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Case Number 599,2013D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CRAIG ZEBROSKI,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 599, 2013
	)	
v.	)	On Appeal from the
	)	Superior Court of the
STATE OF DELAWARE,	)	State of Delaware in and
	)	for New Castle County
Plaintiff-Below,	)	
Appellee.	)	

STATE'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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Dated: February 7, 2014

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Page

Cases cont'd Page

Cases cont'd Page

Statutes and Rules

NATURE AND STAGE OF PROCEEDINGS[1]

On May 1, 1996, Delaware State Police arrested Craig Zebroski. (D.I. 1). On June 24, 1996, a New Castle County grand jury indicted Zebroski on the following charges: murder in the first degree (intentional murder) (11 *Del. C.* § 636(a)(1)); murder in the first degree (felony murder) (11 *Del. C.* § 636(a)(2)); three counts of possession of a firearm during the commission of a felony (11 *Del. C.* § 1447A); attempted robbery in the first degree (11 *Del. C.* §§ 531 & 832); and conspiracy in the second degree (11 *Del. C.* § 512). (D.I. 2). After jury selection on January 14, 1997, and Superior Court held an eight-day trial beginning on January 15, 1997. (D.I. 58). The jury found Zebroski guilty of all charges. (D.I. 58). Beginning on January 30, 1997, Superior Court held a three-day penalty hearing, at the conclusion of which the jury unanimously found the existence of a statutory aggravating circumstance, and by a vote of 9 to 3, found that the aggravating circumstances outweighed the mitigating circumstances. (D.I. 59). Superior Court made its findings after the penalty hearing on August 1, 1997. *State v. Zebroski*, 1997 WL 528287 (Del. Super. Ct. Aug. 1, 1997). On August 18, 1997, Superior Court sentenced Zebroski to a total of 61 years at level V on the weapons, attempted robbery and conspiracy charges, and to death on each count of

[1] The "(D.I. __)" notations refer to the Superior Court docket items in *State v. Craig Zebroski*, ID No. 9604017809.

murder. (D.I. 112 & 113). This Court affirmed Zebroski's convictions and sentence on July 28, 1998. *Zebroski v. State*, 715 A.2d 75 (Del. 1998).

On November 20, 1998, Superior Court appointed Kevin O'Connell, Esq. to represent Zebroski. (D.I. 129). On December 11, 1998, Zebroski filed his first motion for post-conviction relief. (D.I. 132). Zebroski amended that motion on April 26, 1999. (D.I. 141). On December 2-3, 1999, Superior Court held evidentiary hearings. (D.I. 158). On December 15, 2000, Zebroski further amended his motion for post-conviction relief. (D.I. 169). On September 5, 2001, Superior Court denied Zebroski's motion for post-conviction relief. (D.I. 177). *State v. Zebroski*, 2001 WL 1079010 (Del. Super. Ct. Sept. 5, 2001). On May 14, 2003, this Court affirmed that denial. *Zebroski v. State*, 822 A.2d 1038 (Del.), *cert. denied*, 540 U.S. 933 (2003).

On November 4, 2003, Zebroski filed his second motion for post-conviction relief. (D.I. 189). On December 8, 2003, Superior Court stayed consideration of the motion pending the Delaware District Court's resolution of his federal habeas petition.[2] (D.I. 194). On February 15, 2008, Superior Court appointed Jennifer-Kate Aaronson, Esq., to represent Zebroski. (D.I. 199). On July 1, 2008, Zebroski filed a "motion to re-open" his second motion for post-conviction relief. (D.I.

[2] The federal habeas action is now stayed pending resolution of the current post-conviction proceedings in state court. *See Zebroski v. Phelps*, D. Del., Civ. Act. No. 03-853-LPS, Stark, J. (May 13, 2013) (Order) (Ex. A).

202). On March 19, 2009, Superior Court denied in part Zebroski's second motion for post-conviction relief, but reversed and vacated Zerboski's conviction for felony murder. (D.I. 214). *State v. Zebroski*, 2009 WL 807476 (Del. Super. Ct. Mar. 16, 2009). On March 9, 2010, this Court affirmed in part, but also remanded the case for additional findings. *Zebroski v. State*, 12 A.3d 1115 (Del. 2010). On March 16, 2010, Superior Court denied Zebroski's motion which sought the judge's recusal. (D.I. 222). *State v. Zebroski*, 2010 WL 1534165 (Del. Super. Ct. Mar. 16, 2010). On May 14, 2010, Superior Court made additional findings on remand, and again denied Zebroski's motion for post-conviction relief. (D.I. 224). *State v. Zebroski*, 2010 WL 2224646 (Del. Super. Ct. May 14, 2010). On May 16, 2011, this Court affirmed. *Zebroski v. State*, 2011 WL 1900445 (Del. May 16, 2011).

On June 12, 2013, Zebroski filed a third motion for post-conviction relief, which he subsequently amended. (D.I. 237-40). On September 20, 2013, Superior Court summarily denied the motion. (D.I. 241). *State v. Zebroski*, 2013 WL 5786359 (Del. Super. Ct. Sept. 30, 2013). Zebroski appeals this latest denial of post-conviction relief.

SUMMARY OF ARGUMENT

1. Appellant's first argument is DENIED. Zebroski's claim that he was prejudiced by secret information in the PSI report was procedurally defaulted and is unsupported by the record. Trial counsel provided materials for use in the report. The trial court followed the jury sentencing recommendation, after specifically looking for additional mitigation in the PSI report.

2. Appellant's second argument is DENIED. The United States Supreme Court has never prohibited a sentencer from considering youth in both mitigation and in aggravation. Superior Court did not err in recognizing the "double-edged" nature of Zebroski's age in its original sentencing decision.

3. Appellant's third and sixth arguments are DENIED. Superior Court properly determined each of Zebroski's claims of ineffective assistance of counsel were procedurally barred. Zebroski previously had post-conviction evidentiary hearings and he was not entitled to new hearings based on more allegations of ineffective assistance of counsel.

4. Appellant's fourth argument is DENIED. Superior Court properly denied as procedurally barred each of the alleged instances of prosecutorial misconduct. Rumors that Lance Lawson may have also taken part in the crime were not *Brady* material. Zebroski's role as the shooter was not in doubt. Zebroski not only admitted to the crime, but bragged about it. Lisa Klenk's

statements about another person's conversation with Zebroksi after the shooting likewise were not *Brady*. That person, Brian Morris, testified at trial about his conversation with Zebroski consistently with Klenk's proffered memory of their conversation. Because a jury does act as "the conscience of the community" in recommending a sentence in a capital case, the prosecutor's use of that phrase in closing argument was wholly appropriate.

