IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE	)	
	)	
	)	Def. I.D. # 1208011625A
v.	)	
	)	
	)	
CHRISTOPHER SPENCE,	)	
	)	
Defendant.	)	

Submitted: January 11, 2016
Decided: August 20, 2019

Upon Defendant's Motion for Postconviction Relief (R-1)

DENIED

MEMORANDUM OPINION

Kathryn J. Garrison, Esquire, Deputy Attorney General, Department of Justice, 102 Water Street, Dover, DE 19904; Attorney for State of Delaware.

Natalie S. Woloshin, Esquire, Law 3200 Concord Pike, Wilmington, DE 19803; Attorney for Petitioner Christopher Spence.

KARSNITZ, J.

I. INTRODUCTION

On January 11, 2016 defendant Christopher Spence ("Spence" or "Defendant") filed a timely *pro se* Motion for Postconviction Relief under Superior Court Criminal Rule 61 on the basis that he was denied effective assistance of counsel at his 2013 trial.[1] Those claims were summarily rejected because there was no recitation of any supporting facts or any clear delineation of exactly what conduct was allegedly deficient.[2] A claimant must "set forth in summary form the facts supporting each of the grounds … specified."[3]

The Court then appointed counsel to represent Spence, and on September 18, 2017, Spence, through counsel, filed an Amended Motion for Postconviction Relief.[4] Spence's former trial and appellate counsel, Eugene Maurer, Esq., responded to the factual allegations of ineffective assistance of counsel contained in the amended motion by Affidavit filed on January 22, 2018.[5] On November 9, 2018, the State filed its Response to defendant's Motion for Postconviction Relief.[6] On December

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[1] D.I. 77. "D.I." refers to docket items in Superior Court Case Def. I.D. # 1208011625A.
[2] Super. Ct. Crim. R. 61(d)(4).
[3] Super. Ct. Crim. R. 61(b)(2).
[4] D.I. 98.
[5] D.I. 102.
[6] D.I. 110.

31, 2018, Spence filed a Reply in Support of Postconviction Relief.[7] On March 29, 2019, I held an evidentiary hearing concerning Spence's claim that counsel was ineffective for failure to make a motion to suppress Spence's statement to police because of a presentment delay.[8] After that hearing, I permitted counsel to submit post-hearing briefs. Supplemental briefs were filed on July 16, 2019.[9]

Defendant raises several claims under the Sixth Amendment and the Fourteenth Amendment to the United States Constitution, under Article I, §§ 4, 7, 9 and 11 of the Delaware Constitution, and under applicable Federal and State case law. Specifically, he claims that counsel was ineffective for: (1) failure to file a motion to suppress Spence's statement in violation of his rights under the Sixth Amendment of the United States Constitution and his rights under Article I, §§ 4, 7 and 9 of the Delaware Constitution; (2) failure to object to perjury by the State's key witness, thereby denying Spence an opportunity for a new trial under *Larrison v. United States* and its Delaware progeny;[10] and, (3) failure to present readily available evidence supporting Spence's self-defense in violation of his rights under the Sixth Amendment and the Fourteenth Amendment of the United States Constitution and his rights under Article I, §§ 4, 7 and 11 of the Delaware Constitution.

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[7] D.I. 112.
[8] D.I. 118.
[9] D.I. 124, 125.
[10] 24 F.2d 82 (7th Cir. 1928); *Conlow v. State*, 441 A.2d 638 (1982); *Downes v. State*, 771 A.2d 289 (2001).

I find that Defendant has failed to satisfy either the performance part or the prejudice part of the two-part test set forth in *Strickland v. Washington*[11] ("*Strickland*"), as adopted in Delaware and discussed more fully below, as to his allegation of ineffective assistance of counsel. Accordingly, the Motion is **DENIED.**

II. BACKGROUND

A. PROCEDURAL HISTORY

On August 13, 2012, Spence was arrested and charged with Drug Dealing,[12] Maintaining a Drug Property,[13] and Possession of Drug Paraphernalia.[14] While waiting to be presented to a magistrate, Spence was questioned about a shooting that occurred on July 8, 2012 on King Street in Wilmington, Delaware, and another shooting which occurred on July 9, 2012 at Eden Park in Wilmington, Delaware.[15]

On August 14, 2012, Spence was arrested and charged with one count of Murder First Degree,[16] one count of Attempted Murder First Degree,[17] one count of

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[11] 466 U.S. 668 (1984).
[12] 16 *Del. C.* § 4752.
[13] 16 *Del. C.* § 4760
[14] 16 *Del. C.* § 4771
[15] A169-A170. "A" refers to the Appendix for Petitioner's Amended Motion for Postconviction Relief.
[16] 11 *Del. C.* § 636.
[17] 11 *Del. C.* §§ 531, 636.

Reckless Endangering First Degree,[18] and three counts of Possession of a Firearm during the Commission of a Felony[19] in connection with the July 8, 2019 shooting.

