

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

**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cr. ID No. 0703031898
	)	
JOHN E. FOSTER,	)	
	)	
Defendant.	)	
	)	

Submitted: July 24, 2009  
Decided: October 1, 2009

**ORDER DENYING DEFENDANT’S MOTION “SUMMARY FOR JUDGMENT”  
AND MOTION FOR OBJECTION TO PROSECUTOR’S LATE FILING  
AND  
COMMISSIONER’S REPORT AND RECOMMENDATION THAT  
DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF  
SHOULD BE DENIED.**

Steven P. Wood, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Kevin J. O’Connell, Esquire, Assistant Public Defender, Wilmington, Delaware 19801.

John E. Foster, Sussex Correctional Institution, Georgetown, Delaware, *pro se*.

PARKER, Commissioner

This 1st day of October, 2009, upon consideration of Defendant's Motion for Postconviction Relief, motion "summary for judgment" and motion for objection to prosecutor's late filing, it appears to the Court as follows:

A) **DEFENDANT'S MOTION "SUMMARY FOR JUDGMENT" AND MOTION FOR OBJECTION TO PROSECUTOR'S LATE FILING**

On February 18, 2009, Defendant Foster filed a motion for postconviction relief. The Court set a briefing schedule by Order dated March 27, 2009. Defense counsel's affidavit was timely received on or before the deadline of April 27, 2009.

The State requested an extension to respond Defendant's Rule 61 motion prior to the deadline for its response. The Court granted the State's request for the extension and by letter dated June 12, 2009, advised Defendant Foster that the State requested, and the Court granted, an extension for the submission of its response and that the State now had until June 26, 2009 (moved from May 26, 2009) to file its response, and that Defendant Foster's reply was now due on July 24, 2009 (moved from June 16, 2009).<sup>1</sup>

Defendant Foster has filed a motion for "summary for judgment" and a motion for objection to the prosecutor's late filing. Essentially, Defendant Foster contends that the Superior Court should grant his postconviction motion because the State's response was untimely.

Defendant's motions are denied. First, the State's response was not untimely since the State sought and was granted an extension prior to the deadline for the submission of its response. Second, defense counsel's submission was timely, and is not at issue, and would be considered when deciding Defendant's postconviction motion.

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<sup>1</sup> Docket No. 103.

Third, Defendant Foster was provided with ample opportunity to respond to the submissions of both defense counsel and the State and therefore suffered no prejudice as a result of the extension. As the Delaware Supreme Court has recognized, when the Superior Court provides the defendant with ample opportunity to respond to the submissions of both defense counsel and the State, in the absence of any discernible prejudice, a request to grant a defendant's postconviction motion based on untimely submissions is without merit.<sup>2</sup> Consequently, even if the State's response was untimely, given the lack of any discernible prejudice to Defendant, it would still be considered.

Defendant's motion "summary for judgment" and motion for objection to prosecutor's late filing are hereby denied.

Turning now to Defendant's motion for postconviction relief.

**B) DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF**

**I. FACTS AND PROCEDURAL HISTORY**

On September 20, 2007, a Superior Court jury found Defendant John E. Foster guilty of Robbery Second Degree and Burglary Second Degree. On November 2, 2007, the Superior Court declared Defendant Foster a habitual offender and sentenced him to a total of 18 years at Level V. This sentence was reduced to a total of 17 years at Level V on May 6, 2009.

Defendant appealed his conviction which was affirmed by the Delaware Supreme Court on October 24, 2008.<sup>3</sup>

The facts giving rise to this action reveal that in the early morning hours of March 28, 2007, Defendant Foster burglarized Bruce Flickenger's home and robbed him. Mr.

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<sup>2</sup> *Sample v. State*, 2007 WL 3071418 (Del. 2007).

<sup>3</sup> *John E. Foster v. State*, 961 A.2d 526 (Del. 2008).

Flickenger is a fifty year old man who is mentally handicapped. Mr. Flickenger has the emotional mentality at about a grade school level. Mr. Flickenger lived with his mother for most of his life, but at the time of the incident, was living alone in a condominium that was purchased for him by his brothers and sister. Mr. Flickenger worked at two part-time jobs. One was at the Dairy Queen in Newark, Delaware. The other was at the University at Delaware. It was at the Dairy Queen that Mr. Flickenger first met the Defendant. On at least two prior occasions, Defendant Foster had gone to Mr. Flickenger's house seeking to "borrow" money from him.

