IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	Cr. ID. No. 1004018182
	)	
	)	
JESUS L. PINKSTON,	)	
	)	
Defendant.	)	
	)	

Submitted: April 4, 2013
Decided: July 22, 2013

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

Sean P. Lugg, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Eugene J. Maurer, Jr., Esquire, 1201-A King Street, Wilmington, Delaware 19801, Attorney for Defendant

PARKER, Commissioner

This 22nd day of July, 2013, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court that:

1. On July 19, 2010, Defendant Jesus L. Pinkston was indicted.[1] The indictment alleged fifteen separate offenses relating to Defendant's conduct on April 21, 2010. Defendant's conduct included driving a motor vehicle in an erratic and dangerous manner, causing several motor vehicle accidents, and ultimately striking and killing Christopher White, an innocent victim who was standing on a sidewalk at the time Defendant's vehicle hit him. Among the charges that Defendant was facing was the charge of Murder in the Second Degree, a charge carrying a sentence of not less than 15 years up to life imprisonment if convicted.[2]

2. Prior to trial, Defendant accepted the State's offer to plead guilty to Manslaughter (a lesser included offense of Count I-Murder in the Second Degree), Leaving the Scene of a Collision Resulting in Death (Count II), and Reckless Endangering in the First Degree (Count III).[3] As part of the plea agreement, all of the remaining charges of the indictment were dismissed. The parties agreed that a presentence investigation would precede sentencing and the State made no representations or agreements as to its sentencing recommendations.[4]

3. On July 29, 2011, Defendant was sentenced. On the Manslaughter charge, Defendant was sentenced to 25 years at Level V, suspended after 24 years, for decreasing levels of probation. On the charge of Leaving the Scene of a Collision Resulting in Death, Defendant was sentenced to 5 years at Level V, suspended after 1 year, for

[1] See, Superior Court Docket No. 3.
[2] See, 11 *Del. C.* § 635; 11 *Del. C.* § 4205 (Murder in the Second Degree, a Class A felony, carries a sentence of not less than 15 years up to life imprisonment.)
[3] Plea Agreement of May 2011.
[4] *Id.*

probation. Finally, on the Reckless Endangering in the First Degree charge, Defendant was sentenced to 2 years at Level V, suspended for 1 year at Level III. Thus, for all three charges, Defendant was sentenced to a total of 32 years at Level V, suspended after 25 years, for decreasing levels of probation.

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

5. On October 26, 2011, Defendant filed a Motion for Modification of Sentence. Defendant, in a detailed, thorough and elaborate motion, contended that his sentence was excessive and thoroughly detailed the reasons which he believed supported this contention.[5] By Order dated December 9, 2011, the Superior Court denied Defendant's motion for modification of sentence.[6] The Superior Court ruled that Defendant's sentence was appropriate for the reasons stated during his sentencing on July 29, 2011, and that no additional information had been provided which would warrant a reduction or modification of the sentence.[7]

FACTS

6. Prior to the incident at issue, Defendant had been declared a Habitual Driving Offender, and his driving privileges were revoked. Defendant's driving privileges were revoked from July 27, 2009, for a period of five years.[8] Thus, Defendant was prohibited from driving from July 27, 2009 until July 27, 2014 as a result of his driving record.

7. Prior to Defendant being declared a Habitual Driving Offender, he had a history of, among other things, driving without a license, operating a vehicle in a reckless

[5] Superior Court Docket No. 27.
[6] Superior Court Docket No. 29.
[7] Superior Court Docket No. 29.
[8] See, July 27, 2009 Order in Criminal Action No. CPU6-09-001533Declaring Defendant a Habitual Offender pursuant to 21 *Del. C.* § 2802 and revoking Defendant's driving privileges for 5 years- attached to State's Response to Defendant's Rule 61 Motion at Exhibit B.

manner, leaving the scene of accidents, and operating vehicles without authorization from the owner.[9]

8. In addition, at the time of the incident at issue, Defendant Pinkston was on probation, stemming from a March 10, 2009 conviction for Conspiracy in the Second Degree and Unauthorized Use of a Credit Card.[10] As part of that sentence, Defendant was ordered "not [to] possess a motor vehicle ignition key nor . . . sit in the operator's position of a motor vehicle, unless Defendant is licensed and insured."[11]

9. Despite being declared a Habitual Driving Offender and having his license revoked from 2009 until 2014, and despite being court ordered not to drive as a condition to Defendant's pending probation, Defendant disregarded these orders and continued to drive.

