IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	ID. No. 1012004307A
	)	
PABLO DAMIANI-MELENDEZ,	)	
	)	
Defendant.	)	

Submitted: August 6, 2015
Decided: November 25, 2015

Defendant's Amended Motion for Postconviction Relief–DENIED

MEMORANDUM OPINION

Cari Chapman, Esquire, Department of Justice, 820 N. French Street, Wilmington, Delaware 19801. Attorney for State of Delaware.

Kevin P. Tray, Esquire, Law Office of Kevin P. Tray, 1215 King Street, Wilmington, Delaware 19801. Attorney for Defendant.

CARPENTER, J.

FACTUAL & PROCEDURAL HISTORY

Defendant's postconviction motion relates to his September 2011 trial for his involvement in a series of armed robberies. From September to December 2010, Melendez and two alleged co-conspirators either robbed, or attempted to rob, a number of retail stores in New Castle County. State Police began to notice certain patterns within this chain of robberies, *e.g.*, the perpetrators all wore masks, gloves, and black clothing, and one of them carried a shotgun. On the evening of December 6, 2010, two detectives observed Melendez entering and leaving Silview Liquors at the time the establishment was reported to have been robbed. Melendez was subsequently arrested and charged with a number of felonies arising from the three-month string of twelve robberies and two attempted robberies. Bradley V. Manning, Esquire, was appointed to represent Melendez.

Given Melendez's voluntary post-*Miranda* confession as to his participation in the robberies and the potential life sentence he faced as a result of his prior convictions, Mr. Manning urged Melendez to accept the State's plea offer of thirty years in prison.[1] Melendez disagreed with Mr. Manning's advice and refused to take the plea.[2] Soon after, two separate hearings were held by the Honorable Jan R. Jurden on May 26, 2011 and the Honorable Fred S. Silverman on

[1] Aff. of Def. Counsel in Resp. to Def.'s Mot. for Postconviction Relief, at 2.
[2] Hearing Tr., May 26, 2011, at 6; Hearing Tr., Sept. 21, 2011, at 17.

September 21, 2011[3] to address Melendez's motions to dismiss Mr. Manning. The complaints he asserted in those proceedings included that he wanted another attorney from the Public Defender's Office, that Mr. Manning denied him access to certain evidence, and that Mr. Manning refused to file certain motions and bring certain claims, even though such claims "hold no merit."[4] On both occasions, Melendez's requests for appointment of new counsel were denied and Melendez confirmed for the Court on multiple occasions that it was not his desire to proceed *pro se*.[5] On September 22, 2011, just prior to jury selection, Melendez expressed to the Court that he "refused to go to trial with [Mr. Manning]."[6] The Court again informed Melendez that it would not appoint a new attorney to represent him and inquired about whether he was asking to proceed to trial *pro se*.[7] Melendez replied "[i]f it comes down to me having to represent myself, I will represent myself."[8] After recessing to confer with the judges who had previously addressed this issue, the Court denied Melendez's request for self-representation, reasoning:

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[3] The Court notes Defendant's second Motion to Dismiss Counsel was dated August 14, 2011, but was not submitted to the prothonotary. Judge Silverman addressed the Motion on September 21, 2011. Hearing Tr., Sept. 21, 2011, at 46.

[4] Hearing Tr., Sept. 21, 2011, at 47-48. Melendez also alleged there was a conflict of interest because Mr. Manning represented him in multiple cases, but Mr. Manning clarified there was no conflict in the present case and Judge Silverman agreed it would be nearly impossible for this "theoretical conflict" to "spillover." *Id*. at 44.

[5] Hearing Tr., May 26, 2011, at 3, 8; Hearing Tr., Sept. 21, 2011, at 3.

[6] Jury Selection Tr., Sept. 22, 2011, at 11.

[7] *Id*. at 16.

[8] *Id*. at 16-17.

> It would be disruptive to…allow a defendant on the eve of trial to make the request to represent himself, because at the moment it would appear to the [C]ourt he is not prepared to proceed forward and with the potential consequences to him, I find that a last minute request to represent himself would be so disruptive to the process – we have more than a hundred jurors downstairs waiting, ready to be picked for the trial…Mr. Manning will remain as counsel in the matter because of the lateness of the request that's being made and the fact that it had been addressed previously by two other Superior Court judges.[9]

Melendez's jury trial began on September 27, 2011. The State first called Chief Investigating Officer, Detective Grassi, to the stand for purposes of providing an overview of the State's evidence. Mr. Manning made the following statement for the record:

