IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
v.	)	
	)	ID #9504004126
DARYL ANDRUS,	)	
	)	
Defendant.	)	

Submitted: December 18, 2002
Decided: March 12, 2003

UPON DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF. DENIED.

ORDER

PROCEDURAL POSTURE

Daryl Andrus ("Andrus") was jointly tried in a non-capital murder prosecution with codefendant Jeffrey Fogg, ID #9504002666 ("Fogg") in 1996. A jury convicted both Fogg and Andrus of Murder First Degree (title 11, section 636 of the Delaware Code) and Conspiracy First Degree (title 11, section 513 of the Delaware Code) for the April 5, 1995 death of James Dilley ("Dilley"). Andrus (as well as Fogg) was sentenced to life without probation or parole for the murder conviction.

Prior to this case having gone to trial, Andrus filed a motion to suppress, *inter alia*, certain statements that he alleged were obtained in

violation of Miranda v. Arizona.[1] This Court determined, however, that Miranda had not been violated as to some of the statements Andrus had given (because Andrus was not in "custody" at the time of their making), and that the remaining statements Andrus had made were not otherwise inadmissible[2] (because Andrus had not actually "invoked" his right to counsel during a later "custodial" interrogation, an act which would have required the officer taking Andrus's statements to cease further questioning under Edwards v. Arizona.)[3]

Andrus had also filed a pretrial severance motion jointly with Fogg. This Court denied that motion, and the case thereafter proceeded to trial. At their joint trial, the State introduced out-of-court statements made by Andrus that implicated Fogg in Dilley's death; "this evidence had not been disclosed

[1] 384 U.S. 436 (1966) (holding that any statements taken from a suspect during a custodial interrogation will be admissible in the prosecution's case-in-chief only after the prosecution has shown that the suspect had been apprised of his Fifth Amendment rights and has voluntarily, intelligently, and knowingly waived those rights).

[2] State v. Andrus, ID #9504004126, 1996 WL 190031 (Del. Super. Jan. 16, 1996) (hereinafter "Andrus, Jan. 16, 1996 Mem. Op.").

[3] 451 U.S. 477 (1981) (holding that if a suspect indicates during a custodial interrogation that he wishes to remain silent, the interrogation must cease, and if counsel is requested, interrogation must not continue until after counsel is available).

by the State at the time of…[this Court's earlier] decision [denying]…[the jointly-filed] severance motion."[4]

On Fogg's direct appeal, the Delaware Supreme Court *sua sponte* identified a potential Bruton[5] problem (it not having been raised by Fogg at or before trial), and requested "supplemental memoranda…regarding the inculpatory statements by Andrus[ ] and their effect on Fogg…."[6] The Supreme Court then remanded the case to this Court "for reconsideration of its severance decision[ ] under the holding of Bruton[ ] and its progeny[ ] with regard to the effect at the joint trial on the rights of both Fogg and Andrus."[7]

On remand, this Court found that redaction "sufficient to eliminate any reference to the existence of Fogg[ ] was entirely feasible and would have been the more appropriate remedy than severance."[8] The Supreme

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[4] Fogg v. State, Del. Supr., No. 325, 1996, Holland, J. (Dec. 22, 1997), Order at 2 (hereinafter "Fogg, Dec. 22, 1997 Order").

[5] Bruton v. United States, 391 U.S. 123 (1968) (holding that a defendant is deprived of his rights under the Confrontation Clause of the Sixth Amendment when his nontestifying codefendant's confession naming him as a participant in a crime is introduced at their joint trial).

[6] Fogg, Dec. 22, 1997 Order at 2.

[7] Id. at 2-3.

[8] Id.

Court agreed and accordingly affirmed Fogg's conviction.[9] By separate order entered at the same time, the Supreme Court affirmed this Court's pretrial rulings regarding the statements Andrus had given to the police, as well as Andrus's judgment of conviction.[10] Andrus thereafter filed this Motion for Postconviction Relief (the "Motion").

In his Motion, Andrus alleges some 10 or so instances of error that he contends warrant the granting of a new trial. Andrus largely couches his arguments in terms of ineffective assistance of counsel (the procedural bars of Superior Court Criminal Rule 61 could preclude consideration of most, if not all of his claims).[11] Nevertheless, this Court finds that Andrus is not entitled to the relief sought in his Motion, as all of the claims which this Court has considered (some claims will not be reached but remain preserved for future briefing) have either been procedurally defaulted, formerly adjudicated, or summarily dismissed, and the Court, in so finding, has

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[9] Fogg v. State, No. 325, 1996, 1998 WL 736331 (Del. Supr. Oct. 1, 1998) (en banc).

[10] Andrus v. State, No. 359, 1996, 1998 WL 736338 (Del. Supr. Oct. 1, 1998) (en banc) (hereinafter "Andrus, Oct. 1, 1998 Order").

[11] Before addressing the merits of any claim raised in a motion seeking postconviction relief, this Court must first apply the rules governing the procedural requirements of Superior Court Criminal Rule 61. Younger v. State, 580 A.2d 552, 554 (Del. 1990) (citing Harris v. Reed, 489 U.S. 255, 265 (1989)). Under Superior Court Civil Rule 61(i)(5), however, certain procedural bars will not apply "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."

determined that Andrus's counsel was not ineffective as contemplated by Albury v. State.[12]

FACTUAL OVERVIEW

The Court recites the facts that were adduced at trial, as stated in the Supreme Court's 1998 decision on Andrus's direct appeal:

> On April 4, 1995, there was a party at 407 7th Street, Holloway Terrace, the residence of Daryl "Babe" Andrus. John "Dwayne" Cathell brought over a case of beer around noon and sat on the porch drinking with Andrus and two other men. Fogg arrived around 2:30 p.m. with a 12-pack of beer and Cheryl Adams. James "JD" Dilley ("Dilley") was there also. Dilley and Andrus had been friends for years, although two weeks earlier Andrus had severely beaten Dilley on the face. Dilley was a small man, weighing about 150 pounds and five feet three inches tall. He had a clawed right hand.
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> The party migrated from the front porch to the back where Fogg provoked Cathell into fighting by kicking Cathell's leg and knocking his hat off. Subsequently, the party moved down to the basement where Cathell and Fogg fought again. Dilley got between the two of them, but Andrus hit Dilley out of the way and broke up the fight.
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> Around 8:00 p.m., Andrus, Fogg and Adams went to a tavern. They stayed there for about an hour and a half. According to Adams, Fogg and Andrus were rowdy and excited from the drinking and the earlier fighting.
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> On their way back to Andrus's residence, they stopped at a liquor store. They arrived at Holloway Terrace at approximately 10:00 or 10:30 p.m. Dilley was there. When Adams left approximately 20 minutes later, only three people remained in the dwelling: Dilley, who was in the living room trying to get a fire started in a wood stove, and Andrus and Fogg, who were in the kitchen pouring glasses of black sambucca.
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> The next morning at approximately 7:30 a.m., an ambulance from the local fire company responded to 407 7th Street. When they arrived on the scene, Fogg directed them inside where they found a body wearing boxer shorts and socks. There was blood all over the walls and carpets of the house. Fogg started mouth-to-mouth resuscitation while the emergency medical technicians began CPR compressions. Fogg told

[12] 551 A.2d 53, 58 (Del. 1988) (adopting the Strickland v. Washington, 466 U.S. 668 (1984) standard that in order to succeed on a claim of ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.")

them, "I don't understand what happened, we were talking to him this morning."

