not established. Defendant was deprived of his Sixth Amendment right to confront the five witnesses with respect to the truthfulness of their respective statements. Therefore, the five section 3507 statements should not have been admitted.

Without the five section 3507 statements, each of which implicate Defendant as the shooter, the State's case is much weaker. The record reveals that no gun was recovered, no ballistics tests were conducted, no fibers were collected or tested, no fingerprints were lifted, and no DNA was recovered and compared to

[14] *Blake v. State*, 3 A.3d 1077, 1082 (Del. 2010).
[15] *Johnson*, 338 A.2d at 128.
[16] *Id*. at 1083.

Defendant's DNA. The eyewitnesses presented by the State were forgetful, uncooperative, and gave conflicting and inconsistent testimony.[17]

Three of the five witnesses who gave section 3507 statements—McDougall, Predeoux, and Sudler—failed to identify Defendant as the shooter in their in-court testimony. The remaining two witnesses who gave section 3507 statements, Chamblee and Mays, did identify Defendant as the shooter in their in-court testimony. However, the two testified that they could not be entirely sure that Defendant was the shooter. Chamblee testified that he never saw the shooter's face, but could still identify the shooter as Defendant.[18] Mays testified that he did not see who shot the gun.[19] However, Mays picked Defendant out of the photo lineup and testified that the photo he selected resembled the shooter, but he could not be sure that it was definitely the shooter.[20]

Defendant's sister, Dawson, also testified for the State. Dawson testified that Defendant lived with her "on and off for years" prior to the shooting.[21] She stated that after August 1, 1998, the date of the shooting, Defendant ceased living with her.[22] However, Dawson also testified that Defendant did not have a stable

[17] For a more detailed account of the in-court testimony of the five section 3507 witnesses, *see* Comm. Report and Recommendation at 16–21.
[18] Oct. 23, 2002 Trial Transcript ("Tr. Trans.") of Matthew Chamblee at 73, 81–82.
[19] Oct. 23, 2002 Tr. Trans. of Vernon Mays at 18.
[20] *Id*.
[21] Tr. Trans. of Adrienne Dawson at 173–176
[22] *Id*.

address prior to the shooting.[23] Detective Brock testified that Defendant was located in North Carolina in November 1999 and subsequently was extradited to Delaware.[24]

It cannot be determined with complete certainty whether the jury still would have returned a guilty verdict based on the in-court testimony of Chamblee, Mays, Dawson, and Brock. However, it is reasonable to infer that the jury relied heavily on the five section 3507 statements in returning a guilty verdict against Defendant. The Court is convinced that improper admission of the five section 3507 statements constitutes a constitutional violation that undermined the fundamental integrity and fairness of the trial.

Claims Two, Three, and Four

The Commissioner recommended that claims two, three, and four of Defendant's Motion for Postconviciton Relief be denied. The Court holds that the Commissioner's Report and Recommendation dated April 23, 2015, should be adopted with respect to claims two, three, and four for the reasons set forth therein. The Commissioner's findings are not clearly erroneous, are not contrary to law, and are not an abuse of discretion.

[23] *Id*. at 175
[24] Tr. Trans. of Detective Brock at 33–34.

Claim Five: Failure to Raise Plain Error

Claim five of Defendant's Motion for Postconviction Relief alleges that Appellate Counsel[25] was ineffective by failing to raise claims of plain error regarding: the improper admission of the five section 3507 statements during trial, and permitting the jury to review the taped section 3507 statements during deliberations. The Commissioner stated in the Report and Recommendation that Defendant's fifth claim does not need to be addressed because the same claims were alleged against Trial Counsel—who was also counsel for Defendant in the direct appeal—in claims one and three of Defendant's Motion. Because the same ineffective assistance of counsel claims were analyzed in depth in the previous claims, the Commissioner did not address claim five.

This Court has decided claim one in the context of Defendant's Sixth Amendment right to confront witnesses against him. Therefore, Defendant's claim five, based on the right to effective assistance of counsel, must be evaluated separately from claim one.

Defendant argues that his Sixth Amendment right to effective assistance of counsel was violated because Appellate Counsel failed to argue on direct appeal that the five section 3507 statements were admitted without a proper foundation at trial. This issue was not raised at trial or on direct appeal. Therefore, it is

[25]Appellate counsel was also Defendant's Trial Counsel.

procedurally barred under Rule 61(i)(3), unless Defendant can establish: (1) cause for his failure to have raised it earlier; and (2) actual prejudice.[26]

The two-pronged test set out in *Strickland v. Washington*[27] governs whether Defendant can demonstrate cause for failure to raise the ineffective assistance of counsel claim either at trial or on direct appeal. Although the *Strickland* test was developed to evaluate trial counsel, it also may be applied "to evaluate appellate counsel's performance."[28] Defendant first must show that his counsel's representation fell below an "objective standard of reasonableness."[29] Defendant also must prove actual prejudice.[30] Prejudice is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different."[31] When alleging ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice.[32]

Defendant argues that Appellate Counsel's representation fell below an objective standard of reasonableness because the issue regarding the improper foundation and admission of the five section 3507 statements was not raised on appeal. Defendant contends that the centrality and prejudicial nature of the section 3507 statements should have caused Appellate Counsel to focus on the legal errors

[26] *Younger v. State*, 580 A.2d 552, 555 (Del.).
[27] 466 U.S. 668 (1984).
[28] *Ploof v. State*, 75 A.3d 811, 831 (Del. 2013).
[29] *Id*. at 687.
[30] *Id*. at 694.
[31] *Id*.
[32] *Younger*, 580 A.2d at 556.

in the admission of the statements without an adequate foundation. Defendant asserts that actual prejudice resulted because the error in admitting the five section 3507 statements, having not been raised and reviewed under a plain error standard, must be reviewed for the first time under the more strict standard that governs motions for postconviction relief. Defendant contends that if this claim had been raised on direct appeal, his conviction likely would have been reversed.

The Court finds that Defendant's Sixth Amendment right to effective assistance of counsel was violated because of the failure of Appellate Counsel to raise the issue of the improper foundation and admission of the five section 3507 statements on direct appeal. The Court recognizes that at the trial level, the decision to object is of a strategic nature. In Trial Counsel's Affidavit, he states that his strategy was to thoroughly cross-examine the witnesses regarding inconsistencies between the taped statements and in-court testimony. Trial counsel further stated that if he had objected to State's failure to inquire into the truthfulness requirement for section 3507 statements, he would have risked undermining his credibility with the jury.

When evaluating Trial Counsel's conduct, this Court "should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[33]

[33] *Strickland*, 466 U.S. at 690.

Therefore, at the trial level, the Court will not criticize Trial Counsel's decision to not object to the improper foundation for the five section 3507 statements. However, the same rationale cannot be applied at the appellate level. The admission of the five section 3507 statements—without inquiring into truthfulness—directly violates the language of the statute. Therefore, the Court finds that failure to raise this issue is conduct falling below an objective standard of reasonableness, and constitutes error on appeal.

The Court also finds that Defendant suffered actual prejudice because of Appellate Counsel's failure to raise this issue on direct appeal. As stated previously, without the five section 3507 statements, the State's case against Defendant was much weaker. On direct appeal, it is likely that, if presented with the issue of the improper foundation for admission of the five section 3507 statements, the Supreme Court would have reversed Defendant's conviction in 2004. Therefore, this Court finds that Defendant suffered actual prejudice because of Appellate Counsel's failure to raise the issue regarding the improper foundation for admission of the five section 3507 statements on direct appeal.

CONCLUSION

The Commissioner's Report and Recommendation is adopted in part as to the Commissioner's factual findings as well as to claims two, three, and four. Upon *de novo* review, claim one is granted. Trial Counsel's failure to object to the

improper foundation for admission of the five section 3507 statements resulted in a violation of Defendant's Sixth Amendment right to confrontation. Claim five also is granted on the basis of Appellate Counsel's failure to raise the same issue on direct appeal, which constituted ineffective assistance of counsel.

THEREFORE, the Court hereby Adopts the Commissioner's Report and Recommendation in part and Denies the Commissioner's Report and Recommendation in part. Defendant Damone Flowers' Motion for Postconviction Relief is hereby **GRANTED**. The judgments of conviction are hereby **VACATED**. Defendant shall be remitted for a new trial.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Cr. ID. No. 9808000280A
	)	
	)	
DAMONE E. FLOWERS,	)	
	)	
Defendant.	)	

Submitted: January 14, 2015
Decided: April 23, 2015

COMMISSIONER'S REPORT AND RECOMMENDATION THAT

DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF SHOULD BE GRANTED.

