IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES E. COOKE,	)	
	)	
Defendant Below	)	
Appellant,	)	
	)	
v.	)	CASE No. 519, 2012 & 526, 2012
	)	CONSOLIDATED
STATE OF DELAWARE,	)	
	)	
Plaintiff Below	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

On June 16, 2005 James E. Cooke ("Cooke") was arrested and charged for the murder of Lindsey Bonistall, and the burglaries of Amalia Cuadra and Cheryl Harmon's apartments. On August 9, 2005 Cooke was indicted for murder first degree, felony murder first degree, rape first degree and numerous other felony offenses. This was a capital prosecution.

Cooke's first trial started on February 2, 2007, lasting several weeks. The jury returned a verdict of guilty for all indicted charges. At the conclusion of the penalty hearing phase of the trial, the jury recommended a death sentence for each charge of murder first degree. On June 6, 2007 Cooke was sentenced to death. A timely Notice of Appeal was filed. The Delaware Supreme Court reversed and remanded his case back to Superior Court. State v. Cooke, 977 A.2d 803 (Del. 2009)

For his retrial, Cooke was assigned conflict counsel, however, due to a conflict between Cooke and counsel the trial court allowed counsel to withdraw. Subsequent to Cooke's original conflict counsel withdrawing, the case was assigned to the Honorable Charles H. Toliver, IV. The court appointed new conflict counsel, Anthony A. Figliola, Jr., and Peter W. Veith ("Counsel"). The trial court scheduled Cooke's trial for February 20, 2012. Jury selection began

February 20, 2012 with trial commencing March 7, 2012. On April 13, 2012 the jury returned verdicts of guilty as to Murder First Degree (Intentional), Murder First Degree (Felony), Rape First degree, Reckless Endangering First Degree, Burglary First Degree, Burglary Second Degree (Two Counts), Robbery Second Degree, Theft and not Guilty of Theft.

A penalty hearing began April 18, 2012 and ended May 3, 2012. The jury, by a vote of 10 – 2, recommended death as to Murder First Degree (Intentional) and 11-1 recommended death as to Murder First Degree (Felony).

Appellant filed a Motion for a New Trial which was denied on July 24, 2012. On September 17, 2012, Cooke was sentenced to death.

A timely Notice of Appeal was filed. Appellate counsel sought and received several extensions of time to prepare and file the Opening Brief and Appendix.

Appellate counsel also sought and received a page extension.

This is Appellant's Opening Brief.

SUMMARY OF THE ARGUMENT

1. The trial court abused its discretion when it failed to grant a mistrial when it was discovered, after the verdict, that a juror had failed to properly answer voir dire.

2. Denial of mistrial request after potential juror tainted the panel was an abuse of discretion.

3. Dismissal of juror during trial over objection of defense was an abuse of discretion.

4. State of Delaware through its policy as dictated by the State Department of Corrections deprived Appellant of proper representation.

5. Defendant over objection of Court Appointed Counsel was permitted to represent himself, that right was compromised when the court failed to grant pro se defendant 's continuance request's which prohibited Appellant to properly prepare for his own defense.

6. Failure to declare a mistrial when Court stripped defendant of his right to self-representation was an abuse of discretion.

7. Denial of Appellant's right to put on a defense pursuant to 11 Del. C. §3508, where the only allegation of rape was that asserted by the State is a deprivation of Due Process.

8. Allowing lay-opinion testimony regarding voice identification was an abuse of discretion.

9. Ordering Defense Counsel to put on a Mitigation case during the penalty phase over objection of Appellant was in Violation of V Amendment to the United States Constitution.

10. Sentence of Death did not meet the Proportionality Test.

STATEMENT OF FACTS

The Crime

On April 27, 2005, Newark Police Department ("NPD") responded to 11-2 Thorne Lane, Towne Court Apartments, in reference to a burglary complaint. (A526) The tenant, Cheryl Harmon Johnson, advised that when she entered her apartment she smelled fingernail polish and noticed writing on her wall and door. Written on the living room wall was the statement "We'll be back;" "I what [sic] my drug money" was on the bathroom wall as well as "Stop messing with my men" on the bathroom door. Personal property was missing from the apartment. (A527- A529)

On April 29, 2005, Amalia Cuadra awoke in her apartment at 209 W. Park Place to find someone standing in her bedroom doorway shinning a light in her face. Thinking it might be her roommate she called out her roommate's name. In response she heard a voice say "shut the fuck up or I'll kill you; I know you have money." (A297, 298) Cuadra described the individual as a light skinned black male with bumps or freckles on his face' wearing a gray hoodie, a hat, knitted gloves and light blue pants. The individual demanded money from her and for her to disrobe. The individual fled the house taking personal property. (A530–A535)

Shortly after the burglary Cuadra's credit card company discovered that one

of her credit cards was attempted to be used at an ATM on Elkton Road in Newark. (A536) The NPD was able to retrieve the ATM surveillance video that showed an individual attempting to use her credit card. The NPD was able to download photographs of the individual.(A537) Cuadra assisted the NPD in creating a composite sketch of the intruder. She described the person as a very light skinned black male with "puffy" cheeks wearing a hooded sweatshirt. (A300). When shown the photographs from the surveillance video she was pretty sure that it was the man in her bedroom. (A303) However, when shown a photographic array containing a photograph of ("Cooke") she did not pick him out. (A305) At trial, Cuadra testified that she identified someone other than Cooke, however, a NPD officer; Detective Rubin ("Rubin") told her she picked the wrong guy. She then testified that she should have gone with her first gut instinct and picked out Cooke. (A307)

On May 1, 2005, a Newark volunteer fire department responded to a fire call at 81 Thorn Lane at the Towne Court Apartments. (A538) Rubin also responded to the scene which was a second floor apartment. While at the scene, he observed and photographed writing on the doors/walls/kitchen countertop that appeared to be from a blue Sharpie marker which was recovered. "KKK" was written on the back of the front door, closet door and kitchen countertop. Written on the living

room wall was "More Bodies Are going to be turn in up Dead" [sic] and "We What Are [sic] weed back. Give us Are [sic] drugs back." "White Power" was also written in the kitchen.

(A173, 174)

In the bathroom there was a large amount of debris in the bathtub. The State Fire Marshall started to dismantle the debris; however, he stopped when he found what appeared to be a body. Lindsey Bonistall ("Bonistall"), one of the lessees for the apartment, burned and bound body was found under the debris. (A188-A190) The State Fire Marshall ruled that the fire was intentionally set. (A539)

NPD was able to create a reward poster from the ATM surveillance video from the Cuadra burglary. The reward poster was displayed around the Newark area. The Payless Shoe Store displayed the poster until it was taken from their storefront window. Diane Hannah, a Payless employee testified that a second clearer poster replaced the original poster that had vanished. She testified that Cooke an employee of Payless resembled the person in the poster and that he last work at Payless on May 5th. Hannah called her supervisor James Jones who also thought that the person in the poster resembled Cooke. They called the police.

(A540, 541)

On May 2, 2005, Newark 911 Center received a telephone call from a

cellular phone. The 911 caller gave detailed information about the Bonistall, Cuadra and Harmon crimes. The information provided was not public knowledge. On May 7th NPD received two additional 911 calls in which the caller also provided information about the crimes. (A542 – A546)

On June 7, 2005 Cooke was arrested. Cooke's girlfriend, Rochelle Campbell ("Campbell") was interviewed by the police and told them that Cooke lived with her in Newark. Campbell initially told the police that Cooke did not leave the house during the time of the three incidents; however, she changed her story telling the police late one morning she saw Cooke with a backpack with the name "Amalia" on it and credit cards. Additionally, she told the police that Cooke had tried to use one of the credit cards. (A324 – A327)

The State Medical Examiner ruled the death of Bonistall a homicide with the cause of death strangulation. DNA was also discovered under Bonistall's fingernails and in her vaginal that included Cooke as the contributor. (A204 – A206)

Cooke was indicted and went to trial in 2007. The jury convicted him of all counts including intentional and felony murder. After a penalty hearing, the jury recommended a death sentence by a vote of 12-0 for both counts of murder. The court sentenced court to death. This Court reversed and remanded the case back to

Superior Court. State v Cooke, 977 A.2d 803 (Del. 2009)

Pre-retrial

On March 9, 2011 counsel was appointed to represent Cooke not limited to but including Capital Murder. (A48) On June 27, 2011, Counsel filed a motion with the Court asking for access to Cooke. (A49) Subsequent to the filing of the motion for access to the defendant, Cooke was transferred from the Howard R. Young Correctional Institution in Wilmington to the James T. Vaughn Correctional Institution in Smyrna, Delaware. Since the case was being litigated in Wilmington, counsel filed a motion to compel the state to relocate Cooke. (A51)

The Court set a deadline of December 2, 2011, for Cooke to determine whether to represent himself. (A49)

On November 10, 2011 a hearing was held concerning various motions including his desire to represent himself. One of the issues addressed was the defense motion to relocate Cooke. The court granted the defense motion ordering the Department of Correction to transfer Cooke back to the Howard R. Young Correctional Institution. Discussions over the delay in the request to have Mr. Cooke transferred followed. (A76 - A79) During this hearing, the issue of Cooke representing himself at trial was addressed. The court entered into a colloquy with Cooke concerning his desire to represent himself. The issue was continued for

supplemental legal submissions from the state and defense counsel. (A80- A84) On November 30, 2011, a hearing was held to determine Cooke's intent regarding representation. (A85) Cooke and the court entered into a long colloquy regarding self-representation. (A86 - A102) The court asked counsel for comments; defense counsel suggested that though mentally competent Cooke was not legally competent to represent himself. (A103) Regarding competency to represent one' s self, counsel opined that unless given adequate time to prepare and absent legal resources, Cooke would not be competent to represent himself. (105, 106) The court indicated failure to be prepared was a pitfall of self-representation and that he had no intention of continuing the trial. (A107) The judge further opined that the request for self-representation was due to limited access to counsel. (A108) The court allowed Cooke to represent himself. The court than appointed trial counsel to act as stand-by counsel and prepare for trial, as if they were representing Cooke. (A109) Cooke asked for a continuance, the request was denied; however, the court gave leave for it to be raised again should circumstances change. (A110 - A119) Finally, Cooke informed the Court that if convicted he would not present mitigation. (A104)

At a status hearing held on January 27, 2012, Cooke renewed his request for a continuance of his trial. Cooke argued that due to the voluminous discovery, his

limitations of accessing the discovery and law library at the prison coupled with the serious nature of the penalty he potentially face, he did not have sufficient time to prepare a defense. The continuance request was denied. Additional issues regarding competence of self-representation were discussed. Lastly, the issue of a plea extended to Cooke was discussed. Cooke still wished to represent himself and the plea offer was rejected. (A120 -A126).

On February 20, 2012 jury selection began with general instructions to the jury panel. The potential jurors were instructed that any knowledge or opinion about the case not be shared with any other potential juror. Jurors were also asked if they knew the attorneys involved in the case or any other attorney in the Office of the Attorney General or any employees in the Office of the Attorney General or Defense Counsel. Furthermore the court inquired as to whether or not the jurors, any family member or relatives were victims of any crimes or pending investigation for any crimes? (A127)

Mrs. Luz Rodriquez, ("Rodriguez") a potential juror was presented for voir dire questioning. Rodriquez did not affirmatively answer the preliminary question, of whether she knew the attorney's or any attorney in the Office of the Attorney General or the questions concerning whether she or any family member was the victim of a crime or under investigation. (A128-129) After Rodriguez finished

answering the voir dire questions Cooke elected not to move for cause or exercise a preemptory challenge. Ms. Rodriquez was seated as Juror No. 3. (Juror 3") (A130)

On March 1, 2012 and excused Juror, Joan Reeder was called to the stand and questioned regarding remarks made during the Jury Selection process. Ms. Reeder testified that an individual she knew as Bill was talking about how to get excused from jury duty and how the defendant was guilty. (A131, 132) Ms. Reeder further identified the potential juror as William Wilson. (A133, 134)

She noted that there were approximately five potential jurors who heard Mr. Wilson's inappropriate comments. (A135) Cooke, representing himself moved for a mistrial based upon the testimony of Ms. Reeder. (A136) He also requested that William Wilson be brought in for questioning. (A137) The motion for mistrial was denied, however, the Court agreed to bring in Mr. Wilson for questioning. (A138, 139)

William Wilson testified regarding the accusations of Ms. Reeder. (A140) Wilson admitted to discussing the case with other potential jurors. Wilson testified there were plenty of conversations among the jurors regarding the case. Cooke did not renew his motion for mistrial at this time . (A142 - A 151) The judge ordered his previous denial of the mistrial remained. (A152)

On March 7, 2012 trial began with Cooke, *pro se*, moving for a mistrial. Cooke raised concerns over his inability to meet with counsel, his inability to properly prepare for trial due to time constrains and overall objections to what he believed were unfair acts by the State which were preventing his ability to receive a fair trial. The trial judge failed to rule on Cooke's motions for a mistrial. (A153-A156) Cooke began his opening remarks by addressing the jury and stating "I cannot get a fair trial." (A157) He specifically argued an issue regarding the alleged victim's drug habits, the State raised an objection and argument briefly took place in front of the jury. The jury was removed from the courtroom and argument continued absent the jury. (A157- A160)

The first witness called by the State in their case-in-chief was a Ryan Simms. During cross-examination, Cooke referred to Simms previous testimony "in my last trial" (A161), the judge stopped Cooke and removed the jury. Cooke was instructed that he could not refer to the last trial. Cooke debated the issue but stated he understood. (A162) Cooke continued his cross-examination with the State repeatedly objecting. At the close of his cross-examination of Mr. Simms, Cooke accused the judge, and the state of conspiring against him, denying his right to a fair trial. (A163-A168)

The next state witness was Detective Andrew Rubin ("Rubin") the chief-

investigating-officer. Rubin testified that he was on call the evening of April 30, 2005 when he responded to an apartment fire at 81-Thorne Lane, Towne Court Apartments. (A171). Detective Rubin testified that when he surveyed the apartment, he observed suspicious writing on the walls, doors and kitchen counter top. (A172 - A174)

Prior to finishing direct examination of Andrew Rubin, the State requested the court to instruct Cooke as to what he was permitted to ask on cross examination. Cooke objected to the court instructing him that his cross-examination is limited to the issues raised during direct examination by the State. The Court instructed Cooke that he must follow the Rules of Evidence. (A175 - A 187)

Rubin resumed his testimony. Rubin testified that he was able to establish that the apartment was rented by two University of Delaware coeds, Christine Bush and Lindsey Bonistall ("Bonistall"). (A188) Rubin was able to make contact Ms. Bush; he was unable to contact Bonistall. Rubin testified that the Fire Marshal found what appeared to be a dead body in the apartment's bathtub. (A189, 190) The body in the bathtub was Bonistall.

During his cross-examination of Rubin, Cooke began to ask about the writing found in the apartment, the state objected. The Court sustained the

objection finding the questioning was beyond the scope of direct. Cooke than began to question Rubin about certain items found in the apartment, the State again objected, the court ordered the jury removed from the courtroom. Again, Cooke argued he was not receiving a fair trial. (A191 - A194) When the jury reentered the courtroom, Cooke began to make a statement; the judge ordered Cooke to stop and again ordered the jury be taken out of the courtroom. Cooke was instructed to follow the rules of evidence; the court also concluded Cooke's examination of Rubin. The court further informed Cooke, that if he continued to defy the Court's instruction, Cooke would be stripped of his right to self-representation. (A196 - A200)

The next State witness was Medical Examiner, Jennie Vershovsky, M.D. ("Vershovsky") Prior to her testimony, the State requested the Court to instruct Cooke that he could not question the witness about DNA reports previously excluded. (A200 -A203) Vershovsky testified that she examined Ms. Bonistall for signs of sexual assault. Vershovsky gave no affirmative opinion as to whether Ms. Bonistall was sexually assaulted. (A204, 205) Her testimony continued, and Vershovsky opined that strangulation was the cause of death. Furthermore, Vershovsky testified that the toxicology analysis of Bonistall's blood evidenced that she had marijuana in her system at time of her death. (A206)

Prior to Cooke's cross-examination of Vershosky, he addressed the court regarding what he perceived as the courts' attempt to prevent, him from receiving a fair trial, arguing that the State was interfering with his constitutional right to counsel and that there was no evidence that Bonistall had been raped. (A207 - A213) Vershovsky testified on cross-examination that she did not determine that Bonistall was a victim of rape. (A214) Cooke attempted to continue questioning of Vershovsky when the State objected, an argument between Cooke and the court followed. The court asked for stand-by counsel's estimate of how long they would need to take over the case, Cooke was opposed to having stand by counsel reinstated as his trial counsel. (A215 - A 223) The trial was recessed for a hearing to determine if Cooke had forfeited his right to self-representation. The trial judge heard argument from Cooke as to why; he had not forfeited his right of self-representation. Additionally, the court solicited comment from counsel, and over the objection of Cooke, stripped him of his right to self-representation, appointing stand-by counsel to take over his defense. (A224 - A248)

Counsel for Cooke moved for a mistrial upon being placed into the case citing extreme prejudice to the defendant and the fact the case was still in its early stage. Counsel also addressed areas that were not properly dealt with by Cooke. The State raised objections, arguing Cooke was warned about *pro se* representation

and Counsel should have to proceed with those deficiencies. The motion for a mistrial was denied. (A249 - A253) Cooke again addressed the court, objecting to the court order reinserting stand-by counsel as counsel for his defense. (A254 - A259)

The trial was briefly continued to allow Counsel time to prepare. When trial resumed, Cooke again voiced his objection to the court ordered representation. (A260, 261) Counsel presented a motion pursuant to 11 Del. C. §3508 asking that the Court reverse its previous ruling regarding Bonistall's use of drugs and her sexual activity. The defense argued that these issues were central to the defendant's case. The Court allowed the defense to explore the drug use, but denied the use of any evidence related to sexual activity. (A260 - A266)

The trial re-commenced with counsel conducting the cross examination of Vershovsky asking whether marijuana was present in the victim's system at the time of her death. The presence of marijuana in the victim's system was confirmed (A267) Vershovsky further testified that she examined the victim's vaginal area and found no laceration or tears. She found an area of redness which could be caused by means other than trauma. She also testified that the sex could be consensual. (A268, 269) Cooke again engaged in a colloquy with the court over the court's denial to allow Cooke to represent himself. (A270, 271)

In the State's presentation of the physical evidence of the crime scenes, NPD Evidence Detection Unit Detective Maiura testified. Detective Maiura presented sections of the walls and kitchen counter top found in the Bonistall's apartment. The items were admitted into evidence without objection. The items had writing such as "KKK " , "We What [sic] Are [sic] weed back. Give us Are [sic] drugs back." Also, "White Power" was written in the kitchen. The writing appeared to be written by the use of a blue Sharpie marker. (A272) Additionally, evidence of discolored clothing and bed linens were introduced without objection. Detective Maiura opined the clothing looked as if it could have been bleached. (A273)

During cross-examination, Maiura again identified other writings found on the victim's walls "more bodies are turn in [sic] up dead" he testified that the writing caused questions. (A274) No marijuana was found in the residence, however; drug paraphernalia was found inside the victim's apartment. (A274) Also found inside the residence, was a fraternity composite photograph and a yellow rose. (A275)

Bonistall's roommate at the time of her death Christine Bush was also subjected to cross-examination. Counsel questioned her as to whether she recognized the fraternity composite found in her apartment as belonging to either herself or Bonistall. She denied knowing about the composite. The composite in

question was from a fraternity; Sig Ep. Ms. Bush was then asked if she knew if Bonistall ever dated a member of that fraternity and the State objected. The State's strenuous objection was initially as to relevance, it later reverted to 11 Del. C. §3508. Defense argued that the composite contained hand written remarks regarding the sexual prowess of the fraternity members that may have suggested a motive for murder. Additionally, the writing on the composite was blue ink consistent with type of marker used to write on the walls and kitchen countertop in Bonistall's apartment. Bush testified that she did not see the composite in the apartment prior to the murder of Bonistall. The court limited the questioning. (A276 - A278) Cooke again addressed the court complaining about counsel and asking to be allowed to represent himself. (A279 - A281)

Georgia Carter, a retired State Police forensic document examiner, was called by the State as an expert regarding handwriting analysis. (A282) Ms. Carter was presented documents alleged to have been the known writing samples of Cooke. (A 283-284) Ms. Carter compared the known samples with the evidence, writing on the walls and kitchen countertop opining that there were strong indications that Cooke probably prepared the writings on the wall. (A285) The State further had Ms. Carter testify that too a reasonable degree of forensic certainty, Cooke wrote on Ms. Bonistall's walls, doors and countertop. (A286)

Ms. Carter on cross-examination testified that she was not certified as a forensic examiner. (A287)

Cuadra testified regarding the burglary of her residence. (A288 -A299) Cuadro further testified about her involvement with creating a composite sketch of her intruder. (A300-A302) Following the making of the sketch, she was shown a photo of the suspect at an ATM, using her stolen credit card. She positively identified the person in the ATM photo as the intruder in her home. (A302- 303) Ms. Cuadra further testified that she was shown a photo-array of six or eight suspects which included suspect Cooke; however, she identified an individual who was not Cooke. Cuadra than testified that a NPD officer told her she picked the wrong guy. She continued to testify that her gut instinct was to pick Cooke, however, she did not. (A304 - A307) The trial judge held a sidebar conference concerning her identification of Cooke. (A307 - A313)

On cross-examination Cuadra again stated she did not initially identify Cooke from the photo array and that she was told by a Detective she identified the wrong man. She later picked James Cooke's photograph (A314 - A316) Cuadra testified that Rubin was the officer who told her she picked the wrong guy before she picked Cooke out of the array. Following the testimony of Cuadra the state recalled Detective Rubin. Rubin contradicted Cuadra's testimony concerning

identifying Cooke claiming he never told her she picked the wrong guy. (A 317, 318)

On March 26, 2012 a colloquy between the Court and Juror No. 10 (Juror 10) took place. Juror 10 was late for court, she explained why she was late and the judge admonished her, he did not understand how the incident described would make her late. (A319) Following the morning recess, the state requested a sidebar regarding Juror 10. The State proffered they believed Juror 10 was not paying attention due to the court's prior reprimand for her tardiness. The defense objected to the State's characterization of the juror. The Court seemed to side with the state but took no action. (A320)

Next, the State sought to introduce the lay-opinion testimony from Rubin that he recognized Cooke's voice as the voice that made three 911 calls within days of the Bonistall murder and the Cuadra and Harmon burglaries. The Court expressed concern in light of Ms. Cuadra's allegations regarding her identification of Cooke. (A321 - A323) Additionally Campbell, Cooke's girlfriend, had already testified that the voice on three separate 9011 calls was Cooke and that she was 100 % sure. (A324 - A327) Over defense objection, the court ruled it would allow Rubin to give an opinion as to whether the voice on the 911calls was that of Cooke. Rubin testified that in his opinion Cooke was the caller who made the 911

calls, (A336, 337)

The State again addressed Juror 10, the defense opined that it was their belief the State was attempting to replace Juror 10 because she appeared to be siding with the defense. (A328, 329) Cooke again asked to address the Court. (A330)

During cross-examination of Campbell, who was almost nine months pregnant with Cooke's child at the time of his arrest, testified that when she was initially interviewed by the police she told them that Cooke never left the house on night of the Cuadra burglary, or the Bonistall murder. She also testified that the police did not believe her story. Additionally, she testified that they threatened to take her children away and that she would give birth to her child in jail if she did not cooperate. (A331 - A335)

On March 29, 2012, the jury was allowed to view the three crime scenes and other relevant locations in Newark. (A338, 339) Upon returning from the jury view an issue regarding a juror was brought to the Court's attention. (A339) The juror in question was Juror 10 who had a previous discussion with the court. Juror 10 had engaged in a loud exchange with a bailiff whom the juror thought was disrespecting her. The State asked for the court to remove the juror. The court, after conducting a colloquy with the juror and court personnel, removed the juror;

substituting an alternate in her place. The defense objected. (A340 - A344)

Following dismissal of Juror 10, Cooke requested permission to address the court. Cooke voiced his displeasure at the court's ruling to dismiss Juror 10. He accused the trial judge of having an attitude against his own kind and accused the judge of threatening him. After this heated exchange, counsel sought both a mistrial and a recusal of the trial judge. The motions were denied. The court conducted individual questioning of the remaining jurors. (A344 - A353)

On March 30, 2013, Cooke was instructed regarding his right to testify or remain silent, Mr. Cooke indicated he understood. (A354, 355)

During questioning of Detective Maiura the defense introduced a redacted copy of the fraternity composite found in Ms. Bonistall's apartment, the composite was submitted in the absence of certain sexual writings which were removed, the court ruled that the sexually suggestive writing on the composite was ruled inadmissible under 11 Del.C. §3508. (A356)

Patrick Corcoran, a retired Newark Detective was called as a defense witness. Detective Corcoran basically testified that he had little recollection of his involvement in the Cooke case. Upon completion of his testimony, the court asked counsel to approach the bench. The Court expressed disbelief that the witness could not recall his involvement. (A357 - A359)

During a colloquy regarding scheduling, the court commented on telling the jury the scheduling delay was on the judge. The State commented, the group of 17 likes you, the Court responded I'm glad somebody does, the State's response was "meaning there was only one who didn't and she's gone." This comment by the state was an obvious reference to the dismissal of Juror 10. (A360)

Cooke again asked to address the court. He charged the state with misconduct and complained about the questioning of witnesses by his attorneys. He again argued he wanted to represent himself and the judge unfairly took that right from him. (A361 - A363)

During the defense case, Cooke's sister Sabrina Sorrell also testified. During the cross-examination of Ms. Sorrell, Cooke, sua sponte, raised an objection; the court immediately ordered the jury out of the courtroom. A colloquy took place between Cooke and the court. Cooke expressed displeasure with Counsel and accused the State of demeaning his family. (A364)

At the end of the defense case, the court conducted another colloquy with Cooke regarding his right to remain silent or testify. Cooke elected to testify. The court instructed Cooke he was not permitted to testify about Bonistall's sexual activities unless related to himself. (A365, 366)

Cooke testified he did not attempt to use the ATM card of Ms. Cuadra.

(A367) He also denied owning gray gloves, he admitted to owning brown gloves with dots. (A368) Cooke claimed that he was harassed by the police during his interview and repeatedly denied involvement in the alleged crimes. He claimed to have had consensual sex with Ms. Bonistall and that state would not believe there was consensual sex between a white woman and a black man. (A369) Cooke claimed that in the past, before her murder, Bonistall had come to his house looking to purchase marijuana. (A370) Regarding his statement to the police, Cooke testified that prior to his taped interview he was interrogated. Cooke claimed the entire interview last over six hours. He also claimed that during the police interrogation he was denied food and bathroom breaks. (A371)

During cross-examination Cooke became testy in his response in the presence of the jury. The court informed defendant that it was about to take drastic measures. Cooke responded he was being framed; at that point the court removed the jury. No application for a mistrial was made at that time. (A372, 373)

Cooke again asked to speak with the court. He again raised the issue of the court taking his right of self- representation without cause, and again complained about his court appointed attorneys. Lastly, he accused the State of misconduct. (A374 - A376) Cooke had repeatedly voiced displeasure with his court appointed counsel, having accused the court of pre-planning the court's intention to not allow

Cooke to represent himself throughout the trial. (A377 - A386)

During the State's rebuttal case Cooke again addressed the Court, again asserting the fact he was being denied a fair trial. (387, 388)

During closing rebuttal, the State commented on the lack of a defense expert testifying in rebuttal of the State's handwriting analysis expert. Counsel objected to the reference that no defense expert was utilized to challenge the state. The Court did not rule on the objection. (A389, 390)

Judge Toliver swore the bailiff's and gave the case to the jury. (A391)

On April 13, 2012 the jury returned guilty verdicts on 10 of 11 counts against Cooke. Counsel requested the jury to be polled. (A392, 393)

The Penalty Phase

Following the verdict, the court addressed Cooke and he stated that he would not cooperate with mitigation again asserting his innocence. The court ordered defense counsel to present mitigation over Cooke's objection. (A394)

Cooke again addressed the Court prior to the start of the penalty phase stating that he was waiving the presentation of any mitigation evidence other than his own testimony. (A395) A colloquy between Cooke and the court took place were he put on the record his complaints, including his lack of time to adequately prepare his own defense. (A396 - A398) Counsel than addressed the court

regarding the mitigation case and the difficulty it faced in presenting mitigation. (A398 - A401) Cooke accused the court of stripping him of his constitutional right of self-representation. Cooke further again stated he wanted no mitigation presented on his behalf. Cooke threatened the judge and the judge's family. The defense first moved for a mistrial, upon denial, defense requested the judge recuse himself, this motion was denied. (A402 - A405)

On April 20, 2012 the Court ruled that due to Cooke's conduct the previous day, the Court found that he had forfeited his right to be in the courtroom. This ruling applied to all witnesses and would be lifted only if Cooke chose to either testify or exercise his right to testify and or allocution, or upon application of counsel for good cause. (A406)

The State moved the introduction of the victim's pictures as a child. Defense objection was overruled the court, however, cautioned the State about redundancy. (407, 408)

A colloquy between counsel and the court regarding agreements over evidence in the defendant's mitigation case took place, prior to the start of the first day of testimony in the penalty phase. (A409 -A414)

The State presented penalty phase evidence and rested on April 26, 2012. (A415) The jury was removed from the courtroom and the defendant was brought

in. (A416) Cooke again told the court he was not participating, further told the court he did not want his attorneys to participate in presenting mitigation. Cooke told the court his decision not to participate was his and his alone. Cooke indicated that he only wanted to present his testimony and no other mitigation. (A417) Counsel explained to Cooke the difference between testimony and allocution. However, Cooke was non-committal. Also, it was explained to the court that Cooke was not objecting to letting two of his adult sons testify as mitigation witnesses. (A418, 419)

Before the start of the defense mitigation case, an issue regarding Luz Rodriquez, Juror No. 3 (Juror 3) was brought to the attention of counsel by the court. (A420) Juror 3 informed the court that she was served a subpoena for a Family Court criminal trial in which she was a state witness. She was concerned the trial date may interfere with her jury service. The court questioned her. The court saw no issue, defense, however, did not agree and indicated a motion may be brought. (A421 - A423)

Juror 3 was brought into the courtroom and questioned about her subpoena. It became clear she was a witness to a violent crime involving her daughter and husband. She described in detail the altercation between them. She mistakenly thought her husband had been charged with attempted murder, however, he was

arrested for felony charges of strangulation and possession of a deadly weapon during the commission of a felony. (A424, 25) Juror 3 went on to explain to the court that she thought the charges had been dropped prior to her being selected to serve on the jury. (A425) The incident occurred in December of 2011 prior to the beginning of jury selection. Juror 3 failed to disclose, during voir dire questioning, that she was a witness to a violent crime that her husband was charged with violent felony offenses, that his charges were pending before jury selection, after jury selection, during the guilt phase and during deliberation of the guilt phase of Cooke's trial. Most glaring was her failure to inform the court and counsel that she was actively involved in trying to get the state to drop the charges against her husband. (A426 - A429)

Counsel requested the court to specifically ask Juror 3 why she answered no to the voir dire questions concerning whether any family members were a victim of or charged with a crime. Juror 3 indicated she thought it was a "family" matter. (A430, 431) The State requested that information regarding the case involving Juror 3 be placed on the record. The court allowed the state to proceed. It became clear that Juror 3 had more knowledge of the case than indicated to the Court. (A426, 427)

The defense moved for a mistrial arguing that Juror 3 was not truthful

therefore making it impossible for Cooke to evaluate her suitability to be a juror. Defense counsel opined that if they had known of her involvement with the Attorney General's Office over the incident with her daughter and husband they would have moved to strike her for cause. (A427-A428) The State and court attempted to argue that the nondisclosure of the information would not have mattered since Cooke wanted minorities on his jury. (A429) The defense continued to argue that it had no way to accurately evaluate her because, unlike other potential jurors, she was not truthful in her answers to voir dire questioning. Defense again sought a mistrial. (A430 - A432)

At this point the Court directed Cooke to be brought into the courtroom. (A432) Cooke, who at the time of jury selection was representing himself, made it clear he would have struck her; he further articulated the reasons why he would have struck her. (A433) The Court denied the mistrial request asking the Defense what they wanted to do with Juror 3 moving forward. The Defense responded "if your Honor feels she is fair enough to render a verdict of guilt, she's fair enough to sit on the penalty phase." (A434)

The state responded that since Juror 3 had now been subpoenaed by the State to testify in a criminal trial it did not feel she could be unbiased moving forward and requested she be replaced. (A434) The court asked counsel whether a

subpoena alone warranted removal, defense position was no, the court would have ordered the other case to be continued. (A435) The defense than put its position before the Court if she is biased on April 27, 2012 when she received the supoena she was biased during jury selection and trial entitling Cooke to a mistrial. (A436)

Cooke elected to testify and he told the court he understood the difference between allocution and testimony. (A437) During cross-examination, he spontaneously testified that he was innocent, he wanted no mitigation, that he filed lawsuits on all the attorneys, and the judge. Cooke was instructed by the court to answer the state's questions. Cooke continued to ignore the court's instructions prompting the judge to remove the jury from the courtroom. (A438) The court questioned counsel regarding Cooke's testimony. Counsel informed the court that he was cautioned about what he would be permitted to testify too. (A439) The court did not strike his testimony. Cooke's allocution also ran afoul of the court's rules and was terminated.