> [Defense Counsel]: Your Honor, briefly, while the jury's out, we should probably put on the record—the prosecutor and I discussed this. It is a little unusual. I have no objection to [the State] kind of allowing the CIO [Grassi] to give this overview of the case because, obviously, some of the things he's saying are hearsay. And in putting evidence in, my understanding is that the State, as the case progresses, is going to call all the actual witnesses who are going to testify to what he's testifying to today. So, that's why I don't have any objection to doing it in this manner.
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> [Prosecutrix for the State]: Yes, that was discussed between counsel, just to try to help the jury to have—I don't know if it's more confusing or—it's in hopes of being helpful to the jury to sort of summarize.
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> THE COURT: That's fine.[10]

Throughout the State's case, Grassi was also called to testify after various fact witnesses to supply commentary on the videos and evidence seized in

[9] *Id*. at 19-20.
[10] Trial Tr., Sept. 27, 2011, at 115-16.

connection with the robbery investigation. The jury ultimately found Melendez guilty of eighteen counts of Robbery in the First Degree, thirty-three counts of Possession of a Firearm During the Commission of a Felony, eleven counts of Wearing a Disguise, six counts of Conspiracy in the Second Degree, six counts of Aggravated Menacing, eight counts of Attempted Robbery in the First Degree, and one count of Reckless Endangering in the First Degree.

A notice of appeal was timely filed on July 16, 2012 by Nicole W. Walker, Esquire, who was appointed to replace Mr. Manning as Melendez's counsel. On appeal, Defendant argued "that the trial judge erred by admitting 'improper witness bolstering and needlessly cumulative evidence when, despite their lack of personal knowledge, [two] police [officers] were allowed to provide their own interpretations and opinions of what happened during the [crimes].'"[11] On October 26, 2012, the Delaware Supreme Court affirmed Melendez's convictions on the grounds "that Melendez waived his claim by failing to raise it at trial."[12] The Court emphasized that defense counsel "conceded at trial that he had no objection to Officer Grassi providing an 'overview' of the case" and that "the record [did] not show that Melendez ever objected to the officers' testimony during the remainder of the trial."[13]

[11] *Damiani-Melendez v. State*, 55 A.3d 357, 358 (Del. 2012).
[12] *Id.* at 358.
[13] *See id.* at 358-59.

On October 1, 2013, Melendez filed a *pro se* Motion for Postconviction Relief. Postconviction counsel was subsequently appointed to represent Melendez and this Amended Motion for Postconviction relief was filed March 31, 2015. Melendez argues he is entitled to postconviction relief because (1) counsel was ineffective for failing to object to Detective Grassi's "improper bolstering of the State's witnesses and (2) the Trial Court abused its discretion by denying his constitutional right to self-representation.[14] For the foregoing reasons, Melendez's Motion for Postconviction relief is DENIED.

DISCUSSION

Melendez's Amended Motion for Postconviction Relief is controlled by Superior Court Criminal Rule 61. Because he filed his original *pro se* Motion on October 1, 2013, the Court will apply the version of Rule 61 in effect as of May 6, 2013 to Melendez's postconviction claims. Before addressing the merits of the Motion, the Court must address the procedural requirements set forth in Superior Court Criminal Rule 61(i).[15] Under Rule 61(i), a motion for postconviction relief

[14] Def. Am. Mot. for Postconviction Relief, at 10, 23.
[15] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

can be procedurally barred for time limitations,[16] repetitive motions,[17] procedural defaults,[18] and former adjudications.[19] Where a procedural bar applies, the Court will not consider the merits of the postconviction claim unless Melendez can show that, pursuant to Rule 61(i)(5), the procedural bars are inapplicable.[20]

The instant motion represents Melendez's first postconviction motion, it was timely filed within one year from the date his convictions were affirmed,[21] and the claims asserted have not yet been adjudicated. While it is clear the ineffective assistance of counsel claim clears all four of Rule 61(i)'s hurdles, the Court must

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[16] Super. Ct. Crim. R. 61(i)(1) ("A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final…"); *see also* Super. Ct. Crim. R. 61(i)(m) ("A judgment of conviction is final …: (1) [i]f the defendant does not file a direct appeal, 30 days after the Superior Court imposes sentence; (2) [i]f the defendant files a direct appeal …when the Supreme Court issues a mandate or order finally determining the case on direct review; or (3) [i]f the defendant files a petition for certiorari …, when the United States Supreme Court issues a mandate or order finally disposing of the case on direct review.").

[17] Super. Ct. Crim. R. 61(i)(2) (2013) ("Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.").

[18] Super. Ct. Crim. R. 61(i)(3).

