IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	
	:	
v.	:	**ID NO. 0111003002**
	:	
GARY PLOOF,	:	
	:	
Defendant.	:	

Submitted: October 3, 2011
Decided: January 30, 2012

Upon Defendant's Motion for Postconviction Relief
Pursuant to Superior Court Criminal Rule 61
DENIED

ORDER AND OPINION

Robert J. O'Neill, Jr., Esq., Marie O'Connor Graham, Esq., and John Williams, Esq., Deputy Attorneys General, Department of Justice, Dover, Delaware for the State of Delaware.

Kathryn J. Garrison, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware and Michael Wiseman, Esq., Kristi Charpentier, Esq., Keisha Hudson, Esq., Federal Community Defender Office, Philadelphia, Pennsylvania for the Defendant.

Young, J.

SUMMARY

On June 16, 2003, Gary Ploof (Petitioner) was convicted of Murder First Degree and Possession of a Firearm During the Commission of a Felony for the November 3, 2001 slaying of his wife, Heidi Ploof (Mrs. Ploof). Petitioner was sentenced to death on August 22, 2003. The conviction was affirmed by the Supreme Court on direct appeal. Petitioner filed this motion for postconviction relief pursuant to Superior Court Criminal Rule 61. None of Petitioner's arguments presents grounds for postconviction relief. Accordingly, Petitioner's motion is **DENIED**.

FACTS

Mrs. Ploof's body was found in the driver's seat of a car in the Wal-Mart parking lot in Dover, Delaware on November 4, 2001. She had been shot in the left ear. The bullet exited her right cheek. A .357 caliber magnum bullet was found in the car with a bullet jacket. Police found no gun in the car and no indication of where the bullet struck the inside of the car after exiting Mrs. Ploof's body.

Wal-Mart's security camera recorded the car as it entered the parking lot on November 3, 2001. A woman, later determined to be Mrs. Ploof, was driving the vehicle. A man, later determined to be Petitioner, rode in the passenger seat. Petitioner was wearing a plaid shirt or a flannel jacket with a baseball cap. The footage shows Petitioner standing beside the car's driver side door once it was parked. Petitioner then walked away from the vehicle toward the highway.

Deborah Jefferson, a Wal-Mart employee who was in front of the store at the time, provided police with a similar report. She witnessed a woman driving the car

with a man in the passenger seat. According to her testimony, the car drove to the side of the building. Approximately ten minutes later, the male passenger walked back to the front of the store toward the highway. Ms. Jefferson described the man's clothes as those seen on the security footage.

Police identified Petitioner, Mrs. Ploof's husband, as a suspect in her death. Petitioner, a former United States Air Force Staff Sergeant, was stationed in Dover, Delaware with Mrs. Ploof. Effective November 1, 2001, Petitioner maintained a $100,000 life insurance policy on his wife through his employment.

At the time of Mrs. Ploof's death, Petitioner had been carrying on an extramarital affair with Adrienne Hendricks. According to Ms. Hendricks, Petitioner and his wife were having marital problems. Petitioner told Ms. Hendricks that Mrs. Ploof would be moving out of their home. Petitioner asked Ms. Hendricks to move into the home on November 5, 2001.

Upon searching Petitioner's home, police found a .357 Ruger Security Six Revolver and .357 shell casings. Police determined that the bullet jacket from the vehicle in which Mrs. Ploof's body was found was fired from the weapon located in Petitioner's home. Subsequently, Petitioner was arrested for Mrs. Ploof's murder.

Petitioner's defense at trial, in addition to insisting that the State prove every element of its case for guilt beyond a reasonable doubt, of course, included a theory that Mrs. Ploof committed suicide. According to Petitioner's testimony, he met Mrs. Ploof in town, because she was upset after an argument with her supervisor at work. Mrs. Ploof informed Petitioner that she would not be coming home. By Petitioner's version, she then shot herself in the head with her left hand. Rather than calling the

police, Petitioner drove the car, with the victim's body in the passenger seat, into the Wal-Mart parking lot. He abandoned the car, together with his wife's body, hoping that the circumstances surrounding her death would go unsolved. He took the .357 revolver home because, according to him, while he had never had that gun, he had a friend who might have been able to identify its origins.

At trial, Dr. Judith Tobin, a State Medical Examiner, testified that the cause of Mrs. Ploof's death was a gunshot to the head. She testified to the bullet trajectory and the distance from which the gun was likely to have been fired. Her testimony contradicted Petitioner's suicide theory. Dr. Tobin stated that cases of female suicide with a firearm are very rare and that, in her opinion, Mrs. Ploof was the victim of a homicide.

On June 19, 2003, following the penalty phase of the trial, the Jury recommended that Petitioner receive the death penalty. In doing so, the Jury found that Petitioner had killed his wife for pecuniary gain. That finding was supported, in part, by the testimony of Ruth Jackson and David Eckert regarding Petitioner's plan to claim the life insurance policy on his wife. On August 22, 2003, pursuant to the Jury's recommendation, the Trial Judge sentenced Petitioner to death. On August 11, 2004, Petitioner's conviction and sentence were affirmed on direct appeal to the Supreme Court.[1]

On July 6, 2005, Petitioner filed a *pro se* motion for postconviction relief pursuant to Superior Court Criminal Rule 61. The State filed an answer to Petitioner's motion. Subsequently, Petitioner was assigned counsel who, in turn, filed a

[1] *Ploof v. State*, 856 A.2d 539 (Del. 2004).

supplement to Petitioner's *pro se* motion with a reply to the State's answer. That attorney was excused due to a conflict. New counsel was appointed but, eventually, excused without having filed anything in the case. Petitioner's current counsel was assigned and, after being granted leave by the Court, filed this amended motion for postconviction relief. Petitioner filed a supplement to the amended motion on August 1, 2008 in which he asserts additional claims.

