IN THE SUPREME COURT OF THE STATE OF DELAWARE

EMMETT TAYLOR, III, Defendant below, Appellant,	:	
v.	:	No.: 660, 2015
STATE OF DELAWARE, Plaintiff below, Appellee.	:	On appeal from the Superior Court of the State of Delaware in and for Sussex County

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

ARGUMENT

I. SUPERIOR COURT ABUSED ITS DISCRETION IN CONCLUDING THAT TAYLOR WAS NOT DEPRIVED OF A FAIR TRIAL IN THE GUILT/INNOCENCE PHASE DUE TO THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

A. Reply to the State's Legal Analysis

The legal standard applicable to assessing claims of ineffective assistance of counsel under *Strickland v. Washington* requires evaluating trial counsel's performance from counsel's perspective at the time of trial, thereby avoiding the distorting effects of hindsight:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant ... Accordingly, a defendant must overcome the presumption that under the circumstances the challenged action 'might be considered sound trial strategy.'[1]

The issues raised in this Motion for Post-Conviction Relief do not spring from viewing the circumstances trial counsel confronted with hindsight; the professional failures identified here were the result of trial counsel failing to undertake rudimentary activities required of any attorney preparing to try a case, let alone a capital murder case. The strategic decision trial counsel made was to defend Taylor with a guilty but mentally ill defense based on a diagnosis of multiple personality disorder from a psychologist unqualified to make the diagnosis. Multiple

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[1] *Strickland v. Washington*, 466 U.S. 668, 688-689 (1984).

personality disorder could not have been used to negate the element of intent.[2] The decision to pursue the GBMI strategy conceded the State's case. Moreover, it was the predicate for counsel' decision not to undertake a basic investigation into the facts of the case, including the cause of Mumford's death (which the Superior Court found to be professionally unreasonable[3]) or the instrument allegedly used in causing it. Counsel also failed to engage in basic advocacy, such as moving to sever mis-joined, highly prejudicial charges because they believed Taylor was guilty as charged. Their strategy blinded them to the need to secure the testimony of a man who had precisely the same opportunity as Mi Jung, the State's main witness, to hear and see what went on in and around the Taylor-Mumford household during the hours preceding and succeeding Mumford's death, but who gave a statement to the State Police which conflicted with Mi Jung's evidence.

Taylor did not agree with trial counsels' strategy and made his disagreement known more than a year before trial. The conflict which developed between counsel and their client over the strategy trial counsel chose led them to move to withdraw and the client to request they be removed. In the course of that conflict, trial counsel violated the sacred duties of loyalty and confidentiality they owed Taylor by revealing to the trial court material weaknesses in their case, and their doubt in Taylor's truthfulness. Their strategy resulted in Taylor being compelled

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[2] A-466-467.

[3] *State v. Taylor*, 2015 Del. Super. LEXIS 993, *85 (Del. Super. Ct., Nov. 23, 2015).

to testify against himself in a psychiatric examination which was used to justify sentencing him to death.

In addition, during trial, counsel failed to notice and object to patently false material and rank speculation by both the State's medical witness and the Delaware State Police on material facts as each was admitted into evidence, and failed to object to prosecutorial mischaracterization of the evidence as well as an attempt by the State to shift the burden of proof to Taylor.[4] As deferential as the *Strickland* standard is, it is not without limits. Here, the State must concede, as did the Superior Court, that trial counsels' conduct fell measurably below reasonable professional norms. Both the Court and the State, however, contest that Taylor was prejudiced by trial counsels' deficient performance because, they contend, none of the professional errors would have affected the outcome of the trial; the Court goes so far as to say that Taylor's trial was "remarkably fair and uneventful."[5] Whether Taylor was prejudiced because he was denied effective assistance of counsel requires a determination *de novo* by this Court as to whether the result of his trial was fundamentally fair and reliable under the facts and circumstances of this case[6] because the object purpose of the Sixth Amendment

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[4] The Superior Court conceded that it was error for the false evidence (or non-evidence, extraneous information) and State Police speculation to be submitted to the jury as was the prosecutor's 'misstatement.' *Id.* at *160-161.

[5] *Id.* at *160.

[6] *Smith v. State*, 991 A. 2d 1169, 1177 and 1179 (Del. 2009).

guarantee of reasonably effective counsel is to "ensure that criminal defendants receive a fair trial."[7] Taylor's trial was fundamentally unfair and the results cannot be relied upon. Accordingly, the Superior Court's decision must be reversed and the case remanded for a new trial.

B. Failure to move to sever the charge of Abuse of a Corpse from the charge of Murder in the First Degree.

In its response to Taylor's contention that trial counsel was ineffective for failing to move to sever the murder charge from the abuse charge, the State ignores the question of whether joinder was proper by misstating the purpose of Superior Court Criminal Rule 8(a) and failing to apply it. The Rule permits joinder of alleged offenses which are: 1) of the same or similar character or 2) based on the same act or transaction or on two or more transactions connected together or constituting the parts of a common scheme or plan. The purpose of the rule is solely, not merely in part, as the State has argued,[8] designed to promote judicial economy and efficiency, *"provided that the realization of those objectives is consistent with the rights of the accused."*[9] The State contends, as did the Court below, that the charges in issue meet the requirements of the rule because each occurred as part of the tragic night.[10] Neither made any attempt to establish that

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[7] *Strickland, supra*, 466 U.S. at 689.
[8] State's Answering Brief, pg. 16.
[9] *Mayer v. State*, 320 A.2d 713, 717 (Del. 1974)(emphasis supplied).
[10] State's Answering Brief, pg. 17, citing *Taylor v. State*, 2015 Del. Super. LEXIS 993, * 13 (Del. Super. Ct. Nov. 23, 2015).

the two charges relate to offenses which are of the same or of a similar character or based on the same *act* or *transaction* or parts of a common scheme or plan because they are not. The Court speculated that each was motivated by Taylor's adverse reaction to Mumford disrespecting him,[11] although the State did not echo that speculation in its response, eliminating even a common motive as a basis for joinder. These charges were not properly joined.

Rather than justify joinder under the express terms of Criminal Rule of Procedure 8(a), the State attempts to justify joinder based on the assertion that the evidence of the alleged abuse, the photographs found on Taylor's cell phone, would have been admissible in a trial on the murder charge regardless of severance because they would have been useful in proving the murder charge, but notably, it does not say how. The photographs are probative of nothing related to the murder charge which was based on Taylor allegedly beating Mumford to death after they argued. The State argues that the photos put Taylor at the crime scene two hours after Jung heard banging noises; Taylor's whereabouts at that time was never in dispute. Next, the State argues that the photographs depict Mumford's body beaten and unnaturally posed. The photographs are dark, grainy, low resolution cell phone pictures which show *no injuries* to Mumford. No blood evidence was

[11] *State v. Taylor*, 2105 Del. Super. LEXIS 993, *36 (Del. Super. Ct. Nov. 23, 2015).

collected from the locus shown in the pictures,[12] while blood was evident on, under and around Mumford's body when it was found in the bathroom.[13] Moreover, they are still photos, capturing an instant in time; it's impossible to know whether Mumford was unnaturally and awkwardly positioned. Third, the State argues that the photos were found on Taylor's cell phone when he was picked up in Washington, D.C., which it contends, is powerful evidence of consciousness of guilt. Proof of flight may be evidence of consciousness of guilt, but Taylor's possession of the cell phone photos are proof of no such thing.

The State contends that the photos were extremely useful in proving the murder charge but never says why because they do not prove anything about how Mumford died; the photos' only utility was to show that Taylor had a propensity for evil, an improper basis for joinder or admissibility. The charges were joined for one reason and one reason alone: to encourage the jury to believe that Taylor's character was so void of human decency that he would take photographs of Mumford while he performed disgusting acts on her body and he must have therefor killed her. This type of prejudice is precisely the evil Superior Court Criminal Rule 14 and Delaware Rule of Evidence 403 are designed to prevent.

Whether to grant a motion to sever requires an analysis of the facts known at

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[12]A-432-433.
[13]Defense Hearing Exhibits 21 and 22.

the time the motion is made.[14] Nothing Taylor said at trial would have been used to decide the motion had it been made pre-trial. The Superior Court and the State's contention that the photos were relevant to rebut his trial testimony that the sexual activity was consensual is unavailing. In his pre-trial statement to Porter, Taylor spoke of arguing with Mumford in the presence of Perez and Gibbs, he spoke of his stress over finances which was exacerbated by the elaborate wedding plans, he acknowledged he told Mumford to leave, he spoke of Mumford confronting him with a knife, he spoke of tussling, he spoke of attempting to leave himself and he spoke of something occurring on the steps because he was going to leave. He repeatedly disclaimed knowing why Mumford died. The fact that Taylor did not mention the photos to Porter is irrelevant. The only facts known about the photos pre-trial was when they were taken and that they were found on Taylor's phone. These facts do not tend to prove murder. By contrast, the admission of the photos was obviously highly prejudicial.

In the face of a claim of substantial prejudice to the defendant by joinder of charges, the Court must determine "whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the Court's discretion to sever."[15] Had the charges been severed, it seems unlikely the State would have proceeded with a trial on the misdemeanor charge of Abuse of a

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[14] *State v. Price*, 2009 Del. Super. LEXIS 417, *1 (Del. Super. Ct. Nov. 3, 2009).
[15] *Id. at* *4.

Corpse if Taylor had been acquitted on the murder charge (which would have been substantially more likely had the charges been severed). If he was convicted on the murder charge, trial on the misdemeanor abuse charge would not have required evidence from the murder trial and would have likely consisted of a half-day trial, although it seems equally unlikely that the State would have proceeded if Taylor were serving a sentence to die in prison or through execution. No interest of judicial economy was served by joinder.