5. Appellant's fifth argument is DENIED. Superior Court properly denied as formerly adjudicated Zebroski's refined and restated claim that the admission of testimony including a racial epithet directed at the victim deprived him of a fair trial. This Court decided this claim against Zebroski on direct appeal. Nothing in Zebroski's more nuanced presentation of the claim required reconsideration of that decision.

6. Appellant's seventh argument is DENIED. The prior representation of a prosecution witness, Lance Lawson, by the Office of the Public Defender at a preliminary hearing did not create a conflict of interest for the Assistant Public Defender who represented Zebroski at trial. Moreover, Zebroski failed to show that he suffered any prejudice from the manner of his counsel's cross-examination of Lawson during the penalty phase of his trial.

STATEMENT OF FACTS[3]

On April 25, 1996, Craig Zebroski spent the day drinking and using drugs with acquaintances in an apartment building in New Castle, Delaware. During that time, Zebroski and Michael Sarro agreed to rob a gas station on New Castle Avenue. Zebroski and Sarro walked to the gas station and waited for approximately three-and-a-half hours until all customers left the business. Zebroski took a semi-automatic handgun from Sarro and the two entered the store. Zebroski pointed the weapon at the attendant, Joseph Hammond, and demanded that he open the cash register. Hammond did not comply. Zebroksi then shot Hammond in the forehead, killing him.

Zebroski and Sarro returned to the apartment building where Zebroski told Brian Morris that he shot Hammond, using a racial epithet to identify his victim. In the days following the robbery and murder, Zebroski attended another party where he posed with the gun for photographs. On April 29, 1996, Zebroski sold the gun. Police subsequently recovered the gun.

[3] Given the almost-two decades of litigation in this case, these facts are a summary drawn from this Court's opinion on direct appeal. *Zebroski v. State*, 715 A.2d 75, 77 (Del. 1998).

1. SUPERIOR COURT, IN SENTENCING ZEBROSKI CONSISTENTLY WITH THE JURY RECOMMENDATION, DID NOT RELY ON "SECRET" INFORMATION.

Question Presented

Whether consideration by the sentencing judge of a PSI report, the factual basis of which was provided in large part by defense counsel, prejudiced Zebroski.

Standard and Scope of Review

This Court reviews the Superior Court's denial of a motion for post-conviction relief for abuse of discretion. *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013). When deciding legal or constitutional questions, this Court applies a *de novo* standard of review. *Id*.

Merits of Argument

Zebroski alleges that the sentencing judge improperly relied upon a presentence investigation report (PSI) that had not been disclosed to his counsel in violation of a multitude of constitutional rights. In support of his claim, Zebroski relies on *Gardner v. Florida,* where the United States Supreme Court found that when a sentencing judge, in reliance upon a presentence report containing factual information defense counsel did not have an opportunity to explain or rebut, *overrode the jury's recommendation of life*, the case should be remanded for a new sentencing hearing. 430 U.S. 349 (1977). Having failed to raise the claim on direct appeal or in his two earlier postconviction motions, Zebroski's claim is now

procedurally barred under Criminal Rule 61(i)(1), (2), (3) and (4). Thus, review is now barred unless Zebroski can show cause for his procedural default and actual prejudice, that interests of justice require reconsideration of the claim, or that a fundamental miscarriage of justice will result if the Court does not review his most recent version of the claim.

Zebroski alleges that his trial, appellate, and post-conviction counsel were ineffective in failing to: object to Zebroski being interviewed for the PSI; object to consideration of the PSI by the sentencing court; and present this claim on direct appeal or in the original post-conviction proceedings. Although Zebroski presented a claim of ineffective assistance of trial counsel regarding the sentencing judge's use of the PSI report in his second post-conviction motion, that claim was rejected as procedurally defaulted under Criminal Rule 61(i)(2) for failure to have raised the claim in his first motion for post-conviction relief. *See State v. Zebroski*, 2009 WL 807476, at *2-3 (Del. Super. Ct. Mar. 16, 2009). His claim of ineffective assistance of appellate counsel regarding the PSI was not presented in any prior pleadings, and can be dismissed on that basis alone. In any case, Zebroski cannot show ineffective assistance of trial, appellate, or post-conviction counsel in failing to raise the claim. Nor can he establish prejudice, because his *Gardner* claim is meritless.

Gardner v. Florida

After a trial, a Florida jury found Gardner guilty of first degree murder for assaulting his wife with a blunt instrument, thereby causing her death. At a separate penalty hearing, prosecutors introduced two photographs of the victim into evidence and otherwise relied on the evidence adduced at trial. The state alleged one statutory aggravating circumstance: that the crime was "especially heinous, atrocious, or cruel." 430 U.S. at 352. In mitigation, Gardner testified that he had been on a day-long drinking spree and had almost no recollection of the actual assault. Gardner's testimony, if believed, "was sufficient to support a finding of at least one of the statutory mitigating circumstances." *Id*. The jury, after 25 minutes of deliberation, found that the mitigating circumstances outweighed the aggravating circumstances and recommended a life sentence. *Id*. at 352-53. The trial judge sentenced the defendant to death, finding no mitigating circumstances at all. *Id.* at 353. The judge stated that his decision was based in part on factual information contained in a presentence investigation ("PSI") report. *Id*. Part of the PSI was confidential and never revealed to the defendant or his counsel. *Id.* The sentence was affirmed on appeal without review of that confidential portion of the report. *Id.* at 354. The United States Supreme Court, in a plurality opinion, held that Gardner was denied due process "when the death sentence was imposed, at least in part, on the basis of information which he had no

opportunity to deny or explain." *Id.* at 362. The *Gardner* Court noted that "since the judge found, *in disagreement with the jury*, that the evidence did not establish any mitigating circumstance, and since the presentence report was the only item considered by the judge but not by the jury, the full review of the factual basis for the judge's rejection of the advisory verdict is plainly required." *Id*. at 362 (emphasis added). But Zebroski cannot rely on *Gardner* for relief because this case is critically different.

a. The PSI did not contain "secret" information.

As Zebroski has conceded, his trial counsel provided many of the documents upon which the presentence investigator relied in drafting her report. *State v. Zebroski*, 2013 WL 5786359, at *4 (Del. Super. Ct. Sept. 30, 2013); A51. Trial counsel actively sought to provide information for the PSI, including materials generated by the Department of Services for Children Youth and Families. Op. Br. at 15. In fact, counsel knew Zebroski would be interviewed as part of the presentence investigation. *Id.* And, as the Superior Court found, Zebroski's contention that the PSI report was unavailable to trial counsel is simply without a basis in the record. *Zebroski*, 2013 WL 5786359, at *3. Having provided no factual basis for his claim, Zebroski cannot now make bald assertions to obtain relief.