On January 7, 2013, a New Castle County grand jury indicted Spence with Murder First Degree, Attempted Murder First Degree, Reckless Endangering First Degree, three counts of Possession of a Firearm During the Commission of a Felony, Drug Dealing, and Possession of Drug Paraphernalia.[20] On October 10, 2013, this Court granted Spence's motion to sever the drug dealing and possession of drug paraphernalia charges.[21] Jury trial proceedings on the remaining murder and related charges began on December 3, 2013 and continued through December 19, 2013.[22]

On December 19, 2013, the jury found defendant Spence guilty of Murder First Degree, Attempted Murder First Degree, Reckless Endangering First Degree, and the three related firearms charges.[23] That same day, Spence moved for a mistrial and the Court reserved decision.[24] On December 27, 2013, Spence filed a motion

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[18] 11 *Del. C.* § 604.
[19] 11 *Del. C.* § 1447A.
[20] A 002; A 129 -- A 132.
[21] D.I. 21, 26.
[22] A 006.
[23] D.I. 39.
[24] D.I. 39.

for a new trial.[25] This Court denied Spence's motion for a new trial on May 15, 2014.[26]

On May 16, 2014, Spence was sentenced to a life term plus twenty-four years of incarceration, followed by decreasing levels of supervision.[27] A timely Notice of Appeal was filed on June 3, 2015. The Delaware Supreme Court affirmed the convictions on November 13, 2015.[28]

B. STATEMENT OF FACTS

On the evening of July 7, 2012, Orain and Joshien Harriott hosted a graduation and birthday party on an upper floor of a building at 1232 North King Street, Wilmington, Delaware, that was open to the public with payment of a cover charge.[29] Guests were checked with a wand for weapons and their bags were searched.[30] Many in attendance were affiliated with a gang known as the "Gaza."[31] The Gaza are centered around the Harriott family and are named for an auto repair shop, at which the members hang out, which itself is named for a type of Jamaican music.[32] Many

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[25] D.I. 41.
[26] D.I. 50; *State v. Spence*, 2014 WL 2089506 (Del. Super. Ct. May 15, 2014).
[27] D.I. 51.
[28] *Spence v. State*, 129 A.3d 212, 2012 (Del. 2015).
[29] A 296, 299,309,360, 416.
[30] A 296, 310, 420.
[31] A 312.
[32] A 487, 518.

of the Gaza members are Jamaican immigrants.[33] The leader of the Gaza is Orain Harriott[34], and members include Orain's brother, Joshien Harriott, Orain's wife, Amy Harriott, their son, Derrick Grant-Higgin, Ryan McKay, Ugochukwu Henry and Spence.[35]

The rival gang to the Gaza are the "Sure Shots." The Sure Shots are centered around the Phillips family. The leader of the Sure Shots is Seon Phillips, and members include his brothers, Roland Phillips and Otis Phillips, Jeffrey Phillips (no relation), and Kelmar Allen.[36] Kirt Williams was associated with the Sure Shots but was not a member.[37] Many of the Sure Shots members are Jamaican immigrants.

Sometime after midnight of July 8, 2012, six or seven members of the Sure Shots, including Kelmar Allen, Kirt Williams, Jeffrey Phillips, Roland Phillips, and Seon Phillips, arrived at the party.[38] Shortly after their arrival, there was a disagreement between Jeffrey Phillips and Orain Harriott, with Jeffrey Phillips "disrespecting" Orain Harriott in Jamaican slang.[39] Kelmar Allen and others took Jeffrey Phillips outside, where Kelmar Allen saw Ryan McKay and another man walking up the street towards the building with a shotgun and a handgun,

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[33] A 368, 412, 422, 487.
[34] A 360, 707.
[35] A 295-99, 359-61, 368-69, 382-83, 420, 487-88.
[36] A 370, 378, 414-17, 423, 490, 698-700.
[37] A 417.
[38] A 372, 378, 423.
[39] A 422-23.

respectively.[40] Kelmar Allen and Kirt Williams reentered the party to warn and gather the Sure Shots still inside.[41] Kelmar Allen brushed past Orain Harriott, who was telling him to leave.[42] Kelmar Allen told the others about the guns, and walked towards the elevator with Kirt Williams to leave.[43] There, they got into a brief altercation with Joshien Harriott.[44] As they waited for the elevator, Spence shot at them three times with the shotgun that Ryan McKay had brought to the party.[45] Kirt Williams was killed and one shot grazed Kelmar Allen.[46] Kelmar Allen blacked out and woke up in the elevator.[47] When it reached the first floor, Kalmar Allen fled, leaving Kirt Williams dead inside.[48] Outside, Jeffrey Phillips was shooting at someone in the street.[49] Spence testified at trial that he shot at Kirt Williams and Kelmar Allen in self-defense.[50] Although he had seen neither at the party with a gun, he thought he saw them reach for their waistbands.[51]

Officers responded to a call from the scene, and upon searching the area discovered three .40 caliber spent bullet casings on the intersection of 13th and King

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[40] A 425-26.
[41] A 428.
[42] A 428-29.
[43] A 429.
[44] *Id.*
[45] A 430, 498.
[46] A 394, 431, 499.
[47] A 430.
[48] A 431.
[49] *Id.*
[50] A 498-99.
[51] A 496, 499, 500.