Trial counsel contended that they did not seek severance, not so much because they thought the motion would fail, but because they wanted to use the photographs strategically to ensure the jury saw Taylor as deranged.[16] That strategy, however misguided it may have been, demonstrates that the photographs were substantially likely to have a prejudicial effect on how the jury perceived Taylor. That prejudice was not remotely outweighed by the interest of judicial economy under the circumstances of this case, particularly because trial counsels' purported strategy to use the photos to jaundice the jury's view could have been pursued had the motion been denied. *Knowles v. Mirzayance*,[17] cited by the State in response to Taylor's contention that trial counsel had nothing to lose by filing the motion, is inapposite. The argument is not that trial counsel is ineffective for failing to file the motion because they had nothing to lose by doing so, but that

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[16] A-434.

[17] 556 U. S. 111 (2009).

their "strategy" would have been unaffected had the motion been denied.

Trial counsels' derogation of duty deprived Taylor of the right to a fair trial and cannot be excused.

C. Failure to pursue exculpatory and impeachment evidence.

In an effort to marginalize the importance of Mr. Jung as a witness and to excuse trial counsels' failure to find and question him, the State mischaracterizes the evidence consisting of both his statement to Detective Wells reflected in her hand written notes and recorded in her report, and the evidence Mi Young Jung provided as reflected in Wells' handwritten notes, her report, in Jung's tape recorded statement and in her deposition. The inconsistencies were thoroughly developed in Taylor's Opening Brief;[18] the inconsistencies go to the heart of the State's argument that Taylor alone was angry and yelling, that Mumford was dead when the argument ended and dead when the photographs were taken, all material issues. The State maintains, as did the Court, that it is immaterial that either Mi Jung or Mr. Jung saw two people, one of whom Mi Jung assumed was Mumford, outside the townhouse slamming the door of Mumford's car around 11:30 p.m., at least 30 minutes after the State maintained the "attack" had ended and Mumford was presumably dead. The claim of immateriality ignores the fact that the State's time line was necessary for it to argue Mumford was dead when the cucumber

[18] Appellant's Corrected Opening Brief, pgs. 23-30.

photographs were taken at around 12:30 a.m. Evidence that would have undercut the timeline is material.

The State justifies trial counsels' failure to insist that the State identify Mr. Jung by saying 'they tried.'[19] The State gives no justification for the State's failure to provide an identification for Mr. Jung, a failure the Court agreed was error.[20] When Mi Jung was deposed more than a year before trial, trial counsel clearly knew that Jung had told Wells she saw two people, one tall and one short, at Mumford's car long after the argument between Taylor and Mumford ended.[21] In her deposition, Jung denied having seen two people outside, one of whom she assumed was Mumford, and attributed the observation to her husband. Counsel knew then, or should have known, that Mr. Jung would be a critical witness to the events that took place on the night of August 13-14. The State also knew that if Mr. Jung saw two people at Mumford's car at 11:30 p.m., one of whom Mi Jung assumed was Mumford, it was potentially exculpatory evidence; his identity and whereabouts were essential information which the State was obligated to disclose.[22] Inexplicably, neither the State nor trial counsel asked Mi Jung at her deposition (which took place in June, 2008, 16 months before trial) Mr. Jung's

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[19] State's Answering Brief, pg. 25.
[20] *Taylor v. State*, 2015 Del. Super. LEXIS 993 at *160 (Del. Super. Ct. Nov. 23, 2015).
[21] A-410, deposition transcript pgs. 25-26.
[22] *State v. Wright*, 91 A.3d 972, 987 (Del. 2014): "Under *Brady*, 'the prosecutor's success is measured not merely in terms of winning the competition but winning fairly. The requirement that prosecutors turn over all favorable evidence to the accused is illustrative of the prosecutor's obligation to search for the truth in criminal trials (citations omitted)."

name and whereabouts.

To minimize the witness's importance by saying his statement was "consistent with the other witnesses" ignores the blatant conflict between what Jung told Wells the night Mumford's body was found and what she testified to at her deposition regarding when the sounds of the altercation began and ended and what and who she saw when. It ignores counsels' obligation to undertake an investigation into that conflict and to determine whether Mr. Jung could provide any other evidence which conflicted with Mi Jung's account and supported Taylor's account. It ignores counsels' fundamental obligation to undertake an investigation into the facts of the case regardless of what was known at the time because counsel knew Mi Jung was a critical witness for the State and they must impeach her if they could. It is a weak attempt to mitigate the State's failure to identify by name, a witness it interviewed who had the same opportunity as its main witness to hear and see what occurred in and around the townhouse on the night Mumford died. To suggest that the issue is not one of conflict, but of the clarity provided by a translator, as the State argued, is specious and simplistic.

The State contends that a more effective cross-examination of Mi Jung or Mr. Jung's testimony "would not have changed anything" including the outcome of the trial.[23] The problem with this argument is that because trial counsel and the

[23] State's Answering Brief, pg. 26.

State did not pursue Mr. Jung's testimony, no one testified that someone who was believed to be Mumford was outside the townhouse at 11:30 p.m. That evidence would have precluded any inference that the quiet after the argument ended meant that Mumford had died and would have expanded the timeline. It would have also provided support for Taylor's testimony that Mumford was alive after the argument ended, after she fell down the stairs and when the cell phone pictures were taken. Recently, this Court pointed out that a defendant claiming a *Brady* violation need not demonstrate "that disclosure of suppressed evidence would have resulted in an acquittal."[24] Rather, the question is whether the State's failure to produce Mr. Jung undermines confidence in the outcome of the trial. Clearly, it does.

D. Evidence Bag Labeled "fry pan with blood."

The State reiterates the Court's rationale that the evidence bag which was marked as State's Exhibit 80 and submitted to the jury was not evidence, because the Court says it was not. Implicit in this claim is the belief a rational jury would understand the difference between the evidence bag marked by the police and what was in it. It is true there was one exchange during trial in which the State's DNA expert stated the frying pan did not have blood on it,[25] the evidence bag clearly stated that it did. The jury was free to believe which ever conflicting statement it

[24] *Starling v. State*, 2015 Del. LEXIS 665, * 36 (Del., Dec. 14, 2015).
[25] A-217.

wished. It is immaterial that the State did not argue the fry pan was bloody or characterize it specifically as a "murder weapon." In order to meet the second count in the indictment, the State had to prove that the pan was used to cause death or serious physical injury. If it had been used to cause the visible injuries Mumford suffered, according to Dr. Hameli, it would have been bloody.[26] The note on the bag supported the State's case.

The State did not address Taylor's argument that, irrespective of the Court's charge to the jury as to what constituted evidence, the bald statement on the bag was an impermissible communication with the jury. Typically, impermissible communication with a juror occurs when extraneous information is presented to a juror outside of the context of the trial or the jury room. In *Black v. State*,[27] for example, while jury deliberations were on going, a juror sitting on a drug case asked his son, a recovering drug addict, about drugs and drug dealers. The juror, in turn, discussed his conversation with the other jurors. After conviction, the defendant moved for a mistrial due to alleged juror misconduct, which was denied. On appeal, this Court held that when jurors are exposed to extraneous information, it is incumbent on the trial court to determine whether any juror was influenced by such information, reasoning that the right to a fair trial before an impartial jury guaranteed by both the Delaware and United States Constitution requires that jury

[26] A-364.
[27] 3 A.3d 218 (Del. 2009).

verdicts be based solely on the evidence presented at trial.[28]

Here, there is no doubt that the "extraneous" information, even if not evidence (despite being marked and "submitted" to the jury), was in the hands of the jurors during deliberations and was material to the murder and weapons charge. We do not and cannot know whether any juror was influenced by the false characterization because trial counsel did not look at the evidence bag and accordingly did not object to its submission to the jury, but the manner in which it was presented to the jury certainly would have led jurors to believe they could consider it. This case is far more egregious than cases in which a jury is tainted by information acquired from outside the courtroom.[29] The Superior Court acknowledged that error occurred because the evidence went back with the jury when it deliberated; trial counsel should have looked at what was submitted to the jury and failed in its professional obligation to protect Taylor's right to a fair trial by not doing so. Prejudice must be presumed and cannot be rebutted by any judicial investigation, more than six years after the trial. Accordingly, the case must be reversed.

E. Failure to investigate the cause and manner of Mumford's death.

The crux of the State's case alleging intentional murder was the contention

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[28] *Id.* at 220.