In the early morning hours of March 28, 2007, Mr. Flickenger was in bed watching television when Defendant Foster broke and entered through Mr. Flickenger's bedroom window. Defendant Foster demanded money, and threatened to harm Mr. Flickenger if he failed to comply. Mr. Flickenger gave Defendant Foster twenty dollars. Mr. Flickenger ran out of his house and told a neighbor that "Johny" or "Johnny Foster" had just broken into his house and robbed him. The neighbor called the Newark Police. Officer Michael Watson interviewed Mr. Flickenger, and afterwards, contacted Mr. Flickenger's sister. When Mr. Flickenger's sister arrived Mr. Flickenger told her he had just been victimized by "Johnny Foster". Later that morning at Newark Police Headquarters, Detective Joseph Conover interviewed Mr. Flickenger who identified Defendant Foster from a photograph line-up.<sup>4</sup>

There was no forensic evidence linking the Defendant to the crime. At trial, which was held about six months after the incident, Mr. Flickenger was unable to identify the defendant in court.

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<sup>4</sup> See, *John E. Foster*, 961 A.2d at 527-28.

On February 18, 2009, Defendant Foster filed a motion for postconviction relief pursuant to Rule 61. In the motion he alleges various grounds as the basis for relief: 1) failure to timely produce forensic evidence; 2) *voir dire* questioning; 3) alleged defective indictment; 4) improper mention of defendant's prior arrest; and 5) ineffective assistance of counsel.

## **II. DISCUSSION**

Defendant raises various grounds as the basis for his Rule 61 motion for postconviction relief, each of these grounds is discussed below.

### A) FAILURE TO TIMELY PRODUCE FORENSIC REPORTS

Defendant Foster in his first and fifth grounds for relief complains that his rights were violated because forensic reports and/or evidence were not provided by the State in a timely fashion and that he was somehow prejudiced thereby.

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>5</sup> If a procedural bar exists, then the claim is barred, and the Court should not consider the merits of the postconviction claim.<sup>6</sup> Because these grounds were not previously raised before the trial court or the Delaware Supreme Court on direct appeal as required by the court rules, they are procedurally barred.<sup>7</sup>

In order to overcome the procedural bar, Defendant must show a "colorable claim that there was a miscarriage of justice".<sup>8</sup> The miscarriage of justice exception is a narrow

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<sup>5</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>6</sup> *Id.*

<sup>7</sup> Super.Ct.Crim.R. 61(i)(2) & (3).

<sup>8</sup> Super.Ct.Crim.R. 61(i)(4).

one and has been applied only in limited circumstances.<sup>9</sup> Defendant bears the burden of proving that he has been deprived of a “substantial constitutional right.”<sup>10</sup>

Even if Defendant’s claims were not procedurally barred, they are without merit. There were no forensic reports and/or evidence admitted against Defendant Foster at trial. Latent fingerprints that were collected at the scene were “of no value” and a footprint collected from the mulch outside the point of entry of the burglary was never measured, so it could not be compared to the footprints of the shoes worn by Defendant Foster.<sup>11</sup> There was an absence of any inculpatory or exculpatory forensic evidence. The forensic testimony at trial was that there was nothing at the crime scene of any value. The forensic testimony did not incriminate Defendant in any way. Thus, even if the State did not comply with the scheduling order set by the Court, Defendant Foster suffered no prejudice because there was no forensic evidence offered against him. Having failed to establish any prejudice, Defendant has failed to provide any basis upon which this Court could conclude that it is in the interests of justice to consider these otherwise barred claims for relief.

B) VOIR DIRE QUESTIONING

Defendant Foster in his second ground for relief complains that his trial counsel failed to request *voir dire* questions intended to uncover any potential bias on the part of a juror or jurors as a consequence of the fact that Defendant Foster and Mr. Flickenger are of different races.

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<sup>9</sup> *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

<sup>10</sup> *Id.*

<sup>11</sup> *State v. John E. Foster*, September 20, 2007 Trial Trans., pgs. 40-41.

This appears to be an ineffective assistance of counsel claim, and an ineffective assistance of counsel claim is not procedurally barred because a Rule 61 motion is the appropriate vehicle for such a claim, even when it has not been previously raised.<sup>12</sup>

Turning then to the substantive merits of this claim, to prevail on an ineffective assistance of counsel claim, the defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level “below an objective standard of reasonableness,” and (2) “the deficient performance prejudiced the defense.”<sup>13</sup> The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show “that there is a reasonable probability that, but for defense counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>14</sup>

Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.<sup>15</sup> There is a strong presumption that counsel’s conduct fell within a wide range of reasonable professional assistance.<sup>16</sup> Moreover, there is a strong presumption that defense counsel’s conduct constituted sound trial strategy.<sup>17</sup>

Furthermore, an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment.<sup>18</sup>

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<sup>12</sup> *Malin v. State*, 2009 WL 537060, at \*5 (Del.Super. 2009); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

<sup>13</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

<sup>14</sup> *Id.* at 687-88, 694.