Andrew J. Vella, Esquire, Deputy Attorney General, 820 N. French Street, 7th Floor, Department of Justice, Wilmington, Delaware, Attorney for the State.

Michael W. Modica, Esquire, 715 N. King Street, Suite 300. P.O. Box 437, Wilmington, Delaware, 19899, Attorney for Defendant Damone E. Flowers.

MANNING, Commissioner

Ex. B

This 23rd day of April, 2015, upon consideration of defendant Damone E. Flowers' Motion for Postconviction Relief, it appears to the Court that:

I. FACTS

The facts giving rise to Flowers' convictions, as set forth by the Delaware Supreme Court in its opinion on Flowers' direct appeal, are as follows:

> On August 1, 1998 Alfred Smiley drove a car with two passengers in the area of 22nd and Lamotte Streets in Wilmington. At some point, Smiley became involved in an argument with several people on the street. A gunshot fired from the sidewalk next to the car struck Smiley in the chest. The car careened out of control on the street and came to rest against a utility pole. Wilmington Police responded to the call and took Smiley to the hospital where he died from the gunshot wound.
>
> The State charged Damone Flowers with Smiley's murder and presented five witnesses at trial who were alleged to have been present at the scene of the shooting. Most of the incriminating evidence was presented through pretrial taped statements [pursuant to 11 *Del. Code* § 3507]. [1] Flowers presented no witnesses and did not testify. A jury convicted Flowers of First Degree Murder and Possession of a Firearm During the Commission of a Felony. The trial judge denied Flowers' motion for a new trial. [2]

II. PROCEDURAL HISTORY

On October 30, 2003, Flowers was convicted of Murder in the First Degree and Possession of a Firearm During the Commission of a Felony, and subsequently sentenced to life in prison, plus ten years. Flowers, with the assistance of counsel, took a direct appeal to the Delaware Supreme Court. The Delaware Supreme Court affirmed the

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[1] 11 *Del. Code* § 3507:

> (a) In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.
> (b) The rule in subsection (a) of this section shall apply regardless of whether the witness' in-court testimony is consistent with the prior statement or not. The rule shall likewise apply with or without a showing of surprise by the introducing party.
> (c) This section shall not be construed to affect the rules concerning the admission of statements of defendants or of those who are codefendants in the same trial. This section shall also not apply to the statements of those whom to cross-examine would be to subject to possible self-incrimination.

[2] *Flowers*, 858 A.2d at 330.

convictions on August 31, 2004.[3] On May 3, 2005, Flowers filed a *pro se* Motion for Postconviction Relief under Superior Court Criminal Rule 61. Flowers' motion encompassed eleven separate grounds for relief and was supported by a handwritten 133 page memorandum of law. The Superior Court denied this motion on December 13, 2005. Flowers then appealed to the Delaware Supreme Court, however, that appeal was dismissed as untimely on April 4, 2006. Finding no relief in state court, Flowers pursued his postconviction claims in federal court. Flowers' federal claims were denied on September 22, 2008.[4]

On May 14, 2012, Flowers filed a second *pro se* Motion for Postconviction Relief pursuant to Rule 61 in the Superior Court ("Rule 61 Motion").[5] On April 25, 2013, with the assistance of counsel ("Rule 61 Counsel"), Flowers filed an Amended and Superseding Rule 61 Motion for Post Conviction relief that is the subject of this Report. Flowers' counsel in the 2003 trial ("Trial Counsel") filed an Affidavit in response to Flowers' claims on November 14, 2013. The State filed its Response on March 18, 2013. At the Court's request, Supplemental briefing was filed by Rule 61 Counsel on December 18, 2014. The State and Trial Counsel, at their election, did not file any subsequent responses.

III. FLOWERS' RULE 61 CLAIMS

In Flowers' Amended and Superseding Rule 61 Motion, Flowers raises five claims of ineffective assistance of counsel at the trial and appellate level. Flowers' claims can be summarized as follows:

[3] *Flowers v. State*, 858 A.2d 328 (Del. 2004).
[4] *Flowers v. Phelps*, 2008 WL 4377704 (D. Del. Sep. 22, 2008).
[5] Due to the retirement of the Honorable Michael P. Reynolds, Flowers' Rule 61 Motion was reassigned to the undersigned Commissioner in November, 2014.

1. Trial Counsel was ineffective by failing to object to the admission of the five section 3507 statements based on inadequate foundation; [6]

2. Trial Counsel was ineffective by failing to object to the admission of the section 3507 statements as cumulative to the respective witnesses' live in-count testimony;

3. Trial Counsel was ineffective by failing to object to allowing the jury to have copies of the section 3507 statements in the jury room during deliberations;

4. Trial Counsel was ineffective by failing to investigate and/or present the exculpatory testimony of five different witnesses;

5. Trial Counsel was ineffective by not raising claims of plain error on appeal to the erroneous admissions of the section 3507 statements during trial and as evidence given to the jury during its deliberations.

Because Flowers' filed his motion prior to the most recent amendment to Rule 61, his claims will be evaluated as Rule 61 existed on April 25, 2013. [7]

IV. LEGAL STANDARD

To prevail on an ineffective assistance of counsel claim, a defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness" and, (2) that the deficient performance

[6] To put Flowers' claims into context, a general overview of § 3507 is helpful at this point. 11 *Del. C.* § 3057 allows a party (typically the State, but the law is party neutral) to use a prior out–of–court statement (typically recorded) of a witness other than the defendant, as affirmative evidence in its case. To introduce a prior statement under the statute, the proponent must call the witness to the stand, must elicit testimony from the witness about the event perceived (typically the crime itself) that is the subject of the prior statement, and must ask the witness if he or she was telling the truth about what was observed when the prior statement was made. The witness is not required to offer live in-court testimony consistent with the prior statement, or to agree that the told was told about the prior event. If the proponent is unable to elicit the desired substantive testimony from the witness, and after the above foundation has been established, the witness is excused from the witness stand and the proponent will call a second witness (typically a police officer) to introduce the prior recorded statement. At that point, while the original witness remains in the courtroom, the prior statement is played (or read) for the jury. The prior statement must be near-verbatim, and not a summary based on the second witness' recollection. After the prior out of court statement is played for the jury, the original witness is recalled to the stand. The proponent may ask the witness additional questions, but is not required to do so. At that point, opposing counsel is entitled to cross-examination of the witness on both the live in-court testimony, and the prior out of court statement. *See Washington v. State*, WL 961561, at *3 (Del. March 12, 2013).

[7] The current Rule 61 was amended effective June 4, 2014.

prejudiced the defense.[8] The first prong requires a defendant to show by a preponderance of the evidence that trial counsel was not reasonably competent, while the second prong requires a defendant to show that there is a reasonable probability that, but for trial counsel's unprofessional errors, the outcome of the proceedings would have been different.[9]

When a court examines a claim of ineffective assistance of counsel, it may address either prong first; where one prong is not met, the claim may be rejected without contemplating the other prong.[10]

Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.[11] An error by trial counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment.[12]

Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.[13] Moreover, there is a strong presumption that trial counsel's conduct constituted sound trial strategy.[14]

In considering post-trial attacks on trial counsel, *Strickland* cautions that trial counsel's performance should be reviewed from trial counsel's perspective at the time decisions were being made.[15] It is all too easy for a court, examining counsel's defense

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[8] *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984).
[9] *Id.*
[10] *Id.* at 697.
[11] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).
[12] *Strickland*, 466 U.S. at 691.
[13] *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. Oct. 31, 2008).
[14] *Strickland*, 466 U.S. at 689.
[15] *Id.*

after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.[16] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting efforts of hindsight. Second guessing or "Monday morning quarterbacking" should be avoided. [17]

The Supreme Court of the United States recognized that there are countless ways to provide effective assistance in any given case. Additionally, the Court cautioned that reviewing courts must be mindful of the fact that unlike a later reviewing court, trial counsel observed the relevant proceedings, knew of materials outside the record, and interacted with his client, with opposing counsel and with the judge.[18]

Even the best criminal defense attorneys would not defend a particular client in the same way. Consequently, trial counsel must be given wide latitude in making tactical decisions.[19] Counsel's representation must be judged by the most deferential of standards and there is a strong presumption that trial counsel's conduct constituted sound trial strategy.[20]

V. PROCEDURAL BARS

Superior Court Criminal Rule 61 governs motions for postconviction relief.[21] Before addressing the substantive merits of any claim for postconviction relief, the Court must consider the procedural requirements of Rule 61.[22] Rule 61(i) establishes four procedural bars to a motion for postconviction relief.[23]

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[16] *Id.*
[17] *Id.*
[18] *Harrington v. Richter*, 562 U.S. 86, 105 (2011).
[19] *Id.*
[20] *Strickland*, 466 U.S. at 689; *Harrington*, 562 U.S. at 107.
[21] Super. Ct. Crim. R. 61.
[22] *Younger v.* State, 580 A.2d at 554.
[23] Super. Ct. Crim. R. 61(i)(1)–(4).