[29] *See, e.g., Baird v. Owczarek*, 93 A. 3d 1222 (Del. 2014)(internet research).

that Mumford suffered *multiple, severe* blows to her head. The only medical evidence produced at trial to support that contention were the autopsy photographs showing the separation of Mumford's scalp from her skull, and Tobin's testimony indicating that she believed the photographs demonstrated multiple, severe injuries caused by multiple forceful blows. At trial, Dr. Tobin testified that multiple, severe blows to Mumford's head caused the skull and scalp to separate and it was that separation, resulting in damage to the soft tissues of the head, that caused Mumford's death.[30] Tobin did not testify that the subarachnoid hemorrhage and/or subdural hematoma were the cause of death but did say that those injuries were caused by blunt force.[31]

Dr. Hameli testified it was the subdural hematoma located inside the skull at the base of the brain that was the cause of death. In his opinion, the fatal injury occurred as a result of a fall, due to the brain's acceleration during the fall and deceleration when Mumford's head forcefully struck the wall at the foot of the staircase.[32] Neither the skull/scalp separation, nor the subarachnoid hemorrhage or the subdural hematoma *were caused by blows to Mumford's head.* The essential mechanisms of an injury caused by a moving object striking a stationary object (as in a fall and collision) and a moving object striking another object (as in a blunt

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[30] A-227, TT Vol. M 78 "...the main thing was the severe injuries to the soft tissues to (sic) the head ..."
[31] TT Vol. M, 75.
[32] A-366.

object like a fist or a frying pan striking a head) are completely different. At the evidentiary hearing Hameli described this difference:

> Dr. Tobin put down: To the head. It may imply that blunt force was applied to the head. We have to understand that mechanism of blunt force *in* the head is a little bit different or completely different from other areas of the body. And you have to separate a direct blow to the head versus a fall and striking of a moving head against a stationary object.[33]

Dr. Hameli went on to cite from a scholarly publication[34] that a subdural hemorrhage (which will ultimately form a subdural hematoma) does not even require impact to the head; it is most often caused by the acceleration-deceleration movement.[35]

Regardless of the State's protestations to the contrary, its theory of the case, charged in the indictment and argued to the jury was that intentional murder could be inferred from multiple, serious blows to the head.[36] Hameli's evidence completely contradicts any finding of multiple blows to the head. It does not matter how the fall occurred in terms of the mechanism of injury. Consider the following hypothetical: After the argument and struggle over the knife, Taylor is successful in running down the stairs and exiting the townhouse before Mumford

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[33] HT Vol. A, 127.
[34] Defense Hearing Ex. 18.
[35] HT Vol. A, 131.
[36] A-220; B114. In its closing argument, the State argued: "During this, what appears to be a one-sided fight, the defendant inflicted multiple and severe blows to her head, and that indicates he had but one intent, and that was to kill Stephanie Mumford." TT, Vol. Q, 50. Dr. Hameli's testimony directly contradicted this argument.

catches up with him. Mi Jung hears the argument and stomping on the stairs, looks out and sees Taylor outside next to Mumford's car. In the meantime, she subsequently hears a crash. She and Taylor go into the town house and find Mumford has collided with the wall at the foot of the stairs after tripping and falling. The injuries she would sustain are precisely the same injuries to which Hameli testified; Dr. Hameli did not offer an opinion as to whether Taylor or something else caused her to fall because the genesis of the fall is immaterial to its effect.

The State's entire response to this argument is a futile effort in search of a justification to explain away the compelling nature of Hameli's testimony. The State argues that Taylor's trial testimony was "strikingly different and more detailed" than his statement to Porter[37] yet it can point to not one statement Taylor made to Porter which Taylor contradicted at trial. To characterize a more fulsome recitation of the facts as "recently fabricated" flies in the face of the realities of human nature: Taylor told Porter what he remembered in response to specific questions Porter asked. In fact, at the end of the interview, Porter told Taylor that he was one of the most cooperative people he ever interviewed.[38] The State's argument also completely ignores Hameli's testimony that he considered nothing

[37]State's Answering Brief, pg. 32.
[38]A-061.

Taylor said in reaching his conclusion as to what caused Mumford to die.[39]

There is no dispute now that Mumford collided with the wall at the base of the stairway. The only direct evidence of how she came to do so was provided by Taylor. There was, of course, speculation possibly by Tobin[40] and unidentified investigators whose comments were captured on the crime scene video, that Taylor threw her down the stairs, but that speculation was not evidence and could support no proper inference.[41] There are simply no facts from which one can reasonably infer that, with the intent to kill her, Taylor threw her or pushed her down a flight of six steps. Moreover, the argument completely ignores the fundamental difference between the injuries the State alleged Taylor caused intentionally by beating her (direct blows to the head) and the injuries to which Hameli testified.

The State's argument pertaining to a unanimity instruction wholly misses the point. The Superior Court's opinion denying Taylor post-conviction relief is the first and only indication that the jury might have believed that Taylor intentionally murdered Mumford by throwing her down the stairs, at least based on the evidence properly submitted at trial. The State did not argue he did so and it made no attempt to prove that he did; in its closing argument, the State referred to the broken dry wall at the bottom of the stairs and to another defect in the dry wall on

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[39] Hearing Transcript Vol. B, 16-17.
[40] A-250. Tobin did not believe the injuries were caused by a collision with the drywall.
[41] *See Hughes v. State*, 437 A.2d 559, 573 (Del. 1981).

the stair landing and invited the jury to infer those conditions resulted in injury to Mumford by describing her blood as being near those defects.[42] The argument was directed to the appearance of the crime scene evidencing a "one-sided fight;"[43] the State did not argue that Taylor caused Mumford's death by throwing her down the stairs. It did not charge him with doing so and its entire case of murder in the first degree was predicated on medical evidence grounded on the assertion that Taylor inflicted multiple severe blows to Mumford's head with a fist or frying pan. Tobin testified that a flat object is a blunt object but that doesn't mean she was testifying that Taylor struck Mumford with a wall. The State made the following assertions during its closing argument:

> The State asserts that when you thoroughly and conscientiously review all the evidence in this case and the testimony that was presented to you, there is one reasonable conclusion in this case and that is the defendant acted intentionally when he beat Stephanie Mumford.[44]
>
> Doctor Tobin testified to the condition of Stephanie Mumford's body. She showed you autopsy pictures. The State will show you State's Exhibit No. 115. It shows the right side of Stephanie's face, beaten, her lips swollen, both of her eyes swollen, upper and lower ...damage to the right side of Stephanie Mumford's head ...left side of Stephanie Mumford's head, showing bruising, swelling, damage ... damage to Stephanie Mumford's upper and lower lips where the dental plate was knocked out ... the autopsy diagram prepared by

[42] TT Vol. Q, 47.
[43] *Id.*, at 48.
[44] TT Vol. Q, 40.

> Doctor Tobin literally shows that Stephanie Mumford was beaten from head to toe.[45]

It was, of course, the appearance of Mumford's face, supported by the autopsy photographs purportedly demonstrating multiple, severe blows, which compelled the jury's conclusion that Mumford was beaten to death. Hameli's testimony completely contradicted the State's evidence; in his expert opinion not only was the skull/scalp separation the result of Mumford's head colliding with the wall, but the symmetrical injury to the left and right side of her head, the totally symmetrical swelling of both her eyes, the dislocation of the dental appliance and attendant laceration to the lips were all occasioned by Mumford's collision with the wall. That collision was not in any way, shape or form the beating the State described in its closing.

The Superior Court obviously accepted Dr. Hameli's testimony as credible:

> I also note that Dr. Hameli's finding that Mumford's collision with the wall at the base of the stairway caused her fatal head injury is hardly startling news and is certainly something that the jury probably considered in concluding that Taylor beat Mumford to death by *in some manner* forcing her head into the wall at the base of the stairway. I say this because it appears that Taylor beat Mumford to death that way.[46]

While this statement reflects that the Court accepted Dr. Hameli's testimony as believable, it ignores the fact that at trial there was no medical evidence to support the conclusion that Mumford's head injuries were caused by anything

[45] TT Vol. Q, 49-50.
[46] *State v. Taylor*, 2015 Del. Super. LEXIS 993, *86 (Del. Super., Nov. 23, 2015).

other than severe, multiple direct blows from a fist or a frying pan. Dr. Tobin testified that even if Mumford's head collided with the wall it would not have caused the multiple severe traumas all over the head:

Mr. Callaway:	If you run a head into that flat wall that would produce - -
Dr. Tobin:	No, because there were many separate injuries. If her head hit the wall, it wouldn't produce ecchymosis everywhere else.
Mr. Callaway:	I am talking about injury to the head?
Dr. Tobin:	The multiple to the head it was all over the head.
Mr. Callaway:	Could one of them been caused by - -
Dr. Tobin:	Possibly one, but I certainly wouldn't say all of them.
	And listen, not even unless - - of course, the momentum with which the object struck the wall would play a role also but not as – wouldn't' have an affect on the number of traumas.[47]

For the Court to conclude that the jury would have accepted Hameli's testimony as credible necessarily means belief that Hameli's testimony as to the cause of death was far more believable than Tobin's testimony at trial. It ignores, however, that there was simply no evidence produced at trial to support the conclusion that Mumford died solely because Taylor threw her down the stairs and Hameli's testimony posed no such support. More importantly, if the Superior Court found Hameli's testimony credible, it is certainly more likely than not that a juror would

[47] A-250, TT Vol. M, 84-86.

have believed it as well. Because Dr. Hameli's testimony wholly supported Taylor's testimony, it is reasonable to believe that the outcome of the trial would have been markedly different had trial counsel produced such evidence. The Superior Court acknowledged as much, but concluded that if the jury believed Dr. Hameli his testimony would have been irrelevant because it would have somehow negated Taylor's trial strategy of self-defense and accidental fall:

> ...[I]t is worth noting that Taylor's trial strategy of self-defense and accidental fall makes Dr. Hameli's testimony irrelevant because they would, if believed, absolve him of any responsibility for Mumford's death because her injuries were caused by her own actions and misfortunes, threatening Taylor with a knife and jumping on his back to keep him from leaving the townhouse respectively.[48]

This analysis puts an entirely too fine a point on the 'trial strategy' but does demonstrate that the decision to use a guilty but mentally ill 'strategy' permeated the defense. Taylor never conceded that he used deadly force against Mumford in order to defend himself against the knife Mumford wielded. Because trial counsel failed to investigate the cause of Mumford's death they were unprepared to defend against the State's contention that Taylor caused Mumford's fatal injuries by beating her. They could not, however, ignore the autopsy report and Taylor's pretrial concession that he hit Mumford with the pan in an effort to get the knife away from her; accordingly, they had to argue something in response. Dr.

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[48] *State v. Taylor*, *supra* at *86.

