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Case Number 12,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES COOKE,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 12, 2023
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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Date: January 3, 2024

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NATURE AND STAGE OF PROCEEDINGS

Appellee generally adopts the Nature and Stage of the Proceedings as contained in Appellant James Cooke's Opening Brief.

This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. DENIED. The Superior Court did not err in denying Cooke's competency claims. His freestanding claims are procedurally barred, and the record supports the court's conclusions that Cooke was competent to stand trial and to represent himself. Trial counsel were not ineffective for failing to further address Cooke's competency.

II. DENIED. Cooke has failed to demonstrate that trial counsel's performance was professionally unreasonable, or that he suffered any prejudice from his attorney's actions or inactions.

III. DENIED. The Superior Court did not err in ruling that Cooke's *Batson* claim was procedurally barred. Cooke failed to demonstrate that trial/appellate counsel's performance was professionally unreasonable, or that he suffered any prejudice from his attorney's actions. The trial record does not substantiate a *Batson* violation.

IV. DENIED. The Superior Court did not abuse its discretion in finding trial counsel not ineffective for failing to further pursue suppression of Cooke's statement.

V. DENIED. The Superior Court properly found that Cooke's continuance claim is procedurally barred.

VI. DENIED. Because all of Cooke's claims lack merit, he cannot

establish cumulative error.

VII. DENIED. The Superior Court did not abuse its discretion in denying Cooke's discovery requests.

VIII. DENIED. Cooke has waived the seven claims listed in Argument VIII by failing to address the issues' merits in his opening brief's body.

FACTS

The State adopts and incorporates herein the facts laid out in this Court's opinion on direct appeal from Cooke's second trial.[1] Additional facts relevant to each claim are noted therein.

[1] *Cooke v. State*, 97 A.3d 513, 518-22 (Del. 2014).

ARGUMENT

I. THE SUPERIOR COURT DID NOT ERR IN DENYING COOKE'S COMPETENCY CLAIMS.

Question Presented

Whether the Superior Court erred in denying Cooke's competency claims.

Standard and Scope of Review

This Court reviews the denial of postconviction relief for abuse of discretion.[2] "[F]actual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous."[3] Questions of law are reviewed *de novo*.[4] Competency determinations are reviewed *de novo*.[5] "A [defendant] 'is entitled to no presumption of incompetency and must demonstrate his . . . incompetency by a preponderance of the evidence.'"[6]

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[2] *Gattis v. State*, 955 A.2d 1276, 1281 (Del. 2008) (citation omitted).

[3] *Burrell v. State*, 953 A.2d 957, 960 (Del. 2008).

[4] *Neal v. State*, 80 A.3d 935, 941 (Del. 2013); *Gattis*, 955 A.2d at 1280-81.

[5] *Gibson v. State*, 981 A.2d 554, 557 (Del. 2009) (citing *Diaz v. State*, 508 A.2d 861, 863–64 (Del. 1986)), *cited in Tucker v. State*, 2014 WL 7009954, at *2 (Del. Nov. 21, 2014).

[6] *Perkins v. United States*, 73 F.4th 866, 876 (11th Cir. 2023) (quoting *Lawrence v. Sec'y, Fla. Dep't of Corr.*, 700 F.3d 464, 481 (11th Cir. 2012)). Although this Court has previously held that it is the State's burden to prove competency, that determination was based on outdated Third Circuit precedent. *See Diaz*, 508 A.2d at 863–64 (citing *United States v. DiGilio*, 538 F.2d 972, 988 (1976)). The United States Supreme Court held in *Medina v. California*, 505 U.S. 437, 452 (1992), that allocation of the burden of proof to the defendant to prove incompetency does not offend due process. *Accord Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996).

Merits of Argument

Cooke claimed below (1) the trial court erred in (a) failing to *sua sponte* hold a hearing to determine if Cooke was competent to stand trial, and (b) failing to determine whether Cooke was competent to waive his right to counsel and proceed *pro se*; and (2) trial counsel provided constitutionally ineffective assistance for failing to consult with a mental health expert, obtain an evaluation or otherwise raise the issues of whether Cooke was competent to stand trial, to represent himself, or to waive his *Miranda* rights.[7,8] (A708-17). Cooke also asserted his appellate counsel were ineffective for failing to raise the issue of his competency to represent himself on appeal. (A717).

A. Background

1. The First Trial

Before his first trial in 2007, at least five experts evaluated Cooke's mental health.[9] The four defense experts from whom counsel obtained reports appear to have raised no concerns about Cooke's competency (*see* A920-46), and a fifth doctor, Stephen Mechanick, M.D., a psychiatrist retained by the State, expressly

[7] Because Cooke failed to adequately brief any state constitutional arguments here or below, they are waived. *Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008).

[8] The *Miranda* issue is addressed in response to Claim IV, below.

[9] *See generally State v. Cooke*, 2007 WL 2129018, at *8-13, *36, *39, *41-42 (Del. Super. Ct. June 6, 2007) (discussing doctors' observations and testimony), *rev'd*, 977 A.2d 803 (Del. 2009).

found Cooke competent to stand trial (A2691-2718). (*See* A920, A929, A932, A936, A938-41, A945-46, A1004, A1007; B206-08, B210-222, B229). James Walsh Ph.D., LPCMH, a pastoral counselor, did not perform a diagnostic assessment of Cooke. Alvin Turner, Ph.D., a licensed psychologist, evaluated Cooke to determine whether there was a basis for a "guilty, but mentally ill" verdict. (A932, A936; B206). Dr. Turner concluded that Cooke suffered from Schizotypal Personality Disorder, which he noted is a very severe condition "that includes transient periods of bizarre behavior, irrational impulses and delusional thoughts." (A938-39; B208). Dr. Turner opined that Cooke had succumbed to a psychotic episode prior to the murder, which was precipitated by his son's death. A939.

Lawson Bernstein, M.D., a neuropsychiatrist, evaluated Cooke to determine "whether or not he ha[d] any psychological or psychiatric diagnoses, . . . and to what extent they might be relevant to [the] . . . judicial proceedings." (A945; B210). He concluded that Cooke suffered from a Mixed Personality Disorder with various features from Schizoid, Schizotypal, Paranoid, and Antisocial Personality Disorders. (*Id.*; B211-22).

Dr. Mechanick rejected the notion that Cooke suffered from Schizotypal, Schizoid, or Paranoid Personality Disorder. (A2715-16, A2718). He instead diagnosed Cooke with Antisocial Personality Disorder ("ASPD") and Learning

Disorder, Not Otherwise Specified. (A2717-18). Dr. Mechanick concluded that Cooke was competent to stand trial. (A2718).

2. The Second Trial

Prior to Cooke's second trial, his interim trial counsel ("interim counsel") retained Dr. Steve Eichel, a psychologist, to prepare for the penalty case, but also to assess Cooke's competency. (B788-89, B823). Dr. Eichel met with Cooke four times and was leaning towards diagnosing Cooke with a delusional disorder. (B824-25). He could not, however, reach a conclusion about the diagnosis or Cooke's competency because Cooke stopped cooperating. (B796-98, B826-27). Then Cooke sued his attorneys, the judge, and the experts on his defense team in federal court. (*See* A1159-74; B795). Dr. Eichel's attorney advised him to no longer communicate with Cooke. (A279-80, A283, A287; B810).

Based on preliminary discussions with Dr. Eichel, interim counsel informed the court there was a potential issue with Cooke's competency and they had intended to file a motion addressing it. (A286; B253-54, B790, B808-10). However, because Cooke had filed the federal lawsuit against his entire defense team, counsel were unable to further explore the issue. (A287-88; B792-93). The State suggested to the court that it could exercise its authority to order Cooke transferred to the Delaware Psychiatric Center for a competency review. (A286; B270). But trial counsel could

not consent to the review on Cooke's behalf, given their potential conflict of interest (A287-88; B272, B278-79), and the court denied the State's request. (A289).

