

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE, )  
)  
Plaintiff, )  
)  
v. )  
)  
JAMES P. KALIL, )  
)  
Defendant. )  
)

Cr. ID. No. 1002002075

Submitted: April 3, 2013

Decided: June 6, 2013

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

Maria T. Knoll, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Sandra W. Dean, Esquire, 12322 Willow Grove Road, Camden, Delaware, Attorney for Defendant James P. Kalil.

PARKER, Commissioner

This 6th day of June, 2013, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. Defendant James P. Kalil was arrested on February 4, 2010 and subsequently charged with Murder First Degree and Possession of a Deadly Weapon During the Commission of a Felony (PDWDCF). On June 22, 2011, Defendant pled guilty to Manslaughter and PDWDCF.

2. Defendant's decision to accept the State's plea offer occurred on the day of trial. The jury had already been selected but was not sworn. Defendant's suppression motion, following a hearing, was denied. The trial was ready to begin.<sup>1</sup>

3. As part of the plea agreement, the parties agreed that a presentence investigation would be requested. Also as part of the plea agreement, the State agreed to recommend no more than 15 years at Level V.<sup>2</sup>

4. Following a presentence investigation, on December 2, 2011, Defendant was sentenced. Defendant was sentenced on the manslaughter charge to 20 years at Level V, suspended after 10 years, for decreasing levels of supervision. On the PDWDCF charge, Defendant was sentenced to 4 years at Level V. Consequently, Defendant was sentenced to a total of 14 years at Level V.<sup>3</sup>

5. Defendant did not file a direct appeal to the Delaware Supreme Court.

6. On February 16, 2012, Defendant filed a Motion for Reduction of Sentence. Defendant contended in that motion that his sentence was excessive. By Order dated March 26, 2012, the Superior Court denied Defendant's motion for reduction of sentence.

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<sup>1</sup> See, Superior Court Docket No. 29- Suppression Motion Denied on June 22, 2011.

<sup>2</sup> June 22, 2011 Plea Transcript, at pgs. 17-18; Plea Agreement dated June 22, 2011.

<sup>3</sup> December 2, 2011 Sentencing Transcript, at pg. 16; Sentencing Order of December 2, 2011.

The Superior Court held that the sentence was appropriate, and remained appropriate, based upon all the circumstances of this case.<sup>4</sup>

## **FACTS**

7. The charges at issue stem from an incident which occurred on February 3, 2010. On February 3, 2010, the Wilmington Police Department went to 218 N. Broom Street, the Oxford House, in response to a stabbing complaint. The Oxford House is a Wilmington facility for persons recovering from substance abuse. It is a sober house.<sup>5</sup>

8. Upon the police's arrival at the Oxford House, Defendant Kalil was outside on the front porch. Defendant Kalil's hands were bloody and there was a large kitchen knife located near him.<sup>6</sup>

9. Defendant Kalil and Scott Brooks were the only people present in the home when the incident occurred. The police went inside the home and found Brooks lying in a pool of blood at the bottom of the stairs. Brooks had apparently suffered multiple stab wounds and was later pronounced dead.<sup>7</sup> Police transported Defendant Kalil to the hospital to receive treatment for a small cut on his left wrist.<sup>8</sup> Defendant's cut was about 1 ½" in length and required three stitches.<sup>9</sup> Kalil also had some minor bruising to his arm and a minor abrasion on his head.<sup>10</sup>

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<sup>4</sup> See, Superior Court Docket No. 39; Order dated March 26, 2012 denying Defendant's motion for reduction of sentence.

<sup>5</sup> Preliminary Hearing Transcript of February 12, 2010, at pgs. 4-6, 24; December 2, 2011 Sentencing Transcript, at pg. 4.

<sup>6</sup> Preliminary Hearing Transcript of February 12, 2010, at pgs. 4-6, 24.

<sup>7</sup> Preliminary Hearing Transcript of February 12, 2010, at pg. 6.

<sup>8</sup> Preliminary Hearing Transcript of February 12, 2010, at pgs. 7-8.

<sup>9</sup> Preliminary Hearing Transcript of February 12, 2010, at pgs. 7-8.

<sup>10</sup> Superior Court Docket No. 45- Affidavit of Defense Counsel in response to Rule 61 Motion, at pgs. 4-5.

10. On the night of the incident, Defendant Kalil told the police that he had just stabbed Scott Brooks and thought that he had killed him. Defendant Kalil began to cry and told the police that he had “messed up.”<sup>11</sup>

11. On the night of the incident, Defendant Kalil told the police that he and Brooks had been sharing drinks. When Defendant Kalil refused to continue sharing his liquor, a disagreement ensued. Kalil told the police that Brooks picked up a knife and came after him with it. Kalil told the police that Brooks cut him once on the left hand with the knife. Kalil advised that he then grabbed Brooks by the wrist, the hand that the knife was in, and the two of them began to wrestle over the knife. Kalil advised that he had managed to bend Brooks’ wrist towards Brooks’ body and push the knife into Brooks’ body. After Brooks stopped fighting, Kalil pulled the knife out and went outside.<sup>12</sup>

12. Kalil contended that Brooks, not he, was the aggressor. The physical evidence however told a different story.

13. Defendant Kalil and Scott Brooks were both residents of the Oxford House. It was a city row home and it had three floors. Scott Brooks’ bedroom was on the third floor of the house.<sup>13</sup> Kalil’s bedroom was on the second floor. Brooks’ bedroom door had been stabbed approximately ten times as though someone had been standing outside the door stabbing into it attempting to gain access.<sup>14</sup> One of the slashes was made with such force that it went entirely through the door itself.<sup>15</sup>

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<sup>11</sup> Preliminary Hearing Transcript of February 12, 2010, at pgs. 8, 20.

