No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

BERNARD ELLERBE,

PETITIONER,

vs.

WARDEN ROBERT MAY, et al,

RESPONDENTS

FOR WRIT OF CERTIORARI TO

THE THIRD CIRCUIT COURT OF APPEALS

PETITIONER'S APPENDIX

BERNARD ELLERBE
James T. Vaughn Corr. Ctr.
1181 Paddock Road
Smyrna, DE 19977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-3018

BERNARD D. ELLERBE,
Appellant

v.

WARDEN JAMES T. VAUGHN CORRECTIONAL CENTER, ET AL.

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civ. No. 1-17-cv-01231)
District Judge: Honorable Colm F. Connolly

SUR PETITION FOR PANEL REHEARING

Present: MCKEE, GREENAWAY, JR. and PORTER, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it is hereby O R D E R E D that the petition for rehearing by the panel is denied.

BY THE COURT,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: May 6, 2022
ARR/cc: BE; CSH

BLD-084

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-3018**

BERNARD D. ELLERBE, Appellant

VS.

WARDEN JAMES T. VAUGHN CORRECTIONAL CENTER, ET AL

(D. Del. Civ. No. 1-17-cv-01231)

Present: MCKEE, GREENAWAY, JR., and PORTER, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

The request for a certificate of appealability is denied because jurists of reason would not debate the District Court's decision to deny Appellant's claims. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). For substantially the same reasons stated by the District Court, Appellant's claims are either procedurally defaulted or without merit. Jurists of reason would also agree that Appellant has failed to demonstrate cause and prejudice or miscarriage of justice necessary to excuse the default. See Martinez v. Ryan, 566 U.S. 1, 9 (2012); Schlup v. Delo, 513 U.S. 298, 329 (1995).

By the Court,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: March 15, 2022
ARR/cc: BDE; CSH

A True Copy:

Patricia A. Dodszuweit

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

BERNARD ELLERBE, Petitioner, v. ROBERT MAY, Warden, and ATTORNEY GENERAL OF THE STATE OF DELAWARE, Respondents.1

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

2020 U.S. Dist. LEXIS 176178

Civil Action No. 17-1231-CFC

September 25, 2020, Decided

September 25, 2020, Filed

Editorial Information: Subsequent History

Appeal filed, 10/02/2020Reconsideration denied by, Certificate of appealability denied, Judgment entered by Ellerbe v. May, 2022 U.S. Dist. LEXIS 6773 (D. Del., Jan. 13, 2022)

Editorial Information: Prior History

Ellerbe v. Metzger, 2020 U.S. Dist. LEXIS 8868, 2020 WL 264109 (D. Del., Jan. 17, 2020)

Counsel **{2020 U.S. Dist. LEXIS 1}**Bernard D. Ellerbe, Petitioner, Pro se.

Carolyn Shelly Hake, Deputy Attorney General of the Delaware Department of Justice, Wilmington, Delaware. Attorney for Respondents.

Judges: Colm F. Connolly, UNITED SPATES DISTRICT JUDGE.

Opinion

Opinion by: Colm F. Connolly

Opinion

MEMORANDUM OPINION2

September 25, 2020

Wilmington, Delaware

/s/ Colm F. Connolly

CONNOLLY, UNITED STATES DISTRICT JUDGE:

Pending before the Court is Petitioner Bernard D. Ellerbe's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. 2254 ("Petition"). (D.I. 1) The State filed an Answer in opposition, to which Petitioner filed a Reply. (D.I. 14; D.I. 19) For the reasons discussed, the Court will deny the Petition.

I. BACKGROUND

On June 25, 2014, [Petitioner] was stopped after police observed him engage in an apparent hand-to-hand

drug transaction through his car window. [Petitioner] sped away when the police approached his car, and in the high-speed evasion that ensued, [Petitioner] wrecked his car. When removing [Petitioner] from the wreckage, the police found more than 260 individual glassine bags of heroin in [his] lap and nearly $12,000 in his pockets.

[Petitioner] was indicted for several drug offenses and on charges of reckless endangering, reckless driving, and disregarding{2020 U.S. Dist. LEXIS 2} a police signal. The drugs seized from [Petitioner] were sent to a Drug Enforcement Administration ("DEA") laboratory where they were analyzed by a forensic chemist on December 17, 2014.*Ellerbe v. State*, 161 A.3d 674 (Table), 2017 Del. LEXIS 191, 2017 WL 1901809, at *1 (Del. 2017). In January 2015, a Delaware Superior Court jury convicted Petitioner of drug dealing, aggravated possession of heroin, possession of drug paraphernalia, two counts of first degree reckless endangering, disregarding a police officer's signal, and reckless driving. (D.I. 14 at 1); *see also State v. Ellerbe*, 2016 Del. Super. LEXIS 381, 2016 WL 4119863, at *1 (Del. Super. Ct. Aug. 2, 2016). The Superior Court sentenced him to eighteen years of imprisonment at Level V, followed by decreasing levels of supervision. *See Ellerbe*, 2016 Del. Super. LEXIS 381, 2016 WL 4119863, at *1. Petitioner filed a notice of appeal. (D.I. 14 at 2) In August 2015, while his appeal was pending, Petitioner filed a *pro se* motion for reduction of sentence. *Id.* The Superior Court deferred decision on the motion during the pendency of Petitioner's direct appeal. (D.I. 18-2 at 189-190) In September 2015, Petitioner voluntarily withdrew his appeal. *Id.* at 190. The Superior Court denied Petitioner's motion for reduction of sentence on January 11, 2016. *Id.* at 187-192. Petitioner did not appeal that decision.

In December 2016, this time represented by counsel, Petitioner filed a motion for postconviction relief{2020 U.S. Dist. LEXIS 3} pursuant to Delaware Superior Court Criminal Rule 61 ("Rule 61 motion"). The Superior Court denied the Rule 61 motion in August 2016, and the Delaware Supreme Court affirmed that decision in May 2017. *See Ellerbe*, 2016 Del. Super. LEXIS 381, 2016 WL 4119863, at *4; *Ellerbe*, 2017 Del. LEXIS 191, 2017 WL 1901809, at *4. Petitioner filed a second Rule 61 motion, which the Superior Court summarily dismissed. *See State v. Ellerbe*, 2017 Del. Super. LEXIS 478, 2017 WL 4271207 (Del. Super. Ct. Sept. 26, 2017). Petitioner did not appeal that decision. Petitioner filed the instant 2254 Petition in 2017. (D.I. 1 at 5, 7; D.I. 3)

II. GOVERNING LEGAL PRINCIPLES

A. The Antiterrorism and Effective Death Penalty Act of 1996

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "to reduce delays in

the execution of state and federal criminal sentences . . . and to further the principles of comity, finality, and federalism." *Woodford v. Garceau*, 538 U.S. 202, 206, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). Pursuant to AEDPA, a federal court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2254(a). Additionally, AEDPA imposes procedural requirements and standards for analyzing the merits of a habeas petition in order to "prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

B. Exhaustion and Procedural{2020 U.S. Dist. LEXIS 4} Default

Absent exceptional circumstances, a federal court cannot grant habeas relief unless the petitioner has exhausted all means of available relief under state law. *See* 28 U.S.C. 2254(b); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-44, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999); *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). AEDPA states, in pertinent part:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.28 U.S.C. 2254(b)(1). This exhaustion requirement, based on principles of comity, gives "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 844-45; *see Werts v. Vaughn*, 228 F.3d 178, 192 (3d Cir. 2000).

A petitioner satisfies the exhaustion requirement by demonstrating that the habeas claims were "fairly presented" to the state's highest court, either on direct appeal or in a post-conviction proceeding, in a procedural manner permitting the court to consider the claims on their merits. *See Bell v. Cone*, 543 U.S. 447, 451 n.3, 125 S. Ct. 847, 160 L. Ed. 2d 881 (2005); *Castille v. Peoples*, 489 U.S. 346, 351, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989). If the petitioner raised the issue on direct{2020 U.S. Dist. LEXIS 5} appeal in the correct procedural manner, the claim is exhausted and the petitioner does not need to raise the same issue again in a state post-conviction proceeding. *See Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1996).

If a petitioner presents unexhausted habeas claims to a federal court, and further state court review of those claims is barred due to state procedural rules, the federal court will excuse the failure to exhaust and treat the claims as exhausted. *See Coleman v. Thompson*, 501 U.S. 722, 732, 750-51, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (such claims "meet[] the technical requirements for exhaustion" because state remedies are no longer available); *see also Woodford v. Ngo*, 548 U.S. 81, 92-93, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006). Such claims, however, are procedurally defaulted. *See Coleman*, 501 U.S. at 749; *Lines v. Larkins*, 208 F.3d 153, 160 (3d Cir. 2000). Similarly, if a petitioner presents a habeas claim to the state's highest court, but that court "clearly and expressly" refuses to review the merits of the claim due to an independent and adequate state procedural rule, the claim is exhausted but procedurally defaulted. *See Coleman*, 501 U.S. at 750; *Harris v. Reed*, 489 U.S. 255, 260-64, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989).

Federal courts may not consider the merits of procedurally defaulted claims unless the petitioner demonstrates either cause for the procedural default and actual prejudice resulting therefrom, or that a fundamental miscarriage of justice will result if the court does not review the claims. *See McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999); *Coleman*, 501 U.S. at 750-51.

To demonstrate cause{2020 U.S. Dist. LEXIS 6} for a procedural default, a petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). To demonstrate actual prejudice, a petitioner must show that the errors during his trial created more than a possibility of prejudice; he must show that the errors worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 494.

Alternatively, if a petitioner demonstrates that a "constitutional violation has probably resulted in the conviction of one who is actually innocent,"3 then a federal court can excuse the procedural default and review the claim in order to prevent a fundamental miscarriage of justice. *See Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000); *Wenger v. Frank*, 266 F.3d 218, 224 (3d Cir. 2001). The miscarriage of justice exception applies only in extraordinary cases, and actual innocence means factual innocence, not legal insufficiency. *See Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); *Murray*, 477 U.S. at 496. A petitioner establishes actual innocence by asserting "new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial," showing that no reasonable juror would have voted to

find the petitioner{2020 U.S. Dist. LEXIS 7} guilty beyond a reasonable doubt. *Hubbard v. Pinchak*, 378 F.3d 333, 339-40 (3d Cir. 2004).

C. Standard of Review

If a state's highest court adjudicated a federal habeas claim on the merits, the federal court must review the claim under the deferential standard contained in 28 U.S.C. 2254(d). Pursuant to 2254(d), federal habeas relief may only be granted if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or the state court's decision was an unreasonable determination of the facts based on the evidence adduced in the trial. 2254(d)(1) & (2); *see also Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001). A claim has been "adjudicated on the merits" for the purposes of 2254(d) if the state court decision finally resolves the claim on the basis of its substance, rather than on a procedural or some other ground. *See Thomas v. Horn*, 570 F.3d 105, 115 (3d Cir. 2009). The deferential standard of 2254(d) applies even "when a state court's order is unaccompanied by an opinion explaining the reasons relief has been denied." *Harrington v. Richter*, 562 U.S. 86, 98, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). As explained by the Supreme Court, "it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 99.

Finally, when reviewing a habeas claim, a federal{2020 U.S. Dist. LEXIS 8} court must presume that the state court's determinations of factual issues are correct. *See* 2254(e)(1). This presumption of correctness applies to both explicit and implicit findings of fact, and is only rebutted by clear and convincing evidence to the contrary. *See* 2254(e)(1); *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000); *Miller-El v. Cockrell*, 537 U.S. 322, 341, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (stating that the clear and convincing standard in 2254(e)(1) applies to factual issues, whereas the unreasonable application standard of 2254(d)(2) applies to factual decisions).

III. DISCUSSION

Petitioner asserts two Claims in his timely-filed Petition: (1) defense counsel provided ineffective assistance by failing to impeach the DEA forensic chemist who analyzed the drugs seized in his case with evidence of a pending DEA disciplinary proceeding; and (2) defense counsel provided ineffective assistance by failing to challenge the DEA forensic chemist's use of the hypergeometric sampling method to analyze the drugs in Petitioner's case. (D.I. 1 at 5, 7; D.I. 3) The State filed an Answer, arguing that Claim One should be denied as meritless

and Claim Two should be denied as procedurally barred. (D.I. 14 at 7-19)

A. Claim One

Petitioner presented the ineffective assistance of counsel allegation contained in Claim One to the Delaware Supreme Court on{2020 U.S. Dist. LEXIS 9} post-conviction appeal. The Court denied the Claim as meritless. Given these circumstances, habeas relief will only be available if the Delaware Supreme Court's decision was either contrary to, or involved an unreasonable application of, clearly established federal law.

