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Case Number Multi-Case

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

The Appellant, James E. Cooke ("Cooke"), was arrested on June 8, 2005 and subsequently charged, by indictment, with Murder First Degree (2 counts – intentional and felony-murder), Rape First Degree, Burglary First Degree, Arson First Degree, Reckless Endangering First Degree, Burglary Second Degree (2 counts), Robbery Second Degree and Theft – misdemeanor (2 counts) (A1,2 at DI 1, 3) .

For his first trial Cooke was represented by attorneys from the Public Defender's Office. Jury selection started on January 23, 2007, (A24 at DI 158), and trial began on February 2, 2007. (A28 at DI 203). On March 8, 2007, the jury found Cooke guilty of all charges. (A28 at DI 203). After a penalty hearing, the jury recommended death. (A30 at DI 225). Superior Court sentenced Cooke to death on June 6, 2007. (A31 at DI 230).

After Cooke's counsel filed a notice of appeal and motion to withdraw, Superior Court appointed conflict counsel. (DI 4, 9, Case No. 324, 2007). On August 17, 2009, this Court reversed and remanded the case back to Superior Court for a new trial.[1] A February 2011 trial date was scheduled. (A41 at DI 301).

In December, 2010, unable to work with Cooke, his counsel filed a motion to withdraw. Superior Court heard the motion on December 8, 2010. (A45 at DI

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

333). Superior Court granted counsel's motion to withdraw and, over the State's objection, trial was rescheduled. (A46 at DI 336). Due to a Supreme Court rule change, a new trial judge was appointed on February 24, 2011. (A47 at DI 340).

On March 7, 2011, new counsel was appointed. (A47 at DI 341). On July 26, 2011, Superior Court formally set jury selection for February 20, 2012. (A50 at DI 362). Based upon a number of defense representation issues centering, Superior Court scheduled a hearing on November 30, 2011. (A51 at DI 369). At the hearing, Cooke requested to represent himself. Prior to granting his request, the court conducted a colloquy where Cooke acknowledged a continuance of the trial date would not be granted. (A108). The court granted Cooke the right to represent himself but appointed current counsel as stand-by counsel. (A109).

Jury selection began on February 20, 2012 and trial on March 7, 2012. Due to his behavior, Superior Court termination Cooke's right to self-representation on March 9, 2012. (A65 at DI 435; A158, 217a; B148). On April 13, 2012 the jury returned a verdict of guilty on all but one misdemeanor theft charge. (A65 at DI 435). On May 3, 2012, after a penalty hearing, the jury returned a verdict recommending death by a vote of 10-2 as to intentional murder and 11-1 as to felony murder. (A67 at DI 442). Cooke filed a motion for a new trial which was denied. (A68 at DI 447; 453).

Cooke appealed. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. DENIED. The Superior Court did not abuse its discretion by refusing to grant a mistrial and thereafter a new trial based upon a juror's late disclosure that she was, at the time of jury service, a subpoenaed witness to a misdemeanor domestic family incident. Cooke cannot show that the juror failed to honestly answer a material question on *voir dire,* and he cannot show that a correct response would have provided a valid basis for a challenge for cause and thus, his claim fails.

II. DENIED. The jury was not tainted by the comments of a potential juror who was not seated. The trial judge's thorough inquiry into inappropriate comments made by the potential juror revealed that the remaining pool of jurors was not tainted. There was, therefore, no basis for the Superior Court to declare a mistrial.

III. DENIED. The trial judge properly dismissed juror number ten. It is within the sound discretion of the trial judge to dismiss a juror for misconduct. Juror ten's behavior during the proceedings and her conflict with a member of the court staff provided the trial judge with the appropriate basis to excuse her.

IV. DENIED. Department of Correction (DOC) procedures did not unconstitutionally infringe on Cooke's right to counsel under the Sixth Amendment. Cooke's initial limited access to counsel was caused by his own

behavioral problems in prison and he objected to a transfer of location closer to counsel that would facilitate access. The court, with the assistance of DOC, actively worked to accommodate Cooke while "preserving society's interest in the administration of criminal justice."

V. DENIED. Cooke was not unconstitutionally denied the right to represent himself. The Superior Court properly denied all of Cooke's requests for continuances, properly appointed stand-by counsel, and properly revoked Cooke's right to self-representation based upon his repeated obstreperous behavior. Cooke's claim that his misbehavior that led to the court's termination of his right of self-representation was the fault of the court and the State is meritless.

VI. DENIED. 11 *Del. C.* §§ 3508 and 3509 prohibited the admission of evidence of Lindsey Bonistall's sexual conduct with individuals other than the defendant. Cooke attempted to have such evidence admitted to bolster his claim that he had consensual sex with Bonistall. The trial judge correctly determined that the evidence proffered by Cooke regarding the sexual conduct of Bonistall was not relevant.

VII. DENIED. The trial judge properly permitted Detective Rubin to testify that the voice on three 911 recordings introduced at trial was that of James Cooke. A lay witness is permitted to make a voice identification when the witness has heard

the voice at any time under circumstances connecting it with the alleged speaker pursuant to D.R.E. 901(b)(5).

VIII. DENIED. The Superior Court did not violate Cooke's constitutional rights by ordering his counsel to present a mitigation case in the penalty phase. On the first day of the defense's case, Cooke advised his counsel that he agreed with a majority of their presentation in mitigation. Cooke both testified and gave an allocution in mitigation. Superior Court did not violate Cooke's constitutional rights, because in the end, Cooke did not a waive mitigation case and defense counsel presented evidence in accordance with Cooke's wishes.

IX. DENIED. Cooke's death sentence is not disproportionate. The Superior Court correctly determined that the evidence supported the jury's finding of an aggravating circumstance beyond a reasonable doubt. The sentence was not arbitrarily or capriciously imposed or recommended. The Superior Court's sentence falls in line with Delaware death sentence precedent.

STATEMENT OF FACTS

At the time James Cooke raped and murdered Lindsey Bonistall on May 1, 2005, she was a 20 year-old sophomore at the University of Delaware living at the Towne Court Apartments. That night, Bonistall's best friend and roommate, Christine Bush, was out of town. (B217-218). After having completed her shift at the Home Grown Café on April 30, Bonistall met up with some friends at the dorms and watched Saturday Night Live. Bonistall left the dorms at approximately 1:00 a.m. on May 1, 2005, to go home. This was the last time she was seen alive by anyone other than her murderer. (B219-222).

Prior to Bonistall's murder, on the morning of April 25, 2005, Cheryl Harmon, who also lived at Towne Court Apartments, went to work and then out with a friend. (A527). When Harmon got home after 1:00 a.m. on April 26, she smelled fingernail polish as she opened her apartment door. (A527). Although the electricity was off in her apartment, from the light in the hallway, she could see the words "we'll be back" written on the living room wall in red fingernail polish. (A527-528). Harmon called 911. After the police arrived, they found other writing in fingernail polish on the walls stating, "I WHAT [sic] My drug Money" and "DON'T Mess With My Men." (A528-529). Harmon also discovered she was missing several DVDs and two personalized rings. (B229). Police determined that

the point of entry was a sliding living-room window with a pried-off lock. (B230-231).

On April 29, 2005, Amalia Cuadra, her roommate, Carolina Blanco, and friends went to the movies and a local bar. Cuadra rode her bike home at 209 West Park Place, Newark, Delaware. (A291-292, 295-296). During the night, Cuadra woke up because someone was shining a flashlight in her face. Cuadra, at first thought it was her roommate and called out her name. (A297). The intruder was Cooke, who responded, "shut the fuck up or I'll kill you," and "I know you have money. Give me your fucking money." Cuadra, wearing only a t-shirt and underwear, wrapped a blanket around herself and walked to her desk to get her wallet. (B236-237).

Cuadra also grabbed her cell phone. (B239). She gave Cooke approximately $45.00 in cash when he said, "Give me your fucking credit cards or I'll kill you." Cuadra gave him an American Express card and a VISA card. (B238-239). She then dialed "911" on her cell phone, but did not hit send. (B240). Cooke demanded of Cuadra, "take off your fucking clothes or I'll kill you." Cuadra screamed for her roommate. Cooke attempted to take Cuadra's cell phone, but upon seeing the 911 on the screen, fled. (B242-243). Before fleeing, he took Cuadra's blue-grey Jansport backpack from the dining room, which had a tag with her name and contained diet pills in a silver container and an iPod.

(B245-248).

Cooke lived with his girlfriend and mother of four of his children, Rochelle Campbell, at 9 Lincoln Drive, Newark, DE. Campbell saw Cooke with the backpack and its contents when he returned home in the early morning hours of April 30. (B265-266). Cooke told her he got the backpack from some college kids who had gotten into a car accident and had left it just outside their house. (B267). Cooke showed Campbell the credit cards and told her he was going to try to use them at a nearby ATM. Campbell warned against it but Cooke left to use the cards anyway, attempting to use Cuadra's VISA card at the Wilmington Trust ATM located at 211 Elkton Road at 4:19 a.m. on April 30, 2005. (B249-251, 267, 270). Because Cuadra had cancelled the card, Cooke was unable to get money from the machine. He returned home without the backpack or the credit cards. (B267).

In the early morning hours of May 1, Cooke burglarized Bonistall's Towne Court apartment. He hoisted himself onto Bonistall's balcony and gained entrance into the living room through the patio sliding door. (B215-216). Cooke encountered Bonistall, attacking her in her bedroom. While she was still alive, Cooke beat Bonistall, striking her hard at least twice above her left eye and on her chin. (B164-166). Using an iron cord from her apartment, Cooke bound Bonistall's hands. (B208). Using some of her own t-shirts, Cooke further bound her. One t-shirt was knotted and shoved forcibly in Bonistall's mouth as a gag.

(B154, 168-170). Bonistall suffered severe bruising on her chest, consistent with someone kneeling on her prior to her death. (B172-173). Cooke raped Bonistall and ultimately strangled her to death, using another t-shirt, which he had tied and knotted like a ligature around her neck. (A204; B168-170).

In an attempt to eliminate evidence of his crime, Cooke took a bottle of bleach from the closet and doused Bonistall's body in her bed. (B160, 210-211). To further cover up his crimes, Cooke dragged Bonistall's lifeless, but still bound, body to her bathtub and dumped her body there. (B171). Cooke collected kindling items, such as a wicker waste basket, a pillow, and Bonistall's guitar; piled them atop her body; and lit it all on fire. (A539).

At some point while he was in the apartment, but before the fire, Cooke wrote on the walls and countertops of the apartment. (B279). On the interior surface of the apartment's front door, on two countertop locations, and on a closet door he scrawled, "KKK." On a wall in the living room he wrote, "More Bodies Are going to be turn in [sic] up Dead." Again, in the living room he wrote, "We Want Are [sic] weed back" and "Give us Are [sic] drugs back." In the kitchen sitting area he wrote, "WHITE Power." (B205-207).

Bonistall's body was discovered late on the morning of May 1, 2005, by the Fire Marshall investigating the scene. (B280). Bonistall was found face down in her melted, burnt bathtub. Because of the fire, her hair was fused to the melted

plastic of the bathtub, which had collapsed around her and numerous portions of her body were charred and burnt. (B155-156). Bonistall was fully clothed, but her clothes were riddled with bleach stains and partially burnt away from her body. Her shirts and bra were pushed above her chest. She was still bound and gagged. (B158-162). An autopsy determined the cause of death to be strangulation. (A204).

The 911 calls started on May 2, 2005. An "anonymous" person, attempting to disguise his voice, made at least three calls to the Newark Police 911 call center following the murder. Campbell later listened to the tapes and was 100% certain that the voice on all of the 911 calls was Cooke. (A325-327). In the first of these calls, at 5:42 p.m. on May 2, Cooke said that the Harmon, Cuadra and Bonistall crimes were all related. His statements constituted the first information the police had connecting the crimes. (B256-257). Next, Cooke identified himself as "John Warren" in two 911 calls received by the Newark Police Department on May 7, 2005, at 10:44 a.m., and 3:43 p.m. (B264). In the calls, Cooke admitted the specifics of the Harmon and Cuadra burglaries as well as Bonistall's murder, including names, items stolen, and words written on the walls. Much of what Cooke relayed to the police was not previously released to the public. (B257). Cheryl Harmon's apartment, Amalia Cuadra's house, and Lindsey Bonistall's apartment were all within 1,700 feet of Cooke's residence on Lincoln Drive. All

of them were easily visible from his back door. (B282-283).

Newark Police obtained surveillance video from the Wilmington Trust ATM that showed someone attempting use Cuadra's stolen credit card. (B252). The police released the captured images in a press conference and on wanted posters throughout Newark. (B252). Campbell, Cooke's co-workers from Payless Shoes, and a woman who knew Cooke from nearby Dickey Park, all identified Cooke as the person in the posters. Cooke was recognized by the distinctive way he stood on his "tippie toes," the type of gloves he was wearing and the manner his hair stuck out from the hoodie. (B253-255, 261, 263, 268-269).

While working for Payless, Cooke wore gloves which contained small grips on the inside of the hand in a dotted pattern. (B262). The same dotted grip pattern was found on the balcony railing outside Lindsey Bonistall's apartment, on a CD cover in her living room, and on the sheets on her bed. (B209, 212-213). Cooke fled Newark following the murder. (B269). During this time he stayed in different places, including Atlantic City, New Jersey, where he committed four other, similar home invasions. (B269, 297-304).

Investigators performed a handwriting analysis of the writing on the walls in both Bonistall's and Harmon's apartments and determined that Cooke could have been the writer in both. (A285). Forensic analysis of hair revealed that one of Bonistall's hairs was found on a hoodie which was retrieved from Cooke's sister's

house where he was apprehended. (B275). Analysis on scrapings recovered from Bonistall's fingernails revealed a mixture of Bonistall's and Cooke's DNA. Analysis of DNA recovered from Bonistall's vaginal area was also consistent with Cooke's DNA profile. (B284).

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO GRANT A MISTRIAL AND THEREAFTER A NEW TRIAL BECAUSE OF ALLEGED JUROR MISCONDUCT.

Question Presented

Whether a juror, who belatedly realized that she inaccurately answered *voir dire* questions, was nevertheless able to render an impartial verdict in the guilt and penalty phases of Cooke's trial.

Standard and Scope of Review

This Court reviews a Superior Court's denial of a motion for mistrial and a motion for new trial for an abuse of discretion.[2] A trial judge's determination that a juror can fairly and objectively render a verdict is reviewed on appeal for an abuse of discretion.[3]

Merits of the Argument

a. Factual Background

On February 22, 2012, Juror #3, a Hispanic female, responded for individual *voir dire* questioning. On a scale of one to ten, she advised she was a seven in favor of the death penalty. (A128). When asked if she, a relative or a close friend

[2] *Burroughs v. State*, 998 A.2d 445, 448-49 (Del. 2010), (citing *Taylor v. State*, 685 A.2d 349, 350 (Del. 1996)).
[3] *Knox v. State*, 29 A.3d 217, 220 (Del. 2011).

had ever been a witness or victim of a violent crime, Juror #3 advised that her two nephews were murdered ten years ago and that the perpetrators were tried and sentenced to life in prison. (A129). When asked if she, a relative, or close friend was under investigation, being prosecuted or had ever been charged with or convicted of a crime, she responded no. (A129). Juror #3 further advised that she had been a juror twice before in Philadelphia, serving on both a robbery trial and an attempted murder trial. (A129). Both times, the jury on which she served returned guilty verdicts. (A129). Cooke did not ask for any follow up of Juror #3 as to any of the questions. The juror was thereafter seated. (A130). Juror #3 was part of the panel that convicted Cooke on April 13, 2012.

On April 26, 2012, the sixth day of the penalty phase, the court advised counsel that Juror #3 had approached the bailiff and told him that she had been summoned as a witness in a Family Court hearing involving her husband on May 7, 2012. (A420). Having previously been unaware of this information, that same afternoon, the court briefly questioned Juror #3 in front of counsel. (A421). Juror #3 advised that her husband had charges pending from a fight with her adult daughter. (A421). The following day, the court conducted more in depth questioning of Juror #3. She advised that in December of 2011, her daughter and husband had an argument. (A424). Her daughter became aggressive and pulled a knife on her husband. (A424-425). The juror took her grandchildren and left the

room, but returned when her husband called for her. (A425). The juror saw that her husband had her daughter by the neck and was holding her down. (A425). He told his wife to tell the daughter to calm down and then released her. (A425). The daughter then called the police to report that "he tried to kill her." (A425). Juror #3's husband informed her that after she had left the room, the daughter had hit him with a frying pan and to avoid further assault, he grabbed her. (A425).

