IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Cr. ID. No. 0707021261
	)	
	)	
BEVERLY A. BAKER,	)	
	)	
Defendant.	)	

Submitted: August 3, 2011
Decided: September 22, 2011

COMMISSIONER'S REPORT AND RECOMMENDATION THAT DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF SHOULD BE DENIED.

Elizabeth R. McFarlan, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Beverly A. Baker, Women's Correctional Center, New Castle, Delaware, *pro se.*

PARKER, Commissioner

This 22nd day of September, 2011, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. On September 17, 2007, a grand jury indicted Defendant Beverly A. Baker on charges of first degree murder and possession of a firearm during the commission of a felony. Defendant's Superior Court jury trial began on June 26, 2008, and on July 7, 2008, the jury returned a verdict of guilty on the lesser-included offense of manslaughter and on the charge of possession of a firearm during the commission of a felony. On July 29, 2008, Defendant filed a motion for a mistrial.[1] On February 12, 2009, the Superior Court denied the motion for a mistrial.[2] On February 13, 2009, on the manslaughter conviction, Defendant was sentenced to twenty years at Level V suspended after 10 years. Defendant was sentenced to ten years at Level V on the possession of a firearm during the commission of a felony conviction. Consequently, Defendant was sentenced to a total of thirty years at Level V, suspended after twenty years followed by two years at Level III probation.

2. On February 20, 2009, Defendant filed a motion for a reduction of sentence.[3] On May 5, 2009, the Superior Court denied the motion for a reduction of sentence.[4]

3. Defendant filed a direct appeal to the Delaware Supreme Court. On December 9, 2009, the Delaware Supreme Court concluded that Defendant's appeal was without merit and affirmed the Superior Court's convictions and sentence.[5] The Delaware Supreme

[1] Superior Court Docket No. 29.
[2] Superior Court Docket No. 43.
[3] Superior Court Docket No. 45.
[4] Superior Court Docket No. 52.
[5] *Baker v. State,* 2009 WL 4688947 (Del. 2009).

Court issued its mandate on December 28, 2009, and the mandate was filed with the Delaware Superior Court on January 4, 2010.[6]

4. The facts of the case, as set forth by the Delaware Supreme Court in its decision on Defendant's direct appeal[7], are as follows:

> (2) Baker and Carl Block engaged in a romantic relationship for several years. In June 2007, Block quietly commenced another romantic affair that Baker discovered by calling recently dialed numbers on his phone. After a woman answered her investigative call, Baker hid Block's phone and returned her key to his apartment. Block changed the locks.
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> (3) Late at night, during the following month, Baker and Block met in the Town & Country Shopping Center parking lot. Gun shots rang out and several witnesses saw a person lying on the ground. As she stood over Block, Baker told another witness that he "just slipped." Unsettled by Block's predicament, this witness later asked a restaurant employee to call 911. When police officers arrived at the parking lot, Block lay on the ground with a gunshot to his chest and blood visible on his back. Baker had left, and the police could not find the gun.
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> (4) The State charged Baker with First Degree Intentional Murder and Possession of a Firearm During the Commission of a Felony. Baker claimed that depression over financial issues drove Block to commit suicide.

5. On March 9, 2011, Defendant filed this motion for postconviction relief. In the subject motion, Defendant raises various grounds for relief. Defendant contends that her counsel provided ineffective assistance for a variety of reasons. Defendant also contends that her statement to the police should not have been admitted at trial. Before making a recommendation, the Commissioner enlarged the record by directing Defendant's counsel

[6] Superior Court Docket No. 64.
[7] *Baker,* 2009 WL 4688947, at *1.

to submit an Affidavit addressing Defendant's claims. Thereafter the State filed a response to the motion and Defendant filed a reply thereto.[8]

6. Prior to addressing the substantive merits of any claim for postconviction relief, the Court must first determine whether the defendant has met the procedural requirements of Superior Court Criminal Rule 61.[9] In order to protect the procedural integrity of Delaware's rules, the court will not consider the merits of a post conviction claim that fails any of Rule 61's procedural requirements.[10]

7. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;[11] (2) any basis for relief must have been asserted previously in a prior postconviction proceeding; (3) any basis for relief must have been asserted at trial or on direct appeal as required by the court rules unless the movant shows prejudice to his rights and cause for relief; and (4) any basis for relief must not have been formally adjudicated in any proceeding. The bars to relief under (1), (2), and (3), however, do not apply to 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.[12] Moreover, the procedural bars of (2) and (4) may be overcome if "reconsideration of the claim is warranted in the interest of justice."[13]