A prolonged Rule 61 evidentiary hearing was held during which Petitioner presented expert and lay witnesses to testify regarding the various allegations raised in his Rule 61 motion. That hearing was addressed to both the guilt and penalty phases of the trial. Specifically, the witnesses addressed Petitioner's and Mrs. Ploof's mental health and the testimony presented by Dr. Tobin. Following the hearing, the Petitioner and the State filed post-evidentiary briefs addressing the claims for relief, upon which the evidentiary hearing had elaborated.

PROCEDURAL REQUIREMENTS

Motions for postconviction relief are governed by Superior Court Criminal Rule 61. The Court will not consider the merits of a claim for postconviction relief unless the claim satisfies the procedural requirements of Rule 61(i).[2] There are four:

> 1) Motions for postconviction relief must be filed within three years of the judgment of conviction;
> 2) Any ground for relief that was not asserted in a prior postconviction proceeding is barred unless consideration is warranted in the interest of justice;
> 3) Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this Court, is barred unless the movant shows cause for relief from the default and prejudice; and

[2] *Younger v. State* 580 A.2d 552, 554 (Del. 1990).

> 4) Any ground for relief that was formerly adjudicated, whether in the proceeding leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is barred unless reconsideration is warranted in the interest of justice.[3]

Rule 61(i)(5) provides an exception to the first three of the foregoing procedural requirements, to wit: ..."a claim that the Court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."[4]

DISCUSSION

Although the window for filing has recently been shortened to one year, Petitioner's motion is governed by the three-year window in effect when he filed his original, *pro se* motion. That motion was filed timely. The amended and supplemental filings made subsequent to Petitioner's original motion were at leave of the Court. Accordingly, Petitioner satisfies the first procedural requirement. Petitioner meets the second procedural requirement, because this is his first motion for postconviction relief. This opinion will address the remaining procedural requirements, in turn, when applicable.

I. Court's Denial of Further Funding Is Not Grounds For Relief.

Petitioner's first argument for postconviction relief is inappropriate for a variety of reasons. The claim asserted therein is for additional funding "to press one's

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

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

case and defend one's self," which would then require "a reasonable extension of time for investigation to be complete and the necessary experts to render conclusions, and hold a full hearing on Petitioner's claims..."

The underpinning for the entire postconviction relief process, of course, is *Strickland v. Washington.*[5] For initial and foundational purposes, as was reiterated to postconviction counsel on multiple occasions throughout this entire process, the questions to be examined are (and are limited to):

1) Did counsel in the original case prepare and present a case, the preparation and presentation of which fell below an objective standard of what reasonably competent counsel would provide?[6]

2) Is there a reasonable probability that, but for counsels' failure so to prepare and present, the outcome of the proceedings would have been different?[7]

The absence of either requirement will defeat the postconviction effort. Moreover, there is a strong presumption that trial counsels' efforts were, in fact, reasonable.[8]

Postconviction counsel herein were afforded by the State through the Court $13,500.00 to pursue investigation and expert input above and beyond that done for the original trial by original counsel.

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[5] 466 U.S. 668 (1984).

[6] *Id*.

[7] *Id.*

[8] *Outten v. State*, 720 A. 2d 547 (Del. 1998).

Parenthetically, at Petitioner's request, the Court permitted three additional counsel from the Federal Community Defender Capital Habeas Unit to participate in (indeed, in some respects, to take over) the postconviction effort. That permission was provided following a conference at which the assurance was made that all expenses for all desired witnesses and investigation would be covered by the "Federal Project", precluding any need for any further reimbursement by the State of Delaware.

Nevertheless, postconviction counsel now claim that an additional $20,000 or so ($3,500 + $8,000 + $7,500 + "more") should be provided.

The initial question, then, is whether "reasonable representation" would have, at a minimum, demanded that a lawyer privately retained by a client in the performance of his or her normally competent services defending a capital case client, would expend $32,000, plus whatever undesignated total was provided by the "Federal Project", plus counsel fees, in order to defend the client? Certainly, in retrospect, when someone is convicted of a capital offense, "money is no object." Unfortunately, in the course of the presentation of the case altogether ahead of the client who is seeking representation, money (as well as the available time of two, rather than five, lawyers) is one element in the consideration. The question, as the law makes clear, is what would be expected of a reasonably competent counsel; not what can be imagined by whoever might be considered the universe's best counsel, with unlimited time and resources.

Further, the decision to grant or deny funds for investigative or psychological expertise is within the discretion of the trial court. A decision by the Court will not be disturbed "unless there is a clear and convincing showing of substantial prejudice

as a result of the denial of funds."[9] The State is not required to provide funds for every request made by an indigent defendant.[10] In order to prevail, the defendant must show, by clear and convincing evidence, that substantial prejudice resulted from a denial of requested funds.[11]

In this case, given the funding provided through the trial and the extensive amount afforded postconviction counsel (to say nothing of the undisclosed amounts provided through the "Federal Project"), Petitioner has certainly not presented any suggestion of evidence that the additional funds would be required. Rather, in the trial and throughout the postconviction process, a plethora of expert and lay witnesses has been provided for and presented.

Petitioner's complaints regarding the adequacy of funding are not well-taken.

II. Defendant's Counsel Was Not Ineffective for Failure to Conduct a Reasonable Investigation to Support the Defense's Suicide Theory.

