Supreme Court affirmed Short's convictions. Short filed her motion for postconviction relief on June 6, 2005. This is her first motion for postconviction relief and it was filed in a timely manner.

Short has set forth five grounds for relief. One, Short alleges that her due process rights were violated because the State used a conviction allegedly obtained while she was a minor to have her declared an habitual offender. Two, Short alleges that her due process rights were violated because the State showed the two witnesses to the robbery a photo array containing women when one of the two witnesses described the robber as a man. Three, Short alleges that being convicted of two counts of PFDCF for a single robbery involving a single gun violates her right of protection against double jeopardy. Four, Short alleges that her 55-year sentence is cruel and unusual punishment. Five, Short alleges that she received ineffective assistance of counsel. Short was represented by James D. Nutter, Esquire ("Nutter"). Nutter filed an affidavit responding to Short's allegations. I do not find that it is necessary to hold a hearing to gather more evidence regarding Short's allegations.

Short's first four claims could have been raised on appeal and are, therefore, procedurally barred pursuant to Rule 61(I)(3) unless Short is able to show cause for relief from the procedural bar and prejudice as a result of any violation of her rights.[1] However, "this bar to relief does 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.[2]" Even though Short clearly has not met this standard, I will briefly address each allegation.

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[1] *Outten v. State*, 720 A.2d 547, 556 (Del. 1998).

[2] *Outten*, 720 A.2d at 556, *citing* Super. Ct. Crim. R. 61(I)(5).

A. Habitual Offender

Short alleges that her due process rights were violated when I found her to be an habitual offender because one of her predicate felony convictions was allegedly obtained while she was a minor. The three convictions that make up Short's habitual offender status were a 1998 Superior Court conviction for Assault in the Second Degree, a 1999 Superior Court conviction for Forgery in the Second Degree, and a 2002 Superior Court conviction for Burglary in the Second Degree. Short was born on August 20, 1980. She was 17 years and 9 months old she was convicted of Assault in the Second Degree. However, this conviction was the result of an "adult" criminal proceeding. The Supreme Court has dealt with this issue before. In *Stone v. State*, 648 A.2d 426 (Del. 1994), the Supreme Court held that a juvenile's prior felony convictions, which resulted from an adult criminal proceeding, were admissible as proof of habitual offender status.

B. Photo Array

Short alleges that the photo array used by the police to identify her violated her due process rights. Short's allegation is based upon the fact that the photo array consisted of four photos that clearly appeared to be women, even though one of the two witnesses to the robbery told the police that the robber was a man. Short alleges that the use of these four photos placed an undue emphasis on her as being the robber. The photo array was admitted at trial. The robbery was witnessed by the two store employees, Khalid Alsmadi and Clorice Adams. Adams told the police that the robber was a man. Alsmadi told the police that the robber looked like a man, but was a woman. Thus, since one of the witnesses described the robber as a woman, it was appropriate for the police to include pictures of women in the photo array.

Under Delaware law, a photo array is unconstitutional only when, under the totality of the

circumstances, it is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[3] A suggestive photo array, without more, does not amount to a due process violation.[4] Moreover, even if an identification procedure is impermissibly suggestive, the evidence will not be excluded at trial if the identification is nonetheless reliable.[5]

I have reviewed the photo array that was presented to the two witnesses. It consists of six pictures of light-skinned African Americans with close-cropped hair. Short's picture is located in the top, left-hand corner of the photo array. There is nothing at all about the other five pictures that makes Short's picture stand out. I have also reviewed the identification procedure that Detective Timothy Conaway went through with the two witnesses. He told each witness the following: "Before you choose, look at every picture. Don't guess. If you are not sure, it is okay to say "I don't know. After reviewing all the pictures, if you feel comfortable you are positive you can identify them, tell me who it is." There is nothing at all suggestive about this. Moreover, both of the witnesses also identified Short at trial. Both of the witnesses had a good opportunity to see Short during the robbery. Alsmadi was on the other side of the cash register when Short reached over to take the money out of it. Alsmadi also testified that he knew Short because she had been a customer in the store before. Thus, he was familiar with her. Adams was within six feet of Short during the robbery. I have simply no reason at all to doubt the witnesses' identification of Short or the photo array.

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[3] *Mays v. State*, 815 A.2d 349 (Del. 2003)(ORDER) at p. 2; *Younger v. State*, 496 A.2d 546, 550 (Del. 1985).

[4] *Younger*, 496 A.2d at 550-51.

[5] *Younger*, 496 A.2d at 550.

C. Double Jeopardy

Short alleges that the two PFDCF convictions violate her right of protection against double jeopardy because there was only one gun and one robbery. The Delaware Supreme Court has dealt with this argument before. In *Williamson v State*, the defendant argued that the two counts of possession of a deadly weapon during the commission of a felony should merge because he only used one knife. The Supreme Court denied his argument, stating "under 11 *Del. C.* § 1447 and this Court's holding in *Robertson v. State*, where we construed that statute and stated: 'separate convictions for a deadly weapon offense, for each felony the defendant committed while in possession of a deadly weapon, is consistent with the deterrence goal of the statute and ... such multiple weapon convictions [are] supported by the statute's plain language.'"[6] Short committed two separate felonies against two different individuals. Her first felony was for Robbery in the First Degree, which she committed against Khalid Alsmadi. The first PFDCF count was based on this charge. Her second felony was for Aggravated Menacing, which she committed against Clorice Adams. The second PFDCF count was based on this charge. Thus, the two convictions for PFDCF do not subject Short to twice the punishment for one offense.

