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

**IN AND FOR NEW CASTLE COUNTY**

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| STATE OF DELAWARE, | ) | |
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| v. | ) | ID No. 1306011063 |
| | ) | |
| CESAR FLORES, | ) | |
| | ) | |
| Defendant. | ) | |

Submitted: September 4, 2015
Decided: December 29, 2015

**Defendant's First Motion for Postconviction Relief – DENIED**

**MEMORANDUM OPINION**

Periann Doko, Esquire, Department of Justice, 820 N. French Street, Wilmington, DE 19801. Attorney for State of Delaware.

Cesar Flores, James T. Vaughn Correctional Institution, Smyrna, DE 19977. *Pro se* Defendant.

**CARPENTER, J.**

Defendant Cesar Flores filed this *pro se* Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 on January 23, 2015.[1] For the reasons set forth below, Defendant's Motion is hereby **DENIED.**

## BACKGROUND

This case stems from the June 9, 2013 armed robbery of Mi Ranchita Mexican Food Market ("the Market") in Newark, Delaware. The owner, her daughter, and one customer were present at the Market when Defendant Cesar Flores ("Flores") and Co-Defendant Bryant Harris ("Harris") arrived wearing face masks and brandishing a silver revolver. Flores aimed the firearm at the daughter and demanded to see her mother, the owner of the Market. The daughter pointed Flores to the back of the store. Harris then restrained the daughter and customer with zip ties. Meanwhile, Flores ordered the owner at gunpoint to remove and deliver approximately $12,000 in cash from the store's safe. The robbery was captured by the Market's surveillance system and Newark City surveillance footage showed the men entering and exiting the Market. The men were filmed in a vehicle displaying a license plate number, which the police later traced to Harris's wife. Once in custody, Harris confessed to participating in the robbery and identified Flores as the gunman.

[1] It is unclear the exact date Defendant's motion was filed given that the documents provided to the Court are fraught with inconsistency. However, because all of the dates occur prior to June 1, 2015, this postconviction motion is controlled by the version of Rule 61 in effect as of June 4, 2014.

On August 5, 2013, Flores was indicted by a grand jury on thirteen charges: three counts of Robbery First Degree, four counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"), Possession of a Deadly Weapon by a Person Prohibited ("PDWPP"), two counts of Aggravated Menacing, Conspiracy Second Degree, Wearing a Disguise During Commission of a Felony, and Burglary Second Degree.

After a period of negotiations with the State by trial counsel, Flores pleaded guilty to the following charges: three counts of Robbery First Degree, PFDCF, and Burglary Second Degree. Given his extensive criminal history,[2] Flores faced a possible mandatory life sentence pursuant to Delaware's Habitual Offender Statute.[3] As part of the plea deal, the State agreed not to seek to have him sentenced as a habitual offender, to cap its recommended sentence at fifteen years of Level 5 incarceration, and to enter *nolle prosequi* on the remaining charges.

On May 20, 2014, the Court reviewed the charges and the agreement with Flores during his plea colloquy. He confirmed for the Court that: (1) he read, understood, and signed the agreement and Truth-in-Sentencing guilty plea form; (2) he understood the rights he was waiving; (3) no other promises were made to

[2] The Presentence Investigation report revealed convictions for: possession of a firearm by person prohibited, PFDCF, robbery first degree, and delivery of cocaine.
[3] 11 *Del. C.* § 4214(b).

him outside the agreement; (4) no one threatened or forced him to take the plea; (5) he committed the offenses to which he was pleading guilty; and (6) that he was satisfied with trial counsel's advice.[4] As a result, the Court accepted his plea as knowing and voluntary.[5] The State and defense counsel requested a presentence investigation prior to sentencing.

On September 19, 2014, after reviewing the presentence report and hearing from counsel and Flores, the Court sentenced Flores to 19 years incarceration at Level 5.[6] On October 10, 2014, he filed a Motion for Modification of Sentence pursuant to Superior Court Criminal Rule 35(b) requesting that the Court reduce his sentence to the minimum mandatory for each charge because he was remorseful, he needed to provide for his family, his sister was in poor health, and he was an active member of the Catholic Church.[7] After addressing these issues,[8] the Court denied Flores's Motion, finding his sentence was not arbitrary or unreasonable given the totality of the circumstances and presentence report. [9]