Thereafter, interim counsel withdrew from the case and second trial counsel ("second counsel") took over. (B794). Second counsel retained a mitigation expert to help prepare their penalty phase case, but they engaged no additional mental health experts. (B979). The first time they met with Cooke, he "flat out refused" any type of mental health examination and told counsel he would fire them if they tried to have him evaluated for mental health issues. (B979, B985, B994-95, B1076, B1121, B1123).

In early November 2011, Cooke requested to represent himself at his second trial. (*See* B350). Second counsel suggested to the trial court by letter that, although Cooke had demonstrated that he is able to follow certain procedures "and appears to be literate when it comes to writing lawsuits," his competency to represent himself might need to be addressed by a medical expert. (B347). During a November 30, 2011 hearing on the issue, counsel again suggested that the court might need to order a competency evaluation before granting Cooke's request. (B354-55; *see* A378). The court was not convinced, however, noting that Cooke seemed to understand and appreciate his role and that it had not seen or heard anything indicating that Cooke

was not competent to make the decision to represent himself.[10] (B357; *see* B358). Second counsel argued that, although they felt that Cooke was competent to stand trial, "the mere fact that [he] thinks he can go to trial in February is a sign that he's not competent to represent himself because there's no way in the world . . . this man can be ready for trial and adequately represent himself if trial is in February." (B358). The court noted that concern—the *opportunity* to perform a task—was different than the *understanding* to perform a task. (B358).

After holding a colloquy with Cooke to confirm that his decision was knowing, intelligent, and voluntary (A378-79; B352-54), the court granted Cooke's request to represent himself, but ordered second counsel to serve as standby counsel and to be prepared to move forward should Cooke change his mind or forfeit his right to self-representation. (B360). On the third day of the State's case-in-chief, the trial court determined that Cooke had, through his behavior, forfeited his right of self-representation and reinstated second counsel. (A467-81).

On direct appeal, Cooke claimed the court erroneously took away his right to represent himself, in addition to claiming in his reply brief "the opposite notion that

[10] It appears the prosecutor mistakenly informed the court that Cooke had been examined by two psychiatrists and a psychologist prior to the first trial, who had said he was competent. (B357). In fact, only Dr. Mechanick made that determination. The court, however, noted those determinations were immaterial to his decision. (B358).

the Superior Court erred by failing to take away that right earlier."[11] This Court denied the claim, finding "Cooke's attempt to benefit from his own outrageous and capricious behavior is both inequitable and without basis in the Constitutions of our nation and our state, particularly where the Superior Court so conscientiously respected his rights."[12]

3. Postconviction

Postconviction counsel retained Bhushan Agharkar, M.D., a psychiatrist, to assess Cooke's psychiatric difficulties and their impact on his ability to represent himself and to stand trial in 2012. (A2646; B829). Dr. Agharkar testified during the postconviction hearing that Cooke suffered from a Delusion Disorder, Persecutory Type, which is characterized by the presence of one or more fixed, false beliefs and which would have existed at least from the time of his original trial to the present. (A2658; B830-31). He also believed that Cooke probably had brain damage, or at least disfunction in the frontal lobe that would have rendered him incompetent in 2012 to represent himself or to stand trial. (B830). Dr. Agharkar opined that, although Cooke knew who the players were, he could not understand the legal proceedings against him in a rational way because he suffered from non-bizarre,

[11] *Cooke*, 97 A.3d at 537 (noting approach was "Kafkaesque—but with the twist that it is the citizen who is seeking to ensnare the government in a capricious web of unfair illogic").

[12] *Id.*

rigid, and fixed beliefs that everyone was conspiring against him and everyone and everything was racist. (B831-34, B839-40, B845). Examples the doctor gave of Cooke's delusions consisted of Cooke's (1) belief that the medical examiner had concluded that Bonistall was not raped; (2) belief that the DNA evidence showed three people were involved; (3) accusations that the polygraph examiner and machine were racist; (4) belief that the DNA expert interim counsel retained was racist simply because he was from Texas; (5) attempts to introduce evidence that was not helpful to his case, such as the polygraph exam; (6) belief that the 911 calls eliminated him as a caller; (7) striking of jurors solely on the basis of race and sex; and (8) many outbursts during the trials. (B835, B837-38, B840-44).

Dr. Agharkar concluded that Cooke was likely incompetent to represent himself at trial because his mental illness would have negatively impacted his ability to cooperate with counsel, to interact with others in general, or to make decisions; and he would have had trouble understanding the court's instructions. (B846-48). But the doctor also acknowledged that his role was advisory and he could not answer the ultimate legal questions of whether Cooke was competent to stand trial or to represent himself. (B848).

The State retained Dr. Mechanick in postconviction to revisit his prior opinion, assess Dr. Agharkar's conclusions, and again address Cooke's competence. (A2661-72; B853-54). Dr. Mechanick met with Cooke for about two hours and

found him to be pleasant and cooperative. (B881-82). He noted that Cooke "rambled a bit" but did not have a serious disorganization of thought. (B882). The doctor reiterated his ASPD diagnosis and disagreed with Dr. Agharkar's Delusional Disorder diagnosis. (B859-60, B862-65, B873-75, B895). Dr. Mechanick also disagreed with Dr. Agharkar's opinion that Cooke might have suffered from brain damage, noting that none of the many doctors who had examined Cooke throughout his life had definitively diagnosed him with brain damage and that the MRI and EEG ordered by Dr. Bernstein before Cooke's first trial showed no evidence of physical brain damage. (B855-58). Nor had Dr. Abraham Mensch, who had performed a neuropsychological evaluation of Cooke prior to his first trial, concluded from his testing that Cooke had brain damage. (B908-09).

Dr. Mechanick noted that the evidence Dr. Agharkar pointed to as indicative of delusional thinking was, in fact, Cooke acting in a rational manner, given his circumstances. (B860-61, B864-72, B879-80, B883-89, B896). Cooke had good reason to mistrust authority figures (since such figures had not treated him well in his youth) and the court system, because, among other things, he was forced to present a guilty but mentally ill defense during his first trial against his will. (B860, B869, B876-77, B900, B905-06). Similarly, Cooke's beliefs about racism were rational and not idiosyncratic, given the history of racism in this country. (B883-84). Cooke's belief that ubiquitous societal racism might taint his trial was a part of

the cultural norm; it had a factual basis and, thus, was not delusional. (B884, B907). For the same reason, Cooke's strategy of striking white women from the jury was also not irrational. (B884-85).

With respect to Cooke's perceived misconceptions about some evidence against him, Dr. Mechanick pointed out that Cooke had no motive to concede anything. (B864). While some claims he made were not true, they were not irrational, given he was trying to assert his innocence. (*See* B865-67, B888-89, B904). Cooke's misunderstanding of the DNA evidence was also not surprising, given his low average intelligence. (B903, B906).

Furthermore, the evolution of Cooke's narrative about his interaction with Bonistall—from not knowing her, to not understanding why he killed her, to acknowledging he had consensual sex with her but did not kill her—did not evidence an individual with a fixed belief or delusion, but rather someone who was trying to find a defense that would keep him out of prison. (B887). Cooke also exhibited manipulative behavior just after the crime and while he was being investigated; among other things, he wrote misleading messages on the walls and made the 911 calls trying to deflect attention from himself. (B896-98).

Dr. Mechanick opined that, although he did not think that Cooke suffered from a mental illness that affected his competency, Cooke adequately met the McGarry factors accepted by this Court as a "widely used assessment procedure in the area of

competency to stand trial."[13] (B890-95, B899). Dr. Mechanick believed that Cooke was competent to stand trial and to represent himself, although the fact that he was not trained in the law and, thus, did not understand legal procedure "put him at a disadvantage like any other untrained defendant going pro se." (B895-96).

Finally, Dr. Mechanick noted that none of the other doctors who evaluated Cooke in 2006 had determined that he lacked capacity, pointing out that a doctor evaluating a client should raise the issue of competency with an attorney if he has concerns. (A2683; B878). In any case, "even if [Cooke] had the mental illnesses [the other doctors] espoused[,] [it] would in no way prove that he lacked competence to stand trial." (A2683).