On May 3, 2012, the jury returned their recommendation for death on May 3, 2012. (A440 - A442)

On May 7, 2012, a hearing was held, by order of the trial judge, regarding post-verdict media coverage. (A443) The video showed jurors hugging the mother of the victim. Testimony was taken from the bailiff's working the Cooke trial,

regarding the interaction between the jurors, victim's family and the prosecutors. Testimony was also taken from the prosecution. (A444- A458)

Following the testimony, the defense requested and the court granted, two weeks to file motions. (A459) On May 21, 2012, Cooke, through counsel filed a Motion for New Trial. The motion alleged that Juror 3 committed misconduct in failing to be candid with the court during voir dire. (A456 - A466) The motion was denied. (A467 - A515)

On September 17, 2012, Cooke was sentenced to death. (A516 - A518)

I. FAILURE TO DECLARE A MISTRIAL FOR JUROR MISCONDUCT IS AN ABUSE OF DISCRETION AND VIOLATION OF DUE PROCESS OF LAW.

Question Presented

In a capital case, in which the cause of death was strangulation, did the court abuse its discretion for failing to grant a mistrial based upon a jurors nondisclosure and/or dishonest answers to voir dire questioning about witnessing a violent crime that turned out to involved allegations of strangulation? (A420 - A433)

Standard and Scope of Review

An objection to a discretionary ruling by the court is reviewed under an abuse of discretion standard. Manna v. State, 945 A.2d 1149 (Del. 2008) An alleged Constitutional violation is reviewed de novo. Jones v. State, 940 A.2d 1 (Del. 2007)

Argument

Superior Court Criminal Rule of Procedure Rule 33 provides for the granting of a new trial in the interest of justice. Super., Ct. Crim. R. 33. The denial of the defense request in the case at bar resulted in a denial of justice. The defense submits that based upon juror misconduct Cooke is entitled to a new trial.

On February 22, 2012, Juror 3 appeared for voir dire and was asked the following three voir dire questions that were numbers 14, 15 and 16 respectively:

14) Have you, a relative, or close friend ever been a witness of, or a victim of a violent crime?

15) Have you a relative, or close friend ever been charged with, or convicted of a criminal offense or driving under the influence? and

16) Are you, a relative, or close friend presently under investigation or prosecution by any law enforcement agency for any criminal offense? (A128)

Juror 3, in response to question 14 disclosed that her two nephews were murdered in Philadelphia. With respect to questions 15 and 16 she answered in the negative. (A129) Neither the state nor Cooke moved for cause, or exercised a peremptory challenge. Juror 3 was impaneled.

Juror 3 sat through the guilt phase and returned a guilty verdict for all indicted charges except one misdemeanor. However, prior to the start of the penalty phase, Juror 3 informed court personnel that she was under subpoena to appear in Family Court for a criminal matter. She was concerned that the date of the Family Court trial would conflict with the Cooke trial. (A421) The court conducted a colloquy with her and she informed the court that in December, two months before being summoned for jury duty in Cooke, her daughter filed criminal charges against her husband for an incident witnessed by Juror 3. She also told the court that her daughter tried to drop the charges. (A421)

Both the State and defense were concerned by this revelation. The State was concerned that she likely had contact with employees of the Department of Justice and that the "State" would not allow her to drop the charges. (A422) The defense raised a concern that Juror 3 never disclosed this information during voir dire questioning, and that she had contact with the State either prior to jury selection, or during the trial. (A422, 423)

The following day the court again questioned Juror 3. She stated that the incident happened in December of 2011. Her husband and adult daughter were arguing in their kitchen when she tried to intervene. The argument became physical and she witnessed her daughter threatening her husband with a kitchen knife. Specifically, she witnessed her daughter and husband struggling over the knife with her daughter holding the handle and her husband holding the blade. Fearing that the fight was escalating, she exited the kitchen to the safety of her bedroom. While in the bedroom, her husband called out to her causing her to return to the kitchen. Upon entering the kitchen, she witnessed her husband on top of her daughter with his hands around her throat. The police arrived and arrived and her husband was arrested for felony strangulation, assault third degree, menacing and three counts of endangering the welfare of a child. (A433) The defense submits that the recounting of this incident by Juror 3 clearly evidences

that she was a witness to a violent crime for which the state was prosecuting her husband.

In response to why she did disclose this information on voir dire when asked if she had ever witnessed a violent crime her answer was that she did believe it was a violent crime just a 'family" matter. Similarly, when asked why she didn't disclose that her husband had been arrested for a violent crime and was being prosecuted by the state she told the court she thought the charges had been dropped. The trial judge found her answers to be credible and that she was an impartial juror. (A526) The court denied the defense motion for a mistrial.

Interestingly, when the court questioned the State concerning Juror 3 impartiality to continue during the penalty phase, the State moved to have her removed for cause because she would be biased against the state since she is under subpoena in a matter being prosecuted by the State. (A422). The State further argued that she could not be unbiased in her deliberation moving forward. Id. Both the court and defense were taken aback by this position since the State had argued that her nondisclosure to the voir dire questions did not affect her impartiality during the guilt phase of the case. Based upon the State's position, the defense again moved for a mistrial arguing that if she is biased during the penalty hearing, she was biased during the guilt phase. The motion was denied.

Juror 3 was allowed to remain on the jury.

At the conclusion of the penalty phase of the trial the jury returned a recommendation of death for both intentional and felony murder.

A motion for a new trial based upon misconduct of Juror 3 was filed by defense. The motion was denied.

The issue before this Court is twofold. First, is the answer to the questions about whether a potential juror, her relatives or family members have witnessed a violent crime, been arrested for a crime or is being prosecuted for a crime material voir dire questions? Secondly, if a juror failed to honestly answer those questions would a correct response have provided a valid basis for a challenge for cause? In the case at bar the defense submits that the proposed voir dire questions are material and that a correct response by Juror 3 would have provided a valid basis to challenge for cause. Because Juror 3 failed to honestly answer the material voir dire questions, Cooke could not rationally decide whether to strike for cause or exercise a peremptory challenge for a potentially biased juror denying him his constitutional right to a fair trial by an impartial jury. U.S. Const. Amend. V; U.S. Const. Amend. VI; Del. Const. Article I, Section VII.

Voir dire is the historic method used to identify bias in prospective jurors and is critical to protecting a defendant's right to a fair trial by an impartial jury.

Banther v State, 823 A.2d 467481-842 (Del. 2003); see also Diaz v. State, 743 A.2d 1166, 1172 (Del. 1999); Morgan v. Illinois, 504 U.S. 719, 729 (1992). The purpose of voir dire is to provide sufficient information to the state and defense to determine whether a prospective juror can render an impartial verdict. Hughes v State, 490 A.2d 1034 (Del. 1985)

In Banther v. State, this Court noted that the accused right to be tried by a jury of his peers is fundamental to the criminal justice system in America. An essential ingredient of that right is for a jury panel to be comprised of impartial or indifferent jurors. Both the Sixth Amendment to the United States Constitution and Article I, § 7 of the Delaware Constitution, guarantee a defendant in a criminal proceedings the right to a fair trial by an impartial jury. Banther, 823 A.2d 467 (Del. 2003). The Court reaffirmed this fundament tenet that one of the primary safeguards for impaneling a fair and impartial jury is a **defendant's right to challenge prospective jurors, either peremptorily or for cause. That right to challenge is seriously impaired by a juror's denial or nondisclosure of material information in response to voir dire questions**. Id. at 482 (emphasis added) (citations omitted). The Banther Court, citing to Jackson v. State, 374 A.2d, 1, 2 (Del. 1977), that juror impartiality must be maintained not only in the interest of fairness to the accused in the given case, but also to assure the integrity

of the judicial process itself. Banther, 823 A.2d at 482. See, Knox v. State 29 A.3d 217 (Del. 2011) (all defendants have a fundamental right a fair trial by an impartial jury.) The Banther Court reversed a capital defendant's conviction when the jury forelady deliberately failed to disclose, during voir dire, that she was a victim of a violent crime. This Court held that the answer to a question about being the victim of a violent crime is material and that a correct response would have been a valid basis to challenge for cause. Banther 823 A.2d at 484. Furthermore, this Court held that the forelady's deliberate nondisclosure about being a violent crime victim denied the defendant the constitutional right to a trial by a fair an impartial jury requiring a reversal. Banther, 823 A.2d at 842.

In Jackson v. State, 374 A.2d 1 (Del. 1977), a case that was reversed on other grounds, this Court addressed juror impartiality concerning a juror's failure to disclose, during voir dire questioning, his relationship with an attorney in the Department of Justice. Id. at 3. The Court noted that the right of a defendant to a fair trial by a panel of impartial jurors is basic to our system of justice. Id. at 4 (citing Goodyear v. State, Del. Supr., 348 A.2d 174 (1975). The Court further stated that one of the primary requisite safeguards for a fair an impartial jury is a defendant's right to challenge prospective jurors, either peremptorily or for cause. That right of challenge is seriously impaired by a juror's voir dire denial or

nondisclosure of a relationship to an attorney in the case, or to a member of his firm or staff. Id. (citations omitted). The purpose for maintaining impartiality of the jurors is twofold. First, it is in the interest of fairness to the accused and secondly it assures the integrity of the judicial process itself. Id. Furthermore, the Court stated "[T]o allow jury prejudice and bias, either actual or apparent, may not be allowed to derogate from society's confidence in its judicial system." Id at 6.

In the case at bar the trial judge ruled that Juror 3 was credible and saw no basis to strike Juror 3 for cause. (A438) This Court has recently stated:

> "The investigation into a seated juror's potential bias, and whether that juror should be excluded for cause, depends upon the nature of the juror's misrepresentation during voir dire. To demonstrate reversible error in cases involving inadvertent nondisclosure, a defendant must demonstrate that a juror failed to answer honestly a material question on voir dire, and that a correct response would have provided a valid basis for a challenge for cause. When a juror deliberately failed to honestly answer a material question during voir dire, however, such dishonesty has been considered evidence of bias and resulted in a new trial".

Schwan v State, 65 A.3d 582 (Del. 2013); See Banther v. State, 783 A.2d 1287, 1290-91 (Del. 2001) See also, McDonough Power v. Equp., Inc. v. Greenwood, 464 U.S. 548, 556 (1984). The defense submits that the record supports a finding that Juror 3 not only failed to honestly answer two material questions on voir dire her failure was deliberate requiring this Court to reverse Cooke's conviction.

The defense submits that the trial judge's finding that Juror 3 rational for not disclosing that she witnessed a violent crime and that a family member was charged with a violent crime prosecuted by the state was clearly erroneous. There are generally three ways in which a factual finding based upon credibility could be clearly erroneous. First, the accepted testimony could be incoherent or factually implausible. Second, the testimony could be contradicted by extrinsic evidence and finally, the finding itself could be internally inconsistent. Banther, 382 A.2d at 883.

In the case at bar, the trial judge accepted the testimony of Juror 3 that she did not consider the fight between her husband and daughter to be violent or a crime and that her explanation that she believed that the charges were dropped was rational. The defense submits this finding is incoherent and factually implausible. A review of the voir dire questioning of Juror 3 evidences that she did not have difficulty in understanding the questions posed to her. In fact, she disclosed that her nephews had been murdered when asked if any relative or family member has been a victim of a violent crime. (A129) In contrast, she failed to disclose that she witnessed her daughter being strangled by her husband less than two months before jury selection. This fact cannot be written off by simple claiming she thought it was a "family" matter. Similarly, it is implausible for the trial court to

conclude she was credible when she also failed to disclose that her husband was arrested. The record is clear that her husband was arrested and that Juror 3 bailed him out of jail. (A425) Juror 3 also actively participated in attempting to call the State to get the charges dropped. (A427). Furthermore, even assuming her nondisclosure was an honest mistake, this is rebutted by the fact that she assisted in her husband's family court criminal arraignment on the same day she was to be sequestered during the guilt phase yet, she failed to timely bring this information to the court's attention. (A426). Based upon the record, the trial judge's findings that her answers about why she did disclose that her husband had been arrested and that she witnessed a violent crime were factually incoherent and implausible.

The record supports a finding that Juror 3 deliberately failed to honestly answer the voir dire questions and that, in a capital case in which the cause of death was strangulation, the voir dire questions at issue were material questions. Both Cooke and Counsel stated that if she had answered the questions truthfully they would have challenged her for cause or exercised a peremptory challenge. (A427, 428) In Schwan, this Court stated that such a failure to honestly answer a material voir dire question that would provide a valid basis for a challenge for cause is reversible error. Schwan v. State, 65 A.3d 582 (2013). The trial court erroneously ruled that the standard was whether the court would grant a challenge

for cause based upon the nondisclosure, however, Schwan does not raise the bar that high it is only if the failure to honestly answer would provide a valid basis for a challenge for cause as it did in this case. (A434)

In Jackson v. State, 374 A.2d 1 (Del. 1977) failure of a juror to disclose that his nephew worked in the Office of the Attorney General was deliberate. This Court has held that such dishonesty has been considered evidence of bias and resulted in a new trial.

> Aside from protecting the rights of parties, in the fair and impartial administration of justice, respect for the courts calls for their condemnation of any improper conduct, however slight, on the part of a juror, of a party, or of any other person, calculated to influence the jury in returning a verdict. So delicate are the balances in weighing justice that might seem trivial under some circumstances would turn the scales to its perversion. Not only evil, in such case, but the appearance of evil, if possible, should be avoided.

Jackson, 374 A.2d at 2-3 (quoting George F. Craig & Co. v. Pierson Lumber Co., 169 Ala. 548, 53 So. 803, 805 (Ala. 1910).

The United States Supreme Court has long recognized that peremptory challenges are one of the most important of the rights secured to the defendant and the system of peremptory challenge has traditionally provided the assurance of impartiality. Holland v. Illinois, 493 U.S. 474 (1990) The Supreme Court held that it was error because the juror failed to give full disclosure to the court; defendant

was deprived of his right to request the juror be struck. Finally, the presence of a biased juror introduces a structural defect that is not subject to a harmless error analysis. Arizona v. Fulminante, 499 U.S. 279, 307-10 (1991)

Juror 3 failed to honestly answer material voir dire questions that if answered correctly would have provided Cooke with a valid basis to challenge her for cause. The record is clear that Cooke would have moved to challenge the juror because the crime the she witnessed involved strangulation which was the cause of death of Bonistall. Counsel submits that, based upon the case law and constitutional authority cited herein, Cooke's constitutional right to a trial by an impartial jury was violated entitling him to a new trial.

II. IT WAS AN ABUSE OF DISCRETION TO DENY THE DEFENSE MOTION FOR MISTRIAL WHERE PROSPECTIVE JUROR MISCONDUCT TAINTED THE JURY PANEL PRIOR TO TRIAL.

Question Presented

Where a prospective juror violates the directive of the Court and discusses their opinion of guilt or innocence in the presence of other prospective jurors is mistrial the only remedy? (A131 – A152)

Standard and Scope of Review

An objection to a discretionary ruling by the court is reviewed under an abuse of discretion standard. Manna v. State, 945 A.2d 1149 (Del. 2008)

Argument

All defendants charged with a criminal offense are entitled to a jury of his or her peers and that the jury shall be impartial. U.S. Constitution Amendment VI The question of outside jury influence effecting the impartiality of the potential jurors was brought to the Court's attention early in the stages of jury selection. The trial court is responsible for ensuring that the defendant receives an impartial jury. This is accomplished upon the court making proper inquiry into whether a prospective juror can render an impartial verdict based on the evidence developed at trial in accordance with applicable law. Hughes v. State, 490 A.2d 1034 (Del. 1971)

Upon notification of possible misconduct of a potential juror, the court

summoned the complaining juror for examination. (A131 – A13) The identity of the offending party was determined. (A135) Cooke moved for a mistrial. (A135) The court denied the mistrial application. (A136 – A138) The offending party was brought in for questioning. During questioning he basically denied any wrong doing and seemed to have no recollection of conversations with other potential jurors. However, acknowledging that all potential jurors were engaged in conversation. (A140-A151) The denial of the mistrial was again made part of the record. (A152) The Court conducted no further inquiry into the matter.

The Constitution does not mandate a new trial every time a juror has been placed in a potentially compromising situation. Smith v.Phillips, 455 U.S. 209 (1982) instead trial courts should investigate jurors exposed to extraneous influences to determine whether there has actually been any prejudicial impact. Remner v. United States, 347 U.S. 227 (1954) Extraneous influences include juror contact with other people. U.S. Tejeda, 481 F.3d 44 (1st Cir.2007)

Though the Federal Cases cited deal with jurors actually seated as opposed to potential jurors the potential for juror bias is still present. If only one juror is improperly influenced a defendant in a criminal case is denied his Sixth Amendment right to an impartial jury. Styler v. State, 417 A.2d 948 (Del. 1980)

In the case at bar the Court chose a limited investigation into the alleged

juror misconduct. The trial judge did not interview the entire panel even though the testimony was that all jurors were having conversations. These conversations may have influenced potential jurors. Though not all allegations of extraneous influences require an investigation. U.S. v. Yeje – Cabrera, 430 F.3d 1 (1st Cir.2005)

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. In Re Murchison, 349 U.S. 133 (1955)

Appellant argues with his life on the line the Judge by not conducting full questioning of the entire jury on this specific issue, required a declaration of mistrial and failure to either declare the mistrial or question the entire panel was an abuse of discretion.

III. DISMISSAL OF JUROR OVER DEFENSE OBJECTION DEPRIVED DEFENDANT OF HIS RIGHT TO A JURY OF HIS PEERS.

Question Presented

Did the trial judge abuse his discretion by dismissing of Juror 10? (A319 - A329)

Standard and Scope of Review

An objection to a discretionary ruling by the court is reviewed under an abuse of discretion standard. Manna v. State, 945 A.2d 1149 (Del. 2008) An alleged Constitutional Violation is reviewed de novo. Jones v. State, 940 A.2d1 (Del. 2007)

Argument

The Sixth Amendment provides in pertinent part that the accused shall enjoy the right to a public trial by an impartial jury. U.S.C.A. Const. Amend 6. Exercising that right, Cooke, acting at that time *pro se*, chose along with the State, Juror 10. Neither Cooke nor the State challenge for cause or exercised a peremptory challenge.

Early in the proceeding Juror 10 was late reporting, delaying the start of trial. The Court reprimanded Juror 10 and instructed her to be on time in the future. (A319) Later in the proceedings the State brought to the attention a further

complaint against Juror 10, stating they believed she was mumbling under her breath during side bars. The Court indicated it did not want a problem juror. The defense position she was not a problem, she was not buying the State's case. (A328) Juror 10 was ultimately dismissed by the court; the basis was disrespecting a Court official. Defense counsel objected to the dismissal. Juror 10 indicated she believed a white bailiff was discriminating against her, because he had allowed white jurors to smoke but denied the privilege to her, Juror 10, is black. Juror 10 indicated she could remain on the panel; her issue with the bailiff would not affect her ability to render a fair verdict. (A340 - A344)

Federal Courts have held it is unconstitutional to discharge a juror if there is any reasonable possibility that the request for dismissal was based on the juror's views of the evidence. United States v Symington, 195 F.3d 1080 (9th Cir. 1999); United States v. Thomas, 116 F.3d 606 (2nd Cir. 1997); United States v Brown, 823 F.2d 591 (D.C. Cir. 1987) The defense submits that Juror 10 was chosen because she could be fair and impartial; it is clear from the record that the State was not satisfied with the juror, early on in the proceedings. Though her actions to the bailiff may have been improper she candidly gave a reason for the encounter and steadfastly indicated she could render a fair verdict. The trial judge, in exercising his discretion, stripped defendant of a juror of his choosing.

IV. DEPARTMENT OF CORRECTIONS AN AGENCY OF THE STATE OF DELAWARE INTERFERED WITH COOKE'S RIGHT TO REPRESENTATION.

Question Presented

Did the policies of the Department of Corrections regarding Administrative Segregation and limitation of visitation between Client and Counsel interfere with the attorney client relationship? (A76 – A79)

Standard and Scope of Review

Review of an alleged Constitutional violation is de novo. Jones v. State, 940 A.2d 1 (Del. 2007)

Argument

Cooke was initially tried and convicted of the Murder (along with lesser charges) of the murder of Lindsey Bonistall. Cooke was sentenced to death. The Delaware Supreme Court reversed both the death sentence and the conviction of James Cooke. Cooke was placed in administrative segregation and his access to counsel and legal materials limited. The Department of Corrections alleged Cooke was being protected.

Once a defendant's right to counsel has attached, government intrusion into the attorney client relationship violates his Sixth Amendment Right to Counsel. If the defendant can show a realistic possibility that he or she was prejudiced by the

intrusion. Weatherford v. Bursey, 429 U.S. 545 (1977) Cooke alleges that the State interfered with counsel by limiting the time, place and date of visitation and agreeing to provide times and dates when counsel was unavailable. The limitation caused Cooke to loose trust in appointed counsel and forced him into self-representation. The defendant bears the burden of proving an intrusion into defense strategy and trial preparation. U.S. v Mastroianni, 749 F.2d 900 (1st Cir. 1984)

All cases found involve the obtaining knowledge of defense strategy, illegally obtained by the State through interference with counsel. That fact is not present in the case at bar, the fact however remains the State did interfere with the attorney client relationship. The constitutional rights of an accused cannot be overlooked and those rights are not lost at the gates to prison. Johnson v. Anderson, 370 F.Supp. 1373 (D. Del. 1974)

It is generally accepted that the judicial branch does not wish to interject itself in the operation of other State agencies. State ex rel, Tate v. Cubbage, 210 A.2d 555 (Del. Supr., 1965) The court will intervene to protect the constitutional rights of the accused. Bailey v. State, 521 A.2d 1069 (Del. 1987)

Eventually, the Court ordered Cooke moved so he would be afforded access to stand-by counsel and legal materials.

The actions taken by the court, in this case, were appropriate but took far too long after the damage was administered. Cooke had lost faith in Court appointed counsel. He felt his only appropriate remedy was self-representation. (A76 – A84)

V. APPELLANT WRONGFULLY DEPRIVED OF HIS RIGHT TO SELF- REPRESENTATION.

Question Presented

Did the court wrongfully deprive Appellant of his right to represent himself? (A215 - A248)

Standard and Scope of Review

Appellate court reviews issues of constitutional dimension de novo. Williams v. State, 56 A.3d 1053 (Del. 2012)

Argument

In Faretta v. California, 422 U.S. 806 (1975) the United States Supreme Court held that an accused has a Sixth Amendment Right to conduct his own defense in a criminal trial. This right also forbids the court to force counsel on an unwilling defendant. U.S. v Jones, 452 F.3d 223 (3rd Cir. 2006)

The defense recognizes the Court's right to terminate pro se representation if a defendant refuses to follow court rules or makes it impossible for the proceedings to continue. U.S. v Brock, 159 F.3d 1077 (7th Cir. 1998)

A court may also terminate the right to self - representation if the defendant lacks the mental capacity to conduct a defense without representation. Indiana v Edwards, 554 U.S. 164 (2008). In Edwards, the defendant suffered from schizophrenic. In the case at bar, Cooke was not diagnosed with any mental

disorder.

Cooke represented to the court that he never wanted stand-by counsel and that counsel was appointed by the court, because it was always the court's intent to strip him of his constitutional right to self-representation. (*in passim*) Cooke further asserted his right to self-representation was deprived through his confinement and administrative confinement. (*in passim*)

In Jones, the 3rd Cir., found you cannot force counsel on a defendant and in Tate v Wood, 963 F.2d 20 (2nd Cir.) the state may not interfere with a defendant's right to self-representation. Confinement and administrative segregation may interfere with due process. Limiting access to telephone and legal materials may also be deemed interference. Milton v. Morris, 767 F.2d 1443 (9th Cir. 1985)

Though the Court may have determined Cooke was disruptive the disruption was caused by the State's interference with his right to prepare, the Court's denial of his continuance request, to properly prepare and the appointment of unwanted stand-by counsel.

VI. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S REQUEST FOR A CONTINUANCE DENYING HIM DUE PROCESS OF LAW.

Question Presented

Did the trial judge abuse his discretion by denying the defendant's repeated requests for a continuance of his capital murder trial denying him due process to defend himself against the charges? (A86 – A91)

Standard and Scope of Review

This Court has held that a trial court's denial of a continuance request is reviewed under an abuse of discretion standard. Riley v. State, Del. Supr., 496 A.2d 997 (1985).

Argument

On November 30, 2011, a hearing was held on Cooke's motion to fire his court appointed attorneys and proceed *pro se* for his capital murder case. Counsel informed the court that it has taken two experienced criminal defense attorneys approximately seven months to review the voluminous discovery and prepare for trial, and that based upon his custodial status it would not be in his best interest to represent himself. The voluminous discovery was in excess of 20 banker boxes of documents, videotapes, audiotapes, compact discs, DVD discs, expert witnesses' reports, mitigation materials and defense counsel work product.

The court entered into a colloquy with Cooke to determine if his decision to represent himself was knowingly, voluntarily and intelligently made. During the colloquy, the court informed him that if the motion for self-representation was granted the court would not entertain a continuance request. Counsel raised the issue of whether Cooke was competent to represent himself. (A86 – A91)

> MR. FIGLIOLA: He has been evaluated prior to his last trial. And that's what he was evaluated for, "competency to stand trial," not competency to represent himself." Again, there's no real case law that can really tell Your Honor what "competency" is. But I can, just from working with Mr. Cooke and what Mr. Veith and I have accomplished in the last seven months – the mere fact that Mr. Cooke thinks he can go to trial in February is a sign that he's not competent to represent himself because there is no way in the world, Your Honor, this man can be ready for trial and adequately represent himself if trial is in February. . .
>
> Now, if you appoint Mr. Cooke to represent himself and he is to do it effectively, Your Honor, I would suggest that you do it, continue the case for one year, and allow him to have access to his files. And unless we can do that Your Honor, this man is not competent to represent himself. . .. (A105, 106)
>
> THE COURT: I understand that you are able to assist him and convey. Now, we've got December, January and February -- three months to do that. There's been one trial and he's had counsel go over the record and he knows what has been duplicated . . . [B]ut I have no intention, quite honestly, of continuing the trial of this matter. This offense took place in 2005. It's six years past. (A107, 108)

The court held that he was competent to represent himself. (A109)

Furthermore, the court informed Cooke that it would contact the prison to make arrangements for him to review the discovery and have access to the law library. The defendant responded as follows:

> THE DEFENDANT: Yes. Mr. Figliola made a good point about 21 boxes and not enough time. That will not be enough time for me, even if you did call the warden or whatever, housing unit and made arrangements. Looking over all the documents and getting the law library, that's going to be a lot of time. So I'm asking that you grant me some more time on this case. (A110)

Simply put, Cooke requested a continuance so that he could adequately prepare a defense. Specifically, he felt that 90 days was an insufficient period of time to prepare for trial for a capital murder case. The court denied the request for a continuance, however, granted leave to re-open the issue should it become ripe. (A117 – A119).

At a status hearing held on January 27, 2012, less than one month before jury selection, Cooke renewed his application for a continuance.

> THE DEFENDANT: Yes. I am going to ask for a continuance, the reason – for several reasons, only because I have – I don't have enough time to go through all the legal boxes. So far, I've only gone through five of them which I received on December 28, and I just

> received five more, I believe on January 23 –yeah, January 23 . . ..(A120)

In addition to needing a continuance to review his case file, Cooke informed the court that he needed time to determine what experts he would like to retain for his case. The court clarified Cooke's position by noting that Cooke could not identify any experts because he, Cooke, has not had sufficient time to review his file. (A123)

> THE DEFENDANT: Right, I haven't done the research and I haven't seen anything. I don't know what this research is about. Actually, on November 30, I did ask for a continuance about this type of stuff and it was denied, but it was denied unfairly because you never even gave me a chance or opportunity. So, I mean, me, I must have experts, that's what I'm entitled to. You know, that would be a due-process issue, me going to trial without experts, that's an unfair trial and the State knows that, that – I'm facing death or life . . . .(A124).

The State opposed the continuance motion. The court denied the renewed continuance request noting that Cooke, who was incarcerated, was unemployed so he had sufficient time to review the discovery that was supplied to him. The court also reminded him that he was instructed by the court about the challenges of preparing his case when he was granted the right to self-representation. However, he was again given leave to renew his application. (A123, A124).

At a pre-trial conference held four days before jury selection Cooke complained to the court that he just received nine boxes of documents and that he didn't know when he would have the time to go through the materials. (A547) The case commenced with jury selection starting on February 20 with the trial starting on March 7, 2012. During Cooke's opening statement he had an outburst in front of the jury complaining that he could not get a fair trial in part because he only had three months to prepare. (A157, A158)

This Court reviews a denial of a request for a continuance under an abuse of discretion. Waltman v. State, 840 A.2d 642 (Del. 2003). The trial judge must consider relevant circumstances when deciding continuance request. Stevenson v. State, 709 A.2d 619, 630-631 (Del. 1998). The reasons presented to the trial judge at the time of the request for a continuance is made are of particularly significant. Ungar v. Sarafite, 376 U.S. 575 (1964). This Court has held that a discretionary ruling on a motion for a continuance will not be disturbed by an appellate court unless it is based on clearly unreasonable or capricious grounds. Riley v. State, Del. Supr. 496 A.2d 997, 1018 (1985) cert. den. 478 U.S. 1022 (1986) In Riley, this Court concurred with the United States Supreme Court that "there are no mechanical test for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in

every case." Bailey v. State, Del. Supr., 521 A.2d 1069, 1088 (1987) (quoting Ungar v. Sarafite, 376 U.S. 575, 589 reh. den. 377 U.S. 925 (1964). In Riley, this Court held that on deciding whether to grant a continuance, the trial court should consider the reasons advanced by the defendant as well as the circumstances of the case. Bailey, 521 A.2d at 1088.

This Court has found an abuse of discretion when a trial judge denied an attorney's request for a continuance when he was appointed to represent a defendant on the day of his scheduled trial. Merritt v. State, Del. Supr., 219 A.2d 258 (1966). In Merritt, the defendant's retained attorney was allowed to withdraw, unbeknownst to the defendant. At trial, the defendant learned that he was to be represented by a public defender. His public defender moved for a continuance so that he could adequately consult with the defendant, determine witnesses' availability and generally prepare for trial. Id. at 300. The trial court allowed the attorney thirty minutes to consult with the defendant. The defendant was convicted and appealed. Id.

On appeal defendant asserted that the court's denial of his request for a continuance denied him due process under the 14th Amendment to the United States Constitution and Article I, Section 7, of the Delaware Constitution. Id. at 301. This Court noted that it is fundamental that a denial of the assistance of counsel to a

criminal defendant is a denial of due process of law, both under the Federal and Delaware Constitutions. Id. at 300-301. The State did not oppose this position, however, argued that the defendant was not denied the right to counsel because he was appointed counsel. Id at 301. This Court rejected this argument. The Court conceded that the defendant was appointed counsel but appointing counsel without giving him the opportunity to consult with the defendant and prepare a defense is the denial of the effective assistance of counsel, which both Constitutions guarantee the defendant. Id.

This Court found that the trial court abused its discretion by denying the continuance request. The Court note that it was error for the trial court to allow defendant's counsel to withdraw without his knowledge. Secondly, the defendant argued that given a reasonable period of time he could have produced witnesses who would have materially aided the defense. The Court noted that the refusal to grant the defendant a continuance resulted in the defendant being forced to proceed to trial without an adequate opportunity to prepare a defense. Id. This Court held that the denial of the request for a continuance was an abuse of discretion sufficient to require a new trial. Id. at 302.

In the case at bar Cooke's request for a continuance was first presented to the court 90 days before trial so any rescheduling would have minimally impacted the

State's witnesses and the court's schedule. The first continuance request was made on the day that the defendant was granted *pro se* status for his capital murder prosecution. Stand-by counsel and Cooke both informed that the court 90 days would not be sufficient time for the defendant to prepare a defense. The court was informed that the discovery contained over 20 banker boxes of documents, media and other materials that needed to be provided to the defendant by stand-by counsel. As part of preparing his defense, he wanted additional time to determine based upon is own assessment if he needed to retain expert witnesses and to have adequate access to the prison law library. Furthermore, of greatest significant, is the fact that he received, from stand-by counsel, nine boxes of discovery only four days before jury selection.

The defense submits that the court abused its discretion by not giving sufficient weight to the legitimate reason the defendant asserted in support of his request for a continuance. The trial court unreasonably and capriciously informed the defendant that since he was incarcerated, and unemployed 90 days would be sufficient time to prepare a defense to capital murder. It appears from the outset of Cooke seeking *pro se* status that the court would not entertain a continuance. The denial of the continuance request placed Cooke in the untenable position of only having 90 days to prepare a defense in a capital murder trial. The lack of sufficient

time to review discovery, and prepare a defense essentially denied the defendant his 6th Amendment right to effective counsel denying him due process of law.

Counsel submits that based upon this issue alone Cooke's death sentence must be vacated and his case must be remanded for a new trial.

VII. APPELLANT WAS DENIED HIS RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT HELD 11 Del.C. §3508 WAS APPLICABLE.

Question Presented

Did the trial judge abuse his discretion in finding 11 Del. C. §3508 was applicable absent physical evidence of rape and no allegation of rape by victim? (A262 – A266)

Standard and Scope of Review

An objection to an evidentiary ruling is reviewed under an abuse of discretion standard. Manna v. State, 945 A.2d 1149 (Del. 2008) Constitutional arguments under Sixth Amendment that ruling denied Appellant of his right to a defense is viewed de novo. Jones v. State, 940 A.2d 1 (Del. 2007)

Argument

11 Del. C. §3508 is designated to protect the victim of sexual crimes and encourage the cooperation of victims of sexual offenses. Wright v. State, 513 A.2d 1310 (Del. 1986) Evidence of a victim's sexual conduct in order to attack her credibility is inadmissible, unless certain procedures and burdens of Section 3508 are followed. Scott v State, 642 A.2d 767 (Del. 1994) The merits and holdings of Wright and Scott are not being disputed by Appellant.

Appellant argues that in fact Section 3508 should not be applied to his case. The State alleged Bonistall was raped and murdered, the facts were clear that Ms. Bonistall did not commit suicide, the fact she was murdered was never disputed by the defense. Rape, however, was denied. No allegation of rape was ever alleged by anyone other than the state. The State argued it was a burglary followed by rape, murder and an arson to cover up the under lying crimes. Rape was solely alleged by the state. It was clear from the evidence that Bonistall had sexual relations prior to her death.

The defense argued that the sex between Bonistall and defendant was consensual. Cooke denied murdering Bonistall and argued she was still alive when he left. The evidence of Bonistall's sexual activities was not meant to embarrass her family it was Cooke's defense that the murder occurred after he left. Her Prior relations and proclivity to pick up strangers was relevant to defense. An interpretation as to whether the evidence was favorable to defendant or meant to embarrass the deceased is a question for jury interpretation. United States v. Simpson, 992 F.2d 1224 (D.C. Cir. 1993)

VIII. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING LAY-OPINION TESTIMONY CONCERNIG A MATERIAL ISSUE IN FACT.