Petitioner avers that Trial Counsel failed to conduct an adequate investigation to support the defense theory that Mrs. Ploof committed suicide. Specifically, Petitioner argues that Trial Counsel should have presented more evidence about Mrs. Ploof's alleged depression.

At trial, Petitioner's counsel presented witnesses who testified to Mrs. Ploof's state of mind. Karen Thomas testified about Mrs. Ploof's drug abuse. Carl Chance testified that he maintained a romantic relationship with Mrs. Ploof. Thomas Murray

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[9] *Jackson v. State*, 770 A.2d 506 (Del. 2001).

[10] *Van Arsdall v. State*, 486 A.2d 1 (Del. 1984).

[11] *Id.* (citing *Mason v. Arizona,* 504 F.2d 1345 (9th Cir. 1974)).

testified that Mrs. Ploof had been placed on a patient abuse registry for striking a patient at work.

Trial Counsel argued, in closing argument, that Mrs. Ploof was devastated by the termination of her parental rights over her daughter. Counsel argued that Mrs. Ploof and the Petitioner were having marital problems; that Mrs. Ploof was rejected by Carl Chance; that Mrs. Ploof had lost her chance to become a nurse; and that Mrs. Ploof may have been abusing drugs.

According to Petitioner, evidence exists, but was not presented at trial, supporting the theory that the gunshot wound was self-inflicted. Specifically, Petitioner points to the testimony of a series of lay witnesses who could, potentially, testify regarding Mrs. Ploof's troubled childhood.

Petitioner has not presented evidence that Trial Counsel's efforts fell below a reasonable standard. Trial Counsel presented multiple witnesses to support the defense's suicide theory. The testimony focused on Mrs. Ploof's state of mind at the time of her death. The theory was argued in closings. The Jury was presented with the evidence and given the opportunity to afford it due consideration. The possibility that more evidence could have been presented does not mean that counsel's efforts were less then reasonable.

Moreover, Petitioner has not presented evidence of prejudice. At the Rule 61 evidentiary hearing, Petitioner presented Ashley Hurley, Mrs. Ploof's stepdaughter, to testify that she suspected suicide when she learned of Mrs. Ploof's death. Defense counsel, of course, encountered substantial evidence which certainly did not support the theory of Mrs. Ploof's having committed suicide. In addition to Dr. Tobin's

testimony (see III, below) there was the very damaging evidence of Petitioner's inconsistent stories to the police emerging as cover-up attempts. Any additional evidence does not suggest a reasonable probability that the outcome of the guilt phase of the trial would have been different had it been presented to the Jury. Such evidence would have added nothing new to the extensive evidence against Petitioner. The Jury was well aware that suicide was a possibility. Additionally, there was significant evidence against Petitioner that did not hinge on Mrs. Ploof's state of mind. Accordingly, pursuant to either "Strickland prong", reasonable trial presentation or probability of changed result, Petitioner was not prejudiced by the omission of Ms. Hurley's testimony.

III. Defendant's Counsel was not Ineffective for Failing to Challenge Dr. Tobin's Qualifications as an Expert Witness.

Petitioner avers that Trial Counsel was ineffective by failing to object to Dr. Tobin's expert testimony. Specifically, Petitioner contends that Dr. Tobin is not qualified to present expert testimony regarding the distance at which the bullet was fired or the trajectory the bullet took once it was discharged. Petitioner's claim, again, must satisfy the test set forth in *Strickland.*

Witnesses may testify as experts if they are qualified under Delaware Rule of Evidence 702. To qualify, the witness must possess, either by knowledge, skill, experience, training or education, a scientific, technical or specialized knowledge that

will be helpful to the jury.[12] Experts may present factual testimony or opinion testimony.[13] Expert witnesses must base testimony upon sufficient facts or data.[14] The testimony must be the product of reliable principles and methods.[15] Additionally, the witness must apply those principles and methods to the facts of the case.[16]

Dr. Tobin graduated from Columbia Medical School. At the time of trial, Dr. Tobin had worked for the State Medical Examiner's Office for over 40 years. She had conducted over 5,000 autopsies in her capacity as a State Medical Examiner. She had assisted in numerous homicide investigations. She had been qualified by this Court as an expert witness to testify in murder trials in which victims were shot. Moreover, she conducted the autopsy on Mrs. Ploof following her murder.

Petitioner cannot establish prejudice under *Strickland*. Even if Trial Counsel failed to challenge Dr. Tobin's qualification at trial, doing so would have made no difference in the outcome. Dr. Tobin was, in fact, qualified to testify about the cause and manner of Mrs. Ploof's death. She was qualified to offer an opinion regarding bullet trajectory and firing distance. She was qualified to tell the Jury that, in her experience, women rarely commit suicide by shooting themselves in the head. Given Dr. Tobin's substantial background and described competency, the Court would have found her to be qualified. The factual decision not to challenge and, therefore, not

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[12] D.R.E. 702.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

to be overruled in front of the jury (possibly diminishing counsels' future credence) was justified. No prejudice to Defendant existed.

IV. Defendant's Counsel was not Ineffective for Failing to Consult with Ballistics and Toxicology Experts.

Petitioner suggests that Trial Counsel should have retained or consulted with a ballistics expert and a toxicology expert. In furtherance of the argument, Petitioner presented ballistics and toxicology experts at the evidentiary hearing. Again, Petitioner's argument must meet the test set forth under *Strickland.*

A. Dr. Spitz's Ballistics Testimony

Petitioner claims that Trial Counsel should have retained or consulted with a ballistics expert to determine if the bullet trajectory and firing distance supported the defense theory that Mrs. Ploof committed suicide. Moreover, Petitioner contends that consulting such experts was necessary to cross-examine Dr. Tobin effectively.