Brendan O'Neill, one of Cooke's first trial counsel ("first counsel"), testified at the postconviction hearing that, although he believed Cooke was mentally ill, he did not think he was incompetent; Cooke was able to communicate with them and knew who the players were. (B799-800). Kevin O'Connell, Cooke's other first counsel, believed that Cooke did not understand the DNA, handwriting, or voice identification evidence, but that he did have a rational understanding of some evidence against him, although he was very fixated on certain things. (B804-05; *See* B806). O'Connell also opined that Cooke's paranoia derived from his youth and that he had a very good reason to be paranoid—"[he] is . . . somebody who, . . . from

[13] *Feliciano v. State*, 2017 WL 897421, at *13 (Del. Mar. 3, 2017).

the moment he was born, every time the system had an opportunity to deal with him, he was wronged in some way." (B807).

As discussed above, Cooke's interim counsel raised concerns about Cooke's competency with the trial court based on their conversation with Dr. Eichel. (*See* B790, B811). Patrick Collins did not believe Cooke was competent. (B812-13). But Dr. Eichel could not reach a conclusion about Cooke's competency and agreed during the postconviction hearing that, without testing, his thoughts about the issue were speculative. (B828).

Peter Veith, one of Cooke's second counsel, believed that Cooke understood the evidence against him, although he did get hung up on the DNA evidence. (B980-81). Veith testified that he had no reason to doubt Cooke's competency to stand trial. (B1038). Anthony Figliola, Cooke's other second counsel testified that, although he felt Cooke was a "little off," he did not think he was incompetent. (B1124). They had no difficulty communicating with Cooke and "[Cooke] did know what he was doing." (*Id.*; B1037). "He was paranoid. He didn't trust anybody, but that doesn't make him not competent to stand trial." (B1122).

B. The Superior Court's Denial of Cooke's Claims

Although the State argued that Cooke's freestanding competency claims were procedurally barred, the Superior Court opted to forego a discussion of the bars and instead address the claims' merits because Cooke was presenting "new evidence that

no trial should have taken place." (O42).[14] The court reviewed, *inter alia*, the many doctors' findings, as well as Cooke's behavior during both trials and in between and concluded that Cooke was competent—he was able to consult with his attorneys and assist in preparing his defense. (O52-53). The court concluded that trial counsel were not ineffective for failing to observe that Cooke was incompetent or to force him to submit to a mental health examination. (*Id.*). Cooke adamantly opposed such an examination, and, in any case, Cooke could not show he was prejudiced because the court had determined that he was competent. (*Id.*).

Nor was the court persuaded by Dr. Agharkar's opinion and testimony[15] (*see* O55-67), further holding that Cooke likely suffered from ASPD, not a delusionary disorder, noting his demeanor during court proceedings and that none of the doctors from the first trial had opined that he was incompetent. (O67-68). As to Cooke's competence to stand trial, the court found no merit to the claim because the record did not support it and pointed out that "Cooke was familiar with the criminal justice system in New Jersey and had the benefit of a dress rehearsal by way of his first

[14] "O" refers to the Superior Court's December 15, 2022 memorandum opinion denying Cooke's postconviction motion attached as Exhibit B to Cooke's opening brief, which is reported at *State v. Cooke*, 2022 WL 17817903 (Del. Super. Ct. Dec. 15, 2022).

[15] The court also reviewed and was not persuaded by Dr. Eichel's preliminary conclusion and interim counsel's mitigation specialist's observations. (O54-57; B819-22).

trial." (O77). The Superior Court also held that appellate counsel were not ineffective for failing to raise the competency issue on appeal. (O78-79).

C. Cooke's Freestanding Competency Claims Are Procedurally Barred.

Prior to addressing the merits of a postconviction motion, this Court must first consider and apply the procedural bars set forth in Superior Court Criminal Rule 61.[16] Contrary to the Superior Court's decision, Cooke's freestanding competency claims are procedurally barred.[17]

Because Cooke did not previously challenge his competency to stand trial or his failure to receive a competency hearing, these grounds for relief are procedurally defaulted, and this Court may not consider their merits unless Cooke demonstrates: (i) cause and prejudice under Rule 61(i)(3); or (ii) that an exception under Rule 61(i)(5) applies. To the extent Cooke argued his procedural default is excused because trial counsel were ineffective for failing to raise the issue (*see* A709-10), such argument is insufficient. "Attorney error which falls short of ineffective assistance of counsel does not constitute cause for relief from a procedural default."[18] As explained below, the associated ineffective-assistance claims are meritless.

[16] *Durham v. State*, 2017 WL 5450746, at *1 (Del. Nov. 13, 2017).

[17] *See Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

[18] *Shelton v. State*, 744 A.2d 465, 475 (Del. 2000) (citing *Flamer v. State*, 585 A.2d 736, 758 (Del. 1990); *Younger v. State*, 580 A.2d 552, 556 (Del. 1990)).

Similarly, any argument that the trial court's failure to *sua sponte* raise the issue excuses his default also fails. "'[C]ause' for a procedural default . . . ordinarily requires a showing of some external impediment preventing [the defendant] from constructing or raising the claim."[19] Here, Cooke had ample opportunity to challenge his competency himself. The trial court's failure to raise the issue did not prevent Cooke from doing so. Nor can he demonstrate any actual prejudice because he cannot show his rights were violated.[20]

Because second counsel did ask the Superior Court to address Cooke's competency before granting his request to represent himself, and the court found that Cooke's behavior had given it no reason to doubt Cooke's competency, his competency to waive counsel claim is procedurally barred from reconsideration by Rule 61(i)(4). Cooke has not met the requirements of Rule 61(i)(5) necessary to overcome the procedural bars.[21] He did not assert a viable claim of actual, factual innocence, nor that a new, retroactively-applicable rule of constitutional law applied to his competency claims. Moreover, Cooke does not appear to have claimed that the trial court lacked jurisdiction.

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[19] *Younger*, 580 A.2d at 556 (citing *Murray v. Carrier*, 477 U.S. 478, 492 (1986)).

[20] *Id*. at 555-56.

[21] *See* Super. Ct. Crim. R. 61(i)(5) & (d)(2)(i), (ii).

The Superior Court declined to apply the procedural bars because the nature of the claim affected "the fairness of the trial" (O42); however, such an exception does not exist and the State is not aware of any precedent from this Court that would allow the Superior Court to disregard the procedural bars on that basis. Cooke's freestanding competency claims are procedurally barred. But even if they are not, the Superior Court did not err in denying them because Cooke failed to establish that counsel performed deficiently or that he suffered any prejudice under *Strickland v. Washington*,[22] from his attorneys' alleged deficiencies.

D. The Record Supported the Superior Court's Conclusions that Cooke Was Both Competent to Stand Trial and to Represent Himself and Trial Counsel Were Not Ineffective for Failing to Further Pursue Those Issues.

Cooke claims the Superior Court erred in denying his ineffective assistance claims because (1) it concluded counsel were reasonable in deciding not to assess Cooke's competency because he might fire them; and (2) the court erroneously equated "reasonable probability" with "preponderance of the evidence" and failed to consider the "totality of the evidence" in determining Cooke could not establish prejudice.[23] (Opening Brief ("OB") 26-29). He also asserts the court made a number of factual errors, essentially, because it accepted Dr. Mechanick's conclusions over

[22] 466 U.S. 668 (1984).

[23] Cooke's ineffective assistance claims are not procedurally barred. *Duross v. State*, 494 A.2d 1265, 1266 (Del. 1985).

