IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID. No. 92003717DI
	)	
ROBERT W. JACKSON, III,	)	In the Supreme Court:
	)	
Defendant.	)	No. 622, 2008

Submitted: April 9, 2010
Decided: May 28, 2010

Upon the Supreme Court's Remand for Consideration of Defendant's Claim Under *Gardner v. Florida*.

REPORT TO THE DELAWARE SUPREME COURT OF FINDINGS OF FACT AND CONCLUSIONS OF LAW.

COOCH, J.

This 28th day of May, 2010, upon consideration of the Supreme Court's Order of Remand of January 12, 2010 directing consideration of Defendant's due process claim under *Gardner v. Florida* in connection with his sentence of death, this Court reports the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The facts pertinent to resolution of Defendant's *Gardner* claim are essentially not in dispute. Additionally, and although the Order of Remand

stated that this Court could "permit[] the parties to present additional evidence on the *Gardner* issues," both parties and the Court agreed that no "additional evidence" was needed. Thus, the factual record has not been further developed on remand.

Defendant was arrested on April 10, 1992 in connection with a brutal axe murder that took place in Hockessin.[1] Joseph A. Hurley, Esquire originally entered his appearance on July 6, 1992 and actively represented Defendant in the pretrial discovery process including the proof positive hearing on August 28, 1992.[2] On October 5, 1992, Mr. Hurley filed a motion to withdraw and a hearing was held on the motion on November 10, 1992.[3] At that hearing, conducted by the same judge who would ultimately sentence Defendant to death, Mr. Hurley requested permission for a sidebar conference to articulate additional reasons for his withdrawal "because [he] believe[d] it would be prejudicial to the defendant if [those reasons were] articulated in open court."[4] At sidebar, in the presence of the judge, the prosecutor, and counsel for co-defendant Anthony Lachette, Mr. Hurley stated the following:

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[1] Def. Appx. at 1. Defendant submitted the appendix in connection with this issue. The State did not submit a separate appendix and has relied on Defendant's appendix.
[2] *Id.* at 2.
[3] *Id.* at 4.
[4] *Id.* at 374.

> Your Honor, I've been a defense attorney for seventeen years and I am able to divorce myself emotionally from what I hear in representing a client. There is one exception to that.
>
> During the proof-positive hearing when I heard for the first time the graphic details that were given with regard to the victim in this case grabbing on to the handle of the axe with both hands while the defendant punched her with his free hand and she dropped to the ground, and then while she was writhing or spasming on the ground, then he struck her numerous times, instantly it brought back a circumstance where during the term of my marriage, my wife and I had a continual conversation regarding security at the house and the garage and her being in the garage.
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> At that moment, I felt an absolute sense of revulsion toward the defendant. I reached the conclusion in my mind he ought to die. I identified I would not sit with him at the table for the remainder of the hearing.
>
> I met with him after that and I was supposed to meet with him that week and I delayed meeting with him because it was an emotional strain for me to have to meet with him.
>
> Finally, weeks after I was supposed to meet with him I met with him. I found him to be distasteful. I had a conversation with him about the state of the case. Without indicating what he said to me, the explanations that were given created emotional responses in me and I don't think that it is fair to him.
>
> I didn't put this in the motion because I thought it was prejudicial to him for an attorney to say in my estimation he's guilty and he ought to die. It's the only time it's happened in my life. But nonetheless, it is what it is.[5]

The trial judge granted the motion to withdraw without comment.[6] The transcript of the sidebar was ordered sealed.[7] "None of [Defendant's] subsequent trial or post-trial attorneys were ever informed by the Court or by the State of these sidebar comments."[8] Defendant (his trial counsel not knowing what had transpired at this sidebar conference) never addressed the

[5] *Id.* at 376-77.
[6] *Id.* at 761.
[7] *Jackson*, 2008 WL 5048424, at * 7 n. 42.
[8] *Id.*

sidebar statements made by Mr. Hurley at either penalty hearing or at any other time during the trial.

After hearing the evidence at the first penalty hearing, the jury deliberated for almost twelve hours before returning a verdict of 11-1 recommending a sentence of death. The trial judge imposed a death sentence.[9]

Defendant has filed numerous motions in the Delaware and federal courts seeking to overturn his death sentence.[10] After issuance of this Court's November 25, 2008 opinion denying Defendant's second motion for postconviction relief, Mr. Hurley submitted an affidavit dated March 31, 2009 to Billy H. Nolas, Esquire,[11] which states in pertinent part:[12]

AFFIDAVIT OF JOSEPH A. HURLEY

> 1. I am an attorney of law who practices law in the state of Delaware and has since 1971.
> 2. I was a privately-retained attorney and accepted the representation of Robert W. Jackson, III in the matter numbered IN92-04-1222 et seq.
> 3. Specifically, I participated in a Proof Positive Hearing that was held in 1992. At that time, I had been admitted to the Delaware Bar, and practiced criminal law, for more than 20 years. During that time, I had effected representation in criminal cases in at least 5,000 different

[9] An appeal was then taken to the Delaware Supreme Court. On July 15, 1994, the Delaware Supreme Court affirmed Defendant's convictions, but vacated his death sentence. *Jackson v. State*, 643 A.2d 1360 (Del. 1994). In September 1995, this Court held a new penalty hearing, after which the jury again voted 11-1 in favor of death. The trial judge again imposed a death sentence. This sentence was affirmed by the Supreme Court. *Jackson v. State*, 684 A.2d 745 (Del. 1996).