Question Presented

Did the trial judge abuse his discretion by allowing the chief-investigating-officer to offer lay-opinion testimony that the voice on three 911 calls was Cooke's voice. (A321-A323), (A336, A337)

Standard and Scope of Review

An objection to an evidentiary rulings admitting evidence is viewed under an abuse of discretion standard. Tice v. State, 624 A.2d 399 (Del. 1993)

Argument

During the course of the trial, the State admitted three recorded 911 calls from an English speaking caller who provide the police with incriminating information about the Cuadra and Harmon burglaries, as well as, the Bonistall murder. The caller on the first 911 caller provided information to the police that the burglaries and the Bonistall homicide were related. The 911 caller's information convinced NPD that they were looking for one suspect.

During its case-in-chief, the State elicited testimony from Cooke's girlfriend, Rochelle Campbell, that the voice on the three recorded 911 calls was Cooke. She

testified that he was disguising his voice when he made the calls. The witness's testimony concerning identity of the 911 caller was discredited on cross-examination due to the fact that it was inconsistent with her prior statements to the police and her testimony in Cooke's first trial. (A331-A335) Additionally, the State presented expert witness testimony from Georgia Carter that the handwriting on the walls of the Harmon and Bonistall crime scenes was probably written by the defendant. (A285) Finally, the State introduced into evidence Cooke's redacted recorded post-arrest interview with the police in which he spoke for approximately forty-five minutes.

The State's sought a ruling from the court that would allow Rubin to present lay-opinion testimony that he recognized the voice on the three 911 calls as Cooke's voice. The court informed the State that the proffered opinion testimony was admissible. Counsel objected. The following argument occurred:

> MR. WOOD: Well I didn't want to spring this on you, but this would be the time I would ask Detective Rubin if he recognized the voice on the 911 call. We've had a lot of discussion about that. And I want to see where the Court is on that before I do that.
>
> THE COURT: The Court is not happy, but the Court is never happy; but that has nothing to do with the law. And it allows allows you to do it. And I'm afraid I do not have much choice because the research is what it is.

> MR. FIGLIOLA: The situation is different. We've now heard the person on the tape the jury has heard the person on the tape. It's now up to the jury to decide, not the witness to decide, if he believes that that is the same person on the tape. I think the situation is different than it was before. Now, we have just heard the tape. The jury heard it. Now we're going to have a cop say, yeah, I just heard that; that's him. (A336)

The court overruled the defense objection. Detective Rubin was called by the State and testified that in addition to his interview of Cooke he has heard him speak for tens of hours. Furthermore, he testified that in his opinion the voice on the three recorded 911 calls was the defendant.

D.R.E. 701 permits lay testimony in the form of opinions or inferences are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702." State v. Washington, 2007 Del. Super. LEXIS 222 * 18, 19 (2007)(citing D.R.E. 701. Rule 701 like its federal counterpart, permits a lay witness to testify as to his own impressions when they are based on personal observations . . . State. v. Washington, 2007 Del. Super. LEXIS 222 * 19.

The Delaware Supreme Court has held that lay opinion testimony as to the identity of a recorded voice is admissible if it is properly authenticated under

D.R.E. Rule 901 and a proper foundation is presented. Vouras v. *State*, 452 A.2d 1165 (Del. 1982). The defense submits that the Vouras decision is not controlling because that case dealt with the issue of whether the identification of a suspect's voice from, a taped telephone conversation, was unduly suggestive when the identifying officer was told the identity of the suspect before he listened to the tape. Id.

More on point with this case, is the United States Court of Appeal for the First Circuit decision in United States v. Jadlowe, 628 F.3rd 1 (U.S. App. 2010). Jadlowe, is a case in which the government conducted an exhaustive investigation into a drug dealing network. The investigation involved visual surveillance, and wiretap surveillance of numerous phones. Jadlowe at 57-58. At trial, over defendant's objection, the government was allowed to admit, pursuant to F.R.E. 701 lay opinion testimonies from two government agents as to the identity of the defendant from a surveillance photograph, and voice recognition from a recorded phone conversation. Id. One agent identified the defendant in a surveillance video by comparing a photograph of him to the image on the video. The second agent identified a voice on recorded wiretapped phone calls as the defendant, even though he had never spoken with the defendant in person. Id. The surveillance video,

photograph of the defendant, recorded wiretapped phone calls and transcript of the calls were all admitted into evidence.

On appeal, the defendant argued that the visual and voice identification constituted improper lay-opinion testimony because neither officer's identification was based on prior personal experience with the defendant and "[t]he jury was perfectly capable of drawing its own independent conclusion[s] based on the evidence presented." Id. at 58, (quoting United States v. Garcia-Ortiz, 528 F3d 74, 80 (1st Cir. 2008). The District Court held that the trial court abused its discretion holding that the officers' identifications should not have been allowed as lay opinion testimony because neither officer was in a better position than the jurors to make the identity judgments. Id. 58-59. The district court noted that all of the evidence that the officers relied upon for their respective opinions concerning identification was admitted evidence available to the jury. Id. at 59. However, the court also found that the error in admitting the officers lay-opinion concerning identity was harmless. Id. at 60. The error was harmless because there was abundant circumstantial evidence in the record to identify the defendant visually and by voice. Id.

Recently, the United States Court of Appeals for the First Circuit addressed the issue of the admissible of a police officer's lay-opinion as to the identity of a

voice captured on a wiretap. United States v. Diiaz-Arias, 2013 U.S. App. LEXIS 8677 (U.S. App. 1 st Cir. 2013). The defendant was found guilty of conspiring to deliver cocaine. He appealed arguing that the trial court abused its discretion when it allowed the government to introduce the lay opinion testimony of a state trooper, who identified the defendant as the speaker in an intercepted telephone conversation. The defendant argued that the trooper's testimony was in violation of F.R.E. 701 for lay opinion testimony.

In Diiaz-Arias, the defendant, a Dominican whose natural language is Spanish, and twelve co-defendants were charged with conspiring to distribute cocaine. The case against Diiaz-Arias came about out of a four month investigation conducted by the Drug Enforcement Administration ("DEA") 2013 U.S. App. LEXIS 8677 * 3. The focus of the investigation was an organization that was distributing large quantities of cocaine in the Boston area. Id. The investigation relied on court-authorized wiretaps on phones belonging to four members of the criminal organization. Id. at 4. The evidence against Diiaz-Arias consisted primarily of recorded telephone conversations between members of the organization and an individual named "Hipolito", whom the government identified as Diiaz-Arias. Id. During the DEA investigation, intercepted telephone calls between members of the organization and Hipolito depicted Hipolito attempting to broker

several drug transactions. Id. at 5. All of the intercepted calls involved individual who only spoke Spanish.

At trial, the government introduced into evidence two exhibits which contained the recorded telephone calls of the individual who identified himself as Hipolito. Id. at 15. The government also introduced into evidence a compact disc containing 16 recorded telephone calls, which the parties stipulated were recent recordings of Diiaz-Arias' voice. Id. A state trooper, who was fluent in Spanish, spent several hours listening to the admitted exhibits comparing the voice of Hipolito to the known voice of Diiaz-Arias. Id. At trial the trooper testified that, he recognized the voice on both exhibits as that of Diiaz-Arias.

On appeal the defense argued that the trooper's lay opinion as to voice recognition ran afoul of F.R.E. 701(b). The defendant argued that the trooper's testimony was not helpful to the jury because the jurors were just as capable as the trooper of comparing the voice of Hipolito with that of Diiaz-Arias. Id. at 17. Specifically, the defense argued that the testimony in question went directly to the ultimate issue: it asserted that Diiaz-Arias was the speaker in the recordings, thus identifying him as the guilty party leaving no room for the jury to draw its own conclusions as to what the evidence established. Id. at 18-19. The government countered that the testimony was helpful to the jury because, as a native Spanish

speaker who is familiar with the intonation and accents of people from the Dominican Republic, the trooper possessed particularized knowledge which may have proven helpful to a reasonable juror making a voice comparison of a native speaker. Id. at 19.

In its analysis the court noted that lay opinion testimony will not be "helpful" to the jury "when the jury can readily draw the necessary inferences and conclusions without the aid of the opinion." United States v. Sanabria, 645 F.3d 505, 515 (1st Cir. 2011) (quoting Lynch v. City of Boston, 180 F. 3d 1, 17 (1st Cir. 1999)). Furthermore, the court noted that the "nub" of this helpfulness requirement is "to exclude testimony where the witness is no better suited than a jury to make the judgment at issue, providing assurances against admission of opinions which would merely tell the jury what result to reach." United States v. Meises, 645 F.3d 5, 16 (1st Cir. 2011); see also United States v. Vazguez-Rivera, 665 F.3d 351, 361 (1st Cir. 2011) ("[T]estimony, the 'sole function' of which is to "answer the same question that the trier of fact is to consider in its deliberations . . . [m]ay be excluded as unhelpful.") (quoting 4 J. Weinstein & M. Berger, Weinstein's Federal Evidence § 701.05 (Joseph M. McLaughlin. Ed., Matthew Bender 2d ed. 2011)). The court reiterated that they are mindful that lay opinions which make assertions as to the ultimate issue in the case "will rarely meet the requirements of F.R.E.

701(b), since the jury's opinion is as good as the witness's." United States v. Rodriguez-Adorno, 695 F.3d 32, 39 (1st Cir. 2012). Id. at 17-18.

Ultimately, the court held that the trial court did not abuse its discretion by allowing the lay opinion testimony. The court based its holding on the limited fact that the telephone calls were all in Spanish. Because of this factor, the court found the testimony helpful to the jury in identifying Diiaz-Arias' voice. Id. at 19. The court found that given that the wiretapped conversations were in Spanish the trial court did not abuse its discretion because the jury may not have been able to readily draw the inferences and conclusions necessary to identify Diiaz-Arias voice in the absence of the trooper's testimony. Id. at 19-20. The court specifically noted that there was no evidence that the jury possessed the same mastery of the Spanish language as the trooper, who is a native speaker familiar with the particular accents, intonations and speaking habits of persons from the Dominican Republic. Since the jury lacked this background, they were in a less advantageous position than the witness was in making a voice comparison, as they would have had trouble understanding the words being spoken amongst the speakers and telling the voices apart. Id. at 20. The court concluded that the witness and the jurors were not in the same position when it came to comparing the voices in the recordings, and therefore, the jury could have found the testimony to be helpful. Id. 21.

In the case at bar, the central issue was the identity of the person who committed the burglaries and the Bonistall homicide. The defense at trial was that the defendant denied being involved in the Cuadra and Harmon burglaries. He also denied raping or killing Bonistall, or making any of the three 911 calls. The defendant testified that he had consensual sexual intercourse with Bonistall on the night of her murder; however, he did not rape or kill her. Central to the State's theory of the defendant's guilty were the three 911 calls. The caller gave detailed and incriminating information concerning the burglaries, and the Bonistall homicide. In order to link the defendant, to all three crime scenes the State had to convince the jury that the defendant was the 911 caller.

The trial judge committed reversible error when he allowed the chief-investigating-officer to testify that he recognized the voice on the 911 calls as Cooke because that testimony ran afoul of D.R.E. 701(b) helpfulness requirement for lay-opinion testimony. As noted, supra, D.R.E. 701's requirement that lay opinion evidence must be "helpful to a clear understanding of the witness's testimony or the determination of fact in issue." D.R.E.701(b). The purpose of the requirement is to exclude testimony where "the witness is no better suited than the jury" to make the judgment at issue. United States v. Meises, 645 F. 3d 5, 24-25

(1st Cir. 2011)(citing United States v. Kornegay, 410 F.3d 89, 95 (1st Cir. 2005)(quoting United States v. Jackman, 48 F.3d 1, 5 (1st Cir. 1995). The main concern about requiring the lay opinion testimony to meet the helpfulness threshold under F.R.E. 701 is to insure against the admission of opinions which would merely tell the jury what result to reach. Meises, 645 F.3d at 25 (citations omitted) In order to protect the jury's role as fact-finder, courts must be weary of lay opinion testimony whose "sole function is to answer the same question that the trier of fact must consider in deliberations." United States v. Meises, 645 F.3d 5, 28 (1st Cir. 2011)(quoting United States v. Garcia, 413 F. 3d 201, 210-211 (2nd Cir.2005). Furthermore, lay-opinion will fail the 701(b) "helpfulness" requirement "when the jury can readily draw the necessary inferences and conclusions without the aid of the opinion." United State v. Sanabria, 645 F.3d 505, 25 (1st Cir. 2011)(citation omitted).

In Sanabria, the defendant presented a defense of mistaken identity arguing that he was not the drug courier named "El Chapo" contrary to the testimony of the government's witnesses who identified the defendant as "El Chapo." During the trial, the court allowed Sanabria's girlfriend to expresses and opinion as to the credibility of the defendant's comments to her, after his arrest, that the government had him confused with someone else. The girlfriend testified that she did not

believe the defendant. On appeal the defense argued that in permitting the girlfriend to express her view as to the credibility of the defendant's statement, the district court admitted improper lay opinion testimony and thereby abused its discretion. The appellate court agreed. Sanabria, 645 F. 3d at 515.

The appellate court analyzed the issue under F.R.E. 701 and found that the trial court abused its discretion by allowing the lay-opinion testimony. 645 F. 3d at 515. Specifically, the appellate court held that the opinion testimony failed the second prong of F.R.E. 701 the helpfulness requirement. The appellate court noted that the central issue at trial and the defense was mistaken identity as to whether or not the defendant was the "El Chapo" who delivered the drugs to the cooperating witnesses. Id at 515-516. Thus, in asking the girlfriend to state whether she believed defendant's claim of mistaken identity was effectively inviting the witness to express an opinion on the ultimate issue in the case. Id. at 516. While it is true that F.R.E. 704 (a) does not categorically bar ultimate issue opinion testimony, lay opinion testimony on the ultimate issue in a case must satisfy F.R.E. 701's helpfulness requirement, and "seldom will be the case when lay opinion on an ultimate issue will meet the test of being helpful to the trier of fact since the jury's opinion is as good as the witness . . . Id. at 516 (citing Mitroff v. Xomox Corp., 797 F.2d 271, 276 (6th Cir. 1986). The court held that the jury, having heard the

testimony of those directly involved in the criminal charges, was in a far superior position than the defendant's girlfriend to draw the necessary inferences and conclusions about the defendant's mistaken identity defense. Id. The appellate court found that the trial court abused its discretion by allowing the lay-witness opinion testimony.

The defense submits that Rubin was in no better position than the jury to determine, based upon the evidence admitted, the identity of the 911 caller. Prior to offering his lay-opinion, the jury had listened to all three 911 calls, listened to Campbell testify that it was Cooke's voice on the 911 calls, listened to Cooke's forty-five minute post-arrest interview, and listened to the testimony of the State's forensic document examiner's expert opinion that the handwriting on the walls of the Harmon apartment, and Bonistall apartment was probably written by the defendant. The jury was presented with sufficient clear and concise evidence, as noted above, from which they could link the defendant to all three crime scenes, as well as the identity of the person who made the 911 calls. The defense submits that Rubin's lay-opinion that Cooke was the 911 was not helpful for the jury in acquiring a clear understanding of the witness's testimony or the determination of a fact in issue requires pursuant to D.R.E.701. The impact of the court allowing Rubin's lay-opinion, as to an ultimate issue in fact concerning the identity of the

911 caller, usurped the jury's role as fact finder in violation of D.R.E.701. In essence by allowing the lay-opinion testimony the court allowed Rubin to determine who the 911 caller was, not the jury. The trial court abused its discretion by allowing the lay-opinion testimony as to the identity of the 911 caller.

Assuming this Court finds that the trial court abused its discretion the error was not harmless. Delaware law on harmless error is well established. The Court has consistently refused to reverse a conviction for errors found to be harmless. Van Arsdall v. State, Del. Supr., 524 A.2d 3, 10 (1987). An error in admitting evidence may be deemed harmless when the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction. McLaughlin v. State, Del. Supr., 628 A.2d 69, 77 (1998). However, when the evidentiary error is of a constitutional magnitude, the conviction may be sustained if the error is harmless beyond a reasonable doubt. Id. (citations omitted).

In the case at bar, the ultimate issue in fact was the identity of the person who committed the Harmon and Cuadra burglaries, and the Bonistall murder. The defense was one of actual innocence in that the defendant testified that he did not commit the crimes. Cooke testified that he had consensual sexual intercourse with the victim before she was murdered that explained the presence of his DNA.(A367 – A361) There were no eyewitnesses to the Harmon and Bonistall crimes. The

only eyewitness in the Cuadra burglary was the victim and she identified someone other than Cooke when presented with a photographic array of suspects. Cooke repeatedly denied any involvement in the crimes. The defense submits that the case against the defendant was circumstantial at best. However, by allowing Rubin to offer his lay-opinion identifying Cooke as the 911 caller allowed the State to link all of the crimes to Cooke. The erroneous admission of this lay-opinion testimony was not harmless and denied Cooke a fair trial. The court's erred in admitting Rubin's lay opinion testimony eviscerating the defendant's actual innocence defense.

In conducting the harmless error analysis this Court must take into consideration the trial court's jury instruction for expert witnesses. The trial court instructed the jury on expert witnesses, and failed to instruct the jury on how to interpret lay-opinion testimony. The court instruction was as follows:

> THE COURT: In this case you have heard the testimony of expert witnesses. Generally, a witness cannot testify as to their opinion or conclusions. Expert witnesses may state their opinions, and reason for their opinions because of their education and experience in their field. You should give such expert testimony only the weight you feel it deserves. If it is not based upon sufficient education or experience, or if the reason given in support thereof are not sound, or you feel it is outweighed by other evidence, you may disregard it entirely. (A525)

The trial court's failure to instruct on lay-witness opinion testimony and only instruct on expert testimony compounded the error of admitting the challenged opinion testimony. D.R.E. 701 (c) lay-opinion testimony specifically excludes expert witness testimony. By only instructing the juror about expert witness testimony, the court elevated Rubin's testimony from lay opinion to expert witness testimony.

Based upon the above, the court clearly abused its discretion by admitting the lay-opinion testimony concerning voice recognition of the three 911 calls. Additionally, the court erred by only instructing the jury about expert witness testimony. The defense submits that the court's error was not harmless and denied the defendant a fair trial.

IX. THE TRIAL COURT COMMITTED ERROR BY REFUSING TO ALLOW THE DEFENDANT TO WAIVE HIS MITIGATION CASE VIOLATING HIS CONSTITUTIONAL RIGHT OF DUE PROCESS OF LAW.

Question Presented

Did the trial judge violate defendant's constitutional right to due process by ordering defense counsel to present a mitigation case during defendant's penalty hearing over defendant's express waiver of presenting a mitigation case? (A519/ In passim)

Standard and Scope of Review

This Court reviews de novo claims of a violation of the United States and Delaware Constitution. Flonnory v. State, 893 A.2d 507, 515 (Del. 2006); Hall v. State, 788 A.2d 118, 123 (Del. 2001).

Argument

This Court reversed and remanded Cooke's 2005 conviction and death sentence sending the case back to Superior Court. Cooke was assigned conflict counsel. A hearing was held before the Honorable Jerome O. Herlihy to deal with several issues including his displeasure with his appointed counsel. During the hearing he informed the court that he did not wish to present any mitigation evidence should he be convicted of murder first degree. Cooke stated:

> THE DEFENDANT: ... [Mitigation is looking at your family in a bad way. Don't tell me. I studied that. I studied that. That mitigation is terrible. Sometimes it increases punishment. It increases punishment ... . (A519)
>
> THE COURT: Would you want mitigation evidence?
>
> THE DEFENDANT: I said no. ...
>
> THE COURT: So you would not want mitigation –
>
> THE DEFENDANT: No doctors, no mitigation, none of that. None of that. (A519)

Subsequent to that hearing, a new judge and counsel was assigned Cooke's case. At a scheduling conference on April 18, 2011, Cooke informed the court that the he was directing Ccounsel not to present a mitigation case. (A520). On November 10, 2012, Cooke expressed his desire to represent himself for his capital murder case. (A80) On November 30, 2012 a hearing was held to determine if he could represent himself. During the court's colloquy to determine if Cooke knowingly and voluntarily waived his right to counsel, the following exchange concerning the presentation of mitigation evidence during a penalty phase took place:

> THE COURT: I said I thought I asked you: Do you understand that if there is a penalty phase, you will be allowed to present circumstances in mitigation of the offense? And I thought you answered in the affirmative; that you did understand that.

> THE DEFENDANT: Oh, yes. Yes, I understand that, but I wish not to present any mitigation. (A520)

At the conclusion of the colloquy the court held that Cooke, who the court deemed competent, could represent himself, and that his court appointed attorneys would act as stand-by counsel. (A520).

Cooke represented himself for most of the jury selection and for the first three days of trial. On the third day of trial, the Court held that, due to his disruptive behavior, he forfeited his right to represent himself and reinstated stand-by counsel as his court appointed attorneys. (A248) Counsel took over the representation. During the course of trial Counsel represented to the court that, while preparing the mitigation case, Cooke instructed Counsel that he does not wish to present a mitigation case. (A521) At the conclusion of the guilt phase of the trial, the jury returned a guilty verdict for all charges except one count of misdemeanor theft. (A392, 393) Once the verdict was read into the record the following colloquy took place:

> THE COURT: Mr. Cooke, do you wish to address the court on issues of mitigation defense or the case?
>
> THE DEFENDANT: Your Honor, I stated from the beginning no mitigation. I started from the beginning not put my family up there. .
>
> THE COURT: Aside from your family issue, do you wish to present a mitigation defense?

> THE DEFENDANT: I said from the beginning no, I stand firm about that . . .. (A393)

The court ordered Counsel to present a mitigation defense. In response to the Court's question to counsel concerning Cooke's desire not to present a mitigation case Counsel stated:

> MR. VEITH: I believe Mr. Figliola and myself will have a have a conversation with Mr. Cooke our opinion, I think I am correct, is he does not want to present mitigation because of the impact that has on the family, his mother, brothers and sisters paints the family in a negative light. We never specifically discussed with him exactly what his intentions are not cooperating from a strategic standpoint, with regards to mitigation. We are kind of stepping close to a third rail here but it is vague at this point and down the road when someone is looking at the record, he might have a different opinion as to what his strategy was with regards to no mitigation. (A522)

The Prosecutor followed up with the following comments:

> MR. WOOD: It might help you and Mr. Veith and Mr. Figliola, there was – this first discussion of the defendant's desire not to have mitigation evidence presented occurred when Judge Herlihy was still presiding . . . [W]hat defendant said was it was his view that mitigation evidence, this is almost a quote, makes your family look bad and can sometimes get you a worst sentence. (A522, 523)

Prior to the commencement of the State's penalty hearing case, Cooke addressed the court, and again stated that he did not want to present a mitigation

case. Upon further questioning by the court as to why he did not want to present mitigation the following colloquy took place:

> THE COURT: What do you want me to do?
>
> THE DEFENDANT: I am waiving that mitigation. I told you I waived it. It is not going to be a fair hearing regards how I look at it.
>
> THE COURT: You don't wish to participate and present any witnesses or evidence?
>
> THE DEFENDANT: I waive it, because it is not going to mean anything to me.
>
> THE COURT: I understand you do not wish to participate, and you may –
>
> THE DEFENDANT: I am not going to participate. As a matter of fact, I want the death penalty your Honor, give me death that's what I deserve . . .. (A397)

The court held Cooke's desire not to present a mitigation case was born out of frustration for his perceived belief that he did not get a fair trial. Additionally, the court held that his main desire was not to participate in the mitigation case, not that he did want to present a case. The court ordered Counsel to present a mitigation case. The next day the court again engaged in a colloquy with Cooke to determine whether he still intended not to put on a mitigation case or participate. He informed the court his position was firm. At the end of the colloquy he was removed from the courtroom for disruptive behavior and threatening the judge.

Before the start of proceeding the next day, the trial judge issued an opinion that Cooke, based upon his repetitive, disruptive and disrespectful behavior, had forfeited his right to be present for the remainder of the penalty hearing. The order was read into the record. Interestingly, in the order that trial judge makes the following reference: "[T]he defendant has indicated that he wants no mitigation case. That is his right not to want it and also not to participate in it." (A416)

At the conclusion of the State's penalty hearing case, the court engaged in another colloquy with Cooke to determine his position on mitigation. He informed the court that he objects to mitigation. Furthermore, the court explained to him the potential defense mitigation case, and that if he did not present mitigation evidence there was a likelihood of a jury recommendation for death. The court also informed him that he had a constitutional right to testify during the defense mitigation case. Cooke responded "that's the only thing I would do. That's the only thing I agree to do is testify. Anything else, mitigation, I don't – I reject all of that." The court then asked Counsel if he has remained "steadfast in his direction to you not to present any evidence on his behalf?" Counsel replied in the affirmative. The court then directed Counsel to talk to Cooke, and ordered the defense penalty phase mitigation opening statements to commence. (A415 – A417)

The defense mitigation case consisted of testimony from two of Cooke's children, prior testimony from two of his children who testified during his first penalty hearing being read into the record, a video of defendant interacting with his four youngest children, testimony from a State of New Jersey social worker who was assigned to supervise Cooke and his family, testimony for a mitigation expert hired by the defense and introduction of various exhibits. At the conclusion of the mitigation case Cooke testified telling the jury that he did not want a mitigation case and that if was forced upon him. Additionally, he elected to exercise his right of allocution in which he explained to the jury why he did not want to present a mitigation case, defendant stated:

> THE DEFENDANT: . . ."Now I would be a fool to say that you're not going to give me the death penalty, and the reason why I would say that, the mitigation, I disapprove of that. That, only thing did, was hurt this case. It brought evidence in which it shouldn't never been brought in, a history of my youth. You know, what do that have to do with anything of this case? Only thing that persuaded you to prejudice me even worse." (A524)

The jury returned a recommendation of death for intentional murder first degree and felony murder first degree.

The question before this Court appears to be one of first impression. Can a trial judge order counsel to present a mitigation case over a competent defendant's

request to waive mitigation? The defense submits the answer is no, and that the court's order to present mitigation violated the defendant's constitutional rights. The Delaware Criminal Code sets forth the statutory procedure to statutory procedure to be followed for first degree murder capital punishment hearings. 11 Del. C. §4209(c). The procedure at punishment hearing sets forth in part that:

> "(1) The sole determination for the jury or judge at the hearing provided for this section shall be the penalty imposed upon the defendant for the conviction of first-degree murder. At the hearing evidence **may** be presented as to any matter that the Court deems relevant and admissible to the penalty to be imposed ...."

Id. (Emphasis added.) The statute clearly states that parties may present evidence at the penalty hearing, and it does not impose that the parties shall admit evidence.

The universe of cases that deal with the issue of a capital defendant's waiver of a mitigation case generally arises in either post-conviction relief, or writ of habeas petitions. Typically, the defendant argues his waiver was not valid or counsel was ineffective for not disregarding his waiver, and presenting a mitigation case over his/or her client's objection. As a general matter, it is not necessarily unconstitutional for a capital defendant or his counsel to fail to produce mitigating evidence. Tyler v. Mitchell, 416 F.3d 500 (6th Cir. 2005), See Wiggins v. State, 539 U.S. 510 (2003). The 6th Circuit Court of Appeals has held that a capital

defendant's counsel is not constitutionally ineffective when a competent capital defendant prevents the investigation and presentation of mitigation evidence. Id. (citing Coleman v. Mitchell, 244 F.3 d 533, 544-46 (6th Cir. 2001). The court in Tyler went on to state that "It follows that the Constitution does not prohibit a competent capital defendant from waiving the presentation of mitigation evidence." Id. See Chandler v. United States, 218 F.3 d 1305, 1319 n. 25 (11 th Cir. 2000) ("While petitioner is correct that that a capital defendant has a right to present just about any evidence in mitigation at the sentencing phase, this right is the right to be free of government interference with the presentation of evidence."); Singleton v. Lockhart, 926 F. 2d 1315, 1322 (8th Cir. 1992) (holding that if a defendant may be found competent to waive the right to appellate review of a death sentence, we see no reason why a defendant may not also be found competent to waive the right to present mitigating evidence that might forestall the imposition of such sentence in the first instance.) Id.

In Taylor v. State, 32 A. 3d 374 (2011), this Court was presented with the issue of whether a mitigation defense at a penalty hearing can be waived by a defendant. 32 A.3d at 389. The defendant claimed that his mitigation defense at the penalty hearing was not waivable. Id. The defense premised this argument on the United States Supreme Court decision in Lockett v. Ohio, 438 U.S. 586 (1978).

The Delaware Supreme Court rejected this argument in that the United States Supreme Court's decision in Lockett held that a capital defendant had the right to present mitigating evidence not that a mitigation case was not waivable. Taylor, 32. A.3d at 389. The Court noted that the problem with Taylor's argument is that Lockett does not hold that constitutional rights cannot be waived. Id. Taylor also relied on an intermediate New Jersey appellate court decision for the proposition that his constitutional right to present a mitigation evidence is diminished by allowing a waiver. State v. Hightower, 214 N.J. Super. 43, 518 A.2d 482 (N.J. App. Div. 1989). This Court, however, found several federal Courts of Appeal have held otherwise and their decisions were more persuasive. Taylor, at 389.

This Court cited to Tyler v. Mitchell, 416 F.3d 500, 504 (6th Cir. 2005) a case in which an appellant appealed the district court's denial of his writ of habeas. The district court granted a certificate of appealability one two issues with the first issue being whether Tyler's waiver of mitigation evidence (other than his own unsworn statement) was constitutionally valid. Id. at 501. In Tyler, appellant argued that, despite his clearly-expressed instructions to have no mitigation evidence (other than his own unsworn statement) introduced on his behalf during sentencing, his counsel was required to introduce such evidence anyway. Id. at 503. This issue was raised on direct appeal arguing that permitting a capital defendant to

withhold mitigating evidence from the jury defeats the State's interest in a reliable sentencing determination. Id. (citing Lockett v. Ohio for the proposition that the trier of fact in a capital case should "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for sentencing less than death.") 438 U.S. 586, 604 (1978) (plurality opinion). The Appellate Court rejected this argument noting that the Ohio Supreme Court's was correct in noting that the constitutional requirement that mitigation be considered is rooted solely in a desire to protect the defendant's interest. Tyler, 553 N.E.2d at 584. The Ohio Supreme Court stated "that interest is protected by giving the defendant an opportunity to introduce the mitigating evidence available to him, and requiring the sentencer to consider it. But where he chooses to forgo that opportunity, no societal interest counterbalances his right to control his own defense." Id. See Lockett 438 U.S. at 604 (plurality opinion). The district court found that the Ohio Supreme Court's determination was neither contrary to nor an unreasonable application of established Supreme Court precedent. Tyler 416 F.3d at 503. The Appellate Court affirmed the district court's decision. In reaching this decision the Appellate Court held that the Constitution does not prohibit a competent capital defendant from waiving the presentation of mitigation evidence. Id. See Chandler v. United States,

213 F.3d 1305, 1319 n.25 (11th Cir. 2000) See also Singleton v. Lockhart, 962 F.2d 1315, 1322 (8th Cir. 1992).

The appellate court noted that appellant did not argue that he was incompetent to assist his defense, nor does he deny that it was solely his own insistence that prevented his counsel from presenting mitigation evidence that counsel had prepared and was ready to present. Id. at 504. Furthermore, the court stated that the state court transcript clearly shows that this decision was appellant's own and contrary to his counsel's advice. He cannot now complain that his instructions, which the trial court expressly confirmed by questioning him, should be ignored. Id.

In the case at bar, the trial court held that the Cooke knowingly and voluntarily waived his right to counsel and that he was competent. Cooke repeatedly informed the court that he did not wish to present mitigation evidence, other than his testimony and allocution. His request not to present mitigation evidence is noted throughout his pre-trial hearings, his Counsel's representations and during the guilt and penalty phase of his trial. There should be no question that Cooke was competent and set forth a valid waiver of his mitigation case. His decision not to present a mitigation case was rationally based upon his belief that it would impact negatively on him making him look worse than he was. (A522, 523)

The trial judge ignored Cooke's waiver of his mitigation case ordering Counsel to present a case. By ordering Counsel to present a mitigation case the trial judge abused his discretion and violated Cooke's right to control his defense absent state interference violating his constitutional rights and due process requiring this Court to remand his case for a new penalty hearing.

X. THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE FAILS A PROPORTIONALITY REVIEW

Question Presented

Whether the death sentence imposed herein can survive the scrutiny of constitutional review for proportionality? (Ex. 2) (A515-A518)

Standard and Scope of Review

When a death sentence is imposed, this Court is required to independently review the totality of evidence in aggravation and mitigation which bears upon particular circumstances or details of the offense and the character and propensity of the defendant and determine whether the death sentence is "disproportionate to the penalty recommended in similar cases." See, 11. Del. C. §4209 (g) (2) (a).

Argument

The concept of proportionality review in death penalty cases has two aspects. The first aspect is known as substantive proportionality review which looks to whether the punishment is excessive for a particular case. The second aspect is procedural proportionality which examines whether, when compared to factually similar cases involving the same offense, a defendant's death by execution is excessive. State v. Marshall, 613 A.2d 1059, 1067 (NJ 1992).

In Gregg v. Georgia, 428 U.S. 153 (1976), the Supreme Court spoke of the useful function of proportionality review and the characterized it as assuring that "no death sentence will be affirmed unless in similar cases throughout the state the death penalty has been imposed generally." 428 U.S. at 205. This "procedural" proportionality objective has been recognized in Delaware as one of the goals of our death penalty statute, 11 Del. C. §4209.

As this Court stated in Pennell v. State,604 A.2d 1368 (Del. 1992), the law requires the Court to determine whether "imposition of the death penalty... in each case [is]disproportionate to the penalty recommended in similar cases arising under the Delaware capital punishment statute." 604 A.2d at 1376. In Pulley v. Harris, 465 U.S. 37 (1984), the Supreme Court stated:

> This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to insure instead whether the penalty is nonetheless unacceptable in a particular case because it is disproportionate to the punishment imposed in others convicted of the same on other convicted of the same crime.