<sup>12</sup> Preliminary Hearing Transcript of February 12, 2010, at pgs. 8-10.

<sup>13</sup> Preliminary Hearing Transcript of February 12, 2010, at pgs. 6-7, 12.

<sup>14</sup> Preliminary Hearing Transcript of February 12, 2010, at pg. 12.

<sup>15</sup> See, Superior Court Docket No. 45- Affidavit of Defense Counsel in response to Defendant’s Rule 61 Motion, at pgs. 4-5.

14. In Scott Brooks' bedroom there was blood all throughout the room. There was blood on the carpet and blood on the walls.<sup>16</sup> There was a trail of blood from Brooks' bedroom to the stairway. There was blood all down the stairway to the first floor where Scott Brooks' was found. There was smear marks down the walls.<sup>17</sup>

15. Thus, the physical evidence showed that Brooks had been stabbed a number of times in his bedroom, fell down a flight of stairs and bled out.<sup>18</sup>

16. In fact, Scott Brooks had been stabbed seven times. There was a stab wound on the left side of his neck, one on the right side of his chest, one in the left armpit area, two in his left leg, and two in his left wrist.<sup>19</sup> The stab wounds that were inflicted on Brooks were deep and lethal.<sup>20</sup>

17. Scott Brooks had also been hit on the forehead as evidenced by the blunt force abrasion in the center of his forehead.<sup>21</sup>

### **DEFENDANT'S RULE 61 MOTION**

18. On November 27, 2012, Defendant filed this motion for postconviction relief. Defendant raises five grounds as the basis for the subject motion. In Defendant's first ground, he alleges that the court abused its discretion in denying Defendant's request for a continuance to retain new counsel on the grounds that defense counsel had not prepared for trial and had not provided defendant with copies of all discovery. In his second ground, Defendant alleges that the court abused its discretion and contributed in coercing

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<sup>16</sup> Preliminary Hearing Transcript of February 12, 2010, at pg. 12.

<sup>17</sup> Preliminary Hearing Transcript of February 12, 2010, at pg. 13.

<sup>18</sup> December 2, 2011 Sentencing Transcript, at pg. 5.

<sup>19</sup> Preliminary Hearing Transcript of February 12, 2010, at pgs. 10-11.

<sup>20</sup> Preliminary Hearing Transcript of February 12, 2010, at pgs. 11, 25.

<sup>21</sup> Preliminary Hearing Transcript of February 12, 2010, at pg. 11.

Defendant to enter into a plea. In grounds three through five, Defendant alleges that his counsel provided ineffective assistance.

19. Before making a recommendation, the Commissioner enlarged the record by directing Defendant's trial counsel to submit an Affidavit responding to Defendant's ineffective assistance of counsel claims. Thereafter, the State filed a response to the motion and Defendant filed a reply thereto.<sup>22</sup>

20. 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.<sup>23</sup> If a procedural bar exists, then the claim is barred and the Court should not consider the merits of the postconviction claim.<sup>24</sup>

21. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;<sup>25</sup> (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 or 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.<sup>26</sup> Moreover, the procedural bars of

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<sup>22</sup> Super.Ct.Crim.R. 61(g)(1) and (2).

<sup>23</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>24</sup> *Id.*

<sup>25</sup> 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).

<sup>26</sup> Super.Ct.Crim.R. 61(i)(5).

(2) and (4) may be overcome if “reconsideration of the claim is warranted in the interest of justice.”<sup>27</sup>

22. Defendant’s claims in the subject motion are procedurally barred, waived and without merit.

**A) Procedural Bars Preclude Consideration of Some of Defendant’s Claims**

23. In accordance with the procedural mandates, Defendant was required to raise his claims, with the exception of his ineffective assistance of counsel contentions, on direct appeal.<sup>28</sup> Defendant’s ineffective assistance of counsel claims are not procedurally barred because a Rule 61 motion is the appropriate vehicle for raising such claims.<sup>29</sup> As to Defendant’s other claims, Defendant’s claim that the court abused its discretion in not granting a continuance for Defendant to retain new counsel (Ground One) and his claim that the court contributed to coerce Defendant to enter a plea (Ground Two), these claims are procedurally barred by Rules 61(i)(2) and (3), for Defendant’s failure to raise them on direct appeal.

**B) Defendant Waived His Claims Upon Entry of His Plea**

24. In addition to two of Defendant’s claims being procedurally barred, all of Defendant’s claims were waived upon the entry of Defendant’s guilty plea.