Although Juror #3 acknowledged that her husband had been arrested, she advised that at the time of jury selection, her daughter had told her she had dropped the charges and, in her mind, her daughter had made a false claim against her husband, therefore she responded "no" when asked if she had any family member who was under investigation or had been charged with a criminal offense. (A425-426, 431). Juror #3 advised that on the day she was sequestered, April 11, she realized her husband had a court date for a reduced set of charges stemming from the December incident. (A426-427). She called her daughter, who said she had called the Attorney General's Office to drop the charges but was advised the case would be downgraded to Family Court. (A427). Juror #3, after having had no contact with anyone investigating the case, first realized she was part of the proceeding when she received her Family Court summons on April 25. (A431-432). When the court again asked her the *voir dire* question if she, a friend, or close relative had ever been a victim or a witness to a violent crime, Juror #3

restated that her nephews had been murdered but that that she had not thought about the situation with her daughter. (A427). By way of further explanation, she stated that her husband was not trying to kill her daughter, who suffers from post-partum depression, "[t]he way I saw it, he [was] just trying to stop her from hitting him with a frying pan." (A427). When directly asked if she considered hitting someone with a frying pan a violent act, Juror #3 answered that it is violence, but it was "a family thing, something bad that just happened one day and was not supposed to happen and hopefully won't happen again." (A431).

Moreover, on April 26 and April 27, the court asked Juror #3 if she was fair and impartial. On both dates she stated she was. (A421). Notably, on April 27, the following exchanges took place:

> Court: Did [this situation with your daughter] cause you to treat the State or the Defense any differently because of the problems you have with your daughter?
>
> Juror: Not at all.
>
> Court: Did these situations with your daughter impede or negatively affect your ability to be fair or impartial?
>
> Juror: Not at all.
>
> Court: When you voted, because it was a unanimous decision for a conviction in this case, was it based on anything other than the evidence presented.
>
> Juror: No
>
> Court: Let me ask it a different way. I want to make sure I'm really

> clear. Your daughter, when you walked back in or ran back in, was on the floor and your husband had her by the neck. This case it is alleged involves some strangulation. Did the fact that your daughter claimed to have been strangled or your husband had grabbed her by the throat, did that in any way affect your view of the evidence in this case?
>
> Juror: No, because he wasn't trying to strangle her. He was just trying to stop her. If he wanted to strangle her, why did he call me to the kitchen?
>
> Court: Was there anything about that incident with your daughter that even made it difficult for you in any way to participate as a juror in this case?
>
> Juror: No. (A428-429).

After Juror #3 returned to the jury room, the State advised the court that neither the trial prosecutors nor University of Delaware Police were involved with the charges pending against the juror's husband, and that the charges had been reduced by the Family Division of the Attorney General's Office from felony charges to five misdemeanor counts – offensive touching, menacing, and endangering the welfare of a child (3 counts). (A432-433). Cooke, through counsel, moved for a mistrial, claiming that the juror neglected to advise the court that she had witnessed a violent crime and, had they known of the issue, the defense would have challenged her for cause. (A433-434). The court was unconvinced that the defense would have challenged Juror #3 because she was Hispanic and because Cooke had repeatedly expressed a desire for a jury comprised of minorities. (A434).

Cooke, who was acting *pro se* throughout jury selection, exercised 11

challenges – all against white jurors - and was unable to survive two *Batson* challenges. (A435). The defense attempted to bolster their position that they would have struck Juror #3 by stating that they would have struck her based upon her contact with the Attorney General's Office. (A436). However, as Juror #3 advised the court, she did not have any contact with the Attorney General's Office until April 25 or April 26. (A426). Thus, at the time of jury selection, Juror #3 had not yet had contact with the Attorney General's Office, so Cooke's argument, fails. Moreover, defense counsel cannot adequately explain why Cooke had no questions for Juror #4, a black male, and allowed him to remain on the panel, when that juror answered that his niece's murder had been successfully prosecuted by the Attorney General's Office in 2002. (A435).

When Cooke was personally asked for his position, he at first stated, "if this young woman would have came in here and told the truth from the beginning, maybe I would have struck her and maybe I would not have struck her." (A439). Cooke then recalled the court forcing him to allow Juror #11, a white female, who had initially been seated over Cooke's objection,[4] to remain on the panel, although she had forgotten that her adult son, who did not live with her, had a DUI five years previously. (B96-102). Cooke stated that he most likely would have struck

[4] The State raised a challenge to Cooke's strike of Juror #11 under *Batson v. Kentucky*, 476 U.S. 79 (1986). Because Cooke could not provide a race-neutral reason for his strike, but rather lapsed into a diatribe, the juror was seated over his objection. See B70-74.

Juror #3 and then almost immediately declared that because her familial incident involved "strangulation" and a "young woman hit her husband with a pan" "I would have struck her. There would be no question about that one." (A439). Cooke requested a mistrial, accusing the State and the court of racism in jury selection. He then lapsed into a diatribe that necessitated his removal from the courtroom. (B315-318).

After considering Juror #3's assertions and the parties' arguments, the Superior Court found Juror #3 to be honest. Her answers during *voir dire*, although inaccurate, were made unintentionally and in good faith, and therefore, the court found that it would not have disqualified her for cause. (A438, 440). The Superior Court stated that Juror #3's misstatements in jury selection were not of "such a dimension that it would result in a fundamental injustice to the defendant." (A440). The defense's request for mistrial was denied.

The Superior Court turned to whether to allow Juror #3 to continue to sit in light of her present commitment as a witness in a pending criminal case. Inexplicably, the defense abandoned their quest to remove Juror #3 and stated, "Your Honor, if you find that she was fair enough to render a verdict of guilty, she's fair enough to sit on the penalty phase."[5] (A440). The State, however, expressed a concern that the circumstances of the juror had changed since the guilt

[5] Defense counsel stated that strategically, "we want to keep her only because we believe your original decision is incorrect and we have to stay the course." (A442).

phase verdict and, now, because she was a witness in what she thought was the unfair prosecution of her husband, she was likely biased against the State. (A440-442). Juror #3 advised she would remain fair and impartial towards both the State and defense and was allowed to remain part of the jury. (B319). On May 3, 2012, the jury recommended a sentence of death.

On May 21, 2012, Cooke, through counsel, filed a motion for a new trial, claiming that Juror #3's failure to answer the questions honestly was significant Cooke could not properly evaluate her as a juror, move to strike her for cause, or exercise a preemptory challenge. (A474, 494). Finding the juror's answers in *voir dire* to have not been intentionally dishonest, the Superior Court denied Cooke's motion for new trial. Cooke claims Superior Court's determination is clearly erroneous because Juror #3's explanations are "factually incoherent" and "implausible."

b. Legal Framework

"Both the Sixth Amendment to the United States Constitution and Article 1, § 7 of the Delaware Constitution guarantee a defendant in a criminal proceeding a right to a fair trial by an impartial jury."[6] *Voir dire* is the historic method used to identify bias in prospective jurors, and the right to challenge either for cause or peremptorily a juror is a primary safeguard to the right to trial by an impartial

[6] *Banther v. State*, 823 A.2d 467, 481 (Del. 2003); *see also Schwan v. State*, 65 A.3d 582, 587 (Del. 2013); *Knox*, 29 A.3d at 223-34.

jury.[7] A juror's deliberate non-disclosure of material information can, in certain circumstances, warrant a new trial.[8] However, in *Banther v. State*, this Court adopted the United States Supreme Court's reasoning in *McDonough Power Equipment, Inc. v. Greenwood*, that in order to be reversible error, the moving party must first "demonstrate that a juror failed to honestly answer a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause."[9]

In order to prevail, a movant must show that the juror gave *knowingly* false answers. That is, if the juror's answer was mistaken or inaccurate, but honestly so, a new trial is not warranted.[10] This high threshold simply recognizes:

> To invalidate the result of a [lengthy] trial because of a juror's mistaken, though honest, response to a question is to insist on something closer to perfection than our judicial system can be expected to give.[11]

c. Analysis

Under *McDonough*, Cooke's argument that the Superior Court abused its discretion in failing to grant a mistrial and thereafter a new trial based on Juror #3

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[7] *See Banther*, 823 A.2d at 481; *Jackson v. State*, 374 A.2d 1, 2 (Del. 1977).
[8] *Jackson*, 374 A.2d at 2.
[9] *Banther*, 823 A.2d at 48 adopting *McDonough*, 464 U.S. 548, 555-56 (1984).
[10] *New v. Darrell*, 409 F. App'x 281 (11th Cir. 2011).; *see also United States v. Hodge*, 321 F.3d 429, 441 (3d Cir. 2003) ("Generally, we will not invalidate a jury's verdict because of a juror's mistaken, though honest, response at *voir dire*); *United States v. Saya*, 247 F.3d 929, 936 (9th Cir. 2001); *United States v. Tucker*, 243 F.3d 499 (8th Cir. 2001); *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1259 (10th Cir. 1999).
[11] *McDonough*, 546 U.S. at 555.

actions fails. Juror #3's unprompted disclosure[12] of her husband and daughter's domestic situation, and her subsequent testimony regarding the surrounding circumstances, demonstrate that she did not provide *knowingly* false answers in *voir dire*. Superior Court presided over a full hearing wherein Juror #3 explained why she answered inaccurately. Superior Court made a credibility finding that Juror #3's answers, although "inaccurate," were "honest" and "made in good faith." A trial court's assessment of a juror's honesty during *voir dire* is generally entitled to "great deference."[13] There is no doubt that it is the "judge who is best situated to determine competency to serve impartially."[14] As such, a trial judge's determination that a juror can fairly and objectively render a verdict is reviewed for an abuse of discretion.[15]

In this particular case, the Superior Court judge questioned Juror #3 at length, in the presence of and with the input of counsel, asking appropriate and relevant questions, repeatedly asking the juror in varying fashions whether she was able to impartially and fairly decide the case. She assured the court of her unequivocal impartiality again and again. The Court did not abuse its discretion in

[12] Juror #3's unprompted disclosure strongly suggests a lack of intent to deceive the Court. *See Haney v. Poppell*, 62 F. App'x 846 (10th Cir. 2003).
[13] *Patton v. Yount*, 467 U.S. 1025, 1036-38 (1984); *Hughes v. State*, 490 A.2d 1034, 1043 (Del. 1985).
[14] *Hughes*, 490 A.2d at 1043.
[15] *Knox*, 29 A.3d at 220.

making its determination that Juror #3's answers were honest and she had been and would remain impartial.[16]

Moreover, this Court has never held that a juror who is a witness in an ongoing criminal prosecution should be excluded for cause from jury service in a criminal case. This Court decided in *Knox* that a victim in a pending criminal case may not concurrently serve as a juror in a criminal case because the juror's alignment with the prosecution in the case "can impact upon the victim's ability to serve as a juror in a contemporaneous proceeding."[17] The Court carefully noted that *Knox* presented a situation that "can be distinguished from cases where a juror was merely a potential witness for the prosecution."[18] Such is the case here. Nor is this case like *Banther*, where among other issues, the juror failed to disclose at any point throughout the case that she was the victim of a violent crime.[19] In this case, Juror #3 came forward on her own to advise the court that she was subpoenaed as a fact witness, not a victim, in a misdemeanor incident that she thought, at the time of *voir dire*, was not being pursued. There is no general rule requiring a trial judge to excuse a juror from service in a criminal case merely because he or she is a witness in a pending criminal case.[20] Consequently, as the

[16] *Id.* at 221.
[17] *Id*. at 222.
[18] *Id*.
[19] *Banther*, 823 A.2d at 481-84.
[20] *See Fact that Juror in a Criminal Case, or Juror's Relative or Friend, Has Previously Been the Victim of Criminal Incident as Ground for Disqualification*, 65 A.L.R. 4th 743 (1988).

Superior Court stated, had Juror #3 advised the court of her daughter's situation at the time of jury selection, he would not have found that as a basis to excuse her for cause.

Cooke's arguments that Juror #3's explanations are unbelievable amount to nothing more than a disagreement with the Superior Court's credibility determination. Cooke cannot show under *McDonough* that Juror #3 failed to honestly answer a material question on *voir dire,* nor can he show that a correct response would have provided a valid basis for a challenge for cause.[21] His claim is unavailing.

[21] *McDonough*, 464 U.S. at 555-56 (1984); *Banther*, 823 A.2d at 484. Any valid concern for bias would be held by the State, not Cooke, as the juror made clear that she thought her husband was unfairly being prosecuted by the State.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO GRANT A MISTRIAL BECAUSE THERE WAS NO BASIS TO FIND JUROR MISCONDUCT THAT TAINTED THE SEATED JURY.

Question Presented

Whether Cooke was entitled to a mistrial when, during a break in the *voir dire* process, one prospective juror allegedly discussed his opinion of the case in the presence of other prospective jurors.

Standard and Scope of Review

This Court reviews a trial court's denial of a request for a mistrial because of alleged juror misconduct for an abuse of discretion.[22] This Court reviews the trial court's "decisions on the 'mode and depth of investigative hearings into allegations of juror misconduct' and on the remedy for such misconduct for an abuse of discretion."[23]

Merits of the Argument

Cooke argues that the empanelled jury was tainted by an excused juror because of conversations he allegedly had with other potential jurors during the jury selection process.[24] As required under applicable law, Cooke has failed to

[22] *Durham v. State*, 867 A.2d 176, 177 (Del. 2005) (citing *Barriocanal v. Gibbs*, 697 A.2d 1169, 1171 (Del. 1997)).
[23] *Caldwell v. State*, 780 A.2d 1037, 1058 (Del. 2001) (quoting *Massey v. State*, 541 A.2d 1254, 1257 (Del. 1988)).
[24] *Op. Br.* at 46.

demonstrate actual prejudice in this instance, and he likewise is unable to show a reasonable probability of juror taint which would raise a presumption of prejudice.

"In the juror misconduct context, . . . a defendant is entitled to a new trial 'only if the error complained of resulted in actual prejudice or so infringed upon defendant's fundamental right to a fair trial as to raise a presumption of prejudice.'"[25] When a defendant can demonstrate a "reasonable probability of juror taint of an inherently prejudicial nature, a presumption of prejudice should arise that [a] defendant's right to a fair trial has been infringed."[26]

The moving party generally carries the burden of showing misconduct and proving that he was "identifiably prejudiced by the juror misconduct, unless the defendant can establish the existence of 'egregious circumstances,' - i.e., circumstances that, if true, would be deemed inherently prejudicial so as to raise a presumption of prejudice in favor of defendant."[27] Presumptively prejudicial conduct includes when jurors are made aware of information, not introduced at trial that relates to the facts of the case or the character of the defendant.[28] The trial judge "has broad discretion to determine the appropriate remedy for cases of alleged juror misconduct."[29] "Therefore, 'a trial judge should grant a mistrial only where there is a 'manifest necessity' or the 'ends of public justice would be

[25] *Durham*, 867 A.2d at 179 (quoting *Hughes v. State*, 490 A.2d at 1043).
[26] *Id.* at 179 (quoting *Massey*, 541 A.2d at 1257 (other citation omitted)).
[27] *Massey*, 541 A.2d at 1257 (citations omitted).
[28] *Miller v. State*, 2005 WL 1653713, at *2 (Del. July 12, 2005).
[29] *Id.* at *2 (citing *Lovett v. State*, 516 A.2d 455, 475 (Del. 1986)).

otherwise defeated.'" [30]

On February 29, 2012, the sixth day of jury selection, a Delaware attorney contacted the trial judge's chambers and indicated that an employee in his firm was contacted by her neighbor who had been excused from jury service in Cooke's case. (B83). The potential juror, Joan Reeder, told the employee that another potential juror on the panel had been speaking to other potential jurors about the case. (B93-94). As a result of this information, Superior Court asked Reeder to return to court to discuss the potential juror misconduct issue. (B84). When questioned, Reeder stated:

> REEDER: Yes. We were in the cafeteria and he spouted off and everybody at the table got up and left and went and sat at other chairs. And he was just – that's all, to me, he was doing was spouting off.
>
> COURT: When you say he was spouting off, what did he say?
>
> REEDER: He was saying how prejudiced he was and I'm going to tell the judge that since the guy is black and he did it anyway – and that's all I meant was spouting off. (A131).