[19] Super. Ct. Crim. R. 61(i)(4)(2013) ("Any 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.").

[20] Super. Ct. Crim. R. 61(i)(5) (2013) ("The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.").

[21] Defendant was sentenced by this Court on March 2, 2012. He filed a direct appeal and the Delaware Supreme Court affirmed his convictions on October 26, 2012. Defendant filed this postconviction motion *pro se* on October 1, 2013. Counsel was appointed to represent Defendant in a postconviction capacity and this amended motion was filed thereafter on March 31, 2015.

determine whether the self-representation claim is barred under Rule 61 (i)(3) as a result of Melendez's failure to raise that issue on appeal. Pursuant to Rule 61(i)(3), "[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."[22]

To show "cause" for relief under 61(i)(3)(A), Melendez was required to allege appellate counsel was prevented from asserting the claim by "some external impediment."[23] The Delaware Supreme Court acknowledged in a footnote that Melendez did attempt to raise other claims on appeal "such as a '*pro se* issue, ineffective assistance of counsel, Illegal detention, [and] Illegal arrest,' in a letter that he sent to his attorney and filed with this Court."[24] However, the Court found that "[t]o the extent … Melendez ha[d] not raised these claims in his brief, they [were] waived."[25] While it is true that a successful claim for ineffective assistance of counsel may suffice,[26] the briefing for the instant motion as it pertains to

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[22] Super. Ct. Crim. R. 61(i)(3).
[23] *See Younger*, 580 A.2d at 556 (citing *Murray v. Carrier*, 477 U.S. 478, 492 (1986)).
[24] *See Damiani-Melendez*, 55 A.3d at 357 n.2.
[25] *Id*.
[26] *See Cobb v. State*, 676 A.2d 901 (Del. 1996) ("Cobb's ineffective assistance of counsel claim, might, if proven, establish "cause" for relief from the procedural bar of Rule 61(i)(3)…"). *See also Younger*, 580 A.2d at 556 ("Attorney error short of ineffective assistance of counsel does not constitute "cause" for a procedural default even when that default occurs on appeal rather than at trial."); *Shelton v. State*, 744 A.2d 465, 475 (Del. 2000) (holding that if counsel's failure to pursue a reasonably available claim is so egregious as to constitute ineffective assistance of counsel, that failure may be cause to excuse procedural default of postconviction claim).

ineffective assistance relates exclusively to actions and inactions of *trial counsel*, Mr. Manning.[27] Even if Melendez's Motion made any mention of appellate counsel,[28] his letter to Ms. Walker and her corresponding response indicate that Ms. Walker considered pursing the self-representation claim and decided otherwise.[29] The "mere fact that counsel…failed to raise the claim despite recognizing it, does not constitute cause for a procedural default."[30] Because Defendant failed to make any "concrete allegations" of cause or actual prejudice, [31] his self-representation claim is procedurally barred pursuant to Rule 61(i)(3) unless he can show Rule 61(i)(5) applies.[32]

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[27] Def.'s Am. Mot. for Postconviction Relief, at 8 ("All the claims in the instant motion…allege ineffectiveness of trial counsel…").

[28] *See Duross v. State*, 494 A.2d 1265, 1267 (Del. 1985) ("Moreover, were a reviewing Court to consider the question without an evidentiary hearing, trial counsel would have neither an opportunity to be heard, nor the chance to defend himself against such charge of incompetency.").

[29] In a letter to Melendez dated July 17, 2012, Ms. Walker explained that because Melendez's first request to proceed *pro se* was "at trial," the Court was "permitted to consider the disruption to the trial," did so, "and placed it on the record." *See Reed v. Ross*, 468 U.S. 1, 16 (1984) ("Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable."). *See also Shelton*, 744 A.2d at 475 (emphasizing strong presumption that defense counsel's conduct constituted sound trial strategy).

[30] *See, e.g., Flamer v. State*, 585 A.2d 736, 747 (Del. 1990) (citing *Murray*, 477 U.S. at 486-87). *See also Reed*, 468 U.S. at 13 ("Underlying the concept of cause, however, is at least the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel…").

[31] *See Flamer*, 585 A.2d at 748 (Del. 1990). *See also Shelton*, 744 A.2d at 478 ("Because he has failed to show cause for his procedural default, this Court need not consider whether Shelton can demonstrate prejudice.").

[32] *See Younger*, 580 A.2d at 556.