25. A defendant is bound by his answers on the plea form and by his testimony at the plea colloquy in the absence of clear and convincing evidence to the contrary.<sup>30</sup> In this case, the Truth-in-Sentencing Guilty Plea Form and plea colloquy reveal that Defendant

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<sup>27</sup> Super.Ct.Crim.R. 61(i)(4).

<sup>28</sup> See, *Malin v. State*, 2009 WL 537060, at \*5 (Del.Super. 2009); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

<sup>29</sup> *Id.*

<sup>30</sup> *State v. Harden*, 1998 WL 735879, \*5 (Del. Super.); *State v. Stuart*, 2008 WL 4868658, \*3 (Del. Super. 2008).

knowingly, voluntarily and intelligently entered a guilty plea to the charges for which he was sentenced.

26. Defendant represented that he had read and understood the truth-in sentencing guilty plea form and the plea agreement, and had reviewed them carefully with his counsel.<sup>31</sup> Defendant represented that nobody was forcing him to enter his plea. Defendant represented that he was freely and voluntarily pleading guilty to the charges listed in the plea agreement. Defendant represented that he was not being threatened or forced to do so by his attorney, by the State, or by anyone else.<sup>32</sup>

27. Defendant represented that he had fully discussed this matter with his counsel and that he was satisfied with his counsel's representation.<sup>33</sup>

28. Defendant acknowledged that he understood he could be incarcerated for a total of between 4 to 50 years as a result of his guilty plea.<sup>34</sup> Moreover, Defendant represented that he had not received any promises by anyone as to what his sentence would be.<sup>35</sup> Defendant represented that he was satisfied with his counsel's representation, that his counsel fully advised him of his rights, and that he understood the consequences of entering into his guilty plea.<sup>36</sup> Only after finding that Defendant's plea was entered into knowingly, intelligently and voluntarily did the court accept the plea.<sup>37</sup>

29. Defendant has not presented any clear, contrary evidence to call into question his prior testimony at the plea colloquy or answers on the Truth-In Sentencing Guilty Plea

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<sup>31</sup> June 22, 2011 Plea Transcript, at pgs. 21-22.

<sup>32</sup> June 22, 2011 Plea Transcript, at pg. 22; Truth-In-Sentencing Guilty Plea Form filed June 22, 2011.

<sup>33</sup> June 22, 2011 Plea Transcript, at pg. 22; Truth-In Sentencing Guilty Plea Form filed June 22, 2011.

<sup>34</sup> June 22, 2011 Plea Transcript, at pgs. 21-22; Truth-In-Sentencing Guilty Plea Form filed June 22, 2011.

<sup>35</sup> Truth-In-Sentencing Guilty Plea Form filed June 22, 2011.

<sup>36</sup> June 22, 2011 Plea Transcript, at pg. 22.

<sup>37</sup> June 22, 2011 Plea Transcript, at pg. 22.



Form. As confirmed by the plea colloquy and the Truth-In Sentencing Guilty Plea Form, Defendant entered his plea knowingly, intelligently and voluntarily.

30. Since Defendant's plea was entered into voluntarily, intelligently and knowingly, Defendant waived his right to challenge any alleged errors or defects occurring prior to the entry of his plea, even those of constitutional proportions.<sup>38</sup>

31. The claims that Defendant seeks to raise in his Rule 61 motion were waived when Defendant voluntarily entered his plea. Indeed, all of Defendant's claims, including those claims alleging that the court abused its discretion and those alleging ineffective assistance of counsel stem from allegations of defects, errors, misconduct and deficiencies which occurred prior to the entry of the plea, and were all waived when Defendant knowingly, freely and intelligently entered his plea.

### **C) Defendant's Claims Are Without Merit**

32. In addition to some of Defendant's claims being procedurally barred and all of Defendant's claims being waived, all of Defendant's claims are also without merit.

#### **Overview**

33. Before addressing each of Defendant's claims raised in his Rule 61 motion, it is important to emphasize how overwhelming the evidence was against Defendant and how difficult this case was to defend.

34. On the day of the incident, Defendant told the police that he "messed up." He told the police that after sharing his liquor with Brooks, he refused to continue doing so, and that Brooks picked up a knife and came after him with it. Defendant told the police

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<sup>38</sup> *Somerville v. State*, 703 A.2d 629, 632 (Del. 1997); *Modjica v. State*, 2009 WL 2426675 (Del. 2009); *Miller v. State*, 840 A.2d 1229, 1232 (Del. 2004).

he was able to grab Brooks' wrist and turn the knife into Brooks' body. Defendant told the police that as soon as Brooks stopped fighting, Defendant pulled the knife out.

35. The physical evidence told an entirely different story. Brooks' bedroom was on the third floor. Brooks' bedroom door had about 10 stab holes on the outside of the door. As if someone was standing in the hallway in a rage stabbing at the door to gain entry. In fact, one of the slashes was made with such force that it went entirely through the door itself.

36. Brooks had been stabbed seven times. Brooks was stabbed in the chest, in the armpit area, in his left leg, and in his left wrist. The stab wounds were deep and fatal. Brooks had also been hit on the head as evidenced by the blunt force abrasion in the center of his forehead.