[10] For a more complete procedural history, see *Jackson*, 2008 WL 5048424.

[11] Mr. Nolas is Defendant's attorney admitted *pro hac vice* and is associated with the Federal Community Defender Office in Philadelphia.

[12] Both parties agree that this affidavit is part of the factual record.

matters over the course of those approximate 20 years. Never, in that time, or since that time, as a matter of fact, had I withdrawn as an attorney because I had made a judgment of my client, or his actions, which interfered with my ability to offer him strident, if not fierce, legal representation.

4. During the course of the Proof Positive Hearing, a witness was called by the State. That witness was either a close friend or roommate of Robert Jackson. Robert Jackson was accused of a brutal murder involving an innocent female who was either in her thirties or early forties. She had come to her home and entered her garage when, without provocation, someone attacked her with an axe and struck her dead for no apparent reason. The witness testified, upon information and belief, that he had come to the Jackson residence on the day of the homicide and found Jackson shaving. The television was playing in the apartment. As Jackson was shaving, according to the witness, he more or less casually said words to the effect, "Do you remember that I wondered what it was like to kill someone?" When the witness indicated that he did remember, Jackson made some type of reference to what was being shown on the television involving the homicide indicating, to the witness, at least, that Jackson was acknowledging that he was the murderer. The witness, with curiosity, apparently, asked Jackson to further explain, and Jackson explained, in chilling detail, how he had punched the victim with his fist and then brought the axe or hatchet, whatever the instrument may have been, down on her head and watched her fall to the garage floor. The defense table was to the left of the lectern where I was standing. The witness stand would have been at 10:00 a.m., using a clock as a reference point, if 12:00 was considered the direction that I was facing while standing at the lectern. Mr. Jackson would have been situated at 9:00 a.m., making reference to that same clock.

As the witness described the act of murder, the act of brutal murder, I looked at Jackson primarily to insure that he was not grimacing or showing any emotional response to what was being said, and to my shock and disgust, we made eye contact, and he LAUGHED. I instantly concluded it was all a joke to him. At that moment, whatever it is that makes one feel what one feels was triggered, and I felt a surge of repugnancy at what I viewed as heartless, animalistic and inhumane conduct that was intolerable to me.

5. I deliberately withheld indicating that occurrence to the Court because I wanted to protect Mr. Jackson from whatever "nerve" might be struck, consciously or unconsciously, in Judge Bifferato. I tried to balance my duty as a legal advocate with my duty as a human being and believed it was not necessary to inform Judge Bifferato or the State, for that matter, what I had observed.

6. Under oath, I fully believe that I had not witnessed what I witnessed, as described herein, I would have been able to put aside the

> personal experience that I indicated to the Court and continued my role as an advocate consistent with the Code of Professional Responsibility. It was at that moment that I saw Robert Jackson laughing at the plight of the victim that I instantaneously thought "That could have been Charlotte."[13]

CONCLUSIONS OF LAW

2. The only issue presented by the limited remand is whether Defendant's death sentence violates the holding of *Gardner v. Florida*, a case decided by the United States Supreme Court.[14] The plurality opinion in *Gardner* held that a defendant is "denied due process of law when the death sentence was imposed, at least in part, on the basis of information which [that defendant] had no opportunity to deny or explain."[15]

In *Gardner*, the petitioner had been convicted of first-degree murder in connection with bludgeoning his wife to death.[16] At the penalty hearing, the State sought the death penalty based solely on the fact that the

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[13] Def. Appx. at 733-36. "Charlotte" was Mr. Hurley's wife.

[14] 430 U.S. 349 (1977).

[15] *Id.* at 362. The concurring opinion in *Gardner* by Justice White appears to express a narrower holding than the plurality opinion. Justice White stated that he would overturn the death sentence but that "[t]his conclusion stems solely from the Eighth Amendment's ban on cruel and unusual punishment . . . ." *Id.* at 364 (White, J., concurring). Because Defendant in the instant case was sentenced to death, both sides agree that this Court need not decide whether to apply Justice White's Eighth Amendment analysis or the plurality's due process analysis. *See* Wayne R. LaFave, Criminal Procedure § 26.4(d) (3rd Ed. 2007) ("Justice White concurred in *Gardner* on a basis that would not in all likelihood require the same outcome in a non-capital case – that reliance upon secret information on sentencing a defendant to death violated the Eighth Amendment, not due process.").

