Appendix A

CLD-080

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **23-2811**

WILLIAM HUDSON, Appellant

VS.

WARDEN JAMES T VAUGHN CORRECTIONAL CENTER, ET AL.

(D. Del. Civ. No. 1-20-cv-00805)

Present: KRAUSE, FREEMAN, and SCIRICA, 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 foregoing request for a certificate of appealability is denied. We may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Hudson has not made such a showing as his claims lack arguable merit. See Strickland v. Washington, 466 U.S. 668, 687-96 (1984) (describing standard for claims of ineffective assistance of counsel); Brady v. Maryland, 373 U.S. 83, 87 (1967) (holding that due process is violated by the suppression of evidence favorable to a defendant where the evidence is material).

By the Court,

s/Arianna J. Freeman
Circuit Judge

Dated: March 15, 2024
CJG/cc: William Hudson
Carolyn S. Hake, Esq.

A True Copy:

Patricia A. Dodszuweit

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

Appendix B

WILLIAM HUDSON, Petitioner, v. ROBERT MAY, Warden, and ATTORNEY GENERAL OF THE STATE OF DELAWARE, Respondents.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE
2023 U.S. Dist. LEXIS 173659
Civil Action No. 20-805-RGA
September 27, 2023, Decided
September 27, 2023, Filed

Editorial Information: Subsequent History
Appeal filed, 10/04/2023

Editorial Information: Prior History
Hudson v. State, 225 A.3d 316, 2020 Del. LEXIS 28, 2020 WL 362784 (Del., Jan. 21, 2020)

Counsel {2023 U.S. Dist. LEXIS 1}William Hudson. Pro se Petitioner.

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

Judges: Richard G. Andrews, UNITED STATES DISTRICT JUDGE.

Opinion by: Richard G. Andrews

MEMORANDUM OPINION

September 27, 2023
Wilmington, Delaware
/s/ Richard G. Andrews
ANDREWS, UNITED STATES DISTRICT JUDGE:

Petitioner William Hudson is an inmate at the James T. Vaughn Correctional Center in Smyrna, Delaware. Pending before the Court is Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. 2254. (D.I 3; D.I. 8; D.I. 9) The State filed an Answer in opposition, to which Petitioner filed a Reply. (D.I. 18; D.I. 24) For the reasons discussed, the Court will deny the Petition.

I. BACKGROUND

[Petitioner] began sexually abusing his daughter, Sally, in 2008, when she was 12 years old. The abuse included using a vibrator on her vagina; inserting sex toys and his fingers into Sally's vagina and anus; and forcing Sally to masturbate him. The abuse continued regularly, several times a week, until April 2011. Sally disclosed the abuse to the Department of Family Services, when she was interviewed in April 2011. Based on that interview, New Castle County Police{2023 U.S. Dist. LEXIS 2} Officers obtained and executed two search warrants for [Petitioner's] home. They found vibrators and sex toys. The sex toys contained Sally's DNA, and, in some cases, both Sally's and [Petitioner's] DNA.*Hunter v. State*,1 89 A.3d 477 (Table), 2014 WL 1233122, at *1 (Del. Mar. 24, 2014).

In October 2011, Petitioner was indicted on one count of endangering the welfare of a child; twenty-five counts of first degree sexual abuse of a child by a person in a position of trust ("SACPPT"); one count of continuous sexual abuse of a child; and two counts of violation of privacy. (D.I. 17-12 at 59-71) In February 2012, a Delaware Superior Court jury convicted Petitioner of all indicted charges. (D.I. 17-1 at Entry No. 23)

In June 2012, before sentencing, the State advised [Petitioner] and the trial court that SACPPT was not enacted until June 2010, and that counts 2-16 were related to a time period before June 2010. The State suggested that, since the elements of both crimes are the same, counts 2-16 should be amended by substituting the crime of second degree rape in placement of SACPPT.*State v. Hunter*, 2017 Del. Super. LEXIS 645, 2017 WL 5983168, at *1 (Del. Super. Ct. Sept. 29, 2017). Petitioner moved to dismiss the fifteen counts in July 2012. (D.I. 17-1 at Entry No. 27) In January 2013, the Superior Court sentenced Petitioner on all counts not addressed in Petitioner's{2023 U.S. Dist. LEXIS 3} motion to dismiss to a total of 122 years of unsuspended prison time. (*Id.* at Entry No. 32; D.I. 8 at 2) In March 2013, with leave of the Superior Court, the State *nolle prossed* the fifteen charges that were the subject of the motion to dismiss. (D.I. 17-1 at Entry No. 35) Petitioner appealed, and the Delaware Supreme Court affirmed Petitioner's convictions and sentence. *See Hunter*, 89 A.3d 477, 2014 WL 1233122, at *2.

In January 2015, Petitioner filed a *pro se* motion for postconviction relief pursuant to Delaware Superior Court Criminal Rule 61 ("Rule 61 motion"), followed by a motion for the appointment of counsel. (D.I. 17-1 at Entry Nos. 44, 45, 47) The Superior Court appointed postconviction counsel, who moved to withdraw in August 2016. (D.I. 17-1 at Entry Nos. 49, 51, 54) Petitioner opposed post-conviction counsel's motion to withdraw and filed a memorandum in support of his Rule 61 motion in October 2016. (*Id.* at Entry Nos. 59, 60; D.I. 17-13 at 106-122) The State filed a Response. (D.I. 17-16 at 95-112) Petitioner filed a Response and then an additional submission. (D.I. 17-13 at 129-134; D.I. 17-8) The Superior Court denied Petitioner's Rule 61 motion on September 29, 2017. *See State v. Hunter*, 2017 Del. Super. LEXIS 645, 2017 WL 5983168 (Del. Super. Ct. Sept. 29, 2017). On October 2, 2017, the Superior Court *sua sponte* issued a scheduling order to address claims of{2023 U.S. Dist. LEXIS 4} ineffective assistance of appellate counsel that Petitioner "alluded to" in his Rule 61 motion. (D.I. 17-1 at Entry No. 70; D.I. 17-9) On October 6, 2017, the Superior Court held that post-conviction counsel's motion to withdraw was rendered moot by its September 2017 decision. (D.I. 17-1 at Entry No. 71) On October 23, 2017, Petitioner filed a *pro se* supplemental memorandum in support

of his ineffective assistance of appellate counsel claims (D.I. 17-13 at 137-141) and then a final supplement in February 2018 (D.I. 17-11). A Superior Court Commissioner issued a Report and Recommendation recommending the denial of Petitioner's ineffective assistance of appellate counsel claims. *See State v. Hunter*, 2018 Del. Super. LEXIS 184, 2018 WL 2085006 (Del. Super. Ct. Apr. 25, 2018). The Superior Court adopted the Report and Recommendation and denied Petitioner's supplemental claims. (D.I. 17-3 at 15-18) The Delaware Supreme Court affirmed the Superior Court's decision in January 2020. *See Hudson v. State*, 225 A.3d 316, 2020 WL 361784 (Del. Jan. 21, 2020). Petitioner timely filed the instant Petition in June 2020.

Petitioner filed a second Rule 61 motion on April 21, 2021, which the Superior Court dismissed on October 7, 2021. (D.I. 17-1 at Entry Nos. 106, 107) Petitioner did not appeal that decision.

II. GOVERNING LEGAL PRINCIPLES

A. Exhaustion and Procedural Default{2023 U.S. Dist. LEXIS 5}

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 appeal in{2023 U.S. Dist. LEXIS 6} 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. 1997).

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 for a procedural{2023 U.S. Dist. LEXIS 7} 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 "not merely that the errors at trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 494 (cleaned up).

Alternatively, if a petitioner demonstrates that a "constitutional violation has probably resulted in the conviction of one who is actually innocent," *id.* at 496, 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 guilty beyond a reasonable{2023 U.S. Dist. LEXIS 8} doubt. *See Hubbard v. Pinchak*, 378 F.3d 333, 339-40 (3d Cir. 2004).

B. 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 28 U.S.C. 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. 28 U.S.C. 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 28 U.S.C. 2254(d) if the state court decision finally resolves the claim on 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 in *Harrington*, "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. The Supreme Court expanded the purview of the *Richter* presumption in *Johnson v. Williams*, 568 U.S. 289, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013). Pursuant to *Johnson*, if a petitioner{2023 U.S. Dist. LEXIS 9} has presented the claims raised in a federal habeas application to a state court, and the state court opinion addresses some but not all of those claims, the federal habeas court must presume (subject to rebuttal) that the state court adjudicated the unaddressed federal claims on the merits. *Id.* at 298-301. The consequence of this presumption is that the federal habeas court will then be required to review the previously unaddressed claims under 2254(d) whereas, in the past, federal habeas courts often assumed "that the state court simply overlooked the federal claim[s] and proceed[ed] to adjudicate the claim[s] *de novo*." *Id.* at 292-93.

Finally, when reviewing a habeas claim, a federal court must presume that the state court's determinations of factual issues are correct. *See* 28 U.S.C. 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* 28 U.S.C. 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

The Petition asserts the following four grounds for relief: (1) trial counsel provided ineffective assistance{2023 U.S. Dist. LEXIS 10} (D.I. 8 at 6); (2) appellate counsel provided ineffective assistance (*id.* at 8); (3) the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (D.I. 8 at 9); and (4) the Superior Court's *voir dire* was inadequate to assess individual jurors' ability to be impartial, and counsel was ineffective for failing to raise this issue (*id.* at 11).

A. Claim One: Ineffective Assistance of Trial Counsel

Petitioner contends that trial counsel provided ineffective assistance ("IATC") by: (a) failing to pursue suppression of two videos obtained under an allegedly defective warrant; (b) failing to interview or subpoena additional fact witnesses and consult or subpoena experts; (c) failing to conduct an adequate pretrial investigation; (d) failing to present any evidence at the conclusion of the State's case; and (e) failing to object to the violation of privacy counts in the indictment. Petitioner presented Claim One (a), (b), and (c) in his Rule 61 motion and to the Delaware Supreme Court on post-conviction appeal, and both state courts denied the arguments as meritless. (D.I. 17-12 at 12-24, 27-32, 35-37; D.I. 17-13 at 108-110, 112, 117-122); *see Hunter*, 2017 Del. Super. LEXIS 645, 2017 WL 5983168, at *2-4, *6-7; *Hudson*, 225 A.3d 316, 2020 WL 362784, at *1-6. Petitioner presented Claim One (d) and (e) to the Delaware Supreme Court on post-conviction appeal, which denied{2023 U.S. Dist. LEXIS 11} the arguments as meritless. (D.I. 17-12 at 27, 36-37); *see Hudson*, 225 A.3d 316, 2020 WL 362784, at *5-6. Consequently, Claim One will only warrant habeas relief if the Delaware Supreme Court's decision was either contrary to, or an unreasonable application of, clearly established federal law.

The clearly established Supreme Court precedent governing ineffective assistance of trial 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. *See 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 unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.*

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 is highly demanding{2023 U.S. Dist. LEXIS 12} and leads to a strong presumption that the representation was professionally reasonable. *See Strickland*, 466 U.S. at 689. A court many deny an ineffective assistance of counsel claim by only deciding one of the *Strickland* prongs. *See id.* at 697.

Turning to the first prong of the 2254(d)(1) inquiry, the Court notes that the Delaware Supreme Court correctly identified the *Strickland* standard applicable to Petitioner's IATC allegations. *See Hudson*, 225 A.3d 316, 2020 WL 362784, at *2. Consequently, the Delaware Supreme Court's decision was not contrary to clearly established federal law. *See Williams*, 529 U.S. at 406 ("[A] run-of-the-mill state-court decision applying the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case [does] not fit comfortably within 2254(d)(1)'s 'contrary to' clause").

The Court's inquiry is not over, however, because it must also determine if the Delaware Supreme Court reasonably applied the *Strickland* standard to the facts of Petitioner's case. *See Richter*, 562 U.S. at 105-06. When performing this inquiry, the Court must review the Delaware state courts' denial of Petitioner's ineffective assistance of counsel allegations through a "doubly deferential" lens.2 *Id.* "[T]he question is not whether counsel's actions were reasonable, [but rather], whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential{2023 U.S. Dist. LEXIS 13} 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." *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 Court will address the specific IATC arguments seriatim.

1. Trial counsel failed to object to an illegal search warrant

Petitioner contends that trial counsel provided ineffective assistance by failing to file a motion to suppress two videos Petitioner made of the victim while she was in the shower on the ground that they were obtained by execution of a defective search warrant.{2023 U.S. Dist. LEXIS 14} Petitioner asserts that trial counsel should have challenged the admission of the two shower videos on the following grounds: (1) the warrant lacked probable cause to support a search for video/picture evidence (D.I. 9 at 6); (2) the warrant failed to satisfy the Fourth Amendment's particularity requirement and was overly broad because it allowed a search of the entire contents of the computers without categorical and temporal limitations (*id.* at 6-8); and (3) the police exceeded the scope of the warrant by seizing/searching the videos titled with a date outside the two-year time period (April 2009-April 2011) of criminal activity set forth in the warrant's attached affidavit of probable cause (*id.* at 5). Petitioner alleges that he would not have been convicted of the two violation of privacy charges but for the admission of the two shower videos. (*Id.* at 4)

The following background information provides context for Petitioner's argument.

After the DFS interview in which the victim disclosed the abuse, New Castle County police officers obtained and executed a search warrant for [Petitioner's] home. The subjects of that first warrant were a white vibrator that the victim had identified and a receipt reflecting{2023 U.S. Dist. LEXIS 15} the purchase of the vibrator. In the probable cause affidavit for a second search warrant, the officer who executed the first warrant indicated that he arrived at the home to execute the first warrant and was admitted into the home by [Petitioner's] wife. [Petitioner's] wife indicated that she knew where the vibrator was located and led the officer to the basement, where the officer found numerous sexual stimulation devices. In a dresser that contained many of the devices, the officer also found videotapes with labels that identified them as pornographic and DVDs with handwritten labels on them. Nearby, the officer observed a computer tower and video camera. [Petitioner's] wife then led the officer upstairs to a computer room, where she indicated that [Petitioner] kept all of his receipts. There, the officer found at least three computers, two of which [Petitioner's] wife said she was not permitted to use. The officer also observed DVDs with handwritten labels indicating that they were pornographic and magazines that depicted naked young adult women, with titles such as "Barely Legal." [Petitioner's] wife also indicated that [Petitioner] owned a digital camera that she was not

permitted{2023 U.S. Dist. LEXIS 16} to use. Based on a detailed recitation of these observations and others, the officer sought a warrant to search for and seize the various sexual stimulation devices, the computers, the video camera, the digital camera, and various other items.

After execution of the second warrant, a member of the New Castle County Police technology crimes division examined the computer that had been located in [Petitioner's] basement and found two videos of the victim in the shower. The videos were a few seconds in length; the victim testified that [Petitioner] recorded the videos and identified his voice in the videos.*Hudson*, 89 A.3d 477, 2020 WL 36274, at *3.

In his first Rule 61 motion, Petitioner argued that trial counsel should have filed a motion to suppress the video evidence obtained pursuant to the execution of the second warrant on two grounds: (1) there was no probable cause to seize or search the electronic equipment; and (2) the second warrant lacked sufficient particularity, permitting an overbroad search of the contents of the electronic equipment without limiting the search to any time period. (D.I. 17-8) The Superior Court denied the argument after determining that there was sufficient probable cause "to search for the items taken{2023 U.S. Dist. LEXIS 17} by the police pursuant to the warrant. Had the matter been previously raised by trial counsel, a motion to suppress would not have prevailed." *Hunter*, 2017 Del. Super. LEXIS 645, 2017 WL 5983168, at *7.

On post-conviction appeal Petitioner raised the same issues he now raises. He argued that trial counsel was ineffective for failing to argue that: (1) the warrant lacked probable cause to search for anything other than sexual abuse of a minor and the evidentiary nexus was insufficient to search the electronic equipment (D.I. 17-2 at 16); (2) the warrant lacked sufficient particularity with respect to the electronic equipment because it "had no temporal limitation and it permitted a wide-ranging, exploratory search" (*id.* at 13); and (3) the search of his computer for items outside the two-year period of alleged criminal activity (April 2009-April 2011) exceeded the scope of the warrant (*id.* at 23-24). The Delaware Supreme Court affirmed the Superior Court's decision after determining that Petitioner failed to satisfy the *Strickland* standard, opining:

With respect to the convictions of Sexual Abuse of a Child by a Person in a Position of Trust, Continuous Sexual Abuse of a Child, and Endangering the Welfare of a Child, [Petitioner] cannot demonstrate prejudice{2023 U.S. Dist. LEXIS 18} from trial counsel's failure to seek to suppress the videos or appellate counsel's failure to assert that position on appeal. The evidence supporting those convictions that is not subject to [Petitioner's] challenges to the search warrant - including the victim's testimony and the physical evidence - was overwhelming, and there is no reasonable basis to conclude that the two short videos affected the outcome on those charges.

With respect to the Violation of Privacy charges, we conclude that [Petitioner's] counsel did not act in an objectively unreasonable manner by not seeking to suppress the shower videos. In his affidavit in response to [Petitioner's] postconviction motion, trial counsel stated that he reviewed both search warrants and believed there was no basis to suppress the seized evidence. That was not a professionally unreasonable conclusion. The affidavit in support of the second search warrant contained facts sufficient to establish probable cause to seize the electronic equipment and to search their contents for video or photographic evidence of [Petitioner's] sexual abuse of his daughter, including facts concerning the victim's interview statements and the officer's observations{2023 U.S. Dist. LEXIS 19} and [Petitioner's] wife's statements during the execution of the first search warrant. Thus, there was no reasonable basis for counsel to raise a probable cause argument.