Rule 61(i)(1) provides that a motion for postconviction relief must be filed within one year of a final judgment of conviction.[24] Under Rule 61(i)(2) any ground not asserted in a prior postconviction proceeding is barred "unless consideration of the claim is warranted in the interests of justice."[25] Rule 61(i)(3) bars consideration of any claim not asserted at trial or on direct appeal unless the movant can show "cause for relief from the procedural default" and "prejudice from violation of the movant's rights."[26] Rule 61(i)(4) provides that any ground for relief that was formerly adjudicated is thereafter barred.[27]

Even if a procedural defect exists, the Court may consider the merits of the claim if the Defendant can show that an exception found in Rule 61(i)(5) applies.[28] Rule 61(i)(5) provides that a defect under Rule 61(i)(1)–(4) will not bar a "colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."[29]

At the outset, the Court notes that this is Flowers' second Rule 61 Motion. As such, the motion is repetitive under Rule 61(i)(2) and falls outside the time limits for filings set by Rule 61(i)(1).[30] Flowers seeks to overcome these procedural bars to relief by utilizing Rule 61(i)(2), for claims made in the "interest of justice" that were not raised in prior proceedings, and Rule 61(i)(5), for claims based on a "colorable claim that there was a miscarriage of justice."

[24] Super. Ct. Crim. R. 61(i)(1).
[25] Super. Ct. Crim. R. 61(i)(2).
[26] Super. Ct. Crim. R. 61(i)(3).
[27] Super. Ct. Crim. R. 61(i)(4).
[28] Super. Ct. Crim. R. 61(i)(5).
[29] *Id.*
[30] Flowers' judgment of conviction became final on September 16, 2004.

A review of Flowers' five claims, shows that none were formerly adjudicated in prior proceedings either at the trial, appeal or post conviction level, making Rule 61(i)(4) inapplicable.[31]

Flowers argues that the procedural bar of Rule 61(i)(3) is inapplicable here because although his five claims were not asserted in any prior proceedings, he has shown cause for relief from the procedural default. Flowers' argues that the procedural default was created by Trial Counsel's ineffectiveness in not raising these claims during trial or on appeal. According to Flowers, the result of this ineffectiveness prejudiced him: namely that he was convicted at trial but should not have been and that his case should have been reversed on appeal, but was not.

In opposition, the State argues that all of Flowers' claims are time barred, and that the first claim is procedurally barred because it does not satisfy the requirements of Rule 61(i)(5) because Flowers has failed to prove the existence of a constitutional violation under the rule. The State relies on *State v. Taylor*, to support its argument. In *Taylor*, the Superior Court stated the following:

> [In] order to invoke Rule 61(i)(5) and by-pass Rule 61(i)(3)'s procedural bars, [a defendant] not only must raise a colorable claim that there was a miscarriage of justice, he also must show that the miscarriage of justice was caused by a constitutional violation. Further, he must demonstrate that the constitutional violation involved not only a mistake, but [] must [also] show that the mistake undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to his conviction. While the thresholds imposed by Rules 61(i)(3),(4) and (5) are not insurmountable, they are substantial and they are enforced.[32]

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[31] In this case, the only similar issue previously adjudicated was the voluntariness of Rosetta Sudler's § 3507 statement. Trial Counsel objected during trial to the admission of Sudler's statement, but was overruled by the trial judge. Trial Counsel subsequently appealed the issue to the Delaware Supreme Court, albeit unsuccessfully. *See Flowers v. State*, 858 A.2d 328 (Del. 2004). The foundational element at issue in Flowers' present Rule 61 Motion, truthfulness, was not raised at trial or any subsequent state or federal proceeding.

[32] *State v. Taylor*, 2000 WL 33113935, at *2 (Del. Super. Oct. 27, 2000).

In the present case, the Court finds that Flowers' first claim is not barred by Rule 61 because a constitutional violation occurred when the § 3507 statements were admitted without the proper foundation. The Delaware Supreme Court has held that "[t]he Sixth Amendment requires an entirely proper foundation, if the prior statement of a witness is to be admitted under § 3507 as independent substantive evidence against an accused."[33] Additionally, in *Webster v. State*, [34] the Delaware Supreme Court held that "when a petitioner makes a colorable claim to a mistaken waiver of important constitutional right Rule 61(i)(5) is available to him."[35]

There is no evidence in the record that Flowers knowingly waived his Sixth Amendment right to counsel or to confront his accusers by waiving the § 3507 foundation requirements. As noted by this Court in *Taylor*, the burdens of Rule 61(i)(5), while high, are not insurmountable.

Because the constitutional nature of the claim is "manifest" and Flowers has presented a "colorable claim," it is appropriate for the Court to consider it under Rule 61(i)(5).[36] When a petitioner makes a "colorable claim," further inquiry is required.[37] Thus, as a threshold matter, the requirements of Rule 61(i)(5) have been satisfied and the procedural bars of Rule 61(i)(1), (2) or (3) are inapplicable.

The Court will now address the merits of each of Flowers' claims.

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[33] *Blake v. State*, 3 A.3d 1077, 1083 (Del. 2010).
[34] *Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992).
[35] While the *Webster* Court examined Rule 61(i)(5) in the context of an improper plea colloquy, the underlying claim, as in this case, involved a constitutional violation.
[36] *State v. Rosa*, 1992 WL 302295, at *3–4 (Del. Super. Sep. 29, 1992).
[37] *Webster*, 604 A.2d at 1367.

VI. DISCUSSION

First Claim

Flowers' alleges that Trial Counsel was ineffective for failing to object to the admission of the five out of court witness statements into evidence, pursuant to § 3507. Flowers argues the State failed to establish the proper legal foundation prior to admission of the § 3507 statements, because none of the witnesses were asked on direct examination if the statement given about the event was truthful, or not.

The Court's review of the record reveals that none of the five witnesses were asked, nor testified about, the truthfulness of their prior recorded § 3507 statements during direct examination. Thus, the question before the Court is twofold: (1) was the witness required to testify as to the truthfulness of the prior statement as a foundational condition to its admission under § 3507 in 2003, and (2) assuming the State had not established the proper foundation, was Trial Counsel's failure to object to the admission of the § 3507 statements objectively unreasonable and prejudicial?

1. Deficient performance analysis under *Strickland*.

Title 11 *Del. C.* § 3507 has received extensive scrutiny from the Delaware Supreme Court over the last 45 years. First enacted in enacted in 1970 as § 3509, it was changed to § 3507 with the 1974 Delaware Code revisions. The first examination of the statute by the Delaware Supreme Court was in *Keys v. State*, which established the general foundation requirements for admission of a statement pursuant to § 3507.[38] The foundational issue of "truthfulness" was not before the Court in *Keys*. However, in 1991, the Delaware Supreme Court in *Ray v. State*, held that a "witness' statement [under § 3507] may be introduced only if the two-part foundation is first established: the witness

[38] *Keys v. State*, 337 A.2d 18 (Del. 1975).

testifies about both the events and whether or not they are true." [39] Shortly thereafter, in the 1993 case *Feleke v. State*, the Delaware Supreme Court again had occasion to reiterate that the § 3507 foundation requires that "[f]irst, the witness must testify as to the truthfulness of the statement. Second, the witness must testify as to the events perceived or heard." [40]

In 2010, as part of a trilogy of consolidated cases addressing § 3507, the Delaware Supreme Court again squarely addressed the foundational requirements in *Blake v. State*, and held that:

> A two-part foundation must be established by the State during its direct examination before a witness' prior statement can be admitted under section 3507. First, the witness must testify about the events. Second, the witness must indicate whether or not the events are true.[41]

The *Blake* Court explained the "foundational requirements that the witness indicate whether or not the prior statement is true [or not] is one reason why the substantive operation of section 3507 does not violate the Sixth Amendment."[42] Consequently, a Sixth Amendment violation occurs if a § 3507 statements is played for the jury without the proper foundation. *Blake* makes clear that this holding is not new, and that in fact, the Court has been consistent in its foundation requirements for § 3507 since well before Flowers' 2003.