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[8] Super.Ct.Crim.R. 61(g)(1) and (2).
[9] *Younger v. State,* 580 A.2d 552, 554 (Del. 1990).
[10] *Bailey v. State,* 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State,* 580 A.2d 552, 554 (Del. 1990).
[11] If a final order of conviction occurred on or after July 1, 2005, the motion must be filed within one year. See, Super.Ct.Crim.R. 61(i)(1)(July 1, 2005).
[12] Super.Ct.Crim.R. 61(i)(5).
[13] Super.Ct.Crim.R. 61(i)(4).

8. In this case, Defendant's motion is procedurally barred. Rule 61(i)(1) applies because Baker filed this motion more than one year after her final order of conviction. Rule 61(m) defines when the one year window for filing a motion for postconviction relief begins to run. In those cases, such as the present case, when the Defendant has filed a direct appeal, the one year window begins when the Supreme Court issued a mandate or order finally determining the case on direct review.[14] The one year window for filing a motion for postconviction relief began no later than January 4, 2010, when the mandate issued by the Supreme Court was filed in the Superior Court,[15] and ended one year later on or about January 5, 2011. Defendant failed to file her motion for postconviction relief during this applicable one-year limit. Defendant's motion, filed in March 2011, was filed outside the applicable one-year limit, and is time-barred.

9. The issues raised in this motion for postconviction relief could all have been raised in a timely filed motion. Indeed, the issues raised in this motion were all related to alleged errors made at trial and on appeal. Defendant does not raise anything new or recently discovered or which was not known during the one year window for the timely filing of a postconviction motion. Defendant was aware of, had time to, and the opportunity to raise all of the issues in her post conviction motion in a timely filed motion. Defendant has not offered any explanation of cause which prevented her from raising these claims in a timely manner.[16] Because Defendant's Rule 61 motion was filed more than one year after her conviction became final, Defendant's motion is procedurally barred.

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[14] Super.Ct.Crim.R. 61(m)(2).
[15] Superior Court Docket No. 26.
[16] *Outten v. State,* 720 A.2d 547, 556 (Del. 1998)(a showing of cause is satisfied when a movant shows some external impediment which prevented him from raising the claim in a timely manner).

10. Even if Defendant's claims are not procedurally barred, they are without merit.

11. Defendant contends that her counsel was ineffective both at trial and on appeal. In order to prevail on an ineffective assistance of counsel claim, Defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness" and that, (2) the deficient performance prejudiced the defense.[17] The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show that there is a reasonable probability that, but for defense counsel's unprofessional errors, the outcome of the proceedings would have been different.[18]

12. Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.[19] Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.[20] Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.[21]

13. In considering post-trial attacks on counsel, *Strickland* cautions that trial counsel's performance should be reviewed from the defense counsel's perspective at the time decisions were being made.[22] It is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.[23] A fair assessment of attorney performance requires that

[17] *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).
[18] *Id.* at 687-88, 694.
[19] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).
[20] *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at *1 (Del. 2008).
[21] *Strickland v. Washington,* 466 U.S. 668, 689 (1984).
[22] *Stickland*, 466 U.S. at 688-89.
[23] *Stickland*, 466 U.S. at 688-89.

every effort be made to eliminate the distorting efforts of hindsight. Second guessing or "Monday morning quarterbacking" should be avoided. [24]

14. The United States Supreme Court recently reiterated the high bar that must be surmounted in establishing an ineffective assistance of counsel claim. In *Harrington v. Richter,*[25] the United States Supreme Court explained that representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.[26] The challenger's burden on an ineffective assistance of counsel claim is to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial.[27]

15. The United States Supreme Court explained that a defendant is not guaranteed perfect representation, only a reasonably competent attorney. There is no expectation that competent counsel will be a flawless strategist or tactician. A defense attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.[28]

16. The United States Supreme Court further explained that there are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. Consequently, defense