[4] Flores Plea Colloquy Tr., at 3-7 (May 20, 2014).
[5] *Id*. at 8.
[6] Flores Sentencing Tr., at 12-13 (Sept. 19, 2014).
[7] Def. Mot. for Modification of Sentence, at 2.
[8] The Court considered Defendant's remorse in the context of his repetitive criminal conduct and noted that his "familial hardships [were] not appropriate factors to consider for sentence modification." *State v. Flores*, Del. Super., ID No. 1306011063, Streett, J. (Nov. 24, 2014) (ORDER).
[9] *See id.*

Flores filed his first Motion for Postconviction Relief *pro se* on January 23, 2015, a Memorandum of Law in Support of his Motion on March 3, 2015, and an Amended Postconviction Motion on June 17, 2015, which collectively appear to assert the following grounds for relief: (1) his guilty plea was not knowingly, voluntarily, and intelligently made due to ineffective assistance of counsel; (2) prosecutorial misconduct due to the addition of "unaffiliated charges" to the indictment; and (3) judicial abuse of discretion in sentencing Defendant in excess of the recommended 15 years-incarceration.

## DISCUSSION

Prior to addressing the merits of any postconviction claim, the Court must determine whether the procedural requirements of Rule 61(i) are satisfied:[10] (1) a motion for postconviction relief must be filed within one year from the date judgment of conviction was finalized;[11] (2) second or subsequent Rule 61 motions must comply with the pleadings requirements of Rule 61(d)(2);[12] (3) grounds for relief "not asserted in the proceedings leading to the judgment of conviction" are barred "unless the movant shows (A) [c]ause for relief from the procedural default

[10] *See, e.g.*, *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990) (citing *Harris v. Reed*, 489 U.S. 255, 265 (1989)).
[11] *See* Super. Ct. Crim. R. 61(i)(1) (2014). A judgment of conviction becomes "final" when the defendant does not file a direct appeal within 30 days from the date sentence was imposed. Super. Ct. Crim. R. 61(m) (2014).
[12] *See* Super. Ct. Crim. R. 61(i)(2) (2014).

and (B) [p]rejudice from violation of the movant's rights;"[13] (4) grounds for relief must not have been previously adjudicated .[14] Pursuant to Rule 61(i)(5), the bars to postconviction relief shall not apply to claims that this Court lacked jurisdiction or to claims pleaded in accordance with Rule 61(d)(2).[15]

This is Defendant's first Rule 61 motion. It was timely-filed and seeks relief on grounds that were not previously adjudicated.[16] However, with the exception of his ineffective assistance challenge, Defendant's claims are procedurally barred pursuant to Rule 61(i)(3).[17] Therefore, unless Defendant can show cause and prejudice for his failure to raise these claims prior to this postconviction motion, they must fail.

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[13] *See* Super. Ct. Crim. R. 61(i)(3) (2014).
[14] *See* Super. Ct. Crim. R. 61(i)(4) (2014).
[15] *See* Super. Ct. Crim. R. 61(i)(5) (2014). *See also* Super. Ct. Crim. R. 61(d)(2)(i)-(ii) (2014) ("A second or subsequent motion … shall be summarily dismissed, unless the movant was convicted after a trial and the motion either: (i) pleads with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact …; or (ii) pleads with particularity a claim that a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court or the Delaware Supreme Court, applies … and renders the conviction … invalid.").
[16] Defendant was sentenced on September 19, 2014 and did not file a direct appeal. Thus, his conviction became final on October 18, 2014 and he filed his postconviction motion less than one year later, on January 23, 2015.
[17] *See* Super. Ct. Crim. R. 61(i)(3) (2014). *See also State v. Showell*, 2008 WL 5115038, at *1 (Del. Super. Nov. 24, 2008) ("This procedural default applies to cases where the defendant did not file an appeal to the Delaware Supreme Court, but does file a motion for postconviction relief, as is the case here.").

### *Abuse of Discretion by Trial Court*

Flores argues his conviction should be set aside because he was misled into pleading guilty by the expectation of a 15-year sentence.[18] The Court finds Flores's claim that the Court abused its discretion by frustrating this expectation with a sentence in excess of the State's recommendation procedurally barred and without merit.[19]

Under Delaware law, the Court was not required to adopt the State's recommendation.[20] While the Court arguably could have reinforced this principle on the record,[21] the plea documents and Flores's sworn statements demonstrate that he understood he was not *guaranteed* a sentence of 15-years.[22] He told the Court he read, understood, and signed the Truth-in-Sentencing form, on which he expressly affirmed his plea was made *without* the promise of a specific sentence. Flores also confirmed his comprehension of the maximum penalties attached to