As Justice Holland explained in *Blake*:

> After *Ray* and *Moore* were decided, there was no reason for confusion, because our holding in *Moore* was completely consistent with *Ray*, where we construed *Johnson v. State* as standing for the proposition that the witness must testify about " *whether or not* " the prior statement is true. In *Johnson* we specifically recognized that the drafters of section 3507

[39] *Ray v. State*, 587 A.2d 439, 443 (Del. 1991).
[40] *Feleke v. State*, 620 A.2d 222, 226–7 (Del. 1993) (citing *Ray v. State*, 587 A.2d 439, 443 (Del. 1991).
[41] *Blake v. State*, 3 A.3d 1077, 1081 (Del. 2010).
[42] *Id.* at 1082.

> "expressly contemplated that the in-court testimony [of a witness] might be inconsistent with the prior out-of-court statement. One of the problems to which [section 3507] is obviously directed is the turncoat witness . . . ." Accordingly, our 1995 decision in *Moore* clearly explained, "*[u]nder section 3507, there is no requirement that the witness either affirm the truthfulness of the out-of-court statement, or offer consistent trial testimony.*" Moreover, the foregoing sentence that is quoted from *Moore* is followed by "*See Ray v. State*, Del.Supr., 587 A.2d 439, 443 (1991) ("[A] witness statement may be introduced only if . . . the witness testifies about both the events and *whether or not they are true*.").[43]

In its Response Brief, the "State acknowledges that one of the necessary foundational questions was not asked at trial (i.e. whether the statement given by the witnesses [sic] to the police was true)."[44] The State argues, however, that "at the time of Flowers' trial, the Delaware Supreme Court's view on this was that under § 3507, there is no requirement that the witness either affirm the truthfulness of the out-of-court statement or offer consistent trial testimony."[45] The State cites to *Moore v. State*, to support this argument.[46]

The State's argument in response, while a correct statement of the law, is misplaced and confuses two distinct issues. Flowers' is not arguing that the witnesses failed to "affirm" the truthfulness of their prior statements; rather, Flowers' is arguing that they were never asked by the State about truthfulness of the prior statements, *at all*.

Indeed, *Moore* does not stand for the proposition that the witness must agree or "affirm" that his or her prior statement about the events perceived was *actually true* as part of the § 3507 foundation. Rather, the § 3507 foundation requires that the proponent of the witness must elicit testimony from the witness about the events observed and

[43] *Id.*
[44] State's Resp. Br. at 10.
[45] *Id*.
[46] *Moore v. State*, 1995 WL 67104 at *2 (Del. Feb. 17, 1995).

whether or not the prior statement made about it was true.[47] The actual answer from the witnesses (e.g. yes, no, I can't remember) is irrelevant and not a determinative factor in the basic foundational requirements. While this may seem peculiar, it makes sense viewed in the light of a "turncoat" witness who suddenly disavows a prior statement once on the stand in an attempt to help the defendant's case. For example, in *Washington v. State*, a witness, who was hostile to the State by the time of trial, was asked if he "told the truth" in a prior statement about a shooting, he answered "no." [48] After determining the statement was voluntarily made, the trial court allowed the prior statement into evidence under § 3507.[49] If a witness was *required* to "affirm" the truthfulness of the prior statement, as a condition of admission under § 3507, the purpose of the statute would be easily defeated.

The law in 2003 did not require a witness to "affirm" the truthfulness of the prior statement, nor does it today. More importantly, the law in 2003, as today, only requires the proponent to ask the witness about the truthfulness of the prior statement as part of the § 3507 foundation. [50]

Both the State and Trial Counsel reasonably should have been aware of the state of the law at the time of the trial.[51] The *Blake* opinion removes any doubt that the foundational requirements for admission of a statement under § 3507 were firmly

[47] *Feleke*, 620 A.2d at 226–227.
[48] *Washington v. State*, 2013 WL 961561, at *2 (Del. Mar. 12, 2013).
[49] *Id.*
[50] The State appears to overlook that it conceded such a fact when it argued *Blake*. "The State acknowledges that none of the five section 3507 witnesses was asked, on direct examination, whether or not the statement they made to police was truthful. The State also acknowledges that this Court, in *Ray v. State*, held that such a question was foundational." *See Blake*, 3 A.3d at 1081.
[51] *See also Woodlin v. State*, 3 A.3d 1084, 1087–88 (Del. 2010) (stating that as of the 1991 opinion in *Ray v. State*, "the declarant must also be subject to cross-examination on the content of the statement as well its truthfulness.").

established in 2003 and have not changed.[52] Therefore, failure by the State to ask the witnesses about the truthfulness of their prior statements was error. Likewise, failure of Trial Counsel to object to the introduction of the statement without the proper foundation was also error.

The State argues that Flowers' claim on this issue is "simply an allegation of error by the trial judge cloaked in an ineffective assistance of counsel claim . . . ."[53] While that may be true to an extent, Flowers' claim could have been presented as both plain error (as was the case in *Blake*), or an ineffective assistance of counsel claim, as it is here. While the form of the claim in this case is different, the substance is the same as *Blake*. No matter the procedural posture of the claim, the holding in *Blake* makes clear that an incomplete § 3507 foundation is a constitutional violation that *can* require reversal, depending on the remaining facts of the case.[54]

It is clear from the record that Trial Counsel could have, and should have, objected to the incomplete foundation prior to the admission of the five § 3507 statements in this case. The State argues that had Trial Counsel objected, the State would have cured the error by simply asking the necessary question regarding truthfulness, and then introduced the § 3507 statements anyway.[55] A review of the trial transcripts shows that solution to be undoubtedly far easier said than done given the State's witnesses' combative attitudes and general lack of cooperation. What could or might have happened at trial is not for the Court to consider; only what actually occurred. The law is clear, it is

[52] *Blake*, *3* A.3d at 1083 (stating that "[t]his Court has consistently and unequivocally held a witness' statement may be introduced only if the two-part foundation is first established.").
[53] State's Response Brief at 10.
[54] *Blake*, 3 A.2d at 1083 (holding that the "erroneous admission of the five witnesses' statements under section 3507 without a proper foundation requires Blake's convictions to be reversed unless those errors were harmless.").
[55] State's Resp. Br. at 11.

the proponent's burden to establish a complete and proper foundation *before* seeking to admit a statement under § 3507, arguing it could have been done, *post hoc*, is inadequate.

It is apparent that Trial Counsel understood the general foundational issue as evidenced by his attempt to bar the admission of Rosetta Sudler's § 3507 Statement on the question of voluntariness. In his Affidavit, Trial Counsel acknowledges that he did not object on the basis of truthfulness, and stated that he "felt at the time that the other foundational requirements for the admissibility of the statements had been met and I was intent on effectively cross-examining the witnesses." Trial Counsel also expressed concern that had he objected, and been overruled, he would have potentially lost creditability with the jury.

The Court notes that Trial Counsel was very well prepared and his cross-examinations were highly effective. However, the Court is not persuaded by the argument that Trial Counsel would have lost creditability with the jury had he objected and been overruled. In fact, the trial transcript reveals that Trial Counsel was not afraid to object and did frequently, at times with great success.

Finally, Trial Counsel stated in his Affidavit that "at the time this trial took place, the law on prior voluntary out-of-court statements was more favorable to the State than it is now." The Court notes that the statutory language of 11 *Del. C.* § 3507 was no different in 2003 than it is today. And, more importantly, the fact remains that the Delaware Supreme Court's rulings in *Keys*, *Ray*, *Moore*, and *Feleke*, were all in existence prior to the trial in 2003. While *Blake* is a 2010 case, its holding did not create any new law or condition predicate for the admission of § 3507 statements; it simply applied the law as it existed, since inception, to the case before it.

Viewing Trial Counsel's performance objectively and with all possible deference, there appears to be no reasonable tactical explanation for Trial Counsel to have *not* objected. Trial Counsel conducted an adept and skilled flank-attack on the § 3507 statements by attacking the various witnesses' creditability, memory, observations, motives and inconsistent testimony. However, Trial Counsel seems to have missed the frontal-attack available to him on the foundational issue of truthfulness.