It is the defendant's position that this Court's proportionality review should therefore 'seek to insure that the death penalty is administered in a rational, non-arbitrary, and evenhanded manner, fairly and with reasonable consistency." State v. Marshall, supra, at 1376. In Pennell, this Court measured the universe of Delaware

death penalty cases. The Court defined the universe as "all first degree murder cases that went to penalty phase hearings since 1985." See also, Dawson at 1108. Once the universe has been measured, the next step is to locate cases within the universe which are similar to the cases under consideration. Pennell, supra at 1376. This is not an easy task to accomplish as this Court has noted that a definitive comparison of "universe" of cases is almost impossible. Red Dog v. State, 616 A.2d 298 (Del. 1992).

Cooke asserts that the trial process and penalty phase were so flawed as to deny him Due Process so that a proportionality review for this case would be impossible. Cooke, electing to precede *pro se* was denied multiple requests for a continuance. The trial court forced him to proceed to trial within 90 days of being allowed to represent himself. The denial of his repeated continuance requests so that he could prepare a defense left Cooke woefully unprepared to defend a capital murder case. Furthermore, only three days into trial the trial judge held that the he forfeited his right to self-representation, ordering his conflict counsel to resume representing him.

Additionally, the trial court refused to allow Cooke to waive mitigation during the penalty phase. He clearly expressed concerns that presentation of mitigation evidence only portrays him and his family in a negative light making it

more likely that a jury would recommend a death sentence. Over Cooke's objection to presenting a mitigation case, the trial judge ordered counsel to present mitigation.

Also, the prosecutors' introduction of photographs of the victim as an infant was so prejudicial and a blatant attempt to play on jury sympathy further evidencing that Cooke was denied a fair penalty hearing. Given the gravity of the State's overzealous penalty phase conduct coupled with the denial of Cooke's trial continuance request and forcing him to present a mitigation case, no fair recapitulation of balancing aggravators and mitigators can occur.

Accordingly, Cooke asserts that the evidentiary and structural errors were so severe that rather than undertake the mandated proportionality review, this Court has no choice but to vacate the conviction and sentence as being manifestly unjust and as so lacking in reliability that it renders such an analysis useless.

CONCLUSION

For the reasons and upon the authorities cited herein, the undersigned respectfully requests that this Court vacate Cooke's conviction and sentence of death and remand for a new trial.

/s/ Anthony A. Figliola, Jr.
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Attorneys for Appellant

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES COOKE	}	
	}	
Defendant Below, Appellant	}	
	}	
V.	}	**CASE NO.**
	}	
STATE OF DELAWARE	}	
	}	
Plaintiff Below, Appellee	}	

NOTICE OF APPEAL

TO: Paul Wallace Esquire
Deputy Attorney General
820 N. French Street
Wilmington, DE 19801

PLEASE TAKE NOTICE, that Plaintiff Below, Appellant, does hereby appeal to the Supreme Court of the State of Delaware from Order of the Honorable Charles H. Toliver, IV, dated September 17, 2012, in the Superior Court of the State of Delaware, I.D. No. 0506005981.

The Name and address of the Attorney below for Appellee is:

Paul Wallace Esquire
Chief of Appeals
820 N. French Street
Wilmington, DE 19801

/s/ Anthony A. Figliola, Jr.

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/s/ Peter W. Veith

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
	)	**ID No. 0606005981**
v.	)	
	)	
JAMES E. COOKE,	)	
	)	
Defendant.	)	

SENTENCING ORDER

The Court, as a result of the findings of guilt by the jury as to Courts III through X, of the instant indictment, based upon its review of the record presented to that jury in both the trial and penalty phases, over which the undersigned presided, sentences the Defendant as follows:

1. Count III - Rape First Degree
(Cr. A. No. 11-04-2163)

   The Defendant shall be remanded to the custody of the Department of Correction at Supervision Level 5 to a period of 75 years. The first 15 years are a period of mandatory incarceration.

2. Count IV - Burglary First Degree
(Cr. A. No. 11-04-2164)

   The Defendant shall be remanded to the custody of the Department of Correction at Supervision Level 5 for a period of 15 years.

3. Count V - Arson First Degree
(Cr. A. No. 11-04-2165)

   The Defendant shall be remanded to the custody of the Department of Correction at Supervision Level 5 for a period of 15 years.

4. Count VI- Reckless Endangering Firs Degree
(Cr. A. No. 11-04-2166)

The Defendant shall be remanded to the custody of the Department of Correction at Supervision Level 5 for a period of 5 years.

5. Count VII - Burglary Second Degree
(Cr. A. No. 11-04-02167)

The Defendant shall be remanded to the custody of the Department of Correction at Supervision Level 5 for a period of 8 years.

6. Count VIII - Robbery Second Degree
(Cr. A. No. 11-04-2168)

The Defendant shall be remanded to the custody of the Department of Correction at Supervision Level 5 for a period of 5 years.

7. Count IX - Theft Misdemeanor
(Cr. A. No. 11-04-2169)

The Defendant shall be remanded to the custody of the Department of Correction at Supervision Level 5 for a period of 1 year.

Suspended for 1 year at Supervision Level 4 (Halfway House). The Defendant shall be held at Supervision Level 5 pending space at Supervision Level 4 (Halfway House).

8. Count X - Burglary Second Degree
(Cr. A. No. 11-04-2170)

The Defendant shall be remanded to the custody of the Department of Correction at Supervision Level 5 for a period of 8 years.

Suspended after 4 years for 2 years at Supervision Level 3.

As to all charges

1. Defendant shall pay the costs and prosecution which are hereby suspended for each charge.

2. Any monetary obligations shall be paid according to a schedule to be determined by the office of Probation and Parole.

3. Defendant shall undergo a mental health evaluation and follow all recommendations as to treatment, including, but not limited to anger control and domestic violence counseling.

4. Defendant shall have no contact with any of the victims identified in the indictment, their family or friends, directly or indirectly.

These sentences shall be served consecutive to those imposed as a result of the conviction of the Defendant for the offenses set forth in Counts I and II of the indictment.

IT IS SO ORDERED.

_____

TOLIVER, JUDGE

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
	)	
	)	
v.	)	**ID No. 0606005981**
	)	
JAMES E. COOKE,	)	
	)	
Defendant.	)	

SENTENCING DECISION

Dated September 17, 2012

Steven P. Wood, Esquire, Deputy Attorney General, Diane Coffey, Esquire, Deputy Attorney General, Department of Justice, attorneys for the State of Delaware.

Anthony A. Figliola, Jr., Esquire, Peter W. Veith, Esquire, of Wilmington, Delaware, attorneys for the defendant.

TOLIVER, J.

OUTLINE OF OPINION

I. NATURE AND STAGE OF THE PROCEEDINGS

A. Procedural Posture

Between April 27 and May 1, 2005, a series of crimes took place at three separate locations. On April 27, 2005, an intruder illegally entered Building 11, Apartment 2 of the Town Court Apartments in Newark, Delaware, and is alleged to have removed and/or damaged the property of its occupant, Cheryl R. Harmon ("Harmon Burglary"). On April 29, 2005, there was a similar entry and theft of property followed by a confrontation between the intruder and the occupant of the home, Amelia Cuadra, located at 209 West Park Place ("Cuadra Burglary"). Lastly, there was an illegal entry into Apartment 6, Building 12 of the Town Court Apartments accompanied by the sexual assault and murder of one of the tenants of that unit, Lindsey M. Bonistall ("Bonistall Burglary/Murder").

1. The First Trial and Associated Proceedings

The Defendant was indicted by the New Castle Grand Jury on August 8, 2005, and charged with eleven offenses. He was charged with two counts of Murder First Degree (Counts I and II) and one count each of Rape First Degree (Count III), Burglary First Degree (Count IV), Arson First Degree (Count V) and Reckless Endangering First Degree (Count VI) in connection with the events that took place during the course of the Bonistall Burglary/Murder. He was charged with one count of Burglary Second Degree (Count VII), Robbery Second Degree (Count VIII) and Theft (Misdemeanor) (Count IX) flowing from the Cuadra Burglary. Lastly, based upon what was alleged to have taken place during the Harmon Burglary, the Defendant was charged with individual counts of Burglary Second Degree (Count X) and Theft (Misdemeanor) (Count XI).

The Defendant initially pled not guilty to each of the indicted offenses. Because the case included charges of Murder First Degree and the State elected to seek the death penalty, the case was specially assigned to the

Honorable Jerome O. Herlihy on August 18, 2005. During the course of discovery and after the resolution of a number of pretrial motions, the Defendant's plea was changed by his attorneys to guilty but mentally ill.[1] The jury selection began on January 23 and was completed on January 30, 2007. Trial began on February 2 and concluded on February 28, 2007. The jury rejected the Defendant's plea and instead returned verdicts of guilty as charged. The penalty phase hearing was held from March 13 to March 16, 2007. On March 21, the jury, after unanimously finding the existence of a statutory aggravating factor beyond a reasonable doubt, returned a recommendation that the Defendant be sentenced to death by lethal injection by a unanimous vote of 12 to 0. On June 6, 2007, Judge Herlihy agreed and so sentenced the Defendant.

The Defendant appealed his conviction to the Delaware Supreme Court. Among other grounds, the Defendant claimed that he was denied a fair trial and certain other

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[1] The plea was entered over the Defendant's objection but with the Court's permission after the issue had been briefed and argued.

constitutional rights because trial counsel entered a guilty but mentally ill plea over his objection and stated wish to plead not guilty.[2] He was represented in his appeal by new counsel, trial counsel having been allowed to withdraw given the complaints made by the Defendant against trial counsel.[3] On July 21, 2009, the Delaware Supreme Court agreed and reversed the Defendant's convictions and remanded the case for a new trial. For reasons unrelated to the merits of the case, the case was ultimately reassigned to the undersigned judge on February 24, 2011.

2. The Second Trial and Penalty Phase Hearing

Following the remand of the case back to this Court, appellate counsel were allowed to withdraw after the Defendant filed suit against them, among others, in the United States District Court for the District of

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[2] *Cooke v. State*, 977 A.2d 803 (2009).

[3] During the first trial, the Defendant was represented by J. Brendan O'Neill, Esquire and Kevin J. O'Connell, Esquire, both of the Office of the Public Defender. They were replaced by Jennifer Kate Aaronson, Esquire and Patrick J. Collins, Esquire.

Delaware. Anthony A. Figliola, Esquire and Peter W. Veith, Esquire were appointed to represent the Defendant from that point forward. However, on November 30, 2011, the Defendant's request to proceed *pro se* was granted by the Court. Messrs. Figliola and Veith were removed as requested but were directed to continue as standby counsel and assist the Defendant when appropriate to do so. They were also directed to continue preparing for trial in the event that the Defendant was no longer able to represent himself or forfeited his right to do so.

Jury selection for the retrial began on February 20, 2012 and was completed on March 1, 2012. Trial began on March 7. The Defendant changed his plea to not guilty as to all counts of the indictment, denying any involvement in the events of April 27 and April 29-30, 2005 at the Harmon and Cuadra residences. He also denied illegally entering the Bonistall apartment or killing Lindsay Bonistall. He denied raping Ms. Bonistall, but did admit to having sex with her, claiming that it was consensual.[4]

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[4] The Defendant continued to act *pro se* until permission to do so was revoked because of his contumacious behavior on March 9, 2012, after the jury was selected and trial had commenced. Standby

Trial concluded on April 11, 2012. On April 13, the jury returned verdicts of guilty on ten of the eleven counts of the indictment. The jury found the Defendant not guilty of Theft (Misdemeanor) as set forth in Count XI as it related to the events at the Harmon apartment.

Because the State was seeking to impose the death penalty, 11 *Del. C.* § 4209, which sets forth the procedure and standards governing the issue of capital punishment, became applicable. To be specific, when a defendant is found guilty of Murder First Degree, the statute requires that another proceeding, a penalty phase hearing, be held. At that hearing, the sole issue to be resolved is whether the Defendant is to be sentenced to life without the possibility of probation or parole, or whether the death penalty will be imposed.

At the conclusion of the penalty phase, the jury must provide the Court with responses to the following inquiries:

> (1) Whether the evidence shows beyond a reasonable doubt the existence

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counsel then resumed active control and direction of the presentation of the defense.

> of at least one statutory aggravating circumstance as enumerated in subsection (e) of this section; and
>
> (2) Whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.[5]

While the jury's responses are entitled to appropriate weight, the Court is not bound by them. In fact, the Court may reject the jury's findings in their entirety but must explain and specify the reasons for such a decision.[6]

Pursuant to this procedure, a penalty phase was held from April 18 through May 3, 2012. Notice of the aggravating and mitigating factors being relied upon by the parties was provided by the State on April 16 and 17, and by the Defense on April 17, as required by § 4209(c)(1).

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[5] 11 *Del. C.* § 4209(d)(1).

[6] 11 *Del. C.* § 4209(d)(1),(4).

The State nominated one statutory aggravating factor, that set forth in 11 *Del. C.* § 4209(e)(1)(j), which reads as follows:

> The murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit Rape First Degree and/or Burglary First Degree.

The State further alleged that other, nonstatutory aggravating factors existed. They were identified as:

1. The particular circumstances and details of the commission of the offenses set forth in the instant indictment;

2. The character and propensities of the defendant;

3. The impact of the indicted crimes upon the family of Lindsey Bonistall;

4. The impact of the indicted crimes upon the close friends of Lindsey Bonistall;

5. The particular circumstances and details of the commission of each of the crimes for which the defendant was either convicted or adjudicated delinquent, including, but not limited to the following:

   a. a 1983 adjudication of

delinquency for aggravated assault;

b. a 1988 adjudication of delinquency for aggravated assault;
c. two 1988 adjudications of delinquency for burglary and theft;
d. a 1988 adjudication for simple assault;
e. a 1992 conviction for distribution of cocaine near a school;
f. a 1992 conviction for escape;
g. a 1985 conviction for assault;
h. a 1999 conviction for distribution of cocaine near a school;[7]
i. a 1998 conviction for simple assault;
j. a 1999 conviction for theft by unlawful taking;
k. a 1999 conviction for theft from a person; and
l. a 1999 conviction for possession of cocaine.

6. The particular facts and details of an incident leading to a 1989 arrest for interference with child custody;[8]

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[7] *See* State's Exhibit 26P. The record should reflect that the Defendant was convicted of Possession of Cocaine with Intent to Distribute within a School Zone.

[8] *Id.* The record reflects this case was administratively dismissed.

7. The particular circumstances and details of the commission of four home invasion burglaries committed by the Defendant in June of 2005 in Atlantic City, New Jersey;

8. Acts of domestic violence committed by the Defendant against Rochelle Campbell;

9. The Defendant's pattern of disorderly and disrespectful behavior towards the police;

10. The Defendant's disorderly and disrespectful behavior while incarcerated; and

11. The future dangerousness of the Defendant.

The defense nominated factors which it argued existed in mitigation of the offenses in question. They were identified as:

1. Childhood of abandonment;

2. Physical abuse and neglect as a child;

3. Deep love and affection for his children;

4. Impact his death would have on his family;

5. Stable work history;

6. Amenable to correctional setting; and

7. Support of family members.

At the conclusion of the hearing, the jury was instructed as a matter of law that the existence of one statutory aggravating factor had been established beyond a reasonable doubt because of the guilty verdict returned as to the Murder First Degree (Felony Murder) charge set forth in Count II of the indictment.[9] The jury was therefore directed to unanimously answer the first question in the affirmative.

On May 3, the jury returned its responses to the penalty phase interrogatories. As instructed, the jury answered the first question in the affirmative by a vote of twelve to zero, i.e, that the State had established the existence of the statutory aggravating factor alleged beyond a reasonable doubt. It went on to find that the aggravating factors outweighed the mitigating factors by a preponderance of the evidence by votes of eleven to one as to Count I and ten to two as to Count II. By those votes, the jury was recommending that the Defendant be put to death by lethal injection as the penalty for

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[9] *See Steckel v. State*, 711 A.2d 5 (Del. 1998).

killing Lindsey Bonistall.

B. The Sentencing Process

As a result of the jury's verdict, and pursuant to 11 *Del. C.* § 4209, the Court must review the evidence and, like the jury, make two findings. The Court must first find, beyond a reasonable doubt, the existence of at least one statutory aggravating factor. If the answer is yes, the Court must go on to consider whether any aggravating factors, including any statutory aggravating factors previously determined to exist, outweigh any mitigating factors relied upon by the Defendant. During the course of that analysis, as the jury was required to do, the character and propensities of the offender as well as the circumstances and details of the capital offense in question must be considered by the Court.[10]

This part of the process set forth in § 4209 is not subject to resolution simply by using a formula involving counting the number of aggravating factors versus

[10] 11 *Del. C.* § 4209(d)(1).

mitigating factors, instead it "involves a reasoned and deliberative judgment of the facts and circumstances of each case before determining the appropriate punishment."[11] Stated differently, the process:

> . . . is not to be determined by a mere counting process. The weighing of aggravating and mitigating circumstances involves a qualitative rather than quantitative consideration of the circumstances to determine the appropriate punishment. [This] qualitative process requires that the jury and judge carefully consider the specific facts of each case and, when appropriate, not to give one or more aggravating factors independent weight.[12]

If the answer is in the affirmative as to both questions, the Court shall impose a sentence of death by lethal injection. If the Court determines that no statutory aggravating factors have been established or that the aggravating factors do not outweigh the mitigating factors, the Defendant will be sentenced to life in prison. Regardless of the sentence imposed, if

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[11] *State v. Barrow*, 1998 WL 733212 (Del. Super. Feb. 3, 1998).

[12] *Ferguson v. State*, 642 A.2d 772, 782 (Del. 1994)(citing *State v. Cohen*, 604 A.2d 846, 849 (Del. 1992)).

written findings setting forth the basis of that decision must be provided by the Court.[13]

The jury, as noted above, has determined that the only statutory aggravating factor offered by the State has been established beyond a reasonable doubt. The Court agrees that based upon its review of the evidence, the statutory aggravating factor alleged by the State has been established beyond a reasonable doubt. As a consequence, the Court must address the second inquiry and determine which penalty, death by lethal injection or life imprisonment, should be imposed.

Before beginning that process, the Court must make note of the fact that during the course of the trial and penalty phase hearing, the Defendant engaged in conduct that was disruptive, disorderly and disrespectful to the Court as well as the other participants in the proceedings. That behavior was committed both in and out of the presence of the jury. It was directed at the Court, State's counsel and counsel for the Defendant.

The Court, mindful of the Defendant's right to

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[13] 11 *Del. C.* § 4209(d)(4).

participate in his defense, attempted to allow the Defendant as much freedom to act in that regard as possible while managing the presentation of the evidence and testimony as required by law. The Court also acted to protect the Defendant from any prejudicial effects his conduct could have on the jury. The Defendant would agree to obey the rules of the Court, respect its decorum and behave as directed, only to violate that agreement later during the same session of court. It was that conduct which proximately caused the revocation of his right to proceed *pro se* on March 9, 2012, the third day of the trial. That conduct still did not abate, resulting in his exclusion from the courtroom, with certain exceptions[14], for the balance of the penalty phase hearing on April 20, 2012.

The Court further notes that the Defendant refused to participate in the penalty phase hearing or assist his attorneys in that regard. It also appears, based upon

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[14] Specifically, the Defendant would be allowed to be present to testify and/or to exercise his right of allocution subject again to the applicable rules of evidence and law as well as previously announced rules of civility and courtroom decorum.

representations made by defense counsel and other evidence in the record, that the Defendant directed members of his family not to appear or otherwise assist the defense in the penalty phase hearing. He has a right to decline to do so.[15] In spite of that refusal to participate or allow others to act on his behalf in that regard, the Court directed the Defendant's attorneys to use their best professional efforts to prepare a mitigation case on behalf of the Defendant.

It is the Court's view that the Defendant's attorneys complied with the aforementioned directive notwithstanding the Defendant's intransigent posture during the trial and penalty phase hearing. In addition, the Court notes that the Defendant's behavior has not had a negative impact on the Court's deliberative process other than to limit the information that might be in favor of mitigation, which, again, he has the right to do.[16]

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[15] *See Taylor v. State*, 32 A.3d 374, 384 (Del. 2011).

[16] *Id.* at 388.

II. STATEMENT OF FACTS

A. April 27 to May 1, 2005

1. The Harmon Burglary

On April 26, 2005, Ms. Harmon, a certified nursing assistant, left her apartment in Building 11 of the Town Court Apartments during the early morning hours to visit a patient in New Jersey. She returned between 1:00 and 1:30 a.m. the following morning. When she entered her apartment, she found it in disarray and permeated by the odor of fingernail polish. She also noted that written on the walls were phrases stating "DON'T mess with my men"; "We'll be back"; and "I WHAT [sic] my drug money". Missing were items of personalty including several jewelry rings.

Ms. Harmon called the police. They determined the point of entry to be the living room window which was unlocked, but had been locked when Ms. Harmon left. There were no initial suspects. However, Ms. Harmon did initially think that the entry was the work of a former

boyfriend.

2. The Cuadra Burglary

On April 29, 2005, Ms. Cuadra, a graduate student in engineering at the University of Delaware, and her roommate, Carolina Bianco, returned to the residence they shared at 209 West Park Place in Newark. The two of them had been to the movies, followed by drinks at a local bar. Ms. Cuadra then went to bed.

In the early morning hours of April 30, 2005, Ms. Cuadra was awakened by a noise. Thinking it was her roommate, she called out to her. At that point, a flashlight beam was shined in her eyes by an unknown male intruder. The intruder told her to "shut up" and to give him money. He also told her he had a weapon.

Ms. Cuadra complied with that initial request and gave him $45.00. The intruder then told her to give him her credit cards. Again she complied, giving the intruder her American Express and University of Florida Visa cards. It was at that point that the intruder demanded that Ms. Cuadra take off her clothes or he would

kill her.

Even though she pictured the intruder using his weapon to shoot or stab her, Ms. Cuadra stated that she refused to be a victim. She responded by screaming for her roommate and trying to call for help by dialing 911 on her cell phone which she had inadvertently picked up during the course of the confrontation. The intruder then fled.

The police ultimately responded to the West Park Place residence and interviewed Ms. Cuadra. The intruder was described by her as a light skinned black male approximately 5 feet 6 to 7 inches tall with a "chubby" face. He appeared to be in his late 20s or early 30s. He wore a gray "hoodie" or hooded sweatshirt which he pulled down low on his face, light blue pants, gloves in two shades of gray and a skull cap. She also provided that information to the police sketch artist who developed a composite drawing of the intruder.

The police determined that the intruder entered the residence through the door to the laundry room. The property taken in addition to the money and credit cards

referenced above, included Ms. Bianco's cell phone and Ms. Cuadra's backpack emblazoned with her name. The backpack contained several items including a personal electronic listening device known as an "iPod" and a small box containing diet pills.

At approximately 4:19 a.m. the morning of the burglary, Ms. Cuadra was informed that someone had unsuccessfully attempted to use her Visa card. She notified the police. The police secured the film from the surveillance camera at the ATM which happened to be located across the street from the Newark Police Department, and which was in turn "around the corner" from Ms. Cuadra's residence.

3. The Bonistall Burglary/Murder

Lindsey Bonistall lived at Building 12, Apartment 6 of the Town Court Apartments with Christine Bush since the start of their sophomore year at the University of Delaware. Ms. Bonistall, age 19, was a journalism major and wrote for the school paper. She had met Ms. Bush along with Nicole Gengaro, Katie Johnson and Isabel

Rivero the year before when all of them resided in one of the University dormitories as freshmen. She also worked as a hostess/waitress at the Home Grown Café, a local Newark eatery, having started a few weeks before the weekend during which she was killed.

On April 29, 2005, Ms. Bonistall was alone in Apartment 6. Ms. Bush was away, having gone camping with her father. Ms. Bonistall had planned to complete an assignment for the school paper and study for an exam. She was scheduled to work Saturday, April 30 and Sunday, May 1 as well.

On April 30, Ms. Bonistall did in fact go to work. Home Grown Café time records reflect that she arrived at 5:11 p.m. and clocked out at 9:47 p.m. After work, she went to the apartment of Michael Todd, a fellow University of Delaware student and employee at the Home Grown Café. It was at that location that she smoked marijuana with one of Mr. Todd's roommates before giving Mr. Todd a ride to the home of one of his friends who lived on Cleveland Avenue in Newark. This trip took place around 10:45 p.m. that evening.

After dropping Mr. Todd off, Ms. Bonistall went to Nicole Gengaro's room in the Dickinson dormitory on campus where she met Ms. Gengaro, Katie Johnson and Isabel Rivero. The group spent the rest of the evening watching *Saturday Night Live* on television. At approximately 1:00 a.m. on May 1, the group decided to end the evening. Ms. Johnson and Ms. Rivero returned to their dormitories and Ms. Bonistall headed back to her Town Court Apartment. She apparently made it home but did not show up for work the next day as scheduled and was never seen alive again by family or friends.

At some unknown point in time after 1:00 a.m. but before 2:30 a.m., neighbors saw smoke emanating from Building 12 of the Town Court Apartments. At the same time, residents of Building 12 began to smell smoke followed by the sound of a fire alarm. A maintenance supervisor led efforts to warn residents and evacuate the building going door to door. The Aetna Volunteer Fire Company responded to the 911 calls for assistance and extinguished the fire. It was determined that it began in the bathroom of Apartment 6 and appeared to have been

intentionally started. There were writings made with marking pencils, e.g. "Sharpies" or "Magic Markers", on at least four locations throughout the apartment. They read: "More Bodies Are going to be turn [sic] up Dead";"WHITE Power" (in two places); "We Want Are [sic] Weed back" and "KKK" (on a wall and a kitchen countertop).

No one was initially thought to have been present when the fire started. However, further examination of the debris in the bathroom led to the discovery in the bathtub of the partially charred remains of a female who was later identified as Lindsey Bonistall. Heat from the fire was so intense that it melted the covering enclosing the tub which collapsed inward on top of and completely covered the body.

Bedding, along with the remnants of a guitar given to Ms. Bonistall by her mother, were piled directly on top of Ms. Bonistall's body. Evidence of bleach was found on her clothing, including her underwear and the bedding, which was believed to have been used to destroy fluids

and/or tissue from which DNA could be extracted.[17] Ms. Bonistall's remains were removed and taken to the Office of the Medical Examiner.

B. The Investigation

The initial investigation at the scene did not provide any indication as to who was responsible for the fire in Apartment 6 of Building 12 and the death of Lindsey Bonistall.[18] One nonspecific boot print was located in Ms. Bonistall's bedroom. An impression of a glove was also taken from the balcony railing. No fingerprints were obtained from the scene. However, investigators believed that the perpetrator entered Apartment 6 by climbing on a square vent connected to the apartment balcony, climbing over the balcony railing and going through the patio door.

The examination of her body by the Medical Examiner

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[17] Dr. Jenny Vershvovsky of the Office of the Chief Medical Examiner, so testified.

[18] There was a sighting of a light skinned black male with plaits or corn-rowed hair late on April 30 or early in the morning of May 1. He was seen riding a bike away from the area in which Building 12 was located.

revealed that Ms. Bonistall had been wearing the same clothes that she had been wearing when she was last seen by her friends. It was further disclosed that Ms. Bonistall had been tied up with an electrical cord and gagged with a tee shirt tied in a knot stuffed into her mouth. There were teeth marks in the shirt indicating that she bit into the gag with force.

The examination further revealed that Ms. Bonistall's face was severely bruised from at least two blows to the chin and left eye. Her chest was bruised to such an extent so as to be consistent with the application of great force having been applied by knees or other body parts. Death was brought about by strangulation with a "garotte"[19] made from a shirt. The Medical Examiner concluded that Ms. Bonistall had been raped before she was killed but was dead when her body was placed in the bathtub and the fire set. Samples were taken from her vaginal area and her fingernails for purposes of obtaining the DNA of the rapist.

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[19] The term is defined as "a strangulation [especially] with robbery as the motive . . . an implement for this purpose." *Webster's Ninth New Collegiate Dictionary,* p. 506 (1989).

As might be expected, the murder and rape of Lindsey Bonistall generated a great amount of publicity. A reward of $25,000.00 was offered for information leading to the arrest and conviction of the perpetrator. It appears that little or no note of the Harmon and Cuadra burglaries was taken publicly. In any event, the investigations into the three events continued without any belief or knowledge that they were linked or had any connection.

On May 2, 2005, that began to change with a "911" call to the Newark Police Department. The caller provided information that had not been made public establishing a common thread between the crimes, the identity of the victims and/or specifically describing the writings on surfaces at the Harmon and Bonistall residences. A second "911" call was received on May 7, 2005 providing information relative to the identification of the perpetrator or perpetrators of the crimes in question. The information provided could not be verified and was deemed not to be truthful by the Newark Police. Although the identity of the callers was unknown, both

calls were recorded as were all such contacts.

Now believing that there was a connection between the three events, the Newark Police, as a part of their investigation, created a poster asking for the public's assistance in solving the crimes. The poster featured a composite drawing of the suspect based upon the information provided by Ms. Cuadra. The poster also included photographs taken from an ATM security camera during the unsuccessful attempt to use Ms. Cuadra's Visa card in the early morning hours of April 30.[20] It was circulated in and around Newark in businesses and other locations frequented by the public, including the Payless Store where the Defendant was employed beginning on May 4, 2005. A second poster was created showing additional pictures of a person attempting to use the aforementioned Visa card.

Shortly after the second poster was put in the Newark Payless Shoe Store, the manager of the store, Diane Hannah, recognized the Defendant as the person pictured

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[20] The person depicted in the photographs appeared to be wearing a "hoodie" pulled down low on his forehead. He also had on pants made of a similar material.

in the photographs on the poster. She was able to identify him because of his peculiar gait and the style of the shoes he wore.[21] Ms. Hannah in turn contacted James Jones, the training supervisor, who had hired the Defendant on February 28, 2005 as a stock clerk and shipment processor.

Mr. Jones agreed with Ms. Hannah that the person depicted in the poster photos was in fact the Defendant. His identification was also based upon the gait, the shoes and gloves the individual had on in the pictures placed on the posters. The two of them concluded as well that the gloves and the shoes, which were also sold at Payless, were of the type the Defendant wore at work. Mr. Jones contacted the Newark Police and informed them of his identification of the Defendant as the person captured in the pictures shown in the posters.

Subsequent to the creation and circulation of the posters, Ms. Cuadra visited the Newark Police as part of their continuing investigation. The date of that visit

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[21] The style of shoe was sold by Payless Shoes in area stores and she had seen the Defendant wear similarly styled footwear.

is unknown. She was shown the posters and stated that she was "pretty sure" that the person pictured was the individual who had invaded her residence on April 29, 2005. However, when shown a photo lineup in June of 2005, which included the Defendant, Ms. Cuadra selected another as the perpetrator.

On June 6, 2005, based upon information gained during their ongoing investigation, the Newark Police interviewed Rochelle Campbell. Ms. Campbell had been the Defendant's paramour on an intermittent basis since 1995 as well as the mother of three of his children. In addition, she was very pregnant with their fourth child at the time of the interview.[22] The couple had moved to Delaware from New Jersey in November 2004 and lived at 9 Lincoln Drive in Newark which was separated by open parkland from Buildings Eleven and Twelve of the Town Court Apartments.

Ms. Campbell related to the police that the Defendant told her that he had stolen the backpack with the name

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[22] In addition to the four children that he had with Ms. Campbell, the Defendant, by his own admission, had ten more children for a total of fourteen children by ten different women.

"Carolina" with an "Italian" sounding last name at the scene of an accident on a nearby roadway. Inside the bookbag were credit cards, diet pills in a metal container and an "iPod". Although Ms. Campbell cautioned against it, the Defendant indicated that he was going to attempt to use the credit cards to gain cash. She also told him to remove the bag and its contents from their home. The Defendant left and did not have the backpack when he returned.

The Newark Police also questioned Ms. Campbell regarding the identity of the person who made the 911 calls on May 2 and 7, 2005. After listening to portions of recordings of the calls, she indicated that she was one hundred percent (100%) sure that it was the Defendant on both occasions. The person that called on May 2 spoke in a voice that Ms. Campbell indicated that the Defendant had used when playing with their children. She went on to relate that the names provided during the 911 call made on May 7 were the names of relatives of the Defendant.

Lastly, Ms. Campbell related that the Defendant owned

and frequently wore grey "sweat" clothes including "hoodies". She stated that he often wore a "do rag" on his head under a woolen cap that was either blue or black. Ms. Campbell consented to a search of her residence. The search produced several items, including a cell phone and a bicycle.

The next day, the Newark Police met with Sabrina Sorrell, the Defendant's sister who lived at 1604 West 4th Street in Wilmington. Ms. Sorrell informed the police that the Defendant did stay at her residence from time to time and consented to a search of the premises. That search led to items identified as the Defendant's clothing. "Sweats", including "hoodies", were among the items seized.

Based upon the information obtained during the course of their investigation, the police obtained a warrant authorizing them to apprehend the Defendant for prosecution in connection with the events that took place at the Harmon, Cuadra and Bonistall residences. The Defendant was arrested pursuant to that warrant on June 7, 2005 at Delmore Place near its intersection with

Fourth Street in Wilmington. He was taken into custody without incident and subsequently questioned for a period of time estimated to have lasted between four to six hours.

During the course of that interrogation, the Defendant denied knowing Lindsey Bonistall. He also denied having any involvement in any of the three burglaries and related crimes in Delaware with which he was ultimately charged. It was later determined, however, that the samples taken from Ms. Bonistall's body conclusively matched the Defendant's DNA profile obtained from the State of New Jersey.

C. The Defendant

The Defendant was born on December 2, 1970 in Salem, New Jersey. Salem was a rural community where everyone knew or was related to everyone else. His parents were reputed to be Paula Turner and James Cooke. While there is no question as to the identity of the Defendant's mother, there has been some question as to whether senior Mr. Cooke was actually his biological father. It does

appear that Ms. Turner was married to the putative father on the date that the Defendant was born but it also appears that he left the family when the Defendant was an infant. The social history implies that it was because some question may have arisen relative as to who was the actual biological father of the Defendant. There is no question however that his mother had four other children - Sabrina Sorrell, Eleisa Cooke, Ricky Patillo, Jr. and Tiesha Patillo. It is equally apparent that they all did not share the same biological father.