37. In Brooks' bedroom there was blood all throughout the room. There was blood on the carpet and blood on the walls. There was a trail of blood from Brooks' bedroom to the stairway. There was blood all down the stairway to the first floor where Brooks' was found. There were smear marks down the walls. The physical evidence showed that Brooks had been stabbed seven times, fell down a flight of stairs and bled out.

38. Defendant Kalil's defense for killing Brooks was that he acted in self- defense. The physical evidence told another story, the story of an enraged Kalil, the aggressor, seeking to locate his quarry, and upon doing so, stabbing him multiple times in multiple parts of his body thereby killing him.

39. After speaking to the police on the night of the incident, Defendant Kalil claimed

not to have remembered much of the incident.<sup>39</sup> It was not until Defendant reviewed the autopsy photographs and saw the extent of the damage he inflicted on Brooks that Defendant finally “came to grips with what he did.”<sup>40</sup>

40. Defendant in his Rule 61 motion recounts yet another version of events. In his Rule 61 motion, Defendant contends that when Brooks attacked Kalil with a knife, it was Kalil that fled to Brooks’ room on the third floor. Kalil appears to contend that he ran from the first floor of the residence, past his own room on the second floor, to the third floor, so that he could seek refuge from his alleged aggressor who was in pursuit of him. Kalil appears to contend that he sought refuge in his aggressor’s room rather than his own.

41. Kalil now contends that it was Brooks that was stabbing at the door to his own room to gain entry. Kalil now contends that when Brooks did gain entry to his room, Kalil was able to gain control of the knife, stabbing Brooks in self defense.

42. Kalil’s version of events does not account for the seven deep and lethal stab wounds suffered by Brooks on multiple parts of his body.

43. Defendant was represented by a seasoned criminal defense attorney. Defendant’s trial counsel specialized in the defense of criminal cases and had extensive experience in defending capital and non-capital homicide prosecutions.<sup>41</sup>

44. Kalil’s trial counsel recognized that Kalil’s claim of self-defense was “incredible” and would not be successful at trial.<sup>42</sup> Defense counsel recognized that Kalil was facing a charge of Murder in the First Degree, that his claim of self defense was not viable, and that Kalil was facing the very real probability of serving the rest of his life in prison.

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<sup>39</sup> See, December 2, 2011 Sentencing Transcript, at pg. 5.

<sup>40</sup> December 2, 2011 Sentencing Transcript, at pg. 9.

<sup>41</sup> Affidavit of Defense Counsel in response to Defendant’s Rule 61 Motion- Superior Court Docket No. 45.

45. Defense counsel, in a letter dated April 21, 2011, to Defendant Kalil laid out all the evidence against Defendant, emphasized that the evidence was devastating to Defendant's position of self defense and would likely lead to a conviction, and urged Defendant to accept a plea.<sup>43</sup>

46. Among the factors laid out in defense counsel's April 21, 2011 letter leading to his conclusion that the evidence against Defendant was overwhelming included:

- The victim in this case was stabbed numerous times in different locations. Defendant, on the other hand, received a minor stab wound to the finger area.
- There were multiple stab marks in the door of the upstairs bedroom.
- The State had a witness who was prepared to testify that he befriended Defendant in prison and that Defendant told him Defendant was going to fabricate a self-defense claim.
- The State had a witness who was prepared to testify that Defendant made fun of the fact that he was charged with an offense involving knives and that Defendant sent a knife advertisement to his ex-wife or his girlfriend.

Defense counsel further advised Defendant that this testimony would be devastating against him on cross-examination.

- The State had a witness who was prepared to testify that he interacted with Defendant and Mr. Brooks in the weeks preceding the incident at issue. The witness found Defendant's behavior extremely erratic and that Defendant was drinking and consuming drugs. The witness was prepared to testify that Defendant was constantly picking fights with Mr. Brooks and trying to engage Mr. Brooks in a fight. The witness could only define Defendant's behavior as bizarre.
- The physical evidence in the case did not support Defendant's version of events.
- In preparing Defendant for trial, it appeared to defense counsel that Defendant was fashioning his testimony to fit the autopsy report. [The autopsy report revealed that Mr. Brooks had been hit on the head.] After reviewing the autopsy report, Defendant was now saying that he had head butted the victim. To

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<sup>42</sup> See, defense counsel's letter of April 21, 2011, attached to Defense Counsel's Affidavit in Response to Defendant's Rule 61 Motion- Superior Court Docket No. 45.

<sup>43</sup> See, defense counsel's letter of April 21, 2011 attached to Defense Counsel's Affidavit in Response to Defendant's Rule 61 Motion- Superior Court Docket No. 45.

defense counsel, this was a fairly patent attempt by Defendant to fashion his testimony to fit the autopsy report.

- The only witness that Defendant had to testify on his behalf was himself and the prior statements he made to the police conflicted, in part, with the information he provided to defense counsel.
- At Defendant's suggestion, defense counsel retained the services of an expert witness who would testify that individuals who combine alcohol and benzodiazepines are capable of extreme feats and become unduly violent under some circumstances. While this is somewhat helpful, it cut both ways in that it would then be hard to explain how Defendant was able to overcome such an individual from a strength point of view. This is especially so, when Defendant admitted to consuming approximately 12 ounces of vodka.