Hameli's testimony would have lent considerable support to Taylor's credibility by countering the argument of a beating and countering the contention that Taylor abused Mumford's corpse. Far from being irrelevant, Dr. Hameli's testimony would have more likely than not markedly altered the outcome of the trial.

Notably, the State has made no response to Taylor's argument that Hameli was more than qualified to opine that Mumford was not dead when the cucumber photographs were taken and that she died where she was found in the bathroom. The State did not respond to this argument because it necessarily agrees we are correct.

F. Failure to consult with an appropriate expert to determine the degree and nature of force necessary to damage the pan.

In its response to this argument, the State again ignores that Taylor was charged with beating Mumford with the frying pan, using it in a manner to cause death or serious physical injury. When Tobin was asked on cross examination whether the frying pan was capable of causing Mumford's injuries she replied: "Yes, it could certainly be ... It's bent a little too, warped or something. Yeah, it's bent over there."[49] That testimony created a nexus between the fry pan's appearance and the conclusion that it was used to cause Mumford's head injuries. Trial counsel could have easily broken that nexus if they had retained an expert like Dean Kleinhans to provide evidence that warping of the pan was not caused by

[49]A-248, TT Vol. M, 82.

using it as a weapon against Mumford. Their failure to do so was the result of the professionally unreasonable decision not to undertake any investigation into the facts of the case; prejudice to Taylor is evident from the inference that Tobin, investigating officers and, more than likely, the jury drew that it had been used as alleged by the State.

G. Failure to provide professionally reasonable representation in plea negotiations.

Missouri v. Frye[50] reiterates the principal that the Sixth Amendment right to effective assistance of counsel extends to plea negotiations. In responding to this claim, the State ignores the premise of the argument: had trial counsel undertaken an investigation into the facts, they would have been armed with compelling evidence that would have supported Taylor's contention that he did not beat Mumford to death and did not use or even attempt to use the fry pan to cause death or serious physical injury. In light of the evidence produced post-conviction, it cannot reasonably be argued that Taylor's bargaining position would not have been substantially improved and the outcome of the plea bargaining stage of the proceeding would have been profoundly different had trial counsel investigated the facts.

[50] 132 S. Ct. 1399 (2012).

H. Trial counsels' decision to pursue a mental illness defense was professionally unreasonable and prejudiced Taylor's right to a fair trial.

The State argues that trial counsels' pursuit of a guilty but mentally ill 'defense' due to a diagnosis of dissociative identity disorder was not unreasonable because "[m]ental health evidence may corroborate a criminal defendant's actual belief and a mental health defense was not inconsistent with Taylor's self-defense/accident theory."[51] The problem with this argument is that it ignores the nature of dissociative identify disorder (formerly known as multiple personality disorder) which requires, according to Dr. Zingaro, two or more distinct personality states which recurrently take control over a person's behavior, and the inability to recall important information.[52] Trial counsel struggled with how to apply the disorder to defend Taylor from culpability and the trial court expressed doubt that the mental health evaluations trial counsel obtained could be used to negate culpability. An April 9, 2009 in camera proceeding[53] reflects the history of trial counsels' efforts to obtain a diagnosis of dissociative identity disorder from a qualified professional and the Trial Court's skepticism of the utility of that diagnosis:

The Court: You all, in particular, went through great lengths to get Dr. Fink, to get the money for Dr. Fink, to get

[51]State's Answering Brief, pg. 43.
[52]TT, Vol. T, 112- 115.
[53]Dkt. E. No. 93, and 230.

Dr. Fink to examine the defendant and now you have decided not to use Dr. Fink.

Mr. Callaway: You're correct, Your Honor. Our office retained Dr. Fink – to step back a step, the defendant was evaluated by Dr. Zingaro.

Dr. Zingaro said the defendant was suffering from multiple personality disorder,dissociative identity disorder, which for us old schoolers was the multiple personality disorder.

It was our determination in our staff that we needed to have the defendant evaluated by a psychiatrist. Dr. Zingaro is a psychologist.[54]

The Court: That was because the State has an M.D.

The Trial Court and counsel discussed Dr. Fink's conclusions but counsel told the Court they did not want to prejudice the Court by discussing Fink's tentative conclusions as it would be detrimental to the defense. The Court, without prompting, concluded that the opinion might cause one to see the defendant as a violent man.[55] In the end, Dr. Fink could not substantiate dissociative identity disorder so trial counsel chose to use Dr. Zingaro's opinion, even though they knew his diagnosis was a controversial.[56]

In response, the Trial Court asked how Zingaro's opinion, if accepted by the jury, would affect the case.[57] There was a discussion of the *Cooke*[58] case and

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[54]April 9, 2009 hearing tr. pgs. 5-6.
[55]A-074.
[56]A-076.
[57]A-077.
[58]*Cooke v. State,* 977 A.3d 803 (Del. 2009).

whether counsel could proceed with a guilty but mentally ill defense over the objection of the defendant; then trial counsel told the Court that Dr. Fink's tentative diagnosis was "intermittent explosive disorder, and it sounds horrible."[59] Trial counsel tried to thread the needle of how they could use dissociative identify disorder as a defense but not use a guilty but mentally ill defense. The State would be put to the proof that Taylor's actions caused Mumford's death, they would not concede Taylor was responsible, and they would put their effort into Taylor's state of mind and Zingaro could help them to do so.[60] There was a vague suggestion that perhaps the jury would somehow use mental illness to mitigate culpability which trial counsel echoed in the post-evidentiary hearing.[61] The Trial Court made it clear that, while the diagnoses would support a guilty but mentally ill defense, they could not be used to avoid culpability: "The law is clear that it is no defense…".[62]

Four days before trial, counsel did not know how it could use Zingaro's testimony at trial. There were protracted discussions of whether his testimony would be used to support diminished capacity, or in some manner, negate intent.[63]

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[59]A-080.
[60]A-082.
[61]A-466.
[62]A-083.
[63]TT Vol. I, 14-30.

The Trial Court could not reconcile the defense of "self-defense" with the use of dissociative identify disorder to preclude the intent alleged in the charge of first degree murder.[64] Neither could trial counsel because the premise of dissociative identity disorder was that some other persona committed the offense.[65] At the evidentiary hearing, trial counsel testified:

Mr. Callaway:	it was our belief that, at the time of the incident, that Sergeant Taylor was the one that was in existence at the time and not Mr. Taylor as he sat at the counsel table.
Mr. Karsnitz:	And if Sergeant Taylor formed the intent-and let's ask this hypothetically – if Sergeant Taylor informed (sic) the intent to kill, he'd be as much responsible whether it was Sergeant Taylor or Mr. Taylor?
Mr. Callaway:	That's correct. Legally, I think you're correct.
Mr. Karsnitz:	So, how does this help?
Mr. Callaway:	I think you can argue to the jury to hopefully get the jury to understand the issue of mental illness and not vote to put Mr. Taylor to death.
Mr. Karsnitz:	So, did you believe it was an issue only in terms of what punishment to cause Mr. Taylor?
Mr. Callaway:	That's the major issue.[66]

At trial, however, counsel did not introduce any evidence of dissociative identity disorder, not because Taylor refused to allow Zingaro to testify, as the

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[64] *Id.* at 29.
[65] B 190-91.
[66] A-466.

State argues and as Mr. Johnson alleged at the evidentiary hearing,[67] but because Taylor's trial testimony laid no foundation for Dr. Zingaro to testify that he was experiencing a dissociative episode during the evening Mumford died. After Taylor testified, the State wanted to know whether Zingaro was going to testify before it cross examined Taylor.[68] In the response, the Court stated:

> I'm not sure where that is going to go. I mean I think right now, given his testimony, I do not see where Doctor Zingaro fits in. I think the defendant would have to lay some other basis for that. I mean it's just—I think you are limited to the scope of what he talked about. He hasn't talked about anybody else committing this offense.[69]

When trial counsel suggested that perhaps Zingaro could testify that Taylor believed he was acting in self-defense, the Trial Court responded: "This new one on intent is new to me, that he believes he was acting in self-defense. That's new to me. But all I can say is, in the vacuum I am working in, if this is it, it just strikes me that I do not see where Zingaro fits in right now."[70] Shortly thereafter, Mr. Callaway told the Court, that after consulting with Mr. Johnson and Mr. Taylor it was "our decision that we will not be calling Doctor Zingaro as a witness in this case."[71] The following day, Mr. Johnson asked to revisit the issue about Zingaro's ability to testify about intent to which the Court responded:

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[67]State's Answering Br., pg. 43.
[68] TT Vol. N, 192.
[69] TT Vol. N, 192-193.
[70] TT, Vol. N, 196.
[71] TT, Vol. N, 197.

> We don't need to spend any more time and effort with Dr. Zingaro. I spent a ton of time on him. If you are not calling him, I am not interested in anything else about Dr. Zingaro. I spent a ton of time reading cases over the weeks about Dr. Zingaro. It all went nowhere.[72]

The issue was revisited during the prayer conference. Mr. Callaway asked:

> While we are on the subject for my own edification, the Court, after Mr. Taylor testified, made a comment. I am not sure I can quote it exactly. I got the impression that your Honor said that Mr. Taylor had not testified to make Dr. Zingaro's testimony relevant in this case. Can you explain that?