To the extent that Zebroski is complaining about opinions expressed by the presentence investigator, those are just that – opinions. In *Gardner*, the trial judge expressly stated that he had relied upon *factual* information in the PSI report. Thus, the issue before the court was whether the trial judge should be permitted to rely in sentencing in a capital case upon *factual* information, as distinguished from opinion, the defendant did not have an opportunity to challenge. *Gardner* discussed at length the possibility that secret information might be "critical unverified information" and the importance of to "ascertain[ing] the truth." 430 U.S. at 360 & n.10. *Gardner* also discussed the importance of "the process of evaluating the relevance and significance of aggravating and mitigating *facts*." *Id.* at 360 (emphasis added). In light of the language in the plurality's opinion, the *Gardner* holding is limited to nondisclosure of *factual* information.

Nothing in the trial court's *Findings After Penalty Hearing* is inconsistent with the evidence presented at trial and in the sentencing phase. Nothing in the record supports the argument that counsel should have done anything differently regarding the PSI. Zebroski's counsel certainly knew the PSI existed as he contributed the material for the report. There is no reason to believe otherwise. There is no "secret" factual information that Zebroski did not have an opportunity to explain or deny.

b. The sentencing court followed the jury's 9-3 recommendation of death.

Gardner was a jury override case in which the sentencing judge found no mitigation at all, even though a mitigating circumstance existed under Florida law. Zebroski's case, in stark contrast, was not a jury override case. And Delaware, unlike Florida, does not provide for specific mitigating circumstances by statute. Here, the sentencing judge found all of the listed mitigating circumstances to exist, but nevertheless found that the aggravating circumstances outweighed them. Further, the sentencing judge specifically noted that he searched the record and PSI report "looking in vain for a principled reason to reject the jury's 9-3 recommendation." *State v. Zebroski*, 1997 WL 528287, at *21 (Del. Super. Ct. Aug. 1, 1997).

In *Vining v. State*, the Florida Supreme Court held that even when a sentencing court does review extra-record "secret" material,[4] the review of that material is still subject to harmless error analysis. 827 So. 2d 201, 209-10 (Fla. 2002). In Vining's federal habeas review, the district court likewise concluded that any *Gardner* error was harmless and held that the Florida Supreme Court's analysis was neither contrary to, nor an unreasonable application of *Gardner*. *Vining v. Crosby*, 2007 WL 3024100 (M.D. Fla. Oct. 15, 2007). The Eleventh Circuit agreed, noting that "[t]he jury—with no knowledge of the trial judge's

[4] The State does not concede that there was "secret" information.

personal investigation—voted 11-1 in favor of the death penalty." *Vining v. Sec'y, Florida Dep't of Corr.,* 610 F.3d 568, 573 (11th Cir. 2010).

Here, in light of the consistency of the PSI information with the information presented at trial and the penalty hearing, there could be no error. Zebroski's trial counsel provided the sentencing judge with as much information about Zebroski's troubled youth as possible in hopes of strengthening his mitigation on that point. Although the sentencing judge clearly searched for additional mitigation in the provided materials, he ultimately found, as did a substantial majority of the jurors, that the appropriate sentence in this case was death. That the judge could not find sufficient mitigation to outweigh the aggravating circumstances does not amount to prejudice. That the judge could not find sufficient mitigation in the materials provided to outweigh the aggravating circumstances does not amount to prejudice.

In sum, Zebroski's claim that the sentencing judge improperly considered "secret" information in the PSI report has been procedurally defaulted and this Court has no basis for reviewing the claim. Zebroski's failure to present and develop his claim in earlier proceedings precludes review here. Zebroski has not demonstrated either cause for his failure to pursue the claim or prejudice as a result of that failure. Zebroski failed to overcome the procedural hurdles and Superior Court properly denied this claim.

2. THE CONSTITUTION DOES NOT PROHIBIT A SENTENCER FROM CONSIDERING A CAPITAL DEFENDANT'S AGE BOTH IN MITIGATION AND AGGRAVATION.

Question Presented

Whether a sentencer may consider a capital defendant's age as both a mitigating and aggravating circumstance.

Standard and Scope of Review

This Court reviews the Superior Court's denial of a motion for post-conviction relief for abuse of discretion. *Ploof,* 75 A.3d at 851. When deciding legal or constitutional questions, this Court applies a *de novo* standard of review. *Id*.

Merits of Argument

Superior Court denied as procedurally barred Zebroski's claim that it could not consider his age as an aggravating circumstance. *Zebroski*, 2013 WL 5786359, at *2. In addition to finding the claim procedurally barred, Superior Court held:

> To be clear, in a typical capital sentencing situation, the jury and the court may view the evidence as to aggravators and mitigators as it sees fit. In this case, the court observed that some of the evidence introduced as mitigating, such as Defendant's youth, was "double-edged," and the court explained how that was so. There is no legal prohibition on that sort of analysis. Here, the Delaware Supreme Court affirmed that analysis.

Id. (internal citations omitted).

On appeal from that decision, Zebroski asserts "[i]t is impermissible to consider youth as [an] aggravating [circumstance]." Op. Brf. at 18, citing *Roper v. Simmons*, 543 U.S. 551, 573 (2005). In *Simmons*, the United States Supreme Court established a categorical prohibition on the imposition of a death sentence for defendants who committed murder before they turned eighteen years old. But Zebroski ignores that the Supreme Court also expressly recognized that while youth may be considered a mitigating factor, "[i]n some cases a defendant's youth may even be counted against him." *Simmons*, 551 U.S. at 573. The *Simmons* Court could have, but did not hold that youth could never be considered in punishment as anything other than a mitigating circumstance, and Zebroski goes too far in asserting that it did. Moreover, after *Simmons*, the United States Supreme Court recognized that mitigation evidence such as childhood abuse, youth, and intellect can be viewed as double-edged, and sometimes "as likely to be viewed as aggravating as it is mitigating." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 255 (2007). The Delaware District Court too has observed the dual nature that evidence offered in mitigation can be a "double-edged sword." *Riley v. Taylor*, 1998 WL 172856, at *23 (D. Del. Jan. 16, 1998), *overruled on other grounds*, 277 F.3d 261 (3d Cir. 2001).

Zebroski implies that the Superior Court in its sentencing decision only considered his age and the abuse he suffered as aggravating circumstances, without

considering these factors in mitigation. Op. Brf. at 20. Zebroski also contends that it was improper for Superior Court to consider his "good conduct" while imprisoned as an aggravating circumstance. Op. Brf. at 19. To avoid the application of any procedural bar to this claim, Zebroski generally alleges the ineffective assistance of both trial and appellate counsel. Op. Brf. at 20.