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[18] Def. Mot. for Postconviction Relief (June 17, 2015), at 7.
[19] *See State v. Rowley*, 2014 WL 595241, at *3 (Del. Super. Jan. 13, 2014) ("The Court was not required to follow the recommendation made by the State. Mr. Rowley's contention that this Court did not honor the State's sentencing recommendation has no merit.").
[20] *See* Super. Ct. Crim. R. 11(e)(1)(B) (providing that the State may "[m]ake a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request *shall not be binding upon the court*." (emphasis added)).
[21] *See* Super. Ct. Crim. R. 11(e)(2) ("If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.").
[22] *See, e.g., Lewis v. State*, 2015 WL 5935050, at *2 (Del. Oct. 12, 2015) (stating that "[i]n the absence of clear and convincing evidence to the contrary," defendants are bound by their statements during a plea colloquy).

each offense.[23] While he tried unsuccessfully to have his sentence reduced for reasons unrelated to his plea, he never challenged the voluntariness of his plea on a direct appeal, nor has he shown cause and prejudice for his failure to do so.[24] Thus, this claim must fail.

***Prosecutorial Misconduct***

Flores next asks the Court to set aside his conviction because the State's prosecuting attorney allegedly added charges to the indictment that were "not affiliated with the offense…."[25] Flores does not dispute the validity of his conviction for Robbery First Degree with respect to the owner of the Market. Rather, as discussed further in regard to his ineffective assistance claim, Flores challenges the two counts of Robbery First Degree relating to the customer and store owner's daughter.[26] He maintains the prosecutor acted wrongfully in pursuing these charges under *State v. Bridgers*,[27] where the Court held "[a] person who only

[23] *See Rowley*, 2014 WL 595241, at *2 ("The documents and the plea colloquy clearly disclosed to Mr. Rowley that he faced up to twenty-three (23) years for the two offenses. As such, Mr. Rowley was fully aware that the Court was not obligated to follow the State's sentencing recommendation.").
[24] *See Stanley v. State*, 2015 WL 3545413, at *3 (Del. June 4, 2015) (barring claim that plea involuntary under 61(i)(3) where defendant did not directly appeal). *See also Showell*, 2008 WL 5115038, at *1.
[25] Def. Am. Mot. for Postconviction Relief (June 17, 2015), at 6.
[26] Def. Mot. for Postconviction Relief (Mar. 3, 2015), at 6.
[27] 988 A.2d 939 (Del. Super. 2007) ("Defendants' act of threatening bank customers, who otherwise simply watched defendants rob bank, constituted aggravated menacing, rather than robbery of the customers, as there was an insufficient connection between the theft from the bank and the threats to the customers to support any robbery conviction."), *aff'd*, 970 A.2d 257 (Del. 2009).

is forced to watch a theft or robbery from another person and who is not otherwise involved is not a robbery victim."[28] In response, the State maintains all three robbery charges were wholly-supported by the evidence, including surveillance footage of the incident and co-defendant Harris's detailed confession.[29]

At the outset, the Court acknowledges the uncertainty surrounding Delaware's robbery statute and the distinction created by case law between "robbery victims" and "bystanders." However, there is nothing to support that the attorneys for the State in this matter acted in bad faith by prosecuting Flores and the grand jury found probable cause existed as to each count in the indictment.[30] The indictment clearly identified each crime charged, the factual bases underlying the charges, and the applicable statutory language with citations to the corresponding code provisions.[31] Despite having ample notice of the charges against him, Flores never once objected during plea proceedings, he confirmed he understood and committed the crimes with which he was charged, and ultimately

[28] *See id.* at 945.
[29] State's Resp. to Def. Mot. for Postconviction Relief, at 6, ¶¶ 18-19.
[30] *See State v. Szubielski*, 2015 WL 545151, at *6 (Del. Super. Jan. 30, 2015) ("The Supreme Court stated that '[t]here is a strong presumption that the grand jury has faithfully performed its duty in returning an indictment' and '[m]erely pointing to an omission, probably caused by prosecutorial negligence' does not override that presumption.'" (quoting *Malloy v. State*, 462 A.2d 1088, 1094 (Del. 1983))), *aff'd*, 2015 WL 5928054 (Del. Oct. 8, 2015).
[31] *See id.* at *5 ("The Supreme Court held that an indictment containing the official citation to the statute and the name of the offense was sufficient information to put a defendant on notice of the crime with which he was charged…").