47. Defense counsel urged Defendant to accept a plea rather than insist on a trial in light of the State's strong case against him.<sup>44</sup> Indeed, Defense counsel stated: "It is true that this is your life and you are free to throw it away if you want and do whatever you wish. However, it is my responsibility as an attorney to analyze the evidence carefully and to give you my expert opinion on what I think will happen in the event you went to trial. I have provided you with my opinion and it appears to me that you are now about to make the mistake of rejecting it."<sup>45</sup>

48. Defense counsel met with Defendant on numerous occasions to try to persuade Defendant that his version of the events was basically incredible.<sup>46</sup>

49. Finally, on the day of trial, after the jury had been selected, after Defendant's suppression motion had been denied, and as the trial was about to begin, Defendant made the decision to accept the State's offer to Manslaughter and PDWDF. The State agreed to

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<sup>44</sup> Letter dated April 20, 2011 at pg. 3, attached to Affidavit of Defense Counsel- Superior Court Docket No. 45.

<sup>45</sup> Letter dated April 20, 2011 at pg. 3, attached to Affidavit of Defense Counsel- Superior Court Docket No. 45.

<sup>46</sup> Affidavit of Defense Counsel, at pg. 3-4.

recommend a sentence of not more than 15 years at Level V. Ultimately, the court sentenced Defendant to a total of 14 years at Level V.

50. In the subject Rule 61 motion, Defendant contends that were it not for the alleged deficient conduct of his counsel and the improper conduct of the court, there was a reasonable probability that he would not have accepted a plea and would have instead gone to trial. Defendant contends that if he had gone to trial, he would have been acquitted on his claim of self-defense.<sup>47</sup>

51. Defendant's contention in this regard appears to be implausible in light of the circumstances of this case.

52. Defendant received a significant benefit by pleading guilty. He was sentenced to 14 years at Level V, rather than face the potential of a life sentence if convicted at trial. His guilty plea represented a rational choice given the pending charges, the overwhelming damaging evidence against him, the fact that Defendant's version of events "was basically incredible"<sup>48</sup>, and the potential sentence he was facing.

53. Defendant's specific claims raised in his Rule 61 motion will each be addressed in turn.

#### **Counts One and Two- Abuse of Court Discretion**

54. Defendant's first contends that the court abused its discretion in denying Defendant's request for a continuance on the grounds that his trial counsel was not prepared for trial and had not provided him with copies of all discovery.

55. In reality, the source of Defendant's discontentment with his trial counsel

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<sup>47</sup> Defendant's Memorandum in support of Rule 61 motion, at pg. 4.

<sup>48</sup> See, Superior Court Docket No. 45- Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion, at pgs. 3-4.

was not with his lack of preparation but with his assessment of the case.<sup>49</sup>

56. First, as previously stated, this claim is procedurally barred for Defendant's failure to raise it on direct appeal. Second, as previously stated, this claim was waived when Defendant knowingly, freely and intelligently entered his plea. Defendant could have proceeded to trial, thereby preserving whatever issues he so desired on appeal, but he chose instead to enter a guilty plea thereby waiving this issue.

57. Finally, this issue is without merit. Broad discretion must be given to trial courts on the matters of whether to grant or deny a continuance for change of counsel.<sup>50</sup> There is no mechanical test for making the determination as to whether to grant or deny a continuance and each case must be judged under the particular circumstances of that case. The denial of a continuance will not be disturbed on appeal unless clearly unreasonable or capricious.<sup>51</sup>

58. Under the circumstances of this case, Defendant became agitated with counsel's representation of him because Defendant was distressed by counsel's appraisal of his defense strategy.<sup>52</sup> The court denied the request for the withdrawal of counsel. The court's denial was neither unreasonable nor capricious under the circumstances of this case.

59. Moreover, by the time Defendant entered into his plea, Defendant was, in fact, satisfied with his counsel's representation.<sup>53</sup> Defendant is bound by his representations

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<sup>49</sup> See, Superior Court Docket No. 22- Defense Counsel's May 13, 2011 Motion to Withdraw, at pg. 1 ("[D]efendant has become agitated with counsel's representation and specifically, he has been distressed by counsel's appraisal of his defense strategy.")

<sup>50</sup> *Riley v. State*, 496 A.2d 997, 1018-1019 (Del. 1985).

<sup>51</sup> *Id.*

<sup>52</sup> See, Superior Court Docket No. 22- Defense Counsel's Motion to Withdraw, at pg. 1.

<sup>53</sup> See, Plea Transcript of June 22, 2011, at pg. 22; Truth-in-Sentencing Guilty Plea Form filed June 22, 2011.

to the court that at the time he entered his plea he was satisfied with his counsel's representation of him.

60. Defense counsel was thoroughly prepared for trial. Defense counsel had also provided Defendant with all the discovery he had received that he was able to get into the prison.<sup>54</sup> Under the circumstances of this case, the court did not abuse its discretion in denying Defendant's motion for counsel to withdraw.