The clearly established Supreme Court precedent governing ineffective assistance of counsel claims is the two-pronged standard enunciated by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and its progeny. *See Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Under the first *Strickland* prong, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness," with reasonableness being judged under professional norms prevailing at the time counsel rendered assistance. *Strickland*, 466 U.S. at 688. Under the second *Strickland* prong, a petitioner must demonstrate "there is a reasonable probability that, but for counsel's error the result would have been different." *Id.* at 687-96. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.* at 688.

In order to sustain an ineffective assistance of counsel claim, a petitioner must make concrete allegations of actual prejudice and substantiate them or risk summary dismissal. *See Wells v. Petsock*, 941 F.2d 253, 259-60 (3d Cir. 1991); *Dooley v. Petsock*, 816 F.2d 885, 891-92 (3d Cir. 1987). Although not insurmountable, the *Strickland* standard{2020 U.S. Dist. LEXIS 10} is highly demanding and leads to a "strong presumption that the representation was professionally reasonable." *Strickland*, 466 U.S. at 689.

Turning to the first prong of the 2254(d)(1) inquiry, the Court notes that the Delaware Supreme Court correctly identified the *Strickland* standard as governing Petitioner's instant ineffective assistance of counsel contention. *See Ellerbe*, 2017 Del. LEXIS 191, 2017 WL 1901809, at *3. As a result, the Delaware Supreme Court's decision was not contrary to clearly established federal law.

The Court must also determine if the Delaware Supreme Court reasonably applied the *Strickland* standard to the facts of Petitioner's case. *See Harrington*, 562 U.S. at 105-06. When performing this inquiry, the Court must review the Delaware Supreme Court's denial of Petitioner's ineffective assistance of counsel

allegation through a "doubly deferential" lens. *Id.* "[T]he question is not whether counsel's actions were reasonable, [but rather], whether there is any reasonable argument mat counsel satisfied *Strickland*'s deferential standard." *Id.* When assessing prejudice under *Strickland*, the question is "whether it is reasonably likely the result would have been different" but for counsel's performance, and the "likelihood of a different result must be substantial, not just conceivable."{2020 U.S. Dist. LEXIS 11} *Id.* And finally, when viewing a state court's determination that a *Strickland* claim lacks merit through the lens of 2254(d), federal habeas relief is precluded "so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* at 101.

The following background information provides helpful information for evaluating Claim One:

[Petitioner] went to trial in late January 2015. A week before trial, an official from the DEA disclosed to the prosecutor that, on July 1, 2014, the DEA's Board of Professional Conduct issued a two-day suspension without pay to the forensic chemist who analyzed the drugs in [Petitioner's] case in December 2014. The disciplinary sanction arose from the forensic chemist's alleged violation of a DEA safety protocol when handling drug evidence in a case in November 2013. Because the forensic chemist was a key witness in the State's case against [Petitioner] and evidence about the safety violation, if permitted by the court, could be used by the defense to impeach the chemist at trial, the prosecutor informed defense counsel about the disciplinary sanction.

Under Delaware Uniform Rule of Evidence 403 ("DRE 403"), before evidence can be used to impeach{2020 U.S. Dist. LEXIS 12} the credibility of a witness, the Superior Court must determine if the probative value of the evidence outweighs its prejudicial effect. To make the determination under DRE 403 in [Petitioner's] case, the trial judge conducted *voir dire* of the chemist, outside the presence of the jury, to determine if [Petitioner's] defense counsel should be allowed to use evidence of the disciplinary sanction to impeach the chemist at trial.

During *voir dire*, the chemist testified that the disciplinary matter arose from her alleged violation of a DEA safety policy when she neglected to wear a protective mask when testing a large quantity of cocaine in 2013. The chemist testified that her appeal from the Board's decision was still pending before a DEA appeals official, and that, for the pendency of the disciplinary matter, she continued examining drug evidence for the DEA and to testify in cases. The chemist further testified that, if the Board's decision is upheld by the appeals official, she will continue in her duties with the DEA, and that there was no allegation that she failed to follow any protocol in [Petitioner's] case.

At the conclusion of *voir dire*, defense counsel advised the court and opposing{2020 U.S. Dist. LEXIS 13} counsel that he would not be moving to use evidence of the disciplinary sanction to impeach the chemist because, in counsel's view, the evidence was not relevant in [Petitioner's] case. In this excerpt from the *voir dire* transcript, the trial judge agreed with defense counsel's assessment as follows:

That's fine, 1 think that's appropriate after hearing the entirety of it. Under Rule 403 I do believe that probative value would be substantially outweighed by the danger of unfair prejudice in this particular case, mainly confusing the issues and really trying to have some mini trial of a personnel matter that hasn't even been fully determined yet. If there's a question as to a circumstance of not following protocol that changed the weight, the analysis or something like that, it may be more probative, but in this case, it's quite frankly not taking a safety precaution that she should have taken during testing.

* * *

And as noted through the testimony and cross-examination, even that matter and whether or not she will be held to some sanction from her own agency for violating some safety protocol or laboratory protocol of their own and again, had nothing to do with the validity of the actual testing,{2020 U.S. Dist. LEXIS 14} findings or the like, but their own personal safety standard that they set, then the court might find some greater probative value.

If not, and I think that the defense is absolutely correct in understanding that this probably would not lead to anything that is useful, and therefore I think it is appropriate to be excluded under Rule 403, even if there was a request to put it in.

When trial resumed, the chemist took the stand and testified about the tests she conducted on the drug evidence seized in [Petitioner's] case and the scientific method she used to determine that the evidence was heroin with a net weight of 3.8 grams, in relevant part, the chemist explained that, after analyzing 27 of the 262 individual glassine bags and finding that 27 bags contained heroin, she used a hypergeometric sampling method to determine with 95% accuracy that 90% of the remaining 235 bags also contained heroin.*Ellerbe*, 2017 Del. LEXIS 191, 2017 WL 1901809, at *1-2.

In his Rule 61 motion, Petitioner argued that defense counsel did not effectively cross-examine the forensic chemist on her disciplinary record for purposes of impeachment. *See Ellerbe*, 2016 Del. Super. LEXIS 381, 2016 WL 4119863, at *2. The Superior Court rejected the argument for failing to satisfy either prong of the *Strickland* standard. First, given

defense counsel's{2020 U.S. Dist. LEXIS 15} thorough *voirdire* exploration of the forensic chemist's disciplinary action, the Superior Court concluded that defense counsel reasonably determined that the forensic chemist's unrelated 2013 safety violation was of little value because it had no impact on the validity of the testing that took place in Petitioner's case. *See* 2016 Del. Super. LEXIS 381, [WL] at *3. Next, the Superior Court concluded that Petitioner did not establish prejudice under *Strickland*, because he failed to demonstrate that the trial court would have permitted defense counsel to cross-examine the forensic chemist regarding the disciplinary action. *See Ellerbe*, 2016 Del. Super. LEXIS 381, 2016 WL 4119863, at*4. Even if the trial court would have permitted the cross-examination in question, the Superior Court noted that Petitioner failed to show a reasonable probability of a different outcome. For instance, nothing in the record indicated that the forensic chemist failed to follow any DEA testing protocol or other applicable standards in Petitioner's case, and the chemist's failure to follow a safety standard more than a year before Petitioner's case would have had minimal, if any, impact on the jury's consideration. In addition, there was overwhelming evidence presented against Petitioner at trial, including{2020 U.S. Dist. LEXIS 16} the police officers' visual observations of the drug interactions between Petitioner and the white car, Petitioner's high speed evasion of police, the large amount of heroin found on Petitioner's lap when pulled from the car, and the large amount of cash found on his person. *Id.*

The Delaware Supreme Court affirmed the Superior Court's decision "for the reasons stated in the Superior Court's order of August 2, 2016." *Ellerbe*, 2017 Del. LEXIS 191, 2017 WL 1901809, at *4. The Delaware Supreme Court opined, "[w]ith no specifics offered as to how the additional cross-examination now suggested would have changed the outcome of the trial, [Petitioner] cannot succeed on a claim of ineffective assistance of counsel." *Id.*

After reviewing Petitioner's instant complaint about defense counsel's actions within the context of the aforementioned record and the applicable legal framework, the Court concludes that the Delaware state courts did not unreasonably apply *Strickland* when denying Claim One. An attorney's decision as to how to cross-examine a witness is strategic in nature and will not constitute the basis for an ineffective assistance if that decision is reasonably made. *See Revel v. Pierce*, 66 F.Supp.3d 517, 527 (D. Del. 2014). The record demonstrates that defense counsel thoroughly explored the{2020 U.S. Dist. LEXIS 17} forensic chemist's disciplinary action during *voir dire*. (D.I. 18-2 at 107-110); *see also Ellerbe*, 2016 Del. Super. LEXIS 381, 2016 WL 4119863, at*3-4. As defense counsel explained in his Rule 61 affidavit, since "[t]here was no testimony showing that [the] event had any impact on the testing in this case," he concluded that the

"unrelated event . . . did not have any probative value concerning the test results in this case." (D.I. 18-2 at 197) This explanation demonstrates that defense counsel engaged in a well-reasoned analysis when deciding not to bring the chemist's prior disciplinary record to the attention of the jury. (D.I. 18-2 at 195-197) Consequently, defense counsel's decision not to cross-examine the forensic chemist about her disciplinary record did not fall below an objective standard of reasonableness.

In addition, Petitioner cannot demonstrate a reasonable probability that the outcome of his proceeding would have been different but for defense counsel's failure to cross-examine the forensic chemist on her disciplinary record. Most significantly, following the *voir dire* of the chemist, the trial court stated that it would deny any application to use the disciplinary action to impeach the chemist's testimony regarding the testing of the{2020 U.S. Dist. LEXIS 18} drugs in Petitioner's case. (D.I. 17-14 at 6-7) Even if the trial court would have permitted the cross-examination in question, Petitioner has failed to demonstrate how knowledge that the chemist was disciplined for failing to wear a safety mask would have altered the jury's consideration of his guilt. In addition, there was overwhelming evidence of drug dealing presented against Petitioner at trial even without the results of the drug report or the chemist's testimony. Viewing these circumstances together demonstrates that the Delaware state courts reasonably determined that Petitioner was not prejudiced by defense counsel's failure to cross-examine the forensic chemist. Accordingly, the Court will deny Claim One as merit less.

B. Claim Two

In Claim Two, Petitioner contends that defense counsel provided ineffective assistance by failing to challenge the DEA forensic chemist's use of the hypergeometric sampling method to analyze the drugs in Petitioner's case. Since Petitioner presented Claim Two to the Delaware state courts for the first time on postconviction appeal, the Delaware Supreme Court only reviewed the argument for plain error under Delaware Supreme Court Rule 8. *See* Del. Sup. Ct. R. 8 (claims not raised in the trial{2020 U.S. Dist. LEXIS 19} court are reviewed only in the interests of justice under Rule 8). By applying the procedural bar of Rule 8, the Delaware Supreme Court articulated a "plain statement" under *Harris v. Reed*, 489 U.S. 255, 263-64, 109 S. Ct. 1038, 103 L. Ed. 2d 308(1989), that its decision rested on state law grounds. Delaware Supreme Court Rule 8 is an independent and adequate state procedural rule precluding federal habeas review absent a showing of cause for the default, and prejudice resulting therefrom, or that a miscarriage of justice will occur if the claim is not reviewed. *See Campbell v. Burris*, 515 F.3d 172, 182 (3d Cir. 2008). As a result, the Court cannot

review the merits of Claim Two absent (1) a showing of cause for the default and prejudice resulting therefrom or (2) a showing that a miscarriage of justice will occur if the claim is not reviewed.

Citing *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), Petitioner attempts to establish cause by blaming postconviction counsel for not raising Claim Two to the Superior Court in his Rule 61 motion. The argument is unavailing. In *Martinez*, the Supreme Court held for the first time that inadequate assistance of counsel during an initial-review state collateral proceeding may establish cause for a petitioner's procedural default of a claim of ineffective assistance of trial counsel. *Id.* at 16-17. In order to obtain relief under *Martinez*, a petitioner must demonstrate that the{2020 U.S. Dist. LEXIS 20} state post-conviction attorney in his first state collateral proceeding was ineffective under the standards established in *Strickland*, that the underlying ineffective assistance of trial counsel claim is substantial, and that petitioner was prejudiced. *Id.* at 9-10, 16-17. A "substantial" ineffective assistance of trial counsel claim is one that has "some merit." *Id.* at 13.