10. After being declared a Habitual Driving Offender, and being court ordered not to drive, Defendant was convicted of driving offenses including, but not limited to, driving

---

[9] *Defendant convicted of unauthorized use of a vehicle and leaving the scene of the accident which occurred in 2002- arrested on June 12, 2002 by New Castle County Police Department, Criminal Action Number NYC39416 and Number 109376, Defendant found delinquent on July 8, 2002.
*Defendant convicted of speeding and driving without a license which occurred in 2005- arrested on April 14, 2005 by the Dover Police Department, Criminal Action Number DVA74504, convicted on May 4, 2005.
*Defendant convicted of driving without a license and failing to report an accident which resulted in injury which occurred in 2007- arrested on March 10, 2007 for incident that occurred on March 3, 2007 by the Wilmington Police Department, Criminal Action Number 07000862, convicted on May 3, 2007.
*Defendant convicted of unauthorized use of a vehicle which occurred in 2007- arrested March 10, 2007 for incident that occurred on February 17, 2007 by the Wilmington Police Department, Criminal Action Number 07000862, convicted on May 3, 2007.
*Defendant convicted of reckless driving, criminal impersonation, disregarding a police signal which occurred in 2007- arrested December 14, 2007 by Wilmington Police Department, Criminal Action Number 07005736, convicted April 7, 2008.
*Defendant convicted of driving without a license which occurred in 2008-arrested July 28, 2008 by Delaware River & Bay Authority, Criminal Action Number T910802024, convicted April 7, 2009.
*Defendant convicted of driving without a license which occurred in 2008- arrested August 12, 2008 by Troop 2 State Police, Criminal Action Number T020805850, convicted April 7, 2009.

[10] See, March 10, 2009 Sentencing Order in Criminal Action No. 0812020729- attached to the State's response to Defendant's Rule 61 Motion, as Exhibit "A".

[11] See, March 10, 2009 Sentencing Order in Criminal Action No. 0812020729- attached to the State's response to Defendant's Rule 61 Motion, as Exhibit "A".

with a suspended/revoked license on February 2, 2010,[12] driving with a fictitious or cancelled registration card, number plate or tag on February 2, 2010[13]; and again convicted of driving with a suspended/revoked license on February 14, 2010[14].

11. On the day at issue, April 21, 2010, Defendant was driving a black Mercedes Benz sedan, even though his license was revoked and he was court ordered not to be driving a motor vehicle without a license. Defendant was also aware that the owner of the vehicle he was driving had reported the vehicle stolen.[15] Knowing he was court ordered not to drive, and knowing that he was operating a vehicle that had been reported stolen, Defendant concealed the identification of the black Mercedes Benz by altering the license plate. The alteration to the license plate linked the identity of the motor vehicle to a different black Mercedes Benz that was legally registered in Delaware.[16] Defendant had also obtained a fictitious insurance card and registration of the vehicle.[17]

12. On April 21, 2010, at approximately 3:45 p.m., Defendant was travelling in a southbound direction on Washington Street, while operating a black Mercedes Benz.[18] Defendant was stopped at a light at Sixteenth and Washington Streets. He noticed a vehicle, black in color with tinted windows attempting to get his attention. Believing that the vehicle was a police car, knowing that he was wanted, and knowing that he was driving on a suspended license, he decided to get away from the police officer. When the light turned green, Defendant hit the gas pedal. As he was making a left turn, he almost

[12] Arrested by Delaware River & Bay Authority on February 2, 2010, Number T911000626, convicted May 24, 2010.
[13] Arrested by Delaware River & Bay Authority on February 2, 2010, Number T911000626, convicted May 24, 2010.
[14] Arrested by Wilmington Police Department on February 14, 2010, Number WMB29496, convicted May 24, 2010.
[15] See, Statement of Suspect of June 15, 2010 Police Report.
[16] July 29, 2011 Sentencing Transcript, at pgs. 34-36.
[17] July 29, 2011 Sentencing Transcript, at pgs. 34-36.
[18] Superior Court Docket No. 00- filed on May 13, 2010; Affidavit of Probable Cause- Exhibit B.

struck the curb. The police officer observed Defendant's erratic driving and turned on the lights of the police vehicle to stop Defendant's vehicle.