Dr. Agharkar's and failed to give sufficient weight to Dr. Eichel's incomplete assessment. (*See* OB 31-38). Cooke also asserts (1) the trial court erred in failing to *sua sponte* evaluate Cooke's competence, because reasonable cause existed to believe Cooke was potentially incompetent, and (2) the Superior Court erred in considering the postconviction evidence, because the medical evidence demonstrated that Cooke suffered from brain damage and psychiatric illnesses and "the 'preponderance' of all evidence established Cooke likely would have been found incompetent had the trial court *sua sponte* ordered an evaluation." (OB 42). Cooke's assertions are unavailing.

1. Competency to Stand Trial

Due process requires that a defendant be competent to stand trial.[24] A defendant's trial must be fair, not perfect, however.[25] Accordingly, a defendant must be able to consult with his attorney with a reasonable, not perfect, degree of rational understanding.[26] A defendant is competent to stand trial if he "has sufficient present ability to consult with his lawyer rationally and . . . a rational as well as a factual

[24] *Pate v. Robinson*, 383 U.S. 375, 378, 385 (1966); *Harris v. State*, 1997 WL 537286, at *2 (Del. Aug. 19, 1997).

[25] *State v. Shields*, 593 A.2d 986, 1005 (Del. Super. Ct. 1990).

[26] *Id.*

understanding of the proceedings against him."[27] A defendant's competency is not measured against a reasonable person, but against the average criminal defendant.[28] The competency threshold is "quite low."[29] The question of competency is fact-intensive and does not necessarily turn upon the absence or presence of any particular factor.[30]

A trial court's failure to conduct a competency hearing where appropriate violates due process.[31] However, "[t]here are . . . no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed."[32] This Court has held that "when the record discloses that a bona fide doubt of the competency of a defendant is raised during trial, . . . due process requires the Trial

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[27] *Williams v. State*, 378 A.2d 117, 119 (Del. 1977) (citing *Dusky v. United States*, 362 U.S. 402, 402 (1960)); *accord Tucker*, 2014 WL 7009954, at *2; *Gibson*, 981 A.2d at 558.

[28] *Tucker*, 2014 WL 7009954, at *2 (quoting *Shields*, 593 A.2d at 1012-13).

[29] *Id. Cf. Perkins*, 73 F.4th at 876 ("[T]he standard of proof is high, and the facts must positively, unequivocally and clearly generate [a] legitimate doubt." (internal quotations omitted; citation omitted); *United States v. Patterson*, 828 F.App'x 311, 313 (6th Cir. 2020) ("[I]ncompetence is a 'high' bar, heightened by clear-error review on appeal.").

[30] *Tucker*, 2014 WL 7009954, at *2.

[31] *Robinson*, 383 U.S. at 385; *Jermyn v. Horn*, 266 F.3d 257, 283 (3d Cir. 2001).

[32] *Drope v. Missouri*, 420 U.S. 162, 180 (1975).

Judge to hold a hearing and make a determination as to the legal competency of the defendant to stand trial."[33]

In determining whether there were "sufficient indicia of incompetence" to warrant the court to *sua sponte* order a competency evaluation or conduct a hearing, a reviewing court should consider "the nature and quality of the facts known to the court" and "their probative force in the aggregate," "although any one factor may be sufficient depending on the circumstances."[34] Evidence relevant to a defendant's competence includes "[his] history of irrational behavior, his demeanor at trial, . . . any prior medical opinion on competence,"[35] and trial counsel's representation about his client's competency.[36] However, "[a] defendant is not necessarily incompetent even if he 'suffer[s] from [a] sever[e] mental illness.'"[37]

Similarly, with respect to counsel's failure to address a defendant's competence, the Third Circuit has held:

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[33] *Williams*, 378 A.2d at 119-20 (citing 11 *Del. C.* § 404(a); other citations omitted).

[34] *Jermyn*, 266 F.3d at 292 (citing *Drope*, 420 U.S. at 180).

[35] *Drope*, 420 U.S. at 180.

[36] *United States v. Jones*, 336 F.3d 245, 256 (3d Cir. 2003) (citing *United States v. Renfroe*, 825 F.2d 763, 767 (3d Cir. 1987)); *see Taylor v. Horn*, 504 F.3d 416, 433-34 (3d Cir. 2007) (no error in trial court's failure to hold competency hearing in part because trial counsel never expressed concern over defendant's competency).

[37] *Patterson*, 828 F.App'x at 313 (quoting *Indiana v. Edwards*, 554 U.S. 164, 178 (2008)); *see United States v. Noble*, 42 F.4th 346, 353-54 (3d Cir. 2022) ("[M]ental illness does not, on its own, mean that a defendant is not competent to stand trial." (citing *United States v. Leggett*, 162 F.3d 237, 244 (3d Cir. 1998)).

> [C]ounsel's failure to request the trial court to order a hearing or evaluation on the issue of the defendant's competency, could violate the defendant's right to effective assistance of counsel provided there are sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency, and there is a reasonable probability that the defendant would have been found incompetent to stand trial had the issue been fully raised and considered.[38]

Thus, a reviewing court must answer similar questions in assessing whether a trial court or trial counsel should have pursued measures to ensure that a defendant was competent to stand trial—were there sufficient indicia of incompetence to give either the trial court or counsel reason to doubt defendant's competency?

Here, both the judge and counsel had the benefit of knowing that Cooke had already made it through one trial, in which he objected to his counsel's mental illness defense and successfully challenged that strategy on appeal. Although Cooke had many outbursts during that trial, no one questioned his competency to stand trial—not his trial attorneys, not the prior judge, and not the defense mental health experts who examined him. (*See, e.g.*, B204, B226, B233). Indeed, this Court noted in its decision reversing Cooke's conviction after his first trial, that "there [was] no indication that [he] was not sufficiently competent to make decisions about his

[38] *Jermyn*, 266 F.3d at 283 (citing *Hull v. Kyler*, 190 F.3d 88, 106 (3d Cir. 1999)); *accord Karenbauer v. Beard*, 390 F. App'x 73, 80 (3d Cir. 2010); *see also Strickland*, 466 U.S. at 688, 694.

case."[39] And the only expert who explicitly examined Cooke for competency, Dr. Mechanick, found him competent.

Although, interim counsel raised the issue of Cooke's potential incompetence to the court, their expert was not able to render a definitive opinion due to Cooke's refusal to cooperate with him and to the federal lawsuit. Thereafter, interim counsel's motion to withdraw from the case was granted and a new trial judge was assigned. (A46-47). Second counsel told the trial court that they believed Cooke was competent to stand trial, and that he had demonstrated that he was able to follow certain procedures.[40] (B347-48, B358). They testified at the postconviction hearing consistent with their observations prior to the second trial that they did not believe Cooke to be incompetent to stand trial and they had no difficulty communicating with him. The second trial judge was also able to observe Cooke's demeanor during the pretrial hearings, the colloquy with Cooke concerning self-representation, and at trial. He, too, did not find Cooke's behavior indicative of incompetency to stand trial (or to self-representation). (*See* B357-58).

Although Cooke was difficult and paranoid, and he did not understand the DNA evidence and disagreed with some of the other evidence, those facts did not

[39] *Cooke v. State*, 977 A.2d 803, 843 n.46 (Del. 2009).

[40] *See United States v. Collins*, 949 F.2d 921, 926 (7th Cir. 1991) (judge entitled to rely on counsel's and defendant's own representations that he was competent).

sufficiently indicate he was incompetent to stand trial. A defendant is not incompetent merely because he disagrees with his counsel.[41] "Nor is he incompetent because he believed players in the criminal justice system were conspiring against him."[42] Similarly, the fact that Cooke suffered from a mental illness did not render him incompetent.[43]

"Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel."[44] Here, Cooke had appeared before the trial court a number of times and had engaged with the court in a manner that evidenced he was capable of understanding the proceedings, communicating with counsel, and assisting in his defense. (O73-77). The nature and quality of the facts available to second counsel and the trial court at the time indicated to them that Cooke was competent to stand trial.[45] Thus, the trial court did not err, and trial counsel were not ineffective for failing to further pursue Cooke's competency.

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[41] *Patterson*, 828 F.App'x at 316 (citing *United States v. Miller*, 531 F.3d 340, 349 (6th Cir. 2008)).