The Court responded:

> Well, I just wasn't sure if he had laid any sort of foundation for Zingaro to come in and offer an opinion. What I thought it was going to be was this dissociative identity disorder, this multiple personality disorder. I thought if Mr. Taylor got up there and said: I remember something happened, or I saw all of this stuff happening, and then I remembered being in DC, and I don't know what happened, or I saw all this stuff happen in front of me, and it wasn't me. It wasn't me doing these things. I can't explain it.
>
> I thought that would be consistent or lay the ground work for Zingaro to get up there and say: Yes, he saw something horrible. He dissociated himself from that, or his Taylor bad person did those things, and because of that, I had the opinion that this relevant, that is relevant. So that is what I was thinking.
>
> However, Mr. Taylor got up there and said: This is what I did. This is why I did it. He didn't blame it on anybody. He said I was defending myself, and so that's what I was getting at.[73]

Ultimately, the Court noted, the defense chose not to use Dr. Zingaro and

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[72] TT, Vol O, 4.
[73] TT Vol. P, 32-33.

Mr. Callaway agreed: "We were able to read between the lines."[74] It is clear from the record that Trial Counsel pursued the dissociative identity disorder strategy regardless of whether it could be applied as a factual defense in direct opposition to Taylor's refusal to concede guilt. It was a misguided strategy that had no hope for success in the guilt/innocence phase and trial counsel was forced to abandon it, not because Mr. Taylor refused to allow Zingaro to testify, but because there was no basis for his testimony consistent with Taylor's choice not to concede guilt or consistent with his testimony. Moreover, Trial Counsels' insistence on approaching trial preparation armed only with Dr. Zingaro and no investigation into the cause of death prejudiced Taylor's right to a fair trial because counsel was unprepared to cross examine Dr. Tobin and had no medical evidence to support their belief that the fatal injuries were sustained in a fall. As the United States Supreme Court stated in *Strickland*,

> ... strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.[75]

With all due deference to trial counsels' decision to use a mental illness

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[74] TT Vol P, 35.

[75] *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984).

defense, it was an unreasonable choice in any event, but particularly in light of the failure to undertake any investigation into the cause of death and deadly weapon which gave counsel no choice but to proceed with all it had. Trial counsels' conduct was professionally unreasonable and left Taylor with no real defense at all.

The State relies on *Jackson v. State*[76] in response to Taylor's argument that there was nothing untoward in the comments trial counsel made to the trial court when it became clear that their decision to use a mental illness defense was contrary to Taylor's wishes. The State's reliance on *Jackson* is misplaced for a number of reasons. In that case, the defendant was charged with axing a woman to death during the course of a burglary. The attorney who originally entered his appearance filed a Motion to Withdraw five months after undertaking representation, several months after a proof positive hearing, relatively early in the proceedings in which the defendant was tried for first degree murder. At the hearing on counsel's Motion to Withdraw, he made comments to the court that he felt revulsion toward the defendant and concluded that he ought to die.[77] He did not commit his feelings to writing, but made his comments at side bar and acknowledged that he did so because the comments were prejudicial. The attorney was permitted to withdraw and new counsel was appointed for the defendant. The record of counsel's comments was sealed and not provided to trial counsel who

[76] 21 A. 3d 27 (Del. 2011).
[77] *Id.* at 33.

represented Mr. Jackson at trial.[78]

The facts in *Jackson* have no bearing here. In the instant case, while trial counsel made objectionable revelations to the trial court in an effort to be granted leave to withdraw, counsels' Motion to Withdraw was denied and they continued to represent Taylor through the trial and penalty phases. The comments made to the trial court here consisted of unsolicited commentary about Dr. Fink's tentative diagnosis of "intermittent explosive disorder." They also told the Trial Court that Dr. Fink could not substantiate Zingaro's opinion that Taylor was suffering from dissociative identity disorder. The comments here reflected trial counsels' subjective opinion that Taylor was lying, not based on any investigation, but based on their uninformed view that the disparity in size and weight between Taylor and Mumford (and most likely, the appearance of her face) made his denial of responsibility implausible. The issue here is not focused on the appearance of judicial impropriety, but on trial counsels' violation of their duty of loyalty and duty not to divulge confidential information. Their motive to seek leave to withdraw was predicated on self-interest, not out of concern that Taylor's right to effective advocacy might be prejudiced by their continued representation.

While this claim is not predicated on an assertion of objective or subjective judicial impropriety, as the *Jackson* Court cautioned, capital cases merit special

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[78] *Id.* at 34.

scrutiny on review.[79] The State cannot reasonably contend that trial counsel who voluntarily inform the Trial Court that their own expert disputes the expert they wish to rely on for mitigation, that he assessed Mr. Taylor as a violent man and that they believe he is guilty, are functioning as the counsel guaranteed by the Sixth Amendment to secure Taylor's right to a fair trial.

I. Failure to object to prosecutorial misconduct.

The State mischaracterized the evidence when it argued that Pete Mitchell testified he missed a call from Mumford at 10:00 p.m. The argument was used to complement Mi Jung's testimony that she heard banging sounds that started around 10:00. It was also used in conjunction with the testimony related to the departure of Victor Perez and Carlton Gibbs from the townhouse around 10:00 p.m. The argument that Pete Mitchell testified he missed a call from Mumford at about the same time as the State contended the fatal argument resumed was untrue. Notably, Mi Jung originally told Detective Wells that she heard the banging noise start at 10:30 p.m. and her husband saw Taylor, Perez and Gibbs out in the parking lot at 10:10 p.m.

In any event, Pete Mitchell did not testify he missed a call from Mumford at 10:00 p.m.; he testified that he missed a call from Mumford at 1:50 a.m. the next morning, hours after the State argued Mumford had died. The Superior Court

[79] *Id.* at 39.

marginalized the statement by agreeing that the "prosecutor's statement is not what Mitchell said, the point she was making is valid."[80] The State's time line, when viewed in light of Mi Jung's pretrial statements, was extremely fluid. The State misstated the evidence in order to give the otherwise fuzzy time line shape. The Superior Court conceded that it constituted error.[81] Trial Counsel did not object to it and they should have.

The State argues that the prosecutor's reference to Taylor's remarks to Porter regarding scientific evidence was used to impugn Taylor's trial testimony rather than to attempt to persuade the jury that Taylor had the burden to present scientific evidence of how Mumford got back upstairs after she collided with the wall at the base of the steps. That argument is not supported by the record. Taylor made the comment to Porter specifically with respect to how Mumford died.

Taylor:	Yeah. I don't know what happened man. Do you see what I'm saying?
Porter:	Let me ask you this: do you remember ... did you just use your hands or you use anything else?
Taylor:	Detective what?
Porter:	Porter.
Taylor:	Detective Porter, I want to make your job real easy for you. Okay. I don't want to go through no big rigmarole about it. I really don't. Whether you

[80] *State v. Taylor*, 2015 Del. Super. LEXIS 993 at*133 (Del. Super. Nov. 23, 2015)
[81] *Id.* at *160-161.

	believe it or not I loved the hell out of that woman man.
Porter:	I knew that because I … trust me, I didn't just come here and talk to you.
Taylor:	No.
Porter:	I've been for … three days talking to everybody.
Taylor:	And if I could explain to you what happened. *If I could put in scientific facts*… if I could write it down I would. I can't tell you what possessed me or us because it came out the sky blue from nowhere. I don't know.[82]

Taylor clearly did not know why Mumford died. Had Trial Counsel investigated the scientific facts related to Mumford's cause of death he would have been able to explain to the jury why she died. It was not his burden to do so, but it is more likely than not, had his counsel been armed with those facts he would have been acquitted. The State's argument impermissibly shifted the burden of proof to Taylor and Trial Counsel should have objected.

J. Failure to object to the jury having access to the crime scene video with un-redacted pejorative commentary from the Delaware State Police speculating on material facts.

The State agrees with Taylor that there is audible commentary on the crime scene video speculating that "she" was thrown here and all the way down to there, but argues that to show prejudice, the Court would have to speculate that the jury could and did watch the video and hear the commentary and then ask jurors

[82]A-047-048.

whether its verdict was influenced by the commentary. We disagree based on the argument made in Section I, C above pertaining to the notation "fry pan w/blood" on the evidence bag. We know that the video was admitted into evidence and that it had prejudicial commentary on it. That fact is sufficient to raise a presumption of prejudice because when extraneous information is made available to the jury, prejudice is presumed.[83] To rebut the presumption, the Court is compelled to investigate answers to the questions the State raises which it cannot do at this juncture. The Superior Court agreed that the crime scene video should not have been submitted to the jury with the audio portion included.[84]

It is unclear how Trial Counsel failed to hear what was recorded on the video. The fact that they did not, however, does not contradict the argument that their failure to do so was professionally unreasonable. Given the nature of this case, the speculation contained on the video was highly prejudicial. Because the presumption of prejudice cannot be rebutted, the conviction cannot stand.

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[83] *Baird v. Owczarek,* 93 A. 3d 1222, 1230 (Del. 2014).
[84] *State v. Taylor*, 2015 Del. Super. LEXIS 993, * 161.

ARGUMENT

II. THE SUPERIOR COURT ABUSED ITS DISCRETION IN CONCLUDING THAT TAYLOR'S RIGHTS UNDER THE SIXTH, FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE I, SECTIONS 7 AND 11 OF THE DELAWARE CONSTITUTION WERE NOT VIOLATED DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

A. Trial counsel failed to object to the State's use of a psychiatric evaluation in violation of Superior Court Criminal Rule 12.2(e) and in violation of Taylor's Fifth, Sixth and Eighth Amendment rights.