Martinez's limited exception to the procedural default doctrine cannot be used in this proceeding to excuse Petitioner's default of Claim Two because the underlying ineffective assistance of trial counsel claim is not substantial. First, the record belies Petitioner's assertion that defense counsel failed to challenge the chemist's use of the hypergeometric sampling method to analyze the drugs. *See Ellerbe*, 2017 Del. LEXIS 191, 2017 WL 1901809, at *3 (noting that the "record reflects that [trial] counsel questioned the chemist on the reliability of the hypergeometric method and the accuracy of the chemist's findings,"). Second, contrary to Petitioner's assertion, the chemist did not use the hypergeometric sampling method to determine the total weight of the heroin by weighing a certain number of bags and multiplying the consistent weight from those bags by the total number of bags. (D.I. 3 at{2020 U.S. Dist. LEXIS 21} 1) Rather, the chemist only used the hypergeometric model to determine the probability inference of identifying the substance, and then determined the weight by another process. (D.I. 18-2 at 109-110, 112-113) Finally, the chemist satisfied the standard set forth in Delaware Rule of Evidence 702 by testifying that the hypergeometric method is considered reliable by the scientific community. *See* DRE 702; *Ellerbe*, 2017 Del. LEXIS 191, 2017 WL 1901809, at *3 (explaining that the chemist's testimony satisfied the standard set forth in DRE 702). In short, defense counsel did not provide ineffective assistance by failing to raise a meritless argument about the chemist's use of the hypergeometric sampling method. *See United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999).

In the absence of cause, the Court will not address the issue of prejudice. Additionally, the miscarriage of justice exception to the procedural default doctrine is inapplicable because Petitioner has not provided any new reliable evidence of his actual innocence. Accordingly, the court will deny Claim Two as procedurally barred.

IV. MOTION FOR EVIDENTIARY HEARING

Petitioner filed a Motion for an Evidentiary Hearing during the pendency of this proceeding. (D.I 30) He asserts that an evidentiary hearing is necessary so that he can demonstrate cause for his{2020 U.S. Dist. LEXIS 22} default of Claim Two under the *Martinez* standard. (D.I. 30 at 3)

Typically, requests for an evidentiary hearing in a federal habeas proceeding are evaluated under 28 U.S.C. 2254(e)(2), which provides:

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that

(A) the claim relies on -

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.28 U.S.C. 2254(e)(2). In cases where a petitioner is not barred from obtaining an evidentiary hearing under 2254(e)(2), the decision to grant a hearing rests in the discretion of the court. *See Palmer v. Hendricks*, 592 F.3d 386, 393 (3d Cir. 2010); *see also Lee v. Glunt*, 667 F.3d 397, 406 (3d Cir. 2012). When deciding whether to grant a hearing, the "court must consider whether such a hearing could enable an applicant to prove the petition's factual{2020 U.S. Dist. LEXIS 23} allegations," taking into consideration the "deferential standards prescribed by 28 U.S.C. 2254." *Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007). Additionally, the Third Circuit has held that a district court has discretion to grant an evidentiary hearing to evaluate if a petitioner's procedural default may be excused. *See Goldblum v. Klem*, 510 F.3d 204, 221 (3d Cir. 2007); *Cristin v. Brennan*, 281 F.3d 404, 416-17 (3d Cir. 2002).

Here, an evidentiary hearing is unnecessary to evaluate whether Petitioner's procedural default of Claim Two should be excused under *Martinez*, because the Court has already concluded that the ineffective assistance of counsel allegation in Claim Two lacks "some merit." Therefore, the Court will deny Petitioner's Motion for an Evidentiary Hearing.

V. CERTIFICATE OF APPEALABILITY

The Court must decide whether to issue a certificate of appealabilty. *See* 3d Cir. L.A.R. 22.2 (2011), A certificate of appealability may be issued only when a petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). This showing is satisfied when the petitioner demonstrates "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Additionally, if a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the court is not{2020 U.S. Dist. LEXIS 24} required to issue a certificate of appealability unless the petitioner demonstrates that jurists of reason would find debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in its procedural ruling. *See Slack*, 529 U.S. at 484.

The Court has concluded that the instant Petition fails to warrant federal habeas relief and is persuaded that reasonable jurists would not find this conclusion to be debatable. Consequently, the Court will not issue a certificate of appealability.

VI. CONCLUSION

For the foregoing reasons, the Court will deny the instant Petition without an evidentiary hearing. An appropriate Order will be entered.

ORDER

At Wilmington, this Twenty-fifth day of September in 2020, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Petitioner Bernard Ellerbe's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. 2254 (D.I. 1) is DISMISSED, and the relief requested therein is DENIED.

2. Petitioner's Motion for an Evidentiary Hearing (D.I. 30) is DENIED.

3. The Court declines to issue a certificate of appealability because

Petitioner has failed to satisfy the standards set forth in 28 U.S.C. 2253(c)(2). The Clerk{2020 U.S. Dist. LEXIS 25} shall close the case.

/s/ Colm F. Connolly

UNITED STATES DISTRICT JUDGE:

Footnotes

1 Warden Robert May has replaced former Warden Dana Metzger, an original party to this case. See Fed. R. Civ. P. 25(d).

2

This case was originally assigned to the Honorable Gregory M. Sleet and was re assigned to the undersigned judge on September 20, 2018.

3

Murray, 477 U.S. at 496.

BERNARD D. ELLERBE, Petitioner, v. DANA METZGER, Warden and ATTORNEY GENERAL OF THE STATE OF DELAWARE, Respondents.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE
2020 U.S. Dist. LEXIS 8868
Civil Action No. 17-1231-CFC
January 17, 2020, Decided
January 17, 2020, Filed
Editorial Information: Subsequent History

Writ of habeas corpus denied, Dismissed by, Motion denied by Ellerbe v. May, 2020 U.S. Dist. LEXIS 176178 (D. Del., Sept. 25, 2020)

Editorial Information: Prior History

State v. Ellerbe, 2016 Del. Super. LEXIS 381 (Del. Super. Ct., Aug. 2, 2016)

Counsel {2020 U.S. Dist. LEXIS 1}Bernard D. Ellerbe, Petitioner, Pro se, Smyrna, DE.

For Dana Metzger, Matt Denn, Attorney General of the State of Delaware, Respondents: Carolyn Shelly Hake, LEAD ATTORNEY, Delaware Department of Justice, Wilmington, DE.

Judges: Colm F. Connolly, UNITED STATES DISRICT JUDGE.

Opinion

Opinion by: Colm F. Connolly

Opinion

MEMORANDUM

I. BACKGROUND

In 2015, a Delaware Superior Court jury convicted Petitioner Bernard Ellerbe ("Petitioner") of drug dealing, aggravated possession of heroin, possession of drug paraphernalia, two counts of first degree reckless endangering, disregarding a police officer's signal, and reckless driving. He was sentenced to 18 years of imprisonment at Level V, followed by decreasing levels of supervision. *See State v. Ellerbe*, 2016 Del. Super. LEXIS 381, 2016 WL 4119863, at 1 (Del. Super. Ct. Aug. 2, 2016). Petitioner voluntarily dismissed his direct appeal on two occasions. *Id.*

Petitioner filed in the Delaware Superior Court a Rule 61 motion, which was denied. The Delaware Supreme Court affirmed that decision. *See Ellerbe v. State*, 161 A.3d 674, 2017 Del. LEXIS 191, 2017 WL 1901809 (Del. 2017). Petitioner filed a second Rule 61 motion, which the Superior Court summarily dismissed. *See State v. Ellerbe*, 2017 Del. Super. LEXIS 478, 2017 WL 4271207 (Del. Super. Ct. Sep. 26,

2017). Petitioner did not appeal that decision.

Thereafter, Petitioner filed in this Court a Petition for Habeas Corpus Relief to 28 U.S.C. 2254 ("Petition"), challenging his 2015 convictions. (D.I. 1; D.I. 3) The Petition alleges{2020 U.S. Dist. LEXIS 2} two grounds for relief: ineffective assistance of trial counsel for failing to seek to impeach the DEA forensic chemist with evidence of a pending DEA disciplinary proceeding and ineffective assistance of trial counsel for failing to challenge the DEA forensic chemist's use of the hypergeometric sampling method to analyze the drugs in Petitioner's case. (D.I. 1 at 5, 7; D.I. 3) The State filed an Answer to the Petition, arguing that Claim One should be denied as meritless and Claim Two should be denied as procedurally barred. (D.I. 14 at 7-19)

Petitioner filed a Reply to the Answer (D.I. 19), and a supplemental reply (D.I. 24; D.I. 31). Approximately two months later, on June 3, 2019, Petitioner filed a Motion for Summary Judgment, seeking issuance of the writ. (D.I. 26)

II. DISCUSSION

Although not the standard practice, it appears that a party may technically file a motion for summary judgment in federal habeas proceeding. *See* Rule 12 of Rules Governing 2254 Cases, 28 U.S.C. foll. 2254. Summary judgment will only be appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute as to any material fact exists if "the evidence is such that{2020 U.S. Dist. LEXIS 3} a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The moving party has the initial burden of demonstrating that there is no genuine dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The existence of a factual dispute will not preclude summary judgment when the dispute does not involve a material fact. *See Anderson*, 477 U.S. at 248.

The instant Motion for Summary Judgment merely duplicates Claim Two of the Petition, supplementing Petitioner's argument that the chemist used the wrong method to determine the substance and weight of the drugs, and that the amount of drugs testing positive for heroin did not meet the weight requirements of the offenses for which he was convicted. The factual assertions in the State's answer contradict Petitioner's argument that the chemist used the incorrect drug test and/or that the chemist determined the wrong weights. These factual disputes are "genuine issues of material fact" since they go to the very essence of Petitioner's arguments. Accordingly, the Court will deny the instant Motion for

Summary Judgment because the genuine issues of material fact preclude it from ruling in Petitioner's favor at this juncture. The Court will address the merits of the petition in due{2020 U.S. Dist. LEXIS 4} course.

III. CONCLUSION

For the foregoing reasons, the Court concludes that Petitioner's Motion for Summary Judgment should be denied because he is unable to demonstrate the absence of a genuine issue of material fact. An appropriate Order follows.

Dated: January 17, 2020

/s/ Colm F. Connolly

UNITED STATES DISTRICT JUDGE

ORDER

At Wilmington this 17th day of January, 2020, for the reasons set forth in the Memorandum issued this date;

IT IS ORDERED that Petitioner Bernard D. Ellerbe's Motion for Summary Judgment (D.I. 26) is DENIED.

/s/ Colm F. Connolly

UNITED STATES DISTRICT JUDGE

BERNARD D. ELLERBE, Petitioner, v. ROBERT MAY, Warden and ATTORNEY GENERAL OF THE STATE OF DELAWARE, Respondents.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE
2022 U.S. Dist. LEXIS 6773
Civil Action No. 17-1231-CFC
January 13, 2022, Decided
January 13, 2022, Filed
Editorial Information: Prior History

Ellerbe v. May, 2020 U.S. Dist. LEXIS 176178, 2020 WL 5752672 (D. Del., Sept. 25, 2020)

Counsel {2022 U.S. Dist. LEXIS 1}Bernard D. Ellerbe, Petitioner, Pro se, Smyrna, DE.

For Dana Metzger, Matt Denn, Attorney General of the State of Delaware, Respondents: Carolyn Shelly Hake, LEAD ATTORNEY, Delaware Department of Justice, Wilmington, DE.

Judges: Colm F. Connolly, Chief United States District Judge.

Opinion

Opinion by: **Colm F. Connolly**

Opinion

MEMORANDUM

I. INTRODUCTION

In January 2015, a Delaware Superior Court jury convicted Petitioner of drug dealing, aggravated possession of heroin, possession of drug paraphernalia, two counts of first degree reckless endangering, disregarding a police officer's signal, and reckless driving. (D.I. 34 at 2); *see also State v. Ellerbe*, 2016 Del. Super. LEXIS 381, 2016 WL 4119863, at *1 (Del. Super. Ct. Aug. 2, 2016). The Superior Court sentenced him to eighteen years of imprisonment at Level V, followed by decreasing levels of supervision. (D.I. 34 at 2); *see also Ellerbe*, 2016 Del. Super. LEXIS 381, 2016 WL 4119863, at *1. Petitioner filed a notice of appeal. (D.I. 34 at 2) In August 2015, while his appeal was pending, Petitioner filed a *pro se* motion for reduction of sentence. (*Id.* at 2-3) The Superior Court deferred decision on the motion during the pendency of Petitioner's direct appeal. (D.I. 18-2 at 189-190) In September 2015, Petitioner voluntarily withdrew his appeal. (*Id.* at 190) The Superior Court denied Petitioner's motion for reduction of sentence on{2022 U.S. Dist. LEXIS 2} January 11, 2016. (*Id.* at 187-192) Petitioner did not appeal that decision.