<sup>15</sup> *Younger*, 580 A.2d at 556.

<sup>16</sup> *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at \*1 (Del. 2008).

<sup>17</sup> *Strickland*, 466 U.S. at 689.

<sup>18</sup> *Id.* at 691.

Defendant claims that defense counsel was ineffective for failing to request that the Court *voir dire* prospective jurors as to whether they could remain impartial given the different races of the defendant and the victim. While Defense Counsel did not request a “special” *voir dire* question on this issue, the Defendant’s prospective jury was questioned about whether it was biased for or against either party, and whether they believed they could render a fair and impartial verdict. Moreover, the Court instructed the jury that their verdict must be based solely and exclusively on the evidence in the case, and not governed by passion, prejudice, bias or sympathy, or any motive whatsoever except a fair and impartial consideration of the evidence.<sup>19</sup>

The record in this case is utterly devoid of any fact or occurrence supporting even the slightest inference that the jury, in any way, ignored the Court’s instructions. Absent an objective basis to conclude otherwise, it is presumed that a jury follows the instructions given by the trial judge.<sup>20</sup> There is nothing in this record to indicate that the jury deliberated in any way other than an unbiased fashion. Defendant Foster cannot establish that he was prejudiced by the absence of the specific instruction that he now requests. He cannot establish that there is a reasonable probability that the result would have been different had the specific instruction been given. For that matter, he cannot establish that the trial court would have even granted the request, given its duplicative nature of those questions already asked.

The trial court’s *voir dire* and jury instructions were adequate and defense counsel cannot be faulted for not proffering a special instruction. Defendant has failed to satisfy

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<sup>19</sup> *State v. John E. Foster*, September 20, 2007 Trial Trans., pg. 126.

<sup>20</sup> *Johnson v. State*, 2004 WL 1656497 (Del.Supr.).



either prong of the *Strickland* test and therefore he has failed to establish an ineffective assistance of counsel claim on this issue.

C) ALLEGED DEFECTIVE INDICTMENT

Defendant Foster in his third ground for relief complains that the indictment brought against him was not signed by the foreperson as required by the Court rules. The original copy of the indictment, in the Prothonotary's file, is signed by the Grand Jury's foreperson. Therefore, this claim is baseless. Moreover, since this claim was not raised before the trial court or the Delaware Supreme Court on direct appeal, it is procedurally barred.<sup>21</sup>

D) DEFENDANT'S PRIOR ARREST

Defendant Foster in his fourth ground for relief alleges error because one of the State's witnesses, Detective Conover of the Newark Police Department, made mention of the fact that the Defendant was arrested by the New Castle County Police in February of 2007, which was approximately six weeks before his arrest on the charges in the instant case. This testimony came in response to the trial prosecutor's questioning as to how Detective Conover knew the date that the photo was taken of the Defendant used in the photo lineup shown to Mr. Flickenger.<sup>22</sup>

Defendant's counsel immediately objected to the witness's answer.<sup>23</sup> The trial judge immediately issued a curative instruction.<sup>24</sup>

Defendant never previously raised this issue. Defendant did not raise this issue before the trial court nor did he raise the issue before the Delaware Supreme Court on

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<sup>21</sup> Super.Ct.Crim.R. 61(i)(2) & (3).

<sup>22</sup> *State v. John E. Foster*, September 19, 2007, Trial Trans. pg. 201-202.

<sup>23</sup> *State v. John E. Foster*, September 19, 2007, Trial Trans., pgs. 202.

<sup>24</sup> *State v. John E. Foster*, September 19, 2007, Trial Trans., pg. 206.

direct appeal. Consequently, this claim is procedurally barred unless the Defendant can establish both cause and prejudice excusing his failure.<sup>25</sup>

In light of the immediate objection to the testimony, and the Court's immediate curative instruction, any prejudicial effect of the unsolicited response by the witness appears to have sufficiently cured any prejudice that might have otherwise resulted. Indeed, the Delaware Supreme Court has held that in cases involving an improper mention of a Defendant's prior arrest by a witness who is discussing "arrest photos", a prompt curative instruction will usually cure any prejudice.<sup>26</sup>

A trial judge is in the best position to evaluate the prejudicial effect of an unsolicited response by a witness on a jury.<sup>27</sup> Defendant presented no evidence that the trial court did not adequately address the issue, and there is no evidence that the trial court abused its discretion in any way, in regard to the challenged statement.