As for particularity, the computer forensics officer testified that the shower videos had file names that were consistent with having been assigned by a video recorder and a date of March 10, 2008, which was generally within the time period of the abuse. In *Wheeler v. State*, on which [Petitioner] relies, officers obtained a warrant to search for evidence of witness tampering, which would not have involved video or image files, arising from conduct that began no earlier than July 2013, but they found video evidence of child pornography on a computer that had not been powered on since September 2012. In this case, in contrast, a search for video files bearing a date in March 2008 was within the scope of the criminal activity alleged in the affidavit of probable cause. Similarly, unlike in *Buckham v. State*, on which [Petitioner] also relies, in this case there was a sufficient nexus between the computer where the shower videos were ultimately found and the criminal activity that was alleged in the affidavit of probable{2023 U.S. Dist. LEXIS 20} cause. In the circumstances of this case, we conclude that the search warrant was not impermissibly broad, and counsel therefore was not ineffective for failing to challenge the warrant.*Hudson*, 225 A.3d 316, 2020 WL 362784, at *4.

In this proceeding, Petitioner focuses on the violation of privacy convictions and contends that the Delaware Supreme Court unreasonably applied *Strickland* when concluding that trial counsel's failure to file a motion to suppress the two shower videos on the three grounds he has identified did not constitute ineffective assistance. Where counsel's failure to competently litigate a suppression issue is the focus of the ineffective

assistance claim, to demonstrate prejudice, the petitioner must "also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). For the following reasons, the Court concludes that Petitioner's argument fails to satisfy the standard set forth in 2254(d).3

a. Probable cause to seize/search electronic equipment

Whether probable cause exists to support a search warrant is an objective determination based on the totality of the circumstances present at the time of the challenged governmental conduct.{2023 U.S. Dist. LEXIS 21} *See Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *United States v. Williams*, 413 F.3d 347, 353 n.6 (3d Cir. 2005). The United States Supreme Court has described "probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *Ornelas v. United States*, 517 U.S. 690, 695, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996). Probable cause "is not a high bar." *Kaley v. United States*, 571 U.S. 320, 338, 134 S. Ct. 1090, 188 L. Ed. 2d 46 (2014). "It requires only the kind of fair probability on which reasonable and prudent [people], not legal technicians, act." *Id.*

In his Rule 61 affidavit, trial counsel stated that he reviewed both warrants and found no basis to suppress the seized evidence. (D.I. 17-13 at 127) The Delaware Supreme Court reviewed the record and determined that the affidavit in support of the second warrant provided a sufficient factual underpinning to establish probable cause to seize and search the electronic equipment for photographic/video evidence. Given this determination, the Delaware Supreme Court held that trial counsel did not perform deficiently by not challenging the search for lack of probable cause.

The affidavit of probable cause for the second warrant contained, *inter alia*, the following information and statements:

Police were investigating SACPPT and continuous sexual abuse of a child.

On April 11, 2011, the{2023 U.S. Dist. LEXIS 22} victim disclosed to DFS and police that Petitioner had been sexually abusing her for the past two years.

Police executing a search warrant at Petitioner's residence on April 11, 2011 observed additional items relevant to the investigation, including sex toys, a saddle masturbation device, cameras, computers, and a couch with bedding, in plain view.

Petitioner's wife informed the police executing the search warrant on April 11, 2011 that she was only allowed to use one of the three computers in Petitioner's computer room, and that she was not allowed to use his camera.

"Your affiant is aware through training and experience that digital images of sexually abused children are often stored on computers, digital storage devices, and cameras."

Officers did not believe the victim disclosed everything that happened to her, "evidenced by her not disclosing the sexual penetration of her vagina and anus until the second interview."

"Your affiant is aware that computers store internet browsing history which would capture any transactions that [Petitioner] made related to the sex toys in his basement."

"Your affiant knows that computer hardware [and] software[...] may be instrumentalit[ies], fruits{2023 U.S. Dist. LEXIS 23} or evidence of crime, and/or ... may have been used to collect and store information about crimes (in the form of electronic data)."

"Your affiant knows through training and experience that the act of searching and seizing information from a computer storage media often requires the seizure of most or all of the electronic storage devices ... to be searched later by a qualified computer expert ... because ... a suspect may try to conceal criminal evidence, ... [which] may require searching authorities to examine all the stored data to determine which particular files are evidence or instrumentalities of crime."(D.I. 17-13 at 48-52)

After considering the totality of the circumstances stated in the affidavit supporting the second warrant, the Court concludes that the Delaware Supreme Court reasonably determined the facts and reasonably applied the law when finding that the affidavit laid out probable cause for seizing and searching the electronic equipment found in Petitioner's home for photographic and/or video evidence. Based on this determination, the Court cannot conclude that the Delaware Supreme Court unreasonably applied *Strickland* when holding that trial counsel "did not act in an objectively{2023 U.S. Dist. LEXIS 24} unreasonable manner by not seeking to suppress the shower videos" because "there was no reasonable basis for counsel to raise a probable cause argument." *Hudson*, 225 A.3d 316, 2020 WL 362784, at *4.

b. Particularity

The Fourth Amendment provides that a search warrant shall only be issued upon a showing of probable cause and that the warrant should particularly describe the places to be searched and things to be seized. See U.S. Const. amend. IV. The

particularity requirement is satisfied when "the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended," *Steele v. United States*, 267 U.S. 498, 503, 45 S. Ct. 414, 69 L. Ed. 757 (1925), and when the warrant "describe[s] the items to be seized." *Groh v. Ramirez*, 540 U.S. 551, 558, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004). The Fourth Amendment's particularity requirement "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987). Accordingly, "the scope of a lawful search is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Id.* at 84-85.

A warrant need not be technically perfect, because "[t]he standard ... is one of practical accuracy rather than technical nicety." *United States v. Bedford*, 519 F.2d 650, 655 (3d Cir. 1975). "It is unrealistic to expect a warrant to prospectively restrict the{2023 U.S. Dist. LEXIS 25} scope of a search by directory, filename or extension or to attempt to structure search methods-that process must remain dynamic." *United States v. Burgess*, 576 F.3d 1078, 1093 (10th Cir. 2009).

In his Rule 61 appeal, Petitioner argued that the second warrant "did not satisfy the particularity requirement because it had no temporal limitation and it permitted a wide-ranging exploratory search despite that the officers had a more precise description of the alleged criminal activity and time period involved." (D.I. 17-12 at 13) The Delaware Supreme Court rejected Petitioner's argument and held that the "search warrant was not impermissibly broad," because "there was a sufficient nexus between the computer where the shower videos were ultimately found and the criminal activity that was alleged in the affidavit of probable cause." *Hudson*, 225 A.3d 316, 2020 WL 362784, at *4.

Although the Delaware Supreme Court did not explicitly address the Fourth Amendment's particularity requirement for a search and seizure, it cited *Wheeler v. State* 4 and *Buckham v. State*,5 two cases that identify the Supreme Court precedent concerning the particularity doctrine. After reviewing the second warrant and supporting affidavit for "practical accuracy" while also considering the complexity of the search, the crime under investigation, and{2023 U.S. Dist. LEXIS 26} the nature of the evidence sought, the Court concludes that the Delaware Supreme Court did not unreasonably determine the facts or unreasonably apply clearly established federal law when determining that the second warrant was sufficiently particularized and not overly broad. While the warrant contained an expansive list of specific electronic equipment to be seized, the descriptions in the warrant limited the search to evidence the police reasonably believed was "used during the commission of SACPPT and continuous sexual abuse of a child investigation." (D.I. 17-13 at 43, 45)

In turn, the probable cause affidavit alleged that the continuous sexual abuse occurred over an approximate two year period prior to April 11, 2011:

"Your affiant is aware that on April 11, 2011 [victim] disclosed to her Delaware Division of Family Services case worker that her father [Petitioner] had been inappropriately touching her for the past two years."

"Your affiant is aware that Det. Garcia from the New Castle County Police conducted a follow up interview with [victim] reference her disclosure. Your affiant is aware that during the follow up interview [victim] advised that approx two years ago her father{2023 U.S. Dist. LEXIS 27} [Petitioner] bought her a white battery operated vibrator."

"Your affiant is aware that Det. Garcia conducted a Post Miranda interview with [Petitioner] during which [Petitioner] admitted to buying [victim] a vibrator approx. two years ago [and] teaching [victim] how to use the vibrator to masturbate the first day that he gave it to her."

"[Petitioner] advised [Det. Garcia] that he has watched [victim] use the vibrator for approx 2 years."(D.I. 17-13 at 48) The probable cause affidavit also stated that a dresser in the basement of Petitioner's residence contained approximately four vibrators, various sex toys, and DVDs. (*Id.* at 49) Next to the dresser was a black computer tower, and in the same room as the dresser was a video camera. *(Id.)* The room with three computers - located in the front of the residence - contained magazines depicting young adult women dressed as teenagers and DVDs with pornographic titles. (*Id.* at 50) Finally, both the victim and Petitioner stated that the sexual abuse began at least two years prior, and police reasonably believed the conduct was still ongoing and there might be video evidence of the crimes given the proximity of some of the electronics to the{2023 U.S. Dist. LEXIS 28} location where the victim was sexually abused. *(Id.)*

As explained above, the police officers had probable cause to seize and search the electronic equipment. The crimes under investigation were the SACPPT and the "continuing sexual abuse" of a child, and the warrant limited the seizure and search to electronic equipment (and other items not at issue here) "used during the commission of [SACPPT] and continuous sexual abuse of a child." The probable cause affidavit for the second warrant indicated that the abuse had approximately occurred over a two-year period prior to April 2011. Given all these circumstances, the Delaware Supreme Court reasonably concluded that the warrant was sufficiently particularized. *See, e.g., United States v.*

Conley, 4 F.3d 1200, 1207-08 (3d Cir. 1993) ("Read as a whole, the search warrant allows the seizure of items indicative of an illegal gambling operation. Since the warrant limits the search to items related to an illegal gambling operation, there is sufficient specificity, satisfying the particularity requirement of the Fourth Amendment."). Therefore, the Delaware Supreme Court did not unreasonably apply *Strickland* when holding that trial counsel's failure to file a motion to suppress the videos on the ground that the warrant was overly{2023 U.S. Dist. LEXIS 29} broad did not fall below objective reasonable professional standards.

c. Search/seizure of shower videos exceeded scope of warrant

"[T]he scope of a lawful search is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Garrison*, 480 U.S. at 84-85. "If the scope of the search exceeds that permitted by the terms of a validly issued warrant . . . , the subsequent seizure is unconstitutional without more." *Horton v. California*, 496 U.S. 128, 140, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). "Whether evidence is within a search warrant's scope requires not a hypertechnical analysis, but a common-sense, and realistic one." *United States v. Okorie*, 425 F. App'x 166, 169 n.1 (3d Cir. 2011) (cleaned up). A special concern exists with respect to searches of computers and electronic equipment in general because, "[w]hile file or directory names may sometimes alert one to the contents ..., illegal activity may not be advertised even in the privacy of one's personal computer-it could well be coded or otherwise disguised." *Burgess*, 576 F.3d at 1093. In some cases, the technological reality may be that, "in the end, there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders, and that is true whether the search is of computer files or physical{2023 U.S. Dist. LEXIS 30} files." *Id.* at 1094.

According to Petitioner, trial counsel should have argued that the search and/or seizure of the two shower videos found on his computer exceeded the scope of the warrant because the files were dated March 10, 2008, which was outside the approximate two-year time frame (April 2009 - April 2011) related to the criminal activity alleged in the probable cause affidavit.6 (D.I. 9 at 5, 8) The Delaware Supreme Court implicitly rejected Petitioner's argument that the search exceeded the scope of the warrant when it found that "a search for video files bearing a date in March 2008 was within the scope of the criminal activity alleged in the affidavit of probable cause." *Hudson*, 225 A.3d 316, 2020 WL362784, at *4. Based on this determination, the Delaware Supreme Court held that "counsel therefore was not ineffective for failing to challenge the warrant." *Id.*

Although the Delaware Supreme Court did not explicitly set forth the clearly established federal law for determining when a police search in the digital/electronic context exceeds the scope of a search warrant, it cited *Wheeler*, which, in turn, sets forth the applicable standard cited in Third and Tenth Circuit cases. *See Wheeler*, 135 A.3d 296 (citing *United States v. Stabile*, 633 F.3d 219, 237 (3d Cir. 2011) and *Burgess*, 576 F.3d at 1092-94). For the following reasons, the Court cannot{2023 U.S. Dist. LEXIS 31} conclude that the Delaware Supreme Court unreasonably applied clearly established federal law or unreasonably determined the facts when holding that the search of the two shower video files bearing a date in March 2008 was within the scope of the criminal activity in the second warrant.

The second warrant permitted a search of "any and all photographs and/or video recordings of any computer systems, electronic equipment and evidence found at the scene" used during the commission of SACPPT and continuous sexual abuse of a child. (D.I. 17-13 at 43) The affidavit of probable cause for the second warrant stated that the criminal activity occurred for an approximate two-year period prior to April 2011 and:

"Your affiant is aware through training and experience that digital images of sexually abused children and child pornography are often stored on computers, digital storage devices and cameras."

"Your affiant is aware that often times child victims do not always disclose all of the abuse that they endured right away. This is often because they are embarrassed, they fear the suspect and they do not know or trust the authorities."

"Your affiant is aware that Det. Garcia advised writer{2023 U.S. Dist. LEXIS 32} that he does not believe that [victim] has disclosed everything that has happened to her. This is evidenced by her not disclosing the sexual penetration of her vagina and anus until the second interview."

"Your affiant knows through training and experience that the act of searching and seizing information from a computer storage media often requires the seizure of most or all of the electronic storage devices (along with related peripherals) to be searched later by a qualified computer expert in a controlled environment. This is true because of the following:

A) The volume of evidence. Computer storage devices can store the equivalent of thousands of pages of information. Additionally, a suspect may try to conceal criminal evidence; he or she might store it in random order with deceptive file names. This may require searching authorities to examine all the stored data to determine which particular files are evidence or instrumentalities of crime."

"Your affiant is aware that Det. Garcia interviewed

[the mother of the victim] who informed Det. Garcia of an incidents within the past few months where [victim] and [Petitioner] would take showers together."(D.I. 17-13 at 48, 50-52) And{2023 U.S. Dist. LEXIS 33} finally, during the trial, the police computer analyst testified that he could not determine when the files were created or viewed, explaining that the videos came from a camera, and,

So the camera says it is March 10, 2008, well, it's a year or two, five, whatever the camera just has that as a default date it may come up. You have to look at some other different times, some might be the system time of the computer. That is also relative because if you change - when we start a computer you have something called a bios that starts up first. If you change your time in the bios before Windows starts, that may affect the time that your computer represents, thus all the files that you load will reflect an altered time. So time is relative.(D.I. 17-16 at 17)

Viewed together, the warrant and affidavit established that Petitioner showered with the victim a few months prior to April 2011, the two videos at issue showed the victim in the shower with Petitioner's voice in the background, Petitioner was suspected of continuously sexually abusing the victim for an approximate two-year period preceding the search, the search warrant specified that the contents of the computer could be searched and{2023 U.S. Dist. LEXIS 34} that the suspect may try to conceal criminal evidence with deceptive file names, and the computer analyst who conducted the search knew through experience and training that the date on the video files did not necessarily reflect the date the video was taken. Additionally, the search warrant (1) unambiguously authorized the police to seize and search the computer for electronic/video/photographic evidence of the criminal activities of SACPPT and the continuous sexual abuse of a child; and (2) unambiguously authorized the police to seize and search the electronic/video/photographic files to determine if they were evidence of the criminal activities of SACPPT and continuous sexual abuse of a child.

"[G]iven the unique problems encountered in computer searches and the practical difficulties inherent in implementing universal search methodologies, the majority of federal courts ... have employed the Fourth Amendment's bedrock principle of reasonableness on a case-by-case basis" and have concluded that "a computer search may be as extensive as reasonably required to locate the items." *United States v. Richards*, 659 F.3d 527, 538 (6th Cir. 2011); *see United States v. Cobb*, 970 F.3d 319, 329 (4th Cir. 2020) (finding that, if there is probable cause to search a computer for evidence of a crime, that probable cause is usually{2023 U.S. Dist. LEXIS 35} sufficient to sustain a search of the entire computer); *Burgess*, 576 F.3d at 1094. Similarly, the Third Circuit has recognized that, because "criminals can-and often do-hide, mislabel, or manipulate files to conceal criminal activity," "a thorough computer search requires a broad examination of files on the computer to ensure that file names have not been manipulated to conceal their contents." *Stabile*, 633 F.3d at 237, 241. Applying these principles to Petitioner's case, while keeping in mind the probable cause affidavit's recognition that an individual may conceal criminal evidence with deceptive file names and the computer analyst's professional experience that dates on video files may not reflect the actual date of creation or viewing,7 it was reasonable for the computer analyst to open the March 2008 files to verify that the files actually contained information, videos or photographs from 2008. Once the analyst opened the files and viewed the shower videos, the analyst reasonably determined that the videos of the victim in the shower were "generally within the time period of abuse" (April 2009-April 2011), because the affidavit stated that Petitioner showered with the victim a few months before April 2011. Given these circumstances,{2023 U.S. Dist. LEXIS 36} the Court cannot conclude that the Delaware Supreme Court unreasonably determined the facts or unreasonably applied the law when finding that "a search for video files bearing a date in March 2008 was within the scope of the criminal activity alleged in the affidavit of probable cause." *Hudson*, 225 A.3d 316, 2020 WL 362784, at *4. Therefore, the Delaware Supreme Court did not unreasonably apply *Strickland* when implicitly holding that trial counsel's failure to file a motion to suppress the videos on the ground that the search exceeded the scope of the warrant did not fall below objective reasonable professional standards.