In December 2016, this time represented by counsel, Petitioner filed a motion for postconviction relief pursuant to Delaware Superior Court Criminal Rule 61 ("Rule 61

motion"). The Superior Court denied the Rule 61 motion in August 2016, and the Delaware Supreme Court affirmed that decision in May 2017. *See Ellerbe*, 2016 Del. Super. LEXIS 381, 2016 WL 4119863, at *4; *State v. Ellerbe*, 161 A.3d 674 (Table), 2017 WL 1901809, at *4 (May 8, 2017). Petitioner filed a second Rule 61 motion, which the Superior Court summarily dismissed. *See State v. Ellerbe*, 2017 Del. Super. LEXIS 478, 2017 WL 4271207 (Del. Super. Ct. 26, 2017). Petitioner did not appeal that decision.

Thereafter, Petitioner filed in this Court a 2254 Petition asserting the following two ineffective assistance of counsel claims: (1) trial counsel provided ineffective assistance by failing to impeach the DEA forensic chemist who analyzed the drugs seized in his case with evidence of a pending DEA disciplinary proceeding ("Claim One"); and (2) trial counsel provided ineffective assistance by failing to challenge the DEA forensic chemist's use of the hypergeometric sampling method to analyze the drugs in Petitioner's case ("Claim Two"). (D.I. 34 at 8) In a Memorandum Opinion dated September 25, 2020, the Court denied Claim One as meritless and Claim Two as procedurally barred. (D.I. 34; D.I 35) On October 1, 2020, Petitioner simultaneously{2022 U.S. Dist. LEXIS 3} filed a Notice of Appeal from that decision (D.I. 36) and a timely motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e) (D.I 37).

II. STANDARD OF REVIEW

A motion for reconsideration/amend judgment filed pursuant Federal Rule of Civil Procedure 59(e) is "a device to relitigate the original issue decided by the district court, and [it is] used to allege legal error." *United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003). In order to prevail on a Rule 59(e) motion, the moving party must show one of the following: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court issued its order; or (3) the need to correct a clear error of law or fact or to prevent a manifest injustice. *Max's Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). A motion for reconsideration is not appropriate to reargue issues that the court has already considered and decided. *Brambles USA Inc. v. Blocker*, 735 F. Supp. 1239, 1240 (D. Del. 1990).

III. DISCUSSION

The DEA forensic chemist who tested the drug evidence in Petitioner's case determined that the net weight of the 262 bags of heroin seized was 3.5 grams. The "chemist explained that, after analyzing 27 of the 262 individual glassine bags and finding that 27 bags contained heroin, she used a hypergeometric sampling method1 to determine with 95% accuracy that 90% of the remaining 235 bags also contained heroin." *Ellerbe*, 161 A.3d 674, 2017 WL 1901809, at *1.

In Claim{2022 U.S. Dist. LEXIS 4} Two of his Petition, Petitioner argued that trial counsel provided ineffective assistance by failing to challenge the DEA forensic chemist's use of the hypergeometric sampling method to analyze the drugs in Petitioner's case. The Court denied Claim Two as procedurally barred from habeas review. Petitioner's instant Rule 59(e) Motion challenges the Court's denial of Claim Two as procedurally barred and, more specifically, its conclusion that the limited exception to procedurally defaulted ineffective assistance of trial counsel claims established in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) does not apply in his case. (D.I. 37 at 1) According to Petitioner, the Court misinterpreted the underlying ineffective assistance of trial counsel argument in Claim Two as asserting that trial counsel "failed to challenge the reliability of the hypergeometric sampling." (D.I. 37 at 1) Instead, Petitioner contends that he was

> arguing [that his] trial attorney was deficient for not challenging the use of hypergeometric sampling as a matter of law. [...] [T]rial counsel [... committed] an inexcusable mistake of law [by] unreasonabl[y] fail[ing] to understand the plain language of Title 16 Del. C. Sec. 4751, which doesn't permit hypergeometric sampling on any drugs except{2022 U.S. Dist. LEXIS 5} prescription drugs.(D.I. 37 at 1)

In essence, Petitioner asserts that the Court would have determined that Claim Two had some merit warranting the excusal of Petitioner's procedural default under *Martinez's* exception to the procedural default doctrine if the Court had properly reviewed Claim Two as alleging that trial counsel failed to challenge the propriety of using the hypergeometric sampling method in his case. (D.I. 37 at 6-7) Petitioner's Rule 59(e) Motion appears to invoke the "clear error of law or fact" and "manifest injustice" clause of Rule 59(e).

The Court is not entirely convinced that Petitioner's instant contention regarding trial counsel's failure to challenge the propriety of hypergeometric testing on any of the drugs in his case asserts a separate and distinct ineffective assistance allegation from the argument explicitly considered by the Court in its Memorandum Opinion. Nevertheless, to the extent Petitioner's instant contention does constitute a different argument deserving further discussion,2 the argument does not warrant reconsideration of the Court's dismissal of Claim Two as procedurally barred, because the argument does not trigger *Martinez's* limited exception to the procedural{2022 U.S. Dist. LEXIS 6} default doctrine. First, Petitioner's contention that the hypergeometric sampling procedure was improperly used in his case lacks merit. Delaware courts have explicitly approved the "hypergeometric sampling procedure that the

Delaware Division of Forensic Science was using for testing large quantities of heroin." *State v. Mitchell*, 2017 Del. Super. LEXIS 440, 2017 WL 3912974, at *1 (Del. Super. Ct. Sept. 7, 2017). Additionally, Petitioner cannot demonstrate that he was prejudiced by defense counsel's failure to challenge the use of the hypergeometric sampling method in his case, because there was sufficient other evidence of drug dealing for a reasonable jury to convict Petitioner even without scientific confirmation that the seized substance was heroin.3 Since Petitioner cannot demonstrate prejudice, his instant contention regarding trial counsel's ineffective assistance is meritless and fails to satisfy *Martinez's* standard for excusing a procedural default.

In summary, the Petitioner's instant argument fails to present a clear error of law or fact or demonstrate a manifest injustice of the sort that would compel reconsideration of the Court's denial of Claim Two. Accordingly, the Court will deny Petitioner's Rule 59(e) motion.

IV. CONCLUSION

For the aforementioned reasons, the Court will{2022 U.S. Dist. LEXIS 7} deny the instant Rule. 59(e) Motion. (D.I. 37) The Court also declines to issue a certificate of appealability, because Petitioner has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2); *see United States v. Eyer*, 113 F.3d 470 (3d Cir. 1997); 3d Cir. LAR 22.2 (2011).

Dated: January 13, 2022

/s/ Colm F. Connolly

Colm F. Connolly

Chief Judge

ORDER

At Wilmington this 13th day of January, 2022;

For the reasons set forth in the Memorandum issued this date, IT IS HEREBY ORDERED that

1. Petitioner Bernard Ellerbe's Rule 59(e) Motion to Alter or Amend Judgment is DENIED. (D.I. 37)

2. The Court declines to issue a certificate of appealability because Petitioner has failed to satisfy the standards set forth in 28 U.S.C. 2253(c)(2).

/s/ Colm F. Connolly

Colm F. Connolly

Chief Judge

Footnotes

1

"The hypergeometric sampling methodology allows the testing laboratory to test a portion of the seized drugs, and, based upon those test results, infer certain conclusions about the balance of the untested seized drugs. It is a statistical model based upon a mathematical formula that produces a statistical inference that, if a certain number of randomly selected samples are tested and all test positive, then it is probable that most of the remaining items would likewise test positive if actually tested." *State v. Roundtree*, 2015 Del. Super. LEXIS 495, 2015 WL 5461668, at *2 (Del. Super. Ct. Sept. 17, 2015)

2

Although Petitioner raised this specific allegation concerning trial counsel's failure to challenge the propriety of using hypergeometric sampling in his Response to the State's Answer, the Court did not explicitly address the instant argument when it considered the general ineffective assistance allegation presented in Claim Two.

3

In order for Petitioner to be guilty of drug dealing under 16 Del. Code 4752(2), the State had to prove beyond a reasonable doubt that Petitioner: (1) knowingly possessed with the intent to deliver two or more grams of "morphine, opium, any salt of an isomer thereof, or heroin [...] or any mixture containing any such controlled substance" and (2) that the offense occurred in a vehicle. (D.I. 18-2 at 18) In addition to the forensic chemist's testing results and testimony, the record contains the following evidence of drug dealing. Detective Mark Grajewski and Officer Michael Cornbrooks testified that they observed Petitioner engage in a hand-to-hand transaction with the driver of another vehicle. (D.I. 17-13 at 73, 80-81) Following the hand-to-hand transaction, Detective Grajewski observed Petitioner counting money inside his car as the other vehicle drove away. (*Id.* at 73, 78) Petitioner also made excessive efforts to evade police officers after they attempted to pull him over, including traveling at unreasonable speeds. (*Id.* at 80, 84) After Petitioner crashed his car, Special Agent Hughes found a plastic bag on Petitioner's lap containing 260 pre-packaged bags of a substance that field tested positive for heroin and weighed a total of 3.9 grams. (D.I. 17-3 at 86, 96; D.I. 18-2 at 16) The police also found drug paraphernalia in the car - five cell phones and approximately $11,000 in cash. (D.I. 17-3 at 98, 100)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-3018

BERNARD D. ELLERBE,
Appellant

v.

WARDEN JAMES T. VAUGHN CORRECTIONAL CENTER, ET AL.

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civ. No. 1-17-cv-01231)
District Judge: Honorable Colm F. Connolly

SUR PETITION FOR PANEL REHEARING

Present: MCKEE, GREENAWAY, JR. and PORTER, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it is hereby O R D E R E D that the petition for rehearing by the panel is denied.

BY THE COURT,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: May 6, 2022
ARR/cc: BE; CSH

BERNARD ELLERBE, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.
SUPREME COURT OF DELAWARE
161 A.3d 674; 2017 Del. LEXIS 191
No. 453, 2016
May 8, 2017, Decided
March 2, 2017, Submitted
Notice:

PUBLISHED IN TABLE FORMAT IN THE ATLANTIC REPORTER.

Editorial Information: Subsequent History

Motion for Reargument & Rehearing en Banc filed 5/16/17; Denied 5/19/17. Case Closed May 19, 2017.

Editorial Information: Prior History

Court Below-Superior Court of the State of Delaware. Cr. ID No. 1406020386.State v. Ellerbe, 2016 Del. Super. LEXIS 381 (Del. Super. Ct., Aug. 2, 2016)

Judges: Before VALIHURA, VAUGHN, and SEITZ, Justices.

CASE SUMMARY Defendant failed to show ineffective assistance of counsel because counsel's decision not to use evidence of a disciplinary sanction imposed upon the forensic chemist who analyzed the drugs in defendant's case to impeach the chemist was reasonable as the evidence was of little value in defendant's case.

OVERVIEW: HOLDINGS: [1]-Defendant failed to show ineffective assistance of counsel because counsel's decision not to use evidence of a disciplinary sanction imposed upon the forensic chemist who analyzed the drugs in defendant's case to impeach the chemist was reasonable as the sanction, for an alleged violation by the chemist of a U.S. Drug Enforcement Administration safety protocol when handling drug evidence in another case more than a year before defendant's trial, was of little value in defendant's case; [2]-Defendant failed to show ineffective assistance of counsel because defense counsel challenged the chemist's use of the hypergeometric sampling method when analyzing the drugs in defendant's case. The chemist then testified that the method was considered reliable by the scientific community, and that she followed normal laboratory procedures when using the method in defendant's case.

OUTCOME: Judgment affirmed.

LexisNexis Headnotes

A prosecutor's nondisclosure of material evidence affecting the credibility of a witness, which goes uncorrected, falls within the requirements of Brady.

Evidence > Relevance > Relevant Evidence

Under Del. R. Evid. 403, before evidence can be used to impeach the credibility of a witness, a trial court must determine if the probative value of the evidence outweighs its prejudicial effect.

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

To prevail on an ineffective counsel claim, a defendant has to show that defense counsel's representation fell below an objective standard of reasonableness and that defendant was prejudiced as a result of counsel's deficient representation.

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Ineffective Assistance

When a defendant's claim of ineffective assistance is not raised in a postconviction motion, appellate review of the claim is limited to plain error. Del. Sup. Ct. R. 8.

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions

Plain error is error that is so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of a trial.

Evidence > Testimony > Experts > Daubert Standard

Evidence > Testimony > Experts > Criminal Trials

Under Del. R. Evid. 702, a qualified expert need only testify that any test used as a basis for the expert's opinion is reasonably relied upon by experts in his or her field.