William Wilson, who had been excused from jury service along with Reeder on February 21, 2012, was determined to be the potential juror whom Reeder heard making the above statements. (B52, 89). Cooke moved for a mistrial which was denied. (A138). At Cooke's request, the Superior Court requested that Wilson return to court to answer some questions regarding his conversations with other

[30] *Miller*, 2005 WL 1653713, at *2 (quoting *Steckel v. State*, 711 A.2d 5, 11 (Del. 1998) (other citations omitted)).

jurors. (A138-141). On March 1, 2012, the trial judge questioned Wilson. Wilson acknowledged that it was possible that he may have said something to other jurors about the case but could not recall any specifics. (A143-148). After hearing Wilson's testimony the trial judge indicated that his prior ruling on Cooke's motion for a mistrial would not change. (A152).

Cooke argues that Wilson's statements Reeder overhead "may have influenced potential jurors."[31] A claim of juror misconduct must focus on the jurors who were actually seated and not those excused.[32] Here, both Reeder and Wilson were excused. The misconduct Cooke complains of was not committed by a seated juror and therefore, simply does not rise to the level of being so egregious as to establish a presumption of prejudice under the facts. Because Cooke is unable to show facts that would lead to a presumption of prejudice, he must demonstrate actual prejudice to be granted relief. Here, however, Cooke has failed to demonstrate that Wilson's alleged statements prejudiced any juror who was empanelled and heard his case.

Cooke also claims that the trial judge did not fully inquire into the matter. Cooke's assertion lacks merit. The record reflects that the trial judge did, in fact, conduct a thorough inquiry into the possible juror misconduct. The trial judge

[31] *Op. Br.* at 47.
[32] *Ross v. Oklahoma*, 487 U.S. 81, 86 (1988).

identified both the prospective juror who heard the allegedly improper statements and the prospective juror who made the statements. The two prospective jurors were brought back to court for a hearing after they had already been excused from service.[33] At the hearing, the trial judge attempted to determine what Wilson said, what other potential jurors may have heard, and whether any jurors were prejudiced by Wilson's statements. Reeder indicated that she was not, in any way, influenced or prejudiced by Wilson's statements. Neither Reeder nor Wilson could able to identify any of the other jurors who were present when Wilson is alleged to have made the inappropriate comments. The trial judge's investigation was appropriately conducted. The trial judge did not abuse his discretion in determining that Cooke was not entitled to a mistrial due to possible misconduct of an excused juror.

[33] The trial judge also had Reeder's neighbor and the Delaware attorney who initially brought the matter to the court's attention testify at the hearing.

III. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DISMISSED JUROR #10 BASED UPON HER CONDUCT.

Question Presented

Whether the trial judge abused his discretion by dismissing a seated juror because of the juror's conduct.

Standard and Scope of Review

This Court reviews a trial judge's decision to excuse a juror for an abuse of discretion.[34]

Merits of the Argument

"Excusal of jurors has always been a decision committed to the sound discretion of the trial judge."[35] Here, Cooke argues that the trial judge abused his discretion by excusing Juror #10. While acknowledging that Juror #10's behavior was inappropriate, Cooke indirectly claims that Juror #10 was excused because of her views of the evidence presented. The record demonstrates that Juror #10 was properly removed because of her conduct.

Juror #10 consistently appeared late for court. (B258). The trial judge addressed her separately from the other jurors and advised that she was expected to

[34] *Dickens v. State*, 2008 WL 880162, *3 (Del. Apr. 2, 2008).
[35] *McGonigle v. State*, 1989 WL 154709 (Del. Dec. 4, 1989) (citing *Dumire v. State*, 278 A.2d 836, 838 (Del. 1971)). *See Johnson v. State*, 311 A.2d 873, 874 (Del. 1973) (stating "[t]he decision as to whether to excuse a juror is within the sound discretion of the Trial Court.")(citing *Howard v. State*, 303 A.2d 653 (Del. 1973)).

arrive on time. (A319). Additionally, the trial judge's attention was independently drawn to Juror #10 because of her courtroom behavior.[36] (A328-329). The trial judge expressed his concern stating:

> My concern is, obviously, you want to preserve the integrity of the jury process. I don't want a problem juror no matter who she's going for, whether it's for the defense or the prosecution. It just seems like there's something odd there. But right now . . . I'll watch a little bit more . . . And I'm going to continue to watch it. (A328).

Three days later, Juror #10 raised her voice and cursed at a bailiff because she thought he treated her unfairly when he did not allow her to take a smoke break.[37] (A340). On that same day, Juror #10 attempted to ask the chief investigating officer questions, in violation of court instructions, during the jury view of Newark locations.[38] (A340). Based on Juror #10's exhibited behavior, the State requested that she be removed from the jury. (A340). The trial judge questioned Juror #10 regarding the incident with the bailiff. Juror #10 acknowledged that she used profanity during an exchange with him. (A342-343). Defense counsel requested Juror #10 remain on the jury or, in the alternative, that the court declare a mistrial. (A343). The Superior Court excused Juror #10 and denied Cooke's motion for a mistrial stating that the combination of the juror's

[36] Spectators and court staff also noticed Juror #10 mumbling during sidebars and behaving somewhat oddly. B272.
[37] This behavior was witnessed by court staff. A340.
[38] Juror #10 was observed sleeping on the bus ride to and from Newark. A340. Additionally, she was observed talking to herself during the jury view. A340.

tardiness, her confrontation with the bailiff, and her inability to follow instructions from the court led to the decision to excuse her.[39] (A343).

A juror's conduct can form the basis for excusal, especially where such conduct causes the trial judge concern about the potential effect on the jury's deliberation process. Cooke's claim that the State was dissatisfied with Juror #10 because of her views on the evidence is not supported in the record. The record makes clear that Juror #10's conduct, not her views on the evidence, formed the basis for the trial judge to excuse her from service. That decision was squarely within the trial judge's discretion.

[39] The Superior Court also questioned each of the remaining jurors individually to determine whether Juror #10's behavior or her excusal would affect their ability to give a fair consideration to the issues in the case. Each of the remaining jurors indicated to the trial judge that they would be able to proceed unaffected by Juror #10's behavior and excusal. (A343-353).

IV. COOKE WAS NOT DENIED REPRESENTATION BY DEPARTMENT OF CORRECTION RULES AND PROCEDURE.

Question Presented

Whether Department of Correction (DOC) policy and procedure unconstitutionally infringed upon Cooke's right to counsel under the Sixth Amendment.

Standard and Scope of Review

Alleged violations of constitutional rights are reviewed *de novo*.[40]

Merits of the Argument

Cooke alleges that his access to counsel and legal materials while in prison awaiting trial was limited by the DOC rules regarding time, place and date of visitations. Cooke concedes that the State that the Superior Court took action with respect to providing Cooke with more frequent access to his attorneys. Nevertheless, Cooke complains that he lost faith in his attorneys because of his limited access to them and thus felt his only appropriate remedy was self-representation. Cooke's claim is self-serving and meritless.

In May 2010, the DOC housed Cooke in the disciplinary unit of Howard R. Young Correctional Institution (HRYCI).[41] (B291). On May 21, Cooke asked to

[40] *Bentley v. State*, 930 A.2d 866, 871 (Del. 2007).
[41] The disciplinary housing unit at HRYCI is a housing unit reserved for prisoners who present the most serious disciplinary problems. (B291).

speak to the warden about being moved to general population, but was informed that the warden was not available on that day, a Saturday. (B292). Soon thereafter, Cooke began to create a scene, kicking his door and screaming, "I am tired of you guys fucking around" and "I'm hood right now, there's going to be problems, I need to talk to the warden." (B292). The Quick Response Team (QRT) was called. Cooke was combative, but eventually was subdued. (B292-293). DOC administratively charged Cooke with disorderly behavior and failing to obey an order. He was found guilty. (B293).

On September 20, 2010, while housed in general population at HRYCI, Cooke and other inmates were weight-lifting 40-50 pounds of Cooke's legal mail that was wrapped in sheets and socks in violation of prison rules. Because the mail had been illegally transformed into weights, it was confiscated. (B287-290).

In December 2010, Cooke was housed in general population at HRYCI. At 8:00 a.m. on December 13, rather than respond to the front of his cell for head count, Cooke was found on his bunk masturbating. (B293a-293b). He was found guilty of sexual misconduct in violation of DOC rules. (B293b). Cooke told the hearing officer that he was only found guilty because the hearing officer's family was racist and because Cooke had filed a lawsuit. (B294).

On April 8, 2011, at a pretrial hearing, Cooke complained that he was unfairly being held in the Secured Housing Unit (SHU) of James T. Vaughn

Correctional Center (JTVCC). (B7). At that time, the Superior Court told Cooke that arrangements would be made to allow him adequate opportunity to consult with his counsel. (B7). Cooke's counsel at that point advised Superior Court that prior counsel had requested that Cooke be moved to HYRCI to facilitate contact with counsel.[42] (B8). However, Cooke had "problems" at HYRCI and requested to be returned to JTVCC, where Cooke found himself placed in SHU. (B8).

In August 2011, while in JTVCC-SHU, Cooke stood on his toilet and masturbated so as to be seen by a female correctional officer. (B305-307). DOC administratively charged him with indecent exposure, sexual misconduct and disrespect. He was found guilty of sexual misconduct and disrespect. (A415). Cooke's response was that the hearing officer was racist. (A415).

On November 10, 2011, the Superior Court granted defense counsels request transferring Cooke from JTVCC back to HYRCI as of November 28, 2011. Cooke's counsel agreed to the date and acknowledged efforts by the trial judge and DOC officials to facilitate access Despite the Superior Court's order, Cooke told the Superior Court he wished to remain at JTVCC. (A78). The Superior Court informed Cooke:

[42] This request had been made in March 2010 (DI 306, 307) and was granted on May 7, 2010 "because it is necessary to place Mr. Cooke in a position where counsel is more readily able to get to him without the restrictions imposed on counsel visits to the Vaughn Correctional Center." (DI 318).

> My first concern is are you afforded effective assistance of counsel and I've taken the steps to answer a complaint by two experienced counsel that they had difficulties, And I'm also going -- and I didn't want to do it administratively, I'm issuing an order that says this, this should apply to you, and this will happen. And I'll even include that whatever the normal housing situation is or rules or regulations, unless otherwise ordered. But I'm not going to make any special precautions that are any different than any other capital murder case defendant unless there's some good reason for it, which I haven't been presented up to this point in time. (A79).

Cooke responded to the Superior Court's assurances by stating he has been treated unfairly throughout the proceedings and by firing his attorneys. (A80). Specifically, Cooke said, "They fired because I don't want them," and "[You] not going to rule me. You rule them, you don't rule me. Ha, ha, that's it." (A80). What followed was the first of many outbursts that led to Cooke's removal from the Court. Cooke's counsel advised the Superior Court that despite the fact that moving Cooke to HYRCI facilitated contact with his attorneys, Cooke was angry because he wanted to be in general population at JTVCC and had the Superior Court ordered that, he "would have left here with a smile on his face." (A82-83).

On November 30, 2011, the Superior Court ruled that Cooke could proceed *pro se* and appointed stand-by counsel to assist him. The Superior Court remained concerned with Cooke's legal access and stated, "I have undertaken preliminarily to understand what the access to legal resources are, law library, at the various institutions." (A107). The Superior Court also viewed Cooke's living arrangements, as well as law library and his access thereto, with the warden.

(A109). On January 27, 2012, the judge informed the parties that he had toured the HYRCI law library and was advised of the procedures for obtaining materials. The trial judge also saw Cooke's accommodations: a single cell sufficient to spread out and review material. (A120-121). Although it was clear that Cooke would remain dissatisfied regardless of his arrangements and the Superior Court's efforts, the Superior Court found that Cooke was housed in such a way that he could conduct research and prepare for the retrial of a case he had already seen. (B29-30).

On December 14, 2011, while housed at HRYCI, Cooke asked for an extra slice of bread. (B295). Because all inmates are rationed the same amount of food, Cooke's request was denied. (B295-296). Cooke became upset and called the officer in charge of dispensing the food a "punk ass bitch" and a "pussy." Cooke was ordered to "lock in" to his cell to avoid further problems, but he refused. (B296). The QRT removed him from general population.

The right of a defendant to the assistance of counsel is fundamental to our system of justice.[43] Denying a criminal defendant the assistance of counsel "is a denial of due process of law, under both the federal and Delaware Constitution."[44] In cases involving interference with the assistance of counsel, courts follow "the

[43] *Gideon v. Wainwright*, 372 U.S. 335, 342, 344 (1963); *Bailey v. State*, 521 A.2d 1069, 1083 (Del. 1987).
[44] *Bailey*, 521 A.2d at 1083, (citing *Merritt v. State*, 219 A.2d 258 (Del. 1966)).

general rule that the remedy should be tailored to the injury suffered and should not unnecessarily infringe upon society's competing interest in the administration of criminal justice."[45]

In Cooke's case, at the first indication of problems, the Superior Court took steps to ensure that Cooke had reasonable access to his attorneys and other necessary materials. The trial judge even made a personal visit to Cooke's prison to ascertain his legal accommodations. Indeed, the Superior Court was cognizant throughout the trial of Cooke's need for and access to research materials and counsel. To the extent that Cooke now complains that the Superior Court's ameliorative steps, to the extent they were even needed, were insufficient, the blame, if any, belongs squarely with Cooke himself. He failed to avail himself of the multitude of opportunities and offers presented to him. The Superior Court made repeated attempts to accommodate Cooke while recognizing the "necessity of preserving society's interest in the administration of criminal justice."[46]

Cooke admits that the actions taken by the court in his case were appropriate but alleges that they took far too long after the damage was administered. Cooke claims that by the time the court acted, he had already lost faith in his appointed counsel. Cooke disregards that his initial limited access to counsel was cuased by his own behavior in prison – his unwillingness to abide by prison rules led to his

[45] *Bailey*, 521 A.2d at 1084.
[46] *Id.*

being housed, at times, in units where his access to counsel and other amenities, was restricted. Moreover, Cooke worked against his counsel from the very beginning, becoming angry with counsel for wanting to transfer him to a facility closer to them in order to assist communication and foster a relationship conducive to positive representation. Cooke's claim is unsupported by his very own actions.

V. COOKE WAS NOT UNCONSTITUTIONALLY DENIED THE RIGHT TO REPRESENT HIMSELF.[47]

Question Presented

Whether the Superior Court unconstitutionally denied Cooke the right to represent himself at trial.