entered a plea of "guilty" to those offenses.[32] As such, Flores's voluntary guilty plea waived any errors or defects alleged to have occurred prior to entry of his plea.[33] It is also worth noting that Flores wrote to counsel in the weeks prior to sentencing about the same concerns he articulates here. He nevertheless chose not to withdraw his plea pursuant to Superior Court Criminal Rule 32(d), nor did he challenge the prosecutor's conduct on appeal.[34] Therefore, this claim also must fail.[35]

### *Ineffective Assistance of Counsel*

Finally, Flores alleges trial counsel was ineffective because he: (1) failed to investigate the facts of the case and the counts in the indictment prior to advising Flores to take the plea, (2) failed to request a preliminary hearing on the charges,

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[32] *See Windsor v. State*, 2015 WL 5679751, at *3 (Del. Sept. 25, 2015) ("In the absence of clear and convincing evidence to the contrary, [a defendant] is bound by his [or her] sworn statements" during a plea colloquy). *See also Benge v. State*, 945 A.2d 1099, 1101 (Del. 2008) ("Under Delaware law, a voluntary guilty plea constitutes a waiver of any alleged errors or defects occurring prior to the entry of the plea."); *Clark v. State*, 116 A.3d 1243 (Del. 2015) ("Clark asserts no cause for his failure to raise this claim earlier. Moreover, the guilty plea transcript in this case reflects that Clark acknowledged that he committed the offenses with which he was charged.").

[33] *See, e.g.*, *Benge*, 945 A.2d at 1101.

[34] *See* Super. Ct. Crim. R. 32(d). *See also Stanley*, 2015 WL 3545413, at *3 ("Stanley could have challenged whether he knowingly entered a guilty plea in a motion to withdraw under Superior Court Criminal Rule 32(d) or on direct appeal, but did not do so. Thus, this claim is barred by Superior Court Criminal Rule 61(i)(3) unless Stanley can establish cause and prejudice…"). *See also Windsor v. State*, 100 A.3d 1022 (Del. 2014) (considering a defendant's direct appeal on grounds that the prosecution engaged in misconduct by improperly consolidating charges in indictment).

[35] *See Clark*, 116 A.3d at 1243.

and (3) coerced Flores to plead guilty to crimes he was not guilty of committing. For these reasons, Flores asks the Court to find his plea was not knowingly, voluntarily, and intelligently made. In response to these allegations, trial counsel submitted an affidavit denying that his representation was ineffective.[36]

As a threshold matter, claims alleging ineffective assistance of counsel "must not be vague or conclusory."[37] Where a defendant makes a "clear and specific" claim, the Court will apply the two-part test set forth in *Strickland*.[38] In the guilty plea context, a defendant must demonstrate that: "(1) counsel's representation fell below an objective standard of reasonableness; *and* (2) counsel's actions were so prejudicial that there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial."[39] In evaluating the first prong of *Strickland*, the Court applies a "strong presumption that counsel's conduct was professionally reasonable."[40] To satisfy the second prong, a defendant is required to make

[36] *See, e.g., Horne v. State*, 887 A.2d 973, 975 (Del. 2005) (finding "the preferable practice in a case like this involving a first postconviction motion containing ineffectiveness claims" is to request and consider affidavit of counsel).
[37] *See State v. Starr*, 2014 WL 6673914, at *5 (Del. Super. Oct. 29, 2014) *aff'd*, 2015 WL 894725 (Del. Mar. 2, 2015).
[38] *See id. See also Strickland v. Washington*, 466 U.S. 668 (1984).
[39] *See Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) (internal quotation marks omitted) (emphasis added) (citing *Albury v. State*, 551 A.2d 53, 58 (Del. 1988)).
[40] *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."); *Hoskins v. State*, 102 A.3d 724, 730 (Del. 2014) ("A defendant bears a heavy burden when trying to show that trial counsel's representation fell below an objective standard of

specific and substantiated allegations of *actual prejudice*.[41] The Court may address the prongs in either order and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, …that course should be followed."[42]

After evaluating the record, submissions by the parties, and counsel's affidavit, the Court finds Flores's ineffective assistance allegations do not meet the stringent standard required under *Strickland*. The claim most easily disposed of is that counsel was ineffective for failing to request "a preliminary hearing" because at the time trial counsel entered his appearance, Flores had already been indicted by the grand jury and had no right to a preliminary hearing.[43] Further, "[e]ven if there was no preliminary hearing," that fact would be "inconsequential" because such hearings have "*no bearing on a subsequent conviction.*"[44] Thus, even if trial counsel could have requested a preliminary hearing, but decided not to, Flores could not prove he was prejudiced as a result.