61. Turning next to Defendant's claim that the court abused its discretion by the comments it made prior to Defendant's plea. In his initial submission, Defendant contended that the court made some comment prior to the entry of Defendant's plea that the court would consider a sentence in the range of a four year prison term, and that such comments induced him to enter into his plea. The court however never made any such statement.<sup>55</sup>

62. In his reply brief, probably realizing that the court never made any such statement, Defendant changed his contention and then claimed that the court's general comments prior to Defendant accepting a plea were somehow improper.

63. First, as previously stated, this claim is procedurally barred for Defendant's failure to raise it on direct appeal. Second, as previously stated, this claim was waived when Defendant knowingly, freely and intelligently entered his plea.

64. In fact, at the time Defendant entered his plea, Defendant represented to the court that nobody was forcing him to do so. He also represented to the court that he understood that he could be incarcerated for a total of between 4 to 50 years as a result of his guilty

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<sup>54</sup> Superior Court Docket No. 45- Affidavit of Defense Counsel, at pgs. 2-6.

<sup>55</sup> See, Plea Transcript of June 22, 2011.



plea and that he had not received any promises by anyone as to what his sentence would be.<sup>56</sup>

65. Defendant has not presented any clear, contrary evidence to call into question his representations to the court prior to the court accepting Defendant's guilty plea. Defendant is bound by these representations.

66. From a review of the record it is clear that the court never advised Defendant what his sentence would be at any time before, during or after Defendant accepted the plea. The court encouraged Defendant to consider his options rationally in light of the evidence that would be presented against him at trial.<sup>57</sup> The court noted that the State appeared to have offered to recommend a sentence somewhere between 12-15 years.<sup>58</sup> The court told Defendant that while it was not bound by any recommendation made by the State, the court would give great weight to the agreement.<sup>59</sup>

67. After the court accepted Defendant's plea, the court advised Defendant that "for what it was worth" while the court was not bound by the recommendation of anybody, he would give the State's sentence recommendation great deference.<sup>60</sup> True to its word, the court did. The State recommended 15 years at Level V, and the court sentenced Defendant to 14 years at Level V. The court's comments before, during and after the plea were not improper and the court did not abuse its discretion in its handling of Defendant's plea.

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<sup>56</sup> Plea Transcript of June 22, 2011, at pgs. 10-11, 17-22.

<sup>57</sup> Plea Transcript of June 22, 2011, at pgs. 10-16.

<sup>58</sup> Plea Transcript of June 22, 2011, at pgs. 10-11.

<sup>59</sup> Plea Transcript of June 22, 2011, at pgs. 10-11.

<sup>60</sup> Plea Transcript of June 22, 2011, at pgs. 10-11, 23.

### **Counts Three, Four and Five- Ineffective Assistance of Counsel**

68. Defendant's remaining claims allege ineffective assistance of counsel. Specifically, Defendant contends that his counsel: 1) failed to prepare for trial; 2) failed to preserve exculpatory evidence; and 3) failed to provide Defendant with photographs of the crime scene.

69. Defendant's ineffective assistance of counsel claims, like his abuse of court discretion claims, were waived at the time he entered his guilty plea since they all pertain to alleged deficiencies in the preparation for trial and prior to the entry of his plea.

70. Moreover, Defendant's ineffective assistance of counsel claims are without merit. Defendant's dissatisfaction with his counsel is at odds with Defendant's representations on the record. The Truth-in Sentencing Guilty Plea Form and the plea colloquy reveal that Defendant was satisfied with his counsel's representation. Defendant is bound by these representations.

71. In order to prevail on an ineffective assistance of counsel claim in the context of a plea challenge, it is not sufficient for the defendant to simply claim that his counsel was deficient. The Defendant must also establish that counsel's actions were so prejudicial that there was a reasonable probability that, but for counsel's deficiencies, the defendant would not have taken a plea but would have insisted on going to trial."<sup>61</sup> Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.<sup>62</sup>

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<sup>61</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997); *Premo v. Moore*, 131 S.Ct. 733, 739-744 (2011).

<sup>62</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

72. The United States Supreme Court recently reiterated the high bar that must be surmounted to prevail on an ineffective assistance of counsel claim.<sup>63</sup> The United States Supreme Court cautioned that in reviewing ineffective assistance of counsel claims in the context of a plea bargain, the court must be mindful of the fact that “[p]lea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks.”<sup>64</sup>

73. In Ground Three, Defendant contends that his counsel was ineffective for failing to prepare for trial. Defendant contends that his defense was that he acted in self defense and that his testimony was critical to the defense, but that trial counsel failed to prepare him for direct or cross-examination.

74. Defendant’s contention that his counsel failed to prepare him for trial lacks any factual support. Defense counsel appears to have met with Defendant on “numerous” occasions to prepare him for his trial testimony. In actuality, it was not the lack of preparation that Defendant was dissatisfied with, it was the fact that his defense counsel did not find his claim of self-defense to be viable, that was the root of Defendant’s dissatisfaction with counsel.

75. Indeed, in the motion to withdraw filed by defense counsel on May 13, 2011, counsel represented to the court that he had “carefully prepared this case and in connection with that preparation has met *numerous* times with the defendant over the past month or month and a half.”<sup>65</sup> (emphasis added).