Taylor was compelled to undergo a psychiatric examination at the hands of the State's psychiatrist, Dr. Mechanic. He was ordered to do so because trial counsel gave notice to the State that they intended to raise a mental illness defense at trial.[85] When Dr. Mechanic met with Taylor to evaluate him, Taylor was told that nothing he told Mechanic was confidential and that it would be included in any report or testimony Mechanic provided in the future.[86] He was not advised that his Fifth Amendment privilege against self-incrimination was at stake even though trial counsel knew the State's psychiatrist was likely to issue a highly negative report regardless of who he examined.[87] The examination was compelled solely because trial counsel anticipated using a mental illness defense at trial; they

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[85] A-004, Dkt. En. No. 32 (May 7, 2008).
[86] *State v. Taylor*, 2015 Del. Super. LEXIS 993, *150 (Del. Super. Nov. 23, 2015).
[87] A-441-442.

did not use a mental illness defense nor did Taylor request they do so. Trial counsel never revisited the wisdom or propriety of allowing Mechanic's report and testimony to be used against Taylor. The Superior Court analyzed this argument as a question of confidentiality. The State, however, recognized the issue is not confidentiality but whether trial counsel failed to protect Taylor's right against self-incrimination.[88] It's response to the argument, however, is incorrect.

First, the State has made no response to Taylor's argument that Superior Court Criminal Rule 12.2(e) prohibits admissibility of evidence obtained in response to an order under Superior Court 12.2(b) where the intention to rely on mental illness as to the issue of guilt has been withdrawn. It could be argued, although the State did not, that Rule 12.2(c) permits a statement made by a defendant obtained under Rule 12.2(b) to be used if it pertains to a mental or emotional condition on which the defendant has introduced testimony. The rationale underlying 12.2(c) is implicit in the cases cited by the State. Rule 12.2(c) however, as with the cases cited by the State do not apply here. The objection to Mechanic's testimony is that it was based on an interview Taylor was compelled to give in which he was asked and answered numerous questions about what happened the night Mumford died. Mechanic's testimony and report far exceeded any evidence pertaining to his mental condition. Use of dissociative identity

[88] State's Answering Br., pgs. 55-58.

disorder as a mitigating factor is completely different than whether it could have been used to defend against the charge of first degree murder, which is a much narrower purpose. Accordingly, neither Rule 12.2(c) nor the cases the State relies upon support its position. The question presented is whether rebuttal evidence derived from a psychiatric examination compelled under Rule 12.2(b) comports with the Fifth, Sixth, Eighth and Fourteenth Amendments when the defendant does not raise a mental illness defense at trial.

1) Fifth and Sixth Amendment Rights

The predicate for Taylor's Fifth Amendment claim is *Estelle v. Smith*,[89] which stands for the proposition that a defendant has a Fifth Amendment right against self-incrimination in the penalty phase of a capital murder trial.[90] In *Estelle*, the defendant's right against self-incrimination was violated because substantive statements he made to a psychiatrist pre-trial were used against him in a death penalty hearing to prove the State's contention of future dangerousness. The psychiatric examination had been ordered by the trial court with the neutral purpose of determining the defendant's competency to stand trial.[91] The State argues that *Estelle* is limited to the specific facts of the case, citing *Penry v.*

[89] 451 U.S. 454 (1981).
[90] *Id.*, at 462.
[91] *Id.*, at 466.

Johnson.[92] The State's reliance on *Penry* is misplaced. Although the Court did indicate that *Estelle* was limited to its specific facts, the State does not, nor can it, argue that there are substantial differences to the issues raised in *Estelle* and those at issue here. Moreover, the Court pointed out that if the Court could conclude that the State's use of a psychiatric report violated the defendant's Fifth Amendment right against compelled self-incrimination, the violation could justify overturning the defendant's sentence if the constitutional violation "had substantial and injurious effect in determining the jury's verdict."[93] In the instant case, Taylor's prime mitigating factor was his mental health to which both Walsh and Zingaro testified. Its importance overall has been fully explored in the preceding sections of this brief. The sentencing judge conceded that "dissociative identity disorder" would be an important mitigating factor, but based on Mechanic's testimony, he found Taylor was not suffering from that condition.

Neither can the State substantiate its argument that the State was free to use a psychiatric evaluation to which Taylor was compelled to submit after the notice of intent to rely on a mental illness defense was effectively withdrawn. *Kansas v. Cheever*[94] provides no support for the State's position. There, the defendant raised a voluntary intoxication defense at trial. The State was permitted to use a

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[92] 532 U.S. 782 (2001).
[93] *Id.*, at 795.
[94] 134 S. Ct. 596, 187 L. Ed. 2d. 519 (2013).

compulsory psychiatric examination to rebut the defense. Here, no mental illness defense was raised at trial. *Cheever*'s predicate, *Buchanan v. Kentucky*[95] is similarly inapposite as is each of the cases the State cites. In *Buchanan*, the defendant's entire trial strategy was predicated on the defense of extreme emotional disturbance.[96] His trial evidence consisted solely of portions of pre-trial psychological reports to illustrate his state of mind. The defendant did not take the stand. Accordingly, the court held that the Commonwealth had properly used *at trial* other portions of the reports reflecting the psychiatrist's observations about the defendant's mental state to rebut his claim of extreme emotional disturbance, but not any statements made by the defendant, avoiding any infringement on his Fifth Amendment rights.[97]

In each of the cases cited by the State, the defendant raised a mental illness or mental state of mind defense at trial, including *Szuchon v. Lehman.*[98] *Re v. State*[99] did not involve a penalty hearing. Such is not the case here. The distinction between cases in which a mental illness or state of mind issue is raised at trial and those where the defendant does not put his mental state in issue at trial is critical.[100] If a mental or emotional condition is raised at trial, Fifth Amendment rights are

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[95] 483 U.S. 402 (1987).
[96] *Id*, pg. 423.
[97] *Id*, pg. 423-424.
[98] 273 F. 3d 299, 309 (2001). Neither party introduced any new evidence at the penalty hearing.
[99] 540 A. 2d 423 (Del. 1986).
[100] *Estelle v. Smith,* 451 U.S. 454, 463 (1981) and *State v. Grossberg,* 1998 Del. Super. LEXIS 53, * 10 (Del. Super., Jan. 23, 1998).

deemed waived and the State may use a compelled examination to rebut the defendant's evidence but only to testimony at trial.[101] That waiver is vitiated when mental state issues are not raised at trial.[102]

In addition to violating Taylor's Fifth Amendment rights by using compelled statements against him, use of Mechanic's testimony violated his Sixth Amendment right to counsel on the scope of how the psychiatric interview and report could be used. The psychiatric report in issue was compelled as a direct result of trial counsels' notification that they intended to raise a mental illness defense at trial. Although the record does not reflect that Taylor was advised that he was waiving his Fifth Amendment right against compulsory statements, Superior Court Criminal Rule 12 compels such a result. The Rule does not, however, address the issue of Taylor's right to the advice of counsel under the Sixth Amendment as to the scope of the use of compelled statements.[103] Here, there is no evidence that trial counsel ever advised Taylor that any statements he made to Mechanic could be used against him in support of the State's efforts to execute him. "Courts must take care to analyze these closely related issues."[104]

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[101] *Grossberg*, at *10.
[102] *Cf., Lockett v. State,* 2002 OK CR 30, *26-27, (Ct. of Cr. Appeals OK, 2002); evidence derived from a pre-trial psychiatric investigation permitted in anticipation of a subsequently withdrawn psychiatric defense at trial allowed in a death penalty sentencing hearing where the defendant provide no statements to the State's witness because he refused to cooperate.
[103] *Powell v. Texas*, 492 U.S. 680, 687 (1989).
[104] *Fleenor v. Farley*, 47 F. Supp. 2d at 1068 citing *Estelle v. Smith*, 451 U. S. 454, 468 (1981) and *Powell v. Texas*, 492 U.S. 680, 684-685 (1989).

Here, the question of whether Mechanic's testimony regarding his examination of Taylor could be used at the penalty phase was barely thought through by the State and defense counsel.[105] Taylor was not advised that the examination he was compelled to undergo as a condition to a mental illness defense he never raised at trial (and did not want) could be used to put him to death. Accordingly, use of Mechanic's testimony at the penalty hearing was the result of a violation of his Sixth Amendment right to counsel.[106]

Trial counsel provided Taylor ineffective assistance of counsel by failing to object to the use of Mechanic's testimony at the penalty hearing. "[Counsel] may not treat the sentencing phase as nothing more than a mere postscript to the trial. While the *Strickland* threshold of professional competence is admittedly low, the defendant's life hangs in the balance at a capital sentencing hearing."[107] Had trial counsel not committed to a mental illness defense Taylor would not have been compelled to submit to Mechanic's examination; he was not given notice that "the compulsory examination would be used to gather evidence … to decide whether to

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[105] TT Vol. P, pgs. 28-30: Ms. Ryan: "Typically, the State presents their aggravating circumstances and the defense presents their mitigating circumstances. I don't recall that there is rebuttal in a penalty phase, but I don't know that …" The Court: "I am looking at 4209 quickly. Certainly, as to arguments, it is the same as it would be in a normal case opening. You get opening and rebuttal. Frankly, I don't know why the evidence wouldn't come in the same way. That if the defense puts up something that you want to rebut, that logic would dictate that you get an opportunity to rebut it." Mr. Callaway: "I don't see any problem with that."

[106] *Estelle v. Smith*, 451 U.S. 454, 471 (1981).

[107] *Fleenor v. Farley*, *supra*, pg. 1039.

put him to death."[108] When the mental illness defense was abandoned, objectively reasonable professional norms required counsel to object to the use of Mechanic's testimony against him. Prejudice as a result is manifest.