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reasonableness.").

[41] *See Starr*, 2014 WL 6673914, at *6 (citation omitted).

[42] *See Dabney v. State*, 991 A.2d 17 (Del. 2010) (citing *Strickland*).

[43] Defendant was indicted on August 5, 2013 and counsel entered his appearance sixteen days later on August 21, 2013. *See State v. Eley*, 2002 WL 337996, at *4 (Del. Super. Feb. 19, 2002) *aff'd*, 804 A.2d 1066 (Del. 2002).

[44] *See State v. Lum*, 2007 WL 1041415, at *6 (Del. Super. Mar. 22, 2007) *aff'd*, 941 A.2d 1018 (Del. 2007) (emphasis added). *See also State v. Bailey*, 2004 WL 2914320, at *1 (Del. Super. Dec. 13, 2004) (stating that the purpose of a preliminary hearing is simply to "determine whether Defendant can be held until the case is presented to the Grand Jury" or "[i]n other words, the preliminary hearing puts a defendant's arrest to the test").

Flores's coercion allegations are likewise unsupported by the record. During the plea colloquy, Flores confirmed he was not coerced or forced into taking his plea and that he was satisfied with trial counsel's representation.[45] Given Flores's prior convictions and the strong case the State had against him, counsel was well within reason to encourage Flores's consideration of the plea offer. Counsel was also correct to press upon Flores that, as a result of his habitual offender status, he faced a mandatory life sentence of imprisonment if convicted on even one count of robbery, burglary, or PFDCF. It is well settled that "a defendant's decision to plead guilty as a means to avoid additional prison time does not amount to 'coercion."[46] Thus, counsel was not ineffective and Flores is bound by his statements in the plea colloquy.

The final claim alleging ineffective assistance for failure to investigate the counts in the indictment is also unsuccessful. Here, Flores relies on *Bridgers* for the proposition that he could not possibly have been convicted on all three counts of first degree robbery because only *one* victim was "compelled to deliver up

[45] *See Lewis*, 2015 WL 5935050, at *2 (finding defendant bound by statements made during plea colloquy).
[46] *See Edwards v. State*, 2007 WL 4374237, at *1 (Del. Dec. 17, 2007) (citing *Brady v. United States*, 397 U.S. 742, 751-52 (1970)). *See also Starr*, 2014 WL 6673914, at *5 (finding claim for coercion unsuccessful when based on counsel and prosecutor "truthfully telling [defendant] that he was looking at significantly more time if convicted of his charges").

property."[47] Flores appears to focus on the language in *Bridgers* that "someone who is merely a threatened bystander has not been *robbed*" to argue that his conduct in restraining two of the victims at gun point was insufficient to sustain a robbery conviction.[48] Based on this logic, he contends counsel was ineffective for advising him to plead guilty instead of going to trial and for failing to: investigate the facts of his case, challenge the indictment, and "address *Bridgers*" during plea negotiations.

Under Delaware law, one is guilty of first degree robbery if he or she commits robbery in the second degree under aggravating circumstances, such as here where a deadly weapon is displayed during the crime.[49] A person commits second degree robbery by using or threatening to use force against another during the commission of theft to (1) prevent resistance to the taking of property or (2) compel delivery of property or engagement in conduct which furthers theft.[50]

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[47] Def. Mot. for Postconviction Relief (Mar. 3, 2015), at 6. *See also Bridgers*, 988 A.2d at 941-44 ("Defendants' act of threatening bank customers, who otherwise simply watched defendants rob bank, constituted aggravated menacing, rather than robbery of the customers, as there was an insufficient connection between the theft from the bank and the threats to the customers to support any robbery conviction.").

[48] *See Bridgers*, 988 A.2d at 944 (emphasis added).

[49] *See* 11 *Del. C.* § 832.

[50] *See* 11 *Del. C.* § 831 (providing also that "[i]n addition to its ordinary meaning, the phrase 'in the course of committing theft' includes any act which occurs in an attempt to commit theft or in immediate flight after the attempt or commission of the theft"). A person commits theft by taking, exercising control over, or obtaining the property of another person with the intent to deprive that person of it or appropriate it. *See* 11 *Del. C.* § 841.