[24] *Stickland*, 466 U.S. at 688-89.
[25] *Harrington v. Richter,* 131 S.Ct. 770 (2011).
[26] *Id.,* at * 791.
[27] *Id.*
[28] *Id.,* at *787-792

counsel must be given wide latitude in making tactical decisions.[29] Counsel is permitted to make reasonable decisions that particular investigations are unnecessary. Counsel is not required to pursue an investigation that would be fruitless, much less one that might be harmful to the defense.[30] A defense counsel can avoid activities that appear distractive from more important duties. There is a strong presumption that defense counsel's focus on certain issues to the exclusion of others reflects trial tactics rather than sheer neglect.[31]

17. The United States Supreme Court reasoned that it is difficult to establish an ineffective assistance claim when counsel's overall performance indicates active and capable advocacy.[32] Counsel's representation must be judged by the most deferential of standards. The United States Supreme Court cautioned that reviewing courts must be mindful of the fact that unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with his client, with opposing counsel, and with the judge.[33]

18. Turning now to the subject case, whether or not defense counsel was a flawless strategist, it is clear from a review of the record that defense counsel provided active and capable advocacy. Indeed, the record reflects that defense counsel consistently, vigorously and diligently defended the charges against Defendant. Defense counsel called various witnesses to testify including an expert witness;[34] made tactical decisions

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[29] *Id.*, at *788-789.
[30] *Id.,* at *787-790
[31] *Id.,* at *787-790.
[32] *Id.* at 791.
[33] *Id.* at 787-88.
[34] See, for example, July 1, 2008 Trial Transcript, pgs. 40-49, 70-73; July 2, 2008 Trial Transcript, pgs. 4-84; 84-102.

including the decision not to call another witness to testify[35]; made tactical decisions regarding evidentiary issues[36]; replete throughout the trial, defense counsel vigorously cross-examined the State's witnesses; and defense counsel diligently and thoroughly ensured Defendant's videotaped statement to the police was properly redacted as to all objectionable information.[37]

19. The United States Supreme Court cautioned that a reviewing court must be mindful of the fact that defense counsel was in the trenches, he observed the relevant proceedings and knew of materials outside the record. Defense counsel was therefore confined as to arguments that could be made, and logical inferences that could be drawn, from materials and information which were known to him. [38]

20. In the subject action, Defendant was charged with First Degree Murder. After the shooting, Defendant fled the scene of the shooting, disposed of the weapon, never reported the "accident", but went to work the next day.[39] Yet, despite these facts, Defendant was not convicted of First Degree Murder. Instead, she was convicted of a lesser charge, manslaughter. Defense counsel believes his tactical decision to call a forensic expert to testify at trial was "probably" the difference between a verdict of guilty of First Degree Murder rather than a conviction of manslaughter.[40] Whatever tactical and strategic decisions resulted in the verdict, when reviewing the entire proceeding, the

[35] See, for example, July 1, 2008 Trial Transcript, pg. 3 ("I have made the tactical decision not to call Dr. Kaye as a witness").
[36] See, for example, July 1, 2008 Trial Transcript, pgs. 52-53 (Because the victim's mother had been the victim in a homicide case using a gun, defense counsel , under the circumstances, decided it would be better to waive foundation objections to a line of questioning. The decision to do so was "deliberate" and "tactical.")
[37] See, June 30, 2008 Trial Transcript, pgs. 96-104.
[38] For example, although the jury was not aware, defense counsel was aware that gunpowder residue had been discovered in his client's trunk and inside her purse. Defense counsel was therefore constrained as to inferences that could be drawn and arguments that could be made regarding the existence of the gun at the scene of the crime and the disappearance of the gun after the shooting.
[39] Affidavit of Joseph A. Hurley in response to Defendant's Rule 61 motion, at *2.
[40] See, Affidavit of Joseph A. Hurley in response to Defendant's Rule 61 motion, at *3.

record reflects counsel's overall performance as being active, diligent, thorough and capable advocacy.

21. With the United States Supreme Court's pronouncement that it is difficult to establish an ineffective assistance claim when counsel's overall performance indicates active and capable advocacy, and its direction that defense counsel's representation must be judged by the most deferential of standards, we turn now to Defendant's specific claims.

22. Defendant contends that her counsel was ineffective because he failed to pursue "available defenses, known to him at the time of trial."[41] Baker fails to state what the "available defenses" were and how her counsel's failure to pursue these avenues prejudiced her at trial. Conclusory, unsupported and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.[42] This claim is too conclusory and lacking in detail to establish a claim of ineffectiveness.