13. Defendant did not stop. He continued his efforts to get away from the police officer. As the Defendant approached the light at Fourteenth and Washington Streets, there was a vehicle waiting at the light. Defendant attempted to stop; hit his brakes, but struck the rear of that vehicle. Defendant did not stop his vehicle to determine if there was any injury. Instead, he continued to flee.[19]

14. Defendant traveled around the vehicle he had just struck and continued driving eastbound on Thirteenth Street. As Defendant approached the stop sign at the corner, there was a vehicle at the stop sign. Defendant attempted to stop; hit his brakes, but struck the rear of the vehicle.[20] This vehicle, a black Mercedes, was being driven by an off-duty police officer. Defendant did not stop to determine if he caused any damage or injury as a result of the accident. He fled this accident as well.[21]

15. The off-duty officer in the black Mercedes pursued Defendant. The officer lost sight of Defendant. Defendant turned southbound on Orange Street, heading the wrong way down the one way street.[22] Defendant then turned on Tenth Street in an easterly direction, then south on Shipley Street. Defendant was driving erratically and at a high rate of speed. As Defendant was approaching the intersection of Eighth and Shipley, he had a red light. Defendant disregarded the red light and collided with a grey Chrysler which was traveling in a westerly direction from Eighth Street.[23]

---

[19] Superior Court Docket No. 00- filed on May 13, 2010; Affidavit of Probable Cause- Exhibit B.
[20] Superior Court Docket No. 00- filed on May 13, 2010; Affidavit of Probable Cause- Exhibit B.
[21] Superior Court Docket No. 00- filed on May 13, 2010; Affidavit of Probable Cause- Exhibit B.
[22] Superior Court Docket No. 00- filed on May 13, 2010; Affidavit of Probable Cause- Exhibit B.
[23] Superior Court Docket No. 00- filed on May 13, 2010; Affidavit of Probable Cause- Exhibit B; July 29, 2011 Sentencing Transcript, at pgs. 34-39.

16. This third crash caused Defendant to lose control of his vehicle and his vehicle went up onto the sidewalk.[24] The victim, 48 year old Christopher White, was standing on the sidewalk as Defendant's vehicle struck him causing him to be thrown into the air.[25] Mr. White sustained massive head trauma as a result of being struck by Defendant's vehicle and died as a result thereof.[26]

17. Defendant did not stay at the accident scene to assist Mr. White. Instead, Defendant fled the accident scene, then fled the State of Delaware.[27]

18. On May 3, 2010, through the efforts of Detective Solge of the Wilmington Police Department with the assistance of the United States Marshall Service, Defendant was arrested at the residence of his cousin in Largo, Maryland. Defendant was found hiding in a closet.[28] Defendant was arrested and brought to Delaware.

19. The police investigation revealed that the vehicle Defendant was driving had been reported stolen. Defendant told the police that he was in a relationship with the owner of the vehicle and was granted permission to use the vehicle. Defendant further explained that he failed to return the vehicle at the agreed upon time and date. Defendant was aware that the owner had reported the vehicle stolen.[29]

20. Defendant was sentenced on July 29, 2011. The Superior Court imposed a sentence based upon all the facts and circumstances of the case. The court took into consideration the aggravating and mitigating factors to be considered. Specifically, the Superior Court stated: "I have weighed all of the evidence and other information

[24] Superior Court Docket No. 00- filed on May 13, 2010; Affidavit of Probable Cause- Exhibit B.
[25] Superior Court Docket No. 00- filed on May 13, 2010; Affidavit of Probable Cause- Exhibit B.
[26] Superior Court Docket No. 00- filed on May 13, 2010; Affidavit of Probable Cause- Exhibit B.
[27] Superior Court Docket No. 00- filed on May 13, 2010; Affidavit of Probable Cause- Exhibit B.
[28] July 29, 2011 Sentencing Transcript, at pgs. 37-38.
[29] See, Statement of Suspect of June 15, 2010 Police Report.

provided to me, including the mental health evaluation of Mr. Pinkston and the aggravating factors argued by the State. It is clear that Mr. Pinkston's parents failed him. It is clear that he has significant mental health issues. He had an extraordinary difficult childhood. He was repeatedly abused and neglected. . . I've also balanced this with the extensive criminal record as outlined by the State. . . .I have very carefully considered my sentence, and this is what I find justice to be."[30]

DEFENDANT'S RULE 61 MOTION

21. On July 11, 2012, Defendant filed a motion for postconviction relief. Subsequently, counsel was appointed to represent Defendant on his Rule 61 motion. After counsel was appointed, counsel filed an Amended Motion with an amended supporting Memorandum of Law. In Defendant's Amended Motion, he raises four grounds as the basis for the subject motion. Defendant contends that: 1) the court failed to adequately administer the plea colloquy; 2) the court relied on impermissible factors when sentencing Defendant; 3) Defendant's trial counsel was ineffective for not filing a direct appeal or informing Defendant of his right to appeal; and 4) Defendant's trial counsel was ineffective for failing to communicate the results of a psychological examination to him prior to his acceptance of the plea agreement.