[16] *Gardner*, 430 U.S. at 351.

petitioner's conduct "was especially heinous, atrocious, or cruel."[17] The petitioner presented mitigating evidence, which "if credited, was sufficient to support a finding of at least one of the statutory mitigating circumstances."[18] After twenty-five minutes of deliberation, the jury recommended a life sentence.[19]

However, and in spite of the jury's recommendation, the trial judge ordered a death sentence.[20] This ruling was based in part on a presentence investigation report, part of which was confidential and never disclosed to petitioner's counsel.[21]

In holding that petitioner's death sentence violated due process, a plurality of the *Gardner* Court reasoned that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."[22] The Court further stated that "[o]ur belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital

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[17] *Id.* at 352.
[18] *Id.*
[19] *Id.* at 352-53.
[20] *Id.* at 353.
[21] *Id.*
[22] *Id.* at 358.

cases."[23] Thus, the Court held that, because the confidential information contained in the presentence investigation report had never been disclosed to petitioner's counsel, and petitioner never had any opportunity to rebut the confidential information, the imposition of the death sentence was violative of due process.[24]

3. Relying heavily on *Gardner*, Defendant argues that his death sentence must be vacated because his death sentence was imposed based on "information" provided to the trial judge at the November 10, 1992 sidebar conference that he had no opportunity to deny or explain.[25] Defendant points out that the same judge who heard Mr. Hurley's sidebar comments ultimately had to decide whether a life sentence or a death sentence should be imposed.[26] Defendant asserts that the trial judge was forced to make a "highly subjective" determination on the appropriateness of the death penalty and that the trial judge "possessed extraordinarily negative information about [Defendant], given to him by [Defendant's] own lawyer."[27]

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[23] *Id.* at 360.
[24] *Id.* at 361; *see also* John G. Douglass, *Confronting Death: Sixth Amendment Rights At Capital Sentencing*, 105 Colum. L. Rev. 1967 (2005) (noting that "the Gardner plurality made little effort to define what level of procedural protection was constitutionally adequate.").
[25] Op. Br. at 8 (citing *Gardner*, 430 U.S. at 362).
[26] *Id.* at 9.
[27] *Id.*

Defendant further argues that "[t]he defense lacked even the opportunity to ask [the trial judge] to confront the question of whether he could fairly and impartially sentence [Defendant] in light of the representations made to him by Hurley."[28] Defendant alleges that "when information 'which may influence the sentencing decision[]' is not revealed to the defense, due process is violated because of the risk that the sentence was 'imposed, at least in part, on the basis of information which [the defendant] had no opportunity to deny or explain."[29] Defendant asserts:

> Hurley did not just tell [the trial judge] his 'opinion' about evidence presented at the proof positive hearing. Hurley told [the trial judge] he 'met with' [Defendant] some weeks after the proof positive hearing and 'had a conversation with him about the state of the case,' and that *the things [Defendant] supposedly said to Hurley in that privileged attorney-client conversation* 'created emotional responses in' Hurley and convinced Hurley that *[Defendant] is 'distasteful'* and *'guilty and he ought to die.'* [Defendant] plainly had no 'opportunity to explain or deny' claims Hurley made about the content of privileged attorney-client conversations, because [Defendant] and his counsel did not know Hurley made representations to [the trial judge] about the supposed content of those privileged conversations.[30]

In response, the State argues that there was no *Gardner* violation, or, assuming that the trial judge committed *Gardner* error, that such error was harmless. The State argues that there is no evidence that the trial judge actually considered Mr. Hurley's statements made at the sidebar conference

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[28] *Id.* at 9-10.
[29] *Id.* at 8 (citing *Gardner*, 430 U.S. at 359-62).
[30] Reply Br. at 10 (citations omitted).

when sentencing Defendant.[31] The State asserts that "in the absence of such a statement [that the trial judge considered confidential information], 'the law presumes that judges are not influenced by improper evidence brought before them.'"[32] The State also argues that "'[t]here is no *Gardner* violation unless the judge is both aware of, and actually considers in sentencing, information that is not disclosed to the defendant.'"[33]

Finally, the State argues that "Mr. Hurley's remarks did not provide the judge with any factual information." Mr. Hurley simply expressed his opinion without providing any factual basis other than the facts related at the proof positive hearing."[34] The State contends that "*Gardner* was concerned about a judge's reliance on *factual* information that might have been unreliable – hence the need for an opportunity to explain or rebut by the defense." [35] The State argues that *Gardner* has no application to the present case because Mr. Hurley expressed only his personal opinions.[36]

4. This Court first notes that the first *Gardner* issue (whether *Gardner* applies to opinions, assuming the "information" conveyed to the trial judge at the sidebar conference were "opinions") presents an apparent issue of first

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[31] Ans. Br. at 15.
[32] *Id.* at 11 (quoting *Ashford v. Gilmore*, 167 F.3d 1130, 1136 (7th Cir. 1999)).
[33] *Id.* at 13 (quoting *Hendrix v. Sect'y, Florida Dep't of Corr.*, 527 F.3d 1149, 1152-53 (11th Cir. 2008)).
[34] *Id.* at 17.
[35] *Id.* at 20.
[36] *Id.*

impression and is a difficult issue of law.[37] The second *Gardner* issue (whether the burden is on a defendant to demonstrate that the sentencing judge relied on the undisclosed information) has been periodically addressed by other courts. This Court concludes that there were no *Gardner* violations because (1) a *Gardner* violation potentially occurs when undisclosed "factual information"[38] is provided to a sentencing judge; here, the statements made by Mr. Hurley constituted opinions, not facts; and (2) Defendant has not demonstrated that the trial judge relied on the sidebar statements when sentencing Defendant to death.[39]

I. A *Gardner* Violation Occurs in a Capital Murder Case When There is Undisclosed "Factual Information" Provided to the Sentencing Judge.