Standard and Scope of Review

This Court reviews *de novo* the Superior Court's revocation of a defendant's constitutional right of self-representation.[48] This Court reviews the Superior Court's denial of a continuance request for an abuse of discretion.[49] Requests for continuances "are left to the discretion of a trial judge whose ruling will not be disturbed on appeal unless that ruling is clearly unreasonable or capricious."[50]

Merits of the Argument

Cooke claims the Superior Court should not have revoked his right to represent himself because his misbehavior that led the Court to terminate his right was the fault of the Court and the State. Further, Cooke asserts that the court thwarted his right to self-representation from the beginning by its appointment of stand-by counsel over his objection, the denial of his multiple continuance requests

[47] Because Claims V and VI as presented in Cooke's Opening Brief are interrelated, the State has addressed them jointly as Claim V.
[48] *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996); *Grace v. State*, 658 A.2d 1011, 1015 (Del. 1995).
[49] *See Weber v. State*, 971 A.2d 135, 157 (Del. 2009); *Riley v. State*, 496 A.2d 997 (Del. 1985).
[50] *Bailey*, 521 A.2d at 1088.

and by assisting the State in interfering with his conditions of confinement. Cooke is mistaken.

a. Case History

At Cooke's first trial, he was represented by attorneys from the Public Defender's office. During that time, Cooke exhibited bad behavior, initially towards his own counsel.[51] While it is apparent that much of Cooke's hostility was borne of his frustration that counsel pursued a defense to which Cooke adamantly disagreed, it is also clear that Cooke wanted to make other strategic decisions that are traditionally left to counsel. Cooke wanted to determine how to ask questions and how to argue evidentiary issues, and became argumentative with the Court when faced with the law against his position. Specifically, Cooke advised the Court that he was "concerned that his attorneys would not ask witnesses the questions he wanted his attorneys to ask," and "the State was lying and his attorneys would not contradict their lies."[52] After Cooke complained that only portions of various tapes were being played to jury, the Court advised him that was a strategic decision for his attorneys. Cooke's reply was: "[t]hat's their tactic, [t]hat's not my strategy."[53]

In his first trial, Cooke made accusations of lying and racism. When

[51] *See Cooke v. State*, 977 A.2d at 814. (Defense counsel was concerned that failure to address the disagreement prior to trial might result in "some kind of disastrous happening during trial," such as an outburst by Cooke.)
[52] *Id.* at 820.
[53] *Id.* at 821.

Amandra Cuadra testified about the burglary of her home, Cooke interrupted saying, "Oh, man, I don't care. Excuse me, man." Because of his outburst, the jury was removed.[54] The Superior Court asked Cooke whether he could control himself, Cooke's reply was that he understood that the judge was racist and biased.[55] Nevertheless, the court chanced that Cooke would act appropriately and resumed trial. Cooke's outbursts and non-compliance with court rules continued.[56] After the court advised him of the parameters for his testimony, Cooke took the stand and attacked his attorneys and spoke about the jurors, Bonistall, drugs, and other non-permissible topics. He was repeatedly reprimanded.[57]

On his first direct appeal, Cooke was represented by court-appointed conflict counsel. Cooke's conviction was reversed on July 21, 2009.[58] On March 10, 2010, the Superior Court held an office conference and set a retrial date of February 22, 2011. Subsequently, Cooke filed a civil suit against his attorneys and thus, his counsel was able to only have limited contact with him. (A44 at DI 327). On December 6, 2010, Cooke's counsel filed a motion to withdraw as counsel. (A45 at DI 329). A hearing on the motion was scheduled for December 8, 2010.

On December 8, Cooke informed the Court that he had fired his conflict counsel. (B1-2). Cooke claimed that they were "hiding evidence," "writing

[54] *Id.*
[55] *Id.* at 822.
[56] *Id.* at 823-30.
[57] *Id.* at 834-836.
[58] *Cooke*, 977 A.2d 803.

fraudulent motions," and putting his life in danger at HRYCI. (B2). Cooke told the Superior Court, "Listen, I need a whole new entire – whole new crew, period, meaning you're gone too," (B3) and told the court not to try and persuade him to go *pro se* because "this whole case will get overturned again," and "This would be the worst trial you've ever seen. The worst trial. You hear me? Worst." (B3). Instead of listening to the Superior Court's explanations and answering the court's questions, Cooke ranted that he knew lie detectors were admissible because he had "looked that up" (B3-4). He also accused the judge of racism and bias. (B4). The Superior Court nevertheless attempted to engage Cooke in necessary questioning. Cooke stated "No. I don't want to answer you. Period. Move to your next question. If you are going to repeat yourself, get a tape recorder and hear your own voice." (B5). Due to Cooke's behavior, the hearing was mostly unproductive. Notably, on more than one occasion, Cooke refused to answer the Superior Court's question: "If I appoint new counsel, will you work with them and cooperate with them?" (B6). The Superior Court informed Cooke:

> If I decide to appoint new counsel to replace Ms. Aaronsen and Mr. Collins and you are unable to work with those new attorneys for one reason or another, either because they form the opinion that you need a mitigation case and need to prepare in advance or they don't do everything exactly as you want or you sue them or something else like that, under the United States Constitution and the Delaware Constitution you may have surrendered, forfeited, your right to be represented by counsel. (B5a-5b).

On December 20, 2010, the Superior Court granted counsel's motion to

withdraw, and over the State's objection, the Superior Court continued the February 2011 trial date. (DI 336). Cooke's third set of counsel, current counsel, was appointed On March 7, 2011 (DI 341). At an April 18, 2011 status conference, the parties discussed a tentative trial date; the February 20, 2012 date for jury selection was formalized on July 26, 2011. (DI 362).

As previously noted, on November 10, 2011 Cooke "fired" present counsel and then referred to the trial judge as a "slave master and an "Uncle Tom". Cooke claim that he fired his counsel because, among other things, they sought his transfer from JTVCC to HRYCI.[59] (A80-83). Defense counsel thereafter advised the Superior Court that Cooke refused to speak with them. (A85). Defense counsel nevertheless advised him that there was "volumes of information" comprising "20-some boxes" and in their opinion "he should not represent himself" but that he had a constitutional right to do so if he chose. (A85a) At a hearing on November 30, 2011, Cooke asked to represent himself. Considering relevant law, the Superior Court conducted an extensive colloquy with Cooke.[60] (B9-18). Superior Court asked:

> Court: Do you understand that the right of self-representation is not a license to be disruptive and interrupt trial proceedings and that your

[59] In subsequent hearings, Cooke stated that counsel had filed a motion to suppress without his permission. He also falsely claimed that counsel failed to hire experts. (A123, 125; B21a).

[60] Before the trial court may permit a defendant to represent himself, the court must determine that the defendant has made a knowing and intelligent waiver of the right to counsel and inform him of the risks inherent in going forward in a criminal trial without the assistance of legal counsel. *See Faretta v. California*, 422 U.S. 806, 835 (1975); *Stigars*, 674 A.2d at 479.

> behavior and conduct during trial will be held to the same level as that of an attorney?
>
> Cooke: Yes, I understand.
>
> Court: You must also follow the Court's directions and orders. Do you understand that and agree?
>
> Cooke: Yes, I understand.
>
> . . .
>
> Court: Do you understand that the right of self-representation entails a degree of civility and courtesy that must be shown toward the Court and opposing counsel during trial proceedings and that any unsolicited disruptive remarks made or actions taken during the course of the trial will constitute your forfeiture of your right of self-representation? (A95-96).
>
> Cooke: Yes, sir, I understand.

The Superior Court stated that his right could be forfeited with no further warning and stand-by counsel appointed. Cooke said he understood. (A97-98). Also, the court asked Cooke whether he understood that if he represented himself, there would be no continuance of the currently scheduled trial date, Cooke said he did. (A91). The Superior Court granted Cooke's motion to represent himself, but appointed his attorneys to continue to assist Cooke in the role of stand-by counsel. (A109). Within minutes of the Superior Court's decision, Cooke asked for a continuance of the trial date which was denied.[61] (A110).

[61] Cooke had just acknowledged that he understood he would not receive a continuance of the trial date. The Superior Court asked this question and as such, obviously considered his answer

On January 27, 2012, Cooke again asked for a continuance claiming he was unable to be ready in time for trial. (A120). Cooke stated he hadn't received or gone through all the legal boxes and didn't have any experts to identify because he had not done the research nor seen "anything." (A120; 123-124). Stand-by counsel indicated they had been speaking with experts and continuing to prepare for trial. (A121).

On February 10, 2012, in a pretrial hearing with Cooke's three prior sets of defense counsel present, the Court acknowledged several motions filed by Cooke, one of which was for continuance.[62] (B28). The Court reviewed what experts had been consulted on behalf of Cooke since the case was first indicted in 2005. The Public Defender's office stated that they had consulted 10 psychiatric/psychological experts and had Bonistall's blood subject to independent toxicology analysis. (B22). They also consulted their in-house DNA specialist who in turn assisted them in the area of photogrammetry and handwriting exemplars. (B22). The public defender's in-house forensic nurse provided expert guidance regarding the autopsy protocol. (B23).

Cooke's second set of attorneys consulted and/or retained experts regarding venue change, voice identification, handwriting comparison, eye-witness

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in determining whether to allow him to proceed *pro se*.

[62] Because the motions were in disorder and filed *en masse*, the Court was able to parse out and distinguish 15 motions which the Court bate-stamped. Cooke disavowed all motions filed by his prior attorneys. B29.

identification, and forensic DNA analysis. (B24-25). In addition, counsel requested funds for a handwriting expert, a forensic pathologist, and for NMS labs to conduct statistical analysis on DNA results. (B24-25). Counsel also retained a private investigator (B25) and had been in the process of looking at the photogrammetry aspect of the case.

Cooke's third set of attorneys, then stand-by counsel for the second trial, had received the discovery produced from the two sets of previous counsel. (B26). Counsel stated, but Cooke denied, that Cooke had "all the transcripts, police reports, expert reports, and so forth." (B30). The State asserted that *Jencks* material was provided at the time of the first trial. (B31). Cooke's third set of attorneys retained a private investigator, sought funds for a forensic pathologist, and consulted with a handwriting analyst, footwear expert and voice identification expert. (B26-27). Counsel also consulted with NMS Labs regarding the DNA results and hired a mitigation specialist for the penalty phase. (B26). Counsel was still considering three other experts. (B27).

After further discussing other evidentiary issues and the case history, the Superior Court denied Cooke's continuance request, finding that "nothing of significance has changed." Cooke stated, "Bias, unfair. You already prejudge me." (B32). Cooke then made allegations of prosecutorial misconduct, forgery and racism. (B32-36). Cooke further announced "I don't care what attorney I get,

they're not going to do anything because they all in it together." (B36). Despite Cooke's ill-behavior, disrespect and disregard of rules and procedure, the Court persevered to resolve issues prior to trial.

On February 15, 2012, Cooke and counsel appeared to witness efforts by Detective Maiura to preserve evidence that had deteriorated while in storage at the New Castle County Courthouse. (B37). Even though Cooke bore witness to all actions, Cooke objected to the process based upon a conspiracy theory. The Court nevertheless allowed the preservation to be completed. (B38-39). Cooke then asked to be excused from the following day's hearing because he was too busy. (B40). Because Cooke represented himself, the Court denied his request, but promised to keep things short. (B41).

On February 16, 2012, the Superior Court advised Cooke that he would not be permitted to present evidence of Bonistall's sexual history to support his theory that her vaginal swab showed the presence of "three DNAs." (B43-45). Cooke became agitated and made many statements including, "If you think you God, I think you better look at yourself in the mirror," "You have seven abominations in your heart for me," and "Satanism is running around in here, lot of it going around." (B46-47). Cooke argued with the Court's rulings and refused to acknowledge any applicable law or reasonable explanations. (B48-50).

On February 21, 2012, Cooke complained that in the initial *voir dire*

screening, a higher percentage of black people were being excused for less justification than white people, making for a "race-card thing situation." (B51). On February 22, 2012, after Cooke exercised six peremptory challenges, all on white prospective jurors, four of which were female, the State made a *Batson*[63] challenge which the Court denied. (B53-54).[64] On February 23, 2012, the State renewed its *Batson* challenge after Cooke exercised his ninth peremptory to strike a white female. (B55). When asked to provide a race and gender-neutral explanation for his strikes, Cooke responded, "I don't want no more females on there." (B55a). Despite Cooke's admitted *Batson* violation, the Superior Court only ordered Cooke to provide reasons for any future peremptory strikes of white females. (B56-57). Cooke replied that such a requirement was grounds for a mistrial, which the court denied. (B57).

Later that same day, based upon Cooke having used all of his peremptory challenges on white jurors, the State raised another *Batson* challenge. Among his comments, Cooke stated, "I do not want an all white jury." (B58). The Court found that Cooke did not provide a race-neutral explanation for his strike. Rather than seat the juror *and* forfeit Cooke's peremptory as the State requested, the court

[63] *Batson v. Kentucky*, 476 U.S. 79 (1986).
[64] At the time of the State's first *Batson* challenge, six jurors were selected, 2 white females, 2 black males, 1 black female and 1 hispanic female. (B59).

did as Cooke requested and sat the juror but did not forfeit his peremptory challenge. (B60-61).

On the fifth day of jury selection, Cooke requested a mistrial because the State "struck a black person." (B62). Cooke also revisited a claim that he had previously been improperly placed in SHU because of his lawsuits and prosecutor and defense attorney conduct. (B63-65). Cooke also stated the Superior Court was biased for denying his motions. (B65-68). Later, Cooke exercised his eleventh peremptory challenge to strike a white, female juror. The State raised its fourth *Batson* challenge. When the Superior Court asked for an explanation, Cooke essentially stated, "It is just hard to believe this woman could be fair." The court made further inquiry, and Cooke stated, "My job is not for you to understand me all the time." (B70-71). Finding that Cooke did not survive the State's *Batson* challenge, the court seated the juror and forfeited one of Cooke's peremptory challenges. (B73). Cooke exercised his very next peremptory challenge on a white female stating that his cause was "mistrial." (B75). Cooke then reneged on his strike and stated the juror could sit because it "[d]oes not make a difference." (B76).

Cooke finished the day still complaining about his previous administrative segregation in prison, the legal impediments to presenting his case, his stand-by counsel, the prosecutors, the trial judge, and the need for a continuance. The

Superior Court received assurances from stand-by counsel that they were as prepared as they could be, given the constraints imposed upon them by Cooke, to take over representation if necessary. (B77). The Superior Court reminded Cooke that he was advised prior to his choice to represent himself that a continuance of the trial date would not be granted. (B78).

On February 28, 2012, the court asked Cooke if he had any comments regarding the alternate juror screening process. (B79). Cooke responded that he could not get a fair trial and the court was threatening and disrespecting him. (B79-81). The trial judge advised "we're going to be civil with each other and we're going to be able to get along in that fashion. And I don't wish you to be threatened by me." (B82).

On February 29, 2012, an issue arose regarding excused jurors potentially discussing the case. The next day, things became heated in the courtroom and Cooke accused the prosecutor of lying. (B85-87). The Court put an end to the argument stating "I'm not going to have this craziness back and forth. That might [have] happen[ed] before, but it won't happen this time." (B88). The witnesses regarding the potential juror misconduct issue were brought in for questioning. Cooked complained that the witnesses were not sequestered. The court explained that Cooke had elected to represent himself and was, therefore, responsible for requesting such things as sequestration. (B90-91). Cooke became agitated and

stated, "You always try to violate my rights but you also try to get me upset to banish me from this court." (B92). Minutes later, when the court stopped Cooke from badgering a witness, Cooke stated, "you just totally outrageous." (B95). After two more denied motions for mistrial, Cooke requested to be excused from alternate jury selection for "mistrial" and "I see no fairness in nothing." (B102a). Cooke further accused the trial judge of being biased, tampering with Cooke's stuff,[65] "forcing correctional officers on me twice," and treating him like an animal. (B103-104). Cooke stated "as far as I'm looking at your soul is already required in hell and you don't care." (B108). The Superior Court granted Cooke's request to absent himself, finding that Cooke's behavior constituted misconduct and had it so chosen, the Court could easily have cited him for criminal contempt under DEL. CODE ANN. tit. 11, § 1271.[66] (B109, 110). Later that same day, the court asked Cooke if he wished to continue representing himself. Cooke responded that he did, but disagreed with the court that he committed misconduct (B111-113). The court replied:

> Mr. Cooke, you indicated to me that I had repeatedly, either directly violated your rights by frustrating your arguments, having you physically threatened, stealing your papers, either directly or indirectly, and allowing the State to do what it wanted and continue its

[65] Cooke is apparently referring to the Court's efforts to put his motions in some type of order so that they could be considered. (B104-107).

[66] DEL. CODE ANN., tit. 11, § 1271 (1) states that a person is guilty of criminal contempt when the person engages in disorderly, contemptuous or insolent behavior, committed during the sitting of a court, in its immediate view and presence, and directly tending to interrupt its proceedings or to impair the respect to its authority.

> misconduct as you saw it. And you said based upon that you did not wish to participate any further.
>
> I have no intention of relinquishing the conduct of the case or the presentation of the evidence to you or anybody else. The rules of evidence require that I be the gatekeeper and the one who directs the presentation of evidence and the interrogation of witnesses, which I have to do.
>
> Now, if you wish to continue then you may as long as you abide by the rules and the direction that I have previously given to you. (B114).