The importance and impact of the § 3507 statements to the outcome of Flowers' trial is hard to overstate. Much like the facts in *Blake*, without the § 3507 statements, the State's case against Flowers was far weaker. The § 3507 statements constituted the bulk of the evidence against Flowers. Not that such evidence is required for a conviction, but the record reveals that no gun was recovered, no ballistics tests were conducted, no fibers were collected or tested, no fingerprints were lifted, and no DNA was compared. The State did not present any physical evidence other than the autopsy findings, various photos and maps, for a total of 35 Exhibits.[56] The eyewitnesses presented by the State were forgetful, uncooperative and gave conflicting and inconsistent testimony, to say the least.

In light of the significance of the five § 3507 statements to this case, and no evidence of any reasonable trial-strategy based reason to have *not* objected, the Court finds, by a preponderance of the evidence, that Trial Counsel's representation was objectively unreasonable and therefore deficient under the first prong of *Strickland*.

2. Prejudice Analysis under *Strickland*

Having determined that Trial Counsel's representation was deficient, the Court must now determine if but for Trial Counsel's professional errors "the result of the

[56] Criminal Trial Activity Sheet, Docket ID. 77.

proceeding would have been different." To prevail on this prong of *Strickland*, Flowers is required to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Reasonable probability for this purpose means a probability sufficient to undermine confidence in the outcome."[57]

Therefore, the question becomes: is there a reasonable probability that without the § 3507 statements the outcome of the case would have been different? In this case, unlike *Blake*, there was some live in-court (non-§ 3507) testimony that inculpated Flowers, necessitating a more detailed review and analysis than was needed in *Blake*. It is impossible to know what any given jury might have done without the § 3507 statements, but it is possible to closely scrutinize the live in-court testimony to determine if a reasonable trier of fact would have acquitted Flowers without the § 3507 Statements.

Live In-Court Trial Testimony

Testimony from three of the witnesses, Tysheik McDougall, Othello Predeoux and Rosetta Sudler, absent their respective § 3507 statements, failed to inculpate Flowers.

Tysheik McDougall made it clear during her in-court testimony that while she did know Flowers as "Moan" she testified that she "didn't see anything[,] I wasn't there[,] I wasn't there, so I didn't see anything."[58] McDougall also testified on direct that the "shooting happened on 22nd Street, I'm on 23rd Street. I don't got bionic eyes or something. I can't see around no corners. I was not a witness to anything."[59]Absent McDougall's § 3507 statement, her testimony is largely irrelevant.

[57] *Swan v. State*, 28 A.3d 362, 384 (Del. 2011) (internal quotations omitted).
[58] Tr. of McDougall at 45.
[59] *Id*. at 158–159.

Othello Predeoux was a jailhouse informant who was not interviewed by police until July of 2002, while incarcerated in Symrna, Delaware. His live testimony also failed to implicate Flowers as the shooter. Predeoux testified that he talked to Detective Brock about an incident that happened back in 1998 and it involved Flowers. Predeoux stated, "I just remember it was some shooting and somebody got killed." However, when asked on direct examination if he knew who was shooting, Predeoux replied, "Nah, I didn't see who was shooting, it was a whole bunch of people. I couldn't really decipher where it was coming from."[60] Thus, without Predeoux's § 3507 statement, the substance of Predeoux's in-court testimony was that he was present at the time for the shooting but did not see who the shooter was.

Finally, the trial transcript reveals that Rosetta Sudler was a combative and uncooperative witness who was high on drugs at the time of the incident. Absent her § 3507 statement, however, Sudler never implicated Flowers as the shooter during her in-court testimony.

The remaining two witnesses, however, offered live in-court testimony that inculpated Flowers as the shooter. The first was 16 year-old Matthew Chamblee. Trial testimony indicates that Chamblee was shown two photo-arrays of suspects (for a total of 12 pictures) and selected Flowers' picture as the shooter. The critical aspects of his direct-testimony, in pertinent part, are as follows:

> Q: [by the prosecutor] Did you see anyone get shot that night?
>
> A: [by Chamblee] I didn't see nobody get shot, but I seen some shots fired.[61]

[60] Tr. of Predeoux at 70.
[61] Tr. of Chablee, 72.

* * *

Q: Okay. You say that you did see someone shot that night?

A: I seen a person wearing something black, but I ain't never seen the person who's face—I just see shades and it looks like one of those beanie hats or something.

Q: Shades and a beanie hat?

A: Yes.

Q: Do you recall what kind of shades?

A: They looked like they was kind of yellow, wide shades.[62]

* * *

Q: Did you see who was doing the shooting?

A: Actually, I didn't see the person, but I can tell with the beanie hat and glasses the person who was doing it—what the person was doing.[63]

* * *

Q: And do you remember what the lighting conditions were that night? Could you see it clearly or not?

A: Not clearly.

Q: And could you see the person holding the gun?

A: Yes.

Q: Okay. And did you recognize the person holding the gun?

A: Yes.

Q: Is that person in the courtroom today?

A: Yes.

Q: Where is he?

A: Sitting over there [identifies Flowers].[64]

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[62] *Id.* at 73.
[63] *Id*. at 81.
[64] *Id*. at 82.

At the conclusion of Chamblee's direct examination, the State played his § 3507 statement for the jury. Upon cross-examination by Trial Counsel, Chamblee gave the following testimony:

> Q: But do you allow for the possibility that you could be mistaken about [the identification of the shooter]?
>
> A: It is a possibility.
>
> Q: That you might be mistaken about that?
>
> A: Slight possibility.[65]

On recross-examination Chamblee testified as follows in response to Trial Counsel's questions:

> Q: So I take it if we can boil this whole thing down based upon everything you've said in response to [the prosecutor's] question you're saying that the shooter could be [Flowers]?
>
> A: Could be.
>
> Q: You're also saying that the shooter could not be [Flowers]?
>
> A: Right.
>
> Q: And that's the degree of your certainty?
>
> A: Right.[66]

Cross-examination by Trial Counsel also elicited that Chamblee was mistaken regarding the presence of street lights on the street the night of the shooting and that Chamblee actually did not know personally or hang-out with the victim of the shooting, despite his prior day's testimony that he in fact did.[67] Thus, without the §3507 statement,

[65] *Id*. at 97.
[66] Oct. 25, 2003 Tr. of Chamblee at 29.
[67] Id. at 30.

a jury would be left with a witness that identified Flowers as the shooter, but one who admitted he could not see clearly on the night of the shooting, did not see the shooter's face, and ultimately admitted he could just as equally be mistaken.[68]

The second witness, Vernon Mays, testified on direct examination that he did not see who shot the gun. Mays stated, "I just faintly glanced at a couple of people, but I can't really tell you I saw a lot, because mines was something like a five-second glance."[69] Mays also testified that he looked through "four trays" of "mug shots" before picking out a suspect. Mays testified that the person he picked-out "looked like the individual to me. But it is like I told him, [presumably Detective Brock] I really can't say 100 percent for sure."[70]

On cross-examination by Trial Counsel, Mays' ability to identify Flowers as the shooter simply unraveled. The following exchange is notable:

> Q:…you did not get a good look at the individual who fired the shots on August 1st of 1998; is that correct?
>
> A: That is correct.
>
> Q: Okay. And if I understand what you said yesterday, it is my understanding that what you're saying is that the person who's photograph you picked out and the person who is sitting in the court at this time looks like or resembles the shooter?
>
> A: That's correct.

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[68] Most of the cross-examination in this case touched upon the content of the various § 3507 statements. By operation of law, Trial Counsel was not afforded an opportunity to cross-examine a witness regarding his or her live in-court testimony until after the § 3507 statement was played for the jury, usually at the conclusion of the direct examination by the State. *See Smith v. State*, 669 A.2d 1, 8 (Del. 1995). Therefore, the Court has considered all of the cross-examination in reaching its conclusion. The Court cannot reasonably parse-out what Trial Counsel would, and would not have asked, if the § 3507 statements had not been introduced in the first place. Logic dictates, however, that if a witness did not identify Flowers or offer inculpatory testimony on direct, Trial Counsel may not have conducted any cross-examination. Once a § 3507 statement was introduced, Trial Counsel was then forced to conduct cross-examination to attack the contents of that statement and the live in-court testimony—damaging or not.

[69] Oct. 22, 2003 Tr. of Mays at 63.

[70] *Id*. at 66.

Q: You have to speak up, please.

A: That's correct.

Q: You are not saying, if I understand you, correctly, that he is the shooter, are you?