2. Trial counsel failed to interview or subpoena witnesses, failed to conduct an adequate pretrial investigation, and failed to present any evidence at the conclusion of the State's case

Petitioner contends that trial counsel provided ineffective assistance by failing to consult or subpoena the following witnesses: the victim's pediatrician; experts to rebut evidence provided by the State's sexual assault nurse examiner ("SANE"); a DNA expert; and a computer forensic expert. The Delaware Supreme Court affirmed the Superior Court's denial of these arguments, opining:

[Petitioner] also argues that trial counsel was ineffective{2023 U.S. Dist. LEXIS 37} because he did not conduct an adequate pretrial investigation, did not interview or subpoena additional fact witnesses, and did not call any defense witnesses or present any other evidence after the State rested its case. In this case, trial counsel engaged in vigorous cross-examination of the State's witnesses in an effort to cast doubt where it could-for example, concerning the victim's delayed and limited initial disclosure, the lack of any physical indicators of abuse on the victim's body, and the uncertainty surrounding the date of the shower videos-but the evidence against

[Petitioner] was overwhelming, and [Petitioner] has not demonstrated how the presentation of the additional witnesses would have affected the outcome of his trial.

* * *

[Petitioner] also argues that his trial counsel provided ineffective assistance by failing to present the testimony of the victim's pediatrician or the pediatrician's medical records and by failing to consult with experts to counter evidence presented by the State's sexual assault nurse examiner, DNA expert, and computer forensics expert. With respect to these claims, we affirm on the basis of the Superior Court's September 29, 2017 decision{2023 U.S. Dist. LEXIS 38} denying postconviction relief.*Hudson*, 225 A.3d 316, 2020 WL 362784, at *6. Given the Delaware Supreme Court's reference to the Superior Court's decision, the Court will consider the Superior Court's reasoning when evaluating Petitioner's contentions.

a. Failure to call victim's pediatrician

In his Rule 61 affidavit response to Petitioner's argument concerning the decision not to call the victim's pediatrician as a witness, trial counsel explained that:

Although [Petitioner] and I discussed his pediatrician several times, I have no recollection of [Petitioner] saying that the pediatrician had ever examined the victim's hymen or even saying anything at all about the victim's hymen. [...] In addition, it is my recollection that [Petitioner] advised me that it was he, and not the victim's mother, who took the victim to her pediatric appointments.... My recollection is that the victim did not disclose any unlawful sexual contact, penetration or intercourse prior to the disclosures set forth in the discovery. Although I had retained a private investigator to assist me in my representation of [Petitioner], under the circumstances, I did not believe there to be a benefit to calling the pediatrician as a witness simply to say that the victim{2023 U.S. Dist. LEXIS 39} did not disclose any sexual acts. I feared the State might use this witness to demonstrate [Petitioner's] controlling nature and to provide an explanation as to why she did not disclose, i.e., [Petitioner] was right there to make sure she did not tell her doctor.(D.I. 17-13 at 124-25)

When considering Petitioner's allegation regarding trial counsel's failure to present the victim's pediatrician as witness, the Superior Court referenced trial counsel's Rule 61 affidavit, noting:

Trial counsel avers that Defendant never discussed having the pediatrician testify about the Victim's hymen, but did discuss the fact that she never reported the abuse to the pediatrician. Trial counsel further avers that he did not subpoena the pediatrician to testify that the Victim did not report abuse to him because the Defendant was the person who took her to the appointments and the State could potentially argue his presence would deter the Victim from reporting.*Hunter*, 2017 Del. Super. LEXIS 645, 2017 WL 5983168, at *2. The Superior Court then held:

The Court finds no ineffectiveness in the decision not to call the pediatrician. The Court gives credence to trial counsel's assertion the [Petitioner] never discussed the testimony regarding the condition of the Victim's{2023 U.S. Dist. LEXIS 40} hymen. Further substantiating counsel's contention is the fact that the Sexual Assault Nurse Examiner ("SANE") nurse was not asked about the issue, either. As to the fact that the Victim did not report the abuse to the doctor, trial counsel made an informed, strategic decision. There is a sound, proffered reason for that decision which has not been challenged by the [Petitioner].*Id.*

"*Strickland* [] calls for great deference to an attorney's tactical decision to forego particular lines of investigation. And those strategic choices that counsel makes after conducting a thorough investigation of the law and facts are virtually unchallengeable." *Blystone v. Horn*, 664 F.3d 397, 420 (3d Cir.2011). The reasons provided by trial counsel demonstrate that his decision to not call the victim's pediatrician as a witness was an informed and reasonable strategic decision, entitled to deference in this proceeding under *Strickland*. Therefore, the Court concludes that the Delaware Supreme Court did not unreasonably apply *Strickland* in affirming the Superior Court's denial of the instant IATC argument.

b. Failure to call expert to discredit SANE nurse

The Superior Court also referenced trial counsel's Rule 61 affidavit when considering Petitioner's complaint about counsel's failure to call{2023 U.S. Dist. LEXIS 41} an expert to discredit the SANE nurse, concluding that

[counsel] made an informed, strategic decision not to discredit the SANE nurse. In addition, the SANE nurse's testimony presented contradictory statements by the Victim and indicated no physical evidence of abuse and was actually helpful to [Petitioner]. Further, [Petitioner] has made no showing as to how he was prejudiced or what an expert would have proffered to establish prejudice.*Hunter*, 2017 Del. Super. LEXIS 645, 2017 WL 5983168, at *3.

Trial counsel's statements in his Rule 61 affidavit support the Superior Court's conclusion that counsel's decision not to call an expert to rebut the SANE nurse's testimony constituted an informed strategic decision. For instance, counsel states:

As part of discovery, I was provided with the medical

records documenting the victim's SANE examination. The examination revealed no physical injuries and neither corroborated nor refuted the allegations. In fact, I believed that portions of the SANE records could be of assistance in discrediting the victim in light of her apparently inconsistent statements. Nonetheless, there was nothing in the SANE records which led me to conclude that an expert was needed to interpret or attack the observations or opinions of{2023 U.S. Dist. LEXIS 42} the SANE.(D.I. 17-13 at 125)

Additionally, given the overwhelming evidence against him, Petitioner cannot demonstrate a reasonable probability that the outcome of the trial would have been different but for trial counsel's failure to hire an expert to rebut the SANE nurse's testimony. Therefore, the Delaware state courts did not unreasonably apply *Strickland* when denying the instant argument.

c. Failure to call DNA expert

In his Rule 61 motion, Petitioner argued that trial counsel was ineffective for not calling an expert to challenge the DNA evidence on the basis that it was contaminated during the collection. Decisions to retain and call experts fall within the presumption of sound trial strategy. Petitioner does not identify any witness who would have offered an opinion contradicting the DNA evidence.

A witness cannot be produced out of a hat. [Petitioner] cannot meet his burden to show that counsel made errors so serious that his representation fell below an objective standard of reasonableness based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense. Rather, he must set forth facts to support his contention.*Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3d Cir. 1991). In addition, the record{2023 U.S. Dist. LEXIS 43} supports the Superior Court's finding that trial counsel "fully and effectively argued [the issue of cross-contamination] before the jury." *Hudson*, 2017 Del. Super. LEXIS 645, 2017 WL 5983168, at *4; (*see* D.I. 17-16 at 28-30) Accordingly, the Court will deny the instant IATC argument for failing to satisfy 2254(d).

d. Failure to call computer expert

Petitioner argues that trial counsel was ineffective because he did not call a computer expert to analyze the files on his computer or to challenge the dates assigned to the files by the State. During Petitioner's Rule 61 proceeding, the Superior Court rejected this argument, opining:

The State's expert witness testified that he recognized the computer was likely home-built and designed for file sharing. He was unable to determine the dates on which the videos of the Victim being in the shower were taken, or if the videos, once created, were ever viewed. The Victim did testify to the events surrounding the taping of the videos and gave some time estimates of when that occurred. Trial counsel argued rigorously to keep the videos out, and to secure dismissal of the [Violation] of Privacy charges. The [Trial] Court reserved decision, then denied that motion.

[Petitioner's] claims regarding the videos do not challenge{2023 U.S. Dist. LEXIS 44} their existence, or what was depicted in them. [Petitioner] does not specify what information an expert would have provided that would lead to evidence helpful to his defense. Further, he does not claim evidence exists that would establish when they were taken or if that time period would be outside the statute of limitations. The indictment alleges time frame and location. The jury was specifically instructed they must find all elements of the offenses occurred "at or about the date and places stated in the indictment." [Petitioner] was charged with class G felony of Violation of Privacy for which the statute of limitations was 5 years. The dates were contested as to when video-recordings were made of the Victim in the shower. The Victim testified the videos were made when she was 12 or 13 years old. Some portion of that period was within the statute of limitations. The [Trial] Court, therefore, allowed the charges of Violation of Privacy to go forward.

The Court finds the [Petitioner's] claims are vague and conclusory, without specification of how the [Petitioner] was prejudiced, if at all, by the absence of his own computer expert. Nor does the [Petitioner] allege the time frame{2023 U.S. Dist. LEXIS 45} was beyond the statute of limitations.*Hunter*, 2017 Del. Super. LEXIS 645, 2017 WL 5983168, at *3-4.

Petitioner's assertions in this proceeding do not cause the Court to question whether fair minded jurists could disagree on the correctness of the Delaware state courts' determination that Petitioner failed to demonstrate prejudice resulting from trial counsel's failure to call a computer expert. Petitioner does not identify any expert who could have testified, nor does he provide any evidence that a computer expert would have been able to rebut the testimony regarding the dates of the videos. Accordingly, the Court concludes that the Delaware Supreme Court reasonably applied *Strickland* when affirming the Superior Court's denial of the instant IATC argument.

3. Trial counsel failed to conduct an adequate pretrial investigation and failed to present any evidence at the conclusion of the State's case

Petitioner asserts that trial counsel failed to conduct an adequate pretrial investigation. Petitioner also contends that trial counsel failed to raise any defense. Petitioner presented a general argument regarding trial counsel's failure to conduct an

adequate pretrial investigation in his Rule 61 motion, but did not include an argument regarding trial counsel's failure{2023 U.S. Dist. LEXIS 46} to present a defense at the conclusion of the State's case in his Rule 61 motion. Nevertheless, he presented both arguments to the Delaware Supreme Court on post-conviction appeal. The Delaware Supreme Court implicitly denied the two arguments when it rejected Petitioner's contention regarding trial counsel's failure to interview and call various witnesses. *See Hudson*, 225 A.3d 316, 2020 WL 362784, at *6.

As an initial matter, Petitioner's conclusory allegations do not provide a basis for habeas relief. Nevertheless, to the extent the Delaware Supreme Court implicitly denied the arguments as meritless, that decision did not involve an unreasonable application of *Strickland*. The evidence against Petitioner was overwhelming, and Petitioner has failed to demonstrate a reasonable probability that the outcome of his proceeding would have been different but for trial counsel's alleged inaction in these two areas.

4. Trial counsel failed to object to the indictment

The violation of privacy counts in Petitioner's indictment alleged that Petitioner "did knowingly tape record, photograph, film, video tape or otherwise reproduce the image of [victim] while she was undressed or had her genitals, buttocks or breast exposed, without her consent and in a place{2023 U.S. Dist. LEXIS 47} when she had a reasonable expectation of privacy." (D.I. 17-3 at 24) Petitioner contends that trial counsel provided ineffective assistance by failing to challenge the validity of the violation of privacy counts on the ground that they failed to allege that Petitioner recorded the shower videos with the intent of producing sexual gratification.8 The Delaware Supreme Court rejected this argument, holding that trial counsel was not ineffective for failing to object and that Petitioner was not prejudiced because intent is not an element of the offense of "violation of privacy." More specifically, the Delaware Supreme Court held:

This argument is unavailing because intent to produce sexual gratification is not an essential element of Violation of Privacy; rather, it is an affirmative defense. Under Superior Court Criminal Rule 7, an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged" and "shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated." The indictment satisfied this standard, and it was not necessary to allege the absence{2023 U.S. Dist. LEXIS 48} of an affirmative defense. Because the indictment was not defective, trial counsel was not ineffective for failing to object, nor was [Petitioner] prejudiced by the failure to object.*Hudson*, 225 A.3d 316, 2020 WL 362784, at *5.

On habeas review, the Court must defer to the Delaware Supreme Court's interpretation and application of Delaware statutory law. *See Estelle*, 502 U.S. at 67-68. Since "intent to produce sexual gratification" is not an element of the offense of "violation of privacy," the Delaware Supreme Court reasonably applied *Strickland* in concluding that trial counsel's failure to raise a meritless argument did not constitute ineffective assistance. Therefore, the Court will deny the claim for failing to satisfy 2254(d).

B. Claim Two: Ineffective Assistance of Appellate and Postconviction Counsel

During trial, trial counsel moved for judgment of acquittal regarding the two counts of violation of privacy on the basis that the State would not be able to prove an element of the crime (*i.e.*, that the crime occurred during the time frame charged in the indictment). (D.I. 17-15 at 80-81; D.I. 17-16 at 11-12, 39, 43) The Superior Court denied the motion, finding Petitioner's argument to be without merit. (D.I. 17-16 at 39)

At the end of the State's case, the Superior{2023 U.S. Dist. LEXIS 49} Court told the jury that it had not heard all the evidence in the case. (*Id.* at 40-41) Petitioner had, at that time, made the decision to testify. (*Id.* at 39-40) The following day, Petitioner changed his mind and chose not to testify or present any further evidence. (*Id.* at 42) Petitioner moved for a mistrial, or in the alternative, for a curative instruction contending that the trial court's comments may be interpreted by the jury to have shifted the burden of proof. (*Id.*) The Superior Court denied the motion for a mistrial but did give a curative instruction. (*Id.* at 45) The Superior Court, in its curative instruction, stated: "Yesterday I told you that you had not heard the entirety of the evidence. However, in this particular case, the defendant has chosen not to testify. I want to give you a very specific instruction about that. You will hear it again later. The defendant has a Constitutional right to testify or not testify as he chooses. . . . The burden of proof . . . is upon the State to prove the existence of all the elements of every crime . . . this defendant is not required to present any evidence on his own behalf . . ." (*Id.*) The Superior Court later reiterated this instruction{2023 U.S. Dist. LEXIS 50} when providing the jury instructions. (*Id.* at 57)

In Claim Two, Petitioner asserts that appellate counsel was ineffective for failing to appeal the Superior Court's denial of his motion for mistrial and his motion for acquittal on the two violation of privacy counts. He also contends that appellate and postconviction counsel were ineffective for failing to review all the trial transcripts. (D.I. 9 at 11-13)

To the extent Petitioner asserts a free-standing substantive ineffective assistance of postconviction

counsel claim, the Court will deny the argument for failing to assert an issue cognizable on federal habeas review. *See Coleman*, 501 U.S. at 752 (noting that since there is no constitutional right to an attorney in state postconviction proceedings, a petitioner cannot claim ineffective assistance of postconviction counsel).

In contrast, Petitioner's contention that appellate counsel provided ineffective assistance ("IAAC") is cognizable on habeas review, to be evaluated under the same *Strickland* standard applicable to an ineffective assistance of trial counsel claim. *See Lewis v. Johnson*, 359 F.3d 646, 656 (3d Cir. 2004). An attorney's decision about which issues to raise on appeal are strategic,9 and an attorney is not required to raise every possible non-frivolous{2023 U.S. Dist. LEXIS 51} issue on appeal. *See Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); *Smith v. Robbins*, 528 U.S. 259, 272, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). In the appellate context, the test for prejudice under *Strickland* "is not whether petitioners would likely prevail upon remand, but whether [the court of appeals] would have likely reversed and ordered a remand had the issue been raised on direct appeal." *United States v. Mannino*, 212 F.3d 835, 844 (3d Cir. 2000); *see also Smith*, 528 U.S. at 287-88 (explaining that the question when determining prejudice in the appellate context is whether the issues counsel did not raise "were clearly stronger" than the issues counsel did raise).

Petitioner presented his instant complaints about appellate counsel in his Rule 61 motion and on post-conviction appeal. Both the Superior Court and the Delaware Supreme Court correctly identified *Strickland* as the applicable standard when holding that Petitioner failed to establish that appellate counsel provided ineffective assistance. Therefore, Claim Two's IAAC arguments will only warrant relief if the Delaware Supreme Court's decision was an unreasonable application of *Strickland*.