2) Eighth Amendment Rights

The State concedes that Delaware's death sentence statute, 11 Del. C. § 4209, does not expressly permit the State to present rebuttal evidence in a penalty phase. The authorities cited by the State do not support its position that the United States Supreme Court has sanctioned the use of rebuttal evidence at a death penalty hearing. In *Dawson v. Delaware,*[109] the Supreme Court found that evidence that the defendant was a member of the Aryan Brotherhood used in the penalty phase of a capital murder trial violated his First Amendment right and was irrelevant to the proceeding. The language the State cites from that case, as authorizing rebuttal per se in a penalty hearing, reflects a misunderstanding of the Court's analysis. The authority to which the *Dawson* Court cites is *Payne v. Tennessee*[110] in which the Court analyzed whether victim impact statements in death penalty sentencing hearings violated the Eighth Amendment. Finding that the State could operate within Constitutional bounds by *counteracting* the defendant's mitigation evidence, the Court authorized States to decide whether victim impact statements

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[108] *Estelle v. Smith, supra,* at 467.
[109] 503 U.S. 159 (1992)
[110] 501 U.S. 808 (1991).

can be used in determining whether or not the death penalty should be imposed on a given defendant.[111] The State is permitted under Section 4209 to *counteract* a defendant's mitigating evidence by its submission of evidence of aggravating circumstances[112] and its right to do so is circumscribed only by relevance.[113] That does not mean, however, that the State has the right to introduce affirmative evidence of aggravating circumstances as well as evidence in rebuttal to what a defendant wishes a jury to hear in mitigation of his offenses.[114] The State is free to challenge mitigating evidence through cross-examination and "undermine the weight of that evidence and to emphasize facts that (tend) to support the death penalty."[115] Where, however, the State is permitted to have affirmative evidence of aggravating circumstances and cross-examine the witnesses who support mitigating circumstances and then introduce rebuttal evidence in response to the mitigating circumstances, the penalty hearing violated Taylor's Eighth Amendment right not to be subjected to cruel and unusual punishment because the process deprived him of his right to present complete evidence of mitigating

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[111] *Id*, pg. 827.
[112] 11 Del. C. §4209(c): "At the hearing, evidence may be presented as to any matter that the Court deems relevant and admissible to the penalty to be imposed. The evidence shall include matters relating to any mitigating circumstance and to any aggravating circumstance, including, *but not limited to*, those aggravating circumstances enumerated in subsection (e) of this section (statutory aggravators which constitute a predicate for the death penalty)(emphasis added)."
[113] *Dawson v. Delaware,* 503 U.S. at 168.
[114] Black's Law Dictionary defines "rebut" as to defeat or take away the effect of something; it defines "rebuttal evidence" as not only counteractive evidence but evidence sufficient to counteract that is conclusive.
[115] *See, Fleenor v. Farley,* 47 F. Supp. 2d 1021, 1036 (So. D. Indiana 1998).

circumstances.[116] Mechanic's rebuttal testimony effectively permitted the State to encourage the jurors (and the sentencing judge) to disregard Taylor's mitigation evidence[117] through affirmative evidence rebutting that which was proffered in mitigation. Due to trial counsels' unprofessional revelations that Dr. Fink couldn't substantiate dissociative identity, the sentencing judge had additional cause to discount Taylor's mitigation evidence. The State has not substantiated its position that Delaware law permits the State to submit evidence in rebuttal of a defendant's mitigation evidence. This case offers a compelling example of the fundamental unfairness of a process which can be used to deprive a defendant facing execution of the only meaningful way the law affords him to save his life. Use of Mechanic's testimony and report, with no objection from trial counsel, had the effect of precluding consideration of Taylor's most compelling mitigation evidence. His sentence cannot stand.[118]

B. Trial counsel was ineffective for failing to object to certain aspects of Earline Harris' testimony.

We agree with the State that evidence of unadjudicated crimes is admissible in a penalty hearing if the evidence is plain, clear and convincing. We do not agree,

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[116] *Smith v. Estelle*, 445 F. Supp. 647, 658-659 (N. Dist. TX, 1977), *aff'd* 602 F.2d 694 (5th Cir. 1979), *aff'd, Estelle v. Smith, supra.*

[117] *See, United States v. Aquart*, 2012 U.S. Dist. LEXIS 23851 *12 (D. Conn. 2012)("... the Government is permitted to argue to the jurors its view of the weight that should be given to the mitigation factors, so long as it does not encourage the jurors to disregard the factors," citing Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982)(internal citations omitted).

[118] *See, Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) citing *Skipper v. South Carolina*, 476 U.S. 1 (1986).

however, that Earline Harris who supplied the objectionable evidence, was an eyewitness whose testimony could be considered plain, clear and convincing. The State argues that Taylor has supplied no case law to dispute its characterization of Harris as an eyewitness. The authority it supplies, however, does not support the proposition that a purported victim is an eyewitness. Harris is no more an eyewitness to unreported criminal activity purportedly perpetrated against her than any other victim. Moreover, while eye witness testimony has traditionally been viewed as reliable, that view has been called into question.[119]

Our quarrel with Harris' testimony is that she was an obviously biased witness who did not report the alleged rape while reporting other concurrent criminal activity. The State argued that Taylor's trial testimony was a recent fabrication because he didn't report every detail of the night Mumford died to Porter. A similar reaction to Harris' testimony regarding an alleged rape is not unreasonable. Taylor was in no position to challenge her testimony except for a request by trial counsel that the trial court subject her testimony to voir dire to insure that it was plain, clear and convincing after testing through cross-examination out of the jury's presence. Counsel did not request voir dire and failed in their professional obligations to Taylor. Harris' testimony provided significant support to the State's case on non-statutory aggravators causing great

[119] *See, e.g., Garden v. State*, 815 A.2d 327, 338 (Del. 2003)(defense expert permitted to testify on the limitations which may affect the reliability of eyewitness testimony).

prejudice to Taylor.

C. Failure to ask for an instruction on the nature of an *Alford* plea as the sole statutory aggravator.

The State offers no rationale for the Delaware legislature to have included pleas of *nolo contendere* in 11 Del. C. §4209(c) as a procedural matter[120] but omitted reference to pleas in the list of *statutory* aggravating circumstances which are the *sine qua non* of the penalty hearing. While there is no argument that pleas to criminal offenses may not be considered as non-statutory aggravators, the clear language in §4209(c) compels the conclusion that the legislature intended to require only convictions by a judge or jury to constitute a statutory aggravator. Trial counsel recognized the distinction and filed a Motion in Limine asking the court to consider the issue. When the motion was denied, reasonable standards of professional conduct dictate that they request the trial court instruct the jury that Taylor had not been convicted by a judge or jury of an offense under 11 Del. C. § 4209(e)(1)(i).

The State argues that the question of whether an *Alford* plea constitutes a conviction is a question of law for the court not the jury.[121] Because the question arises in the context of whether the State proved the sole statutory aggravator making Taylor eligible for the death penalty, the State is incorrect.

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[120] "The record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant or the absence of any such prior criminal convictions and pleas shall be admissible in evidence."

[121] State's Answering Br., pg. 64.

Under 11 Del. C. §4209, the factors listed in §4209(e)(1)(a)-(v) are statutory aggravators which constitute the predicates for raising first degree murder to capital murder. They are consequently "elements" of the crime of capital murder and "operate as the functional equivalent of an element of a greater offense" which the Sixth Amendment dictates be found by a jury."[122]

In *Almendarez-Torres v. United States,*[123] in his dissent, Justice Scalia noted that "at common law, the fact of prior convictions *had* to be charged in the same indictment charging the underlying crime, and submitted to the jury for determination along with that crime." [124] Accordingly, he dissented from the Court's majority opinion upholding a federal statute which enhanced the penalty for a crime committed by a deported alien if that person was deported in connection with a conviction for an aggravated felony. The Court concluded that the enhancement was a sentencing factor and not an element of the crime. Here, however, the statutory aggravators function as elements of the crime of capital murder.[125] By contrast, non-statutory aggravators are not elements of the offense of capital murder and may, under §4209(c)(3)(a)(2) and (d) be found by a preponderance of the evidence, by less than a majority of the jurors and ultimately by the court, regardless of what the jury finds. Justice Scalia has famously derided

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[122] *Ring v. Arizona*, 536 U.S. 584, 609 (2002).
[123] 523 U. S. 224, 261 (1998).
[124] 523 U.S. at 226.
[125] *Ring, supra,* at 536 at 599.

the distinction between factors which go to sentencing and, accordingly do not implicate the Sixth Amendment, and factors which constitute elements of the crime and must be found by a unanimous jury beyond a reasonable doubt.[126] There is no doubt under Delaware's death penalty statute, however, that the *fact* of a prior *conviction* of a violent felony constitutes an element of the crime of capital murder and must be found by the jury. There is no support for the State, and implicitly, the Superior Court, to conclude that the sentencing judge may usurp the jury's obligation to find each fact alleged as a statutory aggravator beyond a reasonable doubt. Because the trial court's decision on trial counsels' *Motion in Limine* to exclude an *Alford* plea as a conviction for purposes of the statutory aggravator alleged effectively precluded trial counsel from counteracting that conclusion, Taylor was deprived of his Sixth Amendment right to a jury trial on an element of the offense. Trial Counsel provided ineffective assistance of counsel for failing to protect Taylor's right to a jury determination on the issue.

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[126] "[I] believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts, whether the statute calls them elements of the offense, sentencing factors or Mary Jane-must be found by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U. S. 536, 610 (2002).

ARGUMENT

III. THE SUPERIOR COURT ABUSED ITS DISCRETION IN CONCLUDING THAT APPELLATE COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAILED TO RAISE CLAIMS WHICH IMPLICATED TAYLOR'S RIGHTS TO DUE PROCESS, A FUNDAMENTALLY FAIR TRIAL, A RIGHT TO HAVE ALL THE ELEMENTS OF A CAPITAL CRIME FOUND BY A JURY AND HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.