Superior Court Criminal Rule 61(i)(5) limits consideration of otherwise procedurally barred claims to (1) those that this Court lacked jurisdiction and (2) colorable claims 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."[33] Melendez does not dispute the Court's jurisdiction; rather, he contends he's entitled relief under the "miscarriage of justice" exception.[34] Because Melendez asserts a violation of his Sixth Amendment rights, the Court will address his claim on the merits.[35]

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Melendez first contends "[t]rial counsel was ineffective for failing to object to the improper witness bolstering, personal opinions and conclusions on the evidence provided by Detective Grassi."[36] Claims of ineffective assistance of counsel are governed by the two-part test set forth by the United States Supreme Court in *Strickland v. Washington.*[37] That is, a movant must show both (1) that counsel's representation fell below an objective standard of reasonableness and

[33] Super. Ct. Crim. R. 61(i)(5) (2013).
[34] Def. Am. Mot. for Postconviction Relief, at 4.
[35] *See, e.g., State v. Watson,* 2007 WL 2029302, at *2 (Del. Super. June 28, 2007) *aff'd,* 945 A.2d 595 (Del. 2008).
[36] Def. Am. Mot. for Postconviction Relief, at 10.
[37] *466 U.S. 668 (1984).*

(2) that a reasonable probability exists that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. [38] Failure to prove either prong renders the claim insufficient.[39] Additionally, when evaluating counsel's representation, the Court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct"[40] and apply a "strong presumption that counsel's conduct was professionally reasonable."[41] Indeed, where counsel "makes a strategic choice 'after thorough investigation of law and facts relevant to plausible options,' that decision is virtually unchallengeable...."[42]

Here, Melendez argues Mr. Manning's representation was not reasonably competent because he "failed to object to the improper bolstering committed by the State in calling Detective Grassi to the stand to provide his own interpretations of the still photographs and surveillance footage in addition to the eye witnesses."[43] Such inaction, he contends, prejudiced him at trial because Grassi's "improper

[38] *See Albury v. State*, 551 A.2d 53, 58 (Del. 1988); *see also Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.")
[39] *Strickland*, 466 U.S. at 688.
[40] *Id.* at 690.
[41] *See Albury*, 551 A.2d at 59; *see also Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.").
[42] *See Purnell v. State*, 106 A.3d 337, 342 (Del. 2014) (quoting *Hoskins v. State*, 102 A.3d 724, 730 (Del. 2014)).
[43] Def. Am. Mot. for Postconviction Relief, at 20.

bolstering …inhibited the jury's ability to draw its own conclusions regarding each witness's credibility"[44] and prevented him from challenging the issue on appeal.[45]

It is true that counsel's failure to object at trial results in "a waiver of the defendant's right to raise that issue on appeal, unless the error is plain."[46] On direct appeal, the Delaware Supreme Court found this Court did not commit plain error by admitting Grassi's testimony into evidence.[47] The relevant portions of the opinion are as follows:

> [A]s Chief Investigating Officer, Grassi did not provide cumulative testimony. Rather, he was uniquely qualified to highlight similar facts that linked the fourteen crimes together. For example, Officer Grassi testified that one of the suspects usually wore gray gloves during the robberies, and that the suspect holding the shotgun frequently wore red gloves. Moreover, Melendez conceded at trial that he had no objection to Officer Grassi providing an "overview" of the case, so long as victims would later testify and corroborate Officer Grassi's statements. Melendez cannot now claim that Officer Grassi's testimony is duplicative, when Melendez expressly stated the opposite—that he had no objection to Officer Grassi's allegedly duplicative testimony—at trial.
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> …
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> Finally, the record reflects that the State's evidence against Melendez was overwhelming and not merely circumstantial. The testimony of numerous victims, plus the physical evidence in Melendez's possession that linked Melendez to the crimes were sufficient for the jury to determine Melendez's guilt.[48]

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[44] *Id*. at 21-22.
[45] *Id*. at 22-23. *See also Damiani-Melendez*, 55 A.3d at 358 ("We have concluded that Melendez waived his claim by failing to raise it at trial.").
[46] *See Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[47] *See Damiani-Melendez*, 55 A.3d at 360.
[48] *Id.*

Importantly, however, these findings do not mean "that counsel's representation was *per se* effective."[49] Rather, at this juncture, the pertinent inquiry remains whether trial counsel's failure to object to the admissibility of Grassi's testimony was "so erroneous as to overcome the 'strong presumption' that trial counsel's representation was professionally reasonable."[50]