1. Appellate counsel's failure to appeal motions for mistrial and judgment of acquittal

Appellate counsel raised one issue on direct appeal - that it was plain error to admit evidence of the fifteen improperly indicted counts of SACPPT. (D.I. 17-6) In his Rule 61 affidavit,{2023 U.S. Dist. LEXIS 52} appellate counsel explained that he did not appeal the denial of the motions for mistrial and judgment of acquittal because he did not believe there were any issues that could result in reversal. (D.I. 17-13 at 142-43) He raised only one issue - the improper admission of evidence involving the fifteen SACPPT counts - because, after thoroughly reviewing the record (which included the trial transcripts, victim statement, police reports, investigative summaries, and motions and arguments advanced at sidebar), he believed the argument had the greatest likelihood of securing a new trial for Petitioner. (*Id.* at 142) Appellate counsel did not want to taint the argument with other weaker issues. Appellate counsel also noted that, although the issue raised on appeal did not succeed, it did prompt oral argument. (*Id.* at 143)

When denying Petitioner's instant IAAC argument, the Delaware state courts explained that a defendant can only show ineffective assistance of appellate counsel when "the attorney omits issues that are clearly stronger than those the attorney presented." *Hudson*, 225 A.3d 316, 2020 WL 362784, at *7; *see also Hunter*, 2018 Del. Super. LEXIS 184, 2018 WL 2085006, at *3-4. Referencing appellate counsel's assertion that he chose to advance what he deduced to be the most meritorious{2023 U.S. Dist. LEXIS 53} claim, both state courts determined that Petitioner failed to demonstrate that appellate counsel was objectively unreasonable in failing to appeal the denial of the two motions. *See Hudson*, 225 A.3d 316, 2020 WL 362784, at *7; *see also Hunter*, 2018 Del. Super. LEXIS 184, 2018 WL 2085006, at *3-4.

Notably, in this proceeding, Petitioner has not demonstrated that his arguments regarding the denial of the two motions are nonfrivolous, or that they would have been stronger on appeal than the issue appellate counsel did raise. Given these circumstances, the Court concludes that the Delaware state courts reasonably applied *Strickland* when denying the instant IAAC argument in Claim Two.

2. Appellate counsel's failure to review transcripts

Petitioner also contends that appellate counsel provided ineffective assistance because he did not review the "entire record," including all the transcripts of the trial court proceedings. (D.I. 9 at 12) As explained more completely by the Delaware Supreme Court in Petitioner's postconviction appeal:

Specifically, [Petitioner] asserts that postconviction counsel could not have reviewed the entire record, because transcripts of jury selection on January 31, February 1, and February 2, 2012 were not prepared until after the Superior Court denied [Petitioner's] motion for{2023 U.S. Dist. LEXIS 54} postconviction relief and ruled on postconviction counsel's motion to withdraw. We find no reversible error. [...] Moreover, to the extent that [Petitioner] also asserts this claim with respect to his appellate counsel, he has not demonstrated that his counsel's representation fell below an objective standard of reasonableness, nor is there a reasonable probability that the result of the proceedings would have been different if counsel had reviewed the specified transcripts. All of the transcripts have now been prepared, and [Petitioner] has not identified any viable issue for review arising from those transcripts; nor has this Court found any.

Indeed, the transcript of the proceedings on January 31, 2012-the only one that had not been prepared before [Petitioner] filed his briefs in this case-records the first day of jury selection, at the conclusion of which the parties jointly moved to strike the entire panel, because of concerns that arose relating to comments that potential jurors had made in the courtroom or hallway. The Superior Court granted the motion, and voir dire and jury selection began anew the next day, with a new group of potential jurors.*Hudson*, 225 A.3d 316, 2020 WL 362784, at *2.

Given Petitioner's failure{2023 U.S. Dist. LEXIS 55} to demonstrate how his direct appeal would have been different but for appellate counsel's failure to review the transcripts, the Court concludes that the Delaware Supreme Court reasonably applied *Strickland* when denying the instant IAAC argument in Claim Two.

Accordingly, the Court will deny Claim Two in its entirety for failing to satisfy 2254(d).

C. Claim Three: *Brady* Violation

In Claim Three, Petitioner contends that the State violated *Brady* by failing to provide him with information that the victim's hymen was intact and that she denied the abuse occurred. (D.I. 8 at 9; D.I. 9 at 13-14) Petitioner presented this argument in his Rule 61 motion, and the Superior Court denied it as procedurally barred under Delaware Superior Court Criminal Rule 61(i)(3) because Petitioner did not raise the issue in the proceedings leading to his judgment of conviction. *See Hunter*, 2017 Del. Super. LEXIS 645, 2017 WL 5983168, at *6. Petitioner did not appeal that decision. Instead, he raised the same *Brady* claim in his second Rule 61 motion, which the Superior Court summarily denied as procedurally barred under Rule 61(i)(2) for being a second or successive Rule 61 motion. (D.I. 17-20) Petitioner did not appeal that decision.

This procedural history demonstrates that Petitioner has not exhausted state remedies for Claim Three because he did not present{2023 U.S. Dist. LEXIS 56} the *Brady* argument to the Delaware Supreme Court on direct appeal or postconviction appeal. At this juncture, any attempt by Petitioner to raise Claim Three in a new Rule 61 motion would be barred as untimely under Delaware Superior Court Criminal Rule 61(i)(1) and successive under Rule 61(i)(2). Although Rule 61(i)(1) provides for an exception to the one-year time limitation if the untimely Rule 61 motion "asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final," no such right is implicated in the instant argument. Similarly, the exceptions to Rule 61(i)(1)'s time-bar and Rule 61(i)(2)'s successive bar contained in Rule 61(i)(5) & (d)(2) do not apply to Petitioner's case, because he does not allege a credible claim of actual innocence, lack of jurisdiction, or that a new rule of constitutional law applies to the instant argument. Given these circumstances, the Court must treat the arguments in Claim Three as exhausted but procedurally defaulted, meaning that the Court cannot review the merits of the Claim absent a showing of cause-and-prejudice or a miscarriage of justice.

To the extent Petitioner attempts to invoke *Martinez v. Ryan*, 566 U.S. 1, 9, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) to establish cause for his default by blaming postconviction counsel's failure to raise the instant *Brady* argument in his Rule 61 motion, the attempt is{2023 U.S. Dist. LEXIS 57} unavailing. In *Martinez*, the Supreme Court held 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 14-17. *Martinez's* limited exception to the procedural default doctrine does not apply here because Claim Three asserts a freestanding *Brady* claim, rather than an ineffective assistance of trial counsel claim.

Petitioner does not assert any other cause for his default. 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 failed to provide new reliable evidence of his actual innocence. Therefore, the Court will deny Claim Three as procedurally barred.

D. Claim Four: Inadequate *Voir Dire* and Related IATC

In his final Claim, Petitioner asserts that the Superior Court's *voir dire* was inadequate to assess each juror's ability to be impartial, and trial counsel provided ineffective assistance by failing to object to the allegedly inadequate *voir dire*. (D.I. 9 at 14-18) Both arguments are unexhausted because Petitioner{2023 U.S. Dist. LEXIS 58} did not present them to the Delaware Supreme Court on direct appeal or postconviction appeal. Petitioner cannot return to the Superior Court to present these unexhausted arguments, because a Rule 61 motion would be barred as untimely under Rule 61(i)(1) and successive under Rule 61(i)(2). Although Rule 61(i)(1) provides for an exception to the one-year time limitation if the untimely Rule 61 motion "asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final," no such right is implicated in the instant argument. Similarly, the exceptions to Rule 61(i)(1)'s time-bar and Rule 61(i)(2)'s successive bar contained in Rule 61(i)(5) & (d)(2) do not apply to Petitioner's case, because he does not allege a credible claim of actual innocence, lack of jurisdiction, or that a new rule of constitutional law applies to the instant argument. Given these circumstances, the Court must treat the arguments in Claim Four as exhausted but

procedurally defaulted, meaning that the Court cannot review the merits of the Claim absent a showing of cause-and-prejudice or a miscarriage of justice.

To the extent Petitioner attempts to establish cause for his default of the substantive *voir dire* by blaming trial and appellate counsel for not raising the argument{2023 U.S. Dist. LEXIS 59} during their respective proceedings, the argument is unavailing. In his Rule 61 proceeding and subsequent appeal, Petitioner did not present an ineffective assistance of trial or appellate counsel claim based on counsel's failure to raise the instant *voir dire* issue. Consequently, these ineffective assistance of counsel allegations are procedurally defaulted, and cannot excuse Petitioner's procedural default of the substantive *voir dire* claim. *See Edwards v. Carpenter*, 529 U.S. 446, 453-54, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000).

To the extent Petitioner attempts to establish cause under *Martinez* by blaming postconviction counsel for not including the *voir dire* argument in his Rule 61 proceeding, it is similarly unavailing. An allegation of ineffective assistance of postconviction counsel can only excuse a default when the underlying claim is one of ineffective assistance of trial counsel. *See Martinez*, 566 U.S. at 12, 16-17. Here, Claim Four asserts a freestanding *voir dire* issue and not an ineffective assistance of trial counsel. Therefore, *Martinez* is inapplicable and does not provide cause for Petitioner's default.

Finally, any attempt to trigger *Martinez's* limited exception by alleging that postconviction counsel failed to argue that trial counsel was ineffective for not raising the *voir dire* issue during trial is also{2023 U.S. Dist. LEXIS 60} unavailing. The *Martinez* exception to excuse procedural default only applies where postconviction counsel did not present the IATC claim in the initial-review collateral proceedings, and "does not concern errors in other kinds of proceedings, including appeals from initial-review collateral proceedings." *Martinez*, 566 U.S. at 16. In Petitioner's case, after post-conviction counsel moved to withdraw, Petitioner was permitted to submit his own claims but failed to present the instant *voir dire* argument in his Rule 61 motion or Rule 61 appeal. In other words, the instant default occurred because of Petitioner's failure to raise the argument, not because of postconviction counsel's failure.

In the absence of cause, the Court will not address the issue of prejudice. Additionally, Petitioner has not alleged "new reliable evidence" of his actual innocence such that a fundamental miscarriage of justice will result if the Court does not review the argument.

The Court notes that Petitioner requests an evidentiary hearing in order to develop the record for the defaulted *voir dire* claim, asserting that "the state process was inadequate and the external factor of ineffective counsel prevented [him] from having an opportunity to fully and fairly{2023 U.S. Dist. LEXIS 61} develop the record in state court." (D.I. 9 at 18) A federal habeas court cannot hold an evidentiary hearing for a procedurally defaulted claim unless the petitioner demonstrates (1) the claim is based upon new, retroactive constitutional law or (2) the facts sought would have not been brought to light during the state court proceeding even with due diligence. *See* 28 U.S.C. 2254(e)(2)(A)-(B); *Williams v. Superintendent Mahanoy SCI*, 45 F.4th 713, 723 (3d Cir. 2022). "At a minimum, therefore, 2254(e)(2) still restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Cullen v. Pinholster*, 563 U.S. 170, 186, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011).

The Court concludes that Petitioner has failed to establish that an evidentiary hearing is appropriate, because he fails to demonstrate that 2254(e)(2)'s requirements are met. Notably, the *voir dire* argument could have been raised in state court, and Petitioner's default of the related IATC argument was due to his own failure to raise the IATC argument in his Rule 61 proceeding.

Accordingly, the Court will deny the arguments in Claim Four as procedurally barred from habeas review.

E. Request for Discovery and Appointment of Counsel

Petitioner asserts a single sentence request for discovery and the appointment of counsel at the end of his Petition. (D.I.{2023 U.S. Dist. LEXIS 62} 9 at 19) Given the Court's determination that the Petition must be dismissed, the Court concludes that the two requests are moot.

IV. CERTIFICATE OF APPEALABILITY

A district court issuing a final order denying a 2254 petition must also decide whether to issue a certificate of appealability. *See* 3d Cir. L.A.R. 22.2 (2011); 28 U.S.C. 2253(c)(2). A certificate of appealability is appropriate when a petitioner makes a "substantial showing of the denial of a constitutional right" by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 28 U.S.C. 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Additionally, when a district court denies a habeas claim or petition on procedural grounds without reaching the underlying constitutional claims, the court is not required to issue a certificate of appealability unless the petitioner demonstrates that jurists of reason would find it debatable: (1) whether the claim or 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 v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

The Court has concluded that the instant Petition does not warrant relief. The Court is satisfied that reasonable jurists would not find this conclusion to{2023 U.S. Dist. LEXIS 63} be debatable. Accordingly, the Court will not issue a certificate of appealability.

V. CONCLUSION

For the reasons discussed, the Court will deny the instant Petition without holding an evidentiary hearing or issuing a certificate of appealability. An appropriate Order will be entered.

ORDER

At Wilmington, this 27th day of September, 2023, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Petitioner William Hudson's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. 2254 (D.I. 3; D.I. 8; D.I. 9) is DISMISSED, and the relief requested therein is DENIED.

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/ Richard G. Andrews
United States District Judge

Footnotes

1
On direct appeal, the Delaware Supreme Court assigned pseudonyms to Petitioner ("Hunter") and the victim. (D.I. 17-14 at 7 n.1) The Superior Court used the same pseudonyms until February 6, 2019, when it ceased using a pseudonym for Petitioner. *See id.*

2
As explained by the *Richter* Court,

The standards created by *Strickland* and 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under 2254(d).*Richter*, 562 U.S. at 105 (internal citations omitted).

3
Petitioner also contends the Delaware Supreme Court unreasonably applied Delaware precedent in concluding that his challenges to the validity of the warrant and extent of the search lacked merit. (D.I. 9 at 6; D.I. 24 at 2-4) The Court will not address this contention because it asserts an error of state law that is not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

4
Wheeler v. State, 135 A.3d 282, 296 (Del. 2016).

5
Buckham v. State, 185 A.3d 1, 18 (Del. 2018).

6
Although Petitioner presents the temporal limitation argument in teens of probable cause and particularity, the context of his argument demonstrates that he is arguing that the search of the two shower videos exceeded the scope of the warrant.

7
In *Ornelas*, the Supreme Court explicitly recognized that "a police officer may draw inferences based on his own experience in deciding whether probable cause exists." 517 U.S. at 700.

8
Pursuant to 11 Del. C. 1335(a), "A person is guilty of violation of privacy when, except as authorized by law,[...] the person ... (6) Tape records, photographs, films, videotapes or otherwise reproduces the image of another person who is getting dressed or undressed or has that person's genitals, buttocks or her breasts exposed, without consent, in any place where persons normally disrobe including but not limited to a ... bathroom, where there is a reasonable expectation of privacy. This paragraph shall not apply to any acts done by a parent or guardian inside of that person's dwelling, or upon that person's real property, when a subject of [sic] victim of such acts is intended to be any child of such parent or guardian who has not yet reached that child's eighteenth birthday and whose primary residence is in or upon the dwelling or real property of the parent or guardian, unless the acts done by the parent or guardian are intended to produce sexual gratification for any person in which case this paragraph shall apply ..."

9
See Albrecht v. Horn, 485 F.3d 103, 130 (3d Cir. 2007); *Buehl v. Vaughn*, 166 F.3d 163, 174 (3d Cir. 1999) (stating counsel is afforded reasonable selectivity in deciding which claims to raise without specter of being labeled ineffective).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-2811

WILLIAM HUDSON,
Appellant
v.

WARDEN JAMES T. VAUGHN CORRECTIONAL CENTER;
ATTORNEY GENERAL DELAWARE

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 1-20-cv-00805)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, CHUNG, and *SCIRICA, *Circuit Judges*

The petition for rehearing filed by Appellant in the above-captioned case, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is denied.

By the Court,

s/ Arianna J. Freeman
Circuit Judge

Dated: May 8, 2024
CJG/cc: William Hudson
Carolyn S. Hake, Esq.

*Judge Scirica's vote is limited to panel rehearing.

C1

Appendix D

WILLIAM HUDSON, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.
SUPREME COURT OF DELAWARE
225 A.3d 316; 2020 Del. LEXIS 28
No. 382, 2018
January 21, 2020, Decided
November 8, 2019, Submitted

Notice: PUBLISHED IN TABLE FORMAT IN THE ATLANTIC REPORTER.

Editorial Information: Subsequent History
Motion for Reargument filed 1/31/20; Denied 2/14/20. Case Closed February 17, 2020.Writ of habeas corpus dismissed, Certificate of appealability denied, Request denied by, As moot Hudson v. May, 2023 U.S. Dist. LEXIS 173659 (D. Del., Sept. 27, 2023)

Editorial Information: Prior History
Court Below-Superior Court of the State of Delaware. Cr. ID No. 1410004172.Hunter v. State, 89 A.3d 477, 2014 Del. LEXIS 141 (Del., Mar. 24, 2014)

Judges: Before SEITZ, Chief Justice; VALIHURA and VAUGHN, Justices.

CASE SUMMARY The trial court properly denied the inmate's petition for postconviction relief under Del. Super. Ct. R. Crim. P. 61 because a claim of ineffective assistance of postconviction counsel was not viable, since there was no constitutional right to counsel in a postconviction proceeding.

OVERVIEW: HOLDINGS: [1]-The trial court properly denied the inmate's petition for postconviction relief under Del. Super. Ct. R. Crim. P. 61 because a claim of ineffective assistance of postconviction counsel was not viable, since there was no constitutional right to counsel in a postconviction proceeding. All of the transcripts had been prepared, and the inmate did not identify any viable issue for review arising from those transcripts; [2]-The petition was also properly denied because the search warrant was not impermissibly broad, and counsel, therefore, was not ineffective for failing to challenge the warrant. There was a sufficient nexus between the computer where the shower videos were ultimately found and the criminal activity that was alleged in the affidavit of probable cause.