Opinion

Opinion by: James T. Vaughn

Opinion

ORDER

This 8th day of May 2017, upon consideration of the parties' briefs, the appellant's post-briefing submission filed on March 2, 2017, and the record on appeal, it appears to the Court that:

(1) The appellant, Bernard Ellerbe, filed this appeal from the Superior

Court's order of August 2, 2016, denying his first motion for postconviction relief under Superior Court Criminal Rule 61.1 We conclude there is no merit to the appeal and affirm the Superior Court's judgment.

(2) On June 25, 2014, Ellerbe was stopped after police observed him engage in an apparent hand-to-hand drug transaction through his car window. Ellerbe sped away when the police approached his car, and in the high-speed evasion that ensued, Ellerbe wrecked his car. When removing Ellerbe from the wreckage, the police found more than 260 individual glassine bags of heroin in Ellerbe's lap and nearly $12,000 in his pockets.

(3) Ellerbe was indicted for several drug offenses and on charges of reckless endangering, reckless driving, and disregarding a police signal. The drugs seized from Ellerbe were sent to a Drug Enforcement Administration ("DEA") laboratory where they were analyzed by a forensic chemist on December 17, 2014.

(4) Ellerbe went to trial in late January 2015. A week before trial, an official from the DEA disclosed to the prosecutor that, on July 1, 2014, the DEA's Board of Professional Conduct issued a two-day suspension without pay to the forensic chemist who analyzed the drugs in Ellerbe's case in December 2014. The disciplinary sanction arose from the forensic chemist's alleged violation of a DEA safety protocol when handling drug evidence in a case in November 2013. Because the forensic chemist was a key witness in the State's case against Ellerbe and evidence about the safety violation, if permitted by the court, could be used by the defense to impeach the chemist at trial, the prosecutor informed defense counsel about the disciplinary sanction.2

(5) Under Delaware Uniform Rule of Evidence 403 ("DRE 403"), before evidence can be used to impeach the credibility of a witness, the Superior Court must determine if the probative value of the evidence outweighs its prejudicial effect.3 To make the determination under DRE 403 in Ellerbe's case, the trial judge conducted *voir dire* of the chemist, outside the presence of the jury, to determine if Ellerbe's defense counsel should be allowed to use evidence of the disciplinary sanction to impeach the chemist at trial.

(6) During *voir dire*, the chemist testified that the disciplinary matter arose from her alleged violation of a DEA safety policy when she neglected to wear a protective mask when testing a large quantity of cocaine in 2013. The chemist testified that her appeal from the Board's decision was still pending before a DEA appeals official, and that, for the pendency of the disciplinary matter, she continued examining drug evidence for the DEA and to testify in cases. The chemist further testified that, if the Board's decision is upheld

by the appeals official, she will continue in her duties with the DEA, and that there was no allegation that she failed to follow any protocol in Ellerbe's case.

(7) At the conclusion of *voir dire*, defense counsel advised the court and opposing counsel that he would not be moving to use evidence of the disciplinary sanction to impeach the chemist because, in counsel's view, the evidence was not relevant in Ellerbe's case. In this excerpt from the *voir dire* transcript, the trial judge agreed with defense counsel's assessment as follows:

That's fine, I think that's appropriate after hearing the entirety of it. Under Rule 403 I do believe that probative value would be substantially outweighed by the danger of unfair prejudice in this particular case, mainly confusing the issues and really trying to have some mini trial of a personnel matter that hasn't even been fully determined yet. If there's a question as to a circumstance of not following protocol that changed the weight, the analysis or something like that, it may be more probative, but in this case, it's quite frankly not taking a safety precaution that she should have taken during testing.

* * *

And as noted through the testimony and cross-examination, even that matter and whether or not she will be held to some sanction from her own agency for violating some safety protocol or laboratory protocol of their own and again, had nothing to do with the validity of the actual testing, findings or the like, but their own personal safety standard that they set, then the court might find some greater probative value.

If not, and I think that the defense is absolutely correct in understanding that this probably would not lead to anything that is useful, and therefore I think it is appropriate to be excluded under Rule 403, even if there was a request to put it in.4

(8) When trial resumed, the chemist took the stand and testified about the tests she conducted on the drug evidence seized in Ellerbe's case and the scientific method she used to determine that the evidence was heroin with a net weight of 3.8 grams. In relevant part, the chemist explained that, after analyzing 27 of the 262 individual glassine bags and finding that 27 bags contained heroin, she used a hypergeometric sampling method to determine with 95% accuracy that 90% of the remaining 235 bags also contained heroin.5

(9) On January 30, 2015, the jury convicted Ellerbe of Drug Dealing, Aggravated Possession of Heroin, Possession of Drug Paraphernalia, Reckless Endangering First Degree, Disregarding a Police Officer's Signal, and Reckless Driving. On May 29, 2015, following a presentence

investigation, the Superior Court sentenced Ellerbe as follows: Drug Dealing and Aggravated Possession6-twenty-five years at Level V, suspended after fifteen years for ten years at Level IV, suspended after six months for eighteen months at Level III; Reckless Endangering- one year and six months at Level V for each of two counts; Disregarding a Police Officer's Signal-two years at Level V, suspended for one year at Level III; Possession of Drug Paraphernalia- six months at Level V, suspended for six months at Level III for Possession of Drug Paraphernalia. All told the sentence imposed eighteen years of unsuspended Level V time. Ellerbe filed a direct appeal of his convictions but then voluntarily dismissed the appeal to pursue postconviction relief with the assistance of new privately-retained counsel.

(10) In December 2015 and February 2016, Ellerbe's privately-retained postconviction counsel filed a motion and an amended motion for postconviction relief. The motion, as amended, alleged one claim-that defense counsel's decision not to seek to impeach the chemist with evidence of the disciplinary sanction was ineffective assistance of counsel.

(11) To prevail on his ineffective counsel claim, Ellerbe had to show that defense counsel's "representation fell below an objective standard of reasonableness" and that Ellerbe was prejudiced as a result of counsel's deficient representation.7 To meet the first objective, Ellerbe argued that defense counsel's decision to forego using the impeachment evidence was unreasonable because withholding evidence that the chemist had improperly handled drug evidence in another case deprived the jury of crucial evidence to evaluate the chemist's credibility in Ellerbe's case. To meet the second objective, Ellerbe argued that defense counsel's error was prejudicial because the chemist's testimony was key to proving the elements of the most serious drug charges, and if Ellerbe had the opportunity to challenge the chemist's credibility, there was a reasonable chance the jury would not have convicted Ellerbe of those charges.

(12) Ellerbe's postconviction motion was referred to the Superior Court judge who presided over Ellerbe's trial. The trial judge directed defense counsel to file an affidavit in response to the allegation of ineffective assistance of counsel and the State to file a response to the motion. After those pleadings were filed, postconviction counsel filed a reply.

(13) By order dated August 2, 2016, the Superior Court denied the postconviction motion after analyzing the ineffective counsel claim and concluding it was without merit. The court determined, first, that it was reasonable for defense counsel to conclude that the chemist's disciplinary sanction was

of little value in Ellerbe's case. The violation reflected little about the validity of the testing in the 2013 case, and the violation took place in November 2013 more than a year before the chemist's involvement in Ellerbe's case.

(14) On the question of prejudice, the court determined that Ellerbe was not prejudiced by defense counsel's decision not to impeach the chemist with the disciplinary sanction. The court concluded that it was unlikely that additional cross-examination of the chemist would have overcome the other evidence in Ellerbe's case, which included the police officers' visual observations of the drug transaction, Ellerbe's high-speed evasion of the police, the large amount of heroin found in Ellerbe's lap, and the large amount of cash found in his pockets. Moreover, the court acknowledged its prior determination, at *voir dire*, that if defense counsel had sought to impeach the chemist with evidence of the disciplinary sanction, the court likely would have ruled the evidence inadmissible under DRE 403 because its probative value was substantially outweighed by the danger of unfair prejudice.

(15) On appeal from the Superior Court's denial of postconviction relief, Ellerbe has raised two claims of ineffective assistance of counsel. First, in his opening brief, Ellerbe claims that his defense counsel's decision not to use the impeachment evidence was ineffective assistance of counsel. Second, in his post-briefing submission, Ellerbe claims that his defense counsel's failure to challenge the chemist's use of the hypergeometric sampling method also was ineffective. Because Ellerbe's second claim of ineffective assistance was not raised in his postconviction motion, our review of the claim is limited to plain error.8

(16) The record does not reflect plain error in connection with Ellerbe's second claim of ineffective assistance of counsel. First, the record does not reflect, as Ellerbe claims, that defense counsel failed to challenge the chemist's use of the hypergeometric sampling method when analyzing the drugs in Ellerbe's case. Rather, the record reflects that defense counsel questioned the chemist on the reliability of the hypergeometric method and the accuracy of the chemist's findings. Second, the chemist testified that the hypergeometric method is considered reliable by the scientific community, and that she followed normal laboratory procedures when using the method in Ellerbe's case. Under DRE 702, a qualified expert need only testify that any test used as a basis for the expert's opinion is reasonably relied upon by experts in her field.9 That standard was met here.

(17) As for Ellerbe's first claim of ineffective assistance of counsel, which was thoroughly litigated in the postconviction proceeding, after careful consideration of the parties' briefs we conclude that the claim is without merit for the reasons stated

in the Superior Court's order of August 2, 2016. Ultimately, the Superior Court determined, and we agree, that "[w]ith no specifics offered as to how the additional cross-examination now suggested would have changed the outcome of the trial, Ellerbe cannot succeed on a claim of ineffective assistance of counsel."10

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ James T. Vaughn

Justice

Footnotes

1

State v. Ellerbe, 2016 Del. Super. LEXIS 381, 2016 WL 4119863 (Del. Super. Aug. 2, 2016).
2

See Giglio v. United States, 405 U.S. 150, 153-54, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (holding that the prosecutor's nondisclosure of material evidence affecting a witness' credibility, which goes uncorrected, falls within the requirements of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)).
3

See Del. Unif. R. Evid. 403 (governing exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time).
4

Trial Tr. at 23-25 (Jan. 30, 2015).
5

See generally State v. Roundtree, 2015 Del. Super. LEXIS 495, 2015 WL 5461668, at *2 (Del. Super. Sept. 17, 2015) (explaining that hypergeometric sampling methodology is a mathematical formula that allows a laboratory to test a portion of a quantity of drugs and, based upon those results, infer certain conclusions about the untested portion of the drugs. If a certain number of randomly selected samples are tested and all test positive, it is probable that most of the remaining items would likewise test positive if actually tested.)
6

The Drug Dealing and Aggravated Possession convictions merged for purposes of sentencing.
7

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
8

Del. Supr. Ct. R. 8. *See Trump v. State*, 753 A.2d 963, 971 (Del. 2000) (citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) providing that plain error is error that is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial"))).

9

See Del. Unif. R. Evid. 702 (governing testimony by experts). *Santiago v. State*. 510 A.2d 488, 490 (1986).

10

2016 Del. Super. LEXIS 381, [WL] note 1, at *4.

STATE OF DELAWARE, v. BERNARD ELLERBE, Defendant.
SUPERIOR COURT OF DELAWARE
2016 Del. Super. LEXIS 381
Crim. ID No. 1406020386
August 2, 2016, Decided
June 2, 2016, Submitted
Notice:

THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Editorial Information: Subsequent History

Decision reached on appeal by Ellerbe v. State, 155 A.3d 1283, 2017 Del. LEXIS 42 (Del., Feb. 2, 2017)Affirmed by Ellerbe v. State, 161 A.3d 674, 2017 Del. LEXIS 191 (Del., May 8, 2017)Post-conviction relief denied at State v. Ellerbe, 2017 Del. Super. LEXIS 478 (Del. Super. Ct., Sept. 26, 2017)Habeas corpus proceeding at, Summary judgment denied by Ellerbe v. Metzger, 2020 U.S. Dist. LEXIS 8868 (D. Del., Jan. 17, 2020)

Editorial Information: Prior History

Cr. A. Nos. IN 14-07-0530, etc.State v. Ellerbe, 2014 Del. Super. LEXIS 55 (Del. Super. Ct., Jan. 27, 2014)

Judges: PAUL R. WALLACE, JUDGE.

CASE SUMMARY The court denied an inmate's postconviction relief motion under Del. Super. Ct. R. Crim. P. 61 because his counsel was not ineffective for failing to cross-examine a State witness regarding her prior disciplinary record, as counsel's tactical decision was reasonable and the evidence against the inmate was overwhelming.