Streets.[52] They found the body of the deceased, Kirt Williams in the elevator and, in the area where the party had been taking place, found a shotgun blast, blood splatter patterns, and three shotgun shells.[53]

III. DISCUSSION

A. PROCEDURAL BARS UNDER RULE 61(i).

Before addressing the merits of a defendant's motion for postconviction relief, I must first apply the procedural bars of Superior Court Criminal Rule 61(i).[54] If a procedural bar exists, as a general rule I will not address the merits of the postconviction claim.[55] Under Delaware Superior Court Rules of Criminal Procedure, a motion for post-conviction relief can be barred for time limitations, successive motions, procedural default, or former adjudication.[56]

A motion for postconviction relief exceeds time limitations if it is filed more than one year after the conviction becomes final, or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right was first recognized by the Supreme Court of

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[52] A 232.
[53] A 203, A 232-234.
[54] *Ayers v. State*, 802 A.2d 278, 281 (Del.2002) (citing *Younger v. State,* 580 A.2d 552, 554 (Del. 1990). All references to Rule 61 are to the rule as it existed when Spence filed his pro se motion for postconviction relief See *Bradley v. State*, 135 A.3d 748, 757 n. 24 (Del 2016).
[55] *Id.*; *State v. Page*, 2009 WL 1141738, at*13 (Del. Super. April 28, 2009).
[56] Super. Ct. Crim. R. 61(i).

Delaware or the United States Supreme Court.[57] In this case, Spence's conviction became final for purposes of Rule 61 at the conclusion of direct review when the Delaware Supreme Court issued its mandate on December 1, 2015. Spence filed his *pro se* first motion for postconviction relief on January 11, 2016. Therefore, consideration of the motion is not barred by the one-year limitation of Rule 61(i)(1). I note that the amended motion for postconviction relief was filed after the one-year limitation of Rule 61 (September 18, 2017). However, Superior Court judges have "discretion to permit defendants to amend their motions when justice so requires."[58]

Grounds for relief "not asserted in the proceedings leading to the judgment of conviction" are barred as procedurally defaulted unless the movant can show "cause for relief" and "prejudice from [the] violation."[59] Grounds for relief formerly adjudicated in the case, including "proceedings leading to the judgment of conviction, in an appeal, in a post-conviction proceeding, or in a federal habeas corpus hearing" are barred.[60] None of these bars applies in this case.

The bars to relief do not apply either to a claim that the Court lacked jurisdiction or to a claim that pleads with particularity that new evidence exists that creates a strong inference of actual innocence,[61] or that a new retroactively applied rule of

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[57] Super. Ct. Crim. R. 61(i)(1).
[58] *Ploof v. State*, 75 A.2d 811, 821 (Del. 2013).
[59] Super. Ct. Crim. R. 61(i)(3).
[60] Super. Ct. Crim. R. 61(i)(4).
[61] Super. Ct. Crim. R. 61(i)(5).

constitutional law renders the conviction invalid.[62] None of these claims applies in this case.

Defendant's motion is based on claims of ineffective assistance of counsel, which can only be raised in a motion for postconviction relief.[63] The issues presented in this motion were not formerly adjudicated because ineffective assistance of counsel claims are not addressed by the Delaware Supreme Court on direct appeal.[64] Therefore, the claims made in Defendant's postconviction motion are not procedurally barred.

B. Spence Has Failed To Demonstrate That His Representation By Trial/Appellate Counsel Was Ineffective.

Spence brings numerous claims of ineffective assistance of his trial and appellate counsel (collectively, "counsel"), which are assessed under the two-part standard established in *Strickland v. Washington,*[65] as applied in Delaware.[66] Under *Strickland,* Defendant must show that (1) Counsel's representation "fell below an objective standard of reasonableness" (the "performance part"); and, (2) the

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[62] Super. Ct. Crim. R. 61(d)(2)(i) and (ii).
[63] *Id.* at 61(i)(3).
[64] *Id.* at 61(i)(4).
[65] 466 U.S. 668 (1984).
[66] *Albury v. State,* 551 A.2d 53 (Del. 1988).

"deficient performance prejudiced [his] defense" (the "prejudice part").[67] In considering the performance part, the Court was mindful that "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."[68] *Strickland* requires an objective analysis, making every effort "to eliminate the distorting effects of hindsight" and to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[69] Moreover, "strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based."[70]

As to the performance part, Spence must show that counsel's decisions as to which motions to make (specifically, for suppression of Spence's statement to police officers and for a new trial based on Kelmar Allen's changed testimony) and which witnesses to call (specifically, Ryan McKay) were not reasonable strategic decisions. In my view, counsel's choices not to move for suppression of Spence's statement to police officers and not to move for a new trial based on Kelmar Allen's changed testimony, and counsel's choice not to call Ryan McKay as a witness, were reasonable strategic decisions under the performance part of the *Strickland* test.

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[67] *Id.* at 687.
[68] *Id.* at 690.
[69] *Id.* at 689.
[70] *Id.* at 681.

Counsel's tactical decision not to make these motions and not to call this witness do not amount to ineffective assistance of counsel.