D. Cruel and Unusual Punishment

Short contends that her 55-year sentence is cruel and unusual punishment because her criminal history does not allegedly warrant such a long sentence. In *Solem v. Helm*, the United States Supreme Court held that a criminal sentence must be proportionate to the crime for which the

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[6] *Williamson v. State,* 707 A.2d 350, 363 (Del. 1998), *quoting Robertson v. State*, 630 A.2d 1084, 1093 (Del. 1993).

defendant has been convicted.[7] Appellate review of a sentence generally ends if the sentence falls within the statutory limits prescribed by the legislature.[8] In reviewing a sentence within the statutory guidelines, this Court will not find error unless it is clear that the sentencing judge relied on impermissible factors or exhibited a closed mind.[9] Additionally, it is well settled that the "SENTAC" guidelines are not binding on the sentencing judge, and a sentence imposed outside of the guidelines offers no basis for belief.[10]

Short failed to discuss any proportionality review of her sentence and offers no authority to support her allegation that her sentence constitutes cruel and unusual punishment. The four offenses that Short was convicted of are all violent felonies. Robbery in the First Degree is a Class B felony and carries a sentence of up to 25 years.[11] PFDCF is a Class B felony and carries a sentence of up to 25 years.[12] Short was convicted of two counts of PFDCF.[13] Aggravated Menacing is a Class E felony and carries a sentence of up to five years.[14] Short was charged as an habitual offender on the Robbery in the First Degree charge and the accompanying charge of PFDCF. She was not charged as a habitual offender on the remaining counts. The Habitual Offender statute states that, "any

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[7] *Solem v. Helm*, 463 U.S. 277 (1983).

[8] *Maynes v. State*, 604 A.2d 839, 843 (Del. 1992).

[9] *Boo'zo v. State*, 846 A.2d 237 (Del. 2004), 2004 WL 691903 at **3.

[10] *See Gaines v. State*, 571 A.2d 765, 766-67 (Del. 1990).

[11] 11 *Del. C.* § 832.

[12] 11 *Del. C.* § 1447A.

[13] The second count of Possession of a Firearm during the Commission of a Felony carries a minimum sentence of five years. 11 Del. C. § 1447A (c).

[14] 11 D*el. C.* § 602(b).

person sentenced pursuant to this subsection shall receive a minimum sentence which shall not be less than the statutory maximum penalty provided elsewhere in this title for the 4th or subsequent felony which forms the basis of the State's petition to have the person declared to be an habitual criminal except that this minimum provision shall apply only when the 4th or subsequent felony is a Title 11 violent felony, as defined in § 4201 (c) of this title."[15] Short's sentence falls within the statutory limits, and clearly is not cruel and unusual punishment.

E. Ineffective Assistance of Counsel

Short's final claim for relief is based upon four allegations of ineffective assistance of counsel. One, Short alleges that Nutter's representation was ineffective because he failed to raise on appeal the fact that none of her fingerprints were found at the crime scene. Two, Short alleges that Nutter was ineffective because he did not raise on appeal the fact that Alsmadi first identified the robber's vehicle as a "gray medium-sized car" and then, after talking with the police, described it as a "gray Chevy Corsica." Three, Short alleges that Nutter was ineffective because he did not raise on appeal the fact that no ballistic tests were performed on the gun. Four, Short alleges that Nutter was ineffective because he did not raise on appeal the sufficiency of the proof that the gun found in the Chevy Corsica was used in the crime.

The United States Supreme Court has established the proper inquiry to be made by courts when deciding a motion for postconviction relief.[16] In order to prevail on a claim for ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, the defendant must engage in a

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[15] 11 *Del. C.* § 4214(a).

[16] *Strickland v. Washington*, 466 U.S. 668 (1984).

two-part analysis.[17] First, the defendant must show that counsel's performance was deficient and fell below an objective standard of reasonableness.[18] Second, the defendant must show that the deficient performance prejudiced the defense.[19] Further, a defendant "must make and substantiate concrete allegations of actual prejudice or risk summary dismissal."[20] It is also necessary that the defendant "rebut a 'strong presumption' that trial counsel's representation fell within the 'wide range of reasonable professional assistance,' and this Court must eliminate from its consideration the 'distorting effects of hindsight when viewing that representation.'"[21] There is no procedural bar to claims of ineffective assistance of counsel.[22]

Short's argument is essentially one based upon the sufficiency and weight of the evidence. This argument issue was not raised on appeal. Therefore, it is procedurally barred.[23] Nevertheless, I will address it. In examining an insufficiency of evidence claim, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[24] The only real

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[17] *Strickland*, 466 U.S. at 687.