22. 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, through counsel, filed a reply thereto.[31] In addition, after the briefing was completed, the Defendant, *pro se,* filed correspondence with the court

[30] July 29, 2011 Sentencing Transcript, at pgs. 40-41.
[31] Super.Ct.Crim.R. 61(g)(1) and (2).

seeking to highlight, emphasize and tweak different points raised in the amended motion filed by his Rule 61 counsel. Defendant also sought to make the court aware of complaints he had with the prison such as difficulties he was encountering obtaining a pen and paper.[32]

23. 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.[33] If a procedural bar exists, then the claim is barred and the Court should not consider the merits of the postconviction claim.[34]

24. Rule 61 (i) imposes four procedural imperatives: (1) the motion must be filed within one year of a final order of conviction;[35] (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.[36] Moreover, the procedural bars of

[32] See, Defendant's correspondence to the court of May 6, 2013; Defendant's correspondence to the court of June 14, 2013.
[33] *Younger v. State,* 580 A.2d 552, 554 (Del. 1990).
[34] *Id.*
[35] 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).
[36] 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."[37]

25. For the reasons addressed herein, some of Defendant's claims are procedurally barred and all of Defendant's claims are without merit. Each of Defendant's claims is addressed below.

Defendant's Claim that Trial Counsel Failed to File a Direct Appeal

26. Defendant was required to raise his first two claims on direct appeal.[38] These claims allege trial court error. Specifically, Defendant contends: (1) that the trial court failed to adequately administer the plea colloquy, and (2) that the trial court relied on impermissive factors when sentencing Defendant. These claims are procedurally barred by Rules 61(i)(2) and (3), for Defendant's failure to raise them on direct appeal.

27. On the other hand, Defendant's ineffective assistance of counsel claims are not procedurally barred because a Rule 61 motion is the appropriate vehicle for raising such claims.[39]

28. Defendant, however, contends that he did not file a direct appeal due to his trial counsel's deficiency in failing to do so and/or by failing to inform Defendant of his right to appeal the sentence. Trial counsel responded to this allegation contending that he could not recall whether he discussed with Defendant the right to appeal but that if Defendant had directed trial counsel to file a direct appeal he would have done so.[40]

---

[37] Super.Ct.Crim.R. 61(i)(4).
[38] See, *Malin v. State,* 2009 WL 537060, at *5 (Del.Super. 2009); *Desmond v. State,* 654 A.2d 821, 829 (Del. 1994).
[39] *Id.*
[40] Superior Court Docket No. 48- Affidavit of Defense Counsel in response to Rule 61 Motion.

29. An attorney must file a direct appeal if he is directed to do by his client, but an attorney's responsibility is not as clear in those instances when the client has not *expressly stated* the desire to appeal.[41]

30. The remedy for failing to file a direct appeal is to determine in a Rule 61 postconviction relief motion any contention which could have been raised in a timely filed direct appeal and which had not already been ruled upon by the court.[42]

31. Assuming, without deciding, that trial counsel's conduct was deficient for failing to file a direct appeal, the court will consider all the issues raised in Defendant's Rule 61 motion on their merits so as to assure that Defendant is not prejudiced in any way by his failure to do so.

32. It is important to emphasize that Defendant had the benefit of counsel to assist him in the filing of his Rule 61 motion. Defendant, through his counsel, could have raised any issue he believed to have merit in his Rule 61 motion. Every issue raised will be considered on its merits.

33. Since all of Defendant's claims will be fully considered on their merits, even if counsel was deficient for not filing a direct appeal, Defendant has not suffered any actual prejudice as a result thereof.

Defendant's Claim that Court Improperly Administered Plea Colloquy

34. Defendant seeks to withdraw his guilty plea on the grounds that the court failed to properly administer the plea colloquy.

35. Superior Court Criminal Rule 11 sets out the information that a court must obtain before accepting a guilty plea.[43]

[41] *State v. Garris,* 2002 WL 31484801, at *5 (Del.Super. 2002).
[42] *State v. Garris,* 2002 WL 31484801, at *5 (Del.Super. 2002).

36. Superior Court Criminal Rule 11(h) expressly provides, however, that: "**Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."**[44] A rigid formalistic approach to compliance is not necessary.[45]

37. In this case, Defendant contends that the trial court never inquired on the record whether Defendant was entering his plea voluntarily and whether Defendant understood he was voluntarily agreeing to give up various constitutional trial rights.