As to the prejudice part, Spence must demonstrate that there exists a reasonable probability that, but for counsel's unprofessional errors, the outcome of the trial would have been different.[71] Even if counsel's performance were professionally unreasonable, it would not warrant setting aside the judgment of conviction if the error had no effect on the judgment.[72] A showing of prejudice "requires more than a showing of theoretical possibility that the outcome was affected."[73]

Strickland teaches that there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in a particular order, or even to address both parts of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.[74] In every case the court should be concerned with whether, despite the strong presumption of reliability, the

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[71] *Id.* at 687; *Zebroski v. State,* 822 A.2d 1038, 1043 (Del. 2003); *Wright v. State,* 671 A.2d 1353, 1356 (Del. 1996).
[72] *Strickland,* at 691.
[73] *Frey v. Fulcomer,* 974 F.2d 348, 358 (3d Cir. 1992).
[74] *Strickland,* at 697.

result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.[75]

1. **Motion to Suppress Spence's Statement to Police.**

a. Relevant Facts.

At 6:05 a.m. on Monday, August 13, 2012, Wilmington Police Department officers executed a search warrant at a home on Vandever Avenue as a part of a drug and firearms investigation.[76] Spence was in one of the bedrooms, in which the police found 44.3 grams of marijuana.[77] Spence was taken into custody and charged with possession with intent to deliver marijuana, maintaining a drug property, and possession of drug paraphernalia.[78] An arrest warrant on the drug charges was approved by a Justice of the Peace magistrate at 9:29 a.m.[79] Spence was given his *Miranda* warnings and interviewed by detectives, including Officer Robert Fox.[80] He admitted that the marijuana was his and that he sold it to pay his bills.[81]

Before Spence's arrest on drug charges on the morning of August 13, 2012, detectives had learned from at least one eyewitness that Spence was the person who

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[75] *Id.* at 696.
[76] A 165; A 141.
[77] A 141-142.
[78] A 143; A 625.
[79] A 628.
[80] A 142.
[81] *Id.*

had shot Kirt Williams and Kelmar Allen at the King Street party on July 7, 2012.[82] On the morning of August 13th, Officer Fox, the chief investigating officer of the drug and firearms offenses, notified Detective Randall Nowell, the chief investigating officer of the King Street shooting, that Spence was in custody on drug charges.[83]

Detective Nowell obtained a search warrant for an address on North Locust Street where Spence told Officer Fox he had personal belongings.[84] The search on the early afternoon of August 13th discovered a 12-gauge shotgun located in the rear seat of a car that had paperwork belonging to Spence next to it.[85]

At 5:03 p.m., Detective Nowell and Detective Peter Leccia resumed the interview of Spence, this time with respect to the July 7th King Street shooting.[86] Spence was again read his *Miranda* rights and agreed to answer questions.[87] Spence denied having attended the King Street party on July 7th.[88] He stated he had been at home all night with his girlfriend, Aquisha Tiller.[89] At 5:48 p.m. there was a break

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[82] Ugochukwu Henry identified Spence as the shooter on July 12, 2012. A 154-54.
[83] A 169; A 215.
[84] A 142; A 169.
[85] Id.; Cpl. Law's 8/29/2012 Supp. Rep. at 2. This shotgun was not the one used by Spence to shoot Kirt Williams and Kelmar Allen.
[86] A 162; State's Ex. 84.
[87] A 018; A 162.
[88] A 022-023.
[89] A 162.

in the interview.[90] Spence was given a chance to use the bathroom and was given food.[91]

Meanwhile, Detective Nowell had obtained a search warrant for the Vandever residence to search and seize Spence's car and cell phone.[92] Detective Nowell interviewed Aquisha Tiller, who stated that Spence had left at some point on the night of July 7th to go to the King Street party, and he returned at an unknown hour and told her there had been a shooting at the party.[93]

At 9:47 p.m., Detective Nowell and Detective Leccia returned and resumed the interview with Spence.[94] At 9:56 p.m., Spence admitted to being at the King Street party, and at 11:02 p.m. he admitted to shooting Kirt Williams and Kelmar Allen at the party.[95] The interview ended at 12:32 a.m. August 14, 2012.[96] A magistrate approved an arrest warrant at 1:42 a.m. and Spence was arrested and charged with first degree murder, attempted first degree murder, and two counts of possession of firearms during the commission of a felony.[97] Since a Justice of the Peace magistrate was not available to set bail for Spence until 8:00 a.m., Spence was

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[90] A 164-65.
[91] A 050-51.
[92] A 163.
[93] A 157-58; A 163.
[94] A 051; A 165.
[95] A 102-11; A 164.
[96] A 630; A 633.
[97] A 121, A 633.

given a bed in a holding cell so that he could rest until his presentment.[98] He was presented to a magistrate on Tuesday, August 14, 2012, at 9:00 a.m. with respect to the drug case. With respect to the murder case, he was presented to the magistrate at approximately 9:41 a.m. that same day.[99] He was admitted to the Howard R. Young Correctional Institution at 11:42 a.m. on August 14, 2012.[100]

b. Applicable Law.

11 Del. C. § 1909 states in pertinent part:

> "(a) If not otherwise released, every person arrested shall be brought before a magistrate without unreasonable delay, and in any event the person shall ..... be so brought within 24 hours of arrest, unless the court, for good cause shown, orders that person be held for a further period not to exceed 48 hours."

Delaware Superior Court Criminal Rule 5 similarly provides:

> "(a) ... An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unreasonable delay before the nearest available committing magistrate of the county in which the offense is alleged to have been committed or such other committing magistrate as provided by the warrant or by statute, court rule or administrative order. If a person arrested without a warrant is brought before a committing magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect

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[98] A 121.