23. Next, Baker asserts that her counsel "perjured himself in an affidavit to Superior Court" when he stated that he had "engaged expert witnesses and used attorney's fees to discharge those obligations." Defendant contends that defense counsel never called any expert witnesses to testify at trial. Defense counsel, in his Affidavit filed in response to Defendant's Rule 61 postconviction relief motion, denied that he perjured himself and reiterated that he did retain an expert and paid the witness fee out of the monies he received as a fee.[43] Defense counsel did, in fact, retain a forensic expert, Dr. Ali Hameli.

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[41] See, Defendant's Memorandum in Support of Rule 61 Motion, at pg. 26, ¶37A.
[42] *Younger v. State,* 580 A.2d 552, 556 (Del. 1990); *State v. Brown,* 2004 WL 74506, *2 (Del.Super. 2004)(conclusory and unsubstantiated allegations of unprofessional conduct are insufficient to support a motion for postconviction relief).
[43] Affidavit of Joseph A. Hurley in response to Defendant's Rule 61 motion, at pg. 3.

The forensic expert did, in fact, testify at trial.[44] Moreover, defense counsel believes that his decision to retain Dr. Hameli and have him testify at trial was probably the difference between a verdict of guilty of Murder in the First Degree and the ultimate verdict of manslaughter. Defendant has failed to satisfy either prong of the *Strickland* test and her claim of ineffectiveness must fail.

24. On appeal, defense counsel presented a single claim of "sandbagging" by the state prosecutor in rebuttal. Baker appears to assert that defense counsel should have also claimed on appeal that her sentence was excessive.[45] Defense counsel represents that Baker had no legal grounds to support a reversal of the verdict.[46] He took a direct appeal and raised the issue of "sandbagging." No other issue was raised, no other issue was meritorious and nothing would have resulted in the Supreme Court changing the result of the Superior Court.[47] Defense counsel did not believe that Defendant had any viable grounds for appeal that would give Defendant the "remotest chance of having a successful appeal."[48]

25. Baker's sentence was within the statutory limits. Delaware law is well established that appellate review of sentences is extremely limited.[49] Appellate review of a sentence generally ends upon the determination that the sentence was within the

[44] See, Trial Transcript of July 2, 2008, at pgs. 4-84.
[45] Defendant's Memorandum in support of Rule 61 motion, at pg. 26, ¶37C.
[46] Affidavit of Joseph A. Hurley, at pg. 3-4.
[47] *Id.,* See also, Exhibits G1-G3 to Defendant's Motion in Support of her Rule 61 Motion, a February 18, 2009 letter from Joe Hurley to Defendant advising that she did not have any issues that will be successful on appeal and that a sentence imposed within statutory limits will not be overturned by the Supreme Court. "The 'bottom line' is that I do not see any available grounds that would give you the remotest chance of having a successful appeal."
[48] *Id.*
[49] *Hawkins v. State,* 2010 WL 5043931(Del. 2010), at *(there is no basis for appeal of a 10 year sentence for a conviction of possession of a deadly weapon during the commission of a felony when the statutory range is 2 to 25 years. A 10 year sentence is well within the statutory range).

statutory limits prescribed by the legislature.[50] There is no basis for appeal of a sentence within the statutory limits, unless it is clear from the record that the judge relied on impermissible factors or sentenced the defendant with a closed mind.[51] Defendant has not presented any evidence to support any assertion that the judge exhibited a closed mind during sentencing. Consequently, defense counsel cannot be deemed ineffective for failing to raise an issue which lacked merit. Defendant has failed to meet her burden to establish that defense counsel's conduct was deficient nor has she established actual prejudice as a result from any alleged deficiency.

26. Defendant claims that her counsel was ineffective because he informed her that he intended to withdraw from representing her on appeal and because he did not advise her of her right to supplement his appellate brief.[52] Defense counsel did not, in fact, withdraw from representing Defendant on appeal. Moreover, defense counsel did not file a "no-merits brief", so it does not appear that Baker had any right to supplement counsel's appellate brief. In any event, Baker does not state what issue or issues she would have raised and how she suffered any prejudice by the failure to raise the issue or issues. Defendant has not explained what good faith basis existed for the raising of any other issue on appeal. Defense counsel represents that he raised the only issue on appeal which he believed had any merit. Moreover, defense counsel represents that Defendant suffered "absolutely no prejudice" whatsoever by the failure to raise any other issue, because no other issue had any merit.[53] Defense counsel cannot be deemed ineffective for failing to raise unspecified issue(s) that have no apparent legal or factual basis.