[42] *Id.*

[43] *See* note 36, *supra*.

[44] *Godinez v. Moran*, 509 U.S. 389, 402 (1993).

[45] *See Jermyn*, 266 F.3d at 292 (court must consider nature and quality of facts known to court, and their probative value in aggregate, to determine whether sufficient indicia of incompetence exists to warrant ordering competency evaluation or hearing); *see id.* at 300 (counsels' conduct can only be assessed "by examining

In finding trial counsel not ineffective, the Superior Court noted that Cooke "adamantly refused to participate in mental health" and that trial counsel could not be faulted for failing to force the issue because it would have destroyed the attorney-client relationship. (O53). But Cooke's assertion that the court relied upon that finding to reach its conclusion misconstrues the court's decision. Ultimately, the court found counsel not ineffective because "[t]he history of the two trials evidenced that [] Cooke understood the nature and object of the proceedings against him." (O52). The Superior Court did not err in so deciding.

The Superior Court also did not err in finding Cooke had not established prejudice from trial counsel's failure to have him evaluated. The court found there could be no prejudice because Cooke was competent "from day one." (O53-68). Cooke argues the court failed to apply the proper standard because it implicitly held him to a higher burden—preponderance of the evidence to prove incompetence—instead of that necessary to prove prejudice—reasonable probability of a different result. (*See* OB 28-29). Cooke is mistaken. The court analyzed the issue correctly.

To prove prejudice a defendant must show a reasonable probability that he would have been found incompetent to stand trial had the issue been fully raised and considered. But whether he would have been found incompetent is properly

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what counsel did, and what facts counsel knew that would bear on the issue of [defendant's] competency").

addressed under a preponderance of the evidence standard. The Superior Court correctly considered whether Cooke would have been found incompetent and determined he would not have. The court's factual conclusions are entitled to deference because they are based on competent evidence and are not clearly erroneous.[46]

The court reviewed the "hundreds upon hundreds of pages of the transcripts of both trials including the jury selection in the second trial when [Cooke] was *pro se*" (O52), the many opinions of the mental health witnesses, and the testimony of Cooke's attorneys. (O44-66). It also weighed Dr. Mechanick's and Dr. Agharkar's conflicting opinions and found Dr. Mechanick's conclusions more credible. (O57-67). The court did not clearly err in so deciding.[47] Faced with as many differing opinions on Cooke's diagnoses as there were mental health experts, and given Cooke's apparent ability to navigate the legal system—filing his own federal lawsuit, successfully opposing his counsels' assertion of a guilty, but mentally ill

[46] *Cf. Perkins*, 73 F.4th at 876-77 (district court's competency determination is reviewed for clear error, which is highly deferential, because whether petitioner is competent is factual determination).

[47] *Cf. id.* ("Faced with conflicting expert testimony, a district court does not clearly err by crediting one opinion over another where other record evidence also supports the conclusion.").

defense, and coherently making his case to the court on a number of issues[48] (O73-77)—the court aptly found that Cooke was competent to stand trial at all stages of the proceedings. As such, Cooke did not show he was prejudiced from counsel's failure to have him evaluated or to request a hearing to address his competency to stand trial.

[48] *See Jermyn*, 266 F.3d at 294-95 (defendant's demeanor before court is one factor to consider in assessing defendant's competence, and Jermyn's demeanor supported conclusion that he was competent).

2. Competency for Self-Representation

Cooke asserted below that the trial court had "an obligation to fully explore [his] competence to waive his rights to counsel" and that its failure to do so violated Cooke's due process right to a fair trial. (A713). He also claimed trial counsel were ineffective for failing to ensure that Cooke was capable of knowingly and intelligently waiving his right to counsel and appellate counsel were ineffective for failing to raise the issue on appeal. (A713, A717). The Superior Court denied Cooke's claims, finding the trial judge's rulings that Cooke was competent and had knowingly, intelligently, and voluntarily waived his right to counsel were supported by the record. (O70-77). Cooke maintains on appeal that the Superior Court's failure to *sua sponte* order a competency evaluation violated due process. (OB 42). As with his prior claim, he also contends the court failed to properly weigh the evidence in finding him competent. (*See* OB 28-38). Cooke's claims are unavailing.

In *Indiana v. Edwards*, the United States Supreme Court held that a state court can exercise its discretion to insist that a defendant who is otherwise competent to stand trial, but who suffers from severe mental illness, must be represented by counsel.[49] The Court instructed that "the trial judge . . . will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individual

[49] 554 U.S. at 177-78.

circumstances of a particular defendant."[50] *Edwards* did not hold, however, that a trial court *must* determine whether a defendant is competent to represent himself before allowing him to do so.[51] Nor does it require states to hold defendants to a higher standard of competency; it merely allows them to do so without running afoul of the federal constitution.[52]

The trial judge did not err in failing to further evaluate Cooke's competency before allowing him to represent himself. For the same reasons noted above, the record did not give the judge sufficient reason to believe Cooke was incompetent. Cooke's second counsel initially told the court that a competency hearing might be advisable; however, when pressed, counsel clarified that they only believed Cooke incompetent because he thought he could prepare for trial in a few months. Based on Cooke's interaction with the court, the trial judge did not believe Cooke was incompetent to represent himself. And trial counsel said that they believed Cooke was competent to stand trial.

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[50] *Id*.

[51] *See, e.g.*, *United States v. Garrett*, 42 F.4th 114, 119-20 (2d Cir. 2022), *cert. denied sub nom. Rivera v. United States*, 143 S. Ct. 823 (2023) (*Edwards* does not impose affirmative duty on district court to order evaluation to ensure that defendant is competent to represent himself); *United States v. West*, 567 F.App'x. 240, 241 (5th Cir. 2014) (*Edwards* does not suggest that trial court which allows defendant to represent himself is required to first ascertain that he is capable of doing so; collecting cases).

[52] *See, e.g., Wright v. Bowersox*, 720 F.3d 979, 986 (8th Cir. 2013).

A judge's competency determination is entitled to great deference.[53] Here, the judge conducted a thorough colloquy with Cooke during which he addressed the required *Briscoe*/*Welty* factors, competency, and additional concerns.[54] (*See* A378-79; B352-59). Due process did not require the court to further assess Cooke's competency to waive his right to counsel.

Similarly, second counsel were not ineffective for failing to evaluate Cooke to separately determine whether he was competent to waive his right to counsel. Nor were they ineffective for failing to raise the issue on appeal.[55] Counsel did bring the issue of Cooke's competency to represent himself to the trial court's attention; however, the court believed Cooke was competent. Counsel also believed Cooke was competent to stand trial. They did not have an obligation to raise Cooke's competency to defend himself beyond the measures they did take. In addition, an appellate claim based on *Edwards* was not likely to succeed. It certainly was not

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[53] *United States v. Banks*, 572 F.App'x 162, 164 (3d Cir. 2014) (citing *Edwards*, 554 U.S. at 177).

[54] *See Morrison v. State*, 135 A.3d 69, 73-75 (Del. 2016) (discussing the "*Briscoe*/*Welty*" factors court must address to determine whether defendant's waiver of right to counsel is knowing, intelligent, and voluntary).

[55] To satisfy *Strickland*'s performance prong for an appellate counsel claim, Cooke must prove not only that they failed to brief an arguable and nonfrivolous claim, but also that the omitted claim was "clearly stronger" than the claims actually presented. *See Ryle v. State*, 2020 WL 2188923, at *2 (Del. 2020).

stronger than the claims Cooke did raise on appeal.[56] Moreover, it would have directly contradicted Cooke's appellate claim that the trial court deprived him of his right to self-representation when it revoked the right and installed stand-by counsel.

[56] *See Cooke*, 97 A.3d at 524-58.

II. THE SUPERIOR COURT DID NOT ERR IN DENYING COOKE'S CLAIMS THAT SECOND COUNSEL FAILED TO CONDUCT A REASONABLE INVESTIGATION.