[99] No time is listed for the murder case presentment. Spence's Bail History Display shows that bail information was entered into the system at 9:41 a.m. on that date. Justice of the Peace Court 20 has the same information in its system; however, Spence's file was turned over to the Court of Common Pleas prior to the preliminary hearing, and any other paperwork has since been destroyed.

[100] Client Location History & Control Data Inquiry.

to the showing of probable cause. When a person, arrested with or without a warrant, or given a summons, appears initially before the committing magistrate, the committing magistrate shall proceed in accordance with the applicable subdivision of this rule."

The United State Supreme Court has held that any confession or incriminating statement which is made during an unlawful detention is inadmissible regardless of the voluntariness of the statement.[101] This exclusionary rule was applied in Delaware by the Delaware Supreme Court, which held that an "incriminating statement obtained from the defendant during an unlawful detention, i.e., after the expiration of the 24 hour period, was rendered inadmissible as a matter of law for that reason alone, without regard for voluntariness."[102] However, when the delay is less than 24 hours, courts must evaluate the circumstances on a case-by-case basis to determine whether the delay was "unreasonable.'[103] This exclusionary rule does not rest upon constitutional grounds; it is a court-designed rule to effectuate the orderly administration of justice.[104] Although there is no bright line test or standard, courts are required to consider "the number of hours of detention prior to appearance before a Justice of the Peace ... together with all the other circumstances in the

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[101] *McNabb v. United States*, 318 U.S. 332 (1943); *see also Mallory v. United States*, 354 U.S. 449 (1957).
[102] *Vorhauer v State*, 212 A.2d 886 (Del. 1965). Since *Vorhauer* was decided, the presentment rule has moved from 11 *Del C.* § 1911 to 11 *Del. C.* § 1909 and has been modified, but not in ways pertinent to this case.
[103] *Webster v. State*, 213 A.2d 298, 300 (Del. 1965).
[104] *Wright v. State*, 633 A.2d 329, 333 (Del. 1993).

case."[105] Each case must be judged on its own facts and among the factors to be considered are the length of the delay, the reasons for the delay, and the atmosphere surrounding the detention.[106] Whether a statement otherwise admissible is inadmissible because of unreasonable delay ... is to be determined after consideration of the totality of the circumstances.[107] The reasonableness of a delay is a question to be determined by the trial judge.[108]

"The significant hours of detention are those occurring before the confession and not those thereafter."[109] "The illegality of detention does not retroactively change the circumstances under which he made the disclosures."[110] Even if there is a subsequent illegal detention, exclusion of a confession is not the appropriate remedy where the delay between arrest and the confession is reasonable.[111] Thus, "the question is whether under all the circumstances the time line from the Defendant being taken into custody until the statement was given was an unreasonable period

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[105] *Webster*, 213 A.2d at 333.
[106] *Wright*, 633 A.2d at 334, citing *Deputy v. State*, 500 A.2d 581, 589 (Del. 1985).
[107] *Hopkins v. State*, 501 A.2d 774, 776 (Del. 1985).
[108] *Webster*, 213 A.2d at 300.
[109] *Webster*, 213 A.2d at 302 (citing *United States v. Mitchell*, 322 U.S. 65 (1944)); *Torres v. State*, 1992 WL 53406, at *5 (Del. Feb. 7, 1992) (quoting *Haug v. State,* 406 A.2d 38, 41 (Del. 1979) (citing *Weekley v. State*, 222 A.2d 781, 787 (Del. 1966)).
[110] *Mitchell*, 322 U.S. at 70-71, where the defendant had been detained for eight days after giving his statement before presentment.
[111] *Id.*

of time triggering a finding of the statement being automatically involuntary under the *Vorhauer* ruling."[112]

c. Counsel was Not Ineffective in Failing to File Motion to Suppress Spence's Statement because of Unreasonable Delay.

In his Affidavit, counsel acknowledges the law governing the exclusion of statements because of a presentment delay.[113] However, he made a strategic decision not file a motion to suppress Spence's statement because, even if the motion were granted and the statement suppressed, Spence would have to testify as to his claim of self-defense.[114] Once Spence testified, as a matter of law his statement would still have been admissible for impeachment purposes.[115] I find that this decision by counsel was objectively reasonable under the first part of the two-part *Strickland* test (see Section III(B), *supra*).