A short time later, paramedics arrived. Andrus directed them to the victim. Examining Dilley, the paramedics found signs of rigor mortis in his jaw and finger and no pulse. CPR was discontinued and Dilley was pronounced dead at 7:42 a.m.

When Officer Romi Allen of the New Castle County Police Department arrived, the paramedics informed Allen that this was a crime scene. The victim's face was a bloody pulp. As described by the medical examiner at trial, Dilley had suffered multiple severe injuries cause by "kicking, punching, stomping and striking or being struck with blunt objects as well as hands and shod feet," to the extent that some of these actions left imprints on his body. The injuries to his face were so severe that his nose was torn away from his cheek and his ears were torn away from the back of his head. A false plate inside his mouth was broken into multiple pieces because he had been kicked. The hyoid bone underneath his chin was fractured. According to the medical examiner, Dilley died as a result of extreme blood loss complicated by the inhalation of blood and vomit into his airway.

After inspecting the residence, Officer Allen separated Fogg and Andrus since they were possible witnesses. Allen asked Fogg to have a seat in the police vehicle. When a second officer arrived at the scene, Andrus was placed in the second vehicle.

Detective Quinton Watson of the New Castle of the New Castle County Police Department arrived at approximately 8:30 a.m. He spoke with Fogg who was seated in the back seat of the patrol vehicle. Fogg told Watson that the previous evening, after Adams had brought the men back to Andrus's residence, he had come inside and "crashed on the couch." He was awakened in the morning by Andrus calling his name from the hallway outside the bathroom. He went to the bathroom and saw Dilley lying face up in the bathtub, cold and bloody. Fogg and Andrus pulled him out of the tub and dragged him by the arms to Andrus's bedroom. They put blankets on him and a heater next to him. Andrus started mouth-to-mouth resuscitation. Then Andrus went across the street to call for an ambulance. Fogg continued to perform mouth-to-mouth breathing on Dilley who was making gurgling sounds.

Shortly thereafter, the police then transported Andrus and Fogg to police headquarters for more questioning. Andrus was arrested and charged with hindering prosecution. In his final interview which started at 8:40 p.m., Fogg admitted to the police that he had struck Dilley with his hand. Fogg was arrested and charged with first degree murder and hindering prosecution. On May 1, 1995, Andrus and Fogg were jointly indicted on charges of Murder in the First Degree and Conspiracy in the First Degree.

While Andrus and Fogg were at police headquarters being questioned, other police officers were gathering evidence inside the

Andrus residence. The living room wall facing the front door had what the police described as an enormous amount of blood on it. The floor was stained with apparent blood, as were the hallway and walls leading to the back of the residence. Similar stains were found on the refrigerator door in the kitchen and on the venetian blinds, sink, and shower in the bathroom. The bathtub was three-quarters filled with red-brown water and numerous items were floating in it, including a pillow, beer can, and shampoo containers. A pair of black boots was discovered in the living room and a pair of cowboy boots and a single black boot were located in the bedroom a few feet away from the body. The police found pieces of broken denture in the bathtub, on the living room floor, and on the bedroom floor next to the victim's body. A tooth was located in the hallway. A pair of wet and bloody jeans was found on the door handle of a second bedroom, and a wet shirt and sock were discovered outside the basement on the ground. On the back deck, the police found a t-shirt, lamp base, and a comforter stained with blood that DNA analysis later matched to Dilley.

The day following the defendant's arrests, the Medical Examiner's Office called the police to ask whether any jewelry had been seized at the scene or from the defendants. The police provided the Medical Examiner with a wizard ring belonging to Andrus, Fogg's ring that had on it a skull's face wearing a Viking helmet, and also several pair of boots. At trial, the Assistant Medical Examiner, Dr. Adrienne Perlman, testified that Dilley had very distinct "patterned injuries" on his body. She ultimately identified four distinct "patterned injuries" that were caused by the defendants' rings, and the cowboy boots and single black boot recovered from Andrus's bedroom. The cowboy boots, State's Exhibit No. 74, were later identified by a podiatrist as matching casts of Andrus's feet. Dr. Perlman also stated that one ring had to have had a stone in it to have caused the "patterned injuries" she saw on Dilley's body, even though when she saw the ring, the stone was missing.

On April 5, 1995, the police had observed fingerprints, smears and palm prints in reddish-brown stains on the south wall of the living room. Corporal Ronald Webb lifted several palm prints off that wall, the east wall at the corner of the hallway and from the outside of the door of the master bedroom. At trial, he testified that the ten palm prints that were of value for identification purposes belonged to Andrus and Fogg.

Robert Richmond, an inmate at the Delaware Correctional Center, was called as a witness by the State. Richmond testified that he had met Andrus at Gander Hill. Andrus had told Richmond about his crime, stating that the victim, who lived with Andrus, had slapped Andrus in the face and that Andrus had started fighting. The victim fell to the floor, and Andrus and the co-defendant, who was staying there at the time, kicked and stomped the victim. Andrus said that he had hit the man in the face and apparently was concerned that his ring, which was taken from him by the police, would match 17 cuts to the man's face. According to

> Richmond, Andrus had claimed that his co-defendant, whose name Richmond did not remember, had gotten carried away with the beating and went too far. The incident took place in the living room and afterward, they dragged the victim to the bathroom to clean him up. Their main concern was to clean up the house. They had plans of getting rid of the body, but too many people knew that Dilley had been there and that they had been fighting. Andrus told Richmond that he went to bed and, the next morning after sobering up, he called 911.
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> The defense for Andrus presented evidence that he had sustained a gunshot wound in 1994 that had left him partially paralyzed on his right side and in his left leg. He would not have been able to kick with any force, although he could have performed some of the injuries described in the autopsy such as punching and striking with blunt objects or hands. Neither Andrus nor Fogg testified at trial. The jury subsequently found them both guilty as charged.[13]

Because several of the claims that Andrus raises in his Motion were not raised at trial or on direct appeal, the Court must now consider additional facts not adduced at trial. One such claim relates to the timing and effect of a phone call initially placed by Andrus to William W. Erhart ("Mr. Erhart"), a Delaware lawyer who was acquainted with Andrus and who had represented him in connection with criminal charges unrelated to Dilley's homicide; a second claim relates to the qualifications and findings of Dr. Adrienne Perlman, who was then the Assistant Medical Examiner for the State of Delaware,[14] and who testified as part of the State's case-in-chief at trial.