Under Delaware law, it is well-settled that a witness generally "may not bolster or vouch for the credibility of another witness by testifying that the other witness is telling the truth."[51] Impermissible bolstering or vouching "includes testimony that *directly or indirectly* provides an opinion on the veracity of a particular witness."[52] The underlying rationale for precluding such testimony is that "[i]t is the function of the jury to make its own assessment of witness credibility in a criminal trial."[53] At trial, Mr. Manning consented to Grassi's testimonial overview of the events underlying the case.[54] Further, Mr. Manning

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[49] *See Hoskins v. State*, 102 A.3d 724, 734 (Del. 2014).
[50] *See id.* (quoting *Strickland*, 466 U.S. at 689). *See also Ayers v. State*, 802 A.2d 278, 283 (Del. 2002) ("Because of the ultimate goal of representation is not to win an objection, but to prevail when the verdict is read, courts operate on the presumption that a challenged action was the result of a tactical decision that could be considered sound trial strategy.").
[51] *See Capano v. State*, 781 A.2d 556, 595 (Del. 2001).
[52] *See id.*
[53] *See Holtzman v. State*, 718 A.2d 528 (Del. 1998) (noting that this is especially true "when the testimony of the two key witnesses is directly opposite"). *See also United States v. Scheffer*, 523 U.S. 303, 313 (1998) ("A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.' Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.'") (quoting *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973)).
[54] Aff. of Def. Counsel in Resp. to Def. Mot. for Postconviction Relief, at 3.

did not object to the State's presentation of eyewitness and victim testimony for several of the robberies either preceded or followed by Grassi's interpretation of the corresponding surveillance and physical evidence. In an affidavit submitted to the Court, Mr. Manning explained his trial strategy in light of the overwhelming evidence against Melendez:

> The State had 124 counts in the indictment, but only needed about 10 to secure a virtual life sentence. Thus, I was forced to abandon any argument that he was only responsible for the robberies he confessed to and that were corroborated by physical evidence, and argue reasonable doubt as to all 124 counts. I knew this strategy had little chance of success, but I simply had no other options. [55]
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> …
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> Because of the large number of victims and the extent of the physical evidence offered by the State, I did not feel that Det. Grassi's "overview" or "opinion testimony would hamper my cross-examination of the witness or my ability to make the best possible reasonable doubt argument I could to the jury at the end of the case. In fact, in my closing argument I highlighted how Det. Grassi had been mistaken about one pair of gloves appearing "to be a match" to another pair visible in one of the surveillance videos. I was then able to use this obvious inconsistence as my overarching theme to argue that the jury should question everything and reach their own conclusion as to what the evidence did or did not prove. In the end, the jury seems to have taken my advice; they deliberated for almost 3 full days and acquitted Mr. Damiani-Melendez of 24 counts.[56]

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[55] *Id.* Mr. Manning admitted that he "could have cross-examined Det. Grassi and each witness such that they were to admit that they could not be certain that a specific item was the same as the one seen in the surveillance video – only that they "appeared to be similar" but because "the similarities were obvious" he "would have been putting form over substance." *See id*. at 4 (further elaborating that "[a]t one point, the State entered into evidence an entire matching outfit Mr. Damiani-Melendez wore during one of the robberies that police recovered from his residence.").

[56] *Id*. at 4-5.

The Court finds counsel's conduct to be an appropriate litigation decision based on the overwhelming evidence of the defendant's guilt. However, even if the Court were to find Mr. Manning's course of action unreasonable, Melendez's ineffective assistance claim still fails because it does not demonstrate sufficient prejudice to overcome the second prong of *Strickland*.[57] In other words, Melendez has not convinced the Court "that a proper objection would have produced a different outcome."[58] As the Delaware Supreme Court recognized on direct appeal, "the record reflects that the State's evidence against Melendez was overwhelming and not merely circumstantial. The testimony of numerous victims, plus the physical evidence in Melendez's possession that linked Melendez to the crimes were sufficient for the jury to determine Melendez's guilt."[59] Thus, Melendez's postconviction motion as it relates to the ineffective assistance claim is **DENIED**.

II. DENIAL OF RIGHT TO PROCEED *PRO SE*

Melendez next contends that the Court violated his constitutionally protected right to self-representation when it denied his day-of-trial request to proceed *pro se*.[60] "A defendant's right to represent him [or her]self is protected by the Sixth

[57] *See, e.g., Ayers*, 802 A.2d at 283 ("[W]e need not decide concretely whether in this instance the conduct was unreasonable, because as discussed *supra*, this is but one prong of the *Strickland* test.").
[58] *See id.*
[59] *Damiani-Melendez*, 55 A.3d at 360.
[60] Def. Am. Mot. for Postconviction Relief, at 23.