76. In defense counsel’s letter to Defendant on April 21, 2011, defense counsel references his preparation of Defendant for trial and details all the potential problems

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<sup>63</sup> *Premo v Moore*, 131 S.Ct. 733, 739-744 (2011).

<sup>64</sup> *Id.*, at pg. 741.

<sup>65</sup> See, Superior Court Docket No. 22- Defense Counsel’s Motion to Withdraw, at pg. 1.

with Defendant's anticipated testimony at trial. Specifically, by way of example, in that letter defense counsel states: "The State also has a witness who will testify that you made fun of the fact that you were charged with an offense involving knives and that you sent a knife advertisement off to your ex-wife or your girlfriend. *This material will be devastating against you on cross-examination, as I demonstrated the other evening.*" (emphasis added).<sup>66</sup>

77. In the April 21, 2011 letter, defense counsel also stated: "The physical evidence in the case does not support your version of events. *Further, if you testify as you did in speaking with me the other night, it will be clear that you are fashioning your testimony to fit the autopsy report that was previously provided to you.*" (emphasis added).<sup>67</sup>

78. In Defense Counsel's Affidavit in response to Defendant's Rule 61 motion, Defense Counsel details the lengths to which counsel went in order to have Defendant properly prepared to testify at trial, and in order to be fully and thoroughly prepared to proceed at trial.<sup>68</sup> Defense counsel represented that he met with Defendant on at least 10 occasions prior to trial to go over, not only the facts of the case, but also Defendant's proposed testimony.<sup>69</sup> Defense counsel also detailed his thorough preparation for trial.<sup>70</sup>

79. In his Affidavit, counsel represented that he met with Defendant on numerous occasions and went over not only the substance of direct examination but also the questions on cross-examination. Counsel went over with Defendant how he should present himself to the jury, his demeanor upon questioning that should be displayed, and

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<sup>66</sup> See, defense counsel's letter of April 21, 2011, attached to Defense Counsel's Affidavit in Response to Defendant's Rule 61 Motion- Superior Court Docket No. 45.

<sup>67</sup> *Id.*

<sup>68</sup> Affidavit of Defense Counsel, at pgs. 2-4.

<sup>69</sup> *Id.*

<sup>70</sup> Affidavit of Defense Counsel in response to Defendant's Rule 61 motion, at pgs. 2-3.

how Defendant should handle questions of direct examination and cross-examination. Defense counsel understood the importance of Defendant presenting himself well since he was his only witness and there was little evidence to corroborate his version of events.<sup>71</sup>

80. Defense counsel's Affidavit denying that he was ineffective in any respect is fully supported by Defendant's representations made to the court on June 22, 2011 prior to the plea colloquy, during the plea colloquy, and on the Truth-in-Sentencing Guilty Plea Form.<sup>72</sup>

81. Prior to accepting the plea on the day of trial, on June 22, 2011, Defendant represented to the court that he had talked to his counsel on numerous occasions about the case and the evidence. Defendant represented that he had the opportunity to review the facts, the State's charges against him and the evidence that the State says will result in a conviction.<sup>73</sup> During the plea colloquy, Defendant represented that he was satisfied with his counsel's representation.

82. Defendant's contention that but for his counsel's alleged deficient conduct, he would not have taken a plea, and would have instead gone to trial and been acquitted of the charges on self-defense, is implausible. Defendant's version of events was "incredible" and it does not appear that it would be credited by the jury in light of the overwhelming contradictory evidence.<sup>74</sup>

83. Defense counsel was not deficient in any regard in his trial preparation nor has Defendant established that he suffered prejudice allegedly as a result thereof.

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<sup>71</sup> Affidavit of Defense Counsel, at pgs. 3-4.

<sup>72</sup> See, Superior Court Docket No. 45, Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion.

<sup>73</sup> Plea Transcript of June 22, 2011, at pgs. 6-7.

<sup>74</sup> Affidavit of Defense Counsel, at pg. 4.

84. In Ground Four, Defendant claims that trial counsel was ineffective for failing to preserve evidence that Defendant sustained a head abrasion and a “severe bruise” when he killed Brooks. Again this claim is waived because it alleges a deficiency that occurred prior to the entry of the plea. It is also without merit.

85. In his Affidavit, defense counsel pointed out that the victim in the case suffered numerous stab wounds which were fatal in nature and which were located on various parts of his body. The wounds were serious, deep, and lethal. On the other hand, Defendant received a minor stab wound to the finger area that required three stitches, and relatively minor bruising.<sup>75</sup>

86. Defense counsel represents that although he was unable to arrange for the services of a photographer to document the bruising on Defendant’s arm and the abrasion to Defendant’s head, the bruises were not “severe” as Defendant appears to indicate.<sup>76</sup> Defense counsel, did, however, have an associate visit Defendant in prison for the specific purpose of observing Defendant’s injuries. Defense counsel stated that his associate was prepared to testify as to the nature of the injuries that Defendant suffered.<sup>77</sup>

87. Having said that, the minimal injuries sustained by Defendant were in stark contrast to the lethal and multiple stab wounds suffered by the victim.<sup>78</sup>

88. Defense counsel’s conduct was not deficient. Moreover, Defendant has failed to establish that he suffered any prejudice as a result thereof. The evidence was scant and Defendant cannot show how preservation of such evidence, to the extent it was not

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<sup>75</sup> Affidavit of Defense Counsel, at pgs. 4-5.