Moreover, I find that, even if a motion for suppression of Spence's statement because of presentment delay had been filed, it is more likely than not that the motion

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[112] *State v. Williams*, 2014 WL 2536992, at *4 (Del. Super. Ct. June 2, 2014).
[113] Aff. Of Counsel at ¶ 3.
[114] *Id.*
[115] In *Holder v. State*, 692 A.2d 882, 888 (Del. 1997) the Delaware Supreme Court held that "it is well established law that even if an otherwise voluntary statement is obtained in violation of *Miranda*, the prosecution is not prohibited from introducing the statement on rebuttal for purposes of impeachment, after the defendant has testified." (citing *Harris v. New York*, 401 U.S. 222, 225-26 (1971)).

would have been denied, and that the outcome of the trial would have been no different. Applying the three *Wright* tests:

Length of Delay. Spence confessed approximately 17 hours after he was arrested for drug offenses. During the initial part of the interview, Spence was being questioned about drug and firearms offenses. Only at 5:03 p.m. did the interview turn to the shooting offenses. The interview relating to the shooting offenses resumed at 9:47 p.m. Spence confessed to the shooting at 11:02 p.m., the interview ended at 12:32 a.m., and the arrest warrant for the shooting offenses was issued at 1:42 a.m. The aggregate time of the actual interaction between Spence and the police officers was only one or two hours before he confessed to the shooting. The rest of the time was "down" time during which he was alone in the interview room.[116]

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[116] Although Spence was held another eleven hours after his confession until his presentment the next morning, under *Mitchell* and *Williams* the period of time *after* his confession (11:02 p.m.) until his arraignment (9:41 a.m. the next morning), even if unreasonable, is irrelevant in determining the reasonableness of the delay *before* the confession. There were exigent circumstances: no Justice of the Peace magistrate was available to set bail until 8:00 a.m. the next morning. During the March 29, 2019 evidentiary hearing, the police officers testified that the system had subsequently been changed to make magistrates more readily available. Moreover, during the night, Spence was given a bed in a holding cell so that he could lie down and sleep until his presentment.

Reasons for the Delay. It took time for Detective Nowell and Detective Leccia to interview witnesses, obtain several search warrants, and conduct the searches related to the shooting offenses. They moved as quickly as they reasonably could.

Atmosphere Surrounding the Detention. This is an aspect of Spence's detention that I find problematic. In reviewing the video of portions of his detention, and the police officers' testimony it is clear to me that for much of the time at issue Spence was unattended. Spence was in a room by himself monitored by video by detectives of the Wilmington Police Department. It is obvious to me that the officers investigating the terrible events of July 8 and July 9, 2012 were focused and bent on solving the crimes, not tending to Spence's needs. Spence himself testified at the March 29, 2019 evidentiary hearing that his medical needs were neglected, and he was provided minimal attention to his basic needs of food, water and bathroom breaks. By way of example only, I was shown a video of a Wilmington police officer rather blithely tossing a wrapped hamburger to Spence as the only provision of food to him over a period of about twelve hours.

One might hope for better treatment, but being arrested and detained in connection with the investigation of murder and firearm offenses is serious business important to society. The investigating officers had a lot to do and proceeded professionally and efficiently. Spence received minimal but in my view satisfactory attention. In the videos I watched, he made no complaints and seemed reasonably

comfortable. No threats were made to him and the questioning was professional. Under all the circumstances, the reasons for the delay in presentment were reasonable and did not affect the process or the results.

Thus, I find that Spence was not prejudiced by the failure of counsel to make a motion to suppress the confession for presentment delay under the second part of the two-part *Strickland* test (see Section III(B), *supra*). Spence's ineffective assistance of counsel claim fails.

2. **Kelmar Allen's Changed Testimony**.

a. Relevant Facts.

Kelmar Allen was the star witness at Spence's trial. He testified that neither he nor Kirt Williams (the victim) carried a gun into the King Street party on the night of July 7, 2012; they were patted down and scanned with a security wand at the upstairs entrance.[117] He testified that Jeffrey Williams was carrying a nine-millimeter gun *before* the party, and that *after* the party Jeffrey Williams was carrying a gun (later determined to be a .40 caliber handgun) which he was firing at someone.[118] The police found five .40 caliber spent shell casings on the street after the party.[119]

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[117] A 419, 420-21, 439.
[118] A 450-54.
[119] A 232-33.

On July 8, 2012, Jeffrey Phillips and Otis Phillips (no relation) shot and killed two people at Eden Park in Wilmington.[120] The police recovered the .40 caliber handgun that Jeffrey Williams had shot the night before after the King Street party.[121] Kelmar Allen was also the star witness in the Eden Park trial.[122] In that trial, he testified again about the King Street shooting.[123] His testimony was generally consistent with his testimony in the Spence trial, except that he testified that the .40 caliber handgun which Jeffrey Williams was firing after the King Street party belonged to him (Kelmar Allen).[124] He testified that he had not admitted before that .40 caliber handgun was his in order to protect Jeffrey Phillips and because he was afraid of the consequences he would face for owning a handgun used in a murder.[125]

Spence claims that he is entitled to a new trial because Kelmar Allen committed perjury during Spence's trial, and that counsel was ineffective because of his failure to raise the issue on appeal or to file a motion for a new trial. He argues that the truth – that the gun Jeffrey Phillips had and used that night was really Kelmar Allen's – could have bolstered his claim of self-defense because it undermined

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120 *Phillips v. State*, 154 A.3d 1146, 1150 – 51 (Del. 2017).
121 *Id.* at 1151.
122 *Id.*
123 A 706-09.
124 A 709.
125 A 714.

Kelmar Allen's credibility as a witness generally, and Kelmar Allen's specific testimony that that Spence had fired at him and Kirt Williams unprovoked.

b. Procedural History.