It is undisputed that neither the daughter nor the customer had property taken from them, personally, on the night of the robbery. Thus, the issue presently before the Court is whether Flores's conduct with respect to those individuals can be classified as having been done to prevent resistance to the taking of property or to compel conduct in furtherance of theft such that they would be considered victims of robbery. Ultimately, there must be some "causal connection between the predicate theft and the force or intimidation."[51] In *Bridgers*, the Court found:

> [T]o be a robbery victim, a person must have property taken from him or her, including property the person controls. Otherwise, the victim must become involved or Defendant must force the victim to become involved in the theft, and be threatened by Defendant in the process. A person who only is forced to watch a theft or a robbery from another person and who is not otherwise involved is not a robbery victim.[52]

Applying this logic, the Court found customers, who "were threatened, but otherwise …simply watched"[53] were victims of aggravated menacing, not robbery because they were "not the subject of theft or otherwise involved in that crime."[54] However, this Court has found two bank employees *were* victims of robbery where one was held at gun point and forced to watch the theft while the other was forced "to order tellers out of [the] way."[55] Although neither employee was compelled to

[51] *See Bridgers,* 988 A.2d at 942.
[52] *See id.* at 945.
[53] *See id.* at 944.
[54] *See id.* at 942.
[55] *See id.* at 944.

give anything to the defendants, the employees had a custodial interest in the bank's money and had to watch helplessly as the defendants stole that money, "intimidated their co-workers and frightened the bank's customers."[56] As a result, the Court reasoned that the character of the threats towards the employees was different such that "a jury could find that neutralizing employees during a bank robbery by threatening them is causally related to the theft."[57]

Applying the same rationale in *State v. Johnson*,[58] the Court found First Degree Robbery charges legally sustainable where the defendants ordered five bank tellers from their stations and into a bathroom at gun point while a sixth was forced to open the vault.[59] However, in *State v. Owens*,[60] the Court found a bank's customer service representative, who was ordered to move under her desk at gun point during a robbery, was not a victim of robbery despite the fact that force was threatened to keep the employee from interfering with the taking of the bank's property.[61] Earlier this year, in *State v. Walker*,[62] the Court found a store's cashier was a victim of robbery where "the money in the cash register was taken from

[56] *See id.*
[57] *See id.*
[58] 2010 WL 780101 (Del. Super. Mar. 4, 2010).
[59] *See id.* at *3
[60] 2010 WL 2892701 (Del. Super. July 16, 2010).
[61] *See id.* at *10-11.
[62] 2015 WL 3654806 (Del. Super. June 8, 2015).

[her] with the use of force."[63] Then, in what appears to be the most recent decision on this issue, the United States District Court for the District of Delaware found "[b]y killing … two store owners, …[a defendant] used force to eliminate the two people who were in a position to prevent the robbery, demonstrating that the two victims were not mere 'bystanders' under *Owens* and *Bridgers*."[64]

Neither the Code, nor the case law, clearly defines when a victim is capable of "interfering" with the taking of property such that their being forcefully restrained would suffice to sustain a separate robbery charge. While it would appear to the Court that one would not restrain an individual's hands with zip ties during an armed robbery if they did not perceive that person as a threat to the theft of property, it need not resolve this issue in the context of Flores's ineffective assistance of counsel claim, because Flores failed to convince the Court he would have gone to trial had counsel successfully sought dismissal of the other two counts of first degree robbery. The motivation for Flores's plea was clearly the State's agreement to forego sentencing him as a habitual offender. He knew the State had surveillance footage of the armed robbery and Harris's confession in its arsenal. His counsel also made him aware that conviction on the one uncontested

[63] *See id.* at *3.
[64] *See Parson v. Pierce*, 2015 WL 6694156, at *4 (D. Del. Oct. 29, 2015) (emphasis added) (internal citations omitted) (citing *Bridgers*, 988 A.2d at 940-44 and *Owens*, 2010 WL 2892701, at *1).

robbery charge alone would land him in prison for the rest of his life. Thus, whether Flores was charged with one or more counts of robbery first degree, his incentive for taking (and counsel's rationale for encouraging) the State's plea offer remained the same. With counsel's assistance, Flores obtained a substantial and favorable benefit: the State's agreement not to pursue him as an habitual offender. This is particularly true since Flores does not dispute, and the evidence overwhelmingly supports, that he committed first degree robbery at least with respect to the store owner. Thus, that he would have jeopardized a 15 year deal when he was clearly facing a life sentence is just not convincing. Absent a substantiated showing of actual prejudice, Flores's ineffective assistance claim must fail.

## CONCLUSION

Based upon the above reasoning, Flores' Motion for Postconviction Relief is hereby **DENIED**.

**IT IS SO ORDERED.**

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