Amendment of the United States Constitution and by Article I, § 7 of the Delaware Constitution."[61] The exercise of this right, however, is not unqualified.[62] Prior to allowing a criminal defendant to proceed *pro se*, the Court is required to "1) determine that the defendant has made a knowing and voluntary waiver of his constitutional right to counsel; and 2) inform the defendant of the risks inherent in going forward in a criminal trial without the assistance of legal counsel."[63] Yet, even after this two-step inquiry, "the right to represent one's self is not absolute."[64] A defendant's request to proceed *pro se* must also be raised unequivocally and,[65] "[w]hen faced with an ambiguous request for self-representation, a trial court should lean in favor of the right to counsel."[66] Additionally, the Delaware Supreme Court has made clear that the right to self-representation must be asserted

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[61] *Hartman v. State*, 918 A.2d 1138, 1140 (Del. 2007) (citing *Hooks v. State*, 416 A.2d 189, 197 (Del. 1980) and *Faretta v. California*, 422 U.S. 806, 816-19 (1975)).
[62] *See id.*
[63] *Stigars v. State*, 674 A.2d 477, 479 (Del. 1996) (citing *Faretta*, 422 U.S. at 835 and *Briscoe v. State*, 606 A.2d 103, 107-08 (Del. 1992)).
[64] *See Zuppo v. State*, 807 A.2d 545, 547 (Del. 2002).
[65] *See Hooks*, 416 A.2d at 197 ("However, this right may only be invoked when the defendant has made a knowing and intelligent waiver of the right to counsel and the record must show that the defendant has clearly and unequivocally made his choice."). *See also Buhl v. Cooksey*, 233 F.3d 783, 790 (3d Cir. 2000) ("[T]he law simply requires an affirmative, unequivocal, request, and does not require that request to be written or in the form of a formal motion filed with the court."), *subsequent mandamus proceeding sub nom. In re Buhl*, 275 F.3d 33 (3d Cir. 2001) (mandamus denied).
[66] *See Muto v. State*, 843 A.2d 696 (Del. 2004) (quoting *Stigars*, 674 A.2d at 479). *See also Buhl*, 233 F.3d at 790 ("Courts must indulge every reasonable presumption against a waiver of counsel. In order to overcome this presumption, and conduct his/her own defense, a defendant must clearly and unequivocally ask to proceed *pro se*.") (internal citations omitted).

"in a timely fashion."[67] Indeed, once proceedings have commenced, "[t]he State's interest in 'ensuring integrity and efficiency of the trial" can be found to "outweigh[] the defendant's interest in acting as his own lawyer.'"[68]

However, in cases where the defendant requests on the eve of trial that new counsel be appointed, or, alternatively, to represent his or herself, the two-step inquiry articulated by the Delaware Supreme Court in *Briscoe* applies.[69] First, the Court must "determine if the reasons for the defendant's request for substitute counsel constitute good cause to justify a continuance of the trial, in order to allow new counsel to be obtained."[70] Second, if the Court "determines that the defendant is not entitled to a continuance, in order to engage new counsel, the defendant must then choose between two constitutional options, *either* continuing with his existing

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[67] *See Christopher v. State*, 930 A.2d 894, 896-97 (Del. 2007) (denial of self-representation request proper where "jury selection, opening statements by counsel, and the direct examination of the first prosecution witness had all occurred before [defendant] first raised the idea of self-representation"). *See also Zuppo*, 807 A.2d at 547-48 ("[T]he right to self-representation is not a license to disrupt the criminal calendar, or a trial in progress. After a trial has begun, the right of self-representation may be curtailed, and the trial judge considering the motion must weigh the legitimate interests of the defendant against the prejudice that may result from the potential disruption of proceedings already in progress.").

[68] *See Christopher*, 930 A.2d at 897 (quoting *Zuppo*, 807 A.2d at 548). In Christopher, the Delaware Supreme Court also clarified that when performing this balancing test, "the trial judge need not expressly mention the timeliness of the request to proceed *pro se"* so long as record clearly reflects the factual and legal reasoning underlying a denial of the request. *See id.*

[69] *See Briscoe*, 606 A.2d at 108 (citing *United States v. Welty*, 674 F.2d 185, 187 (3d Cir. 1982)). *See also Stigars*, 674 A.2d at 480 ("Although our decisions in *Briscoe* and *Hooks* focused on the right to counsel rather than the right to self-representation, the reasoning underlying those decisions is equally applicable to the present case—the right to self-representation is central to our adversarial system of justice and is specifically guaranteed by the Delaware Constitution.").