The Defendant's early years were problematic for a number of reasons, including those related to his health. He was born prematurely and underweight at three and one-half pounds. At four months, he suffered from malnutrition and was hospitalized for a short period of time. At the age of twenty-four months, the Defendant suffered third degree burns on his feet when he was immersed in extremely hot water by his mother's then current boyfriend, Ricky Patillo, Sr. His injuries were not properly dressed and/or treated. Severe nerve damage resulted causing disfigurement and permanently affecting

the Defendant's gait in a patently obvious manner.[23] It was also at this point that the Defendant first came into contact with the New Jersey Department of Youth and Family Services ("DYFS"), which came to investigate claims of the abuse of one of his siblings.

During his childhood and adolescence, the Defendant suffered beatings and other forms of physical abuse. In 1983, he was beaten at the probation office and his mother refused to take him home, at least initially. It was also in 1983 that note was taken of open cuts on his back and of old cigarette burns and other injuries. In 1985, the Defendant came to the offices of DYFS and refused to leave because he had been beaten with an extension cord leaving visible injuries along side older similar injuries.

There were at least three other occasions where DYFS attempted to intervene, going to court to get temporary custody of the Defendant and/or his siblings because of reported abuse. The Defendant and his siblings were

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[23] It is visibly apparent that the Defendant walks on his toes.

often hungry, dirty, smelled of human waste and were generally neglected. Their care, or the lack thereof, resulted in numerous calls to DYFS.

The Defendant was taken away from his mother and placed in foster care on at least two occasions. The first one was terminated because the Defendant was disruptive. His stay at the second foster home ended because he wanted to return to his family.

Efforts were made to help the Defendant by getting him admitted to residential treatment facilities. Unfortunately, the first attempt was rejected because the Defendant had a history of "arson ideation". The second placement at the Teaching Family Program was terminated when the Defendant was discharged because of numerous rule infractions and/or improper conduct.[24]

The Defendant's inability to conform his conduct to applicable rules, regulations and/or laws was not limited to social service efforts to ameliorate the harsh effects

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[24] The Defendant's ability to coexist with others did not improve when it came to living with family. His grandmother and mother refused to have him live with them because of, in their view, the Defendant's continuous criminal behavior and disregard for authority.

of his early rearing. There was, unfortunately, an almost continuous involvement with the juvenile justice system which began in 1980 at the age of ten with an adjudication for criminal mischief. That was followed by adjudications for simple assault and theft in 1982-1983.

Most illustrative of the Defendant's involvement with the New Jersey juvenile justice system was an incident that took place in 1983. On that occasion, the Defendant so disrupted the efforts of a mother and her daughter to play a video game at a local convenience store that they decided to leave to avoid an escalation of the encounter. The Defendant followed them outside and threw a golf ball sized rock at them, hitting the mother in the head resulting in a cut and bleeding. He was subsequently arrested and adjudicated delinquent but continued to harass the woman and her child until another member of that family intervened.

From that point in time until he turned eighteen in 1988, the Defendant was found culpable or delinquent a total of eighteen times for aggravated assault, burglary and theft. At age seventeen, the Defendant was sentenced

to one year at Jamesburg, a juvenile detention facility, as a result of having been adjudicated as delinquent for engaging in conduct constituting aggravated assault and [25]shoplifting. At that point, the DYFS file was closed because the Defendant had "aged out" of that system. Stated differently, he was no longer eligible for the services that were provided to its clientele because he had reached the age of majority, eighteen.

According to Joyce A. Johnson, the clinical therapist assigned by DYFS to provide social services to the Defendant and his family, all the efforts that DYFS could provide had not benefitted the Defendant who was among that small percentage that could not be helped.[26] This conclusion seemed to confirm the evaluation by Dr. Octavio Munoz, a psychologist on behalf of DYFS in 1984 that the Defendant was an angry, resentful and hostile

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[25] The Defendant notwithstanding his lack of overall progress toward rehabilitation up to this point in time, however, receive his high school diploma from Salem High School while under the supervision of DYFS and the New Jersey Department of Corrections Salem Day Program. The exact date it was awarded is not apparent.

[26] Defendant's Exhibit 14P ("The goal of family stabilization was not achieved and DYFS attempts over three months to divert James from criminal activity with the Youth Advocate Program and Job Corp had not succeed[ed].").

individual who seemed to be proud of and enjoyed acting out. It is readily apparent that he did not change notwithstanding the efforts of those who attempted to help him and his family.[27]

The Defendant's behavior did not improve as an adult. In fact, his activities expanded to include drug sales on at least two occasions in 1991 and in 1997. There was an escape from custody in 1992 and an attempt to flee during a motor vehicle stop and a charge for resisting arrest on outstanding warrants in 1997. He was also arrested and convicted for snatching a purse from an Atlantic City casino worker in 1997.

Following the rape and murder of Ms. Bonistall on May 1, 2005, it appears that the Defendant returned to Atlantic City and continued to engage in violent criminal activity in the following month of June. There were four such incidents which came to light.

All of the events took place on or about June 6,

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[27] Tr. 57:12-22 (5/1/12). It should also be noted that Dr. Munoz also found that part of the Defendant's anger stemmed from his mother's failure as a parent. Dr. Munoz went onto opine that the Defendant projected this anger onto women in general and could be unpredictable if left unsupervised.

2005.

First, Angel Rojas was asleep in his home. Living in the same household were Pasqual Lopez, Yvon Robles and Mr. Robles' wife, and their two year old baby. At approximately 4:00 a.m., the Defendant entered the dwelling thru a second floor window allegedly carrying a gun and demanded money. The occupants complied and he took jewelry and a cell phone. Within twenty minutes, the Defendant was finished and walked out the front door after telling the occupants not to move.

Later that day, the Defendant attempted to forcibly enter the apartment of Noe Victoria. Mr. Victoria who happened to be home, confronted the Defendant after hearing his efforts to enter thru a screened window. In response to Mr. Victoria's questioning as to what the Defendant was doing, he replied: "I want to go in because I want your money." The Defendant refused to stop and leave until he heard the police arriving.

It appears that the Defendant next assaulted seventy seven year old Mildred Boody as she was leaving for a dinner engagement. To be specific, the Defendant was

hidden from view in a crouched position near the rear entrance to her home. As Ms. Boody left her residence, the Defendant emerged from his hiding place, grabbed Ms. Boody by the arms and told her: "Give me your jewelry or your life." The Defendant, according to Ms. Boody, was carrying a switchblade in one hand and a white t-shirt in the other hand.

Lastly, later that evening, the Defendant surreptitiously entered a second floor window in the apartment of Cathy Chao. Ms. Chao who had been asleep, heard a noise and saw the Defendant sitting on her bed. The Defendant told her not to scream and started to choke her before taking several of her credit cards and a necklace. As he was leaving, the Defendant, for some unknown reason, briefly tugged at Ms. Chao's underwear, but did not go any further.

There was no doubt that the Defendant was the perpetrator of the Atlantic City incidents described above for several reasons. First, when the Defendant was arrested on June 7, 2005, he had three credit cards belonging to Ms. Chao in his possession. That

information was forwarded to the Atlantic City police who were able to link the Defendant to all four crimes. Second, each of the victims of the crimes in question identified the Defendant as the perpetrator of the crimes committed against them. Third, when questioned by detectives from the Atlantic City Police Department after being arrested in Wilmington on June 7, although minimizing his involvement by claiming to have assisted another, the Defendant did admit to participating in the four events described above.

Since his arrest on June 7, 2005, the Defendant has been in the custody of the Department of Corrections' facilities at Howard R. Young in Wilmington or the James T. Vaughn Correctional Institution in Smyrna. From that time until the present date, while not consistently extreme, the Defendant's behavior has certainly been less than exemplary and has demonstrated his potential for violent or disruptive conduct at any time for any reason.

On May 21, 2010, because the warden was unavailable to meet with the Defendant concerning his request to be housed with the general population, he began forcefully

kicking his cell door and had to be subdued when he refused to stop as directed.[28] On September 20, 2010, the Defendant engaged in a verbal dispute with a corrections officer regarding the possession of legal materials and incited other inmates to refuse to return to their cells in sympathetic protest. He was observed masturbating in the presence of corrections officers on December 13, 2010 and August 10, 2011. Lastly, on December 4, 2011, the Defendant became involved in a dispute with corrections officers because he was refused an additional slice of bread and called the responding officer a "punk ass bitch" when temporarily placed in more restrictive custody following the incident.[29] In each case, the

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[28] The officers had to direct a pepper based chemical spray at the Defendant at least twice during the encounter during which the Defendant indicated that he was going to go "straight hood" if he didn't get his way. The Court, while being unfamiliar with the term, must assume, given the context in which it was used, meant that the Defendant was going to become very violent, which he did before being brought under control.

[29] The State also cites as an example of misconduct, the determination by the Department of Corrections staff that the Defendant falsely complained that he had been physically abused in 2010. The Court does not agree that the failure to substantiate a complaint of abuse by an inmate in a prison, without more, arises to the level of misconduct for purposes of determining whether that individual should be imprisoned for the rest of his or her life or be put to death by lethal injection. Stated differently, the Court finds that this is not an aggravating factor for purposes of the

Defendant was found guilty of misconduct in violation of prison rules and/or regulations.[30]

D. The Relationship of Lindsey Bonistall with Her Family and Friends

1. With Her Family

It is without dispute that Lindsey Bonistall was the "joie de vivre" or the joy of her parents' lives and everyone's baby. Socially, she was personable, outgoing and a comedienne. Her peers respected and admired her, and she had a great number of friends. As a student, she excelled from the time she entered school until her untimely demise. When it came time for college, Ms. Bonistall could choose between highly ranked institutions not the least of which were Cornell University and the University of Delaware. She was athletically gifted, having played three varsity sports in high school and was

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penalty to be imposed herein.

[30] On October 13, 2008, the Defendant was cited for covering up a light bulb in his cell. However, he was found not guilty of the alleged infraction following a disciplinary hearing held in response to the charge.

also a cheerleader. It is equally apparent that she was committed to serving her local community as well, given the public service projects in which she participated before she left for college.

To her mother, Kathleen Bonistall, Lindsey Bonistall was kind and compassionate. She was small in stature but lived large. Her mother referred to her as "Lindsey Lou" (from the *Grinch Who Stole Christmas)* and "Mighty Mouse" because of her personal strength. Their relationship was evolving as a friendship apart from the mother-daughter bond that had existed. To Mrs. Bonistall, the loss has hurt more than can be imagined.

She testified that the family will never be the same as evidenced by the pain she sees in her husband's eyes and the loss in her surviving daughter's life. They all struggle with the loss and sense of victimization. She had to go to individual and marriage counseling to try and cope with the loss because that is what she felt "Lindsey would have wanted".

Mark Bonistall, Lindsey Bonistall's father, agreed with his wife's description of their daughter and the

impact of her loss on the family. Mr. Bonistall indicated that the two of them were very close and shared a love of music. He emphasized that she was very athletic and that he went to all her athletic events.

When he learned that it was his daughter that was killed, Mr. Bonistall said that he "felt like hell". He felt the pain and could see it in his wife's eyes. After her death, Mr. Bonistall, who had been active in the Catholic Church, became angry at God and stopped practicing his faith. He started drinking heavily in a subconscious effort he believes to kill himself and join his daughter. Fortunately for Mr. Bonistall, he was unsuccessful in that regard. However, he continues to take medication for depression resulting from the guilt he feels for failing to protect his daughter.

Kristen Bonistall is Lindsey Bonistall's sister. Kristen was the elder of the two by two and one-half years. They were very close and did most things together, including community service projects, and participating on their high school cheerleading and swim teams, despite the difference in age. According to

Kristen, Lindsey was her best friend, her "best sister".

Since her sister's death, Kristen Bonistall has had trouble being alone. She misses her greatly at special times such as when she got married and did not have a maid of honor because it was to be Lindsey, and when her daughter Isabel Lindsey, was born. She has been in counseling in an effort to cope with the loss but has had to watch her parents fall apart without being able to do anything about it.

2. With Her Friends

It is apparent that Lindsey Bonistall had a number of very close friends. There were at least four that formed a special bond at the beginning of their freshman year together at the University of Delaware. They were Isabel Rivero Whitemarsh, Katie Johnson, Nicole Gengaro and Christine Bush, all of whom lived in Dickinson dormitory as did Lindsey Bonistall during that first year, and remained close even though Ms. Bonistall and Ms. Bush moved to off-campus housing at the beginning of their sophomore year.

All agreed that Lindsey Bonistall was funny, outgoing and smart. They also felt that she was dedicated to pursuing a career in her major, journalism, and worked hard at her studies. She was close to her family and equally dedicated to them.

Her friends have made it clear that Ms. Bonistall is missed by them and her death has had a devastating impact on them. Ms. Gengaro has become more aware of her surroundings, fears partings and losing friends. She has had dreams about having to tell Ms. Bonistall that she is dead. Ms. Bush, as her roommate, appears to have been most affected by Ms. Bonistall's death among her friends. She feels that she should have been home with her on May 1, 2005 to protect her or take her place. She has suffered from depression, post-traumatic stress disorder and survivor's guilt. Alcohol and drug abuse have followed and her efforts at rehabilitation are ongoing.

III. DISCUSSION

As noted above, the recommendation of the jury is

entitled to appropriate weight.[31] It cannot be ignored even though the Court is not bound by their view. The issue before the Court, given the statutory scheme set out in § 4209, is whether, by a preponderance of the evidence, after weighing the appropriate factors referenced therein, the aggravating factors, both statutory and nonstatutory, outweigh the mitigating factors found to exist. The Court's analysis and decision is set forth below.[32]

A. Aggravating Factors

1. Circumstances and Nature of the Crimes

The evidence presented at trial leads to the inescapable conclusion that the murder of Lindsey Bonistall was committed in an unusually cruel and depraved fashion. Her apartment was surreptitiously and

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[31] 11 *Del. C.* § 4209.

[32] The Court has reviewed the aggravating factors, statutory and nonstatutory, asserted by the State. It has also reviewed the factors in mitigation being relied upon by the defense. To the extent any factor raised by either party is not discussed or referenced below, they have not been relied upon and/or are deemed as not having been established by the Court for purposes of this sentencing.

illegally entered. At some unknown point in time on May 1, 2005, Ms. Bonistall encountered the intruder or vice versa. That encounter was followed by a severe beating, being bound with an electrical cord and gagged with a knotted cloth. Substantial force was also employed in an apparent effort to subdue and/or sexually assault her. It appears that Ms. Bonistall struggled unsuccessfully against her assailant's efforts to harm her as evidenced by the bite marks in the gag in her mouth and the tissue under her nails from which the Defendant's DNA was extracted.

Ms. Bonistall was raped and was subsequently strangled to death with an article of clothing which was believed to have belonged to her. Death by strangulation, the Court notes, can be slow and agonizing. This act was followed by the further indignity of placing Ms. Bonistall's body in the bathroom tub, covering it with miscellaneous items, including the guitar that Kathleen Bonistall had given her daughter, and setting everything on fire with the assistance of an accelerant. The body was burned but not beyond

recognition.

In an apparent attempt to avoid detection and/or recognition, the Defendant used gloves, presumably to avoid leaving fingerprint evidence, and a "hoodie" pulled down low over his face. Bleach and fire were employed to destroy evidence that could not be removed. Writings and/or slogans at the scene purporting to direct attention away from the Defendant and in the direction of anyone who might be said to bear some animosity against Ms. Bonistall. Gloves and a "hoodie" were also worn in the Cuadra burglary. Lastly, the fire the Defendant started constituted a threat to the safety of the other residents of Building 12 and to their property as well as part of an effort to conceal a horrendous crime.

The version that the Defendant presented at trial was simply not accepted by the jury. The Court agrees and reaches the same conclusion, i.e., that the Defendant's testimony that his sexual assignation with Ms. Bonistall was consensual and that someone else who objected to their interracial relationship must have killed Ms. Bonistall, simply lacks credibility. It was conveniently

raised after the Defendant, having denied knowing her, was made aware of the results of the DNA testing fluids and/or tissue taken from Ms. Bonistall that revealed he had in fact had sexual intercourse with her.[33]

Ms. Bonistall was truly an innocent victim of a violent crime. She had no involvement in and did not contribute to the crimes which ultimately led to her death. Nor was she involved in any illegality at the time of her death.[34] Her only mistake was returning home in time to be beaten, robbed, raped and strangled to death. It is obvious that she did not willingly put herself in harm's way. To take her life as the Defendant did is clearly a factor which aggravates the commission of the crime and must be given substantial weight in the

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[33] This information was provided to the Defendant's counsel on December 15, 2005 by the State.

[34] The Court again notes that earlier in the evening preceding her death, Ms. Bonistall did smoke marijuana with one of the roommates of Michael Todd, her coworker and fellow University of Delaware student. Further note is taken of the fact that there was testimony Ms. Bonistall did buy and ingest the drug periodically since becoming a student at the aforementioned institution. While the Court does not condone these activities, it concludes that these activities had no role in or connection with Ms. Bonistall's death and do not change the Court's view that she was the innocent victim of a violent crime.

instant equation.

2. Consistency and Premeditated Nature of Defendant's Behavior

The evidence put before the Court and jury also require the Court to conclude that the instant offenses were not "spur of the moment" crimes or crimes of opportunity. Instead, they were the product of planning and part of an escalating pattern of criminality which the Defendant began in his youth in New Jersey and which continued when he moved to Delaware. Part of that pattern of criminality included plans and preparation to burglarize and/or rob a number of residences in the Spring of 2005 and escape detection.

The evidence gathered during the investigation of the Harmon and Cuadra burglaries along with those in New Jersey following the Bonistall burglary and murder revealed a similar *modus operandi* or method of engaging in criminal activity.[35] The Defendant would attempt to

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[35] *Black's Law Dictionary*, (9th ed. 2009), *available* at Westlaw BLACKS.

gain access through a door or a window, usually in the rear of the unit on the second floor or story, late at night or very early in the morning. It does not appear to have mattered whether the occupant was home or not. However, if the occupant was home, the Defendant would demand cash and credit cards and threaten the occupant with physical harm if he or she resisted or cried out in alarm. Where the occupant was at home and a female, there were assaults, sexual and nonsexual, attempted or consummated, accompanied by the threat or actual use of force or a weapon. It is clear, as a result, that the Defendant presented a danger to the public which, in each case, had the potential of ending in a violent and/or fatal manner.

3. Defendant's History of Delinquent and Criminal Acts

The record reflects that in 1980, when the Defendant was ten years of age, he began a career in criminality. That career spanned the next twenty-five years. It ended one month after the rape and murder of Lindsey Bonistall

with a series of burglaries and assaults in Atlantic City, the last ones having taken place as noted above, on or about June 6, 2005.

During the aforementioned period of time, there were at least eighteen adjudications of criminal misbehavior. Six of those were adjudications of delinquency based upon conduct by the Defendant as a juvenile. For the next ten years, through 1999, the Defendant was convicted as an adult for a variety of offenses from the simple possession and/or distribution of cocaine near a school (3); assault (2); theft (2) and escape (1). From 1999 to 2002, the Defendant was incarcerated. It was in the Spring of 2005 that the Defendant's conduct began to escalate from simply assaultive to extremely violent and homicidal. That pattern did not abate until June 7, 2005, when he was arrested for the last time.

This history and increasing pattern of criminal behavior is established as an aggravating factor entitled to great weight. It demonstrates that the conduct which culminated in the rape and homicide of Lindsey Bonistall on May 1, 2005 was not aberrant. Rather, that conduct

represents the Defendant's intentional defiance of the behavioral norms agreed to by the majority of society. It signals his desire to continue to engage in deviant conduct harmful to and inconsiderate of the rights of others to live and own property. Stated differently, there is nothing in his behavior until he was arrested for the murder of Lindsey Bonistall, which would indicate that his potential for violence and danger to society would not continue in the future if he were ever to avoid confinement.

Since the Defendant has been incarcerated on the instant charges, he has not, it appears, engaged in conduct that was life threatening. However, the sexual misconduct in the form of perverse exhibitionism which occurred on December 13, 2010 and August 31, 2011, is illustrative of the deviant as well as defiant behavior exhibited leading up to the murder of Ms. Bonistall. Engaging in disruptive conduct and/or speech because the warden was not available on a Saturday, not getting an additional slice of bread or the handling of personal litigation files, constitutes additional proof that the

Defendant remains disorderly and disobedient. Simply put, if he doesn't get what he wants, he creates and/or becomes a problem with a potential for violence.

4. Defendant's Response to Social Service Efforts

The Defendant's response to efforts by New Jersey social services must also be viewed as an aggravating factor. His behavior in that regard can only be described as negative and disrespectful as well as belligerent and confrontational. When confined, the Defendant fled and when placed in a rehabilitative or therapeutic setting, he fought those attempting to ameliorate the hardships he was facing.

When social services were offered in less restrictive settings, they were either rejected outright or passively resisted. No matter what was being done to help him and/or his family, the Defendant opposed it. When he was supposed to be with his family, he ran away on several occasions and begged not to be returned. When he was in foster care or residential treatment, he was disobedient,

disagreeable and didn't want to stay. Only when the Defendant was threatened with extreme violence, did he temporarily seek refuge from his tormentors with the Salem County DYFS.

The Defendant was exposed to all applicable rehabilitative services that Salem County, New Jersey had, which were directed towards rehabilitation and dysfunctional environments. Those efforts were not successful and did not deter the Defendant's misbehavior as a juvenile. It certainly did nothing to redirect his conduct in a socially acceptable manner as an adult. To the contrary, his criminality continued to escalate. As was noted, the Defendant seemed to enjoy engaging in negative behavior and was among that small percentage that simply could not be helped.

5. Impact of Crimes on Family and Friends of Lindsey Bonistall

As noted during the testimony of those closest to Ms. Bonistall, she was loved and cared for by her family. That they were a close knit group is evidenced by the

descriptions of the activities she enjoyed with her parents and her sister. She was a positive individual that presented her parents with nothing but the prospect of a successful and happy future. She and her sister were constant companions until college and an ocean separated them. However, even distance did not prevent a reunion with her sister in England in the spring of her sophomore year.

While the impact of Ms. Bonistall's death upon her family can not be calculated with any degree of precision, it is clear that it has been a familial catastrophe of untoward proportions.

The inability to successfully address the loss of their daughter has rocked the foundations of the marriage between Mark and Katherine Bonistall. Both parents are troubled by feelings of guilt or remorse from having let their youngest daughter go away from home and not having been able to protect her from a crime that they did not, and could not, anticipate. There has been counseling on an ongoing basis but, as yet, an incomplete effort to ameliorate the loss.

There is the premature loss of a young adult that was becoming more than a successful child which caused at least Mr. Bonistall to question, and at least temporarily to abandon, his religious faith. There has been self-destructive behavior and illness that can only be attributed to the death of Lindsey Bonistall. There are extended family events and gatherings which they now avoid because it is simply too painful to attend after her death.

For her sister, the death of Lindsey Bonistall left a huge void in her life. According to Kristen Bonistall, the loss took away her best friend and lifelong confidant. She will now have to participate in the events they looked forward to sharing, such as her wedding and the birth of her children, alone. And, her children will never know their aunt or the joy that she was to all around her.

A similar loss was expressed by the friends of Ms. Bonistall who testified regarding her impact on their lives. They expressed as a group what she meant to them as well as to others fortunate enough to know her. The

death has impacted them individually in separate but related ways. They were left with fears for their personal safety, alone or with others. The loss has been more severe in some than in others.

Ms. Bush, Ms. Bonistall's roommate, it appears will be haunted for the foreseeable future by feelings of guilt for not being home or able to help her friend. While those feelings are not justified given the fact that there is nothing she could have done to avoid the loss, those feelings have resulted in self-destructive behavior which has cast a cloud over her future. Whether she will ever fully recover is unknown.

The losses by Ms. Bonistall's family and friends are clearly established as an aggravating factor and entitled to significant weight. The loss of her life has caused extreme emotional losses to those closest to her. Moreover, there is nothing that they could have done to avoid the loss or its impact upon them.

B. Mitigating Factors

1. Effect of Abandonment and Abuse Suffered By Defendant

There is no doubt when viewing the instant record that the Defendant's childhood was at best unfortunate and more likely full of neglect, negativity and disappointment. It is a factor that has been established as mitigating the commission of the offenses for which the Defendant was convicted. As a result, the factor is entitled to great weight in determining the punishment to be imposed.

To say that the Defendant was not cared for or nurtured as a child, would be an understatement. His father left the family when he was an infant. His departure was followed by abuse as a toddler in the form of burns which continue to affect him to this date. The fact that this abuse was visited upon him either by his mother or one of her paramours who was the father of at least one of his siblings, could not be viewed as a positive contribution to the Defendant's childhood experience.

There was the continued physical and mental abuse which, while apparently not as severe, was bad enough and was constant. That abuse included not being provided with enough to eat, being allowed to become and remain unclean, not having proper clothing and having to wear clothing that smelled of human excrement. The Defendant was, as a result, conflicted when it came to remaining with his family versus being receptive to efforts to eliminate or at least ameliorate the conditions which existed when he lived with his family.

2. Defendant's Affection for and the Support of his Family

The Court finds that viewing the record as a whole, it is clear that the Defendant's love for his children has been established. It is therefore entitled to be considered as a mitigating factor with minimal weight under the circumstances.

Four of the Defendant's children did testify and the Defendant's stated desire to spare them the trauma of testifying at trial was evident. The Court was also able

to view, via a videotape, the Defendant's interaction with his younger children during a visitation after his present incarceration. It is also apparent that those children who did testify and those depicted in the videotape do love and care for the Defendant. Equally evident is the fact that they would be devastated if he were to be put to death for the rape and murder of Lindsey Bonistall.

To the extent that the Defendant's counsel has alleged that the Defendant has the support of his family beyond his children, and they would also be devastated by his execution, those factors have not been established. While they may very well be supportive of the Defendant in some manner, there is no evidence in that regard that was put before the jury and the Court in this trial and penalty phase hearing. To the extent that members of his family have, at his direction, refused to testify on his behalf or cooperate with his counsel at either proceeding, does not constitute support for the Defendant in the view of this jurist. Blind obedience in such a situation bespeaks more of intimidation and/or misplaced

allegiance rather than the type of defense and/or mitigation support envisioned when § 4209 was enacted.

3. Other Mitigating Factors

Counsel for the Defendant have also alleged as mitigating factors that the Defendant has had a stable work history and is amenable to the correctional setting. While it is true that the Defendant has been able to obtain and maintain employment, he has committed serious offenses while employed and there is little indication that having a job interfered with his criminal conduct. In addition, the Court must agree that even though his behavior since his last incarceration has not been consistently problematic, it, as noted above, has not been exemplary either. These factors, while the Court finds them to be mitigating, are not entitled to significant weight.

To the extent that more in mitigation has not been submitted, that is the Defendant's choice. Again, the Defendant has a right to refuse to present evidence in support of his defense and/or in mitigation of any

penalty to be imposed. Since the Court has found that the Defendant's decision in this regard was voluntarily and knowingly made, the Court can only proceed with the evidence that has been provided.

C. Weighing of Aggravating versus Mitigating Factors

The Court, having reviewed the record, must conclude, as did the jury, that the aggravating factors outweigh the mitigating factors. That conclusion has been established by a preponderance of the evidence and takes into account the factors that the Court is required to consider under § 4209 (d)(1). The Defendant must, as a result, be sentenced to death by lethal injection for the crime of Murder First Degree as set forth in Counts I and II of the instant indictment. The rationale underlying that decision is set forth below.[36]

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[36] The Court again notes the recommendation by the jury of a sentence of death by a vote of 11 to 1 as to Count I and 10 to 2 as to Count II. Notwithstanding the difference, both votes were overwhelmingly in favor of the aforementioned sentence. In addition, while the Court is unaware of any explanation for the distinction between the votes, it finds that there is no significance, legal or otherwise, given the Court's independent review of the record and its role as the final sentencing authority.

In the first instance, that balance is based upon the cruel, violent and sadistic nature of the murder of Ms. Bonistall by the Defendant and the fact that it was committed during or after the burglary of her apartment and her rape. There is the recognition that she appears to have been a completely innocent victim of a violent crime with no connection to the Defendant in spite of the bizarre and unsupported effort proffered by him to establish one. The Court further notes the measures taken by the Defendant to eliminate evidence and to otherwise avoid being held responsible for the aforementioned rape and murder as well as the other crimes he committed between April 27 and May 1, 2005, indicate an intention to continue his criminal career.

The second factor tipping the balance in favor of the aggravating factors is that those crimes were part of a pattern of escalating criminality. That pattern continued with four more crimes of a similar nature in Atlantic City in a little over one month following the Bonistall Burglary/Murder before being apprehended in Wilmington on June 7, 2005. Moreover, the crimes were

accompanied by violence, or the threat thereof, and usually took place when the victims were at their most vulnerable, i.e., late at night or early in the morning.

The Court's view of the balance struck between the aggravating factors and mitigating factors is not swayed by the Defendant's history of abuse and neglect as a child. While that history is both sad and tragic, it does not give the Defendant the right to embark on a course of criminal conduct of such violent, cruel and abusive proportions over a span of twenty-five years. There were multiple attempts to intervene and address the abusive behavior in question. However, both the Defendant and his family were not responsive to those efforts.

The Defendant was thirty-four years old when the crimes for which he was tried were committed. Chronologically he was an adult and there is nothing to indicate that he suffered from any form of intellectual impairment that mitigates his responsibility in the instant case. Nor is there any evidence that he had been deprived of at least a basic education given the fact

that he obtained a high school diploma and was employable. When the Defendant choose to do so, he was able to obtain and maintain employment as evidenced by the fact that he worked for Payless Shoes at the time of the Bonistall Burglary/Murder. Moreover, the Court's interaction with the Defendant generally, and in particular during the period of time when he was acting *pro se*, lead the Court to conclude that the Defendant is of above average intelligence and that the Defendant knew as well as understood what was going on at all relevant times during this last trial.

It is readily apparent in light of the foregoing discussion, that the Defendant had numerous opportunities and avenues to effectuate a change in his behavior prior to the Bonistall Burglary/Murder but failed to do so. Nor does this record reflect that there was any impediment that prevented him from doing so. His behavior following those crimes indicates that he had every intention of continuing to steal, rob, rape and/or murder if given the opportunity. Again, the record reflects that he tries to take what he wants when he can get away with it. When he

can't, he becomes violent and abusive. His potential for future dangerousness therefore remains unabated.

The Court has conducted the review and analysis of the instant record and conducted the weighing process as required by 11 *Del. C.* § 4209. Based upon that process the imposition of a sentence of death is warranted. Indeed, that penalty is required by law.

IV. CONCLUSION

Based upon the foregoing, the Court concludes that as to Counts I and II of the indictment, the Defendant, James E. Cooke, shall be put to death by lethal injection.

IT IS SO ORDERED.

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TOLIVER, JUDGE

*2013 U.S. App. LEXIS 8677, **

UNITED STATES OF AMERICA, Appellee, v. HIPÓLITO DÍIAZ-ARIAS, a/k/a HIPÓLITO, Defendant, Appellant.

No. 11-2271

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

2013 U.S. App. LEXIS 8677

April 29, 2013, Decided

PRIOR HISTORY: [*1]
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.
Hon. George A. O'Toole, U.S. District Judge.
United States v. Mitchell, 596 F.3d 18, 2010 U.S. App. LEXIS 3573 (1st Cir. Mass., 2010)

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Following a four-day jury trial, defendant was found guilty of conspiring to distribute cocaine, in violation of 21 U.S.C.S. §§ 841(a)(1) and 846. He received from the United States District Court for the District of Massachusetts a sentence of 120 months' imprisonment to be followed by a supervised release term of five years. Defendant appealed his conviction and sentence.

OVERVIEW: Defendant's main argument on appeal was that the district court abused its discretion when it allowed the government to introduce the lay opinion testimony of a state trooper, who identified defendant as the speaker in intercepted telephone conversations. He contended that this testimony ran afoul of Fed. R. Evid. 701 for lay opinion testimony. The trooper's testimony proved useful to the jury in identifying defendant's voice. Given the fact that the wiretapped conversations were in Spanish, the district court did not abuse its discretion by determining that the jury may not have been able to readily draw the inferences and conclusions necessary to identify defendant's voice, in the absence of the trooper's testimony. Defendant could point to no evidence that this particular jury, sitting in Massachusetts, possessed the same mastery of the Spanish language as did the trooper, who was a native speaker familiar with the particular accents, intonations and speaking habits of persons from the Dominican Republic. The trooper's voice identification testimony was squarely based on his personal knowledge. It was proper authenticated pursuant to Fed. R. Evid. 901.

OUTCOME: The judgment was affirmed.