Petitioner presented Dr. Werner Spitz, a forensic pathologist, at the evidentiary hearing. Dr. Spitz testified that it was possible that Mrs. Ploof committed suicide. He testified that it was possible the weapon was fired from a slightly closer range then that to which Dr. Tobin opined. Dr. Spitz stated that he would have test-fired the weapon to see what patterns projectiles from the weapon made at different ranges. Dr. Spitz testified further that he would not rely on general statistics in coming to a final determination of a cause of death.

What is significant, however, is what Dr. Spitz did not say. He did not say that Mrs. Ploof's death was a suicide. He did not say that the weapon was pressed against her head when the shot was fired. He did not say that suicide was more or less likely

than homicide. Dr. Spitz said only that he felt more testing could have been desirable, and that he was not willing to rule out the possibility that Mrs. Ploof committed suicide.

In essence, Dr. Spitz did not present any evidence that contradicted Dr. Tobin's trial testimony. Dr. Tobin testified to the cause of death, the bullet trajectory and the firing distance. She opined that a homicide was the most likely explanation, but conceded that it was possible Mrs. Ploof pulled the trigger herself. Dr. Spitz did not argue with this opinion. In fact, Dr. Spitz admitted that it is impossible for a forensic pathologist to determine, with certainty, who pulled the trigger in this case. Rather, Dr. Spitz only said that he would have conducted more testing before rendering an opinion.

Hence, Petitioner fails to satisfy *Strickland.* Dr. Spitz's opinion that more testing could have possibly yielded a more definite result does not suggest a reasonable probability that the outcome would have been different had his testimony been presented. Accordingly, Petitioner's argument does not amount to ineffective assistance of counsel or to any probability of an altered outcome.

B. Toxicologist

Similarly, Petitioner's Trial Counsel was not ineffective for failing to consult a toxicologist regarding Mrs. Ploof's alleged drug use. Petitioner suggests that it was possible that Mrs. Ploof was abusing drugs during, or leading up to, the time of her death

Initial testing for substances in Mrs. Ploof's body were positive for marijuana, opiates, amphetamine and propoloxyphene. According to Dr. Tobin, positive results

at the initial stage must be confirmed by further testing. Further test results came back negative. Further testing was not conducted for marijuana, because remnants may remain in the blood for so long after use that testing would not provide reliable results.

Petitioner has not presented any evidence to refute the toxicology reports that were conducted in connection with the investigation. The experts whom Petitioner consulted do not point to evidence suggesting that she was under the influence of anything other than marijuana at the time of her death. Even if Mrs. Ploof was under the influence of marijuana when she died, that fact, alone, would not make it reasonably likely that the jury would have accepted the theory that she committed suicide. Accordingly, Petitioner was not prejudiced by Trial Counsel's failure to consult a toxicologist.

V. Defendant's Counsel was not Ineffective for Failing to Investigate and Prepare Mitigation Evidence In Preparation for Penalty Phase.

Petitioner claims that Trial Counsel was ineffective by failing to investigate and prepare mitigating evidence for the penalty phase. According to Petitioner, Trial Counsel should have spoken with family members, friends and the foster children with whom he grew up in preparation for the penalty phase. Additionally, Petitioner claims that counsel should have conducted more extensive interviews with him regarding his service in the military.

"There is a general duty on defense counsel to 'investigate potentially mitigating evidence for use at the penalty phase.'"[17] "This duty does not demand that

[17] *Outten,* 720 A.2d at 552-53 (quoting *Flamer v. State*, 585 A.2d 736 (Del. 1990)).

counsel pursue 'all lines of investigation,' nor does it require the presentation of all potentially mitigating evidence or even all mitigating evidence uncovered.[18] "That other witnesses might have been available, alone, is insufficient to prove ineffective assistance of counsel."[19] "'Counsel can make reasonable choices' and focus his or her investigation on what might best convince a jury not to impose the death penalty."[20] "To be reasonably competent, [counsel] need not present cumulative evidence."[21] Failure to present certain evidence of mitigating factors in the penalty phase of a capital trial is only ineffective if it violates the standard set forth in *Strickland*.[22]

Petitioner's counsel presented three witnesses at the penalty hearing. Keith Frye testified regarding Petitioner's standing in the Air Force. Dr. Abraham Mensch testified that Petitioner did not pose a danger to society. Shirley Ploof, Petitioner's mother, testified about the impact Petitioner's execution would have on their family.

Dr. Mensch testified that he met with Petitioner for six hours to determine if there were any psychological or neuropsychological issues that may equate to mitigating circumstances to present to the Jury. Dr. Mensch conducted a diagnostic test to that effect, but did not issue an official report thereon. Prior to the meeting, Dr. Mensch reviewed Petitioner's medical records, military records and prison

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[18] *Id*. (citing *Flamer*, 585 A.2d at 756).

[19] *I d.*

[20] *Id*. (citing *Flamer*, 585 A.2d at 756).

[21] *Id*. (citing *Flamer*, 585 A.2d at 756).

[22] *See Id*.

records. He testified that nothing, other than the fact that Petitioner stood convicted of murder, indicated to him that Petitioner was or is a dangerous individual.