[70] *Id.*

counsel *or* proceeding to trial *pro se*."[71] It follows then, that "[a] condition precedent to the latter decision is a knowing and intelligent waiver of the Sixth Amendment right to counsel."[72] Whether a defendant's request to proceed *pro se* was made intelligently and competently "depends upon the particular facts and circumstances surrounding th[e] case…."[73] In *Hartman*, the Delaware Supreme Court discussed the trial court's duties in making this determination:

> [A trial court cannot make] an informed decision as to the knowing and voluntary nature of a defendant's request to proceed *pro se* without a thorough inquiry, on the record, to assure itself that the defendant fully apprehends the nature of the charges against him, the perils of self-representation, and the requirements that will be placed upon him. This calls for specific forewarning of the risks that foregoing counsel's trained representation entails. Once the trial court has fulfilled those responsibilities, however, if the defendant still elects to proceed *pro se*, the trial court must permit him to do so.[74]

Here, Melendez requested to address the Court prior to jury selection about his dissatisfaction with Mr. Manning. His complaints were as follows:

> As I was downstairs talking with Mr. Manning, I asked Mr. Manning what strategy did he have for my case …He tells me that …there is no strategy for people like me, he said that people like me who are guilty, there's no strategy but jail time, he tells me I need to take a plea or spend the rest of my life in jail. Your Honor I do not wish to go to trial with a prejudiced attorney, Your Honor, and I refuse going to trial with this man.[75]

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[71] *Id*. (emphasis in original).
[72] *Id.*
[73] *Id.* at 107.
[74] *Hartman*, 918 A.2d at 1142 (quoting *United States v. Peppers*, 302 F.3d 120, 133 (3d Cir. 2002)).
[75] Jury Selection Tr., Sept. 22, 2011, at 11.

> He also told me I need to go back in the holding cell and hang myself because I'm better off dead, basically. These were his exact words, Your Honor.[76]
>
> He said I'm guilty, he said there's no such strategy for people like me. …[H]e shouldn't be addressing me in this way, Your Honor…. I would not want to go in trial with this man and that's the only argument I am arguing right now.[77]

The Court responded by asking if Melendez wanted to represent himself in a case where he could "spend the rest of his life in jail …if convicted."[78] Melendez replied:

> If that's what it comes down to, to get him out of my case, Your Honor, I will do so, if that's what it takes, and …if I do do that, Your Honor, I would not want Mr. Manning to serve as my co-counsel, I do not want him in my case at all. If it takes for me to go *pro se*, Your Honor, I will do that. I have tried many ways to get rid of him as I feel he's not doing what he should be doing for me, and now with this conflict, today, Your Honor, if I have to go *pro se*…I will do so.[79]

The Court told Melendez that it would confer with the Judges who previously denied his most recent motion to dismiss trial counsel.[80] Prior to recess, the Court informed Melendez that he was "making a huge, huge mistake" and that he would "be required to comply with all the rules, you'll be required to do everything that Mr. Manning [would] be required to…."[81] In response, Melendez told the Court he

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[76] *Id.* at 12.
[77] *Id.* at 15-16.
[78] *Id.* at 16.
[79] *Id.* at 16-17.
[80] *Id.* at 17.
[81] *Id.* at 17-18.

was "pretty confident, pretty sure, positive" he did not want Mr. Manning's representation and that if it would take self-representation to remove Mr. Manning from his case, he would "go *pro se*."[82]

After a brief recess, the Court returned and delivered its ruling:

> I talked to Judge Silverman and Judge Jurden. My understanding is that the issue concerning representation has been previously discussed with both of them.... It also was represented to me that in each of those proceedings, there was not a request by the defendant to represent himself, it was simply a request to remove Mr. Manning from the proceedings. It is quarter of twelve on the morning that we are to select the jury. It would be disruptive to this process to allow a defendant on the eve of trial to make the request to represent himself, because at the moment it would appear to the court he is not prepared to proceed forward and with the potential consequences to him, I find that a last minute request to represent himself would be so disruptive to the process –we have more than a hundred jurors downstairs waiting, ready to be picked for the trial. ...Mr. Manning will remain as counsel in the matter because of the lateness of the request that's being made and the fact that it had been addressed previously by two other Superior Court judges.[83]

Counsel for the State expressed its agreement with the Court's decision on the matter and also added for the record that a ruling otherwise would prejudice the State's case because Melendez had two opportunities to request to proceed *pro se*, trial would be unduly delayed because he would have to review a considerable amount of evidence not presently in his possession, and the State had thirty-seven witnesses scheduled to attend the impending trial.[84] After hearing from

[82] *Id.* at 18.
[83] *Id.* at 19-20.
[84] *Id.* at 22-23.