Kelmar Allen testified in the Eden Park trial after Spence had filed his notice of appeal but before counsel had filed his opening appellate brief. Though characterized as a part of his Amended Motion for Postconviction Relief, Spence is, in reality, making a motion for a new trial based on newly discovered evidence.[126] Since Spence filed his Amended Motion for Postconviction Relief within the two-year time period for filing a motion for a new trial,[127] the Rule 61 procedural bars do not preclude consideration of his claim.[128]

c. Applicable Law.

Spence argues that Kelmar Allen's changed testimony was a recantation, and thus subject to the three-part test of *Larrison v. United States*[129]: the defendant must show: (1) the witness is material and the testimony is false; (2) the jury might have

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[126] Super. Ct. Crim. R. 33 provides a motion for a new trial based on newly discovered evidence must be made within two years after final judgment.
[127] The Delaware Supreme Court affirmed Spence's case on direct appeal on November 13, 2015. *Spence*, 129 A.3d 212. Spence filed his Amended Motion for Postconviction Relief, which contains the motion for a new trial, less than two years later, on September 18, 2017. D.I. 98.
[128] Super. Ct. Crim. R. 33.
[129] 24 F.2d 82, 87 – 88 (7th Cir. 1928); adopted by the Delaware Supreme Court in *Blankenship v. State*, 447 A.2d 425, 428 (Del. 1982). *Accord Conlow v. State*, 441 A.2d 638, 640 (Del. 1982); *Downes v. State*, 771 A.2d 289, 291 (Del. 2001).

reached a different verdict if it knew the testimony was false of if it hadn't heard the testimony; and, (3) the defense was taken by surprise by the false testimony or didn't learn of its falsity until after the trial.[130]

The State argues that Kelmar Allen did not recant his testimony, but rather admitted he had lied about the two specific facts that he, and not Jeffrey Phillips, owned the gun, and that it was a .40 caliber, not a nine-millimeter, gun. Thus, the State argues, the more appropriate test to apply is that for consideration of motions for a new trial under Superior Court Criminal Rule 33, which imposes three requirements: (1) the new evidence would have probably changed the result if presented to the jury; (2) the new evidence must have been discovered after the trial, and could not have been discovered before trial; and, (3) the new evidence is not merely cumulative or impeaching.[131]

d. No New Trial is Required.

I need not decide whether the *Larrison* or Rule 33 standard applies, because under either one Spence's claim fails. Under either standard, no new trial is required.

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[130] Although the Seventh Circuit abandoned the *Larrison* test in *United States v. Mitrone*, 357 F.3d 712 (7th Cir. 2004), Delaware still adheres to the *Larrison* test where a witness recants. *Weedon v. State*, 750 A.2d 521, 528 (Del. 2000). Accord *Burton v. State*, 2016 WL 3568189, at *3 (Del. June 22, 2016).

[131] *Demby v. State*, 2016 WL 5539886, at *2 (Del. Sept. 29, 2016.

Spence does not satisfy the second part of the *Larrison* test because the difference in his testimony would not have caused the jury to reach a different conclusion in his trial.

Similarly, under the first part of the Rule 33 test, the new evidence would not have changed the result of the trial had it been presented to the jury, and under the third part of the Rule 33 test, the new evidence is only impeaching. The fact that the gun belonged to Kelmar Allen and was of a different caliber does not buttress his claim of self-defense., and it only impeaches Kelmar Allen's credibility. Kelmar Allen's testimony that Jeffrey Philips possessed the gun the night of the King Street shooting and that he (Kelmar Allen) did not have a gun, stands unimpeached. Moreover, counsel impeached Kelmar Allen's credibility based on a number of other instances where Kelmar Allen was dishonest with the police.[132]

e. Counsel was Not Ineffective in Failing to Raise the Issue on Appeal or File Motion for New Trial.

Under both parts of the *Strickland* test (discussed above), counsel was not ineffective in his representation of Spence because of his failure to move for a new trial or to raise the issue of Kelmar Allen's changed testimony on appeal.

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[132] A434, 437, 443 – 45, 450 – 51.

With respect to the performance part of the Strickland test, counsel states in his affidavit that the change in Kelmar Allen's testimony about the gun could not reasonably have resulted in a new trial, given the amount of other evidence in the case.[133] Counsel did not provide ineffective assistance by failing to raise meritless arguments or objections.[134] He reasonably decided that a claim based on the underlying substantive issue would not have succeeded either on appeal or in a motion for a new trial.[135]

With respect to the prejudice part of the *Strickland* test, there is no reasonable probability that, but for counsel's failure to move for a new trial or to raise the issue of Kelmar Allen's changed testimony on appeal, the outcome would have been different; i.e., the motion for a new trial would have been granted or the decision on appeal would have been different.

I find neither prejudice nor ineffective performance under *Strickland.* As discussed above, no new trial or other corrective action is warranted.

3. **Failure to Call Witness.**

a. Relevant Facts.

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[133] Aff. Of Counsel ¶ 4.
[134] Wright v. Pierce, 43 F. Supp. 3d 405, 411 (D. Del. 1992).
[135] *Skinner v. State*, 607 A.2d 1170, 1173 (Del. 1992).