With these admonitions on the record, the court added that once Cooke gave up his right to self-representation, it would be gone for the remainder of trial. (B115). The court further stated,

> You've called me a thief, you've called me a liar, you've called me a number of things, that certainly constitutes misconduct. It also constitutes a basis for sanction pursuant to 11 Del. C. Section 1271, which is criminal contempt. (B116).

After an obvious power struggle with the trial judge, where Cooke alternately dodged the court's questions and questioned the court, Cooke finally directly stated that he wished to continue representing himself and would follow the dictates and rules established by the Superior Court. (B117-123). The Superior Court allowed Cooke to continue representing himself.

The following day, Cooke, among other things, unsuccessfully attempted to revisit rulings that were "law of the case." (B124-131). The Superior Court then expressed concern regarding Cooke's wish to call the trial judge from his first trial as part of his case, especially since that would highlight a Cooke's prior trial and

conviction. Cooke refused to provide his reasoning and instead accused the Superior Court of lying and manipulating the record. (B132-134). The trial judge responded that it was the third time that Cooke had called him a liar and that he had to stop because as an Officer of the Court, he would not tolerate such disrespect. (B134). Cooke stated he was the one that was disrespected by the court and that the judge is lying about certain things and a "liar goes to hell." (B134). The trial judge told Cooke that they would have to "agree to disagree." (B134).

The situation did not improve that day. Cooke was angered by the Superior Court's insistence that he comply with the requirements of Del. Code Ann. tit. 11, § 3508 and told the court to cancel the witnesses because "this is a setup," and "[y]ou took everything from me." (B136). Cooke even attacked the appellate counsel that obtained reversal of his first conviction because "she was part of the corruption" and "she played like she was doing some things for me, but she wasn't." (B136). Regardless, the trial judge persevered and asked whether counsel wanted to start trial on Tuesday, or Wednesday of the next week. The State asked for Tuesday but Cooke advised he needed more time and wanted to start Wednesday. Superior Court granted Cooke's request to start Wednesday. (B138). The parties then discussed that the jury was comprised of four black jurors, two Hispanic jurors and six white jurors. (B139). Cooke replied, "Still not

a neutral jury, period." (B140). Before leaving the courtroom, Cooke stated "I don't know, to be honest, if I am going to proceed representing myself because is limitation such as my rights have been taken, I might end up pushing it back to them by force but it is by force, it ain't what I choose." (B141).

On the morning of March 7, 2012, Cooke stated that the court's rulings that he couldn't call specific witnesses or engage in certain areas of questioning acted to "strip[] me from my rights." (A153). Cooke was angered about a number of things, including: the Superior Court's denial of his continuance requests; that § 3508 applied to his case; that he was legally prohibited to use the results of a lie detector test; that the "law of the case" regarding voice identification prohibited its admission at trial; his administrative segregations; and that the Superior Court refused to let him call the trial judge and attorneys involved in his first trial as witnesses in the presentation of his case. (A153-155). Cooke requested both a mistrial and that the trial judge recuse himself. The Superior Court denied these requests and further added:

> I will not continue the trial. I told you that at the start, when you assumed responsibility for your own defense, you would have to meet the same deadlines that I imposed upon counsel. I know of no conspiracy. I have no bias against you, one way or the other. I have decided each issue in accordance with my understanding of the law and arguments of counsel, stand-by, State's counsel, your own argument. (A155-156).

Cooke accused the court of threatening him and treating him unfairly because he

was black and Bonistall was white. (B142-143). The Superior Court moved forward with trial. Within the first five minutes of Cooke's opening statement, he improperly commented on his first trial and Bonistall's alleged "drug situation." (A157). The jury was removed. (A157). The court reemphasized that Cooke had to follow the court's rules and not discuss inadmissible topics. Cooke answered that he was following the rules. (A157-158). After some debate and a discussion of permissible scope, the jury returned for Cooke to resume his opening. (A158-160). Cooke told the jury that the court had "bound me from telling the truth," and that they should not base their decision on the evidence because "there is foul play going on here." (A160). Without further comment, the Superior Court allowed the trial to progress.

During Cooke's cross-examination of the State's first witness, Cooke asked confusing questions, testified, became argumentative and failed to respond to objections. (A161-165). When the Superior Court attempted to enforce procedure, Cooke responded, "You know what, Your Honor, I am done. You just not allowed me to do anything. … I can't get a fair trial with you." (A165). The trial judge calmed the situation by offering Cooke guidance, which he accepted. Although the rest of the cross-examination was not without its mishaps and arguments before the jury, the witness was completed.

Despite the court's admonition against it, Cooke attempted more than once

to cross-examine the State's second witness, a firefighter, using a report authored by a different firefighter. (B145-146). Cooke again stated, "I am done, Your Honor, because you are not allowing me to do anything correct." (B146). The trial judge again gave Cooke some direction, which he initially followed. However, in short order, he lapsed into exceeding the scope of direct and asking questions of the firefighter in an attempt to elicit expert testimony. The State made objections, which the Court sustained. (B147). Cooke said, "You just trying to make it look like I broke in this door, Your Honor," and "we find lot of stuff try to put all this stuff on me." (B144). After releasing the jury, the trial judge gave Cooke a second admonition stating, in part:

> I have given you as much leeway as I can. I have told you how to get past certain objectionable questions, certain run-on sentences, certain use of certain language that no one but you understand, and that's all I can do. If you don't stop continuing to go past what I have told you to do, then you are going to forfeit that right, as well as waive the right to represent yourself, and that would be unfortunate given that you made that request.
> ***
> Now, if you want to represent yourself, you have to follow the rules of evidence, and rules of Superior Court. When you don't do that, that creates a problem. Then you want to add argument beyond that. I told you to stop that. So, if you continue, then I will revoke your right to represent yourself, and I am telling Mr. Figliola, and Mr. Veith, if this continues, then they will become counsel for the defendant,…
> ***
> There is no rancor here. You have made some intelligent, raised some intelligent issues and questions, but then again, you go further and beyond what the Court has said you can do, consistently said you could do.
>
> You called into question the integrity and credibility of the

> Court, counsel, and anyone who has been involved in this, who has done something you don't like. (B148)

Cooke responded that he was obeying the rules, not misbehaving and only speaking the truth. (B148). The Superior Court felt it necessary to recess for the day.

On March 8, 2012, while Detective Rubin was on the stand, the court again had to remind Cooke that the rules of evidence apply to every defendant, including him. (A178). And as such, DRE 611 limited Cooke's cross-examination of witnesses to the subject-matter on direct unless he could show good cause. (A178-183). Cooke told the court its ruling was a "scam." (A179). In his ensuing cross-examination, Cooke proceeded to go beyond the scope of direct and asked Detective Rubin about a marijuana pipe that was found in Bonistall's apartment. (A193). When admonished, Cooke told the trial judge, "I'm being so threatened by you, Your Honor." (A193). The jury was removed. (A193). Cooke told the trial judge he was being unfair. His chief complaint was that the court was restricting his cross-examination by enforcing DRE 611. (A193; B154a-154b). The court reiterated that Cooke had to follow the rules and brought the jury back in. (B154a-154c). Cooke started to tell the jury that he felt he was being treated unfairly. Before he could say too much, the Superior Court ordered the jury be removed again. (A195-196). Cooke then told the trial judge that he was going to hell and that he knew the trial judge planned him harm. (A196-197). The court

found that Cooke "refused to follow the direction of the Court," but decided it would not yet revoke his right to self-representation because he wanted to give the matter further thought in the interest of giving Cooke as fair a trial as possible under the circumstances. (A198a-199). Cooke almost immediately calmed down. (A200). Trial resumed with the direct examination of the medical examiner, Dr. Vershvovsky, filling the remainder of the day.

On March 9, 2012, Cooke repeated his complaints about the court's enforcement of its criminal procedural rules, prosecutorial misconduct, interference with counsel, denial of his continuance motions and his administrative prison segregation. (B174-185a). The Superior Court allowed Cooke to air his grievances and then continued to take testimony. During the first few minutes of Cooke's cross-examination of Dr. Vershvovsky, Cooke became argumentative with her, the State objected. When the court told Court told Cooke it was not time for argument, Cooke said he had things to tell the jury and then told the jury that the trial judge did not provide him with funding for an expert. (A215) Cooke's actions required the judge to remove the jury. (A215). Cooke then argued with the court over requiring him to comply with DRE 611. The Superior Court determined that it appeared that Cooke did not wish to abide by the court's rules and guidelines. Once more the trial judge asked, "[d]o you wish to follow the instructions and guidelines of the Court?" (A217a). Cooke nonsensically

responded that he was following them and then lapsed into his own questioning of and complaints against the court. (A217a-220) to which the court responded, "[i]t does not appear to me you wish to follow the rules and guidelines." (A219-220). Cooke countered, "My way is not the Court's way." (A221). The Superior Court then advised that it would take a half-hour recess and also asked stand-by counsel whether they were ready to proceed. Cooke objected, stating he had fired stand-by counsel and he would represent himself. (A222-223). A recess was taken.

When court reconvened, the Superior Court heard from Cooke, the State and stand-by counsel. Cooke blamed his actions on the Superior Court and said he had done nothing wrong. Cooke felt he deserved to represent himself and did not want to be represented by stand-by counsel. (A242-243). The Superior Court stated (in part):

> From the time trial began with opening statements, notwithstanding the fact that you were cautioned as to what could or could not be stated and talked about, you chose to embark upon a course of conduct which was improper. And I warned you then.
>
> It became a constant issue, there were several episodes of when you were argumentative with the Court, counsel and witnesses. There were numerous delays where you rehash the same arguments that were made time and time again; and usually, factually, quite wrong.
> ***
>
> There were numerous episodes of – several episodes, I'm sorry, where – and then it still wasn't sufficient. You can't have it your way, it has to be in conformity with the law and the Rules of evidence.
>
> ***

> I find that in the first instance that you forfeited your right to proceed. And if there's any distinction there's always a waiving by what I find to be a knowing and voluntary course of conduct designed to delay, disrupt or interrupt the process of this trial.
>
> I have no – any other way to get around it. You have been warned repeatedly. You have been disrespectful to Court and counsel. (B149-153).

Stand-by counsel, who had been in a constant state of trial preparation, was re-appointed as Cooke's counsel. Immediately, counsel asked for a mistrial and new jury pool, which was denied. (A249-253). They also requested and the Superior Court granted with the State's consent, a six-day recess to further prepare. (B196-202). Trial reconvened on March 15, 2012.

Analysis – Appointment of Stand-by Counsel

The right to represent oneself in a criminal trial is a fundamental right protected by the Sixth Amendment to the United States Constitution and by Article I, § 7 of the Delaware Constitution.[67] However, the right to self-representation is not absolute. In addition to many other reasons, "the trial judge may terminate a defendant's self-representation because he deliberately engages in serious and obstructionist misconduct."[68] After trial has begun, the right of self-representation may be "curtailed, and the trial judge considering a motion to terminate must weigh the legitimate interests of the defendant against the prejudice that may result

[67] *Hooks v. State*, 416 A.2d 189, 197 (Del. 1980), citing *Faretta*, 422 U.S. 806 (1975).
[68] *Faretta*, 422 U.S. at 835, n. 46.

from the potential disruption of proceedings already in progress."[69]

Important to this determination is the acknowledgement that *pro se* status does not excuse a criminal defendant from complying with the procedural or substantive rules of the court.[70] A defendant who knowingly and intelligently assumes the risks of conducting his own defense is entitled to no greater rights than a litigant represented by counsel.[71] Courts therefore routinely appoint stand-by counsel, whose presence is intended "to steer a defendant through the basic procedures of trial" and "to relieve the judge of the need to explain and enforce basic rules of courtroom protocol...."[72] The *pro se* litigant may, of course, refuse to follow his stand-by counsel's advice. That choice, as with all the other strategic decisions made by a *pro se* litigant, is his own. Having refused this assistance, however, he may not be heard to complain later that the court failed to protect him from his own ineptitude.[73] The appointment of stand-by counsel does not relieve a defendant of his obligation to act appropriately within the confines of the courtroom and to observe the rules of the court.

A court has the authority to appoint stand-by counsel for a *pro se* defendant

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[69] *Zuppo v. State*, 807 A.2d 545, 547-48 (Del. 2002); (citing *United States v. Stevens*, 83 F.3d 783, 797 (2d Cir. 1996)).
[70] *Faretta*, 422 U.S. at 835, n. 46.
[71] *United States v. Merrill*, 746 F.2d 458, 465 (9th Cir. 1984).
[72] *McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984).
[73] *See United States v. Flewitt*, 874 F.2d 669, 675 (9th Cir. 1989).

even over that defendant's objection.[74] Not only is there a preference for stand-by assistance to *pro se* litigants,[75] but "[s]tandby counsel should *always* be appointed in cases expected to be long or complicated or in which there are multiple defendants."[76] Accordingly, it has been recognized that the wishes of the defendant carry *no weight in the decision to appoint stand-by counsel.*[77]

The appointment of stand-by counsel in this case was not merely for Cooke's benefit, but also for the benefit of the court and the State. Cooke's case was long and complicated and stand-by counsel was necessary and should have been utilized, not only to assist Cooke, but to assist the court and to ensure compliance with the relevant rules of procedural and substantive law, for which Cooke showed constant disregard. Cooke could have, and clearly should have, employed the offered assistance of stand-by counsel. He did not. His choice to disregard this valuable resource or indeed, his anger at having been provided it, does not mean the Superior Court was thwarting his right to self-representation. Rather it was well within the court's discretion to provide such assistance.[78]

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[74] *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (emphasis added) (trial judge did not violate defendant's right to self-representation by appointing stand-by counsel over defendant's objection); *United States v. Dougherty*, 473 F.3d 1113, 1124-1126 (D.C. Cir. 1972).
[75] *United States v. Sertoli*, 994 F.2d 1002, 1017 (3d Cir. 1993).
[76] *United States v. Welty*, 674 F.2d 185, 193 n. 5 (3d Cir. 1982) (emphasis added).
[77] *United States v. Thomas*, 220 F.Supp.2d 430, 441 (W.D.Pa. 2002)
[78] *See Flewitt*, 874 F.2d at 675 .

Analysis – Forfeiture of Right to Self-Representation

In *Illinois v. Allen*,[79] the United States Supreme Court provided guidance regarding the type of conduct that justifies termination of self-representation and the imposition of stand-by counsel on an unwilling defendant. *Allen* held that a "defendant can lose his right to be present at trial if, after he has been warned by the judge ... he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom."[80] The United States Supreme Court further concluded that "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case."[81] Indeed, a trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.[82]

Indeed, this Court has clearly held that "[s]tandards required of members of the Bar must be adhered to by defendants undertaking their own defense, and gross deviations from these standards constitute a waiver of the right of self-representation.[83]

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[79] 397 U.S. 337 (1970).
[80] *Id.* at 343.
[81] *Id.*
[82] *Id.* at 337; *Dougherty*, 473 F.2d 1113.
[83] *Payne v. State*, 367 A.2d 1010, 1017 (Del. 1976); *see also Lopez v. State* 861 A.2d 1245, 1250 (Del. 2004) (This Court found no abuse of discretion in denying defendant's right to represent himself when he became disruptive and refused to follow procedures of the Superior Court for waiving the right to counsel.).