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[50] *Id.*
[51] *Id.*; See also, *Weston v. State,* 832 A.2d 742, 746 (Del. 2003).
[52] Defendant's Memorandum in support of Rule 61 Motion, at pg. 27, ¶37D.
[53] Affidavit of Joseph A. Hurley in response to Defendant's Rule 61 motion, at * 3-4.

Defendant's ineffective assistance of counsel claim on this issue fails to meet either prong of the *Strickland* standard and is denied.

27. Baker complains that her attorney failed to advise her as to what to say to her pre-sentence investigator or at sentencing.[54] This claim is belied by the record. Defense counsel did, in fact, advise Baker not to discuss the circumstances of the crime with the Presentence Office and to "only discuss your background."[55] As to sentencing, defense counsel advised Baker to "talk in terms of expressing sympathy for the family, sorrow for the way that you responded or didn't respond and leave it at that."[56] Thus, there is no factual basis for this claim of ineffective assistance of counsel.

28. Baker complains that defense counsel's secretary, after hearing her statement over the phone, told her that the statement Baker had prepared to read at sentencing was good.[57] Defense counsel has no knowledge as to whether Defendant read her remarks to his secretary.[58] He did not instruct or direct her to do so. He did not know that she did so. Even assuming that Baker's assertion is true, Baker "had no reason to be seeking counsel from a secretary and [then seek to hold defense counsel] responsible."[59] Defense counsel, completely unaware that Baker was soliciting advice from a secretary, cannot be deemed ineffective as a result of Baker's reliance upon his secretary's opinion.

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[54] Defendant's Memorandum in support of Rule 61 Motion, at pg. 27, ¶37E.
[55] Defendant's Exhibit G5, a letter dated July 13, 2008 from Joe Hurley to Defendant, at paragraph 2 ("You will be contacted by somebody from the presentence office in order to interview you. My advice is that you provide information regarding your background, but when you get to that point where you are asked to give your version of events, you should decline to answer. You have given a lengthy account of what happened, and there is nothing that you can do to further explain it, and all you can do is make it worse.")
[56] Defendant's Exhibit G5, a letter dated July 13, 2008 from Joe Hurley to Defendant, at paragraph 3 ("At the time of sentencing, you will be given an opportunity to address the Court. I suggest, although it is your decision, that you talk in terms of expressing sympathy for the family, sorrow for the way that you responded or didn't respond and leave it at that.")
[57] Defendant's Memorandum in support of Rule 61 Motion, at pg. 27, ¶37F.
[58] Affidavit of Joseph A. Hurley in response to Defendant's Rule 61 motion, at pg. 4.
[59] Affidavit of Joseph A. Hurley in response to Defendant's Rule 61 motion, at pg. 4.

29. As an aside, Defendant, in her Memorandum in Support of her Rule 61 motion, asserts that as a result of her statement made at sentencing, the court "raised her sentence from 5 years to 20 years."[60] In her Reply Memorandum, Defendant contends that she received an additional 10 years as a result of her statement.[61] There is, however, no factual support for these assertions. The court never made this representation. At the end of the sentencing hearing, the court sentenced Defendant.[62] It is not known whether the court was going to sentence the Defendant to 20 years at Level V before she made her statement, whether the court increased her sentence, the extent (if any) to which her sentence was increased, or what her sentence would have been had she not made her statements. What is known is that Defendant was sentenced well within the statutory limits for the charges for which she was convicted.

30. Baker complains that her counsel did not call any witnesses at trial or at sentencing to testify on her behalf.[63] First, this is factually incorrect. Dr. Hameli, a forensic expert, was called by the defense at trial. Defense counsel also called various other witnesses to testify.[64] Moreover, defense counsel made tactical decisions not to call another witness to testify.[65] The decision as to whether or not to call a witness, and how to examine and/or cross-examine witnesses who are called are tactical decisions.[66] Great weight and deference are given to tactical decisions by the trial attorney. There is a strong

[60] See, Defendant's Memorandum in support of Rule 61 Motion, at pg. 27.
[61] See, Defendant's Reply Memorandum, at pg. 10.
[62] See, February 13, 2009 Sentencing Transcript.
[63] Defendant's Memorandum in support of Rule 61 Motion, at pg. 28, ¶37G.
[64] See, for example, July 1, 2008 Trial Transcript, pgs. 40-49, 70-73; July 2, 2008 Trial Transcript, pgs. 4-84; 84-102.
[65] See, for example, July 1, 2008 Trial Transcript, pg. 3 ("I have made the tactical decision not to call Dr. Kaye as a witness").
[66] *Outten v. State,* 720 A.2d 547, 557 (Del. 1998).

presumption that defense counsel's conduct constituted sound trial strategy.[67] Baker has failed to overcome this strong presumption. Baker has not established which witness or witnesses that were not called, should have been called, and thereafter to establish how that witness(es) would have helped her defense.