Spence's counsel hired an investigator to locate and interview witnesses with respect to Spence's case.[136] On November 11, 2013, the investigator interviewed Ryan McKay (aka Trini), a member of the Gaza gang.[137] Ryan McKay stated that Gaza gang members do not go to Sure Shots parties, but that Sure Shots gang members go to Gaza parties. The pertinent part of the investigator's notes of the McKay interview, based upon Ryan McKay's personal observations of the behavior of the members of the Sure Shots gang, provides:

> "He also explained that they do not hang out together but when I asked him about the Sure Shots he said that the does not hang out with them. He said that they are a group of younger men who are known to be confrontational where they go and they have been involved in gun violence in and around the city."[138]
>
> "[I]f he was in any confrontation with any members of the Sure Shots and he saw that person reach for his waistband he would fear for his life as to him it would indicate the person is going for a gun."[139]

b. Procedural History.

Spence's counsel did not call Ryan McKay as a defense witness at trial to support Spence's claim that he was acting in self-defense when he shot and killed Kirt Williams and shot Kelmar Allen, because when they moved their hands towards their waists, he believed they were reaching for their guns. Spence based his belief

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136 A 658.
137 A 659.
138 *Id.*
139 *Id.*

on the fact that he knew both Kirt Williams and Kelmar Allen were members of the Sure Shots gang, and that they were known to be violent and to bring guns to parties.[140]

c. Counsel was not Ineffective for Failing to use Ryan McKay as a Defense Witness.

Under *Strickland*, Spence must show that his counsel's failure to call Ryan McKay was objectively unreasonable and that, had Ryan McKay been called as a witness, there is a reasonable probability that the result of the trial might have been different. Spence fails on both counts.

As a member of the Gaza gang, Ryan McKay brought the shotgun to the King Street party and gave it to Spence.[141] Spence did not inform the police about this when he confessed to killing Kirt Williams in order to shield Ryan McKay from criminal liability.[142] It is unlikely that counsel could have persuaded Ryan McKay to testify since he was complicit in the shooting. Thus, counsel's decision not to call him as a witness is objectively reasonable.

Even if Ryan McKay had testified, his alleged testimony would not have affected the result of Spence's trial. It would have been, at best, cumulative, because several other witnesses testified that the Gaza gang feared the Sure Shots.[143] Orain

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[140] A 492.
[141] A 422, 426, 489, 498.
[142] A 489.
[143] A 370, 380.

Harriott, Joshien Harriott, Spence himself, and Detective George Pickford all testified as to the propensity of the Gaza gang members to carry guns, make trouble, and shoot at members of the Gaza gang.[144]

Since Spence cannot show that his counsel was ineffective for failing to call Ryan McKay as a witness, nor that he was prejudiced thereby, his claim of ineffective assistance counsel fails. Counsel competently presented and cross-examined witnesses to elicit information that supported Spence's self-defense claim.

C. Delaware Constitutional Claims

Spence asserts that his conviction resulted from violations of Article I, Sections 1, 4, 7, 9 and 11 of the Delaware Constitution. However, a conclusory statement that Spence's rights under the Delaware Constitution have been violated is insufficient. It waives his State Constitutional law aspect of his argument.[145] The Delaware Supreme Court has delineated the proper form for raising a State Constitutional claim and held that "conclusory assertions that the Delaware Constitution has been violated will be considered to be waived on appeal."[146] Citing

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[144] A 479, 490-92.
[145] *Sykes v. State*, 953 A.2d 261, 266 n. 5 (Del. 2008); *Jackson v. State*, 990 A.2d 1281, 1288 (Del. 2009); *Betts v. State*, 983 A.2d 75, 76 n.3 (Del. 2009); *Jenkins v. State*, 970 A.2d 154, 158 (Del. 2009); *Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008).
[146] *Ortiz v. State*, 869 A.2d 285, 290-91 n. 4 (Del. 2005).

Jones v. State, [147] the Court identified some of the criteria to be considered in determining whether a provision in the United States Constitution has an identical or similar meaning to a provision in the Delaware State Constitution.[148] These include: textual language; legislative history; preexisting state law; structural differences; matters of state interest or local concern; state traditions; and, public attitudes.[149] A proper allegation of a State Constitutional violation should include a discussion of one or more of these criteria.[150] Spence's Amended Motion for Postconvition Relief fails to do so, thus his conclusory claims that his State Constitutional rights have been violated are waived and I summarily deny them.

D. DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING IS MOOT.

Finally, Spence argues that a Rule 61(h)[151] evidentiary hearing is required to develop fully the factual record in light of the claims raised in his motion for postconviction relief and in order to comply with due process. This is mooted by the fact that I permitted briefing by the parties on the first ineffective assistance of counsel claim (suppression of Spence's statement to the police because of late presentment), held an evidentiary hearing on that issue on March 29, 2019, and then

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147 745 A.2d 856, 864-65 (Del. 1999).
148 *Ortiz*, 869 A.2d at 291 n. 4.
149 *Id.*
150 *Id.*
151 *See* Super. Ct. Crim. R. 61(h).

permitted re-briefing by the parties after the hearing. I have carefully considered all such briefs and oral arguments in rendering this opinion. Defendant has failed to meet the *Strickland* requirements.

IV. CONCLUSION

Therefore, for the foregoing reasons, Defendant Christopher Spence's motion for postconviction relief is **DENIED**.

Lovenguth, Lisa (Courts)

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