This Court first considers whether the holding in *Gardner* is limited to "factual information."[40] After review of *Gardner* and its progeny, this Court concludes that the sidebar statements made by Mr. Hurley were statements

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[37] Neither party has cited any authority distinguishing a *Gardner* violation on the basis of facts versus opinions. This Court thinks that such an analysis is particularly appropriate in the present case because (1) *Gardner* uses the phrase "factual information" and (2) the State argues that *Gardner* does not apply to "information" that is opinion information, not factual information.

[38] *See Gardner v. Florida*, 430 U.S. 349, 353 (1977).

[39] Because this Court now holds that there were no *Gardner* violations, this Court does not reach the issue of whether, assuming *arguendo*, that there was a *Gardner* violation that that violation was harmless error.

[40] As explained *infra*, a difficulty in resolving this issue is that *Gardner* uses the words "factual information," "facts," and, notably, "information" seemingly interchangeably, although "factual information" (contained in a confidential portion of a presentence investigation report) was at issue in *Gardner*.

of opinion, rather than of fact and further concludes that *Gardner* does not apply to opinions; there can only potentially be a *Gardner* violation if undisclosed "factual information" is provided to a sentencing judge, who thereupon is demonstrated to have relied on it.

A. The Statements by Mr. Hurley Were Expressions of Opinion Rather than of Fact

As previously stated in this Court's opinion denying Defendant's second motion for postconviction relief, there is no question "that Mr. Hurley's statements to the trial judge that his then-client was 'guilty' and 'ought to die,' coupled with his other sidebar comments, were improper, unprofessional, unbecoming a member of the Delaware Bar, and most troubling to this Court."[41] However, and despite these unprofessional and deplorable comments, this Court views all of Mr. Hurley's sidebar statements, for potential *Gardner* violation purposes, as statements of opinion, rather than of fact.

Defendant argues that the words used by Mr. Hurley raised an inference that Mr. Hurley was disclosing certain "factual information."[42] Defendant argues that Mr. Hurley's comments that he "had a conversation with [Defendant] about the state of the case" raised an inference that

[41] *State v. Jackson*, 2008 WL 5048424, at * 21 (Del. Super.).
[42] Reply Br. at 10.

confidential factual attorney-client information was impliedly disclosed to the sentencing judge. Defendant asserts that, based on this confidential attorney-client information, Mr. Hurley wanted the sentencing judge to know that Defendant was "distasteful" and "guilty and he ought to die."[43] Defendant argues that he was deprived of his opportunity to rebut the sidebar comments made by Mr. Hurley.[44]

This Court does not view Mr. Hurley's statements as disclosing "factual information."[45] Mr. Hurley began the sidebar conference by referring to events that transpired at the proof positive hearing. He stated that during the proof positive hearing:

> I felt an absolute sense of revulsion toward the defendant. I reached the conclusion in my mind he ought to die. I identified I would not sit with him at the table for the remainder of the hearing.[46]

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[43] *Id.*

[44] At oral argument, Defendant's attorney stated:

> No. 1, Mr. Hurley indicated that this is information – that the information itself came from a private attorney/client conversation with Mr. Jackson. One way to deny it is what I was just talking about, is to ask Mr. Hurley, well, what did you mean by that? Of course, we presume that he would have given Mr. O'Connell the same affidavit he's filed today. And that affidavit says that what was so pernicious was that Mr. Jackson laughed at one point during the proof positive hearing. That denies, explains, and constitutionally takes the sting out of the statements that Mr. Hurley made.

Trans. of April 9, 2010 Oral Arg. at 28.

[45] Mr. Hurley's affidavit reinforces this conclusion because Mr. Hurley therein specifically stated that he avoided telling the trial judge the reasons for his emotional response in an attempt to avoid injecting bias into the case. *See* Def. Appx. at 736.

[46] *Jackson*, 2008 WL 5048424, at * 6. "[I]n my mind" is a key phrase because it helps demonstrate that "he ought to die" was only Mr. Hurley's opinion.

Mr. Hurley also stated that after the proof positive hearing, at which time the Court found sufficient evidence under 11 *Del. C.* § 2103 to warrant the continued holding of Defendant without bail, he met with his client and found him "distasteful." Mr. Hurley never disclosed to the trial judge what he and his client discussed at the meeting or specified any specific "factual information" that led him to conclude that his client was "distasteful."