OVERVIEW: HOLDINGS: [1]-An inmate's motion for postconviction relief under Del. Super. Ct. R. Crim. P. 61 lacked merit, as he failed to show that his counsel was ineffective during cross-examination of a forensic chemist for the State because counsel's decision not to discuss the chemist's prior disciplinary record for purposes of impeachment was objectively reasonable, it was a tactical decision that was entitled to great weight and deference, and it was not shown that such evidence would have been admissible under Del. R. Evid. 608(b) and 403; [2]-Moreover, the inmate did not show that even if the evidence was admitted, it would have affected the outcome of the proceeding because it had very little probative value with respect to the drugs involved in the inmate's crime, and the evidence against the inmate was overwhelming.

OUTCOME: Motion denied.

LexisNexis Headnotes

Evidence > Testimony > Credibility > Impeachment > Bad Character for Truthfulness > Specific Instances

Evidence > Relevance > Confusion, Prejudice & Waste of Time

Del. R. Evid. 608(b)(1) provides that specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, may in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness. Del. R. Evid. 403 provides that although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

Evidence > Inferences & Presumptions > Presumption of Regularity

In order to prevail on a claim for ineffective assistance of counsel pursuant to Del. Super. Ct. R. Crim. P. 61, a defendant must show both: (a) that counsel's representation fell below an objective standard of reasonableness; and (b) that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. A defendant may not rely on conclusory statements of ineffective assistance; instead he must plead his allegations of prejudice with particularity. In evaluating this claim, the court is mindful that there is a strong presumption that the trial counsel's representation was reasonable, and that it is not the court's function to second-guess reasonable trial tactics. A defendant fails to carry his burden to establish either showing required by the ineffective assistance of counsel test.

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

It should be noted that even evidence of isolated poor strategy, inexperience, or bad tactics does not necessarily amount to ineffective assistance of counsel.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance > Trials

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

An attorney's decision as to how to cross-examine a witness is a tactical decision which deserves great weight and deference.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

If an attorney makes a strategic choice after thorough investigation of law and facts relevant to plausible options, that decision is virtually unchallengeable. Whether to call a witness, and how to cross-examine those who are called are tactical decisions. So long as the decision to cross-examine is made reasonably, it will not constitute a basis for a claim of ineffective assistance of counsel.

Evidence > Inferences & Presumptions > Presumption of Regularity

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Under Strickland, the strategic decisions made by counsel are entitled to a strong presumption of reasonableness. To restate the requirements of Strickland, a defendant must establish two things, not just one: that trial counsel's performance was deficient and that but for that deficiency, the outcome of the proceedings would have been different. If a defendant cannot establish both prongs, then the ineffective assistance of counsel claim fails.

Opinion

Opinion by: **PAUL R. WALLACE**

Opinion

ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

This 2nd day of August, 2016, upon consideration of the Defendant Bernard Ellerbe's ("Ellerbe") Motion for Postconviction Relief (D.I. 48); the State's Response thereto (D.I. 50); his trial counsel's affidavit (D.I. 47); Ellerbe's Reply Letter (D.I. 51); and the record in this matter, it appears to the Court that:

(1) On June 25, 2014, New Castle County Police Detective Mark Grajewski, Drug Enforcement Administration (DEA) Task Force Officer Michael Combrooks, and DEA Special Agent Dave Hughes met in a restaurant's parking lot to discuss a surveillance operation.1 Unrelated to their operation, the officers noticed a white car that was occupied by two individuals pull in. Moments later a black Chevy Malibu entered the lot, circled around as if looking for someone, then pulled directly next to the white car.2 Each vehicle rolled down its window and the drivers brought their hands together as if to exchange something.3 The white car drove away, while police observed the black car's driver - later identified as Ellerbe - counting money.4 At that point, officers suspected a drug transaction had occurred and decided to stop Ellerbe for further investigation.5 The officers, each in his own unmarked car, followed Ellerbe out of the parking lot.6

(2) Officer Combrooks initiated his emergency lights and Ellerbe pulled over onto the road's shoulder.7 But as soon as Officer Combrooks approached the car, Ellerbe sped away.8

(3) Ellerbe then led police on a high speed chase, which ultimately resulted in him losing control of his car and striking a tree.9 Officers began to remove Ellerbe, who was not seriously injured, from the wreckage and found a ripped bag containing twenty bundles, or more than 260 individual bags, of heroin on his lap, as well as approximately $12,000 cash in his pocket.10

(4) Ellerbe was indicted by a grand jury on eleven charges related to drug possession and police evasion. A two-day jury trial was conducted in late January 2015. Michael C. Heyden, Esquire ("Heyden") represented Ellerbe throughout the trial. The jury found Ellerbe guilty of Drug Dealing, Aggravated Possession of Heroin, Possession of Drug Paraphernalia, Reckless Endangering in the First Degree (two counts), Disregarding a Police Officer's Signal, and Reckless Driving.11 After a pre-sentence investigation was prepared, the Court sentenced Ellerbe to eighteen years of imprisonment followed by diminishing levels of partial confinement and probationary supervision.12

(5) Heyden filed a Notice of Appeal to the Delaware Supreme Court on Ellerbe's behalf, but it was voluntarily dismissed,13 so that Ellerbe's new

(and present) counsel could file his appeal.14 On September 25, 2015, Ellerbe again voluntarily dismissed his direct appeal.

(6) This amended motion is Ellebe's first and timely motion for postconviction relief.15 He raises a single claim alleging ineffective assistance of counsel. Specifically, Ellerbe seeks vacatur of his conviction and a new trial because, in his estimation, his trial counsel, Heyden, was constitutionally ineffective when cross-examining one of the State's witnesses, Ms. Tara Rossy ("Rossy").16

(7) DEA Forensic Chemist Rossy testified regarding her December 2014 analysis of the heroin seized from Ellerbe and his car.17 Rossy tested the seized items and concluded that the substance was heroin totaling 3.8 grams.18

(8) Prior to trial, the State revealed that Rossy had tested positive for benzodiazepine on November 21, 2013, during a random DEA employee drug test.19 Heyden explored this issue outside the presence of the jury via voir *dire*20 Rossy testified that immediately prior to her positive test, she had failed to wear a protective mask while analyzing a 576-kilo cocaine specimen in an unrelated matter.21 In response to this violation, the DEA suspended Rossy from her position for two days without pay.22 At the time of trial, Rossy was awaiting the results of her appeal of that administrative decision.23 No allegations of wrongdoing were made against Rossy in the present case.

(9) Ellerbe now contends that Heyden did not effectively cross-examine Rossy regarding her prior disciplinary record for purposes of impeachment under Delaware Rules of Evidence 608(b) or 403.24 According to Ellerbe, because Heyden did not bring the disciplinary action to the jury's attention, the jury was "unable to fully evaluate her credibility at trial."25 According to Ellerbe, this failure was an unreasonable trial strategy that unfairly prejudiced him, and had the jury heard this evidence, the outcome of his trial would have been different.

(10) In order to prevail on a claim for ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, Ellerbe must show both: (a) that Heyden's representation fell below an objective standard of reasonableness, and (b) that there is a reasonable probability that but for Heyden's errors, the result of the proceeding would have been different.26 Ellerbe may not rely on conclusory statements of ineffective assistance; instead he must plead his allegations of prejudice with particularity.27 In evaluating this claim, the Court is mindful that there is a strong presumption that the trial counsel's representation was reasonable,28 and that "[i]t is not this Court's function to second-guess reasonable trial tactics."29 Ellerbe fails to carry his burden to establish

either showing required by the ineffective assistance of counsel test.

(11) First, Heyden's decision not to cross-examine Ms. Rossy on her prior disciplinary record was objectively reasonable.30 An attorney's decision as to how to cross-examine a witness is a tactical decision which deserves great weight and deference.31 Heyden thoroughly explored Rossy's disciplinary action during voir dire. From this testimony, it was reasonable for Heyden to conclude that Rossy's 2013 safety violation - which reflected little as to the validity of the testing itself and took place over one year prior to her involvement with Ellerbe's case - was of little value.32 Ellerbe has thus failed to overcome the strong presumption that Heyden acted reasonably33 and on that basis alone his ineffectiveness claim must fail.34

(12) Second, however, Ellerbe also has failed to demonstrate that the Court would have permitted the cross-examination in question or that the testimony would have resulted in a different outcome at trial.35 After conducting *voir dire*, the Court observed that the probative value of questioning Rossy on this issue would have been substantially outweighed by the danger of unfair prejudice, and thus, likely inadmissible.36 The record does not reflect that Rossy failed to follow any DEA testing protocol or other applicable standards in Ellerbe's particular case. Her failure to follow a safety standard over a year prior would have had minimal, if any, impact on the jury's consideration. Moreover, it is unlikely that Rossy's additional testimony would have overcome the overwhelming evidence against Ellerbe, including: the Officers' visual observations of the drug transaction between Ellerbe and the white car, Ellerbe's high-speed evasion of police, the large amount of heroin found on Ellerbe's lap when pulled from the car, and the large amount of cash found on his person. With no specifics offered as to how the additional cross-examination now suggested would have changed the outcome of the trial, Ellerbe cannot succeed on a claim of ineffective assistance of counsel.37

(13) Ellerbe has not shown that Hey den's representation fell below an objective standard of reasonableness or that, but for Heyden's alleged errors, there is a reasonable probability that his trial would have been different. Accordingly, Ellerbe's Amended Motion for Postconviction Relief must be DENIED.

SO ORDERED this 2nd day of August, 2016.

/s/ Paul R. Wallace

PAUL R. WALLACE, JUDGE

Footnotes

(aggravated possession); *id.* at 4771 (possession of drug paraphernalia); *id.* at tit. 11, 604 (reckless endangering in the first degree); *id.* at tit. 21, 4103(b) (disregarding a police officer's signal); and *id.* at 4175(a) (reckless driving).

1

Jan. 29, 2015 Tr. Test. at 57-59.

2

Id. at 61-63.

3

On the first day of trial, the State entered a nolle prosequi on five additional charges brought in the June 26, 2014 indictment. *See* Def.'s Mot. at 2 n.7.

12

Id. at 63.

4

Id. at 64.

5

Sentencing Order, *State v. Bernard Ellerbe*, ID Nos. 1406020386 and 1306016966 (Del. Super. Ct. June 3, 2015).

13

Id. at 64-65.

6

Not. of Dismissal, *Ellerbe v. State*, No. 324, 2015 (June 26, 2015).

14

Id.

7

Id. at 67, 99.

8

Not. of Appeal, *Bernard Ellerbe v. State*, No. 330, 2015 (Del. filed June 25, 2015). While his direct appeal was pending, Ellerbe filed a *pro se* sentence reduction motion; the Court deferred decision on that application until Ellerbe's appeal finalized. Order, *State v. Bernard Ellerbe*, ID Nos. 1406020386 and 1306016966 (Del. Super. Ct. Sept. 4, 2015) (staying and deferring decision on Ellerbe's Rule 35(b) motion until disposition of his pending appeal).

15

Id. at 100.

9

Id. at 108-115.

10

Id. at 116-117.