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[13] Andrus, Oct. 1, 1998 Order at *1-*4.

[14] Since Andrus's trial, Dr. Perlman has become the Deputy Chief Medical Examiner for the State of Delaware. Hr'g Tr. of 1/25/02 at 10.

With his Motion, Andrus submitted an affidavit executed by Mr. Erhart, the pertinent parts of which read:

> 1. I am an attorney admitted to the bar of the State of Delaware.
> 2. In 1994 and 1995 I represented Daryl Andrus on various legal matters.
> 3. On the morning of April 5, 1995 shortly after 11:00 a.m. I received a telephone call from Daryl Andrus in my office.
> 4. [Andrus] said he was at New Castle County Police Headquarters. I could hear voices in the background.
> 5. [Andrus] said that someone had been found dead in his house and that he was going to be arrested for hindering prosecution if he did not give a statement to the police. He said that he had already provided a written statement to the police. He then gave the telephone to someone who identified himself as Detective Scott McLaren.
> 6. I then spoke to Detective McLaren who said: Darryl Andrus was going to be arrested for hindering prosecution for trying to mislead the police in the written statement. McLaren was only trying to find out what happened. Darryl Andrus did not realize how much trouble he could be in if he did not help the police.
> 7. I told Detective McLaren not to talk to Daryl Andrus, not to ask him any questions, or to request a statement from Darryl Andrus. He told me he understood.[15]

These statements must be read in the context of the facts as previously determined by this Court, namely that Detective McClaren had "conducted [one] taped interview of Andrus from 12:04 to 12:40 p.m. [on April 5, 1995,]" and a second one "from 1:05 to 1:56 p.m.";[16] these statements were incriminatory in part because Andrus then "gave an account[ ] which

[15] Erhart Aff. of 9/25/02 (Ex. "F" to Def.'s Mot.).

[16] Andrus, Jan. 16, 1996 Mem. Op. at *3.

conflicted with [his] own earlier [written] account[ ] as to what had happened the night and hours before [Dilly's] body was discovered."[17]

Upon Andrus's request, this Court held an evidentiary hearing on February 22, 2002, at which time both Mr. Erhart and Thomas A. Foley ("Mr. Foley"), Andrus's counsel at trial and on appeal, gave testimony. It was unclear from the testimony given at the hearing exactly what time Mr. Erhart spoke with Detective McLaren (and in fact Mr. Erhart may have spoken with him, as well as other law enforcement personnel, more than once), but, as is developed below, the timing of any calls involving Mr. Erhart is immaterial.

With regard to Andrus, Mr. Erhart testified that he had "represented him for a series of three DUIs that [had] occurred late 1993 and early 1994[ ][,]" and that he was in fact representing Andrus on April 5, 1995 "[w]ith regard to [one of those] DUI[s]."[18] While Mr. Erhart was unable to personally go to the New Castle Police Department when Andrus was being investigated because he "was busy,"[19] Mr. Erhart testified that he assumed that Detective McLaren was going to comply with Mr. Erhart's request to

[17] Id. at *4.

[18] Hrg. Tr. of 2/22/02 at 28.

[19] Id. at 59.

cease further questioning of Andrus.[20] The first time Mr. Erhart became aware that Andrus had given statements to the police other than the original, written one occurred after the Supreme Court affirmed Andrus's convictions in October 1998; by that point, Mr. Erhart had conversed with Mr. Foley about Andrus's case, even though Mr. Foley "had [earlier] sent [Mr. Erhart] a courtesy copy of [Andrus's] Opening Brief to the Supreme Court [on direct appeal]…."[21]

At the evidentiary hearing, Mr. Foley testified that he had been a Deputy Attorney General for the State of Delaware from June 1989 until February 1995 before moving into private practice.[22] Although he had previously prosecuted homicide cases, Andrus's case was the first homicide case that Mr. Foley had defended.[23] Mr. Foley recognized that "the State's case was [supported by] the crime scene[ ][,]"[24] and that he was "stuck with

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[20] Id. at 63.

[21] Id. at 24. It is unclear from the record why Mr. Erhart did not promptly determine the identity of counsel representing Andrus in an effort to inform counsel that Andrus had called Mr. Erhart when the police were investigating Dilley's homicide, a fact which now forms the basis of one of Andrus's Rule 61 claims.

[22] Hrg. Tr. of 2/22/02 at 112.

[23] Id. at 113.

[24] Id. at 159.

that."[25] Nevertheless, Mr. Foley's theory was to "[a]t least try to get a middle position…that there was not an intent to kill [as is required for Murder First Degree convictions], that if [Andrus] was involved somehow, it was marginal compared to Fogg."[26]

Relatedly, Mr. Foley realized the significance of Dilley's "cause…and…nature of…death and how it happened[ ][,]" and that in order to successfully evaluate that evidence and defend Andrus, Mr. Foley would need to hire a pathologist.[27] Although Mr. Foley did not retain his own pathologist, he did rely upon the findings of Fogg's pathologist, Walter I. Hoffman, M.D.. Mr. Foley believed that Dr. Hoffman's testimony, combined with that of Andrus's treating physician from his earlier gunshot wound (which apparently immobilized Andrus to some degree), was enough "to counter anything that Dr. Perlman was going to say."[28] To that end, Mr. Foley cross-examined Dr. Perlman at trial, including questions about her qualifications.[29] While Mr. Foley believed that Dr. Hoffman adequately

[25] Id. at 158.

[26] Id.

[27] Hrg. Tr. of 2/22/02 at 119-120.

[28] Id. at 125.