A: No, sir. I can't say that one hundred percent, no.

Q: In fact, you're really not sure, are you?

A: No, not really.

Q: As you sit here today?

A:Yes.[71]

Mays also testified, in contradiction of Chamblee's testimony, that the shooter was not wearing a hat or yellow tinted glasses.[72] Finally, Mays offered confusing testimony on cross-examination regarding his § 3507 statement about the person he picked out from the police photos. Mays stated that the person in the photo he selected was someone he knew to be a high school track or football star the last time he was home on leave from the Army, in 1983 or 1984. The problem with Mays testimony on this point, as pointed out by Trial Counsel, was that Flowers was only seven years old in 1983.[73]

At the close of its case-in-chief, the State offered one final witness who was not a witness to the shooting, Adrienne Dawson. Dawson is Flowers' sister and she testified that Flowers had lived with her in her house "off and on for years" prior to the shooting. She also testified that after the date of the shooting, August 1, 1998, Flowers never came

[71] *Oct. 23, 2003* Tr. of Mays at 18.
[72] *Id*. at 28–29.
[73] *Id*. at 42–45.

back and lived with her.[74] According to testimony from Detective Brock, Flowers was subsequently located living in North Carolina in November of 1999 and was extradited to Delaware in February of 2000. [75] Based on this information, the State argued flight as identity and conciseness of guilty on Flowers' part. However, Flowers' whereabouts between those dates is unknown. Dawson and Detective Brock's testimony also reveals that Flowers did not have a very stable or permanent address in Delaware prior to the shooting, or exactly when he went to North Carolina.[76] Thus, while this information is certainly relevant and somewhat probative of Flowers' guilt, it is far from concrete evidence of deliberate flight or proof of guilt.

Conclusion

The legal standard the Court must use when reviewing Flowers' claim is worth highlighting, as it shapes the outcome. *Strickland* explicitly rejects the higher, preponderance of the evidence standard of proof used under the first prong, and instead, adopts a lower, reasonable probability standard of proof for the second prong.[77] Consequently, Flowers is only required to show a "reasonability probability" that the outcome would have been different to gain relief under the second prong of *Strickland*. Thus, while a jury, hearing only the direct testimony and cross-examination of Chamblee, Mays and Dawson may have still returned a guilty verdict; there is also the very real likelihood that a jury, hearing that same testimony, would have reached a different conclusion.

[74] Tr. of Dawson at 173–176.
[75] Tr. of Detective Brock at 33–34.
[76] Tr. of Detective Brock at 33; Tr. of Dawson at 175.
[77] *Strickland*, 466 U.S. at 693–694.

The prejudice analysis under *Strickland* is analogous to a harmless error analysis, and is thus instructive. In the line of § 3507 cases leading up to and including *Blake*, the Delaware Supreme Court has applied a harmless error analysis in the context of an incomplete § 3507 foundation. The legal standard for this analysis was recently reiterated by the Delaware Supreme Court. In *Hansley v. State*, the Court explained that:

> When reviewing claims for harmless error, the reviewing court considers the probability that an error affected the jury's decision. To do this, it must study the record to ascertain the probable impact of error in the context of the entire trial. As a result, any harmless error analysis is a case-specific, fact-intensive enterprise. This approach indicates that the reviewing court must consider both the importance of the error and the strength of the other evidence presented at trial.[78]

After closely examining the trial transcripts, it is clear to the Court that the non-§3507 testimony was far from overwhelming or convincing. Given the high burden of proof in a criminal case, and distinct lack of other evidence, the Court must conclude that Trial Counsel's error was prejudicial and not harmless beyond a reasonable doubt. If the non-§ 3507 testimony was more reliable, or there was other corroborating evidence, then the prejudice created by the erroneous admission of the § 3507 statements may have been mitigated, and the Court's holding in this regard might well be different.

Nonetheless, because a fundamental constitutional violation occurred in this case, and in light of what little other evidence was available to the jury, the Court is not confident in the reliability or integrity of the underlying conviction in this case. In the Court's opinion, based on the testimony presented at trial and the lack of other physical or corroborating evidence, it is entirely reasonable, and probable, to see how a jury *would* have acquitted Flowers in the absence of the five § 3507 statements; the in-court testimony was simply to equivocal. Thus, the Court is satisfied that the second prong of

[78] *Hansley v. State*, 104 A.3d 833, 837 (Del. 2014) (internal quotations and citations omitted).

Strickland is also satisfied—had the § 3507 statements not been presented at trial, there is a *reasonable probability* that the outcome would have been different.

Accordingly, Flowers should be granted relief on this claim.

Second Claim

Flowers next alleges that Trial Counsel was ineffective for failing to object to the admission of the five § 3507 statements because they were cumulative to the in court testimony of the witnesses.

While parts of the § 3507 statements were arguably cumulative of the in-court testimony, the critical aspects of the statements, as previously noted, certainly were not. In any event, an objection as to admission of the § 3507 statements as cumulative would have been in contravention of the plain-language of the statute. Furthermore, as Trial Counsel and the State pointed out in their briefing, the state of the law governing cumulative § 3507 statements was not as developed in 2003 as it is today. It is not until 2012, in *Richardson v. State*, that the groundwork for an objection on this basis is clearly delineated.[79] In *Richardson*, the Delaware Supreme Court noted, albeit in dictum, that a cumulative § 3507 statement would be subject to exclusion on that ground, and that § 3507 does not "trump" all other rules of evidence.[80] Therefore, it was not unreasonable for Trial Counsel to have not objected on this basis in 2003. Accordingly, this claim is without merit.

Third Claim

Flowers' third claim is that Trial Counsel was ineffective for allowing the jury to have the recorded § 3507 statements in the jury room during deliberations.

[79] 43 A.3d 906 (Del. 2012).
[80] *Id*. at 909.

Setting aside any procedural bars to this claim, it is without merit for two reasons. First, at the time of Flowers' 2003 trial, *Flonnery v. State* was still three years away. In *Flonnery,* the Delaware Supreme Court first announced the "default rule" that § 3507 statements do not go back to the jury during deliberation. [81] Second, Flowers can only offer speculation that the jury actually viewed the § 3507 statements during deliberations. Without concrete evidence that the jury viewed and relied upon the § 3507 statements during deliberations, thus giving the § 3507 statements "undue emphasis and credence," any prejudice argument is nothing more than conjecture at this point.[82] This claim should also be denied.

Fourth Claim

Flowers' fourth claim is that Trial Counsel was ineffective for failing to call five potentially exculpatory witnesses during the trial. The witnesses were:

1. Earl Bazemore

According to the Affidavit of Trial Counsel, Bazemore, who was only 11 years old at the time of trial, could not be located at the time of the trial, and even if he was available to testify, would not have been "overly exculpatory."[83] According to the State, Bazemore was shown a large number of suspect photographs, but was unable to identify the shooter. As noted by the State, this was not a case in which Bazemore identified another person as the shooter—he simply could not identify *anyone*. Additionally, and perhaps most importantly, it is unknown if Flowers' photograph was one of the photos that Bazemore even had the opportunity to view. As such, Trial Counsel cannot be faulted for not calling Bazemore as a witness, even if he could have been located.

[81] *See Flonnery v. State*, 893 A.2d 507 (Del. 2006).
[82] *Id*. at 526.
[83] Affidavit of Trial Counsel at 5.

2. Michael Bartley

Bartley claims to have been standing next to Flowers at the time of the shooting. And, presumably, he would have testified that Flowers was *not* the shooter. The problem with Bartley's story, among other things, is that he did not share it with anyone until 2012, while he was incarcerated with Flowers. There is no evidence that Trial Counsel even knew of the existence of Bartely, much less his exculpatory observations, in 2003. Perhaps Flowers did not recall that Bartley was standing next to him at the time of the shooting until many years after the trial. Plausible or not, Trial Counsel cannot be said to be deficient for failing to call a witness he did not even know existed at the time of the trial.

3. Bruce Duncan

Duncan's presence at the scene of the crime was apparently unknown to Flowers and the State until he sent letters to the State indicating that Flowers was not the shooter. In these letters, Duncan stated that, for a price, he would tell the State who the shooter was. Flowers now claims Trial Counsel was deficient for failing to call Duncan as a witness at his trial.

The problem with Duncan's testimony is twofold. First, there is no evidence he was actually at the scene of the crime—he was not interviewed by police until December 19, 2001—while incarcerated on other charges.[84] Secondly, Duncan was not offering this information as an unbiased Good Samaritan; rather, he was only willing to bargain it in exchange for his freedom.