In *United States v. Brock*,[84] the Seventh Circuit Court of Appeals found when a defendant's obstreperous behavior is so disruptive that the trial cannot move forward, it is within the trial judge's discretion to require the defendant to be represented by counsel.[85] In *Brock*, the defendant, who initially had court-appointed counsel that was actively working for him, nevertheless began to file his own motions and rejected his appointed attorney as well as another.[86] When questioned by the court, Brock refused to respond whether he wished to represent himself and was subsequently held in contempt.[87] Brock at first was permitted to proceed *pro se*, but when he continued to challenge the court's jurisdiction and make other demands, his *pro se* status was revoked.[88] The Seventh Circuit found that Brock's conduct made it extremely difficult for the court to move forward with its proceedings. Given the situation, the Seventh Circuit stated that the trial judge was within her discretion in revoking Brock's *pro se* status.[89]

Much like the situation in *Brock*, Cooke's intent to dodge the Superior

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[84] 159 F.3d 1077 (7th Cir. 1998).
[85] *Id.* at 1079; see also *United States v. Mosely*, 607 F.3d 555, 557-59 (8th Cir. 2010) (Court of Appeals concluded that the District Court properly terminated the defendant's self-representation when he filed frivolous pleadings and was disruptive and unresponsive during pretrial hearings holding that "[t]here was good cause to believe that [the defendant] would continue to disrupt the proceedings if the court permitted him to resume self-representation."); *McCray v. State*, 71 So.3d 848, 868 (Fla. 2011) (given capital defendant's uncooperative behavior, coupled with his history of disruption, court concluded that the trial court did not err in removing McCray and reinstating counsel).
[86] *Id.* at 1078.
[87] *Id.*
[88] *Id.* at 1079.
[89] *Id.* at 1080.

Court's questions or to outright ignore them made it extremely difficult for the court to resolve threshold issues, such as discovery, or even to determine whether Cooke would follow court rules and procedure.[90] The jury had to be taken out time and again and Cooke had to be admonished repeatedly, both in front of and outside the presence of the jury. Despite warnings, Cooke's contumacious behavior persisted. As the record makes clear, the problems were only escalating, despite the court's obvious attempts to mollify Cooke. The Superior Court was understandably very concerned about Cooke's behavior. The court stressed that it was concerned, not because of the "names I have been called," but because of Cooke's "approach to the jury." Indeed, the Superior Court stated that Cooke was not advocating in his own best interest, he said things to the jury as they were leaving, he was rude and uncivil before them, he was argumentative with witnesses and would overtalk counsel. (B190-192).

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[90] The Superior Court stated:

> And interestingly enough, Mr. Cooke, you have kind of played – and this is my view of it, but I do so find – kind of a cat and mouse game where you would go, well, I'll do what you want, yeah, and then something else will happen and then you'll do something else. Then when I asked you before you went out, are you going to comply with the Court rules and dictates and procedure? I'm going to do what I think necessary to cross-examine witnesses. Fine. I said are you going to follow – again, the dictates? And I never got a clear expression.
>
> And what it appears to me, for purposes of delay or disruption, you will say yes one minute, then go back and do something else and the next time a witness comes through. (B151-152); *See generally, Id.* at 1081.

And, as *Faretta v. California*[91] recognized, the right of self-representation is not a license to abuse the dignity of the courtroom nor to avoid compliance with relevant rules of law. "Nor is it a license to flood the court repeatedly with frivolous requests or 'demands' or 'notices' which already have been denied."[92] As previously argued, regardless of Cooke's objections, stand-by counsel was properly appointed to represent him when he forfeited his right to self-representation through his egregious conduct.

Analysis – Motions for Continuance

Cooke's claim that the court's repeated denials of his continuance requests worked to degrade his ability to effectively represent himself is also meritless. In the first instance, Cooke was not forced to represent himself due to court action. Rather, as made clear by the Cooke's thorough colloquy, it was Cooke's choice to proceed *pro se*. Cooke was aware of the pitfalls of self-representation, was aware there would be no continuance and was well aware of March 2012 trial date. And, when the Superior Court discussed with Cooke his request to proceed *pro se*, it asked him whether he realized that by representing himself he would not receive a continuance. Cooke stated that he understood. (A91). Regardless of that

[91] 422 U.S. at 834 n. 46.
[92] *United States v. Ford,* 2011 WL 2036677, *1 (W.D.Pa. May 24, 2011).

professed understand, Cooke asked for a continuance minutes later, which unsurprisingly, the court denied. (B19-21).

This case was first indicted in 2005. It first went to trial in 2007 with Cooke present and represented. Cooke was aware of the State's facts and evidence. The facts of the crime, witnesses and discovery remained predominantly unchanged. Cooke's convictions were reversed in 2009. The 2011 trial date was continued because Cooke had sued his second set of attorneys, they filed a motion to withdraw which was granted, and new counsel was appointed. Cooke apparently had issues that he never fully explained to the Superior Court with his third set of attorneys. However, the record is clear that Cooke refused to speak with them and he was upset that they wished to move him from JTVCC TO HRYCI. (A85), In any case, Cooke requested and the Superior Court subsequently allowed him to proceed *pro se* on November 30, 2011, more than 3 months before the beginning of the taking of testimony in his retrial. While Cooke had between 19-26 boxes of material to review, most contained mitigation material, something Cooke stated he had no interest in pursuing. (B13, 17). Stand-by counsel was appointed to assist and meet with Cooke as needed prior to and during trial and to continue to work on the case as if they were indeed proceeding to trial as his counsel.

In *Secrest* v. *State,*[93] this Court set forth the criteria to be considered in determining whether a continuance should be granted. First, the party seeking the continuance has the burden of establishing a clear record of the relevant facts relating to the criteria for a continuance, including the length of the requested continuance. Second, the party seeking the continuance must show: (a) that it was diligent in preparing for the presentation of the testimony; (b) that the continuance will be likely to satisfy the need to present the testimony; and (c) that the inconvenience to the Court, opposing parties, witnesses and jurors is insubstantial in relation to the likely prejudice which would result from the denial of the continuance.[94]

The answer as to whether a continuance should be granted must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."[95] Furthermore, pertinent circumstances that the court should consider include the State's position, the rights of the moving defendant, the need for calendar control, as well as the efficient and effective administration of criminal justice.[96]

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[93] 679 A.2d 58 (Del. 1996).
[94] *Weston v. State*, 832 A.2d 742, 745 (Del. 2003); citing *Secrest v. State*, 679 A.2d at 66.
[95] *Secrest*, 679 A.2d at 64.
[96] *Stevenson v. State*, 709 A.2d 619, 630-31 (Del. 1997). This Court quoted the Third Circuit's position as follows:

> Desirable as it is that a defendant obtain private counsel of his own choice, that goal must be weighed and balanced against an equally desirable public need for the efficient and effective administration of criminal justice. The calendar

Here, Cooke constantly asked for continuances stating he would not be ready and had boxes to review and experts to retain. When asked for specifics, Cooke did not provide them. (A126). He said he just needed more time, a delay. A litany of experts had already been retained in this case, evidence had been reviewed time and time again. The information was there for him to review and appropriate accommodation had been provided for him to accomplish what he needed to do. Cooke never justified his need for a continuance.

And here, the court had a significant interest in calendar control. This case was by no means easy to schedule. By the time Cooke first moved for a continuance on November 30, 2011, the trial, initially set for March 2012, had already been tried once and been postponed once since then because of an issue with Cooke's representation. Cooke constantly sought continuances even after jury selection. The case was seven years old. Thus, the court's interest in calendar control weighed heavily against the continuance.[97] The State also had a stated

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> control of modern criminal court dockets, especially in metropolitan communities, is a sophisticated operation constantly buffeted by conflicting forces. The accused's rights-such as those relating to a speedy trial, to an adequate opportunity to prepare the defense, and to confront witnesses-are constantly in potential or real conflict with the prosecution's legitimate demands for some stability in the scheduling of cases. The availability of prosecution witnesses is often critically dependent on the predictability of the trial list. That delays and postponements only increase the reluctance of witnesses to appear in court, especially in criminal matters, is a phenomenon which scarcely needs elucidation.

Id. (quoting *U.S. ex rel. Carey v. Rundle*, 409 F.2d 1210, 1214 (3d Cir. 1969).

[97] *See generally, Carletti v. State*, 2008 WL 5077746, *5 (Del. Dec. 3, 2008).

significant interest in proceeding to trial as scheduled. Subpoenas had already been issued for that date and the State's expert witnesses were already scheduled. The alteration would also cause inconvenience to the witnesses and difficulty in rescheduling. Thus, the State's position weighed against the continuance. Finally, the interests of justice supported beginning the trial as scheduled. Thus, the efficient and effective administration of justice weighed against the continuance.

The Superior Court did not abuse its discretion in denying Cooke's multiple continuance requests. Nor can Cooke validly claim that the courts denial of his requests worked as a denial of his constitutional right to self-representation.

VI. SUPERIOR COURT PROPERLY EXCLUDED EVIDENCE OF BONISTALL'S PRIOR SEXUAL CONDUCT BECAUSE DEL. CODE ANN. TIT. 11, §§ 3508 AND 3509 PROHIBIT ITS ADMISSION.

Question Presented

Did the trial judge abuse his discretion by excluding evidence of Bonistall's sexual conduct with individuals other than Cooke under DEL. CODE ANN. tit. 11, §§ 3508 and 3509.

Standard and Scope of Review

This court reviews a trial judge's evidentiary rulings for an abuse of discretion.[98]

Merits of the Argument

"[E]vidence of a complaining witness's previous sexual conduct may be admissible at trial to attack the credibility of the complaining witness if the parties and court follow a prescribed statutory 'vetting' process" under 11 *Del. C.* § 3508.[99] Pursuant to § 3508, the defendant must submit a written motion

[98] *Richardson v. State*, 43 A.3d 906, 911 (Del. 2012) (citing *Harris v. State*, 991 A.2d 1135, 1138 (Del. 2010)).

[99] *Fritzinger v. State*, 10 A.3d 603, 608-09 (Del. 2010). The procedure set forth in § 3508 is as follows:

> (1) The defendant shall make a written motion to the court and prosecutor stating that the defense has an offer of proof concerning the relevancy of evidence of the sexual conduct of the complaining witness which the defendant proposes to present, and the relevancy of such evidence in attacking the credibility of the

identifying the evidence he is proffering and its relevance in attacking the credibility of the complaining witness.[100] The motion must be accompanied by an affidavit explaining the specific offer of proof tending to prove the evidence.[101]

Cooke argues that the trial judge abused his discretion by denying him the opportunity to introduce evidence of Bonistall's previous sexual conduct claiming that § 3508 was not applicable in his case. Cooke failed to comply with the procedural requirements of § 3508, but even if his motion under § 3508 was not procedurally barred, the merits of his motion did not provide a proper basis for the trial judge to admit the proffered evidence.

The purpose of the rape shield statute, codified in §§ 3508 and 3509, is to "allow defenses based on the complainant's credibility while protecting her from

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> complaining witness.
>
> (2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.
>
> (3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at such hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.
>
> (4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant, and is not inadmissible, the court may issue an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

[100] 11 *Del. C.* § 3508 (a)(1).

[101] 11 *Del. C.* § 3508 (a)(2). *See State v. Stevens*, 1995 WL 456149, *5 (Del. Super. July 18, 1995) (stating"[u]nder the rape shield statute . . . a victim's prior sexual conduct cannot be admitted unless a proper motion is filed *before* trial."(emphasis added)).

unnecessary humiliation and embarrassment. This ensures the cooperation of victims of sexual offenses."[102] However, "[t]he purpose of § 3508 is not satisfied if evidence of prior sexual conduct may be offered and admitted simply by calling it another name.[103] In *Wright v. State*, this Court explained that a defendant "has no constitutional right to present irrelevant evidence at trial."[104] Accordingly, "[e]vidence of the prior sexual conduct of an alleged rape victim is admissible only when the statutory procedure is followed and the court determines that the evidence proposed to be offered by the defendant regarding the sexual conduct of the alleged victim is relevant."[105]

Section 3508 must be read in tandem with 11 *Del. C.* § 3509 which provides that in a case involving any degree of rape, "any opinion evidence, reputation evidence and evidence of specific instances of the complaining witness' sexual conduct, or any of such evidence, is *not admissible* by the defendant in order to prove consent by the complaining witness."[106] A defendant may offer "any evidence ... to attack the credibility of the complaining witness" provided that it complies with the procedure set forth in § 3508.[107]

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[102] *Jenkins v. State*, 2012 WL 3637236, *3 (Del. Aug. 23, 2012).
[103] *Id.* (citing *Scott v. State*, 642 A.2d 767, 771 (Del. 1994)). In the affidavit filed in support of his § 3508 motion, Cooke claimed that exclusion evidence of "Ms. Bonistall's lifestyle" would deprive him of a meaningful defense. A64 (D.I. 427, *Aff.* at 2.)
[104] *Wright v. State*, 513 A.2d 1310, 1314 (Del. 1986).
[105] *Id.*
[106] 11 *Del. C.* § 3509 (emphasis added).
[107] 11 *Del. C.* § 3509; *Jenkins*, 2012 WL 3637236 at *3.

Here, Cooke failed to comply with the procedural requirements of § 3508. Prior to trial Cooke made two unsuccessful attempts to present evidence regarding Bonistall's sexual conduct with individuals other than himself. (B44-46, 131, 135-136). On both occasions the trial judge advised Cooke that he had failed to follow the procedural requirements of § 3508 and denied his request. (B46, 135). It was not until trial commenced that Cooke filed a written motion under § 3508. (A64; D427). Moreover, the motion itself failed to comply with the procedural requirements of § 3508 in that it sought the introduction of a "past relationship" and "drug usage," but made no mention of Bonistall's sexual conduct. The supporting affidavit mentions statements from two witnesses in which the witnesses were aware that Bonistall had "one night stands" and a "propensity for picking up strangers." However, both the motion and the affidavit fail to state how the proffered evidence would be relevant in attacking Bonistall's credibility as required by § 3508(1). Cooke's motion, on its face, failed to comply with the procedural requirements of § 3508.

Notwithstanding the procedural shortcomings of the motion, the trial judge still considered its merits. During argument on the motion, the trial judge was concerned because he did not see the relevance of Lindsey Bonistall's sexual conduct with individuals other than Cooke. (A265). From both the motion and the record, it is clear that Cooke's purpose in seeking the admission the proffered

evidence was to bolster his claim that he had consensual sex with Bonistall. (A264). Indeed, counsel argued the following to the trial judge:

> "So, how does Mr. Cooke show that this was consensual sex, other than by showing, through the witnesses, the victim's – the alleged victim's friends that it was not unusual for her to have random one night stands." (A264).

§ 3509 specifically prohibits the admission of "any opinion evidence, reputation evidence and evidence of specific instances of the complaining witness' sexual conduct, or any of such evidence . . . by the defendant in order to prove consent by the complaining witness."[108] While Cooke claims that such evidence was "relevant to [the] defense,"[109] he fails to demonstrate how it was relevant for a permissible purpose under § 3508. Rather, he inexplicably argues that § 3508 is inapplicable to the case. That argument, however, does not make the evidence any more relevant. The trial judge ruled as follows:

> I would deny it under 3508, but I don't even need to reach 3508 at least as to prior sexual conduct, because it's simply not relevant. Then if I go to 3508, what is proffered in the affidavit, isn't relevant again, nor is it in any way assisting. . . .I just don't reach that point because it's not relevant, and therefore, it's not admissible with or without 3508, but in the alternative, with 3508. (A264).

The trial judge properly excluded evidence of Bonistall's sexual conduct under DEL. CODE ANN. tit. 11, §§3508 & 3509.

[108] 11 *Del. C.* § 3509 (a).
[109] *Op. Br.* at 65.

VII. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING DETECTIVE RUBIN TO IDENTIFY COOKE'S VOICE IN THE 911 CALLS.

Question Presented

Whether the trial judge abused his discretion by permitting Detective Rubin to testify that he identified Cooke as the caller in 911 recordings.

Standard and Scope of Review

This court reviews a trial judge's evidentiary rulings for an abuse of discretion.[110]

Merits of the Argument

The State introduced three 911 calls into evidence. During its case-in-chief, the State called Rochelle Campbell, Cooke's girlfriend, who identified the voice on the 911 recordings as Cooke's. (A325; 327). The State also called Detective Rubin who testified that he had reviewed the 911 recordings and believed that the voice on the recordings belonged to Cooke. (A325). The basis for Rubin's opinion was, in part, the fact that he had interviewed Cooke, face-to-face for over four hours and was familiar with Cooke's voice. (A325).

Cooke argues that the trial judge abused his discretion by permitting Rubin's opinion testimony regarding the identity of the caller on the 911 recordings. He claims that Rubin's testimony was not permitted by Delaware Rule of Evidence

[110] *Richardson*, 43 A.2d at 911 (citing *Harris*, 991 A.2d at 1138).