[18] *Id.* at 687.

[19] *Id.* at 687.

[20] *State v. Coleman*, 2003 WL 22092724 (Del. Super. Ct.).

[21] *Coleman*, 2003 WL at *2, *quoting Strickland*, 466 U.S. at 689.

[22] *Coleman*, 2003 WL at *1, *citing State v. Johnson*, Del. Super. Ct., Cr. A. No. 97-10-0164(R1), Graves, J. (August 12, 1999) at 2; *State v. Gattis*, Del. Super. Ct., Cr. A. Nos. IN90-05-1017 to 1019, Barron, J. (December 28, 1995) at 7, *aff'd*, 637 A.2d 1174 (Del. 1997).

[23] Super. Ct. Crim. Rule 61(I)(3).

[24] *Bodan v. State*, 622 A.2d 1094 (Table), 1993 WL 61679 at **1 (Del.Supr.).

issue in this case was the identification of the robber and the gun. Both witnesses to the robbery identified Short as the robber and the gun introduced into evidence as the one used by the robber. Alsmadi testified that the robber drove off in a gray medium-sized car. Short's neighbor saw her drive home in a gray medium-sized car shortly after the robbery. The police searched the car and found a gun and articles of clothing that the witnesses identified as being worn by the robber. This is more than enough evidence to support the jury's verdicts. I will also briefly address Short's four specific allegations.

1. Fingerprints

Short alleges that Nutter's representation was ineffective because he did not raise on appeal the fact that her fingerprints were not found at the crime scene. This is correct, but Nutter did extensively question the State's witnesses about the fingerprint evidence, allowing the jury to focus on it and consider it. Clorice Adams testified that the robber carried a Sprite soda bottle around during the robbery. The police recovered the soda bottle, examined it, and found a fingerprint on it belonging to Adams, not Short. The police examined the gun and other areas in the store, but were not able to find Short's fingerprints on anything. The significance and weight to give to the fact that none of Short's fingerprints were found at the crime scene belongs with the finder of fact. The finder of fact in Short's case was the jury, and as evidenced by the jury's verdict, the jury found the evidence sufficient to find Short guilty beyond a reasonable doubt even though her fingerprints were not found at the crime scene. The absence of Short's fingerprints at the crime scene does not, of course, in any way exonerate her. The absence can be explained by the simple fact that Short may not have left any identifiable prints, which is often the case. I can find no fault in how Nutter handled this matter.

2. Car Identification

Short alleges that Nutter's representation was ineffective because he did not raise on appeal the fact that Alsmadi originally described the robber's car as a "gray medium-sized car" and then, after talking to the police, described it as "a gray Chevy Corsica." This is correct, but Nutter did extensively examine Alsmadi about his description of the robber's car. Nutter was able to get Alsmadi to admit that his view of the robber's car was obstructed by a van and other cars. Nutter was also able to get Alsmadi to admit that he did not tell the police exactly what kind of car the robber was driving. The issue of whether or not the car that was involved in the robbery was the same that was found in Short's yard was a question for the jury. The jury made a determination that the car that Alsmadi saw at the crime scene was the same car found at Short's home shortly after the robbery. I can find no fault in how Nutter handled this matter.

3. Tests on the Gun

Short alleges that Nutter was ineffective because he did not raise on appeal the fact that the police never test-fired the gun or performed any other tests on it. There was no testimony that the gun was fired during the robbery, so I fail to see the relevance of whether or not ballistic tests were performed. Nutter did, during his cross-examination of the police officers, force the police officers to admit that they did not find Short's fingerprints on the gun that was found in the trunk of her car. Nutter also forced the police officers to admit that they did not conduct any other tests on the gun that might have linked it to Short. Once again, the issue of whether or not the gun introduced into evidence was the gun used by the robber was a question for the jury. The jury made a determination that the gun that the police found in Short's car was the one that she used in the robbery. I can find no fault in how Nutter handled this matter.

4. Nexus

Short alleges that Nutter was ineffective because he did not raise on appeal the sufficiency of the proof that the gun found in the Chevy Corsica was the same one used in the robbery. Alsmadi and Adams both identified the gun that was taken from the Chevy Corsica as the gun used by the robber. A number of witnesses linked Short to the Chevy Corsica. Alsmadi said that Short left the scene in a gray medium-sized car. Ruth Deshields, who is Short's neighbor, testified that Short arrived at her home in a gray medium-sized car shortly after the robbery. Short then, according to Deshields, got out of her car and left in another car. Harry Litten, an Ellendale Police Officer, testified that he drove to Short's house shortly after the robbery and found the car, which was a gray Chevy Corsica. He also testified the hood over the motor was still warm. The police seized the car, searched it, and found a gun in the trunk. This evidence is more than sufficient to link the gun to both Short and the robbery.[25]

CONCLUSION

Short's Motion for Postconviction Relief is denied for the foregoing reasons.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

[25] *Farmer v. State*, 698 A.2d 946, 949 (Del. 1997).