38. Defendant never sought to withdraw his guilty plea at any time prior to sentencing. After sentencing, a plea may only be set aside by way of a Rule 61 motion. The inquiry to be made under Rule 61 for withdrawal of a plea subsequent to sentencing is whether the defendant has shown prejudice amounting to manifest injustice.[46]

39. The standard to be employed in this case, in which the Defendant did not seek to withdraw his guilty plea until after sentencing, is whether Defendant has been prejudiced by a defect in the plea colloquy which amounts to manifest injustice. Only in those cases in which the defendant has been prejudiced by the error in the plea colloquy does that error rise to the level of manifest injustice. Only in those instances will the defendant be permitted to withdraw his plea.[47]

---

[43] Superior Court Criminal Rule 11(c)& (d); *Sullivan v. State,* 636 A.2d 931, 937 (Del. 1994).
[44] Super.Ct.Crim.R. 11(h).
[45] *Somerville v. State,* 703 A.2d 629, 631 (Del. 1997).
[46] Super.Ct.Crim.R. 32(d); *State v. Webster,* 1992 WL 91142, *2-3 (Del.Super. 1992), *aff'd, Webster v. State,* 1993 WL 227340 (Del. 1993).
[47] *State v. Webster,* 1992 WL 91142, at *3 (Del.Super. 1992), *aff'd, Webster v. State,* 1993 WL 227340 (Del. 1993); See, *State v. Casto,* 375 A.2d 444, 450-451 (Del. 1977)(where the guilty plea colloquy failed to include a statement of the maximum penalty provided by law for conviction of the offense, the defendant was significantly prejudiced and thereby permitted to withdraw his guilty plea).

40. In *Webster v. State,* a case relied on by Defendant to support his contention that he should be permitted to withdraw his guilty plea, the Delaware Supreme Court remanded the case back to the Superior Court to determine whether the *Webster* defendant's plea was knowing and voluntary. In the *Webster* case, the Superior Court had summarily asked a defendant whether he had heard the plea colloquy from a preceding entry in the same courtroom, read the charges from the indictment, and asked the defendant if he was aware of the penalties to which he could be sentenced. [48]

41. In *Webster,* following the remand, the Superior Court concluded that even though the plea colloquy was deficient, under the totality of the circumstances in that case, the defendant was aware of the nature of the charges against him and that he had knowingly and voluntarily waived his rights to enter the plea. The *Webster* court concluded, and the Delaware Supreme Court affirmed, that the deficiencies in the plea colloquy did not affect defendant's substantial rights, that defendant had not shown prejudice which amounted to manifest injustice, and the defendant was not permitted to withdraw his plea.[49]

42. In reaching the conclusion that the defendant in *Webster* had understood and voluntarily agreed to waive his constitutional rights, even though the Superior Court failed to make that determination during the plea colloquy, the court recognized that the defendant had signed the guilty plea form.[50] The *Webster* court further noted that on the guilty plea form, defendant wrote in his own handwriting that he understood the various rights he was giving up by pleading guilty and that each of those rights were separately

---

[48] *Webster v. State,* 604 A.2d 1364 (Del. 1992).
[49] *State v. Webster,* 1992 WL 91142 (Del.Super. 1992), *aff'd, Webster v. State,* 1993 WL 227340 (Del. 1993).
[50] *State v. Webster,* 1992 WL 9114, at *3 (Del.Super. 1992), *aff'd, Webster v. State,* 1993 WL 227340 (Del. 1993).

listed on the form.[51] The *Webster* court recognized that a defendant is bound by the statements on his signed guilty plea form absent clear and convincing evidence to the contrary.[52]

43. Moreover, In *Webster,* defendant's trial counsel testified that he explained all of defendant's constitutional rights to him before he pled guilty and that defendant appeared to understand everything that they discussed. [53]

44. The Superior Court also found it significant that the defendant in *Webster* had a number of prior criminal convictions and that it was, therefore, reasonable to infer that he had considerable experience with the criminal justice system at the time he pled guilty.[54]

45. Based on the totality of the record, the *Webster* court held that the defendant understood the rights he was giving up by pleading guilty, and that he voluntarily waived those rights. Therefore, the defendant in *Webster* had not shown prejudice amounting to manifest injustice by virtue of the court's failure to inquire on the record about defendant's rights during the plea colloquy.[55]

46. Turning to the subject action, based on the totality of the record, it is clear that Defendant understood the rights he was giving up by pleading guilty, and knowingly and voluntarily waived those rights.