31. Baker complains that her counsel did not subpoena the victim's records from the Internal Revenue Service to support her contention that the victim was facing possible jail time for tax evasion.[68] Defense counsel explains that he did not call anyone from the Internal Revenue Service because he did not think it was particularly helpful.[69] The fact that the victim had tax problems was already at evidence in the case.[70] Baker has failed to demonstrate how presentation of this evidence would have affected the outcome of her trial. There is a strong presumption that defense counsel's conduct constituted sound trial strategy.[71] Defendant has not overcome this strong presumption and her ineffectiveness claim must fail.

32. In her next two claims, Baker alleges that counsel failed to "use" forensic evidence of the victim's blood/alcohol level to show that the victim was intoxicated when he was shot or the victim's history of mental instability and his prior criminal history.[72] Defense counsel represents that at trial he brought forth all relevant evidence that was helpful to Defendant at trial.[73] Indeed, the blood/alcohol level of the victim and findings of cannabinoid was brought into evidence at trial.[74] The victim's prior criminal history was not relevant to any defense claim that he was trying to commit suicide. Baker has

[67] *Strickland v. Washington,* 466 U.S. 668, 689 (1984); [67] *Harrington v. Richter,* 131 S.Ct. 770 (2011).
[68] Defendant's Memorandum in support of Rule 61 motion, at *28, ¶37H.
[69] Affidavit of Joseph A. Hurley in response to Defendant's Rule 61 motion, at pg. 4.
[70] See, for example, July 1, 2008 Trial Transcript, pgs. 73-74; July 3, 2008 Trial Transcript, pgs. 39-40.
[71] *Strickland v. Washington,* 466 U.S. 668, 689 (1984); [71] *Harrington v. Richter,* 131 S.Ct. 770 (2011).
[72] Defendant's Memorandum in Support of Rule 11 Motion, at pg. 28, ¶37I & J.
[73] Affidavit of Joseph A. Hurley in response to Defendant's Rule 61 motion, at pg. 4.
[74] See, Trial Transcript of July 2, 2008, at pgs. 42-46, 61-63.

failed to explain how the "use" of this evidence would have affected the outcome of her trial. Defendant has failed to establish that defense counsel's conduct was in any way deficient nor has she established actual prejudice resulting from any alleged deficiency.

33. No gun was ever recovered in this case. Baker now complains that counsel failed to sufficiently argue that fact to the jury.[75] Defense counsel responds that the so-called "defense" of the gun missing from the scene was not particularly helpful to the defendant.[76] Given the facts of this case (witnesses and police arrived at the scene within minutes of the gunshot) and Baker's defense that Carl Block was trying to commit suicide, the fact that the gun was missing from the scene was not helpful to the defense. Moreover, defense counsel was also aware that gunpowder residue had been discovered in his client's trunk and inside her purse, which created additional constraints on what could be argued and what logical inferences could be drawn from the existence of the gun at the scene of the shooting and its disappearance after the shooting. The fact that the gun was missing was argued by the prosecutors and supported the State's theory that Baker took the gun and disposed of it. Baker has not explained how her attorney should have used the missing gun evidence in her defense and how it would have been helpful to the defense.

34. Baker also appears to be making a claim regarding cell phone records, but she does not appear to be making an actual claim of attorney deficiency related thereto.[77] This claim is too vague and lacking in detail to establish a viable claim.

35. Baker asserts that her attorney "never negotiated a plea agreement."[78] Defense counsel responds that there "has never been a case that I have not attempted to negotiate a

[75] Defendant's Memorandum in Support of Rule 11 Motion, at pg. 29, ¶37K.
[76] Affidavit of Joseph A. Hurley in response to Defendant's Rule 61 motion, at pg. 4.
[77] Defendant's Memorandum in support of Rule 61 Motion, at pg. 29, ¶37L.

reasonable plea offer."[79] Even so, the State is under no obligation to offer a plea, and the Defendant has no constitutional or statutory right to have one provided.[80] A defendant is not entitled to a plea offer, and thus Baker cannot maintain a viable claim against her counsel for failing to obtain one.