[84] It is also worth noting that the murder in this case occurred on August 1, 1998. Obviously, Duncan sat on this information until it was useful to him, a factor that would surely have hurt his creditability on cross-examination.

Finally, in his Affidavit, Trial Counsel noted that while he did not call Duncan as a witness, he "is quite sure at this time that such a decision was made for strategic reasons." The Court will take judicial notice of the fact that Trial Counsel has been a practicing attorney since 1975, and is one of the State's most prolific and experienced criminal defense attorneys. While it would be helpful to the Court's decision if Trial Counsel could recall a specific reason he did not call Duncan, it at least appears that Trial Counsel considered calling Duncan as a witness, but made a conscious decision not to. Additionally,

In light of the dubious circumstances surrounding Duncan's proposed testimony, and the fact Trial Counsel made a deliberate, but now forgotten reasoned decision not to call him, the Court has no concrete basis in the record to second-guess that decision almost twelve years later.

4. Marvin Swanson

According to both parties, Swanson gave two statements to the police. In one of the statements, made four years after the date of the incident, one of the shooters identified by Swanson may have been Flowers himself. Given this expected testimony, it is self-evidence Trial Counsel did not call Swanson as a witness – his testimony was a dangerous and unknown proposition.

5. Chermaine Mayo

Flowers claims that Trial Counsel was deficient for failing to call Mayo as a witness at trial. The record indicates that at the time of the trial, Trial Counsel understood Mayo to have *identified* Flowers as the shooter.[85] Flowers has since presented information to the Court that Mayo, in a taped statement made to the police,

[85] Witness #6, Detective Andrew Brock's police report, attached to Trial Counsel's Affidavit.

presumably on or about August 7, 1998, but not transcribed until 2011, actually did not identify Flowers as the shooter.[86] It is unclear, at this point at least, if Trial Counsel listened to, or even knew of, the recorded statement prior to trial. Trial Counsel states in his Affidavit that if the taped statement was made on the same date as the statement in the police report, it is inconsistent with the police report and it should have been provided to Flowers prior to trial. Based on the current state of the record, the Court is unable to conclude if the State committed a discovery violation at this point. In any event, in her recorded and transcribed statement, Mayo also told police that she didn't see the shooting and that other people told her that a person named "Joe" was the shooter.

In light of the apparent hearsay and inconsistent nature of Mayo's testimony, it is again apparent to the Court why neither party called Mayo as a witness at trial.

For the aforementioned reasons, the Court finds that Flowers' Fourth Claim is without merit and should be denied.

Fifth Claim

Finally, Flowers claims that Trial Counsel, who was also counsel for the first direct appeal, was ineffective for failing to raise claims one and three, as outlined above, on appeal. In light of the Court's ruling as to Flowers' first claim, this argument does not need to be addressed.

[86] December 18, 2014, Supplemental letter from Rule 61 Counsel.

VII. CONCLUSION

For the foregoing reasons, Flowers' Motion for Postconviction Relief should be **GRANTED**.

IT IS SO RECOMMENDED.

/s/ Bradley V. Manning
Bradley V. Manning,
Commissioner

oc: Prothonotary
cc: Defendant

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	
	)	ID No. 9808000280A
DAMONE E. FLOWERS,	)	
	)	
Defendant.	)	

Submitted: September 23, 2005
Decided: December 13, 2005

ORDER

UPON DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF
DENIED

Upon consideration of Defendant Damone E. Flowers' Motion for Postconviction Relief, it appears to the Court that:

1. On October 30, 2002 a Superior Court jury convicted Defendant Damone E. Flowers of First Degree Murder and Possession of a Firearm During Commission of a Felony. On April 25, 2003 Defendant was respectively sentenced to life imprisonment with no benefit of probation or parole and ten years at level V, three years of which is a minimum mandatory period of incarceration for the PFDCF charge.

2. On September 16, 2004, the Delaware Supreme Court issued the mandate affirming the conviction of the Superior Court.

3. On May 3, 2005 Defendant filed a *pro se* Motion for Postconviction Relief supported by a 133 page handwritten memorandum of law. Defendant's motion alleged eleven separate grounds for relief.

4. The Court denied Defendant's motion without prejudice, stating that Defendant may amend his Rule 61 Motion for Postconviction Relief, setting forth his claims in summary form as required by Rule 61(b)(2).

5. On July 11, 2005, Defendant resubmitted his *pro se* motion for Postconviction Relief, stating that he could not set forth the motion in summary form because he lacks the legal background to do so. Defendant requested that the Court accept the motion and the memorandum of law as originally filed.

6. On September 15, 2005, Defendant submitted an amended motion for Postconviction Relief. In support of his motion, Defendant alleges four separate instances of prosecutorial misconduct, one instance of abuse of discretion, one instance of cumulative errors, one instance of violation of sixth Amendment rights, one instance of violation of due process, one instance of failure to produce *Brady* material, one instance of professional misconduct rising to constitutional violation, and one instance of ineffective assistance of counsel.

7. In evaluating a postconviction relief motion, the Court must first ascertain if any procedural bars of Superior Court Criminal Rule 61(i) apply.[1] If a procedural bar is found to exist, the Court should refrain from considering the merits of the individual claims.[2] This Court will not address claims for postconviction relief that are conclusory and unsubstantiated.[3] Pursuant to Rule 61(a), a motion for postconviction relief must be based on "a sufficient factual and legal basis." "The motion shall specify all the grounds for relief which are available to movant ..., and shall be set forth in summary form the facts supporting each of the grounds thus specified." Any ground for relief not asserted in a prior postconviction relief motion is thereafter barred unless consideration of the claim is necessary in the interest of justice.[4] Grounds for relief not asserted in the proceedings leading to the judgment of conviction are thereafter barred, unless the movant demonstrates: (1) cause for the procedural default; and (2) prejudice from the violation of movant's rights.[5] Any ground for relief that was formerly adjudicated, whether in a proceeding leading to

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[1] *Younger v. State*, Del. Supr., 580 A.2d 552, 554 (1990); Super. Ct. Civ. R. 61(i).

[2] *See id.*

[3] *See Younger*, 580 A.2d at 555; *State v. Conlow*, Del. Super., Cr. A. No. IN78-09-0985R1, Herlihy, J. (Oct. 5, 1990) at 5; *State v. Gallo*, Del. Super., Cr. A. No. IN87-03-0589-0594, Gebelein, J. (Sept. 2, 1988) at 10.

[4] Del. Super. Ct. Crim. R. 61(i)(2).

[5] Del. Super. Ct. Crim. R. 61(i)(3).

the judgment of conviction, in an appeal, or in a postconviction proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.[6]

8. Defendant previously filed a motion for postconviction relief in May 2005. Because that motion was denied without prejudice for failure to set forth claims in a summary form in accordance with Rule 61(b)(2), the procedural bar of Rule 61(i)(2) regarding repetitive motions does not apply. However, the procedural bar of Rule 61(i)(4), applicable to any ground already adjudicated, does apply.

9. Even though on its face, Defendant's motion appears to be a postconviction relief motion, this motion is actually Defendant's attempt to rehash matters that already have been litigated, either in the Superior Court or the Supreme Court of Delaware.

10. Defendant's first four grounds for postconviction relief focus on instances of prosecutorial misconduct. Defendant's theory is that the State extended deals and reduced pleas to witnesses, some of whom had been approached and propositioned by the State, in exchange for damaging statements against Defendant. Defendant contends that the State created a last minute issue in order to delay the May 7, 2002 trial, made prejudicial suggestions during trial that Defendant was

[6]Del. Super. Ct. Crim. R. 61(i)(4).

member of a "deuce-deuce" group/gang and that Defendant had people approach State witnesses in order to intimidate them when these suggestions were not supported by evidence, and suppressed exculpatory evidence from Defendant.

11. Prosecutorial misconduct has been adjudicated before in this case. In a May 22, 2002 letter to Judge Alford, defense counsel Eugene Maurer questioned the credibility and motivation of State witness Othello Predeoux, who had pending charges. Mr. Maurer wrote: "The resolution of these cases obviously could be affected or impacted by the witness' cooperation in this prosecution." In her February 5, 2003 order denying Defendant's motion for a new trial, Judge Alford wrote:

> "State presented five eyewitnesses placing the Defendant at the scene of the murder with a weapon or identified the Defendant as the shooter. Although some witnesses were less forthcoming on the stand, it was for the jury to weigh the evidence and make its decision. At least one witness, who knew the Defendant, clearly identified him as the shooter, during a video taped police interrogation performed shortly after the incident. Thus, a new trial is not warranted. It is clear that the jury weighed the evidence before them and made a decision. Additionally, *no prosecutorial misconduct occurred.* The Court finds no prejudicial error denying the Defendant a fair trial." (Emphasis added).