The obvious difficulty in analyzing appellate counsels' professional performance in this case arises because a number of the issues raised were obscured from appellant counsels' view. The issues related to the "fry pan with blood," the crime scene video, and the State's *Brady* violation were not apparent from the record. The issues pertaining to the errors committed in closing argument and Earline Harris' testimony regarding an allegation of rape which was not scrutinized to determine whether it constituted plain, clear and convincing evidence resulted from ineffective assistance of trial counsel which is not typically considered on direct review. Accordingly, the State's Answering Brief on those issues does not raise points which require a response.

There are several issues, however, which present more compelling arguments than appellate counsel raised and require a response.

A. Appellate counsel failed to challenge the trial court's denial of trial counsels' Motion in Limine to have Delaware's death penalty statute ruled unconstitutional.

Taylor's Opening Brief was filed on January 26, 2016, two weeks after the United States Supreme Court decided *Hurst v. Florida.*[127] In that case, the Court held that "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury."[128] On January 25, 2016 the day before Taylor's Opening brief was filed, the Delaware Superior Court certified five questions to this Court asking it to determine what affect the *Hurst* decision has on the constitutionality of Delaware's death penalty statute.[129] The State has argued that should this Court determine in *Rauf* that Delaware's death penalty statute is unconstitutional, it will have no retroactive effect on the instant case.[130] It is impossible to determine at this time whether *Rauf* will have retroactive effect because the Court has yet to determine, if at all, which portions of the statute are unconstitutional. The State argues that the Court's prospective ruling will necessarily implicate a procedural, rather than a substantive rule, citing *Schriro v. Summerlin.*[131] The State ignores, however, the possibility that the Court will invoke a "new watershed rule of criminal procedure

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[127] 136 S. C. 616 (2016).
[128] *Id.* at 621.
[129] *Rauf v. State*, No. 36, 2016 (Del. 2016).
[130] State's Answering Br., pg. 73.
[131] 542 U.S.348, 351-354 (2004).

implicating the fundamental fairness and accuracy of the criminal proceeding" which *will* have retroactive effect.[132]

The Superior Court certified five questions to this Court including the following:

> If the finding of the existence of "any aggravating circumstance," statutory or non-statutory, that has been alleged by the State for weighing in the selection phase of a capital sentencing proceeding must be made by a jury, must the jury make that finding unanimously and beyond a reasonable doubt to comport with federal and state constitutional standards?

And

> If the finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist must be made by a jury, must the jury make that finding unanimously and beyond a reasonable doubt to comport with federal and state constitutional standards?[133]

If this Court were to answer either of these questions in the affirmative, arguably the rule announced by that decision would constitute a 'watershed rule of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding and would accordingly make the rule retroactive and applicable to Taylor's penalty hearing.[134]

In *Montgomery*, the Supreme Court held that *Miller v. Alabama*,[135] which held that juveniles convicted of homicide could not constitutionally be sentenced to

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[132] *Id.* at 352.
[133] *Rauf*, at * 6-7.
[134] *See, Montgomery v. Louisiana*, 193 L. Ed. 599, 613 (2016).
[135] 183 L. Ed. 2d 407 (2012).

life in prison without parole unless consideration is given to the juvenile's circumstances in light of the principles and purposes applicable to juvenile sentencing, had retroactive application. The Court's rationale was grounded on the finding that mandatory life-without-parole for juveniles "poses too great a risk of disproportionate punishment" and accordingly offends the precepts expressed by the Eight Amendment.[136] Citing *Graham v. Florida*,[137] the Court stated that "[p]rohibition against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence."[138] A non-unanimous jury verdict weighing mitigation against aggravation is clearly less reliable than a unanimous decision; if this Court were to answer either of the above cited *Rauf* certified questions in the affirmative, it would do so in a manner that implicates a substantive constitutional right because it would necessarily invoke the fundamental fairness and accuracy of the sentencing which would necessarily apply retroactively.[139]

B. Appellate counsel failed to challenge the trial court's ruling holding that an *Alford* plea constitutes a conviction for the purposes of the prior violent conviction statutory aggravator.

The State has not responded to Taylor's contention that 11 Del. C. §4209(e)(1)(i) does not include pleas of any sort in identifying a "conviction" for a

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[136] *Supra*, at 622.
[137] 560 U.S. 48, 59 (2010).
[138] 193 L. Ed. at 618.
[139] *See, Montgomery, supra*, at 613.

prior violent felony as a statutory aggravator, while §4209(c)(1) permits pleas, including guilty pleas or pleas of nolo contendere, to be admissible in death penalty hearings. The omission permits the following inference: "*expressio unius est exclusio alterius*, i.e., the expression of one thing is the exclusion of the other."[140] Appellate counsel apparently did not consider this maxim in determining that it could not challenge the trial court's decision on the Motion in Limine made by the trial court to prohibit use of an *Alford* plea as a statutory aggravator. It is not new. The *Brown* court cited the 2007 case of *Leatherbury v. Greenspun*[141] in its decision.

The State's argument discounting the argument that appellate counsel had a sound legal basis to challenge the trial court's denial of the Motion in Limine to exclude an *Alford* plea as a statutory aggravator ignores the point that the jury must find the existence of a statutory aggravator beyond a reasonable doubt and the finding of a "conviction" is a necessary predicate. It is simply wrong to argue that it is the Court's prerogative to decide what constitutes a conviction in this context.[142]

Moreover, the State ignores a number of cases available to appellate counsel which would have supported a challenge on appeal to the trial court's decision to

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[140] *Brown v. State*, 36 A.3d 321, 325 (Del. 2012).
[141] 939 A.2d 1284, 1291 (Del. 2007).
[142] *See* Section II, C, *supra.*

permit the State to use an *Alford* plea as the conviction required by §4209(e)(l)(i). In *United States v. Makins*,[143] the defendant was being sentenced under a federal statute which permitted increased sentences based in the defendant's prior criminal history. The issue was whether an *Alford* plea constituted a conviction supporting a prior sentence.[144] The statute defined a "prior sentence" as "any sentence previously imposed upon an adjudication of guilt, whether by plea, trial or plea of nolo contendere ..."[145] The court held that for, purposes of enhanced sentencing, an *Alford* plea was the functional equivalent of a guilty plea.[146] Under Delaware law, pleas are admissible in a death penalty hearing by virtue of 11 Del. C. §4209(c) and, under the *Makins* rationale, would include *Alford,* pleas, although not expressly stated. But *Makins* has no applicability to whether an *Alford* plea constitutes a conviction under §4209(e)(l)(i) as a felony conviction necessary for imposition of the death penalty because that section makes no reference to a plea of any sort in clear contrast to the sentencing guidelines at issue in *Makins* and in §4209(c).

In *Rhyne v. State*,[147] the Nevada Supreme Court did reject the defendant's argument that an *Alford* plea was insufficient as a statutory aggravator stating that

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[143] 218 F. 3d 263 (3rd Circuit 2000).
[144] *Id.* at 265.
[145] *Id.* at 266.
[146] *Id.* at 268.
[147] 118 Nev. 1 (Nev. Supr. 2002).

it would "decline to require inquiry into the circumstances and negotiations involved in defendants' decisions to enter pleas in prior cases. In addition, the record reflects sufficient evidence of (another) aggravating circumstance ..."[148] *Rhyne* is distinguishable from the instant case for two reasons: 1) the jury, not the court, determines whether to impose the death penalty (and is a pre-*Ring* case); and 2) the aggravator based on the *Alford* plea was not the sole aggravator alleged. Moreover, note 35 cited by the court refers to a case holding that pleas of nolo contendere are valid for purposes of sentence enhancements, *Jones v. State*,[149] compelling the conclusion that a plea may not be used as a predicate for a finding of capital murder, although it may be admissible as a non-statutory aggravator.

In *People v. Bradford*,[150] another pre-*Ring* case, the California Supreme Court expressly found that a "conviction" based on an *Alford* plea could *not* be used as a "conviction" of a prior violent felony, stating "[T]he court erred in admitting the conviction resulting from this plea as a prior conviction under section 190.3 factor (c)(the presence or absence of any prior felony conviction), but the error was harmless because the evidence was admissible as evidence of violent criminal activity under factor (b)(The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the

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[148] *Id.* at 14-15.
[149] 105 Nev. 124-127 (Nev. Supr. 1989).
[150] 939 P. 2d 259, 346 (Cal. Supr. 1997).

express or implied threat to use force or violence). Applying the *Bradford* rationale to the instant case, Taylor's *Alford* plea could have been admitted as a non-statutory aggravator as a sentencing enhancement but could not be used to meet the statutory aggravator as a "conviction."

Application of the Delaware death penalty in this case violated Taylor's right to a jury determination of whether he was eligible for a death sentence because the court (erroneously), not the jury, determined that an *Alford* plea constituted a prior conviction. It was plain error for it to do so and appellate counsel failed to prevent the violation. His sentence must be vacated.

C. Failure to challenge Mechanic's testimony.

The arguments made in Section II, A 1) and 2) apply to appellate counsel. Use of Mechanic's testimony and report violated Taylor's Fifth and Eighth Amendment rights and should have been challenged on direct appeal.

CONCLUSION

For all of the foregoing reasons, the Court must vacate the judgment of conviction on all charges along with each attendant sentence, grant a new trial and such other relief as the Court deems just.

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Dated: April 1, 2016

CERTIFICATE OF SERVICE

I, Craig A. Karsnitz, do hereby certify that on April 1, 2016 I caused the Department of Justice to be served with copies of the forgoing Appellant's Reply Brief to be service upon the below listed attorneys of record through LexisNexis file-and-serve:

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