Superior Court did not categorically use Zebroski's age at the time of his conviction against him. To the contrary, the court specifically found "Defendant's youth is the first and strongest mitigator." *Zebroski*, 1997 WL 528287, at *13. Superior Court discussed Zebroski's youth at length, but found youth to be "double-edged." *Id*. The sentencing judge made specific findings why he viewed Zebroski as immature (his allocution, his letters in prison, his prior unsuccessful attempts at rehabilitation, and his interactions with supporters during trial), and why he did not view Zebroski as having insight into the devastation his murder of an innocent man had. *Id*. And, importantly, no decision of the United States Supreme Court required Superior Court to find that Zeboski's youth at the time he murdered Joseph Hammond precluded a death sentence for that crime. No constitutional provision prohibits a sentencer from considering evidence offered in mitigation as aggravating. Nothing required Superior Court to draw only those inferences from Zebroski's mitigation evidence that he desired.

Zebroski asserts that Superior Court failed to consider his "good conduct in prison" and describes his prison behavior as "non-violent." Op. Brf. at 19. But, Superior Court had Zebroski's own written profession of his intention to engage in future violence. While awaiting trial, Zebroski wrote a letter to his friend, Danielle Kauffman, expressing his desire to commit violent acts while in prison. *Zebroski*, 1997 WL 528287 at *13. Zebroski wrote that he would physically harm Brian Morris for cooperating with police, intimidate other witnesses from testifying, hated prison, and considered assaulting correctional staff and attempting to escape. *Id.* at *4. Superior Court thus had ample evidence of Zebroski's misconduct in prison, not hypothetical "good conduct" prognosticated by his mental health expert. *Id.* at *15.

Next, Zebroski states that Superior Court "weighed as aggravating the unrelenting trauma and abuse inflicted upon Defendant as a child." Op. Brf. at 19-20. Like Zebroski's age, Superior Court found Zebroski's dysfunctional family and childhood to be a mitigating circumstance, but in its balancing analysis did not find a "principled way to reject the jury's recommendation" of death. *Zebroski*, 1997 WL 528287 at *16. Superior Court found that Zebroski's "pathetic background not only is a source of sympathy, it explains how he could commit a cold-blooded murder, pose for photographs with the murder weapon, fabricate an alibi and attempt to intimidate witnesses from testifying against him." *Id*. at *14.

Zebroski asserts the Superior Court was incorrect in finding the "'youth' portion of this claim to have been previously adjudicated" and he instead asserts that "this claim has never previously been addressed." (Op. Brf. at 20). Not so. In the context of its denial of a claim of ineffective assistance of counsel for failing to present youth as a mitigating factor in Zebroski's previous motion for post-conviction relief, Superior Court found: "Now, there is no principled way to argue that the jury and sentencing court were not vividly aware of Zebroski's youth and his harsh upbringing, including its violence, abuse, chaos, isolation, substance abuse, multiple stepfathers and paramours of his mother, and mental illness." *State v. Zebroski*, 2010 WL 2224646, at *8 (Del. Super. Ct. May 14, 2010). Zebroski's assertion that youth as a mitigating factor has never previously been addressed is demonstrably incorrect.

3. SUPERIOR COURT COMMITTED NO ERROR IN FINDING ALL OF ZEBROSKI'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL TO BE PROCEDURALLY BARRED.

Question Presented

Whether an allegation of ineffective assistance of counsel automatically permits a defendant to avoid the application of procedural bars to a successive motion for post-conviction relief.

Standard and Scope of Review

This Court reviews the Superior Court's denial of a motion for post-conviction relief for abuse of discretion. *Ploof,* 75 A.3d at 851. When deciding legal or constitutional questions, this Court applies a *de novo* standard of review. *Id*.

Merits of Argument

Zebroski has raised seven separate claims of ineffective assistance of counsel in both the guilt and penalty phases of his trial. Superior Court found those claims that Zebroski had raised before procedurally barred by Rule 61(i)(4) as formerly adjudicated, and the others procedurally barred by Rule 61(i)(2) for failing to raise them in a previous motion, and all as untimely under Rule 61(i)(1). *Zebroski*, 2013 WL 5786359, at *1-2, *5.

a. firearm evidence

Zebroski contends that trial counsel was ineffective for not objecting to

testimony related to the trigger pull on the murder weapon, and for failing to call an expert witness to rebut evidence the State presented related to the trigger pull. The weapon Zebroski admitted to firing was a .25 Titan semi-automatic. Three days after he shot Hammond directly between the eyes, Zebroski sold the murder weapon to Hugh Russell for $50. [B-1]. After purchasing the gun from Zebroski, Russell fired the gun twice along railroad tracks. [B-2]. Russell, who had fired weapons, including handguns, in the past, testified that the weapon did not have a hair-trigger pull, but also was not difficult to fire. *Id.* Defense counsel cross-examined Russell on the specific point of the amount of force required to fire the weapon. [B-3].

The State called Ronald Dodson, a firearms examiner for the Bureau of Alcohol, Tobacco and Firearms, who had examined the gun and the projectile recovered by the medical examiner from Hammond during the autopsy. After confirming that the gun he examined did in fact fire the fatal shot, and having test-fired the gun himself, Dodson testified that the weapon had a 12½ pound trigger pull. [B-6]. Defense counsel raised a timely objection to Dodson's testimony. *Id.* After a sidebar discussion where the prosecutor discussed his intended line of questioning, which included a comparison of the murder weapon's trigger pull to that of other weapons, defense counsel indicated his intention to object to that line of questioning. [A-188]. Defense counsel also objected to the jurors attempting to

"dry fire" the weapon once they began deliberations. [A-189]. In his cross-examination of Dodson, defense counsel elicited that because the weapon's recoil spring and rod were missing by the time the weapon came into his custody, those changes to the weapon could have affected what the weapon's trigger pull would have been before they were removed. [A-190]. At a second sidebar colloquy related to the witness, defense counsel indicated his concerns regarding how the prosecutor would use Dodson's testimony related to trigger pull in closing argument, and defense counsel advised the Superior Court that he would be "on the balls of my feet, and if I hear something that I don't believe is sustained by the evidence I'll bring it to the Court's attention immediately." [A-198].

Zebroski testified during the guilt phase of his trial that he had the gun in his hand with two fingers on the trigger. He demonstrated to the jury how he held the weapon and kept it trained on Hammond while Sarro attempted to open the cash register. [B-14]. Zebroski also testified that he had a "tight grip on the gun" and that his own "flinch" caused the weapon to fire. [B-16].

Defense counsel discussed the murder weapon's trigger pull during closing argument. Defense counsel challenged the prosecutor's analogy of lifting a bag of potatoes to assist the jury's understanding of the amount of force required to pull the trigger. [A-214]. Defense counsel also reminded the jury that while it would have the gun in the room during deliberations, it was no longer in the same

condition it was at the time Zebroski shot Hammond. *Id*. Defense counsel successfully argued against a jury request during deliberations to have the safety removed from the gun to test the trigger pull. [B-20-22].