[29] Id. at 127.

testified at trial "as to [Dr. Perlman's] shortcomings[ ][,]"[30] Mr. Foley opined at the hearing that "only [a] jury can [answer whether witness's credibility has been effectively attacked]."[31]

An additional evidentiary hearing was held because of Andrus's claim that Dr. Perlman's qualifications were misrepresented at trial and that the jury was therefore unable to properly evaluate the doctor's credibility.[32] At that hearing, Michael W. Modica ("Modica"), Andrus's counsel in support of his Motion, questioned Dr. Perlman's affiliation with and the prestige of the American College of Forensic Examiners, Inc. ("ACFE"), an organization with which Dr. Perlman had been a member. Modica's cross-examination of Dr. Perlman was promoted in part by a recent article from *The Wall Street Journal* (attached as Exhibit "D" to Andrus's Motion) in which ACFE had been described as a "witness-certification business" and a part of the "broadening market" of "expert-witness warehouses" established

[30] Id. at 201.

[31] Id. at 133.

[32] The hearing at which Dr. Perlman was examined was the first of the two evidentiary hearings held on Andrus's Motion; because of scheduling difficulties, Mr. Erhart and Mr. Foley gave testimony at the later, continued hearing.

after the United States Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc..[33]

At the hearing, Dr. Perlman testified that she had been a "diplomate" of the American Board of Forensic Examiners as well as a "diplomate" of the American Board of Forensic Medicine, and that her *curriculum vitae* that had been introduced at trial had reflected this.[34] Dr. Perlman agreed with Modica's suggestion that ACFE was "the organization that issue[d] those credentials[ ][.]"[35]

In contrast to Dr. Perlman, Fogg's medical expert (also utilized by Andrus) had been a member of the American Board of Pathology ("ABP"), an organization with which Dr. Perlman had never affiliated. Andrus argues that this fact was important at trial because although it was made clear that Dr. Perlman was a forensic pathologist, the jury may nonetheless have been left with the impression that Dr. Perlman was "board certified" in that field; apparently Fogg's expert, Dr. Hoffman, had been "certified" in "forensic

[33] 509 U.S. 579 (1993) (holding that scientific expert testimony would no longer be admitted after it had been shown that the theory or technique upon which the testimony was predicated was "generally accepted" in the relevant scientific community, but rather a proponent of such testimony would now need to show the "reliability" of any scientific opinion, as determined by the trial judge in his or her "gatekeeping" function).

[34] Hr'g Tr. of 1/25/02 at 24.

[35] Id.

pathology" by the ABP, but when asked at trial whether she was "board certified with respect to forensic medicine," Dr. Perlman had simply responded "Yes…."[36] Dr. Perlman testified at the evidentiary hearing that she didn't explain the difference between "forensic pathology" and "forensic medicine" at trial because she "wasn't asked to."[37]

Dr. Perlman further testified at the hearing that Dr. Hoffman was the only ABP-certified pathologist and the only pathologist with a certification in the discipline of forensic pathology to testify at Andrus's trial.[38] Dr. Perlman also opined that certification by the ABP does not increase one's level of knowledge or skill,[39] and that only a state can determine who may practice medicine within its jurisdiction, through that state's licensing authority. (Dr. Perlman had earlier testified at the evidentiary hearing that in order to hold the position of Assistant Medical Examiner for the State of Delaware, one would need a certification or possession of the required training and experience to sit for the ABP-administered exam in anatomic

[36] Id. at 64.

[37] Id.

[38] Id.at 84.

[39] Hr'g Tr. of 1/25/02 at 90.

pathology,[40] and that she in fact was "board eligible" by the nature of her training and experience to sit for that exam.)[41]

THE PARTIES' CONTENTIONS

The "Richmond" Issues

In his Motion (but not in the accompanying brief), Andrus raises two claims relating to testimony given by Robert Richmond ("Richmond) at the 1996 joint trial. Richmond had testified that he was an inmate who met Andrus while they were both incarcerated at the Gander Hill Multi-Purpose Criminal Justice Facility, and that Andrus had confessed to him Andrus's participation in the beating death of Dilley.[42] Andrus now claims that the State had made a pretrial agreement with Richmond in exchange for his testimony, such agreement not having been disclosed to Andrus in contravention of Brady v. Maryland.[43] Andrus also claims that this Court erred when it admitted into evidence a taped audio statement given by

[40] Id. at 13.

[41] Id. at 18.

[42] Andrus, Oct. 1, 1998 Order at *3.

[43] 373 U.S. 83 (1963) (holding that following request, the suppression by the prosecution of evidence favorable to an accused violates due process where that evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution).

Richmond in which Richmond allegedly refers to Andrus's involvement with the "Pagans" motorcycle club.

Following Andrus's submission of his Motion, however, it was determined that Richmond was no longer within Delaware; Andrus then hired a private investigator to ascertain Richmond's whereabouts. After the passage of many months, it was determined that Richmond was being held within Georgia's penal system, and that both parties and the Court recognized that his immediate extradition to Delaware was not feasible or practicable.

Andrus has advised the Court that he is not "withdrawing, waiving, or otherwise abandoning th[e] [Richmond] issue[s]."[44] The Court has agreed, and accordingly, the Court does not rule on Andrus's claims relating to Richmond, but instead considers those claims as preserved for a future date if and when Richmond is transported back to Delaware.

The "Erhart" Issues

Andrus seeks to suppress the two taped statements he gave to Detective McLaren on April 5, 1995, the first from 12:04 to 12:40 p.m. and the second from 1:05 to 1:56 p.m.. Andrus contends that he "suffered unfair prejudice by the admission of…[these] statements [which were] obtained

[44] Letter from Michael W. Modica to the Court of 2/20/02, at 1.

after the police were specifically instructed not to interrogate him by…Erhart[ ][,]" and that "[t]he police procurement of both recorded statements violated [his] constitutional rights against self-incrimination as well as his rights to counsel."[45] The State responds that "[t]o the extent that Andrus may be seeking to relitigate any pre-trial evidence suppression issue previously decided by this Court…any such attempt is procedurally barred…as previously adjudicated[ ][,]"[46] and that Andrus has procedurally defaulted because "specific invocation of the Fifth Amendment self-incrimination privilege by an attorney on behalf of Andrus was never fairly presented to this Court…nor was it raised…on direct appeal."[47]

The Court looks in part to the Delaware Supreme Court's decision of Bryan v. State[48] for guidance. In that case, the defendant, who was charged with first-degree murder, possession of a deadly weapon during the commission of a felony, and theft of over $500 by false pretenses, moved to suppress a confession he had made during a custodial interrogation; the interrogation yielding the confession had occurred despite a lawyer for the

[45] Def.'s Am. Opening Br. at 4.