701(b) because Rubin's opinion was not "helpful" as required by the rule. The State disagrees. While Rule 701(b) may be implicated by Rubin's testimony, Delaware Rule of Evidence 901(b)(5) is also directly applicable.

Under Rule 701 lay opinion testimony must meet three requirements: (1) the testimony must be "rationally based on the perception of the witness;" (2) the testimony must be "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue;" and (3) not based on scientific, technical or other specialized knowledge within the scope of Rule 702."[111] The rule "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.'"[112]

Delaware Rule of Evidence 901 requires, as a condition precedent to admissibility, that evidence proffered for admission be authenticated or identified "sufficient[ly] to support a finding that the matter in question is what its proponent claims."[113] Rule 901(b)(5) provides an illustration of authentication for voice identification that conforms with the rule as follows:

> (5) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or

[111] D.R.E. 701.
[112] *State v. Washington*, 2007 WL 2297092, at *4 (Del. Super. Aug. 13, 2007) (quoting BARBARA E. BERGMAN & NANCY HOLLANDER, 3 WHARTON'S CRIMINAL EVIDENCE § 12.2 (15th Ed.2006)).
[113] D.R.E. 901(a).

> record, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.[114]

"An opinion about the identity of a speaker is admissible on a showing that the identifying person has, at some time, heard the voice of the alleged speaker."[115]

In *Smith v. State*, this Court addressed the interplay between Rules 701 and Rule 901.[116] In that case, the State introduced a letter written by Smith which directed its recipient to kill witnesses in Smith's pending case.[117] The letter was introduced through the witness who had received the letter.[118] The witness testified that he was familiar with Smith's handwriting because he had previously observed Smith writing song lyrics.[119] The letter was admitted over Smith's objection and Smith was convicted.[120] On appeal Smith argued that the trial judge abused his discretion by admitting the letter, claiming that the witness' non-expert opinion regarding the origin of the letter and the handwriting identification were insufficient to authenticate the letter for admission into evidence.[121] This Court rejected that argument and gave the following guidance when analyzing Smith's claim:

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[114] D.R.E. 901(b)(5).
[115] *Vouras v. State*, 452 A.2d 1165, 1169 (Del. 1992) (citing *United States v. Smith*, 635 F.2d 716 (8th Cir.1980); *United States v. Rizzo*, 492 F.2d 443 (2d Cir.1974); D.R.E. 901(b)(5)).
[116] *Smith v. State*, 902 A.2d 1119 (Del. 2006).
[117] *Id.* at 1122.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 1123.
[121] *Id.* at 1124.

> Rule 701 governs lay witness opinion testimony generally and provides that such testimony must meet three requirements, only one of which is relevant here: "the testimony must be rationally based on the perception of the witness." Rule 901(b)(2) is a more specific rule, governing lay witness opinion testimony as it relates to the identification of handwriting. This rule requires that "[n]on-expert opinion [testimony] as to the genuineness of handwriting, [must be] based upon familiarity not acquired for purposes of the litigation.[122]

The Court found that the witness' knowledge of the defendant, his non-expert handwriting opinion (based on his familiarity with the defendant's handwriting) and the distinct contents of the letter all served to properly authenticate the letter.[123]

The United States Court of Appeals for the Eleventh Circuit addressed this same issue in *United States v. Gholikhan*.[124] In *Gholikhan*, the defendant was charged with the sale or attempted sale of American military equipment to Iran.[125] During the course of the investigation, investigators listened to and recorded conversations that the defendant was having with a confidential informant.[126] At trial, the prosecution introduced the recorded phone conversations and identified the defendant's voice through the investigator who listened to and recorded the conversations.[127] On appeal, the defendant argued that the trial court abused its discretion by admitting into evidence the lay witness testimony regarding voice

[122] *Id.* at 1123-24 (quoting D.R.E. 701).
[123] *Id.* at 1124.
[124] 370 F. App'x 987 (11th Cir. 2010).
[125] *Id.* at 988.
[126] *Id.* at 989.
[127] *Id.* at 990.

identification.[128] Rejecting this claim, the Eleventh Circuit noted that "[a] speaker's voice may be identified by opinion testimony 'based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.'"[129] The court directly addressed the second prong of Federal Rule of Evidence 701 by referring to its prior decisions, stating:

> [w]e have held that lay opinion identification testimony was 'helpful . . . to the determination of a fact in issue' where there was some basis for concluding that the witness was more likely to correctly identify the defendant from a surveillance photo than the jury. In this regard, . . . we noted that the witness had become familiar with the defendant's appearance over time.[130]

The court went on to hold that the trial court did not abuse its discretion "because the [voice identification] testimony was rationally based on the perception of a witness, [and] it was helpful to the jury . . . ."[131]

In this case, the Superior Court's ruling satisfied the standards this Court set in *Smith* and the Eleventh Circuit set in *Gholikhan*. While Rule 701 is generally applicable to Rubin's testimony regarding the voice identification, his testimony falls under Rule 901(b)(5) which, like Rule 901(b)(2), is a more specific rule governing lay opinion testimony. Under Rule 901(b)(5), the proponent of the evidence must demonstrate that the witness has "at some time, heard the voice of

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[128] *Id.*
[129] *Id.* at 991.
[130] *Id.* (citing *United States v. Marshall*, 173 F.3d 1312, 1315 (11th Cir. 1999)).
[131] *Id.* at 990.

the alleged speaker."[132] Here, the State satisfied the condition precedent to admissibility under Rule 901. Detective Rubin testified that he was familiar with Cooke's voice because he had participated in face-to-face interviews with Cooke for "tens of hours." (A337). Rubin's lay testimony under Rule 701 served to satisfy the authentication requirement of Rule 901(b)(5). Contrary to Cooke's assertion, Rubin's testimony was "helpful to ... the determination of a fact in issue."[133] Rubin was in a better position than the jury to opine on the identity of the voice on the 911 recordings because he had spent extended periods of time with Cooke, interviewing him. (A337). The jury itself listened to but a portion of the nearly four-and-one-half hours of Cooke's one interview. (3/28/12 at 167; 183-185). After Rubin's testimony, the jury was still free to make its own determination of the authenticity of the 911 recordings and the identity of the voice contained therein. Having satisfied the authentication requirement under Rule 901, "the ultimate question of the identity of the voice was one for the jury."[134] The trial judge did not abuse his discretion by permitting the jury to make that determination. Indeed, that is what is required by Rule 901.

Even if this Court were to find that the trial judge abused his discretion by permitting Rubin's voice identification, such error would be harmless in this case.

[132] *Vouras*, 452 A.2d at 1169.
[133] D.R.E. 701.
[134] *Vouras*, 452 A.2d at 1169 (citations omitted).

"An error in admitting evidence may be deemed 'harmless' when 'the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction.'"[135] Rubin's voice identification was hardly the lynchpin of the State's case against Cooke. Another witness, his long-time girlfriend and mother of four of his children – Rochelle Campbell, also testified that the voice on the 911 recordings belonged to James Cooke. Additionally, the contents of the 911 recordings circumstantially show that the caller was involved in the two burglaries and Bonistall murder. In this case, the jury had strong corroborating evidence to determine that Cooke was the caller on the 911 recordings.

[135] *Nelson v. State*, 628 A.2d. 69, 77 (Del. 1993) (quoting *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991)).

VIII. THE SUPERIOR COURT DID NOT VIOLATE COOKE'S CONSTITUTIONAL RIGHTS BY ORDERING HIS COUNSEL TO PRESENT A MITIGATION CASE IN THE PENALTY PHASE

Question Presented

Whether Cooke's constitutional rights were violated by the Superior Court's order that Cooke's counsel present a mitigation case in the penalty phase.

Standard and Scope of Review

Alleged violations of constitutional rights are reviewed *de novo*.[136]

Merits of the Argument

Cooke complains that against his wishes, the Superior Court ordered counsel to present a mitigation case in the penalty phase. Because Cooke never unequivocally waived mitigation, and in fact explicitly consented to the mitigation evidence his counsel presented, the Superior Court did not violate his constitutional rights by requiring defense counsel to present mitigation. Defense counsel presented mitigation evidence in accordance with Cooke's instructions which at various times were ambiguous and hostile.

On November 30, 2011, during the self-representation colloquy, Cooke advised the Superior Court that if there were a penalty phase, he did not wish to present any mitigation. (B13). Cooke represented himself until the third day of trial, March 9, 2012, when Superior Court revoked his right to self-representation

[136] *Bentley*, 930 A.2d at 871.

due to his contumacious behavior and stand-by counsel was appointed. Cooke indicated he no longer wanted to participate in his defense stating, "I'm not going to sit here and perpetrate like I'm with this procedures because I'm not," and "Do not come pick me up not Thursday." (A258). The court agreed with stand-by counsel that as long as they pursued Cooke's requested defense, "from this point forward that all decisions are strategic. We do not need Mr. Cooke's approval with two exemptions. One whether or not he wishes to be in the courtroom, and, two, whether or not he testifies." (A259).

On March 15, 2012, Cooke stated he would not sit in the courtroom because of the "corruption [] going on." (A261). He verbally attacked the Superior Court, the State, and his own counsel, after which the court advised him that his counsel would use "their best professional judgment to prepare the defense that you have previously indicated that you wish to pursue." (A261). The court also said that counsel would consult with him regularly and that he would be brought in to address the court before each session. (A261). Cooke stated he did not want counsel to cross-examine any State witnesses. He was removed to a cell adjacent to the courtroom with a video link to the courtroom so he could see and hear the proceedings. (A261). That afternoon, Cooke returned to the courtroom to request some witnesses be subpoenaed on his behalf and asked to cross-examine some witnesses. (B203-204). The court advised Cooke he could not question witnesses

himself because he had forfeited his right to self-representation. Cooke disagreed. (A270). Eventually, Cooke agreed to stay in the courtroom and gave the questions he wanted to ask to his counsel. (A271).

On March 16, 2012, Superior Court found Cooke in civil contempt and removed him from the courtroom for refusing to stand next an officer for a height comparison. (B214). Because of the contempt finding and his failure to comply, Cooke was not present for court the next day.

On March 20, Cooke stated he wanted to be absent from court proceedings because his trial was unfair. (B223). After Cooke left, his counsel advised that Cooke did not want to present mitigation evidence. Defense counsel nevertheless hired a mitigation expert with whom Cooke's family, except for one sister, refused to cooperate. (B227). The court directed that counsel continue preparing a mitigation case. (B227). On March 22, Cooke requested to be absent. (B223). Prior to leaving, Cooke complained about the court and his attorneys and stated he would not accept the mitigation expert. (B223-228). Later in the day, Cooke reentered the courtroom to complain and request witnesses. (B232-235).

On March 26, Cooke complained about the strategic quality of his representation and asked to be absented. (B259-260). On March 27 and 28, 2012 Cooke decided to remain in the courtroom and on March 29, he participated in the jury view. (A330; B274). After, Cooke was removed from the courtroom for

disrespectful behavior. (A344-345). Cooke was present for trial on March 30, April 2, and April 10 and was initially present on April 11 but asked to be removed when the court refused to listen to his now familiar diatribe. (A361, 387-388; B282, 285).

After the jury's guilty verdict, the Superior Court questioned Cooke:

> Court: Do you wish to present mitigation?
>
> Cooke: I said from the beginning no, I still stand firm about that. Make no difference what I say, you have overruled everything. You gave me no experts. You have took everything from me. Everything you never cared about this trial anyway. Every time I presented the truth, you let them present lies. Expect me to sit here and talk to you, I don't care about this.
>
> Court:You wish to be present during mitigation?
>
> Cooke: No. I am not going to be present. Why should I? You already got the jury do what they want to do?
>
> Court: Will you cooperate with witnesses?
>
> []
>
> Cooke: No, sir. I am not cooperating. I don't. I didn't do this crime. State know I didn't do this crime. Those attorneys know I didn't do this crime. (A394).

The Superior Court nevertheless ordered counsel to proceed with mitigation, stating, "based upon my feeling that [mitigation] is further continued implementation of his choice strategy to plead not guilty, that is for you to effectuate through yourself." (A394).

On April 18, 2012, the first day of the penalty phase, Cooke told the court that he waived his penalty hearing. (A395). Cooke stated that mitigation did not help, especially if a defendant were black and had a criminal record. (A395). Cooke stated that the jury had already found him guilty of the criminal charges "by faulty and corruption" and they were going to "find me guilty of the death penalty situation as well." (A395). Cooke also said his decision to forego mitigation was based upon the court's denial of his continuances and his motions and the multitude of lawsuits that he had filed. (A395-396). Cooke ultimately agreed with the court's characterization of his feelings that "I don't see any use and any utility in having a penalty phase because the case has been stacked against me from the start." (A396). Cooke said his decision was based on more than just his purported innocence; (A396), the mitigation process was going to be meaningless because it was unfair. (A397). Cooke said that, because he was not getting a fair trial and the court did not listen to him,

> I want the death penalty, Your Honor. Just give me death. That's what I deserve. That's what you want to give me. I am not going through it. It ain't nothing about participating. Just give me the death penalty. (A397).

Cooke thereafter lapsed into a nonsensical rant against the trial judge accusing him of telling the jury before deliberation, "think about if it was one of your children." (A397). Cooke then stated:

> Kill me, that's what you can do. Give me the death penalty and

> kill me. I am not going through it, Your Honor. I never got a fair trial. I am an innocent man. You knew it. I knew it, that jury knew it. I don't know how they came back and convicted me like that. (A397-398).

Based upon his behavior, the court determined that Cooke had voluntarily agreed to remove himself from further penalty proceedings. (A398). After Cooke left, the Superior Court summarized that Cooke maintained that he had not been given a fair trial and therefore, wished to waive mitigation because he thought it pointless. (A398). The Superior Court further found:

> I think that what we have here is a situation when an individual has before based upon his belief or view of the situation has determined that it will be futile to participate and does not wish to participate.
>
> And I will honor that request. []
>
> I do not accept his expression of whatever he indicated that the Court wants to do with his ultimate future, because I made no such intention known, because I haven't made such conclusion, because I haven't heard any evidence for this phase of the process. (A398).

On the second day of the penalty phase, Cooke told the court that he did not want any mitigation and asked the court to stop the proceedings to review the whole case because his trial was unfair. (A403; B286). The court instructed Cooke that if he wished to remain in the courtroom, he must behave and cooperate. (A403). Cooke dodged the court's questions, finally telling the trial judge to go to hell, "I'm going to put you in your grave," and "If I ever catch you, you hear me,

you and your family members, you will get a hurting." Defense counsel asked for a mistrial and recusal. The Superior Court denied both stating, "I do not believe I am influenced or biased or bothered about the threat." (A404-406). Cooke was removed from the courtroom having thusly forfeited his appearance with certain exceptions. (A406-407).

On April 25, 2012, defense counsel reported that Cooke was not speaking to them. (A409). On April 26, 2012, prior to the start of the defense case, Cooke told the court he refused to participate in the penalty phase and told his family to also refuse. (A416). In response to the court's questioning about whether he realized a failure to present mitigation could make the jury find that the aggravators outweighed the mitigators, Cooke stated, in part:

> That's all that mitigation does is stereotype a black person family, how they look, how they been treated. All that is nonsense. Everybody that I know since been around me or have I known growing up or before me had problems in their family. So don't try to make this look like pointing-the-finger situation. You know I ain't do this crime. So I don't care what you say and how you say it. (A417).

Cooke stated the court was forcing him not to participate in his mitigation. (A417). Cooke stated he rejected all mitigation but his right to testify, and that it made no difference whether his testimony took the form of allocution or testimony because the jury "already got their mind made up." (A417).

The court took a short recess during which time defense counsel spoke with Cooke. When court reconvened, defense counsel stated that Cooke agreed to

allow, and indeed, encouraged two of his sons to testify in mitigation and "Cooke [was] okay with the majority of the evidence that we're going to present today." (A418-419). Specifically, counsel also stated:

> [Cooke] is amenable at this point to letting us get into Joyce Johnson's testimony on Tuesday who was his social worker as well as the DYFS records and Ms. Connors [the mitigation expert]. And I think we might be even building a little bit of trust with Mr. Cooke. (A419).