Defendant has failed to provide any basis upon which this Court could conclude that it is in the interests of justice to consider this otherwise barred claim for relief.

E) INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant Foster in his sixth ground for relief asserts multiple claims of ineffective assistance of counsel. As previously stated, to prevail on an ineffective assistance of counsel claim, the defendant must meet the two-pronged *Strickland* test by showing that counsel's actions fell short of an objectively reasonable standard and that there is a reasonable probability that, had it not been for counsel's deficient conduct, the results at trial would have been different.<sup>28</sup>

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<sup>25</sup> Super.Ct.Crim.R. 61(i)(2) & (3).

<sup>26</sup> *Quintero v. State*, 2006 WL 3392915, \*2 (Del. Supr.)

<sup>27</sup> *Id.*

<sup>28</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.<sup>29</sup> There is a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.<sup>30</sup> Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.<sup>31</sup>

Defendant Foster first claims that trial counsel was ineffective for failing to file a suppression motion regarding testimony from State witnesses regarding a bike that various witnesses observed Defendant riding. Defendant Foster does not explain the nature of any suppression motion regarding the bike. The bike, itself, was not introduced at trial. The State never seized it. The bike was never in the State's possession. There appears to be no basis for a suppression motion of an item that was never seized nor admitted as evidence in a case. Defendant does not provide any concrete allegations as to what basis existed to warrant a good faith motion to suppress. Defendant has failed to make concrete allegations of actual prejudice and substantiate them. Conclusory and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.<sup>32</sup>

Defendant Foster also appears to contend that his counsel was ineffective for not requesting a "missing evidence" instruction about the bike. Since the State never had possession of the bike, the Defendant does not explain what good faith basis existed to warrant a suppression or missing evidence motion that could have, and/or should have

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<sup>29</sup> *Younger*, 580 A.2d at 556.

<sup>30</sup> *Albury v. State*, 551 A.2d 53, 59 (Del. 1988); *Salih v. State*, 2008 WL 4762323, at \*1 (Del. 2008).

<sup>31</sup> *Strickland*, 466 U.S. at 689.

<sup>32</sup> *State v. Brown*, 2004 WL 74506, \*2 (Del.Super. 2004).

been made regarding the State's lack of introduction of the bike into evidence. Again, Defendant failed to make concrete allegations of actual prejudice and substantiate them.

Defendant Foster claims that his counsel was ineffective for failing to file a "motion to suppress" evidence pertaining to Mr. Flickenger's identification of the Defendant in a photo lineup shown to him by the Newark Police. Defendant does not identify any factual or legal basis for such a motion. Therefore, his contention that his counsel was somehow ineffective for failing to file a motion with no apparent factual or legal basis is without merit.

Defendant Foster claims that his counsel was ineffective for failing to request a "physical line-up" after Mr. Flickenger was unable to identify the defendant in the courtroom. Defendant Foster fails to explain how his position in the litigation could have gotten any stronger with a physical line-up after the victim failed to identify him in front of the jury when asked to do so. There is a strong presumption that his counsel's conduct, in not requesting a physical line-up, constituted sound trial strategy.<sup>33</sup> Defendant has not overcome that strong presumption.

A related claim is the Defendant's assertion that his counsel was ineffective for not moving for a judgment of acquittal immediately following Mr. Flickenger's (who is mentally handicapped) inability to identify Defendant in court. At the moment that Mr. Flickenger was unable to identify Defendant, Defendant wanted his counsel to jump up and immediately move for a judgment of acquittal. In his Affidavit, trial counsel explains that he advised Defendant that during the testimony of the victim was not the appropriate time for moving for a judgment of acquittal, and, in fact, it would not have been the proper time. Trial counsel further explains that he did not later make the motion because

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<sup>33</sup> *Strickland*, 466 U.S. at 689.

it was his opinion that it would be fruitless given that Mr. Flickenger knew the Defendant by name, and had identified the Defendant to his neighbor, his sister and the police on the night of the crime.<sup>34</sup> Moreover, Mr. Flickenger identified Defendant in a photo lineup the day of the incident.