11

See Del.Code Ann. tit. 16, 4752(2) (2014) (drug dealing); *id.* at 4752(4)

On December 18, 2015, present counsel filed Ellerbe's motion for postconviction relief (D.I. 43) that has since been supplemented and amended to its current form. (D.I. 45 & 47).
16

Def.'s Mot. for Post Conviction Relief ("Def.'s Mot.") at 18-24; Def.'s Reply Ltr. (June 2, 2016).
17

Jan. 30, 2015 Tr. Test. at 3-39.
18

Id. at 32-33.
19

Id. at 8-9.
20

See id at 3-25.
21

Id. at 7-10.
22

Id.
23

Id.
24

Def.'s Mot. at 20-21. *See also* D.R.E. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . ."); D.R.E. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.").
25

Def.'s Mot. at 22.
26

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Albury v. State*, 551 A.2d 53, 58 (Del. 1988).
27

See Monroe v. State, 2015 Del. LEXIS 160, 2015 WL 1407856, at *5 (Del. Mar. 25, 2015) (citing Dawson v. State, 673 A.2d 1186, 1196 (Del. 1996)).
28

See Wright v. State, 671 A.2d 1353, 1356 (Del. 1996).
29

State v. Drummond, 2002 Del. Super. LEXIS 145, 2002 WL 524283, at *1 (Del. Super. Ct. Apr. 1, 2002); *Burns*

v. State, 76 A.3d 780, 788 (Del. 2013) ("It should be noted that even evidence of '[i]solated poor strategy, inexperience, or bad tactics do[es] not necessarily amount to ineffectiveassistance of counsel.'").
30

Hoskins v. State, 102 A.3d 724, 730 (Del. 2014) ("If an attorney makes a strategic choice 'after thorough investigation of law and facts relevant to plausible options,' that decision is 'virtually unchallengeable' . . .").
31

Outten v. State, 720 A.2d 547, 557 (Del. 1998) ("Whether to call a witness, and how to cross-examine those who are called are tactical decisions."); *Shelton v. State*, 744 A.2d 465, 479 (Del. 1999) ("So long as the decision to cross-examine is made reasonably, it will not constitute a basis for a claim of ineffective assistance of counsel."); *State v. Hamby*, 2005 Del. Super. LEXIS 108, 2005 WL 914462, at *3 (Del. Super. Ct. Mar. 14, 2005) (finding that attorney's decision not to cross-examine sole witness regarding her alleged alcohol problem was "professionally sound").
32

Heyden Aff. at 2 (stating that "[t]here was no testimony showing that the event had any impact on the testing in this case" and concluding that the "unrelated event . . . did not have any probative value concerning the test results in the present case.").
33

Burns v. State, 76 A.3d 780, 788 (Del. 2013) ("Under *Strickland*, the strategic decisions made by counsel are entitled to a strong presumption of reasonableness.").
34

See State v. McGlotten, 2011 Del. Super. LEXIS 116, 2011 WL 987534, at *4 (Del. Super. Ct. Mar. 21, 2011) ("To restate the requirements of Strickland, a defendant must establish two things, not just one: that trial counsel's performance was deficient and that but for that deficiency, the outcome of the proceedings would have been different. If a defendant cannot establish both prongs, then the ineffective assistance of counsel claim fails.") (emphasis in original).
35

See Ploof v. State, 75 A.3d 811, 828-29 (Del. 2013) (concluding that murder defendant's claim regarding his trial attorney's decision to cross-examine State's witness in a way that was allegedly inconsistent with defendant's theory, even when combined with other purported errors, fell far short of establishing a reasonable probability of a different result).
36

See Jan. 30, 2015 Tr. Test, at 23-25 ("I think that's [Heyden's decision to forego seeking admission of this

evidence] appropriate after hearing the entirety of it. Under Rule 403, I do believe that the probative value would be substantially outweighed by the danger of unfair prejudice in this particular case, mainly confusing the issues and really trying to have some mini trial of a personnel matter that hasn't even been fully determined yet.").

37

See Alston v. State, 125 A.3d 676, 2015 WL 5297709, at *3 (Del. 2015) (citing *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996)) (one claiming ineffective assistance "must make specific allegations of how defense counsel's conduct actually prejudiced the proceedings, rather than mere allegations of ineffectiveness"); *see also Ploof*, 75 A.3d at 825 ("*Strickland* is a two-pronged test, and there is no need to examine whether an attorney performed deficiently if the deficiency did not prejudice the defendant."); *Swan v. State*, 28 A.3d 362, 383 (Del. 2011) (observing that *Strickland* requires that an inmate make both showings - deficient performance and prejudice - 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.'") (quoting *Strickland*, 466 U.S. at 697).

A. Yes, there is uncertainty based on the measurements. Every measurement has some sort of uncertainty associated with it.
Q. Even with the level of uncertainty, do you have a weight, taken into consideration its uncertainty if that comes into play, what would the weight be?
A. The uncertainty associated with that weight was 0.9 grams plus or minus.
Q. So that would be the 3.8, plus or minus that?
A. Correct.
MS. DUNN: No further questions at this time, Your Honor.
THE COURT: Mr. Heyden?
MR. HEYDEN: Thank you.
CROSS-EXAMINATION
BY MR. HEYDEN:
Q. Miss Rossy, you received a plastic bag containing 262 smaller bags, is that correct?
A. Yes.
Q. And then your job was to determine what was in the 262 bags, correct?
A. Yes.
Q. And in connection with your investigation, you

didn't test all 262 bags, correct?
A. Correct.
Q. So, you tested 27 bags, correct?
A. Correct.
Q. So, that would leave 235 bags that were not specifically tested, correct?
A. I'm not sure on the math, but I'll go with a yes.
Q. So, we have 27 bags that tested positive for Heroin?
A. Correct.
Q. And then we have 235 bags that were not tested at all, correct?
A. Correct.
Q. And, now, you determined the total weight to be 3.8 grams of everything, the whole 262 bags was 3.8 grams?
A. Yes.
Q. And but you -- if you tested 27 bags, that's roughly ten percent, so, of the 3.8 grams that you weighed, you can say that you tested and determined that roughly ten percent of it or .38 grams was actually Heroin?

A. No.
Q. You tested 27 bags?
A. Yes.
Q. How much did those 27 bags weigh?
A. I don't know off the top of my head.
Q. What is roughly ten percent of the total, 27, roughly ten percent of 262, give or take?
A. Yes.
Q. And if the total weight was 3.8 grams, 10 percent of that would be .38 grams, somewhere in that neighborhood?
A. Okay.
Q. Okay, so, what we know is what you actually tested was not over three grams but three tenths of a gram, correct?
A. Approximately, yes.
Q. Thank you.
THE COURT: Anything further from the State?
REDIRECT EXAMINATION
BY MS. DUNN:
Q. Miss Rossy, with regards to the 262 bags that were in the exhibit, was there consistency with the packaging and size of those items?

A. Yes, there was.
Q. And was there any type of marking on them?
A. Yes, they are labeled "demolition man" and each little glassine envelope is inside a small ziplock bag.
Q. Had there not been a consistency would that have affected the way you analyzed this substance?
A. Yes.
Q. How?
A. Based on packaging and marking, if the powder appeared to be different colors in different bags we would split them and separate them and perform a full analysis based on the different groups that we've separated out.
Q. In this instances you didn't have any different groups?
A. No.
Q. And was there a consistency within the actual weight of the individual bags here?
A. Yes, there was.
Q. And how is that determined?
A. To obtain a net weight I weigh all of the bags full and then I weighed groups of bags empty to obtain average bag empty weight, and then subtract that from

facts are matters solely within your responsibility.

The pertinent portion of indictment in this case reads as follows:

Count I, drug dealing, in violation of Title 16, Section 4752(2) of the Delaware Code, Bernard Ellerbe on or about the 25th day of June, 2014, in the County of New Castle, State of Delaware, did knowingly possess with intent to deliver two grams or more of morphine, opium, any salt, isomer or salt of an isomer thereof, or Heroin as described in 16 Delaware Code, Section 4714, or any mixture containing any such controlled substance, and the offense occurred in a vehicle.

Count II is aggravated possession, and states defendant on or about that same date and in this County and State did knowingly possess 3 grams or more of morphine, opium, any salt isomer or salt of an isomer thereof or Heroin as described in 16 Delaware Code, Section 4714, or any mixture containing any such controlled substance, and the offense occurred in a vehicle.

Count III is reckless endangering in the first degree, says that the defendant on or about the 25th day

of June, 2014, in the County of New Castle, State of Delaware, did recklessly engage in conduct which created a substantial risk of death to Julia Sanford, by driving at a high rate of speed and striking the vehicle she occupied.

Count IV is another count of reckless endangering in the first degree, it alleges the same conduct but says that, alleges that Mr. Ellerbe did recklessly engage in conduct which created a substantial risk of death to Gabriel Sanford by driving at a high rate of speed and striking a vehicle she occupied.

Count V, disregarding a police officer signal, alleges that Mr. Ellerbe on or about the 25th day of June, 2014, New Castle County, Delaware, did drive a motor vehicle upon a public roadway known as Route 40 and Route 1, Newark, and after having received a visual or audible signal from a police officer identified by uniform, by motor vehicle, or by clearly discernible police signal to bring the driver's vehicle to a stop, operated the vehicle in disregard of that signal.

Count VI, possession of drug paraphernalia, alleging on that same date and in this County and State, did knowingly use or possess with intent to use drug

paraphernalia, as that is defined by Delaware law to pack a controlled substance.

Count VII, reckless driving, alleges that Mr. Ellerbe on or about the 25th day of June, 2014, in the County of New Castle, State of Delaware, did drive a motor vehicle upon a public roadway known as Llangollen Boulevard, New Castle, in willful and wanton disregard for the safety of persons or property by fleeing from police and disregarding traffic control devices.

The defendant is charged with two separate counts of reckless endangering. You must consider each count separately and decide whether the State has proved each count beyond a reasonable doubt. If you find the defendant guilty of any one count does not itself mean the defendant is guilty of any other count alleging the same crime

The defendant is charged with seven separate offenses which are set forth in the indictment. These are seven separate and distinct offenses and you must independently evaluate each offense. The fact that you reach a conclusion with regard to one offense does not mean that the same conclusion will apply to any other charged offense. Each charge is separate and distinct

and you must evaluate evidence as to one offense independently from the offense of each other offense and render a verdict as to each individually.

Delaware law defines the offense of drug dealing, in pertinent part, as follows: Any person who possesses with intent to deliver two grams or more of any morphine, opium or any salt, isomer or salt of an isomer thereof, including Heroin or any mixture containing any such substance, when the offense occurs in a vehicle, shall be guilty of drug dealing.

In order to find the defendant guilty of drug dealing as alleged in Count I, you must find that all of the following elements have been established beyond a reasonable doubt: One, the defendant had a particular substance in his possession; and two, the substance possessed was period Heroin or a mixture containing Heroin; and three, the defendant possessed two grams or more of the substance alleged to be Heroin or a mixture containing Heroin; and four, when the defendant possessed the substance he had an intent to deliver it; and five, the offense occurred in a vehicle; and six, the defendant acted knowingly.

"Possession" in addition to its ordinary

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meaning includes location in or about the defendant's person, premises, belongings, vehicle or otherwise within the defendant's reasonable control.

A person acts "knowingly" with respect to possession of an item when the person knows or is aware of such possession. A person's knowledge may be inferred from the surrounding circumstances, considering whether a reasonable person in the defendant's circumstances would have had such knowledge. With reference to the weight or quantity of Heroin, the State need not prove that the defendant had any knowledge as to the weight or quantity of the Heroin. The State must prove, however, that the defendant knew he possessed the Heroin or mixture containing Heroin; and, must prove that the substance was Heroin or mixture containing Heroin, and that the Heroin or mixture containing Heroin weighed a certain amount or was in a certain quantity.

"Deliver" or "delivery" means the actual, constructive or attempted transfer from one person to another of a controlled substance.

A person acts "intentionally" when it is the person's conscious object to engage in conduct of a certain nature.

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"Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a public highway.

If, after considering all the evidence, you find that the State has established beyond a reasonable doubt that the defendant acted in such a manner to satisfy all the of elements that I've just stated, on or about the date and at or about the place stated in the indictment, you should find the defendant guilty of Drug Dealing. If you do not so find, or if you have a reasonable doubt as to any element of this offense, you must find the defendant not guilty of Drug Dealing. In this circumstance, or if you are unable to reach a unanimous verdict on the charge of Drug Dealing, you should then consider the offense of Possession of Heroin.

Delaware law defines the offense of Possession of Heroin, in pertinent part, as follows: It shall be unlawful for any person to knowingly or intentionally possess morphine, opium or any salt, isomer or salt of an isomer thereof, including Heroin or of any mixture containing any such substance when the offense occurs in a vehicle.

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In order to find the defendant guilty of Possession of Heroin as alleged in Count I, you must find that all following elements have been established beyond a reasonable doubt: One, the defendant had a particular substance in his possession; and two, the substance possessed was Heroin or a mixture containing Heroin; and three, the offense occurred in a vehicle; and four, the defendant acted knowingly.

The terms or phrases "possession," "knowingly," "intentionally," and "vehicle" have each been previously defined for or explained to you. Those same definitions apply here.

If, after considering all the evidence, you find that the State has established beyond a reasonable doubt that the defendant acted in such a manner to satisfy all the elements I've just stated on or about the date and at or about the place stated in the indictment, you should find the defendant guilty of Possession of Heroin. If you do not so find, or if you have a reasonable doubt as to any element of this offense, you must find the defendant not guilty of Possession of Heroin. As to Count II, Delaware law defines the offense of Aggravated Possession of Heroin,

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in pertinent part, as follows: Any person who possesses three grams or more of any morphine, opium or any salt, isomer or salt of an isomer thereof, including Heroin or of any mixture containing any such substance when the offense occurs in a vehicle shall be guilty of aggravated possession.

In order to find the defendant guilty of aggravated Possession of Heroin as alleged in Count II, you must find that all of the following elements have been established beyond a reasonable doubt: One, the defendant had a particular substance in his possession; and two, the substance possessed was Heroin or a mixture containing Heroin; and three, the defendant possessed three grams or more of the substance alleged to be Heroin or a mixture containing Heroin; and four, the offense occurred in a vehicle; and five, the defendant acted knowingly. The terms or phrases "possession," "knowingly," and "vehicle" have each been previously defined for or explained to you. Those same definitions apply here.