Although it is certainly possible, as Defendant posits, that Mr. Hurley may have based his opinion that Defendant was "distasteful" and "ought to die," at least in part, on confidential facts told to him by his client, Mr. Hurley never disclosed those facts to the trial judge. However, based on Mr. Hurley's affidavit submitted after this Court's opinion denying Defendant's second motion for post-conviction relief, Mr. Hurley has averred that he based his opinion on the fact that Defendant laughed at the proof positive hearing.[47] If Mr. Hurley did base his "opinion" on Defendant's public display of laughter, it is debatable whether this "fact" even qualifies as undisclosed "factual information."[48]

Despite Defendant's assertions that Mr. Hurley expressed "factual assertions" when he labeled his client "distasteful," judgments concerning a

[47] Def. Appx. at 736.

[48] If the information is disclosed, there is no *Gardner* violation. *See Gardner v. Florida*, 430 U.S. 349 (1977). The "laugh" was presumably not "undisclosed" because, assuming it happened, the "laugh" occurred in open court.

person's character are more appropriately labeled as opinions.[49] Although any judgment concerning Defendant's character may have been based on facts known to Mr. Hurley, those facts were never disclosed to the trial judge. Also, the judge in all certainty understood that the opinions expressed to the judge were presumably phrased in a sufficiently strong manner that would persuade the judge to allow Mr. Hurley to withdraw, which was Mr. Hurley's goal at that hearing. Thus, this Court concludes that Mr. Hurley's statements concerning his client were opinions.

B. A *Gardner* Violation Potentially Occurs When There is Undisclosed "Factual Information"

This Court ultimately views *Gardner* as applying only to "factual information."[50] Although Defendant urges this Court to adopt a broad reading of the word "information," one of the terms used in *Gardner*, this Court views the word "information," as stated in *Gardner*, as applying to facts. Notably, *Gardner* expressly used the phrase "factual information"

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[49] *See American Heritage Dictionary* (2nd Ed. 2005) (defining "opinion" (among other definitions) as "[a] judgment or estimation of the worth or value of a person or thing.") (defining "information" (among other definitions) as "[k]nowledge of a specific event or situation; news.") (defining "fact" (among other definitions) as "[s]omething that has been objectively verified.").

[50] *Gardner* does not expressly say (because the *Gardner* Court did not know, the presentence investigation report not being part of the record) what was contained in that presentence investigation report. However, and importantly, *Gardner* does note that the sentencing judge apparently relied on the "factual information" in the presentence investigation report. *See Gardner*, 430 U.S. at 353.

towards the beginning of its plurality opinion, prior to its later use of the word "information":

> As the preface to that ultimate finding, [the trial judge] recited that his conclusion was based on the evidence presented at both stages of the bifurcated proceeding, the arguments of counsel, and his review of 'the factual information contained in said presentence investigation."[51]

Although Defendant argues that presentence investigation reports can contain both facts and opinions and asserts that *Gardner* should apply both to facts and opinions,[52] the trial judge in *Gardner* only referred, at the time of his issuance of the death sentence, to the "factual information" contained in the presentence investigation report.[53] This Court concludes that based on the use of the phrase "factual information" earlier in the *Gardner* plurality opinion, the otherwise broad word "information" used towards the end of the opinion was a shortened form of the phrase "factual information."

Additionally, this Court's reasoning is supported by the ultimate rationale of *Gardner*:

> Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on *facts* which may influence the sentencing decision in capital cases.[54]

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[51] *Gardner*, 430 U.S. at 353.
[52] Trans. of April 9, 2010 Oral Arg. at 4-6.
[53] *Gardner*, 430 U.S. at 353.
[54] *Id.* at 360 (emphasis added).

The *Gardner* Court's reasoning is sound. Of course a defendant should have the opportunity to evaluate facts disclosed to a judge and to potentially rebut those facts in some appropriate manner. It can be much more difficult, if not sometimes impossible, to rebut an opinion. Arguably, the expression of an opinion can carry less weight or influence than the communication of facts. Thus, this Court concludes that *Gardner* only applies to undisclosed "factual information." Accordingly, there is no *Gardner* violation in the present case because Mr. Hurley's statements were statements of opinion, not of "factual information."

II. Defendant has not Demonstrated That the Trial Judge Relied on the Prejudicial Statements When Sentencing Defendant to Death

Additionally, and alternatively, this Court concludes that "[t]here is no *Gardner* violation unless the judge is both aware of, and actually considers in sentencing, information that is not disclosed to the defendant."[55]

In *Hendrix v. Secretary, Florida Department of Corrections*, the defendant had been convicted of two counts of premeditated first-degree murder.[56] The defendant argued that his due process rights were violated because the trial judge failed to recuse himself from sentencing the

[55] *Hendrix v. Sect'y, Florida Dep't of Corr.*, 527 F.3d 1149, 1152-53 (11th Cir. 2008).
[56] *Id.* at 1151.

defendant.[57] The defendant argued that the trial judge considered undisclosed information in sentencing him because the trial judge had previously been an advisor to the attorney who had represented the co-defendant in this case.[58]