12. Defendant extended theories of prosecutorial misconduct in his direct appeal to the Supreme Court as well. For example, Defendant argued that the taped statement of Ronetta Sudler, an eyewitness who identified him as the shooter, was not

voluntarily obtained and, therefore, was improperly admitted. After reviewing the record to determine whether Sudler voluntarily made the out-of-court statement, the Supreme Court determined, in its September 16, 2004 opinion, that the trial judge admitted Sudler's out-of-court pretrial statement to Detective Brock only after making a careful factual finding that Sudler gave the statement voluntarily. The Supreme Court also concluded that the record supports the trial judge's findings.

13. Just as he asserts in his Rule 61 motion, Defendant claimed in his direct appeal to the Supreme Court that certain remarks made by the prosecutor were unsupported by the evidence (ground four of Defendant's Rule 61 motion) and constituted unfairly prejudicial, reversible error. The Supreme Court commented in its September 16, 2004 opinion that to be plain error, the remarks must have affected Defendant's substantial rights, or, generally, must have affected the outcome of the trial.[7] The Court concluded that Defendant had failed to demonstrate how the reference distorted the evidence so prejudicially that it unduly affected the outcome and deprived him of a fundamentally fair trial.

14. The record shows that the delay in trial (ground two of Defendant's Rule 61 motion) had nothing to do with prosecutorial misconduct or buying time to further develop witnesses in violation of the Defendant's due process rights. The Delaware

[7] *See United States v. Olano*, 507 U.S. 725, 732-34 (1993).

Supreme Court, in its September 16, 2004 opinion, found: "Before the selected jury was sworn, the State moved to disqualify defense counsel on the ground that defense counsel had previously represented a State's witness, Othello Predeoux. The trial was rescheduled in order to allow the parties an opportunity to brief the legal issues concerning disqualification."

15. Both abuse of discretion, and trial judge's denial of Defendant's motion for mistrial (grounds five and six of Defendant's Rule 61 motion), were specifically addressed by the Supreme Court in its September 16, 2004 opinion. Even though Defendant asked the Supreme Court for a *de novo* review to determine whether an error of law occurred that affected his substantial rights, the Court reviewed the trial judge's denial of Defendant's motions for mistrial and for a new trial for abuse of discretion. The Supreme Court examined Defendant's assertion that when the prosecutor elicited testimony from Defendant's sister about Defendant's recent release from jail, the trial judge should have granted a mistrial rather than give a curative instruction. Defendant argued that the refusal to grant a mistrial denied him a fair trial because his defense strategy centered on him not testifying. Defendant maintained that by allowing the jury to learn of his recent incarceration, he lost the benefit of this trial strategy. The Supreme Court concluded that it was clear that if Defendant had testified in his own defense, earlier convictions for second degree

robbery and drug trafficking would likely have been revealed to the jury. Apparently, Defendant's best hope for appearing credible to a jury was not to testify at all.

16. Defendant's contention that the trial judge abused her discretion by allowing unauthorized ejections of Defendants family and friends by the bailiff is not supported by the record.

17. Grounds seven, eight and ten in Defendant's postconviction relief motion focus on the testimony of witnesses, resulting in the alleged violation of Defendant's sixth Amendment and due process rights. In ground seven Defendant claims that the State's case was presented through five eyewitnesses, include three who claimed memory loss at trial, thus hindering effective cross-examination. As previously discussed, issues emanating from the testimony of witnesses have been addressed by the Superior Court as well as the Supreme Court of Delaware. The Superior Court took into account the silence of some of the witnesses in its February 2003 order, denying Defendant's motion for new trial. The Court held: "Although some witnesses were less forthcoming on the stand, it was for the jury to weigh the evidence and make its decision." Similarly, the Supreme Court in its September 16, 2004 opinion, examined the issue of eyewitness testimony, and concluded that the testimony was voluntarily obtained and therefore properly admitted.

18. Ground eight, violation of due process, refers to the elicitation and utilization of false testimony by the State, especially from Othello Predoux. This is essentially the same argument that Defendant raised in this very motion styled as prosecutorial misconduct. The Court has found this issue to have been adjudicated.

19. In ground ten, violation of due process, Defendant claims that Detective Andrew Brock violated Defendant's due process rights by utilizing suggestive and corruptive interview techniques in order to acquire identification of Defendant. The two named witnesses are Vernon Mays, and Mathew Chamblee. The Supreme Court addressed the issue of utilization of suggestive and corrupting interview techniques by Detective Andrew Brock at great length in its September 16, 2004 opinion. After examining the testimony of eyewitness Ronetta Sudler, the Court stated: "The trial judge, herself, viewed the tape and determined that Detective Brock was not so unfairly oppressive or overbearing that his manner compromised Sudler's willingness to make a statement."

20. In ground nine of his Rule 61 motion, Defendant alleges that the State failed to disclose exculpatory *Brady*[8] material. However, Defendant's contention that such materials exist, and that they would have been exculpatory, is pure speculation and is not supported by the record.

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[8]*Brady v. Maryland*, 373 U.S. 83 (1963).

21. Ground eleven of Defendant's Rule 61 motion asserts ineffective assistance of counsel. This claim is based upon Defendant's theory that defense counsel did not hire a drug expert and an identification expert to assist the defense. Defendant contends that counsel's refusal to do so prevented counsel from effectively cross-examining witnesses who were not sure about the identity of the shooter. Defendant contends that by going it alone, defense counsel exhibited a lack of sound judgment that shows that his conduct fell below the conduct that is expected from a competent criminal defense counsel. Defendant claims that counsel abandoned the defense strategy that would have been successful at the last minute. The Court finds that Defendant's assertions and claims in this regard are pure conjecture, with no factual or legal basis.

22. It appears to this Court that Defendant has attempted to avoid procedural bars by re-packaging the claims that already have been adjudicated. For example, the same occurrences involving witnesses that were asserted as constituting unfair prejudice and reversible error in Defendant's direct appeal to the Supreme Court are now asserted in his Rule 61 motion under the guise of prosecutorial misconduct.

23. Neither federal nor state courts are required to relitigate in postconviction proceedings previously resolved claims.[9]

24. This Court only can consider a ground already adjudicated if the interest of justice exception applies. The interest of justice exception to the procedural bar of Rule 61(i)(4) is narrowly construed. The "movant must show that subsequent legal developments have revealed that the trial court lacked authority to convict or punish him."[10] Defendant has failed to demonstrate subsequent legal developments revealing that the Superior Court lacked authority to convict or punish him.

25. Under the circumstances, this Court finds that reconsideration of Defendant's claims is not warranted in the interest of justice. Defendant's motion for postconviction relief must be denied as it is procedurally barred pursuant to Rule 61(i)(4). To protect the integrity of the procedural rules, the Court will not consider the merits of the postconviction claims where a procedural bar exists.[11]

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[9]*See Kuhlmann v. Wilson*, 477 U.S. 436, 445-55, 106 S.Ct. 2616, 2621-2628, 91 L.Ed. 2d 364 (1986); *Sanders v. United States*, 373 U.S. 1, 7-22, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963).

[10]*Flamer v. State*, 585 A.2d 736, 746 (Del. 1994).

[11]*State v. Gattis*, Del. Super., Cr. A. No. IN90-05-1017, Barron, J. (Dec. 28, 1995)(citing *Younger v. State*, 580 A.2d at 554; *Saunders v. State*, Del. Supr., No. 185, 1994, Walsh, J. (Jan. 13, 1995)(ORDER); *Hicks v. State*, Del. Supr., No. 417, 1991, Walsh, J. (May 5, 1992) (ORDER)).

26. **THEREFORE**, Defendant's Motion for Postconviction Relief is hereby **DENIED**.

IT IS SO ORDERED.

The Honorable Mary M. Johnston

oc: Prothonotary - Criminal Division

CERTIFICATE OF SERVICE

The undersigned certifies that on March 7, 2016 she caused the attached *State's Opening Brief* to be electronically delivered through File and Serve Xpress, to the following:

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/s/Elizabeth R. McFarlan
Chief of Appeals
Bar ID No. 3759