A motion for judgment of acquittal is to be granted only if, after viewing the evidence and all legitimately drawn inferences in the light most favorable to the State, the State has presented insufficient evidence to sustain a verdict of guilt.<sup>35</sup> In the subject action, given the repeated *res gestae* statements by Mr. Flickenger in the first few hours following the incident in which he identified his assailant by name and identified Defendant in a photo lineup, viewing this evidence in the light most favorable to the State, the State presented evidence sufficient to sustain a verdict of guilt, and therefore a motion for judgment of acquittal would not have been successful. Defense counsel did not move for a judgment of acquittal because he believed that the failure of the mentally handicapped victim to identify the defendant at trial was not sufficient to support a motion given the victim's prior relationship with the Defendant and identification of Defendant prior to the trial.<sup>36</sup>

Defense counsel's belief that he did not have a meritorious basis to support a motion for judgment of acquittal appears to be justified, and Defendant cannot establish any prejudice as a result of his counsel's failure to make such a motion. Defendant has failed to make concrete allegations of actual prejudice and substantiate them. Defendant's ineffective assistance of counsel claim must therefore be denied.

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<sup>34</sup> Docket No. 97, Affidavit of Kevin J. O'Connell, pg. 4.

<sup>35</sup> *Vouras v. State*, 452 A.2d 1165, 1169 (Del. 1982).

<sup>36</sup> Docket No. 97, Affidavit of Kevin J. O'Connell, pg. 4.

Defendant Foster claims that his counsel was ineffective for not raising ineffective assistance of counsel claims against himself on direct appeal. However, direct appeal is not the proper place to raise an ineffective assistance of counsel claim and therefore counsel cannot be ineffective for having failed to raise such claims at that time. It is in a Rule 61 motion for postconviction relief that ineffective assistance of counsel claims are to be raised.<sup>37</sup> Defendant has properly raised such issues here.

Defendant Foster claims that his counsel was ineffective based upon his counsel's failure to move for a mistrial based on the State's failure to preserve his arrest photo. The Newark Police believed that the camera that contained Defendant Foster's booking photo had been stolen. Defense counsel believing the photo to be missing raised this issue in a timely fashion before the trial court. However, before the trial court ruled on the issue, the State discovered that the camera had not been stolen, and was able to locate the missing photograph. Once the photograph was located, the jury was able to see the booking photo taken on the date of Defendant Foster's arrest and any issue that may have existed became moot. Defendant fails to show that trial counsel's actions on this issue was in any way deficient nor has he shown actual prejudice resulting from any alleged deficiency.

Defendant Foster claims that his counsel failed to speak on his behalf after sentencing. Defense counsel, in his Affidavit, represented that, in fact, he spoke on Defendant Foster's behalf numerous times after sentencing.<sup>38</sup> Defense counsel in his Affidavit has detailed some of those communications. Defendant has pointed to nothing in the record to demonstrate a lack of diligence on behalf of his counsel.

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<sup>37</sup> *Malin v. State*, 2009 WL 537060, at \*5 (Del.Super. 2009); *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

<sup>38</sup> Docket No. 97, Affidavit of Kevin J. O'Connell, pg. 5.

Defendant Foster's final claim is that he is actually innocent. To the extent that this claim is not an ineffective assistance of counsel contention, it would have to be raised on direct appeal to be procedurally preserved. If not an ineffective assistance of counsel claim, because this claim was not raised on direct appeal as required by the court rules, it is procedurally barred.

If Defendant's actual innocence claim was intended as an ineffective of counsel contention, Defendant's claim fails the *Strickland* standard because he fails to identify with particularity the defects in counsel's performance nor does he make concrete allegations of actual prejudice with respect to this claim.

Defendant appears to be contending that his counsel was ineffective because he was convicted. Defendant fails to explain what his counsel should have done but did not do, or what his counsel did but should not have done. Defendant has pointed to nothing in the record to demonstrate a lack of diligence on behalf of his counsel. Defendant has failed to make concrete allegations of actual prejudice and substantiate them.

The guilt or innocence of Defendant is exclusively within the province of the jury. It has long been our law that the jury is the sole judge of the credibility of the witnesses and responsible for resolving conflicts in the testimony.<sup>39</sup> The jury reached a unanimous verdict based on the weight and credibility of the evidence produced at trial. The weighing of the evidence in the case is within the province of the jury. There was sufficient evidence to convict Defendant on each of the offenses for which he was charged.

Defendant's claim of actual innocence is procedurally barred and without merit.

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<sup>39</sup> *Williams v. State*, 539 A.2d 164, 168 (Del. 1988).

**III. CONCLUSION**

For the reasons stated above, Defendant's Motion for Postconviction Relief should be denied.

**IT IS SO RECOMMENDED.**

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Commissioner Lynne M. Parker

cc: Prothonotary