In holding that there was no *Gardner* violation based on the trial judge's failure to have recused himself, the Court of Appeals for the Eleventh Circuit noted that "[t]here is no *Gardner* violation unless the judge is both aware of, and actually considers in sentencing, information that is not disclosed to the defendant."[59] The *Hendrix* Court held that, "[u]nlike the sentencing judge in *Gardner*, the [judge] in this case did not state that he was considering confidential information. Instead, 'the judge here said just the opposite-that his findings were based solely on proof presented during the guilt and penalty phase of the trial.'"[60]

Defendant argues against applying *Hendrix* to the case at bar, noting, correctly, that the above language in *Hendrix* is *dicta* because in *Hendrix* the defendant knew about the *Gardner* information and did not present any evidence on the *Gardner* issue or question any witnesses about what was said during the confidential communication. The issue in the present case is

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[57] *Id.* at 1152-53.
[58] *Id.* at 1153.
[59] *Id.* at 1152.
[60] *Id.* at 1152-53.

narrower because neither Defendant nor his trial counsel knew about statements made by Mr. Hurley at the sidebar.

Similarly to *Hendrix*, the California Supreme Court in *People v. Sakarias* held that a trial judge must actually rely on undisclosed "factual information" when sentencing a defendant to death before a *Gardner* violation can occur.[61] In *Sakarias*, the defendant and an accomplice were convicted of murder and sentenced to death.[62] The accomplice was sentenced prior to defendant's hearing on a motion for modification of his death sentence.[63] The same trial judge who presided over the accomplice's sentencing also denied the defendant's motion for modification of his death sentence.[64]

The defendant claimed that the trial court must have considered the accomplice's probation report in denying his motion for modification of his

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[61] *People v. Sakarias*, 995 P.2d 152, 185-86 (Cal. 2000).

[62] *Id.* at 158.

[63] *Id.* at 185. In California, a defendant convicted of a capital crime and sentenced to death is granted an automatic application for modification of his death sentence.

> the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

West's Ann. Cal. Penal Code § 190.4

[64] *Sakarias*, 995 P.2d at 185.

death sentence.[65] The defendant argued that consideration of the accomplice's probation report by the sentencing judge violated his due process and Eighth Amendment rights because he was sentenced to death on the basis of information he did not have an opportunity to "confront or rebut."[66]

Despite the defendant's arguments, the Supreme Court of California noted that:

> [t]he record, however, provides not the slightest reason to suppose the trial court [] relied upon or considered the [the accomplice's] report in denying defendant's modification motion. To the contrary, the court expressly stated it had not considered even *defendant's* probation report on the issue of the capital sentence.[67]

The Court also stated that:

> *Gardner v. Florida* is readily distinguishable. The trial judge there stated for the record that his decision in favor of a death sentence was "based on the evidence presented [at trial], the arguments of counsel, and his review of 'the factual information contained in said pre-sentence investigation.' " The high court found Gardner was denied due process of law "when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." As we have just seen, however, the record in the present case provides no support for an assumption defendant's death sentence was based, in any part, on the [the accomplice's] probation report.[68]

Despite the forgoing cases indicating that a trial court must actually rely on undisclosed information in capital sentencing before the occurrence

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[65] *Id.*
[66] *Id.*
[67] *Id.* (emphasis retained).
[68] *Id.* at 185-86.

of a *Gardner* violation, Defendant relies on contrary authority from the Ninth Circuit. In *McKenzie v. Risley*, the Ninth Circuit Court of Appeals held that "[t]he correct inquiry is whether *matters* were discussed *that did or could have* influenced the judge in his sentencing decision."[69] Defendant relies strongly on this standard.

In *McKenzie*, the defendant had been sentenced to death.[70] The defendant filed a writ of habeas corpus in federal court arguing that his death sentence should be vacated "due to an ex parte meeting between the prosecutor and the trial judge prior to sentencing."[71] In connection with the defendant's motion, the District Court heard testimony, and the prosecutor testified

> that he had met with [the trial judge] ex parte to discuss the bill for his work as a special prosecutor. [The prosecutor] stated that [the defendant's] sentencing was not discussed. He admitted, however, that his discussion with the judge may have touched on the facts of the case in general, or as they related to the work he had performed.[72]

The Ninth Circuit in *McKenzie* held that the District Court had applied the incorrect legal standard by requiring the defendant to prove that sentencing was in fact discussed during the ex parte communication.[73] The Ninth Circuit stated, as set forth above, that the appropriate standard was

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[69] *McKenzie v. Risley*, 915 F.2d 1396, 1398 (9th Cir. 1990) (emphasis added).
[70] *Id.* at 1397.
[71] *Id.*
[72] *Id.*
[73] *Id.* at 1398.

"whether matters were discussed that did or could have influenced the judge in his sentencing decision."[74] Accordingly the Ninth Circuit reversed and remanded.