Superior Court properly found that Zebroski had failed to show a miscarriage of justice that required consideration of this procedurally barred claim. As the record shows, trial counsel raised timely and successful objections, and elicited testimony from witnesses called by the prosecution from which he made logical arguments to the jury regarding the trigger pull of the murder weapon. Moreover, trial counsel successfully precluded the jury from testing the trigger pull during deliberations. Superior Court reviewed Zebroski's newly proffered expert and found that he alleged "nothing more than potential failings in the trial expert's testing." *Zebroski*, 2013 WL 5786359, at *4. Superior Court properly concluded that possibilities and conjecture did not justify an evidentiary hearing. *Id*.

b. Sarro statement stipulation

Zebroski challenges trial counsel's decision to stipulate to the admission of his co-defendant Sarro's statements to police. At the time of Zebroski's trial, Sarro had entered into a plea agreement, but had not yet been sentenced. When called as a witness by the prosecution, Sarro refused to testify. [A-198]. Defense counsel then informed the court that, in consultation with Zebroski, he desired that Sarro testify. If, however, Sarro continued to refuse to testify, Zebroski would still seek

to introduce into evidence the statements Sarro made to police. *Id*. Defense counsel unequivocally stated that Sarro's refusal to testify "hurt or undermine[d]" Zebroski's defense. *Id*. After additional discussion between the trial judge and Sarro, as well as Sarro's attorney and the prosecutor, Sarro still refused to testify. [A-198-99; B-7-9]. Before the Superior Court had Sarro returned to prison, defense counsel asked to meet with Sarro in Zebroski's presence, as well as that of the prosecutor and Sarro's counsel. [B9-10]. Defense counsel stressed that it was Zebroski's personal desire that Sarro testify. [A-200]. After this meeting, Sarro still refused to testify. *Id*. At that point, the parties entered into a stipulation to permit the admission into evidence of Sarro's two recorded interviews with police, as well as the opportunity for defense counsel to cross-examine Detective Cicchini about a third unrecorded interview. [B-10]. Defense counsel offered an evidentiary basis for the admission of Sarro's statements. *Id*. Superior Court asked defense counsel if he was making this decision knowing that even though there were portions of Sarro's statements that were not beneficial to Zebroski, that other portions were helpful, and, therefore, on the whole, admission of the statements was in Zebroski's best interest. *Id*. Defense counsel responded affirmatively: "Yes, and for other reasons." *Id*. *See also Zebroksi*, 715 A.2d at 81.

The State later moved into evidence both of Sarro's recorded interviews (April 28, 1996 and June 11, 1996). [A-201-02]. By stipulation, the prosecution

placed in evidence Sarro's plea agreement. [A-202]. On cross-examination of Detective Cicchini, defense counsel elicited that in Sarro's non-recorded interview, Sarro stated that he punched Hammond, and very soon afterwards, heard a gunshot and saw Hammond fall. [B-11]. Detective Cicchini agreed with defense counsel that Sarro's statement was almost identical to the testimony that Zebroski gave in court. [B-12].

In his post-conviction evidentiary hearing testimony in Superior Court, trial counsel, explaining his reason for stipulating to the admission of Sarro's statements stated: "I thought it was very important to get that piece of evidence in that corroborated what Mr. Zebroski said about the happenings just prior to the gun going off." [B-43]. Defense counsel confirmed that he was aware that Sarro's statements contained references to Sarro punching Hammond, a point consistent with Zebroski's accident defense. *Id*. Defense counsel likewise re-confirmed that his decision to stipulate to the admission of Sarro's statements was a strategic decision. *Id*.

Simply because the prosecution used some of Sarro's statements to its advantage does not prove that Zebroski suffered prejudice from a prior failure to raise this claim of ineffective assistance of counsel. Throughout the trial discussion regarding Sarro's refusal to testify, defense counsel indicated his (and his client's) desire to present Sarro's statements to the jury. Sarro was the only

living person who could corroborate Zebroski's version of the events inside the Conoco station. However implausible Zebroski's accident theory was, he himself, and not his attorney, had a right to testify and present that theory in his defense. And as defense counsel noted, Sarro's version of events mirrored the testimony that Zebroski chose to present. Trial counsel engaged in reasonable trial strategy. Zebroski failed to demonstrate a miscarriage of justice that required Superior Court to consider this claim.

c. failure to introduce Sarro's criminal history

In this claim, Zebroski attacks the performance of his trial counsel for not presenting the jury, during the guilt phase of his trial, evidence of his co-defendant Michael Sarro's criminal history—a history which included an attempt by Sarro and two fellow juvenile prisoners to sodomize a fellow juvenile inmate. Zebroski's defense strategy was to show that his shooting of Joseph Hammond was an accident. He presented Sarro's statements to police in an effort to corroborate that accident theory. Revealing Sarro's criminal history, and the attempted rape in particular, would not have assisted Zebroski. Rather, it surely would have created additional jury antipathy towards Zebroski, beyond that engendered by the killing of an innocent man. In any case, if the State had sought to introduce such evidence about Sarro, at any stage in the proceedings, Superior Court likely would have

excluded the evidence at the very least as more prejudicial than probative, and more likely as irrelevant.

d. failure to move to redact Zebroski's letter to Kauffman

The jury simply did not convict Zebroski of murdering Joseph Hammond because Zebroski's trial counsel did not move to redact one line from a letter Zebroski wrote. In this claim Zebroski contends that his trial counsel was ineffective for failing to move to redact a line from a letter that he wrote to Kauffman while he was a pre-trial detainee. The specific line about which Zebroski complains stated: "Shit, I feel like beatin the shit out of a few guards in here just to get out of this fuckin' jail. I hate this jail." [A-193]. That line followed Zebroski's discussion about Sarro's presence in another prison, and preceded his thoughts about Sarro's rejection of a plea offer. *Id*. The whole letter detailed Zebroski's understanding of the witnesses he anticipated the prosecution would call to testify against him, and why he believed each witness would not actually cooperate with the State. *Id.* Zebroski also stated his desire to physically hurt Morris for "snitching" on him, and included identifying Morris' location in a housing unit in the same prison where Zebroski was being held. *Id.* The letter described Zebroski's efforts to concoct an alibi defense with Sarro, and requested Kauffman's assistance in communicating with Sarro to learn whether he had provided a different alibi. [A-193-94]. Zebroski also stated he would stick to an

accident defense, and he sought Kauffman's assistance to ensure that Sarro understood that accident theory. [A-194]. The letter in its entirety would have been admissible in the penalty phase, and Superior Court surely could have relied on it. Zebroski's alleged prejudice, that Superior Court considered the line in assessing punishment, has nothing to do with the jury's decision to convict him of the charged offenses.

e. failure to call expert witness to address use of PCP

Zebroski contends trial counsel should have called an expert witness to testify during the guilt phase of his trial regarding the deleterious effects of PCP usage. In the penalty phase, trial counsel did call an expert witness, Dr. Mandel Much, who testified about a number of topics, including the negative repercussions of ingesting PCP. [A-261]. Dr. Much informed the jury that PCP is a very powerful mind-altering drug which Zebroski regularly abused, not just in the hours before killing Hammond. *Id*. Dr. Much also testified that PCP "commonly induces periods or fits of rage and depression." *Id*. During the post-conviction evidentiary hearing, trial counsel testified that he discussed the significance of PCP with Dr. Much in the early stages of his trial preparation, and that he personally had represented numerous defendants who abused PCP so that he was very familiar with the drug's effects. [B-42].