47. First, during the plea colloquy, Defendant's counsel represented that he had discussed all aspects of the case at length with Defendant, that they had discussed the

---

[51] *State v. Webster,* 1992 WL 91142, at *3 (Del.Super. 1992), *aff'd, Webster v. State,* 1993 WL 227340 (Del. 1993).
[52] *State v. Webster,* 1992 WL 91142, at *3 (Del.Super. 1992), *aff'd, Webster v. State,* 1993 WL 227340 (Del. 1993).
[53] *State v. Webster,* 1992 WL 91142, at *3 (Del.Super. 1992), *aff'd, Webster v. State,* 1993 WL 227340 (Del. 1993).
[54] *State v. Webster,* 1992 WL 91142, at *3 (Del.Super. 1992), *aff'd, Webster v. State,* 1993 WL 227340 (Del. 1993).
[55] *State v. Webster,* 1992 WL 91142, at *3 (Del.Super. 1992), *aff'd, Webster v. State,* 1993 WL 227340 (Del. 1993).

plea offer, and that Defendant understood everything.[56] Defense counsel further represented that Defendant understood that there were no guarantees as to what his sentence would be.[57]

48. Second, Defendant, personally, represented to the court that he had read the plea agreement and the Truth-in-Sentencing Guilty Plea Form. Defendant represented to the court that he had read those documents himself and had discussed them with his counsel.[58]

49. The Truth-in-Sentencing Guilty Plea Form, which Defendant read and discussed with counsel, detailed all the rights that Defendant was giving up by the entry of his guilty plea. In the Truth-in-Sentencing Guilty plea form, Defendant represented that nobody was forcing him to enter his plea, that he was voluntarily giving up the right to have a trial, that he was satisfied with his lawyer's representation, and that his lawyer had fully advised him of his rights.[59]

50. Third, all of Defendant's responses during the plea colloquy were consistent with his answers on the Truth-In-Sentencing Guilty Plea form. During the plea colloquy, Defendant represented that he was "very" satisfied with his counsel's representation of him;[60] and that he understood he could be sentenced up to 35 years in prison.[61] Defendant also acknowledged his guilt to the three charges on the record.[62]

51. A defendant is bound by his answers on the plea form, the Truth-in-Sentencing Guilty Plea form, and by his testimony at the plea colloquy in the absence of clear and

[56] Plea Transcript of May 24, 2011, at pgs. 3-7.
[57] Plea Transcript of May 24, 2011, at pgs. 3-4.
[58] Plea Transcript of May 24, 2011, at pgs. 4-5.
[59] Truth-in-Sentencing Guilty Plea Form of May 2011.
[60] Plea Transcript of May 24, 2011, at pg. 5.
[61] Plea Transcript of May 24, 2011, at pgs. 7-8.
[62] Plea Transcript of May 24, 2011, at pgs. 8-9.

convincing evidence to the contrary.[63] In this case, the plea form, the Truth-in-Sentencing Guilty Plea Form and plea colloquy reveal that Defendant knowingly, voluntarily and intelligently entered a guilty plea to the charges for which he was sentenced.

52. Only after finding that Defendant's plea was entered into knowingly, intelligently and voluntarily did the court accept the plea.[64]

53. Fourth, like the defendant in *Webster,* this Defendant also had a number of prior criminal convictions and it is therefore reasonable to infer that he had considerable experience with the criminal justice system at the time he pled guilty. Indeed, at the time Defendant pled guilty in this case, he had already accepted guilty pleas in various prior criminal actions including cases in the Superior Court.[65] Defendant knew that in each of those prior cases, in which he accepted guilty pleas, he gave up his right to a trial as well as other constitutional rights as result thereof.

54. Defendant now comes before the court and contends that because the trial court did not specifically state during the plea colloquy that Defendant was giving up his trial and appeal rights, and failed to inquire as to whether the plea was voluntary, it is unclear whether the defendant was aware of the court procedures and whether he validly consented to give up his constitutional right to a trial of disputable facts.

55. Defendant entered into his guilty plea on May 24, 2011. His trial date was scheduled on July 20, 2011. He was not being sentenced on his guilty plea until July 29,

---

[63] *State v. Harden,* 1998 WL 735879, *5 (Del. Super.); *State v. Stuart,* 2008 WL 4868658, *3 (Del. Super. 2008).
[64] Plea Transcript of May 24, 2011, at pg. 9.
[65] Defendant had previously pled guilty in Superior Court in Criminal Action No. 0712014504 on April 7, 2008. Defendant had also previously pled guilty in Superior Court in Criminal Action No. 0812020729 on March 10, 2009.

2011. Defendant knew full well that he was giving up his right to go to trial, when his trial date came and went, and he did not go to trial. Defendant never sought to withdraw his guilty plea after his trial date came and went and he had not gone to trial. If Defendant genuinely did not know that by entering into his guilty plea, he was giving up his right to trial, he would have sought to withdraw his plea after his trial date passed without a trial. He never sought to withdraw his guilty plea at any time after he entered into it prior to his sentencing.