Mr. Manning, the Court stated its satisfaction that the record was complete and that its decision, and those of Judge Silverman and Judge Jurden, would remain.[85]

Like the defendant in *Briscoe*, Melendez does not challenge "the propriety of the trial court's decision not to appoint substitute counsel."[86] Rather, Melendez argues the Court abused its discretion by denying Melendez's request to represent himself. Specifically, Melendez maintains his request was unequivocal and raised in a timely fashion prior to jury selection. The Court disagrees. While the Court acknowledges the Delaware and federal case law recognizing as timely those self-representation requests made prior to jury selection, it is not the tardiness of Melendez's request, in isolation, that formed the basis of the Court's decision. Indeed, the Court was required to consider the particular facts and circumstances surrounding Melendez's case.[87] Melendez's case is comparable to that in *Muto*, in which the Delaware Supreme Court found this Court properly denied a defendant's "tardy" *pro se* request where the defendant knew for at least two weeks prior to trial that his motion to substitute counsel had been denied and still "waited until the morning of trial to revisit the issue of substitution of counsel and to ask to proceed *pro se*"[88] In reaching its decision, the Court also emphasized the "defendant's

[85] *Id.* at 27.
[86] *See Briscoe*, 606 A.2d at 107-08.
[87] *See id.* at 107.
[88] *Muto*, 843 A.2d at 696.

ambivalence toward proceeding *pro se*," that his request was ambiguous and "motivated more by a desire to obtain substitute counsel or to delay the proceedings than to represent himself."[89]

Here, the record reflects Melendez requested and was denied appointment of substitute counsel on two occasions prior to trial. As early as May 26, 2011, Melendez was aware he had the opportunity to represent himself, yet he did not make that request until he was denied new counsel for the third time on the morning trial was set to begin. At no time prior to September 22, 2011, did Melendez request to represent himself or indicate he had interest in doing so. Moreover, Melendez's statements that he would proceed *pro se* "[i]f that's what it comes down to" and that he was "pretty confident, pretty sure, positive" he did not want Mr. Manning's representation[90] were ambiguous and uncertain.[91] It was clear to the Court at the time that the desire of Melendez was simply to remove

[89] *Id.*

[90] Jury Selection Tr., Sept. 22, 2011, at 18.

[91] *Desmond v. Snyder*, 1999 WL 33220036, at *17 (D. Del. Nov. 16, 1999) ("A criminal defendant who wishes to represent himself at trial must not only make a knowing and intelligent waiver of counsel but also express this waiver in clear and unequivocal terms."). *See also Merritt v. State*, 12 A.3d 1154 (Del. 2011) ("Because Merritt did not clearly and unequivocally invoke his right to self-representation and proceed *pro se*, neither his federal nor state constitutional right to self-representation was not violated."); *Hamilton v. Groose*, 28 F.3d 859, 863 (8th Cir. 1994)("The probability that a defendant will appeal either decision of the trial judge underscores the importance of requiring a defendant who wishes to waive his right to counsel to do so explicitly and unequivocally."); *Tuitt v. Fair*, 822 F.2d 166, 179 (1st Cir. 1987) ("We are also influenced by our view that where, as here, a conflict erupts between the right to counsel and the right to proceed *pro se*, a court should not be criticized for favoring the former right: the consequences of being deprived of counsel are far more serious than of not being allowed to proceed uncounselled.").

Mr. Manning, and his comments did not reflect a desire to represent himself. He simply did not want Mr. Manning to do so. In such cases, the Court is generally encouraged to "lean in favor of the right to counsel."[92] It is also important to emphasize that this was a complex two week trial with a significant amount of evidence. The State called thirty seven witnesses, and if the defendant's late request was granted, it is clear a continuance of the trial would also have been mandated. To the Court the defendant was simply playing the "representation game" to avoid trial and disrupt the State's case. If Melendez had listened to counsel's sound advice instead of arguing with him, perhaps he would not be serving 296 years in jail. The Court's action here was fair and appropriate and Melendez's postconviction claim of a Sixth Amendment violation is denied.

CONCLUSION

Melendez's Motion for Postconviction Relief is DENIED for the reasons set forth above.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[92] *See Muto*, 843 A.2d at 696 (quoting *Stigars*, 674 A.2d at 479). *See also Buhl*, 233 F.3d at 790 ("Courts must indulge every reasonable presumption against a waiver of counsel. In order to overcome this presumption, and conduct his/her own defense, a defendant must clearly and unequivocally ask to proceed *pro se*.") (internal citations omitted).