OUTCOME: Judgment affirmed.

Opinion by: James T. Vaughn, Jr.

ORDER

(1) The appellant, William Hudson, has appealed the Superior Court's denial of his first motion for postconviction relief under Superior Court Criminal Rule 61. After careful consideration of the parties' briefs and the record, we affirm the Superior Court's judgment.

(2) Hudson began sexually abusing his daughter in 2008, when she was twelve years old. The abuse included using a vibrator on her vagina, inserting sexual stimulation devices and his fingers into her vagina and anus, and forcing her to masturbate him. The abuse continued regularly, several times a week, until April 2011, when the victim disclosed the abuse to the Department of Family Services. After that interview, New Castle County police officers obtained and executed two search warrants for Hudson's home, where they found multiple vibrators and sexual stimulation devices. The devices contained the victim's DNA, and at least one of them contained both the victim's and Hudson's DNA.

(3) Following a jury trial, Hudson was convicted of ten counts of Sexual Abuse of a Child by a Person in a Position of Trust, one count of Continuous Sexual Abuse of a Child, one count of Endangering the Welfare of a Child, and two counts of Violation of Privacy.1 The Superior Court sentenced Hudson to a total of 122 years of unsuspended prison time. Hudson appealed, represented by different counsel than represented him at trial. This Court affirmed on direct appeal.2

(4) Hudson then filed a *pro se* motion for postconviction relief. The Superior Court granted Hudson's motion for appointment of postconviction counsel, and the Office of Conflict Counsel appointed counsel to represent him. Postconviction counsel later moved to withdraw under Superior Court Criminal Rule 61(e)(6), indicating that, after a careful review of the record, counsel had not identified any potential grounds for postconviction relief. After expanding the

D1

record with briefing and an affidavit from trial counsel, the Superior Court denied Hudson's motion for postconviction relief. The Superior Court then directed the parties to address certain claims that Hudson had asserted concerning the effectiveness of appellate counsel. After receiving briefing and an affidavit from appellate counsel, a Superior Court Commissioner recommended that these additional claims be denied, and the Superior Court adopted the Commissioner's recommendation. Hudson now appeals to this Court.

(5) On appeal, Hudson argues that (i) his conviction should be "set aside" because appellate counsel, postconviction counsel, and the Superior Court did not review transcripts of all of the trial court proceedings; (ii) postconviction counsel rendered ineffective assistance of counsel by failing to review all of the transcripts; (iii) trial and appellate counsel provided ineffective assistance because they failed to seek to suppress two videos that were obtained by execution of an allegedly defective warrant; (iv) trial counsel rendered ineffective assistance when he failed to object to the indictment; (v) trial counsel provided ineffective assistance by failing to request a bill of particulars; (vi) trial counsel provided ineffective assistance by failing to conduct an adequate pretrial investigation, failing to interview or subpoena additional fact witnesses, and failing to present any evidence after the conclusion of the State's case; (vii) one of the jurors was potentially biased and trial counsel was ineffective when he did not object to the juror's inclusion on the jury; (viii) trial counsel provided ineffective assistance by failing to present the testimony of the victim's pediatrician or the victim's medical records, and by failing to consult with or subpoena medical, DNA, or computer experts; (ix) appellate counsel was ineffective for failing to appeal the Superior Court's denial of a motion for a mistrial and the court's denial of a motion for a judgment of acquittal; and (x) his conviction should be reversed based on cumulative error.

(6) We review the Superior Court's denial of postconviction relief for abuse of discretion and review questions of law *de novo*.3 The Court considers the procedural requirements of Rule 61 before addressing any substantive issues.4 Rule 61(i)(3) provides that any ground for relief that was not asserted in the proceedings leading to the judgment of conviction is thereafter barred unless the defendant can establish cause for relief from the procedural default and prejudice from a violation of the defendant's rights. To establish cause, the movant must establish that an external impediment prevented him from raising the claim earlier.5 To establish prejudice, the movant must show actual prejudice resulting from the alleged error.6

(7) Most of Hudson's claims on appeal assert ineffective assistance of counsel. A claim of ineffective assistance of counsel can constitute "cause" under Rule 61(i)(3).7 In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that (i) his defense counsel's representation fell below an objective standard of reasonableness, and (ii) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.8 Although not insurmountable, there is a strong presumption that counsel's representation was professionally reasonable.9 A defendant must also make concrete allegations of actual prejudice to substantiate a claim of ineffective assistance of counsel.10 The same *Strickland* framework applies when evaluating a claim that appellate counsel provided ineffective assistance.11

(8) Hudson argues that his postconviction counsel provided ineffective assistance because he did not review the "entire record," including the transcripts of all of the trial court proceedings. Specifically, Hudson asserts that postconviction counsel could not have reviewed the entire record, because transcripts of jury selection on January 31, February 1, and February 2, 2012 were not prepared until after the Superior Court denied Hudson's motion for postconviction relief and ruled on postconviction counsel's motion to withdraw.12 We find no reversible error. As an initial matter, "a claim of ineffective assistance of postconviction counsel is not viable, because there is no constitutional right to counsel in a postconviction proceeding."13 Moreover, to the extent that Hudson also asserts this claim with respect to his appellate counsel, he has not demonstrated that his counsel's representation fell below an objective standard

of reasonableness, nor is there a reasonable probability that the result of the proceedings would have been different if counsel had reviewed the specified transcripts.14 All of the transcripts have now been prepared, and Hudson has not identified any viable issue for review arising from those transcripts; nor has this Court found any. Indeed, the transcript of the proceedings on January 31, 2012-the only one that had not been prepared before Hudson filed his briefs in this case-records the first day of jury selection, at the conclusion of which the parties jointly moved to strike the entire panel, because of concerns that arose relating to comments that potential jurors had made in the courtroom or hallway. The Superior Court granted the motion, and voir dire and jury selection began anew the next day, with a new group of potential jurors.

(9) To the extent that Hudson argues that the transcript issue presents a basis for reversal independent of his ineffective assistance claim, we similarly find no merit to that claim. Hudson or his counsel have received all of the transcripts, and this Court has reviewed them and finds that any failure to provide them earlier did not prejudice Hudson.15

(10) Next, Hudson claims that his trial and appellate counsel were ineffective because they did not seek to suppress two videos of the victim in the shower that the police found on a computer at the Hudson home. After the DFS interview in which the victim disclosed the abuse, New Castle County police officers obtained and executed a search warrant for Hudson's home.16 The subjects of that first warrant were a white vibrator that the victim had identified and a receipt reflecting the purchase of the vibrator. In the probable cause affidavit for a second search warrant,17 the officer who executed the first warrant indicated that he arrived at the home to execute the first warrant and was admitted into the home by Hudson's wife. Hudson's wife indicated that she knew where the vibrator was located and led the officer to the basement, where the officer found numerous sexual stimulation devices. In a dresser that contained many of the devices, the officer also found videotapes with labels that identified them as pornographic and DVDs with handwritten labels on them. Nearby, the officer observed a computer tower and video camera. Hudson's wife then led the officer upstairs to a computer room, where she indicated that Hudson kept all of his receipts. There, the officer found at least three computers, two of which Hudson's wife said she was not permitted to use. The officer also observed DVDs with handwritten labels indicating that they were pornographic and magazines that depicted naked young adult women, with titles such as "Barely Legal." Hudson's wife also indicated that Hudson owned a digital camera that she was not permitted to use. Based on a detailed recitation of these observations and others, the officer sought a warrant to search for and seize the various sexual stimulation devices, the computers, the video camera, the digital camera, and various other items.

(11) After execution of the second warrant, a member of the New Castle County Police technology crimes division examined the computer that had been located in Hudson's basement and found two videos of the victim in the shower. The videos were a few seconds in length; the victim testified that Hudson recorded the videos and identified his voice in the videos. Hudson contends that his counsel should have sought to suppress the video evidence because, among other arguments, there was no probable cause to seize the electronic equipment or search their contents, and the warrant lacked sufficient particularity because it permitted an overbroad search of the contents of the electronic equipment and did not limit the search to any time period.

(12) Hudson's arguments are unavailing. With respect to the convictions of Sexual Abuse of a Child by a Person in a Position of Trust, Continuous Sexual Abuse of a Child, and Endangering the Welfare of a Child, Hudson cannot demonstrate prejudice from trial counsel's failure to seek to suppress the videos or appellate counsel's failure to assert that position on appeal. The evidence supporting those convictions that is not subject to Hudson's challenges to the search warrant-including the victim's testimony and the physical evidence-was overwhelming, and there is no reasonable basis to conclude that the two short videos affected the outcome on those charges.18

(13) With respect to the Violation of Privacy charges,19 we conclude that Hudson's counsel did not act in an objectively unreasonable manner by not seeking to suppress the shower videos. In his affidavit in response to Hudson's

postconviction motion, trial counsel stated that he reviewed both search warrants and believed there was no basis to suppress the seized evidence. That was not a professionally unreasonable conclusion. The affidavit in support of the second search warrant contained facts sufficient to establish probable cause to seize the electronic equipment and to search their contents for video or photographic evidence of Hudson's sexual abuse of his daughter, including facts concerning the victim's interview statements and the officer's observations and Hudson's wife's statements during the execution of the first search warrant.20 Thus, there was no reasonable basis for counsel to raise a probable cause argument.

(14) As for particularity, the computer forensics officer testified that the shower videos had file names that were consistent with having been assigned by a video recorder21 and a date of March 10, 2008,22 which was generally within the time period of the abuse. In *Wheeler v. State*, on which Hudson relies, officers obtained a warrant to search for evidence of witness tampering, which would not have involved video or image files, arising from conduct that began no earlier than July 2013, but they found video evidence of child pornography on a computer that had not been powered on since September 2012.23 In this case, in contrast, a search for video files bearing a date in March 2008 was within the scope of the criminal activity alleged in the affidavit of probable cause.24 Similarly, unlike in *Buckham v. State*, on which Hudson also relies, in this case there was a sufficient nexus between the computer where the shower videos were ultimately found and the criminal activity that was alleged in the affidavit of probable cause.25 In the circumstances of this case, we conclude that the search warrant was not impermissibly broad, and counsel therefore was not ineffective for failing to challenge the warrant.

(15) Hudson's next argument on appeal is that his trial counsel provided ineffective assistance when he failed to object to the indictment. Hudson claims that the Violation of Privacy counts in the indictment were defective because they did not allege an "essential element" of the offense-namely, that Hudson recorded the shower videos *with the intent of producing sexual gratification*.26 This argument is unavailing because intent to produce sexual gratification is not an essential element of Violation of Privacy; rather, it is an affirmative defense.27 Under Superior Court Criminal Rule 7, an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged" and "shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated."28 The indictment satisfied this standard, and it was not necessary to allege the absence of an affirmative defense. Because the indictment was not defective, trial counsel was not ineffective for failing to object, nor was Hudson prejudiced by the failure to object.

(16) Hudson also contends that his trial counsel was ineffective for not requesting a bill of particulars. The indictment alleged one act of sexual penetration per month between April 1, 2009 and April 11, 2011. The victim testified at trial that Hudson engaged in sexual penetration a few times per week during that period. Hudson claims that the victim's testimony created surprise at trial, and his counsel should have requested a bill of particulars in order to avoid that surprise and to protect against subsequent prosecution for additional offenses. In his affidavit in response to the motion for postconviction relief, Hudson's trial counsel stated that he had the affidavit of probable cause, police reports, video recordings of the victim's statements to the police, documentation of a statement that the victim made at the hospital, and statements given by Hudson and his wife. Based on that information, counsel believed that he and Hudson were well aware of the allegations against him and the frequency with which the abuse was alleged to have occurred.

(17) The decision whether to grant or deny a defendant's motion for a bill of particulars is within the sound discretion of the trial court.29 Here, the defense did not request a bill of particulars; rather, Hudson asserts that his counsel was ineffective for failing to do so. In light of the discovery that the State had provided and the discretion that the Superior Court would have had with respect to such a request, we cannot conclude that counsel's performance was deficient or that Hudson was prejudiced. In addition, the indictment clearly

put Hudson on notice that the State alleged sexual penetration once per month over a two-year period. In *Dobson v. State*,30 on which Hudson relies, the juvenile victim reported that the defendant had sexually molested her eight times over the course of a year; the indictment alleged six counts of second-degree rape, with each count worded identically and each covering the same one-year period. Here, in contrast, the indictment specified a different time period for each charge. The indictment therefore sufficiently put Hudson on notice of the charges against him-one act of sexual penetration per month-and Hudson has not shown how a bill of particulars would have helped him achieve a different result at trial. Thus, trial counsel was not ineffective for failing to request a bill of particulars.31

(18) Hudson also argues that trial counsel was ineffective because he did not conduct an adequate pretrial investigation, did not interview or subpoena additional fact witnesses, and did not call any defense witnesses or present any other evidence after the State rested its case. In this case, trial counsel engaged in vigorous cross-examination of the State's witnesses in an effort to cast doubt where it could-for example, concerning the victim's delayed and limited initial disclosure, the lack of any physical indicators of abuse on the victim's body, and the uncertainty surrounding the date of the shower videos-but the evidence against Hudson was overwhelming, and Hudson has not demonstrated how the presentation of the additional witnesses would have affected the outcome of his trial.32

(19) Next, Hudson contends that one of the jurors at trial was potentially biased and should have been removed, and that his trial counsel was ineffective for not objecting to the juror's inclusion on the jury. Hudson did not raise this argument below, and we find no plain error. The basis for Hudson's claim of potential bias is that the juror at issue was a substitute teacher in the school districts where Hudson's wife worked and where the victim attended school. "A defendant seeking a new trial because of a juror's nondisclosure of relevant information requested by the court must show actual prejudice or the existence of circumstances so egregious as to raise a presumption of prejudice to defendant."33 The Superior Court provided the jury panel with a list of potential witnesses, including Hudson, his wife, and the victim, and asked the potential jurors to identify themselves if they knew any of the potential witnesses. The juror about which Hudson complains came forward for voir dire for an affirmative answer to a different question, but did not indicate that she knew any of the potential witnesses or Hudson. Hudson's claim that the juror might have had some contact with the victim or Hudson's wife is pure speculation; Hudson has not shown a "reasonable probability" that the juror knew anyone involved in the trial or was otherwise not impartial.34

(20) Hudson also argues that his trial counsel provided ineffective assistance by failing to present the testimony of the victim's pediatrician or the pediatrician's medical records and by failing to consult with experts to counter evidence presented by the State's sexual assault nurse examiner, DNA expert, and computer forensics expert. With respect to these claims, we affirm on the basis of the Superior Court's September 29, 2017 decision denying postconviction relief.

(21) Hudson contends that his appellate counsel was ineffective for failing to appeal the Superior Court's denial of a motion for a mistrial that Hudson's trial counsel made at the conclusion of the State's case and the court's denial of a motion for judgment of acquittal on the Violation of Privacy charges. With respect to these claims, we affirm on the basis of the Commissioner's April 25, 2018 Report and Recommendation and the Superior Court's July 10, 2018 order adopting the Commissioner's report. Appellate counsel is not required to raise all nonfrivolous claims on appeal.35 Rather, a defendant can show ineffective assistance of appellate counsel only "where the attorney omits issues that are clearly stronger than those the attorney presented."36 Here, appellate counsel presented the issue he thought had the most chance of success and gained oral argument on direct appeal. Hudson has not demonstrated ineffective assistance of appellate counsel.

(22) Finally, Hudson asserts that his conviction should be reversed based on cumulative error. He did not present this claim to the Superior Court, and we decline to raise it for the first time on appeal.37

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED, and the motion for remand with appointment of new counsel is denied.

BY THE COURT:
/s/ James T. Vaughn, Jr.
Justice

Footnotes

1
The jury found Hudson guilty of fifteen additional counts of Sexual Abuse of a Child by a Person in a Position of Trust, but the State dismissed those counts after trial because they related to a time period before June 2010, when the statute creating the offense was enacted. *Hunter v. State*, 89 A.3d 477, 2014 WL 1233122 (Del. 2014).

2
Id.

3
Dawson v. State, 673 A.2d 1186, 1190 (Del. 1996).

4
Younger v. State, 580 A.2d 552, 554 (Del. 1990).

5
Id. at 556.

6
Id.

7
Cook v. State, 758 A.2d 933, 2000 WL 1177695, at *3 (Del. 2000).

8
Harris v. State, 189 A.3d 1289, 2018 WL 3239905, at *2 (Del. 2018) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

9
Albury v. State, 551 A.2d 53, 59 (Del. 1988).

10
Younger, 580 A.2d at 556.

11
Neal v. State, 80 A.3d 935, 946 (Del. 2013).

12
When Hudson filed this appeal, he designated for transcription the proceedings from January 31, 2012 through February 7, 2012. He indicated that January 31, 2012 and February 1, 2012 had never been transcribed and that February 2, 3, 6, and 7, 2012 had already been transcribed and should be transmitted to this Court as part of the record. The Superior Court approved preparation of the transcripts at state expense. After this Court granted certain extensions for the preparation of transcripts and the filing of the record, the record with transcripts was filed with this Court on November 30, 2018. Although Hudson had designated the proceedings on January 31, 2012 for transcription, a transcript of the proceedings on that date was not prepared. Therefore, on August 29, 2019, this Court directed the court reporter to prepare the transcript of January 31, 2012 for the record, and to send copies to Hudson and counsel for the State. This Court received the missing transcript on October 2, 2019.