CORE TERMS: trooper's, speaker, conspiracy, recording, sentence, kilograms of cocaine, phone, cocaine, juror, conversation, quantity, daughter, ledger, identification, intercepted, opinion testimony, recorded, wiretap, telephone calls, co-defendant, sentencing, proffer, restraining order, identification testimony, indictment, customer, helpful, maximum, woman, personal knowledge

LEXISNEXIS® HEADNOTES

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Evidence > Testimony > Lay Witnesses > Opinion Testimony > Helpfulness

HN1 In order for lay opinion testimony to be admissible under Fed. R. Evid. 701, the testimony must be helpful to clearly understanding the witness' testimony or to determining a fact in issue. Fed. R. Evid. 701(b). More Like This Headnote

Evidence > Testimony > Lay Witnesses > Opinion Testimony > Helpfulness

HN2 Lay opinion testimony will not be helpful to the jury when the jury can readily draw the necessary inferences and conclusions without the aid of the opinion. The nub of this helpfulness requirement is to exclude testimony where the witness is no better suited than the jury to make the judgment at issue, providing assurance against the admission of opinions which would merely tell the jury what result to reach. Testimony, the sole function of which is to answer the same question that the trier of fact is to consider in its deliberations may be excluded as unhelpful. Lay opinions which make an assertion as to the ultimate issue in a case will rarely meet the requirement of Fed. R. Evid. 701(b), since the jury's opinion is as good as the witness's. More Like This Headnote

Evidence > Testimony > Lay Witnesses > Opinion Testimony > Personal Perceptions

HN3 Fed. R. Evid. 701 requires that lay opinion testimony be rationally based on the witness's perception. Fed. R. Evid. 701(a). More Like This Headnote

Evidence > Testimony > Lay Witnesses > Opinion Testimony > Personal Perceptions

HN4 Prosecutors should not permit investigators to give overview testimony, in which a government witness testifies about the results of a criminal investigation, usually including aspects of the investigation the witness did not participate in. Such testimony improperly exposes the jury to conclusory statements that are not based on the witness' personal knowledge, and which are unreliable because they often consist of inadmissible hearsay evidence derived from other government agents who participated in the investigation, but who were never brought to testify at trial. More Like This Headnote

Evidence > Testimony > Lay Witnesses > Opinion Testimony > General Overview

HN5 If a proper foundation is laid establishing the basis of a government lay witness' knowledge, opinion or expertise, then such a witness may testify about matters within his personal knowledge and give lay or, if qualified, expert opinion testimony. More Like This Headnote

Evidence > Testimony > Experts > Admissibility

HN6 Fed. R. Evid. 702 governs the admission of expert witness testimony. More Like This Headnote

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Factual Issues

HN7 It is the prerogative of the jury to choose between varying interpretations of the evidence. The government need not succeed in eliminating every possible theory consistent with the defendant's innocence and circumstantial evidence alone may be sufficient to provide a basis for conviction. The evidence need not exclude every reasonable hypothesis inconsistent with guilt, and the jury is entitled to choose among varying interpretations of the evidence so long as the interpretation it chooses is a reasonable one. More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence

Evidence > Documentary Evidence > Writings > Transcripts & Translations > General Overview

HN8 A circuit court of appeals reviews for abuse of discretion a district court's decision to allow the use of a transcript at trial. More Like This Headnote

Criminal Law & Procedure > Appeals > Reversible Errors > Prosecutorial Misconduct

Evidence > Testimony > Credibility > General Overview

HN9 Improper vouching occurs when prosecutors place the prestige of the United States behind one of their witnesses by making personal assurances about the credibility of that witness or by indicating that facts not before the jury support that witness' testimony. Improper vouching can also be said to occur when a prosecutor implies to the jury that they should credit the prosecution's evidence simply because the government can be trusted. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Conspiracy > Elements

HN10 To sustain a conviction for conspiracy under 21 U.S.C.S. § 846, the government must establish that (1) a conspiracy existed; (2) the defendant had knowledge of the conspiracy; and (3) the defendant knowingly and voluntarily participated in the conspiracy. The third element requires a showing that the defendant intended to join the conspiracy and also intended to effectuate its objectives. A tacit agreement to join the conspiracy is sufficient. More Like This Headnote

Criminal Law & Procedure > Accusatory Instruments > Accusatory Instruments Generally > Amendments & Variances > Variances

HN11 A prejudicial variance may result when (1) the facts proved at trial differ from those alleged in the indictment; and (2) the error affects the defendant's substantive rights. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Conspiracy > General Overview

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Factual Issues

HN12 The question of whether the evidence supports the existence of a single conspiracy is a factual one for the jury to determine. Assuming the jury was properly instructed on this matter, the initial question boils down to one of evidentiary sufficiency. On review, a circuit court of appeals frequently regards the totality of the circumstances when evaluating whether the evidence proffered at trial suffices to establish the overarching conspiracy. The circuit court must reject a defendant's claims that a variance occurred if a plausible reading of the record supports the jury's implied finding that he knowingly participated in the charged

conspiracy. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Conspiracy > General Overview

HN13 In conducting an inquiry as to whether a single conspiracy existed, several factors are of use, including (1) the existence of a common goal, (2) interdependence among participants, and (3) overlap among the participants. No single one of these factors, standing alone, is necessarily determinative. As to the common goal requirement, it has been found to be satisfied when the goal is to sell cocaine for profit or to further the distribution of cocaine. Interdependence concerns whether the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect of the scheme. The final factor, overlap among the participants, can be found to exist when the conspiracy features the pervasive involvement of a single core conspirator, or hub character. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Conspiracy > General Overview

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > General Overview

HN14 The government does not need to prove that the defendant knew all of the details of the conspiracy, nor that he participated in every aspect of the conspiracy. It also does not have to show that the defendant knew of or had any contact with each and every one of the conspirators. More Like This Headnote

Criminal Law & Procedure > Jury Instructions > Requests to Charge

Criminal Law & Procedure > Appeals > Reversible Errors > Jury Instructions

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Jury Instructions

HN15 Properly preserved challenges to jury instructions are reviewed de novo, taking into account the charge as a whole and the body of evidence presented at trial. A district court's refusal to provide a requested instruction is reversible error only when the requested instruction (1) was substantively correct; (2) was not substantially covered elsewhere in the charge; and (3) concerned an important point in the case so that the failure to give the instruction seriously impaired the defendant's ability to present his defense. Cases satisfying all three of these factors are relatively rare. More Like This Headnote

Criminal Law & Procedure > Jury Instructions > Requests to Charge

HN16 A trial court's charge need not use the exact wording requested by the defendant so long as the instruction incorporates the substance of the defendant's request. More Like This Headnote

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Bias

Evidence > Inferences & Presumptions > Presumptions > General Overview

HN17 There is no constitutional presumption of juror bias either for or against members of any particular racial or ethnic groups. More Like This Headnote

Criminal Law & Procedure > Juries & Jurors > Challenges to Jury Venire > Equal Protection Challenges > Equal Protection Rule

HN18 Racial discrimination by the State in jury selection offends the Equal Protection Clause. More Like This Headnote

Criminal Law & Procedure > Sentencing > Imposition > Statutory Maximums

HN19 The Supreme Court in Apprendi established the principle that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. The Apprendi principle, however, does not apply to facts that increase the mandatory minimum sentence. A sentencing court may use the preponderance of the evidence standard to find facts that require the imposition of a specified minimum sentence, so long as that sentence does not exceed the maximum sentence provided by the relevant statute. Hence, the principle established in Apprendi is not breached if the district judge finds that a specific quantity of drugs can be attributed to a defendant -- thereby increasing the mandatory minimum sentence involved -- as long as that mandatory minimum sentence remains at or below the statutory maximum sentence that could be applied against the defendant given the jury's verdict. The Apprendi principle will not be transgressed as long as the district judge does not impose a sentence above that statutory maximum sentence. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Conspiracy > Penalties

Criminal Law & Procedure > Sentencing > Imposition > Findings

HN20 When sentencing a member of a drug conspiracy, the district court must make an individualized finding concerning the quantity of drugs attributable to, or reasonably foreseeable by, that member. In making that determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy. More Like This Headnote

Criminal Law & Procedure > Sentencing > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > Sentencing > Imposition > Findings

HN21 When a defendant objected to the district court's drug quantity calculation at sentencing, the circuit court of appeals reviews any legal error committed by the district court de novo, while factual findings must be reviewed for clear error. If the circuit court can discern no legal error, then it must credit the district court's factual findings as to drug quantity unless, on the whole of the record, it forms a strong, unyielding belief that a mistake has been made. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Confrontation

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Confrontation

Criminal Law & Procedure > Sentencing > Imposition > Evidence

HN22 Confrontation Clause rights do not attach during sentencing. More Like This Headnote

COUNSEL: John F. Cicilline, for appellant.

Theodore B. Heinrich, Assistant United States Attorney, with whom Carmen M. Ortiz, United States Attorney, was on brief for appellee.

JUDGES: Before Torruella ▾, Boudin ▾,[1] and Thompson ▾, Circuit Judges.

1 Judge Boudin heard oral argument in this matter and participated in the semble, but he did not participate in the issuance of the panel's opinion in this case. The remaining two panelists therefore issued the opinion pursuant to 28 U.S.C. § 46(d).

OPINION BY: TORRUELLA ▾

OPINION

TORRUELLA ▾, Circuit Judge. Following a four-day jury trial, Defendant-Appellant Hipólito Díaz-Arias was found guilty of conspiring to distribute cocaine, in violation of sections 841(a)(1) and 846 of Title 21 of the United States Code. He received a sentence of 120 months' imprisonment to be followed by a supervised release term of five years. Díaz-Arias now appeals his conviction and sentence, claiming that the district court erred in (1) permitting a non-expert witness to identify him as one of the speakers in several wiretap recordings, which the government introduced at trial **[*2]** to establish his involvement in the conspiracy; (2) allowing the jury to receive the transcripts of those recordings, which were labeled with his first name, "Hipólito," in order to identify him as one of the speakers; (3) allowing the government to introduce evidence about his co-defendants' unrelated drug activity; (4) declining to give the jury a specific instruction regarding any animosity they may have towards his race and ethnicity; (5) refusing to allow the jury to make a determination as to the specific drug quantity that could be attributed to him in the conspiracy; and (6) finding, by a preponderance of the evidence, that he was involved with five or more kilograms of cocaine. Finding no error in the district court's actions, we affirm its judgment in all respects.

I. Background

A. The Indictment and Investigation

On July 27, 2005, Díaz-Arias and twelve other co-defendants were charged pursuant to a four-count, first superseding indictment issued by a grand jury in the District of Massachusetts. Díaz-Arias was only charged in Count One of the indictment, which alleged that he participated in a conspiracy to distribute at least five kilograms of cocaine, from January to October **[*3]** 2004, at various locales within the District of Massachusetts. Among the other defendants who were charged in Count One were Manuel Pinales, Rafael Heredia,[2] Richard Pena and Tajh M. White. The following facts are recounted in the light most favorable to the verdict. United States v. Poulin, 631 F.3d 17, 18 (1st Cir. 2011).

FOOTNOTES

2 Heredia was also known as Luis Clas or "Cuba." During Díaz-Arias' trial, the government referred to him as Luis Clas. On appeal, both parties refer to him in their briefs as Heredia. We do the same here.

The charges brought against Díaz-Arias arose out of an investigation conducted by the Drug Enforcement Administration ("DEA") during the summer and fall of 2004. The focus of the investigation was an organization involved in the distribution of large quantities of cocaine in the Boston area. Manuel Pinales was identified as the leader of the organization, receiving cocaine in quantities of between 30 and 80 kilograms at a time from a source of supply in the Dominican Republic. Pinales and his cohorts then distributed these drugs to customers in the Boston, New Bedford and Lowell areas of Massachusetts, as well as to customers in Rhode Island. According to

the results **[*4]** of the investigation, the core members of the Pinales organization were Heredia, Rodríguez and Pena.

The DEA investigation relied on court-authorized wiretaps on phones belonging to Pinales, Rodríguez, Pena and Heredia. The evidence submitted at trial against Díaz-Arias consisted primarily of recordings of conversations between Pinales, Pena, Heredia and a man referred to as "Hipólito," whom the government later identified as Díaz-Arias. The government also relied on several "drug ledgers" that were seized on October 8, 2004, pursuant to search warrants executed on 115 Navarre Street, where Heredia maintained an inventory of cocaine, and at another location known as the "Park Avenue Market," a grocery store run by Pinales. The government's position at trial was that the ledgers linked Díaz-Arias (referred to in the ledgers as "Hipólito" or "H.P.") with several kilograms of cocaine and thousands of dollars paid or owed to the Pinales organization. The wiretap recordings, which the government also used to prove that Díaz-Arias was a regular customer of the Pinales organization, are discussed in more detail below.

B. The Wiretapped Conversations

In July 2004, law enforcement agents **[*5]** began intercepting several telephone calls between Hipólito, Pinales, Pena and Heredia. These telephone calls depicted Hipólito attempting to broker several drug transactions with Pinales, with Hipólito asking Pinales to "give me some stuff" and later reminding Pinales "I owe you seven and a half." The intercepted conversations also revealed that the parties spoke in code, referring to kilograms of cocaine as "cars" and money as "tickets."

The low point for Hipólito came in the final days of September, when one of his planned cocaine transactions with Pinales went awry. It all began on September 28, when agents intercepted a telephone call where Hipólito told Pinales the following: "so, tomorrow, I am going to send the guy over there . . . to bring the tickets, the little tickets, yes, and so you give him that." Pinales responded, "[a]lright . . . [t]ell him to call me, so that he meets up with Viejo . . ."[3]

FOOTNOTES

3 Trooper Cepero testified that, over the course of the investigation, he concluded that "Viejo," which in this context translates into English as "Old Man," was **[*6]** a reference to either Heredia or Pena. In this particular call, the government posited that Pinales was referring to Heredia.

The next day, at 11:47 a.m., Alex Hernández, Hipólito's courier, called Pinales and said: "I am Hipólito's guy. I will, I am going to call you . . . in a couple of minutes, do you hear?" Pinales told Hernández that this was fine, but gave him another phone number and asked him to "[c]all him there." An hour later, Hernández placed a call to the phone number that Pinales gave him, which turned out to belong to Heredia. Hernández again identified himself as "Hipólito's guy," and Heredia instructed him to "come by here, by near here, by Hyde Park," where the "little store"[4] was located. Hernández told Heredia that he would stop by there to "pick up a pair of pants." Heredia then called Pinales to ask what he should give to Hernández, to which Pinales responded "the usual" or "the complete one." Massachusetts State Trooper Jaime Cepero, who was eavesdropping on these calls while sitting in a wire room, alerted surveillance officers that there was a person heading to the Park Avenue Market to meet with Heredia, and that said person was going to be receiving a kilogram **[*7]** of cocaine.

FOOTNOTES

4 This is apparently a reference to the Park Avenue Market.

At 1:00 p.m., several law enforcement officers, including DEA Task Force Agent Kevin McDonough,

were conducting surveillance around the Park Avenue Market. Twenty minutes later, McDonough observed Heredia come out of the Park Avenue Market, wearing an unzipped jacket. As Heredia stood outside, a red Mustang pulled over next to him, and he began to talk with the driver. At that point, Heredia entered the vehicle through the passenger door, and the vehicle then proceeded down Hyde Park Avenue. It stopped just a few blocks away from 115 Navarre Street. Heredia emerged from the vehicle and entered a residence at that location. One or two minutes later, Heredia exited the residence, this time with his jacket zipped up and his hands inside his pockets. Agent McDonough perceived him to be holding something around his stomach area. Heredia then traveled to the Mustang, reconvened with the driver, and together they headed back to the area of the Park Avenue Market. Now back there, Heredia stepped out of the vehicle, and the vehicle continued on its way. The officers, including Agent McDonough, proceeded to follow it in their **[*8]** unmarked cars.

The red Mustang made its way through several streets in Boston, eventually embarking on Interstate 93, northbound. As Agent McDonough was shadowing the vehicle, Trooper Cepero, who was still in the wire room, contacted a nearby Massachusetts State Police barracks to arrange for a marked police cruiser to stop the Mustang. Trooper John Costa and Sergeant McCarthy, who were in the area driving separate police cruisers, spotted the Mustang as it was approaching the town of Wilmington, Massachusetts and ordered it to pull over onto the hard shoulder lane.[5] They identified the driver as Alex Hernández and conducted a search of the vehicle using trained canines. The canines sniffed around the vehicle and alerted the officers to an area under the rear of the passenger seat; the officers inspected the floor around this area and found a possible hidden compartment. Hernández was placed under arrest, and the Mustang was towed to the Andover barracks, where an inspection of the hidden compartment yielded a kilogram of cocaine.

FOOTNOTES

5 Trooper Costa testified that, at the time, the Mustang was traveling over the speed limit and was following the vehicle infront of it too closely.

As time **[*9]** passed, Hipólito grew anxious awaiting Hernández's arrival. At 3:31 p.m., he called Pinales and asked "[a]t what time did you guys give the car to the guy?" Pinales replied, "[a] while ago . . . [i]s he not answering the phone?" "No, he is not answering now . . . [y]ou know how that is," said Hipólito. A worried Pinales then told Hipólito "[o]h, damn . . . [b]ad sign . . . [t]here are problems there, bro . . . I hope . . . God willing there are not . . ." The two agreed that they would wait and see what happened to Hernández, with Hipólito promising to call Pinales as soon as he had news.

At 4:57 p.m., Hipólito finally called Pinales and told him: "[t]hey caught the man, dude." Dismayed, Pinales asked where, and Hipólito replied, "in Andover." Hipólito then told Pinales that he was going to call someone to figure out what was going on. Pinales and Hipólito spoke again on the phone at 7:39 p.m. Pinales warned Hipólito that "[i]t seems the friend is singing" to the police, and Hipólito advised Pinales to change his phone numbers. Almost two hours later, Hipólito called Pinales and told him that he had spoken with Hernández's lawyer, who confirmed that the police had "caught him with that, **[*10]** yes." Several other phone conversations between Hipólito and Pinales were intercepted on the following day. Those recordings mostly featured discussions concerning the amount of Hernández's bail.

C. Jacqueline Fresa

During trial, Trooper Costa testified that on October 2, 2004, he received a phone call from a woman who identified herself as Jacqueline Fresa. He testified that Fresa expressed anger at the arrest of Hernández, and that she complained about receiving threats, because "somebody had said that she was the informant that had told the police about Hernández" and therefore was responsible for his arrest. Fresa denied being the informant, but admitted she knew Hernández.

On the same day, Hipólito told Pinales over the phone that, "[t]he mother of my daughters . . . I got told that . . . she screwed me over." "But which one of them, who?" asked Pinales. "The one who was in jail, who came out," replied Hipólito. Hipólito told Pinales that, shortly before Hernández was arrested, "the mother of [his] daughters" had called Hernández to find out where he was. Hipólito then claimed that, as soon as Hernández told her his location, "like five hundred showed up . . . she is a rat[,] man **[*11]** . . ." A few days later, on October 7, Hipólito called Pinales again and told him that the mother of his daughters had filed a restraining order against him.

During the trial, the district court admitted into evidence certified birth records from the city of Haverhill, Massachusetts, which showed that Díaz-Arias and Fresa were in fact the parents of two daughters. In addition, the district court admitted a certified record from the Haverhill District Court, which reflected that on October 4, 2004, Fresa had filed a restraining order against Díaz-Arias. Thus, the government claims that Fresa was the one Hipólito referred to as "the mother of [his] daughters," and that this was conclusive evidence proving that Hipólito was in fact Díaz-Arias.[6]

FOOTNOTES

6 Fresa also testified at trial and identified Díaz-Arias as the father of two of her three daughters. She stated that she knew Hernández, that she was supposed to go out with him on the day he was arrested, and that after learning of his arrest, she called the Andover police station to complain about people commenting that she was the informant who helped them apprehend Hernández. Fresa further testified that, later on, she asked Hipólito to "beat **[*12]** up" Hernández in retribution for Hernández accusing her of being the snitch. When Hipólito refused, Fresa took out a restraining order against him.

D. Arrest and Sentencing

Díaz-Arias was arrested on October 22, 2004, in Lowell, Massachusetts, while using the name of Carlos Santiago. He was also known to use other aliases, such as "Junio Humberto Santana Ortiz," "Raphael Ortiz Santino," "Guillermo Sánchez" and "José Nieves." Díaz-Arias was subsequently released on bail, but became a fugitive when he was indicted on the federal drug charge. On June 11, 2009, he was arrested in Lynn, Massachusetts. At that time, the officers found Díaz-Arias to be in possession of a Dominican passport in the name of Rafael Bienvenido Reynoso Hernández and a Social Security Card in the name of Rafael Matos Bruno.

The jury found Díaz-Arias guilty of participating in the charged conspiracy. At sentencing, the district court found, by a preponderance of the evidence, that he was responsible for at least five kilograms of cocaine and therefore subject to a mandatory minimum sentence of ten years. 21 U.S.C. § 841(b)(1)(A)(ii) (2006). The court determined that the applicable guideline range for Díaz-Arias, **[*13]** taking into account an offense level of 32 and a criminal history category of III, was 151 to 188 months. The court nevertheless varied downward to reflect the culpability of Díaz-Arias in comparison to the other defendants in the case and sentenced Díaz-Arias to 120 months' imprisonment to be followed by five years of supervised release. This timely appeal followed.

II. Discussion

A. The Voice Identification Testimony

Díaz-Arias' main argument in this appeal is that the district court abused its discretion when it allowed the government to introduce the lay opinion testimony of Trooper Cepero, who identified Díaz-Arias as the speaker in the intercepted telephone conversations. He contends that this testimony ran afoul of Federal Rule of Evidence 701 for lay opinion testimony because it: (1) was not helpful to the jury; (2) was not based on personal knowledge; (3) constituted expert testimony masked as lay opinion; and (4) was factually flawed. The following background on

Trooper Cepero's testimony at trial will assist us in sorting through these arguments.

1. Background

Trooper Cepero is a trooper with the Massachusetts State Police, where he has served for approximately 30 years, **[*14]** primarily in narcotics enforcement. At trial, he testified that he has fulfilled many roles there, including working undercover, serving search warrants, doing surveillance and serving as affiant on wiretaps. He stated that he has participated in hundreds of investigations, including over 30 that involved wiretaps. He was born in Puerto Rico, and Spanish is his native language; he continues to speak Spanish fluently and uses it in connection with his duties as a state trooper. For example, he has used his Spanish skills in several wiretap investigations involving Spanish speakers. He testified that he is familiar with individuals from the Dominican Republic (where Díaz-Arias is from) and their speaking intonations and accents.

Trooper Cepero testified that he was a co-case agent on the DEA investigation that led to Pinales' and Díaz-Arias' arrests. During most of the investigation, Cepero was stationed in a "wire room," overseeing and reviewing the audio of the intercepted telephone calls from the day before, as well as the transcripts and summaries of those calls. Whenever a phone call was made to or from an intercepted phone line, the call would be recorded via computer onto an **[*15]** optical disk that would contain the audio of the call, the data furnished by the phone company, and any additional comments provided by the officer monitoring the call. In preparation for trial, Trooper Cepero copied the recorded calls that involved Hipólito onto a separate optical disk and reviewed the transcripts and translations of those recorded conversations. The parties do not seem to dispute that the transcripts accurately reflected the words spoken among the speakers, which were translated from Spanish into English.

During trial, the government introduced into evidence Exhibits 26 and 27, which featured the recorded telephone calls that involved "Hipólito" and the transcripts of those calls. Trooper Cepero testified that he had reviewed all of those calls with their companion transcripts, and assured that the transcripts accurately identified the speakers and the words spoken. He testified that he spent approximately "five or six hours" listening to the calls in preparation for trial.

In order to adequately compare the voice of "Hipólito" in Exhibits 26 and 27 with the voice of Díaz-Arias, the prosecution introduced Exhibit 41, a compact disk that contained at least 16 recorded **[*16]** telephone calls, which the parties stipulated were "recent recordings of the defendant Hipólito Díaz-Arias' voice obtained by lawful means." Some of the recordings included conversations between Díaz-Arias and Fresa. Trooper Cepero testified that he spent about three hours listening to the calls in Exhibit 41 in their entirety and went over some of them a couple of times. In preparation for trial, he compared the voice of Díaz-Arias on Exhibit 41 with the voice of Hipólito on Exhibit 27. In making that comparison, Trooper Cepero testified that he took into account several factors, including: (1) things that were unique to the voice, such as greetings, laughter, tone, manner and speech pattern; (2) certain expressions that could not have been rehearsed; (3) certain expressions that were indicative of something the speaker did all the time; and (4) if the speaker used, or responded to, his name, and whether the speaker referenced to having spoken with someone else beforehand. Based on these factors, Cepero testified that, in his opinion, the voices belonged to "the same gentleman, same voice." Díaz-Arias lodged an objection to this testimony, but it was overruled by the district **[*17]** court. He now renews his objection to the admission of the lay opinion testimony before us, which we review for manifest abuse of discretion. United States v. Valdivia, 680 F.3d 33, 50 (1st Cir. 2012).

2. Helpfulness to the Jury

Díaz-Arias claims that the proffered testimony by Trooper Cepero was not helpful to the jury because the jurors were just as capable as Trooper Cepero of comparing the voice of Hipólito with that of Díaz-Arias. We disagree. *HN1*In order for lay opinion testimony to be admissible under Federal Rule of Evidence 701, the testimony must be "helpful to clearly understanding the witness' testimony or to determining a fact in issue." Fed. R. Evid. 701(b); United States v. Flores-de

Jesús, 569 F.3d 8, 20 (1st Cir. 2009).

HN2 Lay opinion testimony will not be "helpful" to the jury "when the jury can readily draw the necessary inferences and conclusions without the aid of the opinion." United States v. Sanabria, 645 F.3d 505, 515 (1st Cir. 2011) (quoting Lynch v. City of Boston, 180 F.3d 1, 17 (1st Cir. 1999)) (emphasis added). The "nub" of this "helpfulness" requirement is "to exclude testimony where the witness is no better suited than the jury to make the judgment at issue, **[*18]** providing assurance against the admission of opinions which would merely tell the jury what result to reach." United States v. Meises, 645 F.3d 5, 16 (1st Cir. 2011) (internal quotations and citations omitted); see also United States v. Vázquez-Rivera, 665 F.3d 351, 361 (1st Cir. 2011) ("[T]estimony, the 'sole function' of which is 'to answer the same question that the trier of fact is to consider in its deliberations . . . [m]ay be excluded as unhelpful.'") (quoting 4 J. Weinstein & M. Berger, Weinstein's Federal Evidence § 701.05 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2011)). We are mindful that lay opinions which make an assertion as to the ultimate issue in a case "will rarely meet the requirement of Rule 701(b), since the jury's opinion is as good as the witness's." United States v. Rodríguez-Adorno, 695 F.3d 32, 39 (1st Cir. 2012) (internal quotations and citation omitted).

Díaz-Arias contends that Trooper Cepero's opinion was just as good as the jury's because Trooper Cepero had never spoken with Díaz-Arias in person. Furthermore, the testimony in question went directly to the ultimate issue: it asserted that Díaz-Arias was the speaker in the recordings, thus identifying **[*19]** him as the guilty party and leaving no room for the jury to draw its own conclusions as to what the evidence established. The government, for its part, argues that Trooper Cepero's testimony was helpful to the jury because, as a native Spanish speaker who is familiar with the intonations and accents of people from the Dominican Republic, Trooper Cepero possessed particularized knowledge which may have proven helpful to a reasonable juror in making a voice comparison of a native Spanish speaker. The government calls our attention to United States v. Ayala, No. 09-CR-0138, 2010 U.S. Dist. LEXIS 87262, 2010 WL 3369686, at *2 (N.D. Okla. Aug. 24, 2010), where the district court for the Northern District of Oklahoma allowed the lay opinion testimony of an interpreter who made a voice identification of a Spanish speaking defendant.

We agree with the government that, in this particular case, Trooper Cepero's testimony should have proven useful to the jury in identifying Díaz-Arias' voice. Given the fact that the wiretapped conversations were in Spanish, the district court did not abuse its discretion by determining that the jury may not have been able to readily draw the inferences and conclusions necessary to identify **[*20]** Díaz-Arias' voice, in the absence of Trooper Cepero's testimony. Díaz-Arias can point to no evidence that this particular jury, sitting in Massachusetts, possessed the same mastery of the Spanish language as did Trooper Cepero, who is a native speaker familiar with the particular accents, intonations and speaking habits of persons from the Dominican Republic.[7] Lacking this background, the jurors were in a less advantageous position than Trooper Cepero was in making the voice comparison, as they would have had trouble understanding the words being spoken amongst the speakers and telling their voices apart. This, in turn, would have hampered their efforts to detect how specific words were being repeated and vocalized by the speakers, to the detriment of their efforts to make a voice comparison.

FOOTNOTES

7 It is irrelevant that Trooper Cepero had never spoken with Díaz-Arias prior to trial, as the helpfulness of his testimony centers upon his fluency in the Spanish language, and not on any contact he may have had with Díaz-Arias beforehand.

The jurors also benefited from Trooper Cepero's guidance in making their voice identification because Trooper Cepero testified as to the particularities they **[*21]** should look for, including the speaker's unique intonation of certain words, greetings and laughter. Trooper Cepero was able to derive these indicators thanks to the significant amount of hours he was able to devote, before

trial, to listening to and comparing the voices of Hipólito and Díaz-Arias. In this regard, Trooper Cepero's testimony may have actually saved time for the jury.

We conclude that Trooper Cepero and the jurors were not in the same position when it came to comparing the voices in the recordings, and therefore, the jury could have found the trooper's testimony to be helpful.

3. Personal Experience

HN3 Federal Rule of Evidence 701 also requires that lay opinion testimony be "rationally based on the witness's perception." Fed. R. Evid. 701(a). Díaz-Arias argues that Trooper Cepero's testimony failed to comport with this requisite, because Trooper Cepero allegedly based his identification of Díaz-Arias' voice on information that was relayed to him from the other agents working on the case. Specifically, Díaz-Arias claims that Trooper Cepero testified that he "coordinated" with the other agents in the case and read their reports. Because Trooper Cepero never spoke to Díaz-Arias **[*22]** in person, the argument goes, Trooper Cepero's lay opinion was not based on personal knowledge, but rather resulted from the overall investigation.

We have repeatedly warned that HN4 "prosecutors should not permit investigators to give overview testimony, in which a government witness testifies about the results of a criminal investigation, usually including aspects of the investigation the witness did not participate in . . . ." United States v. Rosado-Pérez, 605 F.3d 48, 55 (1st Cir. 2010). Such testimony improperly exposes the jury to conclusory statements that are not based on the witness' personal knowledge, and which are unreliable because they often consist of inadmissible hearsay evidence derived from other government agents who participated in the investigation, but who were never brought to testify at trial. See Flores-De Jesús, 569 F.3d at 19 (stating that, when a government witness expresses his opinion as to a defendant's culpability based on the overall results of an investigation, "these conclusory statements often involve impermissible lay opinion testimony, without any basis in personal knowledge, about the role of the defendant in the conspiracy.").

We are satisfied that **[*23]** Trooper Cepero's voice identification testimony was squarely based on his personal knowledge. Díaz-Arias claims that, during cross-examination, Trooper Cepero admitted that he worked with the other agents participating in the investigation and read their reports. However, Trooper Cepero never said that his identification of Díaz-Arias' voice was based on the contents of those reports or on his interactions with the other agents, and Díaz-Arias' counsel did not follow up on this line of questioning by asking Trooper Cepero whether he had in fact based his opinion on outside evidence. Rather, a review of the testimony reveals that Trooper Cepero adequately based his testimony on the knowledge he developed from personally listening to, and analyzing, the recorded telephone conversations of "Hipólito," as well as the stipulated audio recordings containing exemplars of Díaz-Arias' voice.[8] HN5 If a proper foundation is laid establishing the basis of a government lay witness' knowledge, opinion or expertise, then such a witness may testify about matters within his personal knowledge and give lay or, if qualified, expert opinion testimony. Rosado-Pérez, 605 F.3d at 56. This was clearly done **[*24]** in this case, as the prosecutor properly authenticated Trooper Cepero's voice identification testimony, by having him testify at length about (1) the procedures that were used to intercept and record the relevant phone conversations; (2) his experience handling wiretap investigations; (3) his fluency in the Spanish language as a native speaker from Puerto Rico who is familiar with the accents and intonations of individuals from the Dominican Republic; (4) his familiarity with the voices present in the recordings, given the extent of his preparation before trial in listening to them; and (5) the particularities he looked for in comparing the voices present in the recordings.

FOOTNOTES

[8] Díaz-Arias' reliance on our decision in Vázquez-Rivera, 365 F.3d at 361, is misplaced, because in that case, the government had asked the government witness who the investigation had identified as the culpable party, and the witness answered that it was the defendant. We held that such testimony was improper under Rule 701 because the agent had never personally

heard or observed the defendant; instead, the agent based her testimony on the combined perceptions of others. This is not the case here, as Trooper Cepero **[*25]** testified that he was familiar with Díaz-Arias' voice due to the hours he spent listening to the admitted recordings, and based his voice identification testimony on his own perceptions of those recordings.

Therefore, we conclude that the voice identification testimony was properly authenticated pursuant to Federal Rule of Evidence 901, and that the content of this testimony was squarely based on Trooper Cepero's personal knowledge.

4. Lay vs. Expert Opinion

Díaz-Arias' fourth challenge is that the district court erred in allowing Trooper Cepero's voice identification testimony as it did not comply with the requirements of *HN6*Federal Rule of Evidence 702, which governs the admission of expert witness testimony. Specifically, he complains that the government attempted to portray Trooper Cepero as an expert in voice identification, by having him testify about his fluency in the Spanish language and his familiarity with the accents of Spanish speakers from the Dominican Republic. However, apart from this impression, Díaz-Arias makes no attempt to explain how the trooper's familiarity with the Spanish language constituted the type of "specialized knowledge and heightened sophistication normally **[*26]** associated with expert testimony." United States v. Espinal-Almeida, 699 F.3d 588, 614 (1st Cir. 2012) (ellipsis omitted). Neither does he elaborate on how the methods used by Trooper Cepero in making the voice comparison were unreliable or how he was prejudiced by the district court's decision to allow the testimony as lay, instead of expert, opinion. See United States v. Hilario-Hilario, 529 F.3d 65, 72 (1st Cir. 2008)("to succeed in obtaining a reversal on appeal, a defendant must prove both an abuse of discretion and prejudice.") (citing United States v. Álvarez, 987 F.2d 77, 85 (1st Cir. 1993), cert denied, 510 U.S. 849, 114 S. Ct. 147, 126 L. Ed. 2d 109 (1993)).

In addition, these arguments are irrelevant to the issues presented by Trooper Cepero's testimony identifying Díaz-Arias as the speaker in question. During cross-examination, Trooper Cepero clearly admitted that he was not an expert in voice identification, and stated that the jury had as much expertise as he did in voice recognition. Further, at the close of evidence, the district court reminded the jurors that they were not obligated to accept his testimony, and that they could disregard it if they concluded it was unreliable or inadequately supported. **[*27]** As a result, we cannot conclude that the jurors were misled into thinking that Trooper Cepero was an expert witness and that they needed to accord any undue deference to his testimony. Accordingly, we find no abuse of discretion here.

5. Factual Inconsistencies

Díaz-Arias' final challenge to the admission of the voice identification testimony is that the testimony was factually flawed. He makes the case that, in the recordings of the wiretapped conversations, Hipólito represented that he was facing certain events and circumstances in his life which are directly at odds with the events and circumstances surrounding Díaz-Arias' life in 2004. Firstly, he notes that in the recordings, Hipólito identified himself as being age 34 and that he was born in the month of April. Conversely, Díaz-Arias claims he is 41 years of age and that his birthday falls on January 29. Secondly, he notes that in the recordings, Hipólito made reference to the "sacrifices" he was making for "Angie," who presumably was his daughter. Díaz-Arias now claims that the evidence at trial revealed that he only had three children, none of whom were named "Angie." Thirdly, on one of the calls, Hipólito mentioned that **[*28]** he had not been able to see a certain woman, because she had put a restraining order on him, and that this, in turn, had prevented him from seeing his oldest daughter, whom he had raised. Díaz-Arias argues that the recording does not identify the woman as Jacqueline Fresa, that the government did not elicit testimony from Fresa going to her efforts to impede Díaz-Arias from seeing his oldest daughter, and that Fresa's oldest daughter was in fact fathered by a man named Jason Pina, which makes it extremely unlikely that Díaz-Arias would have been the one that raised her. Lastly, Díaz-Arias

contends that the speaker in the recordings was not clear on whether he had one or more daughters with the woman he spoke about.