Question Presented

Whether the Superior Court abused its discretion in denying Cooke's claims that second counsel were ineffective by failing to conduct a reasonable investigation.

Standard and Scope of Review

See postconviction standard in Argument I.

Merits

Cooke argued below that second counsel "failed to investigate and present evidence that would have undermined the State's case or provided a coherent defense." (A718). Specifically, Cooke asserted, *inter alia*, that counsel failed to: (1) challenge the State's evidence, including failing to adequately: (a) investigate and present evidence that Rochelle Campbell's testimony was the product of police coercion (A720-23); (b) challenge the State's DNA evidence because they did not seek expert assistance in evaluating that "highly technical" evidence (A723-27); and (c) present evidence that Amalia Cuadra identified someone other than Cooke as her assailant (A741-43); (2) investigate and present evidence of alternative suspects (A744-53); and (3) investigate and present evidence of the "incompetent" and "biased" police investigation (A753-72). The Superior Court denied Cooke's claims because, whether considered individually or cumulatively, Cooke failed to establish

that his trial counsel were deficient under *Strickland* or that he suffered any prejudice from counsels' alleged failures. (O26, O125-28, O142-44, O147-48, O152-61, O168-70, O181-85, O192-93, O202-12, O214, O234).

On appeal, Cooke contends that the Superior Court "improper[ly]" divided Cooke's ineffectiveness claim into separate claims, thereby "taint[ing]" the court's analysis under both prongs of *Strickland*," and "contaminat[ing] the entire case," warranting reversal. (OB 43-44, 52). Cooke also argues that second counsel were ineffective for "deciding their defense theory without investigating material issues," regarding: (a) DNA; (b) Campbell; (c) Cuadra; (d) alternative perpetrators; and (e) "evidence of a flawed or biased police investigation."[57] (OB 43-56). Cooke's first claim is unavailing. Cooke failed to make the instant iteration of his second argument below, and thus, this argument is waived on appeal, unless he can show plain error.[58] He cannot. In any event, his argument fails because the court properly found that second counsel acted within reasonable objective standards and that Cooke was not prejudiced by the alleged deficiencies.

[57] To the extent Cooke does not raise claims he made in his motion for postconviction relief, he has waived those claims. *See Whittle v. State*, 2016 WL 2585904, at *2-3 (Del. Apr. 28, 2016); Supr. Ct. R. 14(b)(vi)(A)(3).

[58] *Hardin v. State*, 844 A.2d 982, 990 (Del. 2004); Supr. Ct. R. 8.

A. The Superior Court did not improperly divide Cooke's ineffectiveness claim.

Cooke claims that the Superior Court improperly "rewr[ote]" his allegations that second counsel's "decision to pursue their chosen defense undermined the reliability of his trial because that decision was made without a reasonable investigation," "to allow for piecemeal denial." (*Id.*). In *Zebroski v. State*, this Court rejected an identical argument, finding cumulative review of ineffectiveness claims would not have changed the result where the trial judge had found no errors in each of the claims individually.[59] Here, as in *Zebroski*, the Superior Court did not abuse its discretion because it did not find any errors in second counsel's representation of Cooke.

Furthermore, Cooke's argument is factually wrong. Although the court separately addressed each allegation of second counsel's ineffectiveness, the court also addressed and rejected Cooke's claim concerning the cumulative effect of counsel's alleged failure to conduct any reasonable investigation, concluding "[t]he sum total is zero so there can be no cumulative effect." (O234).

[59] 822 A.2d 1038, 1049 (Del. 2003).

B. Second Counsel were not ineffective.

1. DNA

On appeal, Cooke contends for the first time that second counsel was ineffective for deciding to provide an "innocent explanation" for the State's DNA evidence matching Cooke's DNA to scrapings from the victim's fingernails and from a semen sample from the victim's vagina, without reasonably investigating the admissibility or credibility of the evidence. (OB 44-45). Cooke asserts that counsel possessed "clear evidence of lab-error" and "prior counsel's hiring of a DNA expert," but "nevertheless decided not to investigate the reliability of the State's DNA evidence because it did not fit their defense." (*Id.*). According to Cooke, this decision is not entitled to deference because it is the "precise opposite of a reasonable process." (*Id.*). He cannot show plain error, and his argument otherwise fails.

First, the record does not support Cooke's claim. Prior to trial, second counsel met with Cooke to discuss his case, potential defenses, and trial strategy. (B662, B971-81). During those discussions, Cooke stated that he had an ongoing consensual sexual relationship with Bonistall and was not the individual who killed her. (B662, 664, B999-1000, B1034, B1086-87). He was also adamant about testifying to assert his innocence. (B662, B1001, B1045-46, B1120, B1127). Counsel devised a plan to pursue an identity/reasonable doubt defense by presenting evidence that Cooke was in an ongoing sexual relationship with Bonistall and

someone else killed her in retaliation, which comported with Cooke's strategy. (B663, B993, B997, B1000, B1039, B1086-87, B1100, B1125). Counsel retained a private investigator to find evidence supporting Cooke's version of events. (B663, B970, B976, B1004-13, B1024, B1028-36, B1039-43, B1071-74, B1077, B1084-88, B1090-94, B1101-02, B1125-26, B1132, B1139-40). Counsel also sought to admit evidence about the victim's sexual endeavors, propensity, and behavior, but the motion was denied. (B415a-f, B663, B1071-72, B1125-26). Although the investigator could find no evidence to support Cooke's claim, second counsel still presented Cooke's chosen defense, questioning the State's witnesses to cast doubt on their testimony and identifications of Cooke and highlighting inconsistencies to attack their credibility, calling witnesses to support the defense that someone else killed Bonistall, and arguing in opening and closing, in the face of overwhelming evidence against him, that Cooke was not the killer. (A494-98; B422-31, B433-35, B438-41, B444-54, B456, B478-506, B514-17, B526-28, B531-39, B556-61, B563-77, B581-88, B590-96, B598-605, B608, B611-13, B615-25, B627-43, B649, B651-52, B654-55, B663-66, B923-24, B928-63, B1086-88, B1103-07, B1125-26).

It is apparent from the record that trial counsel devised their own strategy, following a reasonable investigation, which was consistent with Cooke's chosen defense. His complaints and second-guessing of trial strategy are conclusory and thus meritless.

Cooke's allegations are also insufficient to establish prejudice, particularly in light of the overwhelming evidence against him, including the DNA evidence showing only a single source profile of a male—Cooke—and a single source profile of a woman—the victim, Bonistall (B609-10), Cuadra's description and identification of her intruder as the person in the ATM photographs, the writings on the wall, the 911 calls that indicated knowledge of the crime and tied the murder to the Harmon and Cuadra burglary cases (B4-10, B18-27), Campbell's identification of Cooke as the speaker on the 911 calls and as the person in the ATM photographs, and Romeo's steadfast identification of Cooke as the man riding the bike away from Towne Court Apartments minutes after the fire. (*See* O231-33). In convicting Cooke, the jury, as the trier of fact, assessed the credibility of all the witnesses and the overwhelming evidence, and rejected Cooke's defense.

Furthermore, Cooke's attacks on the DNA evidence are specious, and his claim that second counsel neglected DNA issues is not supported by the record. First counsel consulted with Gerard Spadaccini, an attorney in the OPD with a graduate degree in forensic science, who reviewed the DNA report and believed that the science appeared valid. (A1019; B370, B803, B901-02). Interim counsel retained Michael Adamowicz, Ph.D., to assist with forensic DNA analysis. (B372, B786-87, B816, B927). They also moved for funds to hire NMS Labs ("NMS") to perform statistical analysis of the DNA evidence and had begun consulting with NMS

although the motion was still pending. (B372-73, B786-87). Second counsel, who had received first and interim counsel's files, also sought to retain a defense expert to review the State's DNA evidence and consulted with NMS and Dr. Manion, a forensic pathologist, regarding the DNA evidence. (A2822-23; B374, B1040-41, B1129). However, they chose not to hire an expert to contest the DNA results because Cooke was insistent about testifying that he had an ongoing sexual relationship with the victim, which would provide an innocent explanation for his DNA. (B662, B664, B999, B1001). Their DNA experts also "fell by the wayside because they were not helpful." (B374-75, B1140).