Because Zebroski's trial defense was accident, it made little sense to emphasize Zebroski's voluntary use of PCP during the guilt phase through the use of an expert. Superior Court appropriately instructed the jury that voluntary intoxication is not a defense to criminal culpability. [B-19]. Trial counsel pursued a reasonable trial strategy of presenting Zebroski's PCP usage to the jury solely during the penalty hearing.

f. presentation of mitigation case

Zebroski has more extensively litigated the performance of his trial counsel in the presentation of his penalty phase mitigation case than any other matter. This Court wrote extensively on this issue in its opinion affirming Superior Court's denial of Zebroski's first motion for post-conviction relief. *Zebroski v. State*, 822 A.2d 1038, 1046-49 (Del. 2003). Zebroski revisited the issue in his second motion for post-conviction relief, and Superior Court found the claim to be procedurally barred. Nonetheless, it re-analyzed the claim, explaining why Zebroski could not avoid application of the procedural bars, and determined even if he could, he still failed under a new *Strickland* analysis. *Zebroski*, 2010 WL 2224646, at *5-12.

Superior Court has properly denied Zebroski's latest presentation of this claim as procedurally barred. *Zebroski*, 2013 WL 5786359 at *5 ("like Defendant's other successive claims, his ineffective assistance claims are inexcusably untimely, repetitive, and formerly adjudicated, and accordingly

procedurally barred. And, they are no more subject to constitutional scrutiny or review in the interest of justice than are his other barred claims.").

4. PROSECUTORS COMMITTED NO MISCONDUCT.

Question Presented

Whether Superior Court abused its discretion in finding Zebroksi's claims of prosecutorial misconduct to be procedurally barred.

Standard and Scope of Review

This Court reviews the Superior Court's denial of a motion for post-conviction relief for abuse of discretion. *Ploof*, 75 A.3d at 851. When deciding legal or constitutional questions, this Court applies a *de novo* standard of review. *Id*.

Merits of Argument

Zebroski alleges three instances of prosecutorial misconduct: (1) the State failed to disclose *Brady* material regarding Lance Lawson; (2) the State failed to disclose allegedly exculpatory information regarding Lisa Klenk's statement; and (3) in penalty phase closing statements prosecutors impermissibly argued that the jury acted as the "conscience of the community." Superior Court rejected each of these claims as procedurally barred, and found that the interests of justice did not require further review. *Zebroski*, 2013 WL 5786359, at *3.

Zebroski asserts that the "prosecution failed to disclose that Lance Lawson was the police's initial suspect in Mr. Hammond's death," that Lawson only cooperated under threat of prosecution, and that Lawson received favorable

consideration from the State in exchange for his testimony. Op. Brf. at 36-37. Zebroski cites an affidavit from an investigator of the Federal Public Defenders to support the theory that Lawson was the initial suspect. [A-460]. But nowhere in that affidavit is there evidence that police believed Lawson to have murdered Hammond. Without conceding the veracity of the affidavit, if police told Lawson that they would arrest him "as an accessory" to the crime, such a statement is not *Brady* material. No doubt exists that Zebroski murdered Hammond. An alleged failure to divulge that the police may have heard a rumor that Lawson took part in the robbery with Zebroski at some point did not violate *Brady*.

The United States Supreme Court held in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." A *Brady* claim has three components: 1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; 2) the evidence must have been suppressed by the State, either willfully or inadvertently; and 3) suppression must have resulted in prejudice. *See Strickler v. Green*, 527 U.S. 263, 281-82 (1999). The prejudice prong is closely related to the question of materiality. *Banks v. Dretke*, 540 U.S. 668, 698-699 (2004). The standard is whether there is a "reasonable probability" that disclosure of the suppressed

evidence would have led to a different result." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). A defendant must show that "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 435. Simply showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation. *Id*. at 437. Put yet another way, "the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether [a reviewing court] can be confident that the jury's verdict would have been the same." *Id*. at 453.

There are, however, limits to the State's automatic duty of disclosure. *See United States v. Bagley*, 473 U.S. 667, 675 n.7 (1985) ("An interpretation of Brady to create a broad, constitutionally required right of discovery 'would entirely alter the character and balance of our present systems of criminal justice.'"), quoting *Giles v. Maryland*, 386 U.S. 66, 117 (1967). As the United States Supreme Court has explained, "a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest of the finality of judgments." *Bagley*, 473 U.S. at 675 n.7.

The prosecution has no *Brady* obligation to make a complete and detailed accounting to the defense of all police investigatory work or information that is

preliminary, challenged or speculative. *See, e.g., Giles,* 386 U.S. at 98; *Moore v. Illinois*, 408 U.S. 786, 795 (1972); *United States v. Agurs*, 427 U.S. 97, 109 (1976). Indeed, the mere possibility that an item of undisclosed information might have helped the defense, or might even have affected the outcome of trial, does not establish "materiality" in the constitutional sense. *Agurs*, 427 U.S. at 110.

To the extent police ever considered Lawson a suspect in this case, that possible assumption by the police does not constitute *Brady* material. Nor does Zebroski show how any information possibly given by Lawson to the police constitutes *Brady* information. Zebroski's claim is mere speculation. There is no *Brady* violation where "defendants can only speculate" that the allegedly withheld evidence contained exculpatory information. *See United States v. Rouse,* 410 F.3d 1005, 1010 (8th Cir. 2005), cited with approval in *United States v. Cocchiola*, 358 F. App'x 376, 381 (3d Cir. 2009). The defendant must instead produce some evidence of actual exculpatory information or show that his investigation, aided by the allegedly withheld information, would have borne fruit. *Agurs*, 427 U.S. at 109-110. That some people in Zebroski's group may initially have believed that Lawson helped Zebroski with the robbery does not "put the whole case in such a different light as to undermine confidence in the verdict." Superior Court committed no error in denying this claim as procedurally barred.