[46] State's Answering Br. at 9-10.

[47] Id. at 10.

[48] 571 A.2d 170 (Del. 1990) (en banc).

defendant's repeated telephonic admonitions directed towards the police not to question the defendant in that lawyer's absence. The Superior Court had denied the defendant's motion, but on appeal the Supreme Court reversed and remanded in order that a new trial could be held.[49] After recognizing that under Delaware's Constitution "there is no distinction between an in-person request by retained counsel to render assistance to [a] client [accused of having committed a crime] and a telephonic request by that lawyer[ ],"[50] the Bryan Court held that:

> the procedural protections afforded by the Delaware Constitution demand that an accused be afforded the unqualified opportunity to consult with counsel prior to custodial interrogation, provided that (i) the lawyer has clearly made a reasonable, diligent, and timely attempt to render legal advice or otherwise perform legal services on behalf of [a] client, the accused, and (ii) the lawyer has been specifically retained or designated to represent the accused.[51]

Thus "when counsel has been specifically designated and retained to represent a suspect and the suspect has clearly made police aware of [a] desire to deal with police only through [ ] counsel…a heavy presumption [is imposed] against waiver [of the right to counsel]…."[52] Because the defendant's specifically-retained counsel contacted the police and advised

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[49] Bryan, 571 A.2d at 177.

[50] Id. at 175.

[51] Id.

[52] Id.

them not to interrogate the defendant in his absence but the police nonetheless interrogated the defendant thereafter, the Bryan Court determined that the defendant "could not [have] waive[d] his right to counsel…" and concluded that his subsequent confession should not have been admitted into evidence at trial.[53]

As stated, this Court has previously denied Anrdus's claim that the statements he had given to the police were obtained in a constitutionally defective manner. In connection with that ruling, this Court had determined that before Andrus gave his first oral statement (which was taped and allegedly occurred after Andrus contacted Mr. Erhart), Andrus "was not in custody…and [thus] his rights as prescribed by Miranda were not violated."[54] This Court also determined that prior to the giving of the second oral statement, "Detective McLaren…read Andrus his Miranda rights[ ][,]" and Andrus "signed a Miranda waiver form at that time."[55] It was only at the conclusion of this second oral statement that Andrus requested the assistance of counsel, "and all future questioning [then] ceased[ ][.]"[56]

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[53] Id. at 177.

[54] Andrus, Jan. 16, 1996 Mem. Op. at *9.

[55] Id. at 4.

[56] Id.

"Andrus was then arrested for [h]indering [the] [p]rosecution of Dilley's murder[ ][,]"[57] presumably because these oral statements conflicted with the earlier, written statement that Andrus had given.

This Court sees no reason to reverse its initial ruling that the manner in which the two taped statements Andrus now seeks to suppress was constitutionally proper. As to the first taped statement, this Court has previously determined that Andrus was not in "custody" at that time and that the proscriptions of Miranda therefore did not apply to the taking of that statement; without Miranda having been implicated, the Court cannot hold that Andrus's Fifth Amendment right to counsel was violated. Nor was Andrus's Fifth Amendment right to be free of self-incrimination violated, given this Court's earlier determination (by virtue of the fact that he was not then in custody) that Andrus's first oral statement was given in a "voluntary" manner.[58]

When Miranda was implicated prior to the taking of Andrus's second oral statement (by virtue of Andrus's interrogation having become "custodial" because charges against him had then been contemplated), Andrus failed to properly "invoke" his right to counsel, and in reality waived

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[57] Id.

[58] Andrus, Jan. 16, 1996 Mem. Op. at *9.

that right. The fact that Mr. Erhart may have told Detective McLaren not to further interrogate Andrus is of no moment, given that Andrus was read his Miranda rights before he himself signed a Miranda waiver form; therefore—and in contrast to Bryan—Andrus was "afforded an unqualified opportunity to consult with [his] counsel" and did not thereafter "clearly ma[ke] [the] police aware of his desire to deal with [them] only through [ ] counsel."[59] Accordingly, the protection recognized by the Bryan Court, *i.e.*, the "heavy presumption"[60] against waiver of the right to counsel, does not apply here. Andrus's comprehension of the situation and the ramifications of his consent to being interrogated are corroborated by the fact that he subsequently requested the assistance of counsel, "and all future questioning [then] ceased[ ][.]"[61]

Accordingly, Andrus's claims relating to the "Erhart" issues are subject to the former adjudication bar of Superior Court Criminal Rule 61(i)(4),[62] and those claims are therefore **DENIED**.

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[59] Bryan, 571 A.2d at 175.

[60] Id.

[61] Andrus, Jan. 16, 1996 Mem. Op. at *4.

[62] That rule provides that "[a]ny ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal *habeas corpus* proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice." Super. Ct. Crim. R. 61(i)(4).

Dr. Perlman's Trial Testimony and Credibility

Andrus argues that Dr. Perlman "misled the jury regarding the strength of her qualifications" and there is a reasonable probability that "but for this deception, the outcome of [Andrus's] trial would have been different."[63] A summary of Andrus's theories (predicated upon the fact that Dr. Perlman was not board certified in forensic pathology by the ABP but left the jury with the impression that she in fact was) follows:

> The State's theory against Andrus was supported by the conclusions of Dr. Adrienne Perlman, Assistant Medical Examiner. She testified regarding her autopsy of the victim, his cause of death, and the nature of the injuries which she contended were caused by [Andrus]'s ring and boots. [Andrus] presented the testimony of Dr. Walter Hoffman, a board certified forensic pathologist, who refuted the conclusions of Dr. Perlman and raised questions about her qualifications. [But] [d]ue to the significance at trial of the issues addressed by Dr. Perlman and Dr. Hoffman, the credibility of each expert was central to the resolution of critical issues by the jury.[64]

The State responds that this claim is barred through the procedural default provisions of Superior Court Criminal Rule 61(i)(3)[65] because this claim was not presented on direct appeal; the State also argues that even if Andrus's

[63] Def.'s Am. Opening Br. at 14.

[64] Def.'s Am. Opening Br. at 7.