The decision whether or not to pursue DNA evidence is a strategic one that will be upheld if it is reasonable.[60] Here, trial counsel's handling of the DNA evidence was professionally reasonable. (O181-85). "Counsel [is] entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."[61] A reviewing court must "'reconstruct the circumstances of counsel's challenged conduct' and 'evaluate the conduct from counsel's perspective at the time.'"[62] Given Cooke's insistence on

[60] *See State v. Madison*, 2018 WL 1935966, at *7-8 (Del. Super. Ct. Apr. 11, 2018), *aff'd,* 2018 WL 6528488 (Del. Dec. 11, 2018); *Jackson v. State*, 770 A.2d 506, 511-13 (Del. 2001); *Staats v. State*, 961 A.2d 514, 520-21 (Del. 2008).

[61] *Harrington v. Richter*, 562 U.S. 86, 107 (2011).

[62] *Id.* (quoting *Strickland*, 466 U.S. at 689).

testifying about having consensual sex with Bonistall, counsel's decision not to challenge the DNA evidence was not unreasonable.

Nor can Cooke establish prejudice. Cooke asserts that had counsel investigated the DNA evidence, "counsel would have learned that evidence was incredible potentially to the point of inadmissibility" or at least capable of being "heavily impeach[ed]." (OB 52-54). He contends that the court's conclusion that the DNA evidence was unsullied by the Rule 61 evidence is factually incorrect because his own expert, Dr. Krane, identified four problems that were not changed by the belated production of electronic data during the postconviction hearings. (OB 53). He is wrong.

Cooke failed to establish through Dr. Krane that the DNA evidence was inadmissible and "any attempt to keep that out would probably have failed." (B1311; *see* O185). Nor does Dr. Krane's testimony establish that counsel could have "heavily impeach[ed]" such evidence. Although a test run was faulty because the samples were switched, the DNA case notes make clear that, upon discovery, the error was remedied by discarding those results and re-running the test. (B161). Furthermore, although Dr. Krane initially testified at the evidentiary hearing that the medical examiner's report identified some errors, after examining the laboratory protocols, he was satisfied that the errors had been addressed and did not negatively impact the conclusions in the State's DNA report and testimony. (B161, B1052,

B1055-61). Dr. Krane also admitted that his remaining concerns were merely speculative. (A2771). Furthermore, Dr. Krane conceded the fingernail DNA was a mixture of only two people: Cooke and Bonistall. (B1061-63).

Finally, the record does not support Cooke's claim that he was forced to testify because his counsel did not investigate whether there was a basis to challenge or reframe the DNA evidence. (OB 54). Cooke testified against counsel's advice (B1126-27, B1044-45), and Cooke has not established a reasonable probability that he would not have testified. Rather, the record, including trial counsel's testimony, establishes that Cooke had indicated that he was going to testify "no matter what." (*See* O182; B996, B1001, B1044, B1046, B1089, B1120, B1126-27, B1136). In any event, Cooke cannot establish prejudice because even excluding the DNA evidence, there was independent, significant evidence against Cooke.

Cooke further contends that counsel "did not reasonably prepare for Cooke's expected 'innocent explanation' testimony … that he was with Bonistall on Friday night," because counsel failed to explain the impossibility of his planned testimony. (OB 45). According to him, "[s]o advised, Cooke could have realized his mistake and, with his recollection refreshed, remembered he saw Bonistall on *Saturday* night." (*Id.*) (emphasis in original). Cooke's claim is unavailing.

As postconviction counsel conceded below, the record refutes Cooke's claim that counsel did not advise Cooke of the "impossibility" of his story. (*See* B1137-

40, B1169-71). Second counsel testified that, before trial, they showed Cooke evidence that Bonistall was working when Cooke claimed to be with her. (A2814; B1118-19, B1130). Cooke "disregarded" it, insisting he would testify that the State was "lying" and someone else punched her timecard. (A2814; B1118–19, B1130). Despite Cooke's repeated testimony that he was with Bonistall Friday night between 10:45/10:48 to 11:45 (B641-49), second counsel nevertheless attempted to persuade the jury that Cooke was mistaken about the time. (B655).

Nor can Cooke establish prejudice. He has not provided any evidence to support the suggestion that he mixed up Friday with Saturday. (*See* O125-28, O195-96, O239-40; B1454). And, the established timeline does not support that Cooke had a Saturday rendezvous with Bonistall either. (*See* O127-28, O196, O239-40; B1-2, B175, B436-37).

Cooke also contends that counsel were ineffective for "failing to employ mental health evidence to explain Cooke's confusion about dates, or to investigate ways to bolster his testimony." (OB 46). Not so. As discussed above, Cooke refused to cooperate with any competency evaluation. (B662, B978-79, B985, B1038). Without Cooke's cooperation, any attempt to substantiate this speculative claim, let alone raise it successfully, would have been futile. Nor has Cooke established any actual prejudice. He has not presented any evidence that an expert would have testified to support this speculative claim. Nor can he establish that the

result would have been different. (*See* O125-28, O196, O239-40). As the court found, Cooke's testimony that he had a one-hour rendezvous with Bonistall to smoke "wet" marijuana and have sex was not believable, whether it occurred Friday or Saturday night, and would not change the result. (*Id.*).

Finally, Cooke argues that the court erred by finding that counsel's inaction was reasonable because they followed Cooke's instructions on what defense to pursue. As discussed above, counsel devised their own defense strategy to attack reasonable doubt. Trial counsel's performance was not deficient because their defense comported with Cooke's strategy. Second counsel's strategy was not objectively unreasonable; Cooke is not entitled to relief.[63]

2. Campbell

On appeal, Cooke contends that counsel were ineffective for not interviewing Campbell, seeking further discovery about "the police's coercive efforts," and confirming whether Campbell wrote a letter to Cooke "in which she complained how police were pressuring her to inculpate Cooke." (OB 47-48, 55). Cooke also asserts that counsel were ineffective because he failed to present "*all* evidence, [including "the letter and the many police contacts"] to impeach Campbell's inculpatory testimony and to present her exculpatory statement" that "provided an innocent explanation for how Cooke came to possess Cuadra's ATM card, and provided alibis

[63] *See Strickland*, 466 U.S. at 690-91.

for both the Cuadra burglary and the Bonistall murder." (*Id.*). Cooke's claims are unavailing.

Campbell testified that Cooke told her he found a backpack, later identified as being stolen from Cuadra's apartment on May 29, 2005, at the scene of a traffic accident outside their house in Newark. (B543, B548). Campbell also 100% positively identified Cooke's voice from the three 911 calls. (B552-55). In addition, she was positive it was Cooke pictured in the ATM video and photos. (B68-69, B550-55).

On cross-examination, Cooke's counsel elicited testimony from Campbell that during her initial police interview, the police told her that they did not believe her, she could get in trouble, and she could lose her children. (B564). Campbell testified she tried to tell the police the truth when they first questioned her, but she was eight months pregnant, things were developing quickly, and she was in denial that Cooke was capable of committing these crimes. (B566-67, B569). She did not remember Cooke going out the night of the homicide, but she could not account for his whereabouts while she had been asleep. (B574). Campbell also acknowledged that she initially told police that Cooke did not have any scratches, but later she remembered that he did. (B575-78).

Contrary to Cooke's argument, second counsel testified that their investigator *did* interview Campbell before trial (B998, B1077, B1132-33). And, they had first

counsels' file, whose investigator had talked to Campbell shortly after she made her statement to police and concluded that Campbell was not going to be helpful. (B165-66, B168, B1320). Counsel were not ineffective for failing to seek further discovery. As this Court and the Superior Court previously found, there is no evidence of police coercion.[64] Nor is there any evidence that the State concealed any *Brady* material regarding Campbell. (*See* DO 188). Indeed, Campbell initiated contact with police numerous times.