Superior Court also properly found Zebroski's *Brady* claim regarding material contained in an interview of Lisa Klenk to be procedurally barred. Zebroski contends that when the police interviewed Klenk, she supplied them with exculpatory hearsay information from a conversation she had with her then-boyfriend, Brian Morris. According to Zebroski, Morris told Klenk that when he saw Zebroski after the homicide, he appeared "white as a ghost" and told Morris the shooting was an accident. Zebroski further claims that Morris's alleged failure to tell Klenk that Zebroski was laughing when he spoke of the homicide and that Zebroski used racial epithets constitutes *Brady* information. Zebroski is incorrect.

At trial Morris testified that shortly after the homicide he saw Zebroski and Sarro and they were acting "real weird," "like they both just got done seeing a ghost." [B-4]. In addition, Morris testified that at first he actively tried to avoid a conversation with Zebroski, but ultimately he was overcome with curiosity and asked Zebroski what happened. Zebroski told him that they "took out the guy that works [at the Conoco station]" *Id*. Morris also testified that Zebroski told him that after Sarro punched the victim, the "gun went off." [B-5]. Zebroski admitted to the crime when he testified, but claimed the shooting was an accident. He also insisted that he did not tell Morris the details of the crime, stating only that "[s]omebody got shot." [B-13; B-15-16].

Zebroski has failed to show prejudice from the alleged failure to turn over purportedly favorable material contained in Klenk's statement. Police interviewed Morris, who supposedly made these statements to Klenk, a number of times. Zebroski knew of those statements and played them at trial. Morris testified at trial, touched upon all issues about which Zebroski now complains and was subject to cross-examination. Zebroski denied talking to Morris in detail. Thus, according to his own version of post-homicide events, Klenk's statement would be, if not untrue, nothing more than uncorroborated and cumulative hearsay. To the extent that Klenk's statement may not have been provided to Zebroski, there was no "reasonable probability" that disclosure of it would have led to a different result. *Kyles*, 514 U.S. 419 (1995).

Zebroski next claims that the prosecution committed misconduct in penalty phase closing arguments by advising the jury twice, once in initial closing and again in rebuttal, that they act as "the conscience of the community." Superior Court properly found this claim to be procedurally barred. Here the prosecutors' statements were an accurate statement of the law. While 11 *Del. C.* § 4209 endows the trial judge with the ultimate sentencing authority, it also provides for an advisory recommendation from the jury, predicated on a balancing of the aggravating and mitigating circumstances. The jury's role comprises the "conscience of the community" in recommending life or death. *Cohen v. State*,

604 A.2d 846, 856 (Del. 1992) ("Although not the final arbiters of punishment, jurors still play a vital and important role in the sentencing procedure. The jury sits as the conscience of the community in deciding whether to recommend life imprisonment or the death penalty.") "[The jury] partakes of a duty normally performed by a judicial officer to 'express the conscience of the community on the ultimate question of life or death.'" *Sanders v. State*, 585 A.2d 117, 133 (Del. 1990), quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). *See also Spaziano v. Florida*, 468 U.S. 447, 481, 486 (1984) (Stevens, J., concurring in part and dissenting in part) (jurors are more attuned to "the community's moral sensibility," because they "reflect more accurately the composition and experiences of the community as a whole."); *Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (jurors provide "an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.").

Here, the judge's instructions to the jury following closing arguments clearly stated that the jury, "acting as the conscience of the community" was to determine for itself the validity and weight of each factor the prosecution had laid out, and to decide on its own and give any advisory opinion as to whether the mitigating factors outweighed the aggravating. [B-35-41]; *see also Sullivan v. State*, 1998

WL 231264, at *30 (D. Del. Apr. 30, 1998). Thus, under the circumstances, the prosecutors' comments did not cause any misperception as to the jury's role under Delaware law. *See id.* In addition, because the prosecution correctly stated the law, counsel's failure to object did not amount to ineffective assistance of counsel. *Id.*

5. THE "INTERESTS OF JUSTICE" DID NOT REQUIRE THE SUPERIOR COURT TO RECONSIDER A REFINED CLAIM RELATED TO THE ADMISSION OF ZEBROSKI'S USE OF A RACIAL EPITHET.

Question Presented

Whether Superior Court abused its discretion in declining to reconsider a refined claim that this Court decided on direct appeal.

Standard and Scope of Review

This Court reviews the Superior Court's denial of a motion for post-conviction relief for abuse of discretion. *Ploof,* 75 A.3d at 851. When deciding legal or constitutional questions, this Court applies a *de novo* standard of review. *Id*.

Merits of Argument

Zebroski again challenges the admission at trial of his use of a racial epithet that he made regarding the victim. Superior Court denied this claim as formerly adjudicated based on this Court's decision on direct appeal. *Zebroski*, 2013 WL 5786359, at *2, citing *Zebroski*, 715 A.2d at 80. On direct appeal, Zebroski raised a claim that the trial court erred in allowing testimony that he referred to the victim as a "nigger." *Zebroski*, 715 A.2d at 79. Zebroski has refined that claim and added allegations of ineffective assistance of counsel.

a. **Brian Morris Testimony**.

Morris, over extensive defense objection, testified that Zebroski told him

that he "shot the nigger [Hammond] in the head." After weighing the probative value against the risk of unfair prejudice, this Court found that because Zebroski presented an accident defense, the statement was probative of his state of mind as to intent and motive. *Zebroski*, 715 A.2d at 79. In upholding the admission of Morris's statement, this Court specifically considered both *Dawson v. Delaware*, 503 U.S. 159 (1992), and *Barclay v. Florida*. 463 U.S. 939 (1983). This Court acknowledged that while the introduction of racial material in an effort to create bias against a defendant or establish his abstract belief is unconstitutional (*Zebroski*, 715 A.2d at 79, citing *Dawson*, 503 U.S. at 166-67), such evidence is nevertheless properly admitted where it indicates more "than mere abstract belief and was relevant to issues involved." *Zebroski*, 715 A.2d at 80; *see Barclay*, 463 U.S. at 949. Zebroski claimed that he shot Hammond accidently, *i.e.*, he lacked the requisite criminal state-of-mind. His statement that he "shot the nigger in the head" therefore had particular relevance as to the determination of whether Zebroski shot Hammond intentionally or by accident.

b. Proffer of Morris's Testimony.

Zebroski complains that the State did not satisfy its proffer to Superior Court regarding the anticipated substance of Morris's testimony. According to Zebroski, the prosecution, therefore, did not prove that the racist sentiment expressed by Morris was tied to Zebroski's criminal acts. Zebroski appears to argue that

because the prosecution failed to elicit even more racially charged statements from Morris, he has suffered prejudice. Not so. The relevance of Zebroski's statement to Morris is undeniable: the statement contradicted Zebroski's accident defense. That Morris's testimony was not as damaging as the State's proffer of his testimony did not prejudice Zebroski.

c. Lance Lawson Testimony.