13
Asbury v. State, 219 A.3d 994, 2019 WL 4696781, at *4 (Del. 2019); *Watson v. State*, 976 A.2d 172, 2009 WL 2006883, at *2 (Del. 2009) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987)).

14
See Stone v. State, 690 A.2d 924, 925-26 (Del. 1996) (rejecting claim that appellate counsel provided ineffective assistance by failing to obtain a transcript for use on direct appeal because the appellant "failed to demonstrate how the outcome of the appeal would have been different had the transcript been reviewed by this Court").

15
Cf. Watson v. State, 781 A.2d 696, 2001 WL 339637, at *1 (Del. 2001) ("It is well settled in Delaware that the loss of part of the trial record does not entitle the appellant to a new trial as a matter of law. In order to obtain a new trial due to the loss of the trial record, the appellant must show that a) the lost record is vital to a proper review of the appellant's case; and b) there is no practicable way of reconstructing the record or of providing a sufficient substitute. Additionally, a defendant must show that the missing portion of the trial record prejudices the defense. 'A transcript or an adequate substitute for a transcript is

required only to the extent that it is essential for the presentation of a particular issue on appeal.'" (footnotes omitted)). *Cf. also Asbury*, 219 A.3d 994, 2019 WL 4696781, at *1 n.2 ("While review of trial transcripts may be necessary to resolve the claims raised in some appeals, Asbury has not explained how the complete trial transcript is necessary to resolve any of the issues raised in this appeal from denial of postconviction relief.").

16
A18-21.

17
A22-32.

18
See Burton v. State, 200 A.3d 1206, 2018 WL 6824636, at *2 (Del. 2018) (rejecting claim that counsel was ineffective for stipulating to drug evidence, because the evidence of the defendant's guilt was overwhelming, and therefore there was no prejudice).

19
For each of the Violation of Privacy charges, Hudson received a sentence of two years of imprisonment, suspended for two years of probation.

20
See Bradley v. State, 51 A.3d 423 (Del. 2012) (holding that an affidavit of probable cause alleged sufficient facts to support a search of an outbuilding where electronic devices were found, based on the defendant's use of the outbuilding in connection with his medical practice, a parent's observation of the defendant carrying a patient to the outbuilding, and the proximity of the outbuilding to the main practice room). Indeed, Hudson admits that the "search warrant created probable cause to search for two years of evidence of a sexual contact offense." Opening Br. at 18.

21
Transcript of Trial, Feb. 6, 2012, at 26-29.

22
The officer testified that he could not determine when the files were created or viewed. *Id.* at 29-43.

23
Wheeler v. State, 135 A.3d 282, 294-95 (Del. 2016). *See also id.* ("Upon discovering that the iMac had last been turned on in 2012, [the officer] should have terminated his forensic examination of the device since it could not contain information from the relevant time frame.").

24
See id. at 301 ("Some irrelevant files may have to be at least cursorily perused to determine whether they are within the authorized search ambit."). *Cf. United States v. Richards*, 659 F.3d 527, 539-40 (6th Cir. 2011) ("Applying a reasonableness analysis on a case-by-case basis, the federal courts have rejected most particularity challenges to warrants authorizing the seizure and search of entire personal or business computers. . . . [I]n general, so long as the computer search is limited to a search for evidence explicitly authorized in the warrant, it is reasonable for the executing officers to open the various types of files located in the computer's hard drive in order to determine whether they contain such evidence." (internal quotations and alteration omitted)); *State v. Anderson*, 2018 Del. Super. LEXIS 1326, 2018 WL 6177176 (Del. Super. Ct. Nov. 5, 2018) (holding that a warrant to search seven cell phones improperly lacked a time period, but that the proper remedy was to suppress evidence from time periods preceding the period of alleged criminal activity, and citing cases).

25
Buckham v. State, 185 A.3d 1, 19 (Del. 2018).

26
See 11 *Del.C.* 1335(a) ("A person is guilty of violation of privacy when, except as authorized by law, the person . . . (6) Tape records, photographs, films, videotapes or otherwise reproduces the image of another person who is getting dressed or undressed or has that person's genitals, buttocks or her breasts exposed, without consent, in any place where persons normally disrobe including but not limited to a . . . bathroom, where there is a reasonable expectation of privacy. This paragraph shall not apply to any acts done by a parent or guardian inside of that person's dwelling . . .when a subject of [sic] victim of such acts is intended to be any child of such parent or guardian who has not yet reached that child's eighteenth birthday and whose primary residence is in or upon the dwelling or

real property of the parent or guardian, unless the acts done by the parent or guardian are intended to produce sexual gratification for any person in which case this paragraph shall apply . . . .").

27
See 11 *Del.C.* 305 ("When this Criminal Code or another statute specifically exempts a person or activity from the scope of its application and the defendant contends that the defendant is legally entitled to be exempted thereby, the burden is on the defendant to prove, as an affirmative defense, facts necessary to bring the defendant within the exemption."). *See also* Delaware Criminal Code with Commentary at 63-64, 508 (1973) (stating that there are "a number of sections of the Code which exempt particular persons or activities from liability for particular offenses," "which requires the defendant to prove, as an affirmative defense . . ., the facts necessary to exempt him," and identifying Section 1335(a)(6) as providing an exemption that is treated as an affirmative defense).

28
DEL. SUPER. CT. R. 7. *See also Asbury*, 219 A.3d 994, 2019 WL 4696781, at *3 (rejecting claims of ineffective assistance of counsel based on failure to object to allegedly defective indictment or to request bill of particulars).

29
Luttrell v. State, 97 A.3d 70 (Del. 2014).

30
80 A.3d 959, 2013 WL 5918409 (Del. 2013).

31
See Asbury, 219 A.3d 994, 2019 WL 4696781, at *4.

32
Stone, 690 A.2d at 926.

33
McDonald v. State, 615 A.2d 531, 1992 WL 276371, at *1 (Del. 1992).

34
See id. (stating that a defendant must show a "'reasonable probability' that a juror has been biased by outside influences in order to require a new trial or evidentiary hearing," and affirming denial of new trial on drug charges where a witness, the defendant's girlfriend, submitted an affidavit that one of the jurors was an acquaintance of hers and was likely to have heard rumors in the community that the defendant was involved in the drug trade).

35
Ploof v. State, 75 A.3d 811, 831 (Del. 2013).

36
Id. at 832.

37
Del. Supr. Ct. R. 8.

Appendix E

STATE OF DELAWARE v. WILLIAM HUNTER1, Defendant.
SUPERIOR COURT OF DELAWARE, NEW CASTLE
2017 Del. Super. LEXIS 645
ID No. 1104009274
September 29, 2017, Decided
June 26, 2017, Submitted

Disposition: Upon Defendant's Motion for Postconviction Relief, DENIED.

Counsel Annemarie H. Puit, Esquire, Deputy Attorney General, Department of Justice, Carvel State Building, Wilmington, Delaware.
William Hunter, Pro se, Smyrna, Delaware.

Judges: M. Jane Brady, Superior Court Judge.

Opinion by: M. Jane Brady
BRADY, J.

I. Facts2 and Procedural History

Before the Court is a Motion for Postconviction Relief filed pursuant to Superior Court Criminal Rule 61 ("Rule 61") by William Hunter ("Defendant").

Defendant William Hunter began sexually abusing his daughter, Sally ("Victim") in 2008, when she was 12 years old. The abuse included using a vibrator on her vagina; inserting sex toys and his fingers into her vagina and anus; and forcing her to masturbate him. The abuse continued regularly, several times a week, until April 2011. Victim disclosed the abuse to the Department of Family Services ("DFS"), when she was interviewed in April 2011. Based on Victim's interview, New Castle Police Officers obtained and executed two search warrants for Defendant's home. They found vibrators and sex toys. The sex toys contained Victim's DNA, and in some cases, both Victim's and Defendant's DNA. Defendant was indicted on 25 counts of Sexual Abuse of a Child by a Person in a Position of Trust ("SACPPT"), one count of Continual Sexual Abuse of a Child, one count of Endangering the Welfare of a Child, and two counts of Violation of Privacy. Early in 2012, after a six-day trial the jury found Defendant guilty on all charges. In June 2012, before sentencing, the State advised Defendant and the trial court that SACPPT was not enacted until June 2010, and that counts 2-16 were related to a time period before June 2010. The State suggested that, since the elements of both crimes are the same, counts 2-16 should be amended by substituting the crime of second degree rape in placement of SACPPT. Ultimately, the State *nolle prossed* counts 2-16.

Defendant appealed his conviction to the Delaware Supreme Court and the Court affirmed the conviction on March 24, 2014.3 On January 20, 2015, Defendant filed a *pro se* Motion for Postconviction Relief. On April 30, 2015, Defendant filed a *pro se* Motion for Appointment of Counsel under Rule 61. This Court granted the Motion and referred the matter to the Office of Conflict Counsel, which appointed counsel in March 2016. On August 15, 2016, appointed counsel filed a Motion to Withdraw as Counsel and concluded, within an attached Memorandum of Law, that she believes no claims for relief existed.4 Defendant filed a *pro se* Memorandum of Law in support of his Motion on October 13, 2016. Defendant's trial counsel, filed an affidavit on February 10, 2017. State filed a Response to Defendant's Memorandum of Law on April 13, 2017, and Defendant filed a reply to State's Response on May 3, 2017. On June 26, 2017, Defendant filed an additional submission clarifying one of the issues. This is the Court's decision.

II. Discussion

A. Procedural Bars

Before addressing the merits of Defendant's claims, the Court must apply the procedural bars set forth in Superior Court Criminal Rule 61(i) in effect at the time the motion was filed.5 Pursuant to that version of Rule 61, this Court must reject a motion for postconviction relief if it is procedurally barred. That Rule provides that a motion is procedurally barred if the motion is untimely, repetitive, a procedural default exists, or the claim has been formerly adjudicated.6 Rule 61(i)(1) provides that a motion for postconviction relief is time barred when it is filed more than one year after the conviction has become final or one year after a retroactively applied right has been newly recognized by the United States Supreme Court or by the Delaware Supreme Court.7 Rule

E1

61(i)(2) provides that a motion is repetitive if the defendant has already filed a Motion for Postconviction Relief and that a claim is waived if the defendant has failed to raise it during a prior postconviction proceeding, unless "consideration of the claim is warranted in the interest of justice."8 Rule 61(i)(3) bars consideration of any claim "not asserted in the proceedings leading to the conviction" unless the petitioner can show "cause for relief from the procedural default" and "prejudice from violation of the movant's rights."9 Rule 61(i)(4) provides that any claim that has been adjudicated "in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in the federal habeas corpus proceedings" is barred "unless reconsideration of the claim is warranted in the interest of justice."10

The Court finds no procedural bars as to the claims of ineffective assistance of counsel. Procedural bars to substantive claims are addressed herein.

For ease of reference, the Court has used the designations of the claims established by the Defendant in the Memorandum of Law in support of his Rule 61 Motion for Postconviction Relief.

B. Defendant's Claims

Ground I. Ineffective Assistance of Counsel

To prevail on claims of ineffective assistance of counsel, the defendant must meet the two-prong test set forth by the United States Supreme Court.11 Defendant must establish that: (i) his counsel's representation was deficient in that it fell below an objective standard of reasonableness; and (ii) that deficient performance prejudiced the defense.12 When assessing counsel's performance, a court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."13 A defendant must overcome the presumption that the challenged action or lack of action by counsel might be considered "sound trial strategy."14 Additionally, defendant must show that the deficiencies in counsel's performance were prejudicial to the defense,15 in that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.16

Defendant claims trial counsel was ineffective because he did not call the Victim's pediatrician to testify that the Victim's hymen was intact and that she never disclosed any sexual abuse to the doctor.17

Trial counsel avers that Defendant never discussed having the pediatrician testify about the Victim's hymen, but did discuss the fact that she never reported the abuse to the pediatrician.18 Trial counsel further avers that he did not subpoena the pediatrician to testify that the Victim did not report abuse to him because the Defendant was the person who took her to the appointments and the State could potentially argue his presence would deter the Victim from reporting.19

The Court finds no ineffectiveness in the decision not to call the pediatrician. The Court gives credence to trial counsel's assertion the Defendant never discussed the testimony regarding the condition of the Victim's hymen. Further substantiating counsel's contention is the fact that the Sexual Assault Nurse Examiner ("SANE") nurse was not asked about the issue, either. As to the fact that the Victim did not report the abuse to the doctor, trial counsel made an informed, strategic decision. There is a sound, proffered reason for that decision which has not been challenged by the Defendant.

Defendant also claims trial counsel was ineffective because he did not call an expert to discredit the SANE nurse.20 Trial counsel notes that the SANE nurse did not provide any testimony to corroborate abuse -she noted no injuries or physical evidence that would support or refute the claims.21 Further, trial counsel avers that he did not want to discredit the SANE nurse because her testimony was helpful in discrediting the Victim.22

The Court finds trial counsel was not ineffective because he did not call an expert to discredit the SANE nurse. He clearly made an informed, strategic decision not to discredit the SANE nurse. In addition, the SANE nurse's testimony presented contradictory statements by the Victim and indicated no physical evidence of abuse and was actually helpful to the Defendant. Further, the Defendant has made no showing as to how he was prejudiced or what an expert would have proffered to establish prejudice.

Defendant next claims trial counsel was ineffective because he did not call an expert to challenge the DNA evidence, contending it was contaminated during the collection.23 Trial counsel fully explored the issue of contamination during his cross-examination of the DNA expert24 offered by the State as well as of the police officer.25 The issue of cross-contamination was fully and effectively argued before the jury.26 The Court finds trial counsel was not ineffective because he did not call an independent witness on this issue, but rather, presented the issue to the jury by effective cross-examination.

Defendant also claims trial counsel was ineffective because he did not call a computer expert to analyze the files on his computer or to challenge the dates assigned to the files by the State.27 Further, Defendant claims a specialist was needed because his computer had a special operating system.28 The videos on the computer were relevant, particularly, to the charges of Invasion of Privacy.

The State's expert witness testified that he recognized the computer was likely homebuilt and designed for file sharing.29 He was unable to determine the dates on which the videos of the Victim being in the shower were taken, or if the videos, once created, were ever viewed.30 The Victim did testify to the events surrounding the taping of the videos and gave some time estimates of when that occurred.31 Trial counsel argued rigorously to keep the videos out, and to secure dismissal of the Invasion of Privacy charges.32 The Court reserved decision, then denied that motion.

Defendant's claims regarding the videos do not challenge their existence, or what was depicted in them. Defendant does not specify what information an expert would have provided that would lead to evidence helpful to his defense. Further, he does not claim evidence exists that would establish when they were taken or if that time period would be outside the statute of limitations. The indictment alleges time frame and location. The jury was specifically instructed they must find all elements of the offenses occurred "at or about the date and places stated in the indictment."33 Defendant was charged with class G felony of Violation of Privacy for which the statute of limitations was 5 years.34 The dates were contested as to when video-recordings were made of the Victim in the shower. The Victim testified the videos were made when she was 12 or 13 years old. Some portion of that period was within the statute of limitations. The Court, therefore, allowed the charges of Violation of Privacy to go forward.

The Court finds the Defendant's claims are vague and conclusory, without specification of how the Defendant was prejudiced, if at all, by the absence of his own computer expert. Nor does the Defendant allege the time frame was beyond the statute of limitations.

Defendant next claims trial counsel was ineffective because he did not subpoena or interview witnesses that would discredit the Victim.35 Trial counsel states in his affidavit that he did not recall Defendant asking him to subpoena additional witnesses.36 While Defendant claims he provided the names of several potential witnesses to trial counsel, he does not specify who they are and what they would have said.37 There is no information provided by the Defendant as to how he was prejudiced, if at all, by the failure to call these unidentified witnesses. Defendant next claims trial counsel was ineffective for not filing a request for a Bill of Particulars.38 Defendant claims he could not focus on each charge to defend himself because he had to focus on generality.39 He claims the multiple counts, without specificity in the language of the Indictment, also prevented the jury from considering each charge separately.40

The State chose to charge one act of SACPPT per month over the time period the Victim contended the acts occurred. Victim testified the abusive events occurred several times per week during that same time period.41 The nature of the abuse included using a vibrator on her vagina, inserting sex toys or his fingers into her vagina or anus, and forcing her to touch his genitals. The State established, through Victim's testimony, multiple acts in each of the time periods charged. Further, trial counsel was provided the police reports, the videotaped statements of the Victim and the forensic reports.42 Significant, specific information was known to trial counsel and the Defendant prior to trial. Trial counsel avers he and Defendant were aware of the allegations, the evidence that supported the allegations and the frequency with which the abuse was alleged to have occurred.43

The Court finds the Defendant has failed to

establish what deficiencies, if any, were in the information known to him before trial and how they may have prejudiced him. Further, while Defendant claims the Indictment was defective because it was vague and did not properly or sufficiently specify the charges against him, the Court finds the Indictment legally sufficient. Defendant complains that the specification of location and method of penetration were omitted in each count of SACPPT, which resulted in his inability to form a defense as to each particular count.44 An example of the language of a count of SACPPT is as follows:

COUNT II a felony, SEXUAL ABUSE OF A CHILD BY A PERSON IN POSITION OF TRUST, AUTHORITY OR SUPERVISION FIRST DEGREE, in violation of Title 11, Section 778 of the Delaware Code.