[65] That rule provides "[a]ny ground for relief that was not asserted in the proceedings leading to the judgment of conviction…is thereafter barred, unless the movant shows (A) [c]ause for relief from the procedural default and (B) [p]rejudice from violation of the movant's rights." Super. Ct. Crim. R. 61(i)(3).

claim was not subject to a procedural default, this claim is nonetheless "meritless."[66]

At trial, Dr. Hoffman testified that "[t]here [we]re certain patterns of injury on…Dilley['s] [body] which were done by shoes, blunt objects and other types of instruments[ ]"; the doctor then clarified this statement with his opinion as to the cause of Dilley's death (which was somewhat in contrast to the testimony of Dr. Perlman reprinted from Andrus's direct appeal as summarized above):

> The[ ] [patterns] are consistent with rings that you [the jury] saw, with boots and shoes that you saw and other objects that may have been presented to you, but note that I say 'they are consistent with.' I am unable, based on the written report of Doctor Perlman, plus all of the photographs that you have seen, that I have seen, to say with a high degree of certainty that it can only be those objects.[67] It could be things that are very similar to those objects, but the state of our science is that we are not at a point yet that we can say with a hundred percent certainty that it can only be those objects. Certainly could be those objects. I certainly don't want to mislead you, but not with a hundred percent accuracy. [The patterns] are consistent with objects of that type.[68]

Dr. Hoffman additionally testified that he was "certified in the field of forensic pathology [by the ABP][ ][,]"[69] and that "[t]his [wa]s the one and

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[66] State's Answering Br. at 17.

[67] Dr. Hoffman did not actually examine Dilley's corpse.

[68] Trial Tr. of 4/29/96 at 18-19.

[69] Id. at 8.

only way to become board certified in the field of forensic pathology…."[70] When asked for clarification, Dr. Hoffman responded the ABP "does not recognize any other board, but there is another board that has come into existence…that…gives one a certification by paperwork only."[71] Dr. Hoffman was presumably referring to the board that Dr. Perlman had represented at trial that she was a member of, the ACFE.

To the extent that Andrus's argument that the ACFE was a "witness-certification business" and an "expert-witness warehouse" implicates this Court's "gatekeeping" function as explained in M.G. Bancorporation, Inc. v. LeBeau,[72] this Court finds that argument to be without merit. As explained above, Daubert contemplates a trial judge's role as determinative of the "reliability" of scientific expert testimony sought to be admitted at trial. Here, the expert testimony that is questioned relates to the cause of death as determined by Assistant (now Deputy Chief) Medical Examiner Adrienne Perlman. Dr. Perlman apparently followed standard procedures in

[70] Id. at 12.

[71] Id. at 12-13.

[72] 737 A.2d 513 (Del. 1999) (en banc) (explaining in the context of a minority corporate shareholders' statutory appraisal remedy a trial judge's "gatekeeping" function in relation to scientific expert testimony as established by Daubert and its progeny); see also Nelson v. State, 628 A2d 69 (Del. 1993) (holding that in order for scientific evidence or testimony to be admissible, a trial court must also find the evidence relevant and reliable).

conducting her autopsy of Dilley, and that by nature of her qualifications for her position as Assistant Medical Examiner, *i.e.*, she was ABP-"board eligible," Dr. Perlman was qualified to render that opinion. Thus Andrus's claim on this ground fails.

With regard to Andrus's argument that the jury may have improperly favored Dr. Perlman's testimony over that of Dr. Hoffman (in part because of Andrus's contention that Dr. Perlman "misrepresented" her credentials at trial), the Court likewise finds this argument to be without merit. As excerpted above, Dr. Perlman's conclusions and qualifications were explored through Dr. Hoffman's testimony; in fact, their testimony in part agreed that the patterns observed on Andrus's body were "consistent with" rings, boots and shoes alleged to be the objects that caused Andrus's death. "It has long been [the] law [of Delaware] that the jury is the sole judge of the credibility of the witnesses and responsible for resolving conflicts in the testimony."[73] Accordingly, the jury's determinations will not be disturbed now.

This issue was not presented before, but based on the above analysis, the Court finds that Andrus has suffered no "prejudice" as contemplated by

[73] Tyre v. State, 412 A.2d 326, 330 (Del. 1980).

the procedural default provision of Rule 61(i)(3).[74] Nor has Andrus shown that the "fundamental fairness" exception of Rule 61(i)(5) applies.[75] Accordingly, Andrus's claim of error relating to Dr. Perlman's testimony is procedurally defaulted and therefore **DENIED**.

EVIDENCE OF ANDRUS'S EARLIER FIGHT WITH DILLEY

Andrus objects to this Court's ruling admitting at trial evidence that two weeks prior to his death, "Andrus had severely beaten Dilley on the face[ ]";[76] the State had filed a motion in limine seeking to admit this evidence, and Andrus objected to that motion.[77] Andrus now argues that because of this ruling, the jury was "less likely to apply the presumption of innocence or carefully evaluate the evidence."[78] Andrus argues that in his case "the issue of identity was not a valid basis for admitting th[is] evidence[ ]" because "[t]o use th[e] evidence [in this manner]…requires [a] finding that because Andrus had been in a previous fight with Dilley…he probably

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[74] If a movant cannot prove "prejudice," it is immaterial whether the movant can prove "cause." State v. Conyers, 413 A.2d 1264 (Del. Super. Ct. 1979) (decided under former Superior Court Criminal Rule 35(a)), aff'd, 422 A.2d 345 (Del. 1980).

[75] The "fundamental fairness" exception contained in Rule 61(i)(5) is "a narrow one and has been applied only in limited circumstances, such as when the right relied upon has been recognized for the first time after [a] direct appeal." Younger, 580 A.2d at 555.

[76] Andrus, Oct. 1, 1998 Order at *1.

[77] See Trial Tr. of 4/25/96 at 24-47.

[78] Def.'s Am. Opening Br. at 15.

assaulted Dilley again."[79] Andrus additionally argues that the Court should have instructed the jury "that the evidence of the altercation is only relevant if the jury finds that Andrus initiated the fight[ ] or was the aggressor."[80]

In response, the State posits that "[t]he impact of the limited prior bad act evidence in this case was minimal given the other evidence against Fogg and Andrus."[81] The State contends that it did not introduce this evidence in order "to prove that Andrus was a bad person, but simply as proof of motive and identity[,] [ ]both of which are specifically recognized as valid purposes under D.R.E. 404(b)[ ]."[82] (Delaware Rule of Evidence 404(b) provides that evidence of other crimes, wrongs or acts may be admitted "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.") The State further argues that "[t]he jury limiting instruction…properly channeled the jury's consideration…of

[79] Id. at 17.

[80] Id. The Court instructed the jury that it could not "use that evidence as proof that Mr. Andrus [wa]s a bad person[,]" but only as "evidence in connection with all other evidence presented at trial[ ] in helping [the jury] decide whether…Andrus committed[ ] the offenses charged in the indictment." Trial Tr. of 5/2/96 at 186-187.

[81] Id. at 22.