Despite *McKenzie's* broad standard, another Ninth Circuit case has held that, to prove a *Gardner* violation, a defendant must "demonstrate that a [trial judge] considered [the undisclosed information], in arriving at his sentencing decision."[75] In *Paradis v. Arave*, the defendant argued that the trial judge "violated his right to confrontation in considering the following: (1) the contents of a private letter from [defendant's co-defendant] and his in-camera statements; (2) evidence presented at [the co-defendant's] trial; (3) the findings made by [the trial judge] in sentencing [the co-defendant] to death; and (4) [the co-defendant's] testimony at his trial."[76] The defendant

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[74] *Id.* Interestingly, *McKenzie* does not cite *Gardner* for this proposition. Instead, *McKenzie* cites *United States v. Reese*. 775 F.2d 1066 (9th Cir. 1985). *Reese* does not cite *Gardner*. Thus, despite Defendant's urging that this Court apply *McKenize*, *McKenize* seems factually distinguishable because it applied only to ex parte communications between a judge and prosecutor (something that did not occur in this particular case). Only after *McKenzie* was re-appealed to the Ninth Circuit in 1994 was *Gardner* addressed. *See McKenzie v. McCormick*, 27 F.3d 1415 (9th Cir. 1994) (holding that the trial judge did not commit error because the defendant failed to establish that any statements made ex parte to the trial judge "did or could have" affected his sentence). *McKenzie v. McCormick* reiterates the "could have" language used in *McKenzie v. Risley*. However, *McKenzie v. McCormick* distinguished *Gardner* "[b]ecause . . . no information relevant to sentencing was communicated during the course of the [ex parte] meeting, [the trial judge] obviously couldn't have relied on it. Thus, unlike *Gardner*, [the defendant] never made a threshold showing of constitutional error, and the burden to prove the harmlessness of that error never shifted to the State."

[75] *Paradis v. Arave*, 20 F.3d 950, 956 (9th Cir. 1994).

[76] *Id.*

cited *Gardner* and asserted "that [the trial judge's] reliance on [his co-defendant's] letter and his [co-defendant's] statements in-camera in sentencing [the defendant] to death violated his right to due process."[77]

The Ninth Circuit rejected the defendant's claims. Specifically, the Ninth Circuit stated:

> [The defendant] has failed to demonstrate that [the trial judge] considered [the co-defendant's] letter, or his in-camera statements, in arriving at his sentencing decision. In *Gardner* the trial judge explicitly stated that he relied on information not disclosed to the defendant in sentencing the defendant to death. In this case, [the trial judge] listed the things he would consider in determining whether any aggravating circumstance existed. [The co-defendant's] letter and in-camera statements, as well as the evidence from [the co-defendant's] trial, were not referred to as factors the court intended to consider.[78]

The "matters were discussed that did or could have" standard of *McKenzie* is very broad. That standard potentially creates a large universe of *Gardner*-prohibited information. *Gardner* did not use this expansive language (including the word "matters"); the *McKenzie* standard is broader than the *Gardner* standard, especially since this Court concludes that *Gardner* violations must be a matter that is fact-based.[79] In order for there

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[77] *Id.*

[78] *Id. Paradis* does not utilize the "could have" language used in *McKenzie v. Risley*. Instead, *Paradis* stated that "[the defendant] has failed to demonstrate that [the trial judge] considered [the co-defendant's] letter, or his in-camera statements, in arriving at his sentencing decision." *Id.*

[79] *Gardner* specifically states that "[w]e conclude that petitioner was denied due process of law when the death sentence was imposed, *at least in part*, on the basis of information which he had no opportunity to deny or explain." *Gardner*, 430 U.S. at 362 (emphasis

to be a *Gardner* violation, a trial judge must actually rely on undisclosed information in his sentencing decision. It appears that it is Defendant's burden to establish such reliance.[80] This Court declines to adopt the *McKenzie* standard.[81]

Defendant correctly notes that the *Gardner* Court uses the phrase "may have" when the *Gardner* Court stated that:

> Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.[82]

Despite this language, this Court notes that the holding of *Gardner* expressly states that:

> We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.[83]

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added). The standard articulated in *Gardner* appears to this Court narrower than the statement expressed in *McKenzie*.

[80] *Paradis*, 20 F.3d at 956.

[81] The State also cites numerous other cases in support of its contention that a trial judge must actually rely on the undisclosed information when sentencing Defendant to death. *See Ashford v. Gilmore*, 167 F.3d 1130 (7th Cir. 1999); *Worthington v. Roper*, 619 F. Supp. 2d 661 (E.D. Mo. 2009); *Vining v. State*, 827 So. 2d 201 (Fla. 2002). This Court has not directly addressed the additional cases cited by the State because Defendant's arguments as to why each of these cases is factually or procedurally distinguishable are more persuasive.

[82] *Gardner*, 430 U.S. at 360. Defendant also cites *Simmons v. South Carolina*. 512 U.S. 154, 165 (1994) (stating that *Gardner* is violated when "[a] petitioner was prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death.). As discussed *infra*, there is no indication that the trial judge in this case "considered" or even "may have relied" on undisclosed factual information.

[83] *Gardner*, 430 U.S. at 362.