56. Although there does not appear to be any ambiguity that Defendant entered into his plea knowingly, intelligently and voluntarily, to the extent that any existed, it was put to rest by Defendant, from his own mouth, in his own words, at the time of sentencing on July 29, 2011.

57. On July 29, 2011, Defendant appeared for his sentencing. Defendant addressed the court and stated: "**Your Honor, I readily accepted the plea which resulted in the resolution of this case because I wanted to be held responsible for my crime. So in furtherance of this act of accountability, I stand before you today ready to accept responsibility for the actions I created which caused an upright and leading member of our society his life. ."**[66]

58. Defendant personally represented to the court that his plea was knowing and voluntary and that he recognized that the entry of the plea resulted in a resolution of the case. Defendant has not suffered any prejudice rising to the level of manifest injustice resulting from any alleged deficiency in the plea colloquy.

[66] Sentencing Transcript of July 29, 2011, at pg. 24.

Defendant's Claim That Court Relied on Impermissible Factors at Sentencing

59. Defendant contends that at sentencing the trial court failed to give appropriate deference to the plea agreement and was impermissibly biased by her own personal emotions toward the victim in this case.

60. Defendant has already raised this claim in a detailed comprehensive motion for modification of sentence. Defendant, through counsel, already sought judicial review of the perceived impropriety of Defendant's sentence and counsel vigorously defended the position that the sentence was both disproportionate and that it failed to consider the mitigating factors in the case. Defendant's motion for modification of sentence was denied. Defendant is now repeating, recouching and reraising the same claim in his Rule 61 motion.

61. This claim has already been adjudicated and is now procedurally barred. Rule 61(i)(4) precludes this court's consideration of this claim.

62. Moreover, this claim is without merit.

63. Delaware law is well established that appellate review of sentences is extremely limited.[67] Appellate review of a sentence generally ends upon determination that the sentence is within the statutory limits prescribed by the legislature.[68] Defendant's sentence was within all statutory limits.

64. In Delaware, a sentencing court has broad discretion to consider information pertaining to a defendant's personal history and behavior which is not confined exclusively to conduct for which that defendant was convicted.[69] A sentencing court

[67] *Mayes v. State,* 604 A.2d 839, 842 (Del. 1992).
[68] *Mayes v. State,* 604 A.2d 839, 842 (Del. 1992); *Haskins v. State,* 1991 WL 165563 (Del.).
[69] *Mayes v. State,* 604 A.2d 839, 842 (Del. 1992).

should have the fullest information possible concerning the defendant's life and characteristics.[70]

65. In reviewing a sentence within statutory limits, an appellate court will not find error of law or abuse of discretion unless it is clear from the record that a sentence has been imposed on the basis of demonstrably false information or information lacking a minimal indicia of reliability.[71]

66. The court imposed a legal sentence based on the facts and circumstances surrounding Defendant's crime as well as Defendant's prior criminal history, and his "extraordinary difficult childhood."[72] The sentencing court properly considered the horrific circumstances of this case together with this defendant's unique criminal disposition in crafting its sentence. In challenging the propriety of the sentence imposed in this case, Defendant substantially undervalues his prior criminal record as well as his actions leading to the death of Christopher White.

67. To compare this case with other different cases is inappropriate. Defendant seeks to compare his sentence in this case to eight other vehicular homicide cases. Yet each defendant in each particular case presents his own unique characteristics and circumstances. The appropriate sentence in each case should be determined based upon the totality of the circumstances of each particular defendant in each particular case.

68. Defendant has made no showing that any of the other defendants in the other cases are similarly situated. Sentencing disparities are unreasonable only when the defendants are similarly situated.[73] This Defendant had aggravating and mitigating

[70] *Mayes v. State,* 604 A.2d 839, 842-843 (Del. 1992).
[71] *Mayes v. State,* 604 A.2d 839, 842-843 (Del. 1992).
[72] July 29, 2011 Sentencing Transcript, at pgs. 40-41.
[73] See, *United States v. King,* 604 F.3d 125, 145 (3rd Cir. 2010).

circumstances that were particular to this defendant. The court considered the totality of the circumstances and the unique characteristics of this particular defendant in fashioning the appropriate sentence.

69. As a result of the plea agreement, Defendant substantially reduced his maximum exposure as well as the minimum mandatory penalty required by law. If convicted of Murder in the Second Degree, Defendant could have received a life sentence. Had Defendant not accepted the plea, he would have faced additional charges, more minimum/mandatory time, and the possibility of more jail time overall.