[82] State's Answering Br. at 21.

the…act…to only the appropriate relevant purposes for its admission in this prosecution."[83]

This Court conducted a Getz[84] analysis before permitting the introduction of evidence of Andrus's earlier fight with Dilley.[85] The Court concluded that the evidence sought to be admitted was "material to an issue or ultimate fact of issue in th[e] case[ ][,]" that the evidence "would be introduced for a purpose sanctioned by 404(b)[,]" that the evidence of the prior fight could be proved by evidence which was "plain clear and conclusive[ ][,]" that the earlier fight was "not too remote in time from the charged offense[ ][,]" and that "the probative value [of evidence of the earlier fight] [wa]s great enough that it [wa]s not substantially outweighed by any unfairly prejudicial effect."[86] This Court's ruling was not challenged on direct appeal.

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[83] Id.

[84] Getz v. State, 538 A.2d 726 (Del. 1988) (setting forth a six-point "guideline" to govern the admissibility of evidence of other crimes, wrongs, or acts under Delaware Rule of Evidence 404(b)).

[85] At the time of Andrus's trial, the Supreme Court had not yet decided Deshields v. State, 706 A.2d 502 (Del. 1998) (stating that there are "at least nine" factors that a court should consider in applying the Delaware Rule of Evidence 403 "balancing test" to Rule 404(b) evidence).

[86] Trial Tr. of 4/25/96 at 43-46.

Because this Court formerly considered Andrus's objection to the inclusion of this evidence at trial, Andrus's claims are subject to the former adjudication bar of Superior Court Criminal Rule 61(i)(4). Reviewing his current challenge to the Court's earlier ruling, this Court cannot say that it would have ruled any differently than it did then; accordingly, Andrus has failed to show that "reconsideration of the claim is warranted in the interest of justice."[87] Therefore, the bar of Rule 61(i)(4) applies, and Andrus's claim on this point is **DENIED**.

THE STATE'S CLOSING ARGUMENT

Andrus elected not to take the witness stand and testify at the 1996 trial. During its closing argument, however, the State's prosecutor asked the following of the jury: "Is there one scintilla of remorse in the statements or actions of the defendant[ ] that you see through the transcripts, through the audio tape, through the videotape? Is there one scintilla, one crumb of remorse or regret expressed in those materials by…defendant? And the answer to that is no."[88] The prosecutor additionally read to the jury from a report made by the police made during Andrus's investigation, as follows:

> Question: Is [Dilley] a good guy?
> [Answer:] Yeah.

[87] Super. Ct. Crim. R. 61(i)(4).

[88] Trial Tr. of 5/2/96 at 46.

> Question: Cause you any problems while he's been staying with you?
> Answer: Well, not really, no. When we get drunk, we get—we get—we [got] scrapping once a couple weeks ago, but that was all straightened out.
> Question: About what?
> [Answer:] Oh, I forgot. I forget. We were drunk. It wasn't really a fight. We just argued a little bit, smacked each other a little bit, and that was it.[89]

The prosecutor then commented that "[t]he compassion flows from Daryl Andrus's lips."[90]

Andrus now argues that since he did not elect to testify, "it was improper for the prosecutor to comment on…[his] lack of remorse, because it could [have] be[en] interpreted as a comment on his failure to testify."[91] Andrus additionally contends that he "suffered prejudice because the jury was left with the erroneous belief that he had a duty to express remorse and that his failure to express remorse was evidence of [his] guilt."[92]

The State asserts "the matter has been procedurally defaulted [under Superior Court Criminal Rule 61(i)(3)] because it was not raised as a plain error claim on direct appeal…."[93] It argues that Andrus's contention is

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[89] Id. at 50-51.

[90] Id. at 51.

[91] Def.'s Am. Opening Br. at 20.

[92] Id. at 22.

[93] State's Answering Br. at 23.

"meritless" because, as it posits, "the limited closing argument comment…was not a reference to…[Andrus]'s election not to testify at trial[ ][,]" but rather the comment was "only a reference to [Andrus's] prior statements and actions…in April 1995."[94] The State insists that "[e]ven if the now[-]challenged prosecutorial closing argument remark was improper in some fashion, not every improper prosecutorial comment requires a new trial…."[95]

In Hughes v. State,[96] the Delaware Supreme Court concluded that "the courtroom demeanor of a defendant who has not testifies is irrelevant[ ][,]" and that "therefore, comment [thereon] is beyond the scope of legitimate [closing] summary."[97] The prosecution in that case had, during closing arguments, depicted the defendant's courtroom demeanor as "unemotional, unfeeling and without remorse[ ]"; like Andrus, Hughes had elected not to testify at trial.[98] Similarly, Professor LeFave in his treatise on criminal procedure has noted that "[e]ven if not construed as a comment on [a]

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[94] Id.

[95] Id. at 24.

[96] 437 A.2d 559 (Del. 1981) (en banc).

[97] Hughes, 437 A.2d at 572.

[98] Id.

defendant's failure to testify, a comment on a nontestifying defendant's courtroom behavior…may violate due process by seeking to go beyond the evidence adduced at trial."[99]

Here, by contrast, the prosecutor's arguments can fairly be described as commenting on Andrus's demeanor during the investigative stage of this prosecution, and not on Andrus's demeanor in the courtroom during trial. As the State pointed out in its above-quoted commentary, the instances upon which it was commenting were captured in police reports, audio and videotape, all of which had (properly) been admitted into evidence. The prosecution is "allowed and expected to explain all the legitimate inferences of…[an accused's] guilt that flow from th[e] evidence [admitted at trial]."[100] Thus Andrus's arguments are without merit.

This issue was not presented before, but based on the above analysis, the Court finds that Andrus has suffered no "prejudice" as contemplated by the procedural default provision of Rule 61(i)(3). Nor has Andrus shown that the "fundamental fairness" exception of Rule 61(i)(5) applies. Accordingly, Andrus's claim of error relating to the State's closing argument

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[99] 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.5(b) (2d. ed. 1999).

[100] Hooks v. State, 416 A.2d 189, 204 (Del. 1980) (citation omitted).

is procedurally defaulted and therefore **DENIED**.