Petitioner's contention that Dr. Mensch testified only to Petitioner's potential to adjust to prison life is inaccurate. Dr. Mensch testified regarding the extent of his investigation. By and through his testimony, it is apparent that he was looking for potential mitigating circumstances. The fact that he did not suggest that any exist is less indicative of counsel's having been ineffective and more indicative of a lack of mitigating circumstances. In any event, it seems apparent that counsel contemplated the very psychological issues that Petitioner contends they should have, but found few to no workable results.

At the evidentiary hearing, Trial Counsel testified that they interviewed Petitioner and each of his parents. They did not interview the Petitioner's brother, because he is handicapped. They repeatedly asked those individuals about any problems with Petitioner's upbringing. In each instance, no issues were reported. As a matter of course, Trial Counsel asked those individuals if Petitioner suffered from any abuse. In each instance, the resounding answer was "no." Petitioner himself told counsel repeatedly that there were no problems with the foster children in the home growing up. Without any indication of any problems from any source, counsel chose not to pursue interviews with the foster children.

In sum, Trial Counsel determined that there was little in the way of mitigating evidence. The best course of action, from their perspective at the time (which is, of course, the critical issue), was to highlight Petitioner's clean record, military service to the Country and quiet background. Accordingly, that is the form of mitigating

evidence that counsel presented. This was the reasonable course of action at the time. It cannot be said that their performance fell below the standard of reasonableness; nor can it be said that any of the prolonged foster child information probably could have made any impact, even if presented. Accordingly, this argument does not satisfy *Strickland.*

VI. Failure of Defense Mental Health Expert to Provide Competent Assistance.

Petitioner contends that the defense's expert mental health witness, Dr. Abraham Mensch, failed to provide competent assistance. Petitioner argues that Dr. Mensch should have conducted more detailed research and analysis to prepare Petitioner's defense.

Petitioner does not point to how Dr. Mensch's assistance was deficient. Rather, Petitioner asserts conclusory assumptions that Dr. Mensch should have done more. Dr. Mensch took considerable steps in his assessment of Petitioner. According to his assessment, there were no mental conditions that could be used as mitigating factors. Accordingly, this argument is not grounds for relief.

VII. Trial Counsel was not Ineffective for Declining to Re-Assert it's Motion for Change of Venue, and Appellate Counsel was not Ineffective for Failing to Raise the Issue on Appeal.

Petitioner claims that Trial Counsel was ineffective for failing to renew its motion for change of venue after the Trial Judge denied the motion without prejudice. Additionally, Petitioner claims that appellate counsel was ineffective for failing to raise the issue on appeal.

From the outset, Petitioner's argument is barred by Rule 61(i)(3) because it

should have been raised at trial or on appeal.[23] The Court will consider the argument on the merits only if Petitioner shows cause for the procedural default and prejudice.[24] Additionally, the Court may consider the merits of the argument if Petitioner presents a "colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."[25] A claim of ineffective assistance of counsel can rise to "cause" for the purpose of Rule 61(i)(3).[26] Accordingly, the Court applies *Strickland* to determine if the argument is warranted.[27]

"The law is well established that routine pre-trial publicity of a criminal case will not justify the grant of a motion for change of venue. A change of venue will be granted only upon a showing of reasonable probability of prejudice. To make such a showing, a defendant must present evidence of highly inflammatory or sensationalized pre-trial publicity sufficient for the Court to presume prejudice if it finds the publicity to be inherently prejudicial. Short of such a showing, [a] defendant must demonstrate actual prejudice through *voir dire*."[28]

Trial Counsel moved for a change of venue prior to trial. The Trial Judge denied the motion on the ground that prejudice could not be presumed. The motion

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[23] *State v. Joyner*, 2006 WL 2270937 (Del. Super. Aug. 7, 2006).

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

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

[26] *State v. Dawson*, 681 A.2d 407 (Del. Super. June 9, 1995).

[27] *Id*.

[28] *Riley v. State*, 496 A.2d 997, 1014-15 (Del. 1985).

was denied without prejudice so that trial counsel could renew the application should actual prejudice be found during *voir dire*.

Petitioner contends that prejudice can be presumed in this case because pretrial publicity was sensationalized. Petitioner cannot say that Trial Counsel was ineffective in this sense because it did, in fact, make the argument before trial. That said, it was reasonable for appellate counsel to forego the argument on appeal, because the trial judge was likely to be affirmed. Petitioner points to a series of news article headlines, characterizing them as inflammatory. In fact, these news articles amount to nothing more then routine reporting surrounding a murder investigation and trial.

Similarly, Trial Counsel was not ineffective for its failure to renew the motion. Actual prejudice exists where news reporting causes jurors not to be able to render a fair verdict on the evidence presented in court.[29] During *voir dire*, potential jurors were asked if they had been exposed to pre-trial publicity and, if so, whether they could render an impartial verdict based solely on the evidence presented at trial. Petitioner argues that, because approximately 25% of the petit jury had heard of the case in the news, there was a demonstration of actual prejudice. Accordingly, Petitioner argues that Trial Counsel should have renewed the motion for change of venue at this time.

That, alone, is not enough to render trial counsel ineffective. The mere fact that jurors had heard of the investigation and pending trial does not render them biased by it. Actual prejudice requires that jurors not be able to render a verdict on the

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[29] *Irvin v. Dowd*, 366 U.S. 717 (1961).

evidence presented at trial. Petitioner does not present evidence suggesting that to have been the case. Accordingly, there is no showing that counsel's efforts fell below a reasonable standard. Petitioner's counsel was not ineffective at the trial stage or the appellate stage in regard to press inspired venue motions.