If, after considering all of the evidence you find that the State has established beyond a reasonable doubt that the defendant acted in such a manner as to

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satisfy all the elements that I've just stated on or about the date and at or about the place stated in the indictment, you should find the defendant guilty of Aggravated Possession of Heroin. If you do not so find, or if you have a reasonable doubt as to any element of this offense, you must find the defendant not guilty of Aggravated Possession of Heroin.

Delaware law defines the offense of Reckless Endangering in the First Degree in pertinent part as follows: A person is guilty of Reckless Endangering in the First Degree when the person recklessly engages in conduct which creates a substantial risk of death to another person.

In order to find the defendant guilty of Reckless Endangering in the First Degree as alleged in Counts III or IV, you must find that both of the following elements have been established beyond a reasonable doubt: One, the defendant engaged in conduct which created a substantial risk of death to another person, in this case, as to Count III, Julia Sanford, and as to Count IV, Gabriel Sanford; and two, the defendant acted recklessly.

A person acts "recklessly" with regard to that

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offense when he is aware of an consciously disregards a substantial and unjustifiable risk that the death of another person could result from his conduct. The risk must be of such a nature and degree that disregard thereof constitute a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

If, after considering all the evidence, you find that the State has established beyond a reasonable doubt that the defendant acted in such a manner as to satisfy all the elements that I've just stated, on or about the date and at or about the place stated in the indictment, you should find the defendant guilty of Reckless Endangering First Degree. If you do not so find, or if you have a reasonable doubt as to any element of this offense, you must find the defendant not guilty of Reckless Endangering First Degree. In this circumstance, or if you are unable to each a unanimous verdict on a charge of Reckless Endangering First Degree, you should then consider the offense of Reckless Endangering Second Degree.

Delaware law defines the offense of Reckless Endangering Second Degree, in pertinent part, as

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follows: A person is guilty of reckless endangering second degree when the period recklessly engages in conduct which creates a substantial risk of physical injury to another person.

In order to find the defendant guilty of Reckless Endangering Second Degree as alleged in Counts III or IV, you must find that both of the following elements have been established beyond a reasonable doubt: One, the defendant engaged in conduct which creates a substantial risk of physical injury to another person, in this case as to Count III, Julia Sanford, and as to Count IV, Gabriel Sanford; and two, the defendant acted recklessly.

A person acts "recklessly" with regard to this offense when he is aware of and consciously disregards a substantial and unjustifiable risk that physical injury to another person could result from his conduct. The risk, again, must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in a situation.

"Physical injury" means impairment of physical condition or substantial pain.

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If, after considering all of the evidence, you find that the State has established beyond a reasonable doubt that the defendant acted in such a manner to satisfy all the elements that I've just stated on or about the date and at or about the place stated in the indictment, you should find the defendant guilty of Reckless Endangering Second Degree. If you do not so find, or if you have a reasonable doubt as to any element of this offense, you must find the defendant not guilty of Reckless Endangering in the Second Degree.

Delaware law defines the offense of Disregarding a Police Officer's Signal, in pertinent part, as follows: Any driver who, having received a visual or audible signal from a police officer identifiable by uniform, by motor vehicle or by a clearly discernable police signal to bring the driver's vehicle to a stop, operates the vehicle in disregard of the signal shall be guilty of Disregarding a Police Officer's Signal.

In order to find the defendant guilty of Disregarding a Police Officer's Signal as alleged in Count V, you must find that all the of following elements have been established beyond a reasonable

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doubt: One, the defendant was driving a motor vehicle on a public street or highway of this State; and two, the defendant received a visual or audible signal from a police officer to bring his vehicle to a stop; and three, the police officer was identifiable by uniform, by motor vehicle or by a clearly discernable police signal; and four, the defendant operated the vehicle in disregard of that signal.

If, after considering all the evidence, you find that the State has established beyond a reasonable doubt that the defendant acted in such a manner as to satisfy all the elements that I've just stated on or about the date and at or about the place stated in the indictment, you should find the defendant guilty of Disregarding a Police Officer's Signal. If you do not so find, or if you have a reasonable doubt as to any element of this offense, you must find the defendant not guilty of Disregarding a Police Officer's Signal. In this circumstance, or if you are unable to reach a unanimous verdict on a charge of Disregarding a Police Officer's Signal, you should then consider the offense of Failure to Comply With Direction of a Police Officer.

Delaware law defines the offense of Failure to

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Comply With Direction of a Police Officer, in pertinent part, as follows: No person shall wilfully fail to refuse to comply with any lawful order or direction of any police officer to direct, control or regulate vehicle traffic.

In order to find the defendant guilty of Failure to Complete With Direction of a Police Officer as alleged in Count V, you must find that all of following elements have been established beyond a reasonable doubt: One, the defendant was driving a motor vehicle on a public street or highway of the State; and two, the defendant received a lawful order or direction from a police officer regulating vehicle traffic; and three, the defendant willfully failed or refused to comply with a police officer's order or direction.

If, after considering all the evidence, you find that the State has established beyond a reasonable doubt that the defendant acted in such a manner as to satisfy all the elements I've just stated, on or about the date and at or about the place stated in the indictment, you should find the defendant guilty of Failure to Comply With Direction of a Police Officer.

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If you do not so find, or if you have a reasonable doubt as to any element of this offense, you must find the defendant not guilty of Failure to Comply With Direction of a Police Officer.

Delaware law defines the offense of Possession of Drug Paraphernalia, in pertinent part, as follows: It is unlawful for any person to use, or possess with intent to use, drug paraphernalia.

In order to find the defendant guilty of Possession of Drug Paraphernalia as alleged in Count VI, you must find that all of following elements have been established beyond a reasonable doubt: One, the defendant used or possessed with intent to use drug paraphernalia, in this case bags or baggies to pack a controlled substance; and two, the defendant acted knowingly.

"Drug paraphernalia" shall mean all equipment, products materials of any kind which are used, intended for use or designed for use, in packaging, repackaging, storing, containing or concealing a controlled substance the manufacture delivery, possession or use of which is in violation of Delaware Uniform Controlled Substances Act. "Drug paraphernalia" includes capsules, balloons,

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envelopes and other containers used, intended for use or designed for use in packaging small quantities of controlled substances, the use, manufacture, delivery or possession of which is in violation of the Delaware Uniform Controlled Substances Act.

The terms or phrases "possession," "knowingly," and "intentionally" each have been previously defined for or explained to you. Those same definitions apply here.

If, after considering all of the evidence, you find that the State has established beyond a reasonable doubt that the defendant acted in such a manner to satisfy all of the elements that I've just stated on or about the date and at or about the place stated in the indictment, you should find the defendant guilty of Possession of Drug Paraphernalia. If you do not so find, or if you have a reasonable doubt as to any element of this offense, you must find the defendant not guilty of Possession of Drug Paraphernalia.

Delaware law defines offense of Reckless Driving, in pertinent part, as follows: No person shall drive any vehicle in willful or one wanton disregard for the safety of persons or property.

e. 5 grams or more of amphetamine, including its salts, optical isomers and salt of its optical isomers, or of any mixture containing any such substance, as described in § 4716(d)(1) of this title;

f. 5 grams or more of phencyclidine, or of any mixture containing any such substance, as described in § 4716(e)(5) of this title;

g. 25 or more doses or, in a liquid form, 2.5 milligrams or more of lysergic acid diethylamide (LSD), or any mixture containing such substance, as described in § 4714(d)(9) of this title;

h. 12.5 or more doses or 2.5 or more grams or 2.5 milliliters or more of any substance as described in § 4714 of this title that is not otherwise set forth in this section, a designer drug as described in § 4701(9) of this title, or of any mixture containing any such substance; or

i. 12.5 or more doses or 2.5 or more grams or 2.5 milliliters or more of 3,4-methylenedioxymethamphetamine (MDMA), its optical, positional and geometric isomers, salts and salts of isomers, or any mixture containing such substance, as described in § 4714(d)(21) of this title.

j. 30 or more substantially identical doses of a narcotic Schedule II or III controlled substance that is a prescription drug, or 3 grams or more of any mixture that contains a narcotic Schedule II or III controlled substance that is a prescription drug.

Section 5. Amend § 4751D, Title 16 of the Delaware Code by making deletions as shown by strikethrough and insertions as shown by underline as follows:

§ 4751D. Knowledge of weight or quantity not an element of the offense; proof of weight or quantity

(a) In any prosecution under this subchapter, in which the weight or quantity of a controlled substance is an element of the offense, the State need not prove that the defendant had any knowledge as to the weight or quantity of the substance possessed. The State need only prove that the defendant knew that the substance was possessed; and, that the substance was that which is alleged, and that the substance weighed a certain amount or was in a certain quantity.

(b) In any prosecution under this subchapter, in which the quantity of a controlled substance is an element of the offense, and the controlled substance is alleged to be a "prescription drug" as defined in § 4701 of this title, and the alleged prescription drug consists of multiple doses that appear to be substantially identical, evidence that a chemist or other qualified witness properly tested one dose, and found the presence of a controlled substance, shall be prima facie evidence that the "substantially identical doses" each contained the controlled substance that is a prescription drug for purposes of determining whether the State has proven the number of doses constituting the Tier quantities set forth in ~~§ 4751C(2)j. or (4)j. of this title~~ § 4751C(2)j. or (3)j. of this title. Nothing in this subsection precludes the right of any party to introduce any evidence supporting or contradicting evidence offered pursuant to this subsection.

(c) The identity or composition of a controlled substance, or a mixture containing a controlled substance, may be established by utilizing a hypergeometric sampling plan or other scientifically accepted methodology.

Section 6. Amend § 4752, Title 16 of the Delaware Code by making deletions as shown by strikethrough and insertions as shown by underline as follows:

§ 4752. ~~Drug dealing – Aggravated possession~~ Drug dealing or possession; class B felony.

~~Except as authorized by this chapter, any person who:~~

~~(1) Manufactures, delivers, or possesses with the intent to manufacture or deliver a controlled substance in a Tier 4 quantity;~~

~~(2) Manufactures, delivers, or possesses with the intent to manufacture or deliver a controlled substance in a Tier 2 quantity, and there is an aggravating factor;~~

~~(3) Possesses a controlled substance in a Tier 5 quantity;~~

~~(4) Possesses a controlled substance in a Tier 3 quantity, and there is an aggravating factor; or~~

~~(5) Possesses a controlled substance in a Tier 2 quantity, as defined in any of § 4751C(4)a. i., of this title, and there are 2 aggravating factors,~~

~~shall be guilty of a class B felony.~~

(a) Except as authorized by this chapter, it is unlawful for any person to do any of the following:

(1) Manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance in a Tier 3 quantity.

(2) Possess a controlled substance in a Tier 3 quantity.

(3) Manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance in a Tier 2 quantity and an aggravating factor applies.

(b) Violation of subsection (a) of this section is a class B felony.

Section 7. Amend § 4753, Title 16 of the Delaware Code by making deletions as shown by strikethrough and insertions as shown by underline as follows:

§ 4753. ~~Drug dealing – Aggravated possession; class C felony~~ Drug dealing or possession: class C or E felony.

~~Except as authorized by this chapter, any person who:~~

~~(1) Manufactures, delivers, or possesses with the intent to manufacture or deliver a controlled substance in a Tier 2 quantity;~~

~~(2) Manufactures, delivers, or possesses with the intent to manufacture or deliver a controlled substance, and there is an aggravating factor;~~

§ 4751D. Knowledge of weight or quantity not an element of the offense; proof of weight or quantity

(a) In any prosecution under this subchapter, in which the weight or quantity of a controlled substance is an element of the offense, the State need not prove that the defendant had any knowledge as to the weight or quantity of the substance possessed. The State need only prove that the defendant knew that the substance was possessed; and, that the substance was that which is alleged, and that the substance weighed a certain amount or was in a certain quantity.

(b) In any prosecution under this subchapter, in which the quantity of a controlled substance is an element of the offense, and the controlled substance is alleged to be a prescription drug as defined in § 4701(37) of this title, and the alleged prescription drug consists of multiple doses that appear to be substantially identical, evidence that a chemist or other qualified witness properly tested one dose, and found the presence of a controlled substance, shall be prima facie evidence that the "substantially identical doses" each contained the controlled substance that is a prescription drug for purposes of determining whether the State has proven the number of doses constituting the Tier quantities set forth in § 4751C(2)j. or (4)j. of this title. Nothing in this subsection precludes the right of any party to introduce any evidence supporting or contradicting evidence offered pursuant to this subsection.

History

78 Del. Laws, c. 13, § 36.

End of Document

Additional material from this filing is available in the Clerk's Office.