70. At the time of his sentencing, Defendant recognized that he could be spending the next 25 to 35 years of his life in prison. [74] Defendant further represented to the court: "I know I am where I should be. I did something very serious that will have a lasting effect. I also realize that I will be here for a significant length of time."[75]

71. Defendant is displeased with the sentence imposed and now seeks to employ Rule 61 as a vehicle to reargue the court's denial of his motion for modification of sentence. In doing so, Defendant fails to recognize the entirety of the facts made available to the trial court. This Defendant had aggravating and mitigating circumstances that were particular to this defendant. The court considered the totality of the circumstances and the unique characteristics of this particular defendant and exercised its broad discretion to craft an appropriate sentence unique to Defendant.

72. At sentencing the court stated that it had "weighed all of the evidence and other information provided to me, including the mental health evaluation of Mr. Pinkston and the aggravating factors argued by the State. It is clear that Mr. Pinkston's parents failed

[74] Sentencing Transcript of July 29, 2011, at pg. 22.
[75] Sentencing Transcript of July 29, 2011, at pg. 17.

him. It is clear that he has significant mental health issues. He had an extraordinary difficult childhood. He was repeatedly abused and neglected. . . I've also balanced this with the extensive criminal record as outlined by the State. . . .I have very carefully considered my sentence, and this [sentence] is what I find justice to be."[76]

73. The Superior Court's sentence was not improper.

Defendant's Claim that Counsel Failed to Provide Mental Evaluation Report

74. Defendant's final claim is that his counsel provided ineffective assistance when he failed to provide the psychological evaluation report to Defendant prior to Defendant entering his guilty plea. Defendant contends that he lost the benefit of the report when determining whether to plead the case or to pursue a trial by the failure of his counsel to provide the report to him.

75. Defense counsel, in his Affidavit, explains that he had discussed the report with Defendant and had also discussed the fact that Defense Counsel would be intentionally withholding the report from Defendant prior to sentencing for "tactical reasons." Defendant did not voice any objection at the time to this strategy.[77]

76. 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."[78] Mere

[76] July 29, 2011 Sentencing Transcript, at pgs. 40-41.
[77] See, Superior Court Docket No. 48, Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion.
[78] *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).

allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.[79]

77. There is a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.[80] Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.[81]

78. 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."[82]

79. Choices of trial strategies and tactics are insufficient to establish ineffective representation even though others might have made different choices and such choices may be subject to criticism. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence.[83]

80. Defense counsel, in his Affidavit, explains that he intentionally withheld the report from Defendant prior to his sentencing as a matter of strategy.[84] He did, however, share the general findings of the report with Defendant. Defense counsel explained to Defendant that he did not want Defendant to read the report prior to sentencing because Defense Counsel wanted Defendant to focus his remarks at sentencing on expressing remorse for his actions and apologizing to the victim's family rather than use the report

[79] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).
[80] *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984).
[81] *Strickland,* 466 U.S. at 689.
[82] *Premo v Moore,* 131 S.Ct. 733, 739-744 (2011).
[83] *Harrington v. Richter,* 131 S.Ct. 770, 787 (2011).
[84] See, Superior Court Docket No. 48, Affidavit of Defense Counsel in response to Defendant's Rule 61 Motion.

as a crutch to excuse or justify his actions.[85] Defense counsel was concerned that given Defendant's "unique personality traits" he would use the report as a crutch.

81. Defense counsel further explained that while the report was helpful, since it highlighted the peculiar difficulties of Defendant's life, it did not provide any type of actual legal defense to the charges.[86]

82. Defense counsel explains that Defendant told Defense Counsel that he understood the reasons for not being given a copy of the report and that Defendant did not voice any objection.[87]

83. Defense Counsel's decision was the product of sound legal strategy. It should not be second-guessed because Defendant is dissatisfied with the sentence.

84. Defendant in his Rule 61 motion appears to contend that he had no knowledge of the contents of the report and that counsel failed to communicate with him about the report. To the contrary, defense counsel explains that he did share the general findings of the report with Defendant but did not provide him with a complete copy. At the time, Defendant was satisfied with the handling of the report and it is only now, with the distorting effects of hindsight, that Defendant now questions that strategy.

85. The conduct of defense counsel does not appear to be deficient in any regard nor has Defendant shown any actual prejudice allegedly as a result thereof.

[85] *Id.*
[86] *Id.*
[87] *Id.*

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

IT IS SO RECOMMENDED.

_____
Commissioner Lynne M. Parker

oc: Prothonotary
cc: Bradley V. Manning, Esquire