MR. FOLEY'S USE OF DR. HOFFMAN

Andrus's argues that Mr. Foley "erred by failing to hire an independent pathologist."[101] Andrus contends that Mr. Foley's "failure to hire an independent pathologist prevented him from obtaining evidence that was favorable to hi[m]…."[102] Andrus also posits that Mr. Foley "erred by failing to make arrangements for Dr. Hoffman to g[e]t to the medical examiner's office to review their slides and work product."[103]

Because Andrus fails to articulate what benefit, if any, hiring an independent pathologist and preparing Dr. Hoffman to his personal satisfaction would have conferred, the Court views this claim as conclusory and unsubstantiated. "[A]llegations that are entirely conclusory are legally insufficient to prove ineffective assistance of counsel."[104] Where, as here, "it plainly appears…that the movant is not entitled to relief, [a] judge may

[101] Def.'s Answering Br. at 25.

[102] Def.'s Opening Br. at 25.

[103] Id.

[104] State v. Brittingham, 1994 WL 750341, at *2 (Del. Super. Dec. 12, 1994).

enter an order for its summary dismissal…."[105] Accordingly, Andrus's claim on this point is **SUMMARILY DISMISSED**.

LACK OF "INDEPENDENT" CRIME SCENE EXPERT

Andrus argues that "[t]he failure to hire a crime scene expert to independently analyze evidence in this case constitute ineffective assistance of counsel."[106] Andrus contends that "the jury had no choice [at trial] but to accept the conclusions of the State's witnesses regarding the crime scene evidence."[107] Because Andrus fails to articulate what benefit, if any, hiring an independent crime scene expert would have conferred, the Court views this claim as conclusory and unsubstantiated. Accordingly, and pursuant to Superior Court Criminal Rule 61(d)(4), Andrus's claim on this point is **SUMMARILY DISMISSED**.

INEFFECTIVE ASSISTANCE OF COUNSEL

Two of Andrus's arguments remain to be addressed: 1) that Mr. Foley "was ineffective by not [request]ing a limiting instruction [that would have] address[ed] the ['']proper['] use of th[e] evidence [of Andrus's earlier fight

[105] Super. Ct. Crim. R. 61(d)(4).

[106] Def.'s Am. Opening Br. at 25.

[107] Def.'s Am. Opening Br. at 26.

with Dilley]";[108] and 2) that Mr. Foley "was ineffective by failing to identify, consider and raise the viable issues [within Andrus's Motion for Postconviction Relief,] which had substantial legal and/or factual support."[109]

This Court, when ruling upon the potential admissibility of Anrdrus's prior altercation with Dilley, suggested to Andrus's trial counsel that he should "prepare a proposed limiting instruction that would generally track footnote eight of Getz that's tailored to this particular case."[110] The limiting instruction actually given at trial does in fact substantially track that footnote. The suggested instruction reads, in pertinent part:

> [Y]ou [the jury] may not use that evidence [of defendant's earlier similar act] as proof that the defendant is a bad person and therefore probably committed the [ ]indicted offense[ ] he is charged with. You may use the evidence only to help you in deciding whether the defendant was the person who committed the [ ]indicted offense[ ] charged in the indictment now on trial.[111]

And the instruction read at trial stated, in pertinent part:

> You [the jury] may not use that evidence [of Andrus's prior altercation with Dilley] as proof that the Mr. Andrus is a bad person and[ ] therefore[ ] probably committed the offenses for which he is now on trial. You may only use this evidence in connection with all other evidence

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[108] Id.

[109] Id.

[110] Trial Tr. of 4/29/96 at 47.

[111] Getz, 538 A.2d at 734 n.8 (citation omitted).

> presented at trial in helping you decide whether the defendant, Daryl Andrus, committed the offenses charged in the indictment.[112]

Although the Getz footnote went on to explicitly suggest that its proposed instruction include the phrase "[i]f the defendant committed the other act and you find that both acts were committed in the same, distinctive fashion, that [fact] might tend to identify the defendant…now on trial[ ][,]"[113] any mention of a finding that the charged defendant had been the initial aggressor during the prior act (as Andrus now suggests) is conspicuously absent. Andrus overlooks the fact that one of the reasons why the Court permitted the 404(b) evidence to come in was that this type of evidence (if admitted) can establish identity—just as was suggested in the Getz footnote. Under the facts of this case, to require the jury to first determine that Andrus was the initial aggressor would not have been proper. Given that the instruction that was given otherwise complied with the form instruction suggested by the Delaware Supreme Court and urged by this Court, Mr. Foley cannot now be said to have been ineffective at trial on this point.

With regard to Mr. Foley's appellate performance, this Court has held that "the Strickland test applies not only to trial counsel, but also to appellate counsel's performance when [counsel's] effectiveness during…[an]

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[112] Trial Tr. of 5/2/96 at 186-187.

[113] Getz, 538 A.2d at 734 n.8.

appeal…is challenged."[114] As stated, the Strickland standard requires that in order to succeed on a claim of ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different."[115] Under this standard, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."[116]

This Court cannot say that Andrus's prosecution was totally without error. This Court finds, however, that the jury could reasonably have convicted Andrus based on the evidence properly adduced at trial. On the "totality of the record," this Court cannot say that Andrus's counsel was ineffective, either at trial or on appeal. Given all of this Court's above rulings, it is clear that Andrus suffered no prejudice from any of the alleged error Mr. Foley may have made.

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[114] State v. Alcocer, 1990 WL 47347, at *2 (Del. Super. Apr. 9, 1990), aff'd, No. 136, 1990, 1991 WL 57102 (Del. Mar. 20, 1991).

[115] Strickland v. Washington, 466 U.S. 668, 688, 694 (1984).

[116] Id. at 689.

Mr. Foley was a Deputy Attorney General for six years before he came to represent Andrus in the State's case against him; Mr. Foley had previously prosecuted homicide cases, and recognized the difficulty of the case that he had to defend against. Mr. Foley recognized the necessity of expert pathological testimony, and relied on both Dr. Hoffman and Andrus's earlier-treating physician to that end. Mr. Foley cross-examined Dr. Perlman at trial, including questions about her qualifications, and Dr. Hoffman testified at trial "as to [Dr. Perlman's] shortcomings."[117] Mr. Foley ultimately realized that only the jury could determine Andrus's guilt accordingly. Andrus was entitled "to a fair trial but not a perfect one."[118] The Court therefore finds no reason to disturb the findings of the jury.

CONCLUSION

For all of the reasons stated above, all claims that have not been preserved, *i.e.*, the "Richmond" claims, are either procedurally barred or are without merit, and accordingly are **DENIED**.

IT IS SO ORDERED.

_____/s/_____
Richard R. Cooch, J.

oc: Prothonotary
xc: John Williams, Esquire, Deputy Attorney General
Michael W. Modica, Esquire

[117] Hrg. Tr. of 2/22/02 at 201.

[118] Bruton, 391 U.S. at 135.