VIII. Petitioner's Batson Challenge is Barred.

Petitioner claims that he was denied his right to a fair trial because the State improperly excluded juror Jacqueline Aull. Petitioner raised this argument on direct appeal to the Supreme Court. Therefore, the argument is barred as formerly adjudicated unless Petitioner can show that reconsideration is warranted in the interest of justice.[30] "In order to invoke the 'interest of justice' provision of Rule 61(i)(4), a movant must show that subsequent legal developments have revealed that the trial court lacked the authority to convict or punish him."[31]

Petitioner offers no subsequent developments that may serve as an exception to the procedural bar. In his brief, Petitioner provides a biographical description of Ms. Aull compared to other jurors. That information was available to the trial court and the appellate court. Accordingly, the Court will not consider the merits of this argument.

IX. Petitioner's Trial Counsel was not Ineffective for Failing to Object to the Exclusion of Juror Amy Kellam for Cause and Appellate Counsel was not Ineffective for Failing to Raise the Issue on Appeal.

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

[31] *Flamer,* 585 A.2d at 746.

Petitioner argues that Trial Counsel was ineffective because it failed to object to the dismissal of potential juror Amy Kellam for cause. Moreover, Petitioner claims that trial Counsel was ineffective for failure to request meaningful questioning of potential jurors regarding their views on the death penalty. Petitioner argues that Appellate counsel was ineffective because it failed to raise the issue on appeal.

"A juror in a capital case may be excused for cause when that juror's views on the death penalty would prevent or 'substantially impair' the performance of his duties in accordance with the Court's instructions and the juror's oath."[32] "Juror bias need not be proved with unmistakable clarity, for the individual juror may not know how he or she will react when faced with imposing a death sentence or he or she simply be unable to articulate their true feelings."[33] For that reason, the Court's decision to excuse, or to not excuse, a potential juror for cause is given great deference.[34]

Amy Kellam was questioned extensively regarding her opinion about the death penalty. She stated that she did not believe in the death penalty. She stated that she believed that those convicted of first degree murder should receive life sentences. At one point during *voir dire*, Ms. Kellam stated that, despite her beliefs, she could recommend a death sentence if the law so required. At another point during *voir dire*, she stated that she could not vote in favor of the death penalty, because she does not believe anyone should receive the sentence under any circumstances. After the State

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[32] *Jackson v. State*, 684 A.2d 745 (Del. 1996).

[33] *Id.*

[34] *Id.*

challenged Ms. Kellam for cause, Petitioner's trial counsel recognized the ambiguity between her responses, and took no position.

Neither Petitioner's trial counsel nor appellate counsel were ineffective as Petitioner so argues. Applying *Strickland*, Petitioner has not presented evidence to suggest that counsel fell below a reasonable standard or that doing so caused prejudice. Petitioner's characterization of Ms. Kellam's answers as having presented no evidence of substantial impairment is inaccurate. Ms. Kellam wavered in her answers to the Court regarding her ability to impose the death penalty. Most notably, she stated clearly, at the end of her *voir dire*, that she could not recommend the death penalty under any circumstances. Trial Counsel noted the ambiguous nature of her answers, and decided not to object to her exclusion. Considering the nature of Ms. Kellam's responses, Trial Counsel was reasonable in doing so. Moreover, whether the objection were raised at trial or the issue were raised on appeal, it is not reasonably likely that the outcome of the trial would have been different. It is not reasonably likely that the Judge would have sustained a defense objection. It is equally unlikely that Petitioner would have prevailed on the issue on appeal. Accordingly, Petitioner's claim does not meet the test set forth in *Strickland*.

Furthermore, as the State points out in its Answering Brief, during the jury selection process, the State exercised only 3 of its 12 peremptory challenges. Hence, ample opportunity to exclude Kellam existed, had she not been excused for cause.

Thus, Petitioner's claim herein is without merit.

X. Petitioner's Trial Counsel was not Ineffective for Failing to Request a more Detailed Curative Instruction Following an Improper Comment by the Prosecution

and Appellate Counsel was not Ineffective for Failing to Pursue the Issue on Appeal.

Petitioner contends that Trial Counsel was ineffective, because it failed to request a curative instruction after the prosecutor commented in closings: "It took nineteen months to hear the claim of suicide and cover-up to protect his wife's reputation." According to Petitioner, this was an improper comment on the Petitioner's right to remain silent. Although Trial Counsel objected and the Trial Judge instructed the Jury to disregard the comment, Petitioner contends that the Trial Counsel should have moved for a mistrial or a more detailed curative instruction. Petitioner contends, also, that appellate counsel was ineffective because it failed to raise the issue on appeal.

Immediately following the purportedly incorrect comment, upon the objection of counsel, the Trial Court instructed the Jury to disregard the one sentence claimed to be inappropriate. Ample case law exists indicating the general presumption that jurors follow the instructions of the Court.[35] No reason exists here to presume otherwise. Indeed, further comment by either counsel or the Court could very easily do further damage by way of emphasis.

Since there is no demonstrated support for any error in the response to the comment during trial, there is *a fortiori* failure on the part of appellate counsel for not having raised the issue.

XI. Petitioner was Denied Fair Trial Before an Impartial Jury.

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[35] *Hendricks v. State*, 871 A. 2d 1118 (Del, 2005); *Capano v. State*, 781 A. 2d 556 (Del. 2001)

Petitioner raises three arguments, in addition to those already presented, that Petitioner was denied the right to trial by an impartial jury.