This Court ultimately finds the *Gardner* holding the applicable statement of the law.[84] The "may have" language appears to explicitly refer to "facts."[85] Even if Defendant is correct that the word "information" should be read broadly to include both facts and opinions, the broad reading of the word "information" is restricted by the *Gardner* Court's holding that the death sentence cannot be "imposed, at least in part, on the basis of information which [Defendant] had no opportunity to deny or explain."[86] Thus, even if *Gardner* applies to both facts and opinions, the judge must rely "at least in part" on the facts and opinions in sentencing the defendant.

Here, there is no evidence whatsoever that the trial judge actually relied on any statements made at sidebar in his sentencing decision.[87] In his

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[84] *See* William J. Brunson, Daphne A. Burns, & Robin E. Wosje, *Presiding Over A Capital Case: A Benchbook for Judges* 1.30 (2009) ("Despite the broad language [used in *Gardner*], most courts read *Gardner* narrowly as only prohibiting sentences that are based on secretive, non-disclosed information.").

[85] *Gardner*, 430 U.S. at 360.

[86] *Id.* at 362. *Gardner* appears most concerned with a defendant's opportunity to rebut information used in sentencing. The *Gardner* Court did not overrule *Williams v. New York*. 337 U.S. 241 (1949). In *Williams*, "the sentencing judge stated the facts upon which it was relying in open court, [and] the opportunity to rebut, explain or deny the information contained in the presentence report was nevertheless available [] in *Williams*." *Creech v. Arave*, 947 F.2d 873, 881 n. 7. (9th Cir. 1991*), rev'd on other grounds*, 507 U.S. 463 (1993).

[87] Defendant argues that this Court should not even consider whether the trial judge relied on the undisclosed "factual information" when issuing the death sentence because that line of inquiry is foreclosed by the Supreme Court's Order of Remand. Although this Court is foreclosed from calling the retired trial judge as a witness, it is not foreclosed from considering the trial judge's two sentencing decisions. Additionally, as previously noted, it appears that it is a Defendant's burden to establish a *Gardner* violation. *See Paradis v. Arave*, 20 F.3d 950, 956 (9th Cir. 1994).

first 1993 sentencing decision, the trial judge noted that "[i]n deciding the sentence, the Court has considered the evidence presented at both the guilt/innocence trial and the subsequent penalty hearing."[88] The exact statement was made in the 1995 sentencing decision.[89]

"Trial judges are presumed to know the law and to apply it in making their decisions."[90] This presumption applies as well to evidence considered by a trial judge in reaching a sentencing decision.[91] Although Defendant argues that the sidebar statements were so prejudicial that the trial judge could not have ignored them,[92] there is simply no indication in the record that the trial judge considered the statements, and the presumption is that the trial judge did not.[93]

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[88] Def. Appx. at 57.

[89] *Id.* at 71.

[90] *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002).

[91] *Bowling v. Commonwealth*, 168 S.W.3d 2, 13 (Ky. 2005) (holding that because "there was no indication in the record that the trial judge considered any evidence that Appellant did not have the opportunity to confront or explain, there was no due process violation").

[92] Defendant cites several cases indicating that prejudicial comments implicate a Defendant's Sixth Amendment Rights. For example, in *Parker v. Gladden*, the United States Supreme Court held that a bailiff's comments to jurors that the defendant was "wicked" and "guilty" violated the defendant's rights to confrontation and cross-examination. 385 U.S. 363, 363-65 (1966); *see also Butler v. United States*, 414 A.2d 844, 852 (D.C. App. 1980) (holding that a conviction violated due process where counsel pretrial told presiding judge at bench trial that he believed the defendant would be convicted). This Court considers such cases outside the scope of this present remand and has not considered their merits under *Gardner*. The present issue is only whether there was a *Gardner* violation.

[93] *Ortiz v. Stewart*, 149 F.3d 923, 938 (9th Cir. 1998) ("[W]e abide by the general presumption that judges are unbiased and honest.") (citations omitted).

Finally, and importantly, there is no evidence that the death sentence was based on "caprice or emotion." In *Gardner*, the Supreme Court stated that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."[94] Here, that particular concern of the *Gardner* Court is satisfied because the trial judge stated his reasons for imposing death in both sentencing decisions. The trial judge's two sentencing opinions do not suggest at all that they were based on "caprice or emotion."[95]

5. This case is **RETURNED** to the Supreme Court of Delaware.

Richard R. Cooch

oc: Prothonotary
cc: Clerk of the Supreme Court of Delaware
Elizabeth R. McFarlan, Esquire, Deputy Attorney General
Gregory E. Smith, Esquire, Deputy Attorney General
Thomas A. Foley, Esquire, Attorney for Defendant
John S. Malik, Esquire, Attorney for Defendant

[94] *Gardner*, 430 U.S. at 358.

[95] This Court notes that the trial judge found an additional non-statutory aggravating factor in his 1993 opinion. In 1993, the trial judge found that Defendant lacked sympathy or remorse. This aggravating factor was not discussed in the 1995 sentencing decision, but was included as a mitigating factor in the 1995 decision. The absence of the lack of remorse aggravating factor in the 1995 decision further suggests that the trial judge was able to evaluate the evidence without being swayed by any potential bias.