Having thoroughly reviewed the record, including Díaz-Arias' smorgasbord of aliases and liaisons, we are convinced that a reasonable jury may still have elected to credit Trooper Cepero's testimony, despite these seeming inconsistencies. In fact, many of the inconsistencies cited by Díaz-Arias are not inconsistencies at all. First of all, the Presentence Report (PSR) lists Díaz-Arias as having been born on January 29, 1971. In the summer and fall of 2004, Díaz-Arias **[*29]** would have been 33 years old, turning 34 the following year. In his brief, he states that he is 41 years old, but that probably refers to his age in 2012, when the brief was written. That said, there is a valid question as to the month of his birthday, January vs. April, but the record in this case establishes that Díaz-Arias was an avid user of false identities, which allowed him to assume several false dates of birth. Therefore, a reasonable jury would have acted well within in its discretion in concluding that Díaz-Arias was merely being untruthful when he asserted that he "was 34 years old as of April." It was also free to surmise that Díaz-Arias' true date of birth was not conclusively established at trial.

Likewise, Díaz-Arias' assertion that he only had three daughters, none of whom were named "Angie," is unsupported by the record. First of all, the record indicates that it was Fresa, and not Díaz-Arias, who testified that she only had three daughters, two with Díaz-Arias and one with Jason Pina. Second, having reviewed the pertinent transcripts, it is apparent to us that Hipólito never explicitly stated that he had procreated "Angie" with the woman who placed the restraining **[*30]** order against him, and whom the government argued was Fresa. Hipólito only appeared to mention that he had raised "Angie" and that the woman in question had taken her away from him. Third, there was evidence that Díaz-Arias had romantic relationships with other women, and so the jury could have inferred that "Angie" was another one of Díaz-Arias' daughters, procreated with someone other than Fresa. In fact, the PSR noted that Díaz-Arias reported having four other children, including two with Angie Christo, one of his former girlfriends. In any case, it is difficult to argue that the reference to "Angie" could have created any reasonable doubt within the minds of the jurors while evaluating the sufficiency of the evidence against Díaz-Arias.

We are similarly unpersuaded by Díaz-Arias' remaining arguments, to the effect that the recordings did not identify Fresa as the woman who had placed the restraining order against him. The content of the recorded phone conversations, Fresa's testimony, and the admission of the restraining order itself (which was filed only a few days before Hipólito referred to it in the recordings) as well as the other evidence presented at trial, comprised **[*31]** enough circumstantial evidence for the jury to conclude that it was Fresa who filed the restraining order against "Hipólito." Any uncertainty as to the amount of children Hipólito had with Fresa is minimal compared to the corroborating circumstantial evidence presented at trial, which strongly indicated that Hipólito was indeed Díaz-Arias. Moreover, HN7 it is the prerogative of the jury to "choose between varying interpretations of the evidence." United States v. Sánchez-Badillo, 540 F.3d 24, 32 (1st Cir. 2008) (citing United States v. Wilder, 526 F.3d 1, 7 (1st Cir. 2008)); see also United States v. Rodriguez-Duran, 507 F.3d 749, 758 (1st Cir. 2007) ("The government need not succeed in eliminating every possible theory consistent with the defendant's innocence . . . and circumstantial evidence alone may be sufficient to provide a basis for conviction." (internal quotations and citations omitted)); United States v. Martinez, 922 F.2d 914, 923 (1st Cir. 1991)("The evidence need not exclude every reasonable hypothesis inconsistent with guilt, and the jury is entitled to choose among varying interpretations of the evidence so long as the interpretation it chooses is a reasonable one.").

Based **[*32]** on the foregoing, we find that the district court did not abuse its discretion in allowing Trooper Cepero's voice identification testimony.

B. Labeling of Transcripts

Díaz-Arias' second argument is that the district court abused its discretion when it allowed the government to provide the jury with transcripts of the intercepted phone conversations which

identified one of the speakers by his first name, i.e. Hipólito.

1. Background

On July 25, 2011, Díaz-Arias filed a motion in limine aimed at precluding the government from introducing the transcripts of the wiretapped conversations it prepared, because one of the speakers was labeled as "Hipólito." After hearing arguments, the district court ruled that the transcripts could be used as the government proposed, "with the caution to the jury that it's a point the government has to prove, not only to identify who the speaker is but that, in fact, it is the defendant."

At trial, Díaz-Arias requested a limiting instruction when the government began playing the recorded telephone calls and providing the jury with the transcripts. The district court imparted the following instruction:

> Let me just tell the jurors that the government's labeled **[*33]** these conversations, and the transcripts have been prepared, obviously, from their point of view as to who the speakers are and what their names are and so on and so forth. Ultimately, that's your judgment to make, whether those people are who are actually recorded on the matter to the extent it's important. Particularly, the person identified as Hipólito. You'll have to decide if there was such a person and, ultimately, the question will be whether that was the defendant or not, or somebody else. But because the government has labeled it as "Hipólito" doesn't mean that that's determinative. You will make the determination at the appropriate time.

The jury was allowed to use the transcripts several times in order to follow along whenever the government played a recording of an intercepted telephone call. The jury was also provided with a copy of the transcripts to use during their deliberations.[9] Díaz-Arias now reiterates his objections to the use of the transcripts before this forum.

FOOTNOTES

9 Díaz-Arias lodged a continuing objection to the use of the transcripts at trial. He also objected to the government's request to provide the jury with the transcripts for their deliberations. The district **[*34]** court overruled both objections.

2. Standard of Review

HN8↑ We review for abuse of discretion the district court's decision to allow the use of a transcript at trial. United States v. Anderson, 452 F.3d 66 (1st Cir. 2006).

3. Analysis

Díaz-Arias mainly advances three arguments regarding the admissibility of the contested transcripts: (1) that there was no compelling evidence supporting Trooper Cepero's identification of him as one of the speakers; (2) that the district court did not properly instruct the jury that it was up to them to decide whether the speaker labeled as "Hipólito" was indeed Díaz-Arias; and (3) that labeling one of the speakers as "Hipólito" constituted impermissible vouching by the government.

The first two arguments are derived from Díaz-Arias' reading of our decision in **United States v. Jadlowe, 628 F.3d 1 (1st Cir. 2010)**. In Jadlowe, the district court admitted the lay opinion testimony of a police officer identifying the defendant's voice in several recordings of wiretapped communications. **628 F.3d at 24**. The defendant had argued that it was error to admit such testimony, because the identification was not based on the officer's prior personal experience with him, **[*35]** and because the jury "was perfectly capable of drawing its own independent

conclusion[s] based on the evidence presented." Id. (internal quotations omitted). We agreed with the defendant that it was error for the district court to admit as lay opinion testimony the voice identification of the officer, because the officer was "not in a better position than the jurors to make the identity judgments." Id. We also agreed with the defendant that the district court erred when it allowed the prosecution to furnish the jury with the transcripts of the recorded conversations, because the transcripts reflected the officer's identification of the defendant's voice by labeling one of the speakers with his name. However, since the record established that there was "compelling circumstantial evidence that Jadlowe was properly identified as the speaker in the calls" and the district court providently instructed the jury that it was up to them to make a determination as to whether the transcripts accurately identified the speaker as Jadlowe, we held that any error in admitting the lay opinion testimony and allowing the transcripts was harmless. **Id. at 25.**

Díaz-Arias claims that, contrary to Jadlowe, **[*36]** the circumstantial evidence pointing to him as the speaker in the phone call recordings was not compelling, and that while the district court did give the jury an instruction as to the use of the transcripts, this instruction was not given at the time that the transcripts were provided to the jury. Díaz-Arias' arguments, however, are misplaced, because the situation in Jadlowe is completely distinguishable from the one present in this case. The centerpiece of our holding in Jadlowe, as it pertained to the use of the transcripts, was that the officer's testimony identifying Jadlowe as one of the speakers was not helpful to the jury, because the evidence the officer relied upon to make that assessment was readily available to the jury. **Id. at 24.** Instead, here one of the speakers in the transcript was labeled with the name "Hipólito" based on Trooper Cepero's identification of Díaz-Arias as said speaker, and as we have already explained, Trooper Cepero in this case was in a better position than the jury to make that assessment, based primarily on his mastery of the Spanish language and his familiarity with the accents of native speakers. Therefore, Díaz-Arias' attempts to frame his **[*37]** arguments within the context of our holding in Jadlowe are unavailing.

In any event, we agree with the government that there is sufficient evidence to establish that the speaker in the intercepted telephone conversations was someone named "Hipólito," and that "Hipólito," in turn, was the defendant, Díaz-Arias. There is strong circumstantial evidence that the speaker in question was referred to as "Hipólito" by the other members of the Pinales organization when they communicated with each other over the phone. For example, on the night of July 11, 2004, Pinales told Pena to call Hipólito the next day so that Pena and Hipólito could meet. A minute after that conversation took place, Pena called Hipólito to ask if he could visit him. On September 28, 2004, Hipólito called Pinales to inform him that "tomorrow, I am going to send the guy over there" and the next day, Hernández called Pinales and identified himself as "Hipólito's guy." Later that day, Pinales called a phone number and asked to speak with "Hipólito," after which he spoke with the speaker in question. Apart from Trooper Cepero's admissible testimony identifying the speaker as "Hipólito," there was enough circumstantial evidence **[*38]** here to support the labeling of the transcript with the name "Hipólito."[10]

FOOTNOTES

10 In addition, two of the phone numbers used by Hipólito during the intercepted telephone calls were listed in Pinales' address books as belonging to "H.P.," which a reasonable juror could inferis an abbreviation for Hipólito.

The same can be said about the government's theory that Hipólito was the defendant, Díaz-Arias. As we have previously recounted, a reasonable jury could have concluded that Fresa was the woman Hipólito referred to in the tapes, given the ample evidence connecting the two. This evidence, coupled with Trooper Cepero's testimony that he was able to match the voice of "Hipólito" with the voice of Díaz-Arias, the latter of which he was able to discern from stipulated recordings of Díaz-Arias' voice, is enough to support the jury's conclusion that the voice of Hipólito belonged to Díaz-Arias.

The record also belies Díaz-Arias' second argument, that the district court did not properly instruct the jury that it was up to them to decide if the speaker labeled as "Hipólito" was in fact Díaz-Arias. As previously recounted, the district court did give the jury such an instruction when the government **[*39]** began playing the audio recordings of some of the intercepted calls. This instruction was given at the behest of Díaz-Arias' counsel. The district court again reminded the jury that the labeling of the transcripts was not determinative when it gave its concluding instructions, stating that "it is the government's position that the person referred to in . . . the transcripts of the intercepted telephone conversations as Hipólito is this defendant. To convict the defendant, the government must convince you of that fact beyond a reasonable doubt." We thus find that the district court sufficiently instructed the jury that it was up to them to decide whether the speaker in question was Díaz-Arias.

Lastly, we are similarly unswayed by Díaz-Arias' third argument, that permitting the transcript to identify the speaker in question as "Hipólito" constituted improper governmental vouching.

HN9 Improper vouching occurs when prosecutors place the prestige of the United States behind one of their witnesses "by making personal assurances about the credibility of [that] witness or by indicating that facts not before the jury support [that] witness' testimony." United States v. Rosario-Diaz, 202 F.3d 54, 65 (1st Cir. 2000). **[*40]** Improper vouching can also be said to occur when a prosecutor implies to the jury that they "should credit the prosecution's evidence simply because the government can be trusted." United States v. Castro-Davis, 612 F.3d 53, 66 (1st Cir. 2010) (citing United States v. Pérez-Ruiz, 353 F.3d 1, 9 (1st Cir. 2003) and Flores-De Jesús, 569 F.3d at 18). We fail to see how any vouching took place with regards to the district court's allowance of the impugned transcripts. In his appellate brief, Díaz-Arias cites to some of our case law on the vouching doctrine, but fails to explain how the situations in those cases -- of government witnesses and prosecutors improperly bolstering the credibility of other government witnesses -- are mirrored in this case. Neither can we find any evidence on the record to suggest that the prosecutor improperly implied to the jury that they should take the transcript at its word that the speaker in question really was "Hipólito," simply because the government and Trooper Cepero could be trusted to speak the truth. On the contrary, the government properly authenticated the transcripts via Trooper Cepero's testimony, and the labeling of those transcripts with the **[*41]** name "Hipólito" merely memorialized a part of that testimony: the identification of the speaker in question as a man named "Hipólito." Therefore, we reject Díaz-Arias' claims of improper vouching.

Consequently, we find no abuse of discretion in the district court's decision allowing the jury to use the transcripts. However, notwithstanding our validation of the evidence in this case, we suggest that in future cases it would be better practice for the government to establish the basis for the labeling of the transcripts, before these documents are initially presented to the jury, in addition to the court instructing the jury as was done by the district court in this case.

C. Admission of Unrelated Drug Seizures

Díaz-Arias' third claim of error is that, while the indictment charged him with participating in a single, overarching conspiracy with the other twelve co-defendants, the evidence marshaled at trial indicated the existence of multiple independent conspiracies. Specifically, Díaz-Arias maintains that he was only "one of [the] many customers" of the Pinales organization, and that he only entered into a limited conspiracy with two of the co-defendants (presumably Pinales and Heredia) **[*42]** to purchase cocaine from them, and not into the broader conspiracy charged in the indictment. Because of this, Díaz-Arias contends that the district court erred when it allowed the government to introduce evidence pertaining to the seizure of a kilogram of cocaine from Tajh White on September 27, 2004, as well as the seizure of 53 kilograms of cocaine from the stash house stewarded by Heredia at 115 Navarre Street. He claims this caused an impermissible variance to result at trial, which fomented an evidentiary spillover that allowed the jury to transfer the guilt of the other co-defendants to him, thereby abridging his "substantial rights." The following is a brief overview of the law in this regard.[11]

FOOTNOTES

11 Díaz-Arias also seems to challenge the drug quantity at tributable to him in this section. For the sake of clarity, we will address said issue in the final section of this opinion.

HN10 To sustain a conviction for conspiracy under 21 U.S.C. § 846, the government must establish that "(1) a conspiracy existed; (2) the defendant had knowledge of the conspiracy; and (3) the defendant knowingly and voluntarily participated in the conspiracy." United States v. Maryea, 704 F.3d 55, 73 (1st Cir. 2013) **[*43]** (citing United States v. Dello santos, 649 F.3d 109, 116 (1st Cir. 2011)). The third element requires a showing that the defendant intended to join the conspiracy and also intended to effectuate its objectives. Id. A tacit agreement to join the conspiracy is sufficient. United States v. Portela, 167 F.3d 687, 695 (1st Cir. 1999).

HN11 A prejudicial variance may result when "(1) the facts proved at trial differ from those alleged in the indictment; and (2) the error affects the defendant's substantive rights. . . ." Maryea, 704 F.3d at 73 (citation omitted). *HN12* The question of whether the evidence supports the existence of a single conspiracy is a factual one for the jury to determine. United States v. Escobar-Figueroa, 454 F.3d 40, 48 (1st Cir. 2006). Assuming the jury was properly instructed on this matter, something which Díaz-Arias does not challenge here, the initial question boils down to "one of evidentiary sufficiency." Dellosantos, 649 F.3d at 116. On review, we frequently regard the totality of the circumstances when evaluating whether the evidence proffered at trial suffices to establish the overarching conspiracy. Pérez-Ruiz, 353 F.3d at 7. We must reject Díaz-Arias claims that **[*44]** a variance occurred if a "plausible reading of the record supports the jury's implied finding that he knowingly participated in the charged conspiracy." Id.

After carefully reviewing the record in this case, we first conclude that there was abundant evidence for the jury to determine that Díaz-Arias entered into a conspiracy to distribute cocaine. The evidence showed that Díaz-Arias purchased multiple kilograms of cocaine from the Pinales organization on several occasions. See, e.g., United States v. Mitchell, 596 F.3d 18, 23 (1st Cir. 2010)("pattern of drug sales between individuals for redistribution supports conclusion that individuals were involved in drug conspiracy." (citing United States v. Moran, 984 F.2d 1299, 1303 (1st Cir. 1993))). It also established, as reflected in the wiretap recordings, that Díaz-Arias arranged for drug transactions with the core members of the conspiracy using the conspiracy's coded language. Mitchell, 596 F.3d at 24 ("use of drug code probative of membership in conspiracy" (citing United States v. Morales-Madera, 352 F.3d 1, 12-13 (1st Cir. 2003))). The drug ledgers also indicated the Díaz-Arias was a recurrent customer of the Pinales organization **[*45]** and that, at one point, he was indebted to the organization by more than $50,000. Id. ("drug ledger, containing nicknames of defendant and other conspiracy members, is direct evidence of membership in conspiracy." (citing United States v. Tejada, 886 F.2d 483, 487 (1st Cir. 1989))).[12]

FOOTNOTES

12 In Mitchell, we rejected a similar argument made by one of Díaz-Arias' co-defendants. 596 F.3d 18. Marcus Mitchell, who was tried separately from Díaz-Arias, also argued that the evidence was insufficient to establish his participation in the conspiracy, although he did so as part of his challenge against the district court's decision to admit wiretap recordings as co-conspirator statements. See Fed. R. Evid. 801(d)(2)(E). We rejected his argument and found that the government had "offered substantial evidence . . . to establish that Mitchell was an active conspiracy member," by a preponderance of the evidence. Mitchell, 596 F.3d at 24. The evidence used against Mitchell was substantially the same as that used against Díaz-Arias, except that a co-defendant, Oscar Rodríguez, testified at Mitchell's trial as a government witness. Id.

There was also a sufficient evidentiary foundation for the jury to **[*46]** determine that a single conspiracy existed. HN13 In conducting our inquiry as to this issue, several factors are of use, including: "(1) the existence of a common goal, (2) interdependence among participants, and (3) overlap among the participants." Dellosantos, 649 F.3d at 117. No single one of these factors, standing alone, is necessarily determinative. Sánchez-Badillo, 540 F.3d at 29. As to the common goal requirement, we have found it satisfied when the goal is to sell cocaine for profit or to further the distribution of cocaine. Portela, 167 F.3d at 695; Dellosantos, 649 F.3d at 117. Interdependence concerns "whether the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect of the scheme." United States v. Ciresi, 697 F.3d 19, 27 (1st Cir. 2012) (internal quotation omitted). The final factor, overlap among the participants, can be found to exist when the conspiracy features "the pervasive involvement of a single core conspirator, or hub character." Dellosantos, 649 F.3d at 118 (internal quotation omitted).

Here, Díaz-Arias seems to argue that the evidence introduced at trial established the existence of multiple, independent drug trafficking **[*47]** conspiracies instead of the single, overarching conspiracy described in the indictment. He claims that while all the defendants had the purpose of profiting from the distribution of cocaine, "that objective was achieved by different methods of operation, at different places, and with different people," which, according to him, suggests there was no interdependence between the parties. Although Díaz-Arias admits he received his supply of cocaine from Pinales, he contends the evidence did not establish that either of them believed that the success of the distribution operation depended on the ventures of the remaining eleven defendants. He also argues there was no evidence presented at trial indicating that he had any interactions with the other members of the conspiracy, thus reflecting a lack of overlap between them.

Since it appears that Díaz-Arias concedes the conspiracy had the common goal of selling and distributing cocaine for profit, we address the remaining two factors: whether overlap and interdependency existed among the participants of the conspiracy. The overlap factor is easily established, as the government proved that Díaz-Arias' supply of cocaine came directly from **[*48]** Pinales and Heredia, who spearheaded the organization. Hence, Pinales and Heredia neatly fit into the roles of core conspirators or hub characters of the conspiracy.

As to interdependency, we are not convinced by Díaz-Arias' argument that there was no interdependency because his co-defendants, who also purchased cocaine in wholesale quantities from the Pinales organization, were independent criminals whose criminal activity was unforeseeable to him. It is well established that HN14 the government does not need to prove that the defendant knew all of the details of the conspiracy, nor that he participated in every aspect of the conspiracy. Sánchez-Badillo, 540 F.3d at 29. It also does not have to show that the defendant knew of or had any contact with each and every one of the conspirators. Id.

Further, in United States v. Soto-Beníquez, we stated that an example of interdependence is when "the success of an individual's own drug transactions depends on the health and success of the drug trafficking network that supplies him . . . ." 356 F.3d 1, 19 (1st Cir. 2003). This is readily apparent here, where the evidence established that Díaz-Arias was a repeat customer of the Pinales organization, **[*49]** purchasing multiple kilograms of cocaine, often on consignment, and regularly paying down debts, amounting to thousands of dollars, to the organization. A rational jury could have inferred that the proceeds the organization obtained from customers such as Díaz-Arias allowed it to continue importing large quantities of cocaine, thus furthering the criminal enterprise. Therefore, it can be said that Díaz-Arias' success as a distributor was predicated upon the success of the other co-conspirators; were it not for the combined collective effort of all of them, the Pinales organization would have faltered, possibly leaving Díaz-Arias bereft of a supplier. See Maryea, 704 F.3d at 77 ("This interdependence makes it reasonable to speak of a tacit understanding between [a core conspirator] and others upon whose unlawful acts his success depends.") (internal quotation marks omitted). Accordingly, there was sufficient evidence for a jury to infer interdependency, and thus the existence of a single conspiracy.

Having determined that there was sufficient evidence to support the existence of a single conspiracy, we must also determine that the district court did not err in admitting the evidence **[*50]** from the cocaine seizures of Tajh White and Heredia's stash house. The evidence proffered by the government tended to establish that White was also a customer of the Pinales organization and that the stash house at 115 Navarre Street was used by that organization as a repository for cocaine. Therefore, the evidence stemming from the cocaine seizures were plainly relevant to proving the existence of the charged conspiracy. See Fed. R. Evid. 401.

D. The Race and Ethnicity Instruction

Díaz-Arias has also lodged an objection to the district court's refusal to provide the jury with his requested instruction on race, ethnicity and national origin. The requested instruction stated the following:

> It would be improper for you to consider, in reaching your decision as to whether the government sustained its burden of proof, any personal feelings you may have about the defendant's race or ethnicity, or national origin, or his or any witness' immigration status.

The district judge declined to give this instruction, stating "I don't think I will give that specifically. I will emphasize that they are to be completely fair-minded and impartial and not to be influenced by private views of any of the **[*51]** instances in the case, but I won't be any more specific than that." Instead, the court opted to charge the jury with the following instruction:

> You should determine what facts have been shown or not based solely on a fair consideration of the evidence. That proposition means two things, of course. First of all, you'll be completely fair-minded and impartial, swayed neither by prejudice, nor sympathy, by personal likes or dislikes toward anybody involved in the case, but simply to fairly and impartially judge the evidence and what it means.

In his brief, Díaz-Arias points to surveys which "have established that large portions of the community believe that drug trafficking is more prevalent amongst Hispanics than it is with any other ethnic group." He also provides citations to other studies which have indicated that: (1) Blacks and Hispanics are more likely to be incarcerated for drug offenses than are Caucasians; and (2) the correlation between race and drug activity is a popular misconception. Therefore, Díaz-Arias contends his proposed instruction was necessary to dispel any notion among the jurors that being Hispanic in and of itself is evidence of guilt in a drug crime. By not **[*52]** giving the instruction, he argues, the district court diminished the burden of proof and "allowed a misconception to infect the jury trial process." He contends the district court's lapse in this regard constituted reversible error. We reject that contention.

*HN15*Properly preserved challenges to jury instructions are reviewed de novo, "taking into account the charge as a whole and the body of evidence presented at trial." United States v. Sampson, 486 F.3d 13, 29 (1st Cir. 2007). A district court's refusal to provide a requested instruction is reversible error only when the requested instruction "(1) was substantively correct; (2) was not substantially covered elsewhere in the charge; and (3) concerned an important point in the case so that the failure to give the instruction seriously impaired the defendant's ability to present his defense." United States v. Willson, 708 F.3d 47, 54-55 (1st Cir. 2013). "Cases satisfying all three [of these] factors are 'relatively rare.'" Id. (quoting United States v. González, 570 F.3d 16, 21 (1st Cir. 2009)).

In this case, Díaz-Arias' instruction fails to surmount the second prong of the test. The district court adequately instructed the jury that it **[*53]** should be "completely fair-minded and impartial,

swayed neither by prejudice, nor sympathy, by personal likes or dislikes toward anybody involved in the case . . . ." Díaz-Arias' proposed instruction was a more specific version of the court's instruction; it merely recited the possible forms of prejudice that a person might have against Díaz-Arias: race, ethnicity, national origin or immigration status.[13] The court's instructions effectively incorporated the essence of Díaz-Arias' request; they advised the jurors that they could not be swayed by any form of prejudice towards anybody involved in the case, which obviously included the defendant. See United States v. Rose, 104 F.3d 1408, 1416 (1st Cir. 1997) (*HN16*"[T]rial court's charge need not use the exact wording requested by the defendant so long as the instruction incorporates the substance of the defendant's request."); United States v. McGill, 953 F.2d 10, 12 (1st Cir. 1992) (similar); Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 564 (1st Cir. 1986) (holding that instruction to jury to "avoid bias or prejudice" was sufficient, despite defendant requesting an "anticorporate bias" instruction). Thus, the district court's decision **[*54]** to use a general term such as "prejudice," without listing the examples of concern to Díaz-Arias, does not constitute reversible error.

FOOTNOTES

13 The proposed instruction also referred to "the defendant," while the court's instruction referred to "anybody involved in this case."

Our conclusion here is also based upon a number of factors. We first note that a plurality of the Supreme Court has stated that *HN17*"[t]here is no constitutional presumption of juror bias either for or against members of any particular racial or ethnic groups." Rosales-López v. United States, 451 U.S. 182, 190, 101 S. Ct. 1629, 68 L. Ed. 2d 22 (1981). Although Díaz-Arias expresses a concern in his brief as to one or more of the jury members possibly bringing "to the process some bias or just some inkling that the drug problem in this country is created by the presence of Hispanic's [sic] in our society," nothing in the record supports such an assertion. The district court docket reflects that Díaz-Arias was able to propose voir dire questions that went directly to the issue of prejudice on account of race, ethnicity, national origin and immigration status. Díaz-Arias has not argued before us that the district court refused to ask the venire those questions, **[*55]** or that the venire members who ultimately served as jurors demonstrated signs of harboring any kind of prejudice towards him. Neither can he point to any incident during the proceedings which would have given rise to a heightened concern of potential bias in any of the jurors.

Díaz-Arias' reliance on cases such as Miller-El v. Dretke, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) and United States v. Casas, 425 F.3d 23 (1st Cir. 2005), is also misplaced. While the Court in Miller-El did reaffirm that *HN18*"racial discrimination by the State in jury selection offends the Equal Protection Clause," 545 U.S. at 238, there are no allegations in this case that the prosecutor discriminatorily used her peremptory strikes against venire members on account of their race or ethnic background. In Casas, on the other hand, we did warn that "[w]hen a non-frivolous suggestion is made that a jury may be biased or tainted by some incident, the district court must undertake an adequate inquiry to determine whether the alleged incident occurred and if so, whether it was prejudicial." 425 F.3d at 48 (quoting United States v. Gastón-Brito, 64 F.3d 11, 12 (1st Cir. 1995)). However, Casas concerned an incident during trial where it was **[*56]** discovered that some of the jurors may have been biased in favor of certain defendants. Here, in contrast, Díaz-Arias has not alleged that any incidents took place during the course of the proceedings which may have called into question the impartiality of the jurors. Furthermore, we emphasize that Díaz-Arias did not inform the district court of his belief that some of the jurors may have been prejudiced against him; much less did he provide the court with any evidence to support such a claim, as he attempts to do on appeal. Accordingly, we see no legal basis to find reversible error in the district court's decision to forgo using the requested instruction.[14]

FOOTNOTES

14 Our decision does not foreclose the possibility that, on facts not presented here, we would

take up and reconsider the issue in the future. While the surveys and studies cited by Díaz-Arias present legitimate concerns, the record does not reflect that the jurors in this case were afflicted with the kind of bias said studies point to. In addition, we are confident the district courts will remain vigilant when it comes to detecting possible signs of jury bias, particularly during the jury selection stage of the proceedings.

E. [*57] Drug Quantity Determination

The fifth claim of error broached by Díaz-Arias in this appeal concerns whether the district court erred in refusing another of his proposed jury instructions, one that would have asked the jury to determine the drug quantity attributable to him. The district court, however, opted to instruct the jury that "proof of the quantity of cocaine is not an issue for you to determine." Díaz-Arias now contends that the drug quantity finding should have been made by the jury beyond a reasonable doubt, not by the district judge by a preponderance of the evidence. He invokes the Supreme Court's landmark case of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), to argue that his sentence was imposed in violation of his rights under the Fifth Amendment's Due Process Clause as well as the Sixth Amendment's notice and jury trial guarantees. Since Díaz-Arias preserved this claim at sentencing, we review his challenge to the constitutionality of his sentence de novo. See United States v. Brown, 669 F.3d 10, 19 (1st Cir. 2012).

*HN19*The Supreme Court in Apprendi established the principle that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime **[*58]** beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490; United States v. Malouf, 466 F.3d 21, 25 (1st Cir. 2006). The Apprendi principle, however, does not apply to facts that increase the mandatory minimum sentence. Harris v. United States, 536 U.S. 545, 557, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002); Malouf, 466 F.3d at 25. In United States v. Goodine, 326 F.3d 26, 33 (1st Cir. 2003), we emphasized that "[a] sentencing court may use the preponderance of the evidence standard to find facts that require the imposition of a specified minimum sentence, so long as that sentence does not exceed the maximum sentence provided by the relevant statute." (emphasis in original). Hence, the principle established in Apprendi is not breached if the district judge finds that a specific quantity of drugs can be attributed to a defendant -- thereby increasing the mandatory minimum sentence involved -- as long as that mandatory minimum sentence remains at or below the statutory maximum sentence that could be applied against the defendant given the jury's verdict. United States v. Platte, 577 F.3d 387, 392 (1st Cir. 2009); United States v. Barnes, 244 F.3d 172, 177-78 (1st Cir. 2001). **[*59]** The Apprendi principle will not be transgressed as long as the district judge does not impose a sentence above that statutory maximum sentence.

In this case, the indictment charged the defendants with violating sections 841(a)(1) and 846 of Title 21 of the United States Code, by conspiring with each other to possess with intent to distribute, and to distribute, at least five kilograms of cocaine. At trial, the government did not seek to have the jury determine whether the drug quantity attributable to Díaz-Arias was at least five kilograms of cocaine. Instead, the government agreed that if the jury decided to convict Díaz-Arias, it would not seek a sentence in excess of 20 years, which is the default statutory maximum sentence for crimes involving the distribution of cocaine in any quantity. See 21 U.S.C. § 841(b)(1)(C) (2006). Given the jury's verdict finding Díaz-Arias guilty of the crimes charged, the maximum sentence that could have been applied against him was 20 years. Id. Subsequently, at sentencing, the district court found by a preponderance of the evidence that five or more kilograms of cocaine were attributable to Díaz-Arias and it imposed the mandatory minimum sentence **[*60]** contained in section 841(b)(1)(A)(ii), that is, ten years. Therefore, since the imposed sentence of ten years is not in excess of the default statutory maximum sentence of 20 years, Díaz-Arias' Apprendi-based attack on the constitutionality of his sentence fails. See Goodine, 326 F.3d at 33 ("If the disputed fact (here, drug quantity) influences the sentence, but the resulting sentence is still below the default statutory maximum, there is no Apprendi violation.").

F. Sentencing

Lastly, Díaz-Arias takes issue with the district court's finding that more than five kilograms of cocaine were attributable to his participation in the conspiracy. He notes that the district court arrived at that estimate by relying on several pieces of evidence: (1) the single kilogram seized from Hernández on September 29, 2004; (2) a recording dated July 11, 2004, where Díaz-Arias supposedly discussed another kilogram; (3) the amounts shown on the seized drug ledgers from the Park Avenue Market; and (4) several proffer statements made by two of Díaz-Arias' co-defendants, Pinales and Rodríguez, who entered into cooperation agreements with the government. Although Díaz-Arias admits that the kilogram seized **[*61]** from Hernández could arguably be tied to him, he claims that the remaining pieces of evidence are insufficient to establish, by a preponderance of the evidence, that he was involved with five or more kilograms of cocaine. He argues that the July 11, 2004 recording does not contain any explicit mention of a kilogram of cocaine, that no reliable evidence was introduced to discern the meaning of the numbers contained in the drug ledgers, and that the proffer statements should not have been relied upon because they violated his Confrontation Clause rights under the Sixth Amendment. We proceed to analyze his claims.

HN20 When sentencing a member of a drug conspiracy, the district court must make an individualized finding "concerning the quantity of drugs attributable to, or reasonably foreseeable by," that member. United States v. Cintrón-Echautegui, 604 F.3d 1, 5 (1st Cir. 2010). In making that determination, the court "may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy." Id. at 6 (quoting United States v. Zapata, 589 F.3d 475, 485 (1st Cir. 2009)).

HN21 Since **[*62]** Díaz-Arias objected to the district court's drug quantity calculation at sentencing, we review any legal error committed by the district court de novo, while mindful that factual findings must be reviewed for clear error. United States v. Ortiz-Torres, 449 F.3d 61, 72 (1st Cir. 2006). If we can discern no legal error, then we must credit the district court's factual findings as to drug quantity "unless, on the whole of the record, we form a strong, unyielding belief that a mistake has been made." Platte, 577 F.3d at 392 (quoting Cumpiano v. Banco Santander Puerto Rico, 902 F.2d 148, 152 (1st Cir. 1990)). Here, we find that the district court's determination as to drug quantity was sufficiently grounded on reliable evidence.