Zebroski alleges error based on the penalty phase testimony of Lance Lawson. Lawson testified that Zebroski had thought of robbing the Conoco station a couple years prior and told Lawson "if anything happened, he would shoot the nigger." [B-23]. In pertinent part, 11 *Del. C.* § 4209(c)(1) provides that in a capital punishment hearing "evidence may be presented as to any matter that the Court deems relevant and admissible to the penalty to be imposed." Had trial counsel objected to the admission of Lawson's testimony, the Superior Court would have overruled this objection. *See* 11 *Del. C.* § 4209(c)(3)(a)(2) (judge and jury consider "all relevant evidence in aggravation … which bear[s] upon the particular circumstance or details of the commission of the offense and the character and propensities of the offender"). This is especially so, not only because the racial statement negated Zebroski's accident claim, but also because Zebroski himself testified that he had previously discussed, with Morris and others, plans to rob the same Conoco station two years prior and had even staked out the

station before he changed his mind. [A-205; 180; B-17-18]. Moreover, on cross-examination of Lawson, defense counsel elicited testimony helpful to Zebroski that Lawson did not call police because he did not believe that Zebroski intended to shoot Hammond. [A-228]. The Superior Court did not err in admitting Lawson's testimony in the penalty phase, and did not abuse its discretion in denying as previously adjudicated Zebroski's refined racial epithet claim.

6. ZEBROSKI'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AND CONFLICT OF INTEREST REGARDING LANCE LAWSON WAS PROCEDURALLY BARRED AND MERITLESS.

Question Presented

Whether representation of a witness at a bail hearing by a different public defender caused a conflict of interest that undermined the reliability of Zebroski's penalty phase.

Standard and Scope of Review

This Court reviews the Superior Court's denial of a motion for post-conviction relief for abuse of discretion. *Ploof*, 75 A.3d at 851. When deciding legal or constitutional questions, this Court applies a *de novo* standard of review. *Id*.

Merits of Argument

Zebroski contends that his trial counsel, Dallas Winslow, Esq., an Assistant Public Defender, operated under a conflict of interest because a witness the prosecution called during the penalty phase, Lance Lawson, had been represented by John McDonald, Esq., also an Assistant Public Defender, at the time of Lawson's preliminary hearing in the Court of Common Pleas. Superior Court denied the claim as "unsupported by evidence, such as a transcript." *Zebroski*, 2013 WL 5786359, at * 3. Moreover, Superior Court found the claim to be "trivial

at the worst." *Id*. The record supports Superior Court's disposal of Zebroski's claim.

The United States Supreme Court has held that "the possibility of a conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). This Court will not find ineffective assistance of counsel based on a conflict of interest and presume prejudice unless the defendant shows that "counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Lewis v. State*, 757 A.2d 709, 718 (Del. 2000), quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984), quoting *Cuyler*, 446 U.S. at 348. "[A]n actual, relevant conflict of interests [exists] if, during the course of representation, the defendants' interests do diverge with respect to a material factual or legal issue or to a course of action." *Lewis*, 757 A.2d at 718, quoting *Cuyler*, 446 U.S. at 356 n.3.

First, Zebroski wrongly assumed that a conflict existed. Second, he failed to show that he suffered any prejudice as a result of the purported conflict. Zebroski cites no violation of a Rule of Professional Conduct. Zebroski describes Mr. McDonald's May 29, 1996 letter as "acknowledging conflict." Op. Brf. at 49. The letter, however, reads: "to avoid any *appearance* of a conflict of interest on the part

of the Office of the Public Defender, I am requesting appointment of counsel for Mr. Lawson at the earliest possible date." [A-496] (emphasis added). On June 3, 1996, Superior Court appointed Anthony Figliola, Esq., to represent Lawson. Jury selection for Zebroski's trial did not begin until January 7, 1997, more than seven, not two, months after Lawson had new counsel. *Cf.* Op. Brf. at 48. Lawson did not testify during the guilt phase of Zebroski's trial. The State called him as a witness during the penalty phase on January 30, 1997. Zebroski's trial counsel vigorously cross-examined Lawson regarding his memory, credibility, and particularly his motivation in testifying. [A-228-30]. Additionally, Zebroski's trial counsel called Mr. Figliola as a witness in the penalty phase on the topic of Lawson's cooperation with the prosecution. [B-24-34]. At a sidebar during that testimony, Mr. Winslow informed the Superior Court that he did not even know who represented Lawson until he cross-examined Lawson. [B-29].

The Office of the Public Defender is assigned to represent indigent defendants at the time of arraignment in Justice of the Peace Court. The preliminary hearing here involved an assistant public defender only seeking a reduction of Lawson's bail. The interaction between the defendant and the public defender at a preliminary hearing was necessarily brief. In general, this high volume proceeding could not function if the Office of the Public Defender had to conduct a conflict check before the preliminary hearing stage. Zebroski has not

suggested that Lawson provided any confidential information to Mr. McDonald. Zebroski has not argued that Mr. Winslow refrained from cross-examining Lawson because he had accessed privileged communications between Lawson and Mr. McDonald. Instead, Zebroski contends that Mr. McDonald's brief representation of Lawson at the preliminary hearing, which resulted in Lawson's release on bail, eliminated an area of cross-examination. Op. Brf. at 48. Superior Court properly found Zebroski's conflict argument to be speculative. *See Pettiford v. State*, 2011 WL 2361383, at *2 (Del. Jun. 13, 2011) (representation of co-defendant by office of public defender for six-week period during which counsel did not meet with or obtain information from co-defendant did not support speculative claim of ineffective assistance of counsel related to cross-examination of co-defendant). *See also People v. Wilson*, 952 N.Y.S.2d 837, 842 (N.Y. App. Div. 2012) (no ineffective assistance of counsel who represented prosecution witness at bail hearing and cross-examined that witness at time of defendant's trial where attorney provided no substantive legal advice and did not engage in detailed discussion with former client who became prosecution witness); *People v. Cornwell*, 117 P.3d 622, 638-39 (Cal. 2005) (no actual or potential conflict where attorney has not received confidential information from witness); *Hunter v. State*, 817 So.2d 786, 793 (Fla. 2002) (prior representation of prosecution witness by public defender's office insufficient to show conflict which prevented adequate cross-examination of

witness); *United States v. Hopkins*, 43 F.3d 1116, 1119 (6th Cir. 1995) (no conflict arising from dual representation where attorney was unaware of representation and never made choices between interests of two defendants).

CONCLUSION

The judgment of the Superior Court should be affirmed.

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DEPARTMENT OF JUSTICE

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CERTIFICATION OF SERVICE

The undersigned certifies that on February 7, 2014, he caused the attached *Answering Brief* to be delivered to the following persons in the form and manner indicated:

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