A. Trial Counsel's Failure to Request that a Sleeping Juror be Removed.

Petitioner claims that Trial Counsel should have, but did not, request that a juror who may have fallen asleep be dismissed. Counsel brought the issue to the Court's attention. The Court questioned the juror. The juror said that he may have fallen asleep for a brief second, but that he was okay to continue. The Court permitted him to stay. Trial Counsel did not request that he be removed. This level of inquiry was completely adequate, and reasonably determined. Discretion is afforded the Trial Court in dealing with such a situation.[36]

B. Trial Counsel's Failure to Investigate Juror's Failure to Adhere to the Court's Admonitions.

Petitioner claims that Trial Counsel was ineffective by failing to question, or to question more extensively, a juror who had discussed the trial against the Court's instructions. A third-party informed the Court that she overheard, at work, a juror commenting on the case. The Court denied Trial Counsel's application for a mistrial. Petitioner claims that Trial Counsel should have made further inquiry into the matter. In fact, this issue was thoroughly explored by the Court, in counsels' presence. The probability of additional questioning leading the Court to dismiss the juror is beyond remote. The probability of the Supreme Court's reversing the Court on that decision is even beyond that.

C. Trial Judge's Denial of Trial Counsel's Motion for Mistrial.

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[36] *Durham v. State*, 867 A. 2d 176 (Del. 2005).

Petitioner claims that the Court erred in denying Trial Counsel's motion for a mistrial after the prosecutor commented on the case to the media during trial. Petitioner does not allege that Trial Counsel was ineffective. This is not a Rule 61 issue, since the complaint is not addressed to any claimed failure on the part of counsel. Beyond that, a mistrial would hardly be expected in this sort of situation. In general, a mistrial is granted only when no meaningful practical alternatives exist.[37] This post-guilt phase comment, given the background of the Court's instructions to the jury to avoid media coverage, was properly addressed by the Court in the decision on the motion for mistrial

For the foregoing reasons, Petitioner's claims in Item XI do not support any postconviction relief.

XII. Trial Counsel was not Ineffective for Failing to Object to the Admission of Evidence of a Prior Bad Act and Appellate Counsel was not Ineffective for Failing to Raise the Issue on Appeal.

During the penalty phase, the State introduced evidence of a prior misdemeanor assault charge against Petitioner. That charge resulted in a *nolle prosequi.* The Trial Judge admitted the evidence over Trial Counsel's objection, but reserved to counsel the right to entertain objections raised during the presentation of the evidence. According to Petitioner, Trial Counsel's failure to reassert the objection, and appellate counsel's failure to raise the issue on appeal, constitute grounds for postconviction relief.

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[37] *Dawson v. State,* 627 A. 2d 57 (Del. 1994).

Evidence of unconvicted criminal activity is admissible in the penalty phase of a capital murder trial as evidence of a non-statutory aggravating circumstance, if the crime can be proven by clear and convincing evidence.[38] The State presented Petitioner's former girlfriend, the victim of the alleged assault, and the responding police officer to testify. Consistent, eyewitness testimony from two witnesses satisfies the *Cohen* standards, and is at any rate within the Trial Court's discretionary range. Hence, the absence of renewal of the motion or the raising of the issue on appeal is no failure of competency.

While admissibility still requires that the evidence be relevant and not unduly prejudicial, the assault as described was committed by Petitioner against his girlfriend at the time. As an act of domestic abuse, it is reasonable to consider the evidence relevant to the murder of his former wife. The evidence was, therefore, admitted properly. Accordingly, Petitioner cannot identify prejudice to satisfy *Strickland* based upon a claim that counsel should have re-raised the prior (overruled) objection.

XIII. Petitioner's Right Against Self-Incrimination was not Violated by the Use of Handwriting Exemplars as Evidence by the State.

Petitioner claims that the State's use of his handwriting samples at trial constituted a violation of his Fifth Amendment right against self-incrimination. This is an evidentiary matter. Setting aside for purposes of this consideration only the propriety of raising the issue in this Rule 61 context, this claim still cannot prevail. The testimony of Georgia Carter, the handwriting analyst linking the "mystery letters" to Petitioner's authorship did not stand alone. The letters also contained fingerprints,

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[38] *State v. Cohen*, 634 A.2d 380 (Del. Super. 1992).

which were matched to Petitioner's by the State's expert witness, Rodney Hegman. There was no evidence that Petitioner did not write the letters. Hence, the complained of testimony was merely supportive of other testimony on the same undisputed issue. There is no probability of a different outcome had this testimony been excluded.

XIV. Petitioner's Claim that his Rights were "Violated in Additional Ways" is Conclusory and Without Merit.

Petitioner combines a string of complaints regarding Trial Counsel's and Appellate Counsel's efforts throughout the litigation. In each case, Petitioner fails to present argument that could lead to relief under Rule 61. Petitioner presents conclusory allegations only.

In an argument for Rule 61 relief, unsupported expressions of discontent are insufficient. Petitioner must demonstrate prejudice. Thus, the bold statement that Trial Counsel failed to request audiotapes or request an "eyewitness identification expert" or "properly" argue objections or make "certain objections" or argue the foregoing on appeal, are meritless without reference to what is specifically claimed to be lacking, and more importantly how each specific would have shown the probability of its altering the outcome of Petitioner's verdict of guilt or sentencing recommendation.

The long list of error assertions on the part of the Trial Court made in paragraph 5 of this claim by Petitioners is not directed to the competency of counsel, and is not a Rule 61 matter.

Therefore, the claims grouped together under this heading are summarily dismissed.