That day, two of Cooke's children testified and the prior testimony by two of his other children were read into the record. (B308-314). In addition, a DVD of Cooke engaging in a video/telephone conference with four of his children was played for the jury. (B314).

On May 1, 2012, defense counsel advised the court that one of Cooke's sisters had cooperated with the mitigation specialist, but it did not appear that she or any other family member would testify. (B320). Thereafter, Joyce Johnson, a former Salem County DYFS worker familiar with the Cooke family, testified as to instances of physical and other abuse perpetrated upon Cooke as he was growing up. (B321-329). Nancy Connors, the defense mitigation speciailist, testified regarding instances of physical abuse as well Cooke's family, educational and medical history up to age 18. (B330-345). Cooke then addressed the court and stated he wished to testify and allocute. He also objected after the fact to Nancy Connors' testimony. (B346).

On May 2, 2012, Cooke testified and told the jury that a mitigation case was

presented against his wishes. (B347). Instead of answering the State's questions on cross-examination, Cooke stated over and over that he was an innocent man. (B347-348). Cooke's testimony was terminated and the jury was removed. (B348). The court reviewed with Cooke the rules of allocution, and he agreed to abide by them. (A444-445). After closing remarks, Cooke exercised his right to allocution stating in part, "I am innocent," "I filed many lawsuits against the state," the case was corrupted and racist, and:

> 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 persuade you to prejudge me even worse. (B349).
>
> . . .
>
> Every family members has problems. But not one time I blamed anything on my family saying it made me do anything because I never done this. I never committed this crime. There's plenty of things I'd like to say, but they will stop me, for real. They will stop me. Proving my innocence right here today. (5/2/12 at 91).
>
> . . .
>
> It's sad. I'm sorry. I'm innocent. If you going to do what you're going to do, do it them. That's all I can say. (B350).

Superior Court properly found Cooke's statements and actions did not comprise a clear, unambiguous, and complete waiver of mitigation. (A394,398). While this Court has not set forth a specific test to determine whether a competent

defendant has actually waived mitigation,[137] a defendant's request relating to a fundamental right, [138] such as the right to self-representation and the right to remain silent, must be clear, genuine, unambiguous, and unequivocal.[139] Indeed, a course of disruptive courtroom conduct justifies treating a request to waive or pursue a fundamental right as ambiguous and less than genuine.[140]

Cooke's statements with respect to mitigation, and indeed his behavior throughout trial, simply exhibited one thing – Cooke wanted control. As to mitigation specifically, Cooke wanted to be at the helm to determine what, if any, mitigation evidence was presented. Cooke repeatedly stated he perceived mitigation evidence to be futile, unfair, and inconsistent with his purported innocence. (A394-397, 403, 417; B286). Specifically, Cooke did not want to involve his family or family history. But he did want to testify in mitigation and participate in allocution. (A415-416; B320).

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[137] Superior Court has adopted a seven-point procedure from Oklahoma. *State v. Ashley*, 1999 WL 463708, *2, n.6 (Del. Super. Mar. 19, 1999) (citing *Wallace v. State*, 893 P.2d 504, 512-13 (Okla. Crim. App. 1995)).

[138] The United States Supreme Court has held that a capital defendant has a constitutional right to present mitigating evidence. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

[139] *E.g.*, *Hartman v. State*, 918 A.2d 1138, 1142 (Del. 2007) (noting "[a]t each step, Hartman indicated his understanding of what he was being told and indicated an unambiguous and unequivocal desire to go *pro se*"); *Garvey v. State*, 873 A.2d 291, 296-7 (Del. 2005) (requiring a waiver of *Miranda* rights to be unambiguous and unequivocal, as determined by the totality of the circumstances); *Kostyshyn v. State*, 2004 WL 220321, *2 (Del. Jan. 30, 2004) (finding a series of disruptive, dilatory outbursts was not a "genuine, unequivocal request to proceed pro se"); *Hooks*, 416 A.2d at 197-98 (requiring a waiver of the right to counsel to be "clear and unequivocal," citing *Faretta v. California*, 422 U.S. 806 (1975)).

[140] *Kostyshyn*, 2004 WL 220321.

When the time came to actually present mitigation or waive it, on the first day of the defense's case in the penalty phase, Cooke agreed to the mitigation. While Cooke complained that mitigation was presented after the evidence was presented, this does not change the fact that Cooke had agreed.

Superior Court properly interpreted Cooke's varied, ambiguous, and hostile statements about mitigation to be Cooke's desire not to participate in what he perceived to be an unfair and futile process. While Cooke did reference actually receiving the death penalty on the first day of the penalty phase, even those remarks were in the context of complaints that the process was unfair and that he was innocent. (A397-398). Cooke did not clearly, genuinely or unambiguously ask for the death penalty. Such a request would have been inconsistent with his repeated assertions that he was innocent. When faced with an ambiguous request, a trial court should lean in favor of the defendant's constitutional rights; here, the right to present mitigation evidence.[141] Superior Court did just that; it interpreted Cooke's many remarks about mitigation in the manner that afforded the most protection to Cooke's constitutional right to present mitigation. Cooke ultimately agreed to the mitigation evidence that was presented, nullifying any previous remarks that might be construed as a waiver. (A418-419). Superior Court did not violate Cooke's constitutional rights, because in the end, Cooke did not a waive

[141] *Stigars*, 674 A.2d at 479 ("When faced with an ambiguous request for self-representation, a trial court should lean in favor of the right to counsel."); *Lockett*, 438 U.S. at 604.

mitigation case and defense counsel presented evidence in accordance with Cooke's wishes.

IX. COOKE'S DEATH SENTENCE IS NOT UNCONSTITUTIONALLY DISPROPORTIONATE.

Question Presented

Whether Cooke's death sentence is disproportionate to the penalty imposed to the penalty imposed in similar cases under 11 *Del. C.* § 4209.

Standard and Scope of Review

Under Section 4209(g)(2), this Court must review the death sentence to determine whether: (1) the evidence supports, beyond a reasonable doubt, the jury's finding of the particular aggravating circumstances; (2) the sentence was arbitrarily or capriciously imposed or recommended; and (3) the sentence is disproportionate to the penalty imposed in similar cases.[142]

Merits of the Argument

Review of Cooke's death sentence by this Court is statutorily mandated.[143] Cooke has failed to address the factors this Court has adopted for independently reviewing a sentence of death under Section 4203(g),[144] arguing instead 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."[145] The State herein

[142] *Ortiz v State*, 869 A.2d 285, 311 (Del. 2005); *Swan v. State*, 820 A.2d 342, 359 (Del. 2003).
[143] 11 *Del. C.* § 4209(g)(2); *Starling v. State*, 903 A.2d 758, 762 (Del. 2006).
[144] *See Manley v. State*, 918 A.2d 318, 321 (Del. 2007).
[145] *Op. Br.* at 96. Cooke also argues that the admission of photographs of the victim as a child were prejudicial and denied him a fair penalty hearing. *Op. Br.* at 97. The fact that emotional evidence is introduced during a penalty phase in a capital case does not render the proceeding

addresses the analysis adopted by this Court.

A. The Statutory Aggravating Circumstance Properly Found

In Cooke's case, the State alleged one statutory aggravator: that Lindsey Bonistall's murder was committed while Cooke was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit Rape in the First Degree and/or Burglary First Degree.[146] During the guilt phase, the State presented more than sufficient evidence of the murder, rape and burglary.[147] This guilt phase evidence carries over to the penalty hearing.[148] At the conclusion of the penalty hearing, the jury was instructed as a matter of law that the only statutory aggravating circumstance alleged in this case had been established beyond a reasonable doubt by their unanimous guilty verdict as to count II, first degree felony-murder.[149]

B. The Sentence Was Not Arbitrary Or Capricious.

The Superior Court's decision to impose the death penalty in this case was neither arbitrary nor capricious. A judge's decision is not arbitrary and capricious if the decision is "the product of a deliberate, rational and logical deductive

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fundamentally unfair. *Norcross v. State*, 816 A.2d 757, 765 (Del. 2003).
[146] 11 *Del. C.* § 4209(e)(1)j.
[147] *Op. Br*., Ex. B at 48-52.
[148] *Flamer v. State*, 490 A.2d 104, 124 (Del. 1983).
[149] *Steckel*, 711 A.2d at 13 ; *Dawson v. State*, 637 A.2d 57, 66 (Del. 1994); *Flamer*, 490 A.2d at 127.

process."[150] The jury found by a preponderance of the evidence that the aggravating circumstances outweighed the mitigating factors in this case by a vote of eleven to one as to felony-murder and ten to two as to intentional murder.[151] The trial judge set out his rationale for the sentencing decision in a well-crafted 70-page written opinion.[152]

In reaching its decision to impose the death sentence, the Superior Court described many of the disturbing details of Bonistall's rape and murder, but summarized it as follows:

> 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 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 evidence 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 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

[150] *Manley*, 918 A.2d at 329 (quoting *Red Dog v. State*, 616 A.2d 298, 310 (Del. 1992)).
[151] *Op. Br.*, Ex. B at 11.
[152] *Op. Br.*, Ex. B.

> 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.[153]

In addition to the statutory aggravating factor, the Superior Court found several nonstatutory aggravators alleged by the State.[154] In that regard the sentencing judge considered the following: the circumstances and nature of Bonistall's rape and murder and other crimes in the indictment; Cooke's character and propensities, including the particular circumstances of the other home invasion burglaries Cooke committed around the same time as the Bonistall murder; Cooke's twenty-five year long criminal history; and the impact of the crimes on Bonistall's family and her close friends.

The judge balanced those aggravating factors against the multiple significant mitigating factors proposed by Cooke which concentrated primarily on Cooke's well-documented childhood during which he was subject to abandonment and repeated physical and emotional abuse.[155] Indeed, the Court gave "great weight" to the effect of abandonment and abuse suffered by Cooke during his childhood.[156] Other mitigators included: Cooke's affection for his family and his children's support of him; the impact his execution would have on his children; his stable

[153] *Op. Br.*, Ex. B at 48-50.
[154] *Op. Br.*, Ex. B at 48-60.
[155] *Op. Br.*, Ex. B at 61-62.
[156] *Op. Br.*, Ex. B. at 61-62.

work history; and Cooke's amenability to the correctional setting.[157] Because other of Cooke's family members refused to participate in mitigation at Cooke's request, the Court was not able to attribute to take their comments into consideration, because they were unknown[158]

The evidence supports the trial judge's determination, consistent with the jury's eleven-to-one and ten-to-two recommendation, that the aggravating factors outweighed the mitigating factors. This is based upon the cruel, violent and sadistic nature of Bonistall's murder and the fact that it was "committed during or after the burglary of her apartment and her rape."[159] Bonistall was a completely innocent victim with no connection to Cooke. And Cooke not only attempted to eliminate evidence to avoid responsibility for his actions here in Delaware but continued to engage in a pattern of violent criminality thereafter.[160] Cooke's history of abuse and neglect is tragic and, but cannot outweigh his violent, cruel and abusive criminal conduct that has spanned the past twenty-five years, despite multiple attempts to intervene and address his abusive behavior.[161] When a trial court's decision to impose a death sentence is "the product of a deliberate rational

[157] *Op. Br*., Ex. B at 62-63.
[158] *Op. Br*. Ex. B at 63-64.
[159] *Op. Brf.* Ex. B. at 66.
[160] *Op. Brf.* Ex. B. at 66.
[161] *Op. Brf.* Ex. B. at 67.

and logical deductive process," it is neither arbitrary nor capricious.[162] The Superior Court's sentencing opinion clearly met this standard.

C. The Sentence Is Not Disproportionate.

The Court's final inquiry is whether the death sentence imposed in this case is disproportionate to the penalty imposed in similar cases under 11 DEL. C. § 4209. In the proportionality review mandated by State law, this Court reviews the "universe" of first degree murder cases which have proceeded to a penalty hearing.[163] Though penalty decisions rendered before the 1991 amendment to Section 4209 are pertinent, cases decided under the 1991 amendment are "directly applicable and therefore more persuasive."[164] A definitive comparison of cases is "almost impossible."[165] Instead, the Court considers the factual background of the relevant cases to determine the proportionality of the particular sentence.[166] Thus, "a review of some objective factors including the gravity of the offense, the circumstances surrounding the crime, and the harshness of the penalty is helpful in reaching a determination of whether or not this case is within a pattern of Delaware death sentence precedent."[167] The inquiry is intended to eliminate the possibility that a death sentence in any given case is an aberration; the Court's function is not

[162] *Red Dog*, 616 A.2d at 310.
[163] *E.g,. Ortiz*, 869 A.2d at 311; *Dawson*, 637 A.2d at 68; *Sullivan v. State*, 636 A.2d 931, 950 (Del. 1994).
[164] *Clark v. State*, 672 A.2d 1004, 1010 (1996).
[165] *Id.* (citing cases).
[166] *E.g., Zebroski v. State*, 715 A.2d 75, 84 (Del. 1998); *Clark*, 672 A.2d at 1010.
[167] *Capano v. State*, 781 A.2d 556, 677 (Del. 2001 (quoting *Zebroski*, 715 A.2d at 84).

to search for proof that the defendant's death sentence is perfectly symmetrical to that imposed in another case in the universe, but to identify the sentence that markedly diverges from the norm.[168]

With these parameters now delineated, it is clear that the sentence imposed on Cooke is not disproportionate to other sentences applied within the universe of applicable cases. This Court has "upheld the imposition of the death penalty in several cases involving cruel and outrageous deaths of defenseless, helpless persons."[169] Second, Cooke's case is comparable to others whether the murder occurred in the victim's home where the object was to commit another criminal offense.[170] Lastly, in those situations where the victim was raped, brutalized and murdered by strangulation in her own home, this Court has consistently found the death sentence proportionate. [171] The excessive cruelty of Bonistall's death informs the cold-blooded, tortuous nature of this killing.

Finally, the sentence is also proportionate to cases in which the defendant had a significant history of criminal conduct.[172] The State alleged, and the

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[168] *See Flamer*, 490 A.2d at 144.
[169] *Sykes v. State*, 953 A.2d 261, 273 & n.4 (Del. 2008) (collecting cases).
[170] *Id.*
[171] *Id. Steckel v. State*, 711 A.2d 5 (Del. 1998); *Dawson*, 637 A.2d. at 66. *See also Whalen v. State*, 492 A.2d 552, 563 (Del. 1985) ("He broke into a house and raped a frail [92 year-old] woman, during the course of which he brutally strangled her."); and *Lawrie v. State*, 643 A.2d 1336, 1349 n.13 ("Although Whalen's death sentence was vacated by the Court, 492 A.2d at 569, the basis for the reversal was the existence of procedural errors during his penalty hearing and not the propriety of the sentence in light of Whalen's conduct.").
[172] *Clark*, 672 A.2d at 1010; *Red Dog*, 616 A.2d 307-10.

Superior Court found, as a nonstatutory aggravator, Cooke's extensive criminal history. As described by the Superior Court, Cooke began a "career in criminality" at the age of ten.[173] "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 . . . on or about June 6, 2005."[174] The Superior Court highlighted that Cooke's criminality is not waning. Instead Cooke's "increasing pattern of criminal behavior . . . demonstrates that the conduct which culminated in the rape and homicide of Lindsey Bonistall on May 1, 2005 was not aberrant."[175] The Superior Court determined that "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."[176] Cooke's lengthy criminal history was found by the Superior Court to be "an aggravating factor entitled to great weight."[177]

The Court's role in determining proportionality is to identify the anomalous sentences. Cooke's rape and murder of a "truly innocent" Lindsey Bonistall was "unusually cruel" and "depraved." Cooke's death sentence for that murder is proportionate and should be affirmed.

[173] *Op. Br.*, Ex. B at 53.
[174] *Op. Br.*, Ex. B at 53-54.
[175] *Op. Br.*, Ex. B at 54.
[176] *Op. Br.*, Ex. B at 55.
[177] *Op. Br.*, Ex. B at 54.

CONCLUSION

For the foregoing reasons, the Superior Court judgment should be affirmed.

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