36. Finally, Defendant claims that her statement to the police should not have been admitted at trial.[81] Defendant does not appear to be raising a claim of attorney deficiency in connection with this claim. As a result, in addition to being time-barred, this claim is also procedurally barred by Rule 61(i)(2) and Rule 61(i)(3), for Defendant's failure to raise the claim at trial, on direct appeal, or in any prior postconviction proceeding.[82] If Defendant genuinely believed this contention had any merit, she was required to raise the claim on direct appeal. Having failed to raise the claim in her direct appeal, it is now procedurally barred pursuant to Rule 61(i)(2) and Rule 61(i)(3).

37. For the sake of completeness, however, it is noted that even if this claim was not procedurally barred it is without merit. In his Affidavit, defense counsel explains that Defendant's statement, which was introduced into evidence, was exculpatory.[83] Moreover, it does not appear that there was any good faith basis to support any further objection to the admission of the statement, other than those objections and redactions to the statement that were, in fact, already made by defense counsel. The record reflects that defense counsel diligently and thoroughly ensured that Defendant's videotaped

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[78] Defendant's Memorandum in support of Rule 61 Motion, at pg. 29, ¶37M.
[79] Affidavit of Joseph A. Hurley in response to Defendant's Rule 61 motion, at pg. 5.
[80] *State v. Collins,* 2006 WL 1174021, at *3 (Del.Super.)
[81] See, Defendant's Motion for Postconviction Relief, at pg. 3.
[82] Defendant's ineffective assistance of counsel claims are untimely and therefore procedurally barred. The additional procedural requirement that a claim be raised on direct appeal to be preserved is not applicable to ineffective assistance of counsel claims. Rule 61 motions are the appropriate vehicle for ineffective assistance of counsel claims, even where they have not been previously raised. *Malin v. State*, 2009 WL 537060, at *5 (Del.Super. 2009); *Desmond v. State,* 654 A.2d 821, 829 (Del. 1994).
[83] Affidavit of Joseph A. Hurley in response to Defendant's Rule 61 motion, at pg. 2.

statement to the police was properly redacted as to all objectionable information.[84] Defense counsel referred to Defendant's statement extensively during his closing argument.[85] In his closing argument, defense counsel emphasized that although Defendant had her rights and could have refused to subject herself to questioning by the police, she did not do so. Instead, she said "[I have] nothing to hide. . .", and she talked and she talked and she talked for three or four hours.[86]

38. Defendant has not pointed to anything in the record which demonstrates a lack of diligence on behalf of her counsel. Indeed, the record reflects that defense counsel consistently, vigorously and diligently defended the charges against Defendant. Defendant's claims of ineffective assistance of counsel are without merit.

39. Baker's motion for postconviction relief is procedurally barred and without merit. Baker has failed to establish a miscarriage of justice to avoid the limitations prescribed by Rule 61(i)(1). Baker cannot demonstrate that any alleged deficiencies on the part of her counsel at trial or on appeal resulted in any actual prejudice, thereby failing to meet the high standards of Rule 61(i)(5).

40. In this case, Defendant has failed to overcome any of the procedural bars by showing a "colorable claim that there was a miscarriage of justice" or that "reconsideration of the claim is warranted in the interest of justice." The "miscarriage of justice" exception is a "narrow one and has been applied only in limited circumstances.[87] The defendant bears the burden of proving that she has been deprived of a "substantial

[84] See, June 30, 2008 Trial Transcript, pgs. 96-104.
[85] See, July 3, 2008 Trial Transcript, pgs. 42-56.
[86] July 3, 2008 Trial Transcript, pgs. 42-43.
[87] *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

constitutional right."[88] The Defendant has failed to provide any basis, and the record is devoid of, any evidence of manifest injustice. The Court does not find that the "interests of justice" require it to consider the otherwise procedurally barred claims for relief.[89]

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief should be denied.

IT IS SO RECOMMENDED.

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Commissioner Lynne M. Parker

oc: Prothonotary
cc: Joseph A. Hurley, Esquire

[88] *Id.*
[89] *Id.*