XV. Petitioner was not Denied a Fair Trial Due to a Cumulative Effect of Constitutional Errors.

Petitioner contends that the cumulative effect of all the allegations set forth in his petition serves as grounds from relief from his conviction and sentence. None of the arguments in the petition is meritorious. Accordingly, there is no cumulative effect that would require such relief.

XVI. Petitioner was not Afforded Effective Assistance of Counsel on Direct Appeal.

In what is merely an unsupported compilation of much of the foregoing, Petitioner claims that appellate counsel was ineffective, but he does not provide any new bolstering factual or legal information. Hence, as afore described, Petitioner fails to present argument that counsel fell below a reasonable standard. There is no argument regarding prejudice.

XVII. Petitioner's Supplemental Brief Arguments do not Warrant Postconviction Relief.

Petitioner's supplemental brief does not supplement his previous filings, but rather asserts additional claims for postconviction relief. The additional claims are without merit.

A. Trial Counsel was not Ineffective for Failing to Investigate Adequately the State's "Pecuniary Gain" Theory.

Petitioner contends that the State's evidence regarding the "pecuniary gain"

theory at trial was "weak." Pointing to the series of arguments made throughout his petition, Petitioner argues that there is "substantial mitigating evidence" that would have produced a different result if presented to the jury. Petitioner's argument is conclusory, and should be summarily dismissed.

Additionally, this assertion is factually deficient. The extant proof was argued at Petitioner's direct appeal. In its decision, the Supreme Court noted that Petitioner was made aware by the Air Force of the provision of a $100,000 life insurance policy on, Petitioner's wife, unless Petitioner "disenrolled", which he did not. The Court summarized the evidence as follows: "Ploof intended to murder his wife after the life insurance policy became effective," lying to the police by "insisting that he had no knowledge of the policy."

That alone, the stated facts of which are indisputable, provides solid evidence for the fact. Additionally, other evidence existed about which Petitioner complains, but to no avail.

For either of the foregoing reasons, Petition's claim is futile.

B. Appellate Counsel was not Ineffective for Failing to Raise a Confrontation Clause Issue on Appeal.

Petitioner contends that appellate counsel was ineffective for failing to challenge the admissibility of Ruth Jackson's out-of-court statement on appeal. Over Trial Counsel's objection the Court admitted, as an excited utterance, Ms. Jackson's statement to her husband informing him that Petitioner was inquiring into how to claim the life insurance policy on his wife shortly after she was found murdered. Petitioner contends that doing so violated his confrontation clause rights, because Ms.

Jackson was deceased at the time of trial and could not be cross-examined.

The Confrontation Clause applies to testimonial statements only.[39] Although there is no clear definition of what constitutes testimonial, "'a casual remark to an acquaintance' is a non-testimonial statement."[40] The statement was made privately to her husband. It was not made to police. It was not made with the understanding that it could be used at trial. As a non-testimonial statement, it was not governed by the Confrontation Clause. Accordingly, appellate counsel's failure to raise the issue on appeal was reasonable. Appellate counsel was, therefore, not ineffective.

C. Trial Counsel was not Ineffective for Failing to Interview and Investigate State Witness David Eckert.

Petitioner argues that Trial Counsel was ineffective for failing to investigate David Eckert prior to cross-examination at trial. Petitioner contends that there is reason to believe that further investigation would yield testimony in his favor. Petitioner does not identify the testimony or evidence that he claims exists. The most that Petitioner can claim (regardless of the paucity of information to support it) is that, perhaps, some evidence existed discrediting Eckland. Even if so, evidence existed with Sherry Hobb regarding the "money problem resolution" that Eckland discussed. No probability of outcome alteration exists.

XVIII. Trial Counsel was not Ineffective for Failing to Investigate Reasonably and Cross-Examine Deborah Jefferson.

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[39] *Crawford v. Washington*, 541 U.S. 36 (2004).

[40] *Jones v. State*, 940 A.2d 1 (Del. 2007) (quoting *Crawford*, 541 U.S. at 51).

Petitioner argues that Trial Counsel was ineffective in impeaching Deborah Jefferson's testimony regarding her prior identification of Petitioner to police. Petitioner now claims that doing so was inconsistent with the defense theory that he was at the Wal-Mart that night. On cross-examination, Trial Counsel confronted Ms. Jefferson about her alleged statement to police claiming that the man she saw on November 3, 2001 had a mustache and a different color shirt than that which Petitioner wore that night. Ms. Jefferson stated that she did not remember making the statement.

Petitioner contends, finally, that Trial Counsel was ineffective by failing to investigate the facts underlying Ms. Jefferson's testimony more fully. Specifically, Petitioner suggests that inconsistencies in Ms. Jefferson's statements to police and at trial regarding the occupants and movement of Mrs. Ploof's car warrant further investigation. This suggestion seems counter to Petitioner's argument that Trial Counsel was ineffective by presenting impeachment evidence on cross-examination. That said, Petitioner does not argue how the lack of investigation resulted in prejudice. Accordingly, the claim does not establish grounds for postconviction relief

XIX. Trial Counsel was not Ineffective Regarding Military History Presentation.

At trial, significant effort was made by Trial Counsel to emphasize to the Jury the 19 year military history of Petitioner. That included detailed testimony from two witnesses about the many laudatory aspects of Petitioner's career. Clearly, the Jury viewing this (not altogether exemplary) record found it insufficient to supercede the execution-style offense by Petitioner. A few more details of that record cannot be demonstrated to create a probability of changing the outcome.

CONCLUSION

Petitioner's motion for postconviction relief is **DENIED**.

SO ORDERED.

/s/ Robert B. Young
J.

RBY/sal
oc: Prothonotary
cc: Counsel
File