At the outset, we must reject Díaz-Arias' claim that the use of the proffer statements subscribed by Pinales and Rodríguez violated his rights under the Confrontation Clause, because we have repeatedly stated that *HN22* such rights do not attach during sentencing. See United States v. Dyer, 589 F.3d 520, 532 (1st Cir. 2009); United States v. Luciano, 414 F.3d 174, 178-80 (1st Cir. 2005). In these proffer statements, Pinales and Rodríguez described the role of Díaz-Arias **[*63]** within the drug organization, with Pinales stating that Díaz-Arias picked up a kilogram of cocaine from him every 15 days. The proffers of Rodríguez seemed to be more inconsistent; at first he stated that he "possibly" delivered two kilograms to Díaz-Arias, as well as another undetermined amount, to two of Díaz-Arias' couriers. However, a few months later, Rodríguez stated that he met Díaz-Arias three or four times and delivered six or seven kilograms to him. In any event, despite this inconsistency, Díaz-Arias does not separately challenge the reliability of these proffers; he has only assailed the district court's consideration of these statements under the Confrontation Clause. Moreover, the district judge made clear that he did not view the proffer statements in isolation, but rather as part of the information available to him as a whole, and that he did not take those statements as "gospel."

It is clear to us that the proffer statements, coupled with the amounts contained in the drug ledgers and the rest of the evidence presented a trial, adequately supported the district court's finding that Díaz-Arias was involved with five or more kilograms of cocaine. During trial, **[*64]** Trooper Cepero testified that, at the time of the conspiracy, a kilogram of cocaine generally sold for $23,000 to $24,000. The drug ledgers themselves suggested that someone with

the initials "H.P." effectuated three transactions of $24,000 each, and one transaction amounting to $48,000. The ledgers gave the impression that once the transactions were made, "H.P." would proceed to amortize the resulting debts in various installments. Given the other evidence presented at trial, these ledgers could reasonably be read as reflecting the purchase of at least five kilograms of cocaine (three separately and two together), and that these sales were made on consignment. Furthermore, the district court did not commit clear error in concluding that "H.P." was Díaz-Arias, because in one of Pinales' address books, introduced as Exhibit 23, there was a phone number ending in 1764 next to the initials "H.P." The wiretap investigation carried out by the DEA revealed that Díaz-Arias used that same phone number, among others, to communicate with Pinales.

Accordingly, we are not convinced by Díaz-Arias' arguments that the drug ledgers were too ambiguous for the district court to have arrived at a drug **[*65]** quantity determination of five or more kilograms. When considered alongside the other information contained in the PSR, including the proffer statements as well as the evidence produced at trial, the ledgers were sufficiently reliable to hold Díaz-Arias accountable for at least five kilograms of cocaine, as required to sentence him to the mandatory minimum of ten years under 21 U.S.C. § 841(b)(1)(A)(ii).

III. Conclusion

For the reasons elucidated above, the judgment of the district court is affirmed.

Affirmed.

'D'

*2007 Del. Super. LEXIS 222, **

STATE OF DELAWARE v. CHRISTIAN K. WASHINGTON, Defendant.

I.D. No. 0104011899

SUPERIOR COURT OF DELAWARE, NEW CASTLE

2007 Del. Super. LEXIS 222

July 9, 2007, Submitted
August 13, 2007, Decided

NOTICE:

THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

SUBSEQUENT HISTORY: Post-conviction relief denied at Washington v. State, 2008 Del. LEXIS 129 (Del., Mar. 17, 2008)

PRIOR HISTORY: [*1]
UPON CONSIDERATION OF DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF.
Washington v. State, 836 A.2d 485, 2003 Del. LEXIS 551 (Del., 2003)

DISPOSITION: SUMMARILY DISMISSED in part and DENIED in part.

CASE SUMMARY

PROCEDURAL POSTURE: After defendant's convictions for first degree robbery, possession of a firearm during the commission of a felony, possession of a deadly weapon by a person prohibited, and first degree reckless endangerment were affirmed, defendant moved for postconviction relief.

OVERVIEW: Defendant said appellate counsel ineffectively did not raise the admission of hearsay. Del. Super. Ct. R. Crim. P. 61(i)(4) barred this because it was addressed upon denial of defendant's motion to suppress. No legal or factual developments merited reconsideration "in the interest of justice." If it was not barred and was a meritorious ground for appeal, it was not clearly stronger than the ground raised, so no ineffective assistance was shown. Trial counsel was not ineffective for not objecting to references to a complaining witness as a "victim," because this objection only applied when a consent defense was raised, which defendant did not do. Any presumption that the complaining witness was a "victim" did not create a presumption that defendant was a perpetrator. Counsel was not ineffective for not objecting to testimony that a person was "scared" when making a statement to police and after seeing defendant brandish a gun because this was admissible lay opinion testimony. It was rationally based on the witness's perception, aided the jury's understanding of his testimony, and required

no scientific, technical, or other specialized skill or knowledge.

OUTCOME: Defendant's motion was summarily dismissed as to allegations of ineffective assistance of appellate counsel and denied as to allegations of ineffective assistance of trial counsel.

CORE TERMS: trial counsel, ineffective assistance, scared, officer's testimony, objectionable, postconviction, hearsay statements, stronger, afraid, ineffective assistance of counsel, direct appeal, ineffective, failing to object, gun, commission of a crime, objectively unreasonable, body language, adjudicated, meritorious, hearsay, prong, claim of ineffective assistance, meritorious claims, sole defense, personal observation, impression, utterance, formerly, robbery, excited

LEXISNEXIS® HEADNOTES

⊟ Hide

Criminal Law & Procedure > Postconviction Proceedings > General Overview

HN1 Before addressing the substantive merits of any claim for postconviction relief, a trial court must determine whether a defendant has satisfied the procedural requirements of Del. Super. Ct. R. Crim. P. 61. In order to protect the procedural integrity of Delaware's rules, the court will not consider the merits of a postconviction claim that fails any of Rule 61's procedural requirements. More Like This Headnote

Criminal Law & Procedure > Counsel > Effective Assistance > General Overview

Criminal Law & Procedure > Postconviction Proceedings > General Overview

HN2 Del. Super. Ct. R. Crim. P. 61(i) establishes four procedural bars to motions for postconviction relief: (1) the motion must be filed within three years of a final judgment of conviction; (2) any grounds for relief which were not asserted previously in any prior postconviction proceeding are barred; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules; and (4) any basis for relief must not have been formerly adjudicated in any proceeding. However, a defect under Del. Super. Ct. R. Crim. P. 61(i)(1), (2), or (3) will not bar a movant's claim that the court lacked jurisdiction or 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. Del. Super. Ct. R. Crim. P. 61(i)(5). Because an ineffective assistance of counsel alleges a constitutional violation meeting this standard, colorable ineffective assistance of counsel claims are not subject to the procedural bars contained in Del. Super. Ct. R. Crim. P. 61(i)(1), (2), or (3). More Like This Headnote

Criminal Law & Procedure > Postconviction Proceedings > General Overview

HN3 For the purposes of Del. Super. Ct. R. Crim. P. 61, regarding postconviction relief, and the requirement in Del. Super. Ct. R. Crim. P. 61(i)(1) that a motion for postconviction relief be filed within a certain period after a judgment of conviction becomes final, a judgment of conviction becomes final under the following circumstances: (1) if the defendant does not file a direct appeal, 30 days after a trial court imposes sentence; (2) if the defendant files a direct appeal or there is an automatic statutory review of a death penalty, when the supreme court issues a mandate or order finally determining the case on direct review; or (3) if the defendant files a petition for certiorari seeking review of the supreme court's mandate or order, when the United States Supreme Court issues a mandate or order finally disposing of the case on direct review. Del.

Super. Ct. R. Crim. P. 61(m). More Like This Headnote

Criminal Law & Procedure > Counsel > Effective Assistance > Appeals

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

Criminal Law & Procedure > Counsel > Effective Assistance > Trials

HN4 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-part Strickland test by showing both: (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that the errors by counsel amounted to prejudice. The defendant faces a strong presumption that the representation was professionally reasonable in attempting to meet the first prong. Under the second prong, the defendant must affirmatively demonstrate prejudice by showing a reasonable probability that, but for counsel's errors, the proceeding would have had a different result. If either prong is not met, the defendant's claim fails. The same standard governs claims of ineffectiveness raised against both trial and appellate counsel. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Postconviction Proceedings > General Overview

HN5 Del. Super. Ct. R. Crim. P. 61(i)(4) bars any ground for postconviction relief which was formerly adjudicated in the proceedings leading to the judgment of conviction, unless reconsideration of the claim is warranted in the interest of justice. The interest of justice exception is satisfied only if the defendant presents either subsequent legal developments demonstrating that the trial court lacked the authority to convict or punish the defendant or significant factual developments justifying reconsideration of the formerly adjudicated issue. The court need not reconsider a claim which has received prior "substantive resolution" simply because the defendant has repackaged or restated the same claim as an ineffective assistance of counsel argument. More Like This Headnote

Criminal Law & Procedure > Counsel > Effective Assistance > Appeals

HN6 Appellate counsel is not constitutionally required to raise all meritorious claims on direct appeal. Rather, appellate counsel is expected to review the record, recognize and winnow out non-frivolous but weak arguments, and focus on one or a few central issues which offer, in the attorney's professional judgment, the strongest chance of success. In light of the need for appellate counsel to select from amongst multiple meritorious claims arguably presented by the record in crafting an appeal, simply claiming that appellate counsel failed to raise an issue that was meritorious will not establish ineffectiveness. To show that counsel's failure to present a meritorious claim on appeal was objectively unreasonable, a defendant must show that the nonfrivolous issue counsel did not present was "clearly stronger" than the issue or issues counsel did present. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Counsel > Effective Assistance > Appeals

HN7 The full test of the objective reasonableness of appellate counsel's failure to raise a meritorious claim in the appeal of a criminal conviction considers (1) whether the issue not presented was significant and obvious; (2) whether the omitted issue was clearly stronger than the issues which were presented; and (3) whether the decision not to include the omitted issue lacked an articulable strategic purpose. The first prong of Strickland is satisfied if the defendant establishes that all three factors can be answered in the affirmative. A defendant failing the second factor cannot establish that the representation was objectively unreasonable. More Like This Headnote

Criminal Law & Procedure > Counsel > Effective Assistance > General Overview

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Ineffective Assistance

HN8 An ineffective assistance of counsel claim cannot be raised for the first time on direct appeal. More Like This Headnote

Criminal Law & Procedure > Defenses > Consent

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct > Prohibitions Against Improper Statements

HN9 The narrow range of cases in which the prosecution's use of the word "victim" to refer to the complaining witness is inappropriate does not include all cases in which the commission of a crime is in dispute. Rather, the use of the term "victim" to describe a complainant is only objectionable where commission of a crime is in dispute because consent is the sole defense. More Like This Headnote

Evidence > Testimony > Lay Witnesses > Opinion Testimony > Helpfulness

Evidence > Testimony > Lay Witnesses > Opinion Testimony > Nonspecialized Knowledge

Evidence > Testimony > Lay Witnesses > Opinion Testimony > Personal Perceptions

Evidence > Testimony > Lay Witnesses > Opinion Testimony > Rational Basis

HN10 Del. R. Evid. 701 permits lay testimony in the form of opinions or inferences if the opinions or inferences are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Del. R. Evid. 702. Del. R. Evid. 701, like its federal counterpart, permits a lay witness to testify as to his own impressions when they are based on personal observation and form a collection of facts that can most effectively be communicated in the "shorthand" version of an opinion. Subject to the limitations of lay opinion evidentiary rules, a lay witness generally may give his opinion as to the mental state of another in connection with the facts on which that opinion is based and may testify as to personal observations of the person whose mental condition is in question. More Like This Headnote

JUDGES: Peggy L. Ableman, Judge.

OPINION BY: Peggy L. Ableman

OPINION

This 13th day of August, 2007, it appears to the Court that:

1. Defendant Christian K. Washington ("Washington") was convicted by a jury on November 20, 2002 of two counts of Robbery First Degree, two counts of Possession of a Firearm During the Commission of a Felony, one count of Possession of a Deadly Weapon by a Person Prohibited, and one count of Reckless Endangerment First Degree. [1] He was sentenced to ten years imprisonment at Level V. [2] Following an appeal to the Delaware Supreme Court, Washington's conviction was affirmed on November 3, 2003. [3]

FOOTNOTES

1 *See* Docket 40; DEL. CODE ANN. tit. 11, §§ 832, 1447A, 1448, 604.

2 *See* Docket 40.

3 *See Washington v. State,* 836 A.2d 485 (Del. 2003).

2. The evidence presented by the State at trial established that on the evening of April 18, 2001, Washington was at the house of Latisha Seals ("Seals") when Jamal Miller ("Miller") attempted to visit Seals. Washington, accompanied by a pit bull, approached Miller at the doorway of the house and questioned him about the purpose of the visit. Washington **[*2]** pushed Miller out of the house and pulled out a gun. While holding the gun within inches of Miller's face, Washington made three separate demands for Miller to turn over items. Miller complied with each order, first giving Washington a silver chain, then his leather jacket, and finally his car keys. Between each of these demands, Washington told Miller to leave. As Miller attempted to move away, however, Washington ordered the pit bull to pursue or restrain him, preventing retreat. [4]

FOOTNOTES

4 For a more complete description of the factual background, see *id.* at 486-87.

3. Washington filed this, his first motion for postconviction relief, on November 2, 2006. [5] He asserts that he received ineffective assistance of counsel, both at trial and on appeal. [6] Specifically, Washington argues that his trial counsel was ineffective in failing to object when the prosecutor and chief investigating officer referred to Miller as a "victim" during the course of the trial and in failing to object to the chief investigating officer's testimony that Seals was "scared." Washington contends that his appellate counsel was ineffective for failing to appeal the admission, over defense counsel's objection, of hearsay **[*3]** statements made by Seals. [7]

FOOTNOTES

5 Washington also previously filed a motion for sentence modification, which was denied by this Court. *See* Docket 54.

6 Washington was represented by the same attorney at trial and on appeal. Nonetheless, the Court will refer to "trial counsel" and "appellate counsel" separately where doing so will provide clarity.

7 *See* Docket 56.

4. ***HN1***Before addressing the substantive merits of any claim for postconviction relief, the Court must determine whether the defendant has satisfied the procedural requirements of Superior Court Criminal Rule 61 ("Rule 61"). [8] In order to protect the procedural integrity of Delaware's rules, the Court will not consider the merits of a postconviction claim that fails any of Rule 61's procedural requirements. [9]

FOOTNOTES

8 *Younger v. State,* 580 A.2d 552, 554 (Del. 1990). *See also Bailey v. State,* 588 A.2d 1121, 1127 (Del. 1991); *State v. Mayfield,* 2003 WL 21267422, at *2 (Del. Super. Ct. June 2, 2003).

9 *State v. Gattis,* 1995 WL 790951, at *3 (Del. Super. Ct. Dec. 28, 1995) (citing *Younger,* 580 A.2d at 554).

5. HN2 Rule 61(i) establishes four procedural bars to motions for postconviction relief: (1) the motion must be filed within three years of a final judgment **[*4]** of conviction; [10] (2) any grounds for relief which were not asserted previously in any prior postconviction proceeding are barred; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules; and (4) any basis for relief must not have been formerly adjudicated in any proceeding. However, a defect under Rule 61(i)(1), (2), or (3) will not bar a movant's "claim that the court lacked jurisdiction or . . . 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." [11] Because an ineffective assistance of counsel alleges a constitutional violation meeting this standard, colorable ineffective assistance of counsel claims are not subject to the procedural bars contained in Rule 61(i)(1), (2), or (3). [12]

FOOTNOTES

10 The motion must be filed within three years if the final order of conviction occurred before July 1, 2005, and within one year if the final order of conviction occurred on or after July 1, 2005. *See* Rule 61, annot. *Effect of amendments.* HN3 For the purposes of Rule 61, a judgment **[*5]** of conviction becomes final under the following circumstances: "(1) If the defendant does not file a direct appeal, 30 days after the Superior Court imposes sentence; (2) If the defendant files a direct appeal or there is an automatic statutory review of a death penalty, when the Supreme Court issues a mandate or order finally determining the case on direct review; or (3) If the defendant files a petition for certiorari seeking review of the Supreme Court's mandate or order, when the United States Supreme Court issues a mandate or order finally disposing of the case on direct review." Super. Ct. Crim. R. 61(m).

11 Super. Ct. Crim. R. 61(i)(5).

12 *See State v. MacDonald,* 2007 WL 1378332, at *4, n.17 (Del. Super. Ct. May 9, 2007).

6. HN4 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-part *Strickland* test by showing both: (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that the errors by counsel amounted to prejudice. [13] The defendant faces a "strong presumption that the representation was professionally reasonable" in attempting to meet the first prong. [14] Under the second prong, the defendant must affirmatively **[*6]** demonstrate prejudice by showing a reasonable probability that, but for counsel's errors, the proceeding would have had a different result. [15] If either prong is not met, the defendant's claim fails. The same standard governs claims of ineffectiveness raised against both trial and appellate counsel. [16]

FOOTNOTES

13 *Albury v. State,* 551 A.2d 53, 58 (Del. 1988) (citing *Strickland v. Washington,* 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

14 *Wright v. State,* 671 A.2d 1353, 1356 (Del. 1996) (citation omitted).

15 *Strickland,* 466 U.S. at 694. *See also Fletcher v. State,* 2006 WL 1237088, at *2 (Del. Super. Ct. May 9, 2006).

16 *See Younger,* 580 A.2d at 556; *State v. Nave,* 1998 WL 442932, at *1 (Del. Super. Ct. May

8, 1998).

A. Failure to Appeal Evidentiary Ruling

7. Applying the procedural bars to Washington's claim of ineffective assistance of appellate counsel, this ground is barred by Rule 61(i)(4). The admissibility of hearsay statements made by Seals was addressed by this Court when it denied Washington's motion to suppress at trial. [17] *HN5* Rule 61(i)(4) bars any ground for relief which was formerly adjudicated "in the proceedings leading to the judgment of conviction . . . unless reconsideration of the claim is warranted **[*7]** in the interest of justice." [18] The interest of justice exception is satisfied only if the defendant presents either subsequent legal developments demonstrating that "the trial court lacked the authority to convict or punish the defendant" [19] or significant factual developments justifying reconsideration of the formerly adjudicated issue. [20] The Court need not reconsider a claim which has received prior "substantive resolution" simply because the defendant has repackaged or restated the same claim as an ineffective assistance of counsel argument. [21]

FOOTNOTES

[17] *See* Docket 42, p. 94.

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

[19] *State v. Fatir,* 2006 WL 3873238, at *3 (Del. Super. Ct. Dec. 12, 2006) (citing *Flamer v. State,* 585 A.2d 736, 746 (Del. 1990)).

[20] *See, e.g., Weedon v. State,* 750 A.2d 521, 526 (Del. 2000).

[21] *See State v. Finocchiaro,* 1994 WL 682434, at *2 (Del. Super. Ct. Nov. 16, 1994) ("Defendant cannot simply restate his claim . . . as one of ineffective assistance of counsel and expect it to be considered anew. The Superior Court is not required to reexamine a claim that has received 'substantive resolution' at an earlier time simply because the claim is refined or restated.") (citing *Johnson v. State,* 1992 WL 183069, at *1 (Del. June 30, 1992)).

8. **[*8]** Washington's motion for postconviction relief supports his ineffective assistance of appellate counsel claim by arguing the inapplicability of the present sense impression and excited utterance hearsay exceptions. In other words, the motion for postconviction relief reiterates the same substantive arguments already decided by this Court in denying his motion to suppress at trial. Washington has not shown that legal or factual developments have arisen which merit reconsideration of this previously adjudicated issue "in the interest of justice." Therefore, Rule 61(i)(4) bars Washington's ineffective assistance of appellate counsel claim.

9. Moreover, even if Washington's ineffective assistance of appellate counsel claim was not procedurally barred, it fails to meet the *Strickland* standard. *HN6* Appellate counsel is not constitutionally required to raise all meritorious claims on direct appeal. [22] Rather, appellate counsel is expected to review the record, recognize and winnow out non-frivolous but weak arguments, and focus on one or a few central issues which offer, in the attorney's professional judgment, the strongest chance of success. [23] In light of the need for appellate counsel to select **[*9]** from amongst multiple meritorious claims arguably presented by the record in crafting an appeal, simply claiming that appellate counsel failed to raise an issue that was meritorious will not establish ineffectiveness. To show that counsel's failure to present a meritorious claim on appeal was objectively unreasonable, a defendant must show that the nonfrivolous issue counsel did not present was "clearly stronger" than the issue or issues counsel did present. [24]

FOOTNOTES

22 *See Watson v. State,* 1991 Del. LEXIS 305, 1991 WL 181468, at *2 (Del. Aug. 22, 1991) (citing *Jones v. Barnes,* 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)). A meritorious ground for appeal, as opposed to a frivolous claim, is one which contains legal points which are arguable on their merits. *See Walls v. State,* 2005 WL 4536483, at *1 (Del. Super. Ct. Dec. 29, 2005) (quoting *Penson v. Ohio,* 488 U.S. 75, 84, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988)). Because the applicability of the present sense impression and excited utterance hearsay exceptions is often a close and highly fact-specific question, the Court will assume for the sake of argument that the omitted claim in this case was meritorious.

23 *See, e.g., Jones,* 463 U.S. at 751-53 (detailing "the importance of winnowing out weaker arguments on appeal **[*10]** and focusing on one central issue . . . or at most on a few key issues" as a crucial appellate advocacy strategy); *State v. Watson,* 2007 WL 2029302, at *3 (Del. Super. Ct. June 28, 2007) ("Grounds for appeal are left to the discretion of counsel who should determine which grounds will likely prevail."); *Nave,* 1998 WL 442932, at *2 ("[C]ounsel is expected to weed through any non-frivolous issues arguably presented by the record and confine the appeal to presenting those issues, which in his or her professional judgment, appear to be the strongest.").

24 *See Fink v. State,* 2006 WL 659302, at *2 (Del. Mar. 14, 2006). This "clearly stronger" standard derives from a three-factor test developed in the Seventh Circuit to determine the objective reasonability of failure to raise a meritorious claim on appeal. HN7 The full test considers (1) whether the issue not presented was significant and obvious; (2) whether the omitted issue was clearly stronger than the issues which were presented; and (3) whether the decision not to include the omitted issue lacked an articulable strategic purpose. *Gray v. Greer,* 800 F.2d 644, 646 (7th Cir. 1986). The first prong of *Strickland* is satisfied if the defendant **[*11]** establishes that all three factors can be answered in the affirmative. *Id.* at 646-47; *see also MacDonald,* 2007 WL 1378332, at *5. The Delaware Supreme Court has held that a defendant failing the second factor cannot establish that the representation was objectively unreasonable, noting that the United States Supreme Court has cited the Seventh Circuit test with approval as to only the second factor. *Fink,* 2006 WL 6509302, at *2 (citing *Smith v. Robbins,* 528 U.S. 259, 288, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000)). The Delaware Supreme Court has neither rejected nor adopted the full three-factor test. *See id.* Subsequently, this Court has applied all three factors in analyzing an ineffective assistance claim based upon failure to raise issues on appeal. *See MacDonald,* 2007 WL 1378332, at *5-6. Because Washington's claim fails the second factor, the Court need not analyze the remaining two factors in this case.

10. Assuming *arguendo* that the admissibility of Seals's statements to police constituted a meritorious ground for appeal, Washington's claim fails the *Strickland* test because the omitted issue is not clearly stronger than the ground raised on appeal. On appeal, Washington's counsel argued that the second count of **[*12]** Robbery First Degree and the second count of Possession of a Firearm During the Commission of a Felony constituted multiple charges for the same offense and were therefore multiplicitous and in violation of the Federal and Delaware Constitutions' double jeopardy clauses. 25 Although Washington's appeal was unsuccessful, it presented an argument which was much stronger than the omitted hearsay claim. Appellate counsel exercised reasonable professional judgment in deciding, as his affidavit stated, that the hearsay argument "was ultimately []a loser and would detract from the stronger argument counsel advanced." 26 Therefore, appellate counsel's representation was not objectively unreasonable and Washington's ineffective assistance of appellate counsel claim must be denied.

FOOTNOTES

25 *See Washington,* 836 A.2d at 487.

26 *See* Docket 59.

B. Failure to Object to Use of the Word "Victim"

11. Applying the procedural bars of Rule 61, Washington's two claims for ineffective assistance of trial counsel are not procedurally barred. Washington's motion was timely filed. The procedural bars of Rule 61(i)(1), (2), and (3) will not apply to a colorable claim of ineffective assistance of counsel. HN8 An ineffective **[*13]** assistance of counsel claim cannot be raised for the first time on direct appeal, [27] and neither of the grounds have been formerly adjudicated in any other proceeding. Because neither ground is procedurally barred, the Court will address the merits of Washington's ineffective assistance of trial counsel claims.

FOOTNOTES

27 *See, e.g., Duross v. State,* 494 A.2d 1265, 1267-69 (Del. 1985).

12. In the first of his claims for ineffective assistance of trial counsel, Washington alleges that defense counsel was ineffective for failing to object when the prosecutor and chief investigative officer repeatedly referred to Miller as a "victim" throughout the trial. Because Washington testified that he was not at Seals's residence and did not see Miller on the night of the crime, he argues that by referring to Miller as a "victim" in its case in chief, the prosecution deprived Washington of the presumption of innocence and unconstitutionally relieved the State of the burden of proving its case beyond a reasonable doubt. [28] Washington relies on *State v. Jackson* [29] for the proposition that "the word 'victim' should not be used in a case where the commission of a crime is in dispute." [30]

FOOTNOTES

28 *See* Docket 56.

29 600 A.2d 21 (Del. 1991).

30 *Id.* at 24.

13. **[*14]** Washington's argument that trial counsel should have objected to the prosecution's use of the word "victim" misconstrues *Jackson.* In *Jackson,* the defendant, who was convicted of several crimes including Unlawful Sexual Intercourse in the first degree, had presented consent as his only defense at trial. The Delaware Supreme Court found the prosecution's use of the word "victim" to refer to the complaining witness was inappropriate, although not plain error, because "commission of a crime [was] in dispute." [31] Upon a motion by the State for clarification, the Court explained that it did not seek to establish a "ban" on the word "victim," and that its holding went only to "a narrow range of cases" in which "consent [is] the *sole* defense, and the principle issue one of credibility." [32] Subsequently, the Delaware Supreme Court has made clear that HN9 this "narrow range of cases" does not include all cases in which the commission of a crime is in dispute. Rather, the use of the term "victim" to describe a complainant is only objectionable where commission of a crime is in dispute because consent is the sole defense. [33]

FOOTNOTES

31 *Id.*

32 *Id.* at 25 **[*15]** (denial of motion for rehearing en banc) (emphasis added).

33 *See Mason v. State,* 1997 WL 90780, at *2 (Del. Feb. 25, 1997) ("Reference to a complainant as a 'victim' is not objectionable in all cases where the commission of a crime is disputed; it is only objectionable in those cases where consent is the sole defense."); *State v. Pandiscio,* 1995 WL 339028, at *5 (Del. Super. Ct. May 17, 1995) (holding that use of the term "victim" was not objectionable where consent was not a defense), *aff'd* 1995 WL 715627 (Del. Oct. 25, 1995).

14. *Jackson* is inapposite to this case, which does not involve any consent defense. At trial, Washington testified that he arrived at Seals's house around 11:30 P.M. on April 18, 2001, after Miller reported the robbery to police and officers interviewed Seals at her residence. [34] Washington further stated that he had not seen Miller that night. [35] Washington's alibi defense obviously was incompatible with any theory of consent. Furthermore, his testimony, if found credible by the jury, could have been consistent with either non-existence of the crime or mistaken identification. Unlike in *Jackson,* presuming that the complaining witness in this case was a "victim" **[*16]** did not give rise to a corollary presumption that the defendant was a perpetrator.

FOOTNOTES

34 *See* Docket 42, p. 43-44; Docket 44, p. 25-26.

35 *See* Docket 44, p. 18.

15. Because Washington did not present a consent defense, the use of the term "victim" by the prosecution and witnesses in this case was not objectionable. Washington's trial counsel was not objectively unreasonable in failing to raise an objection to the use of the word. Therefore, Washington's first ground for ineffective assistance of trial counsel must fail. [36]

FOOTNOTES

36 Although Washington failed to prepare the argument as a separate ground, his motion suggests that appellate counsel was ineffective in failing to raise the use of the term "victim" to refer to Miller on direct appeal. Even assuming that the use of the term "victim" at trial could constitute a meritorious ground for appeal, Washington cannot demonstrate that appellate counsel's representation was objectively unreasonable because this ground is not "clearly stronger" than the argument appellate counsel did present, particularly in light of the clear case law establishing that references to a complainant as a "victim" **[*17]** are only objectionable when consent is the sole defense.

C. Failure to Object to Officer's Testimony

16. Washington's second ineffective assistance of trial counsel argument must also fail. Washington claims his trial counsel was ineffective in failing to object to testimony by the chief investigative officer that Seals was "scared" when giving her statement to police and when leaving the room after seeing Washington brandish a gun. The chief investigating officer did not merely state that Seals was scared when speaking to him, but also clarified that he was testifying as to his assessment of her at the time and provided a detailed explanation of the behavior and body language which led him to describe her as scared. [37] Washington makes the conclusory assertion that trial counsel was ineffective "by failing to object to the officer's subjective interpretation of Seals' body language to conclude that she was afraid" without clearly stating why he believes an objection was tenable. [38] In an affidavit filed at the Court's request, trial counsel asserted that he did "not believe the officer's testimony was objectionable." [39]

FOOTNOTES

37 Washington claims the following portion of the officer's testimony **[*18]** was objectionable:

> Q: Can you describe [Seals's] demeanor to the jury? And by demeanor, I mean how she was acting, how she was talking, what her body language was.
>
> A: She was scared.
>
> Q: How do you know she was scared?
>
> A: She was hunched like a ball. She hunched up. She wouldn't make eye contact. She kept looking down and she spoke to me very softly like she was really upset. I think more or less afraid of what had happened.
>
> Q: Was she shaking?
>
> A: She was just -- her body language was not communicative. Usually when we talk to most people they stand up straight and talk to you eye to eye even about something that happened regardless of how bad it is unless they're afraid or hiding something. She seemed to me she was afraid.

See Docket 42, p. 102-03. Washington also argues that the officer's testimony that Seals was "afraid" when she saw Washington hold Miller at gunpoint was objectionable. *See* Docket 42, p. 103; Docket 56.

38 *See* Docket 56.

39 *See* Docket 59.

17. *HN10*↑Delaware Rule of Evidence 701 ("Rule 701") permits lay testimony in the form of opinions or inferences if the opinions or inferences are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of **[*19]** the witness' testimony or the determination of a fact in issue and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702." [40] Rule 701, like its federal counterpart, permits a lay witness to testify as to his own impressions when they are based on personal observation and "form a collection of facts that can most effectively be communicated in the 'shorthand' version of an opinion." [41] Subject to the limitations of lay opinion evidentiary rules, a lay witness generally may give his opinion as to the mental state of another in connection with the facts on which that opinion is based and may testify as to personal observations of the person whose mental condition is in question. [42]

FOOTNOTES

40 D.R.E. 701.

41 BARBARA E. BERGMAN & NANCY HOLLANDER, 3 WHARTON'S CRIMINAL EVIDENCE § 12.2 (15th Ed. 2006) ("Testimony in the form of opinion as to . . . mental state . . . fall[s] within this 'collective facts' exception.").

42 *See* 31A AM. JUR. 2D *Expert and Opinion Evidence* § 145.

18. The chief investigative officer's testimony that Seals was scared at the time she spoke to him was lay opinion testimony admissible under Rule 701. The officer testified as to the personal

[*20] observations which provided the foundation for his statement. His testimony was rationally based on his perception of Seals, as it entailed drawing reasonable inferences from her tone, body language, and behavior. The officer's description of Seals as scared aided the jury's understanding of his testimony by summarizing and clarifying his observations of her demeanor. His assessment of her state of fear did not require any scientific, technical, or other specialized skill or knowledge. The officer's use of the words "scared" and "afraid" in connection with his personal observation of Seals is precisely the type of "shorthand" Rule 701 is intended to admit for the benefit of juries.

19. The testimony as to Seals's state of fear upon seeing Washington point a gun at Miller appears to be based upon Seals's hearsay statements to the officer, which the Court ruled admissible under the present sense impression and/or excited utterance exceptions. [43]

FOOTNOTES

[43] *See supra* A.8.

20. Because there was no basis for trial counsel to object to the officer's testimony, Washington cannot demonstrate that the representation fell below an objective standard of reasonability, as required by the first prong of the **[*21]** *Strickland* test. Washington also has not established that trial counsel's failure to object resulted in prejudice, as failure to raise a groundless objection cannot affect the outcome of a case.

21. Moreover, even had the officer's testimony been excluded, the excised testimony would not have affected the outcome. Washington correctly notes that the officer's assessment of Seals as "scared" at the time she spoke to him may have supported the admissibility of her statements under the excited utterance rule. [44] Washington does not demonstrate, however, that the outcome of the case would have been different absent the admission of Seals's hearsay statements or the officer's descriptions of Seals as "scared" and "afraid." Washington claims that Seals's hearsay statements, to the extent that they coincide with Miller's recounting of the facts, tend to "bolster" Miller's credibility and damage Washington's. Whatever corroborative effect the officer's testimony as to Seals's mental state and hearsay statements may have had does not equate with prejudice. Seals's statements to the officer identified Washington and described him pulling out a gun. Seals lacked personal knowledge of the full **[*22]** sequence of events which included the robbery, and her hearsay statements did not purport to recount those events. Miller gave testimony at trial detailing Washington's actions which a rational jury could have found credible in establishing Washington's guilt independent of the officer's testimony as to Seals's hearsay statements or her mental and emotional condition during and after the crime.

FOOTNOTES

[44] *See* Docket 56.

22. Because the officer's testimony as to Seals's fear after seeing Washington pull out a gun and while speaking with police was not objectionable, trial counsel did not provide ineffective assistance in failing to object. Washington's second claim of ineffective assistance of trial counsel therefore fails.

23. Based on the foregoing, Washington's Motion for Postconviction Relief is **SUMMARILY DISMISSED in part and DENIED in part.**

IT IS SO ORDERED.

Peggy L. Ableman, Judge

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