<sup>76</sup> Affidavit of Defense Counsel, at pg. 4-5.

<sup>77</sup> Affidavit of Defense Counsel, at pgs. 4-5.

<sup>78</sup> Affidavit of Defense Counsel, at pgs. 4-5.

already done, would have assisted him. This claim of ineffective assistance of counsel fails both prongs of the *Strickland* standard.

89. Defendant's Fifth and final Ground is that counsel was ineffective for his failure to provide Defendant with certain discovery. Specifically, Defendant contends that he was shown crime scene photographs for the first time during jury selection which showed his personal belongings from his pocket thrown on the floor. Defendant contends that these photographs would have supported Defendant's defense that he was attacked and that Brooks attempted to rob him. Defendant contends that if he had reviewed these photographs prior to the day of trial, it would probably had "strengthened his resolve to go to trial."<sup>79</sup>

90. This claim, like all the other claims raised by Defendant in his Rule 61 motion, was waived at the time that Defendant entered his plea. This claim is also without merit.

91. In his Affidavit, defense counsel represented that he provided Defendant with all discovery that he was able to get into the prison to show Defendant. Although counsel was unable to get the disks and the photos into the prison, counsel shared the photographs with Defendant during the course of jury selection. While Defendant was in prison awaiting trial, Defense counsel discussed the crime scene and provided the Defendant with information as to what was found at the various locations in the home. Defense counsel could not take the crime scene disks and photographs into the prison.<sup>80</sup>

92. Defense counsel showed the crime scene and autopsy photographs to Defendant during the course of jury selection and it was Defendant's decision to plead guilty after he saw the extent of the injuries to the victim's body as result of the repeated stabbings.

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<sup>79</sup> See, Memorandum in Support of Rule 61 Motion, at pgs. 5-6.

<sup>80</sup> Affidavit of Defense Counsel in response to Defendant's Rule 61 motion, at pgs. 5-6.

Ultimately, it was the viewing of the autopsy photographs that persuaded Defendant that his self-defense claim was not, under any circumstances, going to be accepted by the jury.<sup>81</sup>

93. Indeed, at sentencing, defense counsel noted the difficulty of getting the crime scene photographs into the prison.<sup>82</sup> Defense counsel explained to the court that Defendant did not have a good recollection of what had happened until he reviewed the autopsy photographs and saw the extent of the damage that he had inflicted on Brooks. After reviewing the autopsy photographs, Defendant “came to grips with what he did.”<sup>83</sup>

94. At sentencing, defense counsel lamented that if Defendant had seen the crime scene photographs sooner, the case could have been resolved sooner. To which the court noted that it was the court’s belief that even if Defendant had seen the crime scene photographs sooner, it would not have made a difference, because until the point when Defendant accepted the plea on the day of trial, he was not ready to do so.<sup>84</sup>

95. Defendant had a full opportunity to review all the photographs prior to making his decision on whether to accept the plea offer. The ultimate decision by Defendant to accept the plea offer was, in fact, prompted by a viewing of these photographs.

96. It does not appear that under the circumstances of this case, had Defendant viewed the photographs of the crime scene at an earlier date, especially those which showed the contents of Defendant’s pockets on the floor, it would have impacted the decisions that were made in any significant regard.

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<sup>81</sup> Affidavit of Defense Counsel in response to Defendant’s Rule 61 motion, at pgs. 5-6.

<sup>82</sup> December 2, 2011 Sentencing Transcript, at pgs. 9-11.

<sup>83</sup> December 2, 2011 Sentencing Transcript, at pgs. 9-11.

<sup>84</sup> December 2, 2011 Sentencing Transcript, at pg. 14.



97. Moreover, the decision to accept the plea, and not go to trial, does not appear to be deficient in any regard. Defendant received a significant benefit by accepting the plea. Defense counsel's representation of Defendant was not deficient and Defendant cannot establish that he suffered any prejudice as a result thereof. Defendant cannot establish that he would have received a lesser sentence if he proceeded to trial. Defendant has failed to satisfy either prong of the *Strickland* test and, therefore, his claims of ineffective assistance of counsel fail.

98. In this case, Defendant's claims are waived, procedurally barred, and without merit. As to the claims that are procedurally barred, 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."<sup>85</sup> The defendant bears the burden of proving that he has been deprived of a "substantial constitutional right."<sup>86</sup> 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.<sup>87</sup>

99. Defendant's request for an evidentiary hearing is denied. The submissions of the parties and the evidentiary record were carefully, fully and thoroughly considered. Defendant's allegations were either reasonably discounted as not supported by the record, persuasively rebutted by defense counsel's Affidavit, or not material to a determination of determination of Defendant's claims.

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<sup>85</sup> *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

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

cc: Prothonotary  
cc: Eugene J. Maurer, Jr., Esquire