WILLIAM HUNTER,45 on or between the 1st day of April, and the 30th day April, 2009,46 in the County of New Castle, State of Delaware, did intentionally engage in sexual penetration with [Victim]47, a child who has not yet reached that child's own 16th birthday and the defendant stands in a position of trust, authority or supervision over the child.Each count properly alleges the elements of the offense charged and specifies a time and location at or about which the offense is alleged to have occurred. Delaware courts have consistently viewed an indictment as serving two purposes: "to put the accused on full notice of what he is called upon to defend, and to effectively preclude subsequent prosecution for the same offense."48 The language of the Indictment clearly put Defendant on notice of the charges against him. The courts of this State have held that "an indictment for a statutory offense is generally held sufficient if the offense is charged in substantially the words of the statute or equivalent language."49 Thus, the lack of specificity as to each particular, alleged act of abuse does not nullify the Indictment.

The Court has considered each claim of ineffective assistance. None has shown counsel to have gone below an objective standard of reasonableness. Although not insurmountable, the *Strickland* standard is highly demanding and leads to a "strong presumption that the representation was professionally reasonable."50 Furthermore, when setting forth a claim of ineffective assistance of counsel, a defendant must make and substantiate concrete allegations of actual prejudice or risk summary dismissal.51 Defendant has not established his attorney's conduct fell below the applicable standard, nor has he shown how he was prejudiced by any of the alleged deficiencies.

Ground II. Insufficient Evidence

Defendant claims there was insufficient evidence presented at trial to support a conviction on the charges of Invasion of Privacy.52 Specifically, Defendant contends there was no evidence presented to support the element that the acts were intended to produce sexual gratification.53

Defendant correctly cites to the jury instructions on the charges of Invasion of Privacy, which informed the jury they needed to find the element of intent to produce sexual gratification. Further, Defendant properly cites the standard to determine the sufficiency of evidence: "whether any rational trier of fact, viewing the evidence in light most favorable to the State, could find the defendant guilty beyond a reasonable doubt."54 However, the issue of insufficiency of evidence with regard to the Invasion of Privacy charge is procedurally barred under Rule 61(i)(4), as it was previously adjudicated (and denied) when trial counsel made a motion for judgment of acquittal.

Even if procedural bars do not apply to this issue, Defendant's claim nevertheless lacks merit because the jury had sufficient evidence, under the circumstances, to infer the intent necessary to convict of the Invasion of Privacy charges. Defendant was alleged to have engaged in conduct in which his daughter did not wish to participate, and yet she did so on many, many occasions. The conduct was of an extremely intimate and sexual nature, and coercion, if not physical force or threat, was a component. Exposing the Victim to videotaping while in the shower, much like watching his daughter use the sex toys he provided, can easily be determined by the jury to be with the intent of gratifying him sexually.

Accordingly, Defendant's Motion is denied as to this claim.

Ground III. Brady Violation

Defendant next claims that the State violated its obligation under *Brady*55 to provide him

with information that the Victim's hymen was intact and that she denied the abuse occurred, and did not provide Defendant's, his co-defendant's or the Victim's statements to the child protection agency.56

This claim was not raised at trial and is procedurally barred under Rule 61(i)(3).57 Defendant must therefore show prejudice from violation of his rights and cause for relief.58 Defendant has failed to present grounds to grant relief. He has not provided any documentation regarding the condition of the Victim's hymen or that, if it were intact, the abuse she related could not have occurred. DNA evidence established the Victim's body was in contact with multiple items, introduced at trial, and alleged to have been used to perpetrate the abuse. Further, the fact that the Victim did not report the incidents of abuse for a substantial period, even when provided the opportunity to do so, was in the police reports and information provided to the Defendant by the State before trial. Additionally, Defendant has not alleged how, if at all, he was prejudiced by failure to provide the statements.

The Motion is denied as to this claim.

Ground IV. Defective Indictment

Defendant claims the Indictment failed to state, with sufficient specificity, the crimes with which he was charged.59 Defendant was charged with one count of SACPPT each month an act of penetration was alleged to have occurred. Defendant argues the Indictment failed to allege sufficient facts to differentiate each count, i.e. it did not specify which acts correlated to which count, and the location and types of penetration were also not specifically alleged as to each count.60

The Court finds Defendant's claim is both procedurally barred, and without merit. Under Superior Court Criminal Rules 12(b)(2) and 12(f), a defense or objection based on a defect in an indictment is waived unless it is raised before trial.61 Additionally, this claim is procedurally barred under Rule 61(i)(3) as it was not raised at trial.62 Even if Defendant's claim is not waived or barred, the Court is satisfied that the Indictment for each count of SACPPT was legally sufficient containing a plain, concise, and definite written statement of essential facts constituting the offense charged, in accordance to Superior Court Criminal Rule 7(c).63 The Indictment matched the statements disclosing the time period in which the Victim contended Defendant conducted the acts of penetration, and the alleged facts were presented and known to Defendant before trial. Defendant cites *Luttrell v. State*, in which the Delaware Supreme Court held the trial court's denial of the defendant's motion for bill of particulars resulted in the defendant's inability to adequately present a defense.64 In *Luttrell*, the indictment included multiple counts of the same general offense, Unlawful Sexual Conduct, with identical language and contained no substantial facts to differentiate each count.65 The indictment in *Luttrell* also listed dates of the alleged crimes different from the dates stated by the victim.66 In the present case, the Indictment reflects Defendant's charge of one count of SACPPT per month during the period the alleged penetration occurred. The time period applicable to the series of charges of SACPPT matches the Victim's statements, and was known to Defendant prior to trial. Further, the trial court in this case did not deny a request for a bill of particulars.67 Thus, the Court finds no merit in Defendant's claim of defective indictment.

Defendant also contends that the Jury Instructions were deficient by not specifying which factual allegations corresponded to which count of offense.68 This claim, similar to above, is also procedurally barred under Rule 61(i)(3) as it was not raised during trial, unless Defendant can show cause for relief and that he was prejudiced by the violation of his rights.69 Defendant made a conclusive statement alleging deficiency in the Jury Instructions without substantiating his claim, or demonstrating how explaining to the jury regarding which factual allegation corresponded with which count would, if at all, result in a different verdict.70 Further, had Defendant raised these issues during trial, the Court would have denied his claims as the Court finds the Indictment and Jury Instructions legally sufficient.

Consequently, Defendant's Motion is denied as to this claim.

Grounds V. Search Warrant Deficiencies

Defendant next claims that the second search warrant in the case is deficient.71 There were two search warrants. The first, for a white,

battery operated vibrator, was executed at the Defendant's residence, at which time multiple items of relevance to the investigation were observed and a second search warrant was secured. The second warrant, which Defendant claims was overbroad and a general warrant, sought to seize sex toys, bedding, and specific electronic equipment, including cameras and computers. At the time of the execution of the first warrant, officers observed additional sex toys, cameras, computers and bedding in plain view.72 A resident of the home, Defendant's wife, confirmed to the police that Defendant performed masturbation with the Victim and that the Victim would lay on the bedding.73 Given the proximity of some of the electronics to the location where sexual activity took place, police thought there might be video evidence and sought a second warrant for the additional items.

This claim is procedurally barred under Rule 61(i)(3) as Defendant did not challenge the search at trial.74 Trial counsel avers that he did not believe there were grounds to do so.75

The Court has reviewed both warrants. The Court finds there is sufficient probable cause in each warrant to search for the items taken by the police pursuant to the warrant. Had the matter been previously raised by trial counsel, a motion to suppress would not have prevailed. Defendant can make no showing that his rights were violated, that he suffered any prejudice or that there is any cause for relief. The Motion is denied as to this claim.

III. Conclusion

For the foregoing reasons, Defendant's Motion for Postconviction Relief is DENIED.

IT IS SO ORDERED.

M. Jane Brady, Superior Court Judge

Footnotes

1 The Supreme Court, on direct appeal, sua sponte assigned pseudonyms to Defendant and the victim to protect the identity of the victim. This Court has used the same pseudonyms assigned by the Supreme Court for the same reason.

2
The facts herein are taken from the factual recitation in the decision of the Supreme Court on direct appeal. *Hunter v. State*, 89 A.3d 477, 2014 WL 1233122 (Del. 2014).

3
Hunter, 89 A.3d.

4
Mem. in Supp. of Mot. to Withdraw as Counsel, at 1, *State v. Hudson*, No. 54, (Aug. 15, 2016).

5
Younger v. State, 580 A.2d 552, 554 (Del. 1990).

6
See Super. Ct. Crim. R. 61(i)(1)-(4).

7
Super. Ct. Crim. R. 61(i)(1).

8
Super. Ct. Crim. R. 61(i)(2).

9
Super. Ct. Crim. R. 61(i)(3).

10
Super. Ct. Crim. R. 61(i)(4).

11
Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

12
Id. at 687.

13
Id. at 688.

14
Id.

15
Id. at 692.

16
Id. at 694.

17
Def's Mem of Law in Supp. of Rule 61 Mot for Postconviction Relief, at 3 (Oct. 26, 2016) (herein as "Def's Mem.").

18
Aff. of Counsel, 4 (Feb. 10, 2017) (herein as "Aff.").

19

F6

Id. 5.

20
Def's Mem, at 3.

21
Aff., 6.

22
Id.

23
Def's Mem, at 4.

24
Trial Tr., 73-83 Feb. 6, 2012.

25
Trial Tr., 51-60 Feb. 2, 2012.

26
Def. Counsel Closing Arg., Trial Tr., 33-37 Feb. 7, 2012.

27
Def's Mem, at 4.

28
Id.

29
Trial Tr., 18 Feb. 6, 2012.

30
Id. at 26-30.

31
Id.

32
Prior to commencement of trial, defense counsel made a Motion to Dismiss two counts of Invasion of Privacy charges, *see* Trial Tr., 13 Feb. 2, 2012.

33
Jury Inst. on Violation of Privacy.

34
11 *Del.C.* 205(b)(1).

35
Def's Mem, at 5.

36
Aff., 7.

37
Def's Mem, at 5.

38
Id.

39
Id. at 5-6.

40
Id. at 6.

41
Trial Tr. 9, 37, Feb. 3, 2012.

42
State's Resp. to Def's Mot. for Postconviction of Relief, at 12, (Apr. 17, 2017) (herein as "State's Resp.") (citing Aff., 4).

43
Aff., 8.

44
Def's Mem., at 6.

45
Defendant's name was changed to reflect the pseudonym used by the Delaware Supreme Court, also adopted by this Court.

46
The language of each count of SACPPT is identical, except for the dates reflecting each month starting when the alleged penetration began.

47
Victim's name is omitted here in effort to protect her identity.

48
Malloy v. State, 462 A.2d 1088, 1092 (1983) (citation omitted).

49
State v. Husser, 1990 Del. Super. LEXIS 373, 1990 WL 161226, at *2 (Del. Super. Ct. Oct. 12, 1990) (citing *State v. Di Maio*, 55 Del. 177, 185 A.2d 269, 271, 5 Storey 177 (Del. Super. Ct. Jul. 27, 1962).

50
Flamer v. State, 585 A.2d 736, 754 (Del. 1990) (citing *Kimmelman v. Morrison*, 477 U.S. 365,

106 S. Ct. 2574, at 2586, 91 L. Ed. 2d 305 (1986)).

51
State v. Coleman, 2003 Del. Super. LEXIS 492, 2003 WL 22092724, at *2 (Del. Super. Feb. 19, 2003) (citing *Strickland*, 466 U.S. at 689 (1984) (citation omitted).

52
Def's Mem., at 8.

53
11 *Del C.* 1335(a) A person is guilty of violation of privacy when, except as authorized by law, the person:

(6) Tape records, photographs, films, videotapes or otherwise reproduces the image of another person who is getting dressed or undressed or has that person's genitals, buttocks or her breasts exposed, without consent, in any place where persons normally disrobe...where there is a reasonable expectation of privacy. This paragraph shall not apply to any acts done by a parent or guardian inside of that person's dwelling..., unless the acts done by the parent or guardian are intended to produce sexual gratification for any person in which case this paragraph shall apply."

54
Def's Mem., at 8.

55
Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

56
Def's Mem., at 9.

57
Super. Ct. Crim. R. 61(i)(3).

58
Id.

59
Def's Mem., at 11.

60
Id.

61
Stewart v. State, 829 A.2d 936, 2003 WL 22015766, *1 (Del. July 29, 2003) (TABLE).

62
Super. Ct. Crim. R. 61(i)(3).

63
Super. Ct. Crim. R. 7(c), states in relevant parts: "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charges....Allegations made in one count may be incorporated by reference in another count."

64
Luttrell, 97 A.3d 70 (Del. July 28, 2014).

65
Id. *73.

66
Id.

67
See pages 8-9 for a discussion of trial counsel's failure to file a Bill of Particulars.

68
Super. Ct. Crim. R. 61(i)(3).

69
Def's Mem., at 12.

70
Def's Mem., at 12.

71
Id. at 13.

72
Search Warrant App. and Aff., at 3 (Apr. 12, 2011).

73
Id. at 4.

74
Super. Ct. Crim. R. 61(i)(3).

75
Aff., 11.

STATE OF DELAWARE, Plaintiff, v. WILLIAM HUNTER1, Defendant.
SUPERIOR COURT OF DELAWARE, NEW CASTLE
2018 Del. Super. LEXIS 184
Cr. ID No. 1104009274
April 25, 2018, Decided
February 14, 2018, Submitted

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

Editorial Information: Prior History
COMMISSIONER'S REPORT AND RECOMMENDATION THAT DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF AS TO DEFENDANT'S SUPPLEMENTAL APPELLATE CLAIMS SHOULD BE DENIED.Hunter v. State, 89 A.3d 477, 2014 Del. LEXIS 141 (Del., Mar. 24, 2014)

Counsel Annemarie H. Puit, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.
William Hunter, James T. Vaughn Correctional Center, Smyrna, Delaware, Pro se.

Judges: Lynne M. Parker, Commissioner.

Opinion by: Lynne M. Parker

PARKER, Commissioner

This 25th day of April 2018, upon consideration of Defendant's Motion for Postconviction Relief as to his supplemental appellate claims, it appears to the Court that:

PROCEDURAL POSTURE OF RULE 61 MOTION

1. After full briefing on Defendant's Rule 61 motion, the Superior Court issued its decision on September 29, 2017, denying the motion.2

2. Prior to the issuance of its decision, counsel had been appointed to assist Defendant with his Rule 61 motion. Rule 61 counsel subsequently withdrew based on counsel's opinion that there were no meritorious claims that existed to support a Rule 61 motion. Defendant thereafter proceeded *pro se* with his Rule 61 motion.

3. Following full briefing on the motion, the Superior Court, in its September 29, 2017 decision, fully and thoroughly addressed all of the claims raised by Defendant in his Rule 61 motion. The Superior Court concluded that Defendant's claims were all without merit. Those claims included trial counsel's alleged ineffectiveness and other substantive claims.3

4. Following the issuance of the Superior Court's decision on Defendant's Rule 61 motion, Defendant requested the opportunity to raise additional claims regarding the alleged ineffectiveness of appellate counsel. The Superior Court granted that request and established a briefing schedule for the presentation of Defendant's appellate counsel claims.4

5. In accordance with the Superior Court's instructions, Appellate Counsel filed an Affidavit responding to Defendant's ineffective assistance of appellate counsel claims, the tate filed a response, and Defendant filed a reply thereto. Defendant's appellate claims have now been fully briefed.

DEFENDANT'S PENDING APPELLATE CLAIMS

6. The facts and procedural history of this case are set forth in the Superior Court's September 29, 2017 decision denying Defendant's Rule 61 motion.5

7. Briefly, Defendant's convictions stem from his sexual abuse of his daughter beginning in 2008, when she was 12, and continuing until April 2011. The abuse included using a vibrator on her vagina; inserting sex toys and his fingers into her vagina and anus; and forcing her to masturbate him. The abuse continued regularly, several times a week, until April 2011.6

8. Defendant was convicted of ten counts of first degree sexual abuse of child by person in a position of trust (SACPPT)7, one count of continual sexual abuse of a child, one count of endangering the welfare of a child, and two counts of violation of privacy. Defendant was sentenced to a total of 122 years of unsuspended prison time.

9. Defendant had been indicted on 25 counts of SACPPT. The jury found Defendant guilty of all

25 counts. Before sentencing, the State advised that SACPPT was not enacted until June 2010, and that 15 of the counts of SACPPT related to a time period before June 2010. Those 15 counts of SACPPT were dismissed by the State prior to sentencing.8

10. Defendant's appellate counsel raised one issue on direct appeal. Appellate Counsel claimed that the evidence supporting those 15 SACPPT charges, that were subsequently dismissed, were highly prejudicial and should not have been admitted at trial.9

11. The Delaware Supreme Court affirmed the judgment of the Superior Court on direct appeal.10 The Delaware Supreme Court held that Defendant was charged with continuous sexual abuse of a child. That offense requires the jury to find that Defendant engaged in three or more acts of sexual conduct over a period of at least three months. Defendant's sexual abuse of his daughter before June 2010 was probative as an element of that crime.

12. The Delaware Supreme Court further concluded that the evidence supporting those 15 counts of SACPPT was not unduly prejudicial because of the remaining 10 counts of SACPPT. The jury heard evidence of a pattern of abuse that continued for more than two years. Each count of SACPPT is a separate crime and the jury found Defendant guilty on all 25 charges. Under the circumstances, there was no reason to believe that evidence of the first 15 counts affected the jury's verdict on the remaining 10 counts.11

13. In Defendant's supplemental Rule 61 submission raising his appellate counsel claims, Defendant contends that appellate counsel was ineffective for: 1) failing to appeal the motion for mistrial; 2) failing to appeal the motion to dismiss/motion for judgment of acquittal; and 3) "failing to raise all other grounds."

14. When evaluating claims of ineffective assistance of appellate counsel, the same *Strickland* framework applies.12 Defendant must show that: (1) counsel performed at a level "below an objective standard of reasonableness" and that, (2) the deficient performance prejudiced the defense.13

15. As to the first prong, deficient performance, Defendant must show that his appellate counsel was objectively unreasonable in failing to find arguable issues to appeal-that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them.14 Appellate counsel is not required to, and should not, raise every nonfrivolous claim, but rather should select and advance only the strongest claims in order to maximize the likelihood of success on appeal.15

16. In cases, like the subject action, in which the allegedly ineffective appellate counsel did file a merits brief on direct appeal, the defendant faces a tough burden of showing that a particular nonfrivolous issue was clearly stronger than the issue(s) that counsel did raise on appeal.16

17. In addition to establishing the first prong of the *Strickland* standard, that appellate counsel's conduct fell below an objective standard of reasonableness, Defendant must also establish the second prong and demonstrate that counsel's deficient performance caused prejudice.17 That is, the defendant must show a reasonable probability that, but for his counsel's deficient failure to raise an issue, he would have prevailed on his appeal.18

18. Turning to the subject action, Defendant's appellate counsel, in his Affidavit in response to Defendant's Rule 61 claims, represented that he thoroughly reviewed the record including the trial transcripts, victim statement, police reports and investigative summaries. Appellate counsel reviewed all motions filed before, during and after trial and reviewed all arguments advanced at side bar.19

19. Following Appellate Counsel's thorough review of the record, counsel raised the strongest issue that he believed existed and the only issue that he believed could secure a new trial for Defendant.20

20. Appellate counsel made the decision not to include any other issue on appeal because he did not want to taint the issue that he raised on direct appeal with other issues that he did not believe warranted reversal. Appellate counsel points out that while the issue that he raised on direct appeal ultimately proved to be unsuccessful, it did warrant oral argument.21

EXO

21. Defendant raises three claims of ineffectiveness of appellate counsel. Each of these three claims will be discussed in turn.

First Appellate Claim: Not Appealing Motion for Mistrial

22. Defendant claims that appellate counsel should have appealed the trial court's denial of his motion for a mistrial.

23. At the end of the State's case, the court told the jury that they had not heard all the evidence in the case.22 Defendant had, at that time, made the decision to testify.23 The following day, Defendant changed his mind and chose not to testify or present any further evidence.24 Defendant moved for a mistrial or in the alternative for a curative instruction contending that the Court's comments may be interpreted by the jury to have shifted the burden of proof.25 The court denied the motion for a mistrial, but did give a curative instruction.26 The court, in its curative instruction, stated: "Yesterday I told you that you had not heard the entirety of the evidence. However, in this particular case, the defendant has chosen not to testify. I want to give you a very specific instruction about that. You will hear it again later. The defendant has a Constitutional right to testify or not testify as he chooses. . . The burden of proof . . . is upon the State to prove the existence of all the elements of every crime . . . this defendant is not required to present any evidence on his own behalf . . "27

24. The court later reiterated this instruction when providing the jury instructions.28

25. Appellate Counsel did not raise this issue on direct appeal because he did not believe this issue would result in a reversal. Counsel believed that even if the Delaware Supreme Court found the comment to be improper, it was likely the Court would have found the error to be harmless error, since there was a curative instruction given, the curative instruction was again reiterated during the jury instructions, and there was substantial evidence against Defendant.29

26. Appellate Counsel is not required to raise claims which would not warrant reversal. Appellate counsel did not want to "taint" the issue he raised on direct appeal by raising additional issues he did not believe in.30 Appellate Counsel did not believe this issue presented any legitimate grounds for reversal. Defendant has not shown that Appellate Counsel was objectively unreasonable in failing to raise this issue on appeal. Moreover, Defendant has not established that he was prejudiced as a result thereof.

Second Appellate Claim: Not Appealing Motion for Judgment of Acquittal

27. A Motion for Judgment of Acquittal was made regarding the two counts of Invasion of Privacy. Trial counsel sought the dismissal of those charges on the basis that the State would not be able to prove an element of the crime, the time alleged in the indictment.31 The motion was denied.32

28. Defendant claims that there are two issues with the Invasion of Privacy charges: 1) the insufficiency of the dates/ times alleged in the indictment, and 2) the insufficiency of the evidence proving the element of intention to produce sexual gratification.

29. The Superior Court already addressed Defendant's claims as to the denial of his motion for judgment of acquittal in its September 29, 2017 decision on his Rule 61 motion. The Superior Court already found Defendant's claims to be without merit.33

30. As to the alleged insufficiency of the date/times alleged in the indictment, the Superior Court noted that the victim did testify to the events surrounding the taping of the videos which gave rise to the invasion of privacy charges and gave some time estimates of when that occurred. The Superior Court further noted that trial counsel argued rigorously to keep the videos out, and to secure dismissal of the Invasion of Privacy charges. The Superior Court concluded that given the victim's testimony that the videos were made when she was 12 or 13 years old, some portion of that period was within the statute of limitations. The court, therefore, denied Defendant's motion and allowed the charges of Invasion of Privacy to go forward.34

31. As to the alleged insufficiency of the evidence proving the element of intention to produce sexual gratification, the Superior Court noted that the evidence provided by the

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State, when viewed in the light most favorable to the State, was sufficient to send the evidence to the jury on those charges.35 Defendant was alleged to have engaged in conduct in which his daughter did not wish to participate, and yet she did so on many, many occasions. The conduct was of an extremely intimate and sexual nature, and coercion, if not physical force or threat, was a component. Exposing the victim to videotaping while in the shower, much like watching his daughter use the sex toys he provided, can easily be determined by the jury to be with the intent of gratifying him sexually.36

32. The Superior Court held that Defendant's claim that there was insufficient evidence presented at trial to support a conviction on the charges of Invasion of Privacy is without merit.37 The jury had sufficient evidence, under the circumstances, to infer the intent necessary to convict of the Invasion of Privacy charges.38

33. Defendant's claim that Appellate Counsel should have raised this issue on direct appeal is likewise without merit. Appellate Counsel, in his Affidavit in response to Defendant's Rule 61 motion, represents that he did not believe that the denial of Defendant's Motion for Judgment of Acquittal presented any legitimate ground for a reversal.39 Appellate Counsel believed that the Superior Court's ruling was proper under the controlling standard, viewing the evidence in the light most favorable to the State.40

34. Appellate Counsel is not required to argue frivolous claims and claims, which he did not believe, would warrant reversal. Appellate Counsel did file a merits brief and argued the strongest appealable issue in this case. Defendant has not shown that his Appellate Counsel was ineffective in any regard.

Third Appellate Claim-Failing to Raise All Other Grounds

35. Defendant claims that the grounds raised in his Rule 61 motion "so clearly violated" his rights that they should have been raised on direct appeal. The Superior Court denied all of the claims raised in his Rule 61 motion.41 After a full and thorough evaluation of Defendant's claims, the Superior Court concluded that Defendant could make no showing that his rights were violated, that he suffered any prejudice or that there was any cause for relief.42 Defendant has not established that Appellate Counsel was deficient in any regard for not raising any of the claims Defendant raised in his Rule 61 motion on direct appeal.

36. In his reply, Defendant claims that Appellate Counsel should have raised "the illegal warrant" on direct appeal. This claim was addressed and found to be without merit in the Superior Court's September 29, 2017 decision.43 The Superior Court already held that the trial court had reviewed both warrants at issue and found that there was sufficient probable cause in each warrant to search for the items taken by the police pursuant to the warrant. Had the issue been previously raised by trial counsel, a motion to suppress would not have prevailed.44 Defendant has not established that Appellate Counsel was deficient in any way in failing to raise this issue on direct appeal.

37. Defendant has failed to establish that Appellate Counsel was deficient in any respect, let alone that he suffered prejudice as a result thereof. Defendant's Rule 61 claims against his appellate counsel are denied.

For all of the foregoing reasons, Defendant's Motion for Postconviction Relief as to his supplemental appellate claims should be denied.

IT IS SO RECOMMENDED.

/s/ Lynne M. Parker
Commissioner Lynne M. Parker

Footnotes

1 The Supreme Court, on direct appeal, assigned pseudonyms to Defendant and the victim to protect the identity of the victim. The Superior Court, in its decision on September 29, 2017, used the same pseudonyms assigned by the Supreme Court. This Court has again used the same pseudonyms assigned by the Supreme Court for the same reason.

2 *State v. Hunter*, 2017 Del. Super. LEXIS 645, 2017 WL 5983168 (Del.Super.).

3 *Id.*

4
Superior Court Docket No. 70-Letter from the court dated October 2, 2017 setting forth the briefing schedule for the presentation of Defendant's appellate counsel claims.

5
See, *State v. Hunter*, 2017 Del. Super. LEXIS 645, 2017 WL 5983168 (Del.Super.).

6
2017 Del. Super. LEXIS 645, [WL] at 1.

7
11 *Del.C.* 778, effective June 30, 2010.

8
Hunter v. State, 89 A.3d 477, 2014 Del. LEXIS 141, 2014 WL 1233122, *1 (Del.).

9
Hunter v. State, 89 A.3d 477, 2014 Del. LEXIS 141, 2014 WL 1233122, *1 (Del.).

10
Hunter v. State, 89 A.3d 477, 2014 Del. LEXIS 141, 2014 WL 1233122 (Del.).

11
Hunter v. State, 89 A.3d 477, 2014 Del. LEXIS 141, 2014 WL 1233122, *1 (Del.).

12
Neal v. State, 80 A.3d 935, 946 (Del. 2013).

13
Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

14
Neal v. State, 80 A.3d 935, 946 (Del. 2013).

15
Id.

16
Id.

17
Id. at 947.

18
Id. at 947.

19
Superior Court Docket No. 73- Affidavit of Appellate Counsel

20
Id.

21
Id.

22
February 6, 2012 Trial Transcript, at pgs. 124-125.

23
February 6, 2012 Trial Transcript, at pgs. 120-123.

24
February 7, 2012 Trial Transcript, at pg. 3.

25
February 7, 2012 Trial Transcript, at pgs. 3-4.

26
February 7, 2012 Trial Transcript, at pgs. 13-15.

27
February 7, 2012 Trial Transcript, at pgs. 14-15.

28
February 7, 2012 Trial Transcript, at pg. 61.

29
Superior Court Docket No. 73- Affidavit of Appellate Counsel.

30
Superior Court Docket No. 73- Affidavit of Appellate Counsel.

31
February 2, 2012 Trial Transcript, at pgs. 13-14; February 6, 2012 Trial Transcript, at pgs. 8-10; February 6, 2012 Trial Transcript, at pg. 120.

32
February 6, 2012 Trial Transcript, at pg. 120.

33
See, *State v. Hunter*, 2017 Del. Super. LEXIS 645, 2017 WL 5983168, *3-4, 5-6 (Del.Super.)

34
Hunter v. State, 89 A.3d 477, 2014 Del. LEXIS 141, 2014 WL 1233122, * 3-4 (Del.).

35

Priest v. State, 879 A.2d 575 (Del. 2005).

36
Hunter v. State, 89 A.3d 477, 2014 Del. LEXIS 141, 2014 WL 1233122, *5-6 (Del.).

37
Hunter v. State, 89 A.3d 477, 2014 Del. LEXIS 141, 2014 WL 1233122, *5-6 (Del.).

38
Hunter v. State, 89 A.3d 477, 2014 Del. LEXIS 141, 2014 WL 1233122, *5-6 (Del.).

39
Superior Court Docket No. 73- Affidavit of Appellate Counsel.

40
Superior Court Docket No. 73- Affidavit of Appellate Counsel.

41
Hunter v. State, 89 A.3d 477, 2014 Del. LEXIS 141, 2014 WL 1233122 (Del.).

42
Hunter v. State, 89 A.3d 477, 2014 Del. LEXIS 141, 2014 WL 1233122 (Del.).

43
Hunter v. State, 89 A.3d 477, 2014 Del. LEXIS 141, 2014 WL 1233122, * 7 (Del.).

44
Hunter v. State, 89 A.3d 477, 2014 Del. LEXIS 141, 2014 WL 1233122, * 7 (Del.).

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
v.	)	ID No. 1104009274
	)	
WILLIAM HUNTER[1],	)	
	)	
Defendant.	)	

ORDER ADOPTING COMMISSIONER'S REPORT AND RECOMMENDATION THAT DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF AS TO SUPPLEMENTAL APPELLATE CLAIMS SHOULD BE DENIED

This 10th day of July, 2018, upon consideration of Defendant's *pro se* Addendum Motion for Postconviction Relief (the "Addendum Motion"),[2] the Commissioner's Report and Recommendation That Defendant's Motion for Postconviction Relief as to Defendant's Supplemental Appellate Claims Should Be Denied (the "Report"),[3] and the record in this case, **IT APPEARS THAT:**

1. The Court referred the Addendum Motion to Commissioner Lynne M. Parker, pursuant to 10 *Del. C.* § 512(b) and Superior Court Criminal Rule 62, for proposed findings of fact and conclusions of law.

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[1] The Supreme Court, on direct appeal, assigned pseudonyms to Defendant and the victim to protect the identity of the victim. The Superior Court used the same pseudonyms in its decision dated September 29, 2017. This Court has again used the same pseudonyms assigned by the Supreme Court for the same reason.

[2] D.I. 72. Defendant filed his first Motion for Postconviction Relief on January 20, 2015 (the "Rule 61 Motion"), and filed a supporting Memorandum of Law on October 13, 2016. D.I. 44, 60. This Court denied his Rule 61 Motion, but allowed him to file supplemental claims regarding alleged ineffectiveness of his appellate counsel. D.I. 69–70.

[3] D.I. 81.

2. On April 25, 2018, Commissioner Parker filed the Report, recommending that the Addendum Motion be denied. On May 3, 2018, Defendant filed an appeal of the Commissioner's Report (the "Appeal").[4] The Report examined three claims regarding the alleged ineffectiveness of Defendant's appellate counsel and denied each one. The Court holds that the Appeal fails to raise any valid objections to the Report's findings and conclusions, and thus, adopts the Report.

3. In his Appeal, independent of objections to the Report, Defendant also objected to the findings and conclusions in this Court's September 29, 2017 Opinion[5] (the "Rule 61 Opinion") which denied his Rule 61 Motion. The Rule 61 Opinion is not a proper subject to be reviewed in this Order. The appropriate process for Defendant to challenge the Rule 61 Opinion is through appeal to the Delaware Supreme Court.

4. Additionally, a review of the record shows that, after the briefing on his Rule 61 Motion was complete, Defendant filed a Motion for Leave to Amend Rule 61 Postconviction Motion, dated June 20, 2017 (the "Motion to Amend").[6] The Court did not decide upon the Motion to Amend, nor did it address the argument raised in the Motion in its Rule 61 Opinion. Although the Motion to Amend is not

[4] D.I. 83.
[5] D.I. 69.
[6] The Motion for Leave to Amend was not docketed, and thus does not have a docket number.

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within the purview of this Order, the Court has considered and will address it on its merits.

5. The Motion to Amend raised an additional argument regarding the validity of a search warrant. As discussed in the Rule 61 Opinion and the Report, there were two search warrants in this case. Defendant argued that the search and seizure authorized by the second search warrant was illegal because it continued "for an indeterminate amount of time." His argument appears to be that since the search warrant contained a time limit by which it must be executed, the police could not retain or investigate the seized item—Defendant's computer—beyond that time limit. This argument is contrary to established Delaware law. Title 11, Section 2311 of the Delaware Code explicitly permits the police to retain "any papers, articles or things validly seized" for "a reasonable length of time" for the purpose of arresting the offender or using the items as evidence in a criminal trial.[7] Accordingly, the argument raised by Defendant in his Motion to Amend is without merit.

NOW THEREFORE, after a *de novo* review of the record in this case,

IT IS FOUND AND DETERMINED that the Report is not clearly erroneous, is not contrary to law, and is not an abuse of the Commissioner's discretion, and

[7] 11 *Del. C.* § 2311(b).

IT IS ORDERED that the Report, including its recommendation, is **ADOPTED** by the Court, and for reasons stated in the Report,

IT IS FURTHER ORDERED that Defendant's Addendum Motion for Postconviction Relief is **DENIED**.

IT IS SO ORDERED.

Sheldon K. Rennie, Judge

Original to Prothonotary

cc: Commissioner Lynne M. Parker
Annemarie H. Puit, Esq., DAG
William Hunter (SBI #688958)

E18

Appendix F