Counsel were also not ineffective for failing to present Campbell's "exculpatory statement." The record does not support Cooke's claim. Campbell never provided Cooke with a sound alibi, her testimony from the first to second trial regarding his lack of an alibi is consistent, and Campbell always implicated Cooke in the Cuadra burglary. (B183-98, B200-02, B541-561, B563-82, B912-22).

Counsel were not ineffective for failing to introduce the letter Campbell wrote to Cooke shortly after the police interview. They sought to discredit Campbell's testimony through cross-examination by showing that she was mistaken about identifying Cooke and chose not to use the letter because they thought they could "probably get it out other ways without showing the letter." (B1103-08). As the Superior Court found, trial counsel brought out through cross-examination that what

[64] *State v. Cooke*, 2006 WL 2620533, at *25-27 (Del. Super. Ct. Sept. 8, 2006), *aff'd*, 977 A.2d at 853-57.

Campbell told police changed and became more certain following the police threats about her children and the potential of being arrested. (B563-82). Counsel's decision as to how to cross-examine Campbell falls within the strong presumption of sound trial strategy.[65] Because Cooke has failed to show trial counsel's strategy was objectively unreasonable, he is not entitled to relief.

Cooke's claim also fails because he cannot show prejudice. The letter would have been cumulative because counsel thoroughly cross-examined Campbell about discrepancies between her police statement and trial testimony, and explored areas of bias or undue influence to support their claim that the police pressured Campbell to get her to corroborate that it was Cooke in the ATM photo and his voice on the 911 calls. (A494-98; B556-61, B563-77, B580-82). In light of their efforts, it cannot be said that failure to pursue even more avenues was "deficient performance."[66]

3. Cuadra

At the 2012 trial, Cuadra testified she was 90% sure the person in the ATM photographs was her intruder. (B459-60, B504). Cuadra also stated that the police showed her a photo lineup five weeks after the burglary. (B460-62). She focused on a photo who she thought was the intruder, second guessed herself, picked another

[65] *See Ragland v. State*, 2009 WL 2509132, at *2 (Del. Aug. 18, 2009); *State v. Ellerbe*, 2016 WL 4119863, at *3-4 (Del. Super. Ct. Aug. 2, 2016), *aff'd*, 2017 WL 1901809, at *3-4 (Del. May 8, 2017).

[66] *Cf. United States v. Frazier*, 2004 WL 825301, at *3 (D. Del. Apr. 7, 2004).

photo, was told by the officer it was incorrect, and then picked Cooke, who had been her first choice. (B462-65). At sidebar, the Court admonished the State for the officer's behavior, and the defense acknowledged they knew about the issue and would cross-examine Cuadra about it. (B465-71). The court later sustained an objection from second counsel when the State tried to have Cuadra identify Cooke in front of the jury. (B470-75).

Defense counsel then cross-examined Cuadra about the mistaken identification. (B493-97). Sgt. Rubin recalled Cuadra's identification differently, testifying that Cuadra initially selected no one from the lineup. (B171, B508-11).

On appeal, Cooke argues that counsel failed to adequately investigate "Cuadra's non-identification of Cooke and the content of the meetings with police to 'clarify' her identification." (OB 48, 55). He is wrong; Cooke cannot demonstrate deficient performance or prejudice.

Second counsel were aware that Cuadra initially selected someone other than Cooke and developed a strategy for how to utilize the information on cross-examination. (B665, B1002-03, B1109-12). Trial counsel deftly handled cross-examination of Cuadra and Detective Rubin so that all the information was before the jury, including the fact that Cuadra first identified someone other than Cooke on her own and picked Cooke's photo when told "wrong guy," and they even successfully avoided Cuadra identifying Cooke in court. (B465-97, B503-13).

Counsel also used this "helpful" testimony to argue reasonable doubt in closing. (A494-98; B665, B1002-03). Furthermore, Cooke cannot show prejudice because Cuadra identified her intruder from the ATM photo (B502-05) and Campbell and Cooke's co-workers identified him from the ATM photo (B518-25, B530-31, B534, B550-51). Cooke's claim of ineffective assistance fails.

4. Alternative perpetrators

On appeal, Cooke challenges counsels' decision to present evidence that one of Bonistall's acquaintances at a University of Pennsylvania fraternity was the alternative perpetrator who killed her, claiming their failure to investigate alternative suspects was unreasonable. (OB 49-50, 55). His claim is unavailing.

In preparing the defense, trial counsel focused on identifying someone from the fraternity over any of the other possible alternatives "[p]rimarily because of the yellow rose that was found in the room [t]hat was not there when her [roommate] left" the night before the murder. (B1071-72, B1097-98, B1113-14, B1125). Counsels' attempt to highlight Bonistall's former romantic partners is not unreasonable simply because the court rejected their attempt to introduce such evidence. Nor is counsel obligated to chase every lead or to violate ethical rules to present a client's desired defense strategy.[67] Cooke points to no evidence that links

[67] *In re Abbott*, 925 A.2d 482, 487-88 (Del. 2007) (counsel "obligated to represent [] clients zealously *within* the bounds of both the positive law and the rules of ethics") (emphasis in original) (citations omitted).

Sentel, Warren, Jervey, Breckin, or Figgs to the murder, and he is wrong that counsel did not investigate them. Indeed, the record reflects that trial counsel investigated Sentel, Warren, Jervey, and Breckin, as alternate suspects, but were not able to find any admissible evidence connecting them to the crimes or establishing that they were viable suspects. (B164, B365, B384-390, B610, B664, B666, B1004-27, B1039-40, B1071, B1077, B1080-81, B1088, B1090, B1097-99, B1113-14, B1134-35). Counsel could not "recall what investigative steps were taken concerning [Figgs]" (B666), however, as the court recognized, Figgs's ankle bracelet report eliminated him as a viable suspect. (B1070, B1115-17).

Cooke cannot show that counsels' decision amounted to ineffective assistance. As is evident from the record and trial counsel's affidavit, the defense in Cooke's case was multi-faceted. Trial counsel challenged the police investigation by highlighting a lack of physical evidence and the detective's improper focus on Cooke as the perpetrator, showed the jury that police had considered other people as suspects to cast reasonable doubt on the prosecution's case, and presented an overarching reasonable doubt defense that provided the jury with several alternatives to conclude that the State had not met its burden. (A494-98; B607-08, B610, B666, B1098-99). Counsel's strategic decision was entirely reasonable.

Moreover, Cooke cannot demonstrate prejudice. He has offered nothing more than speculation and cannot show a reasonable probability that the trial's result

would have been different had counsel investigated other individuals further or presented them as alternative suspects.[68] There is no evidence in this case implicating these individuals (*see* B965), and no reasonable basis for counsel to have done more to pursue them as alternative suspects. Further, as discussed, there was overwhelming evidence against Cooke. Thus, Cooke has failed to show *Strickland* prejudice.

5. Evidence of flawed or biased police investigation

On appeal, Cooke argues counsels' decision to argue in closing that the police investigation was flawed was made without reasonable investigation or implementation to determine if the investigation was flawed. (OB 51, 55). According to Cooke, "a reasonable investigation would have enabled counsel to present evidence *suggesting* any one of Warren, Jervey, or any other of the half-dozen or more possible perpetrators were responsible (rather than the non-existent fraternity perpetrator), [o]r, counsel could have used the evidence they already had to cross-examine police witnesses about the focus on Cooke instead of completing the investigations into the many other, better, suspects." (*Id.*). His claim is unavailing.

[68] *See Outten v. State*, 720 A.2d 547, 557 (Del. 1998) (citing *United States v. Rodriguez*, 53 F.3d 1439, 1449 (7th Cir. 1995)); *Flamer*, 585 A.2d at 755.

First, Cooke's speculative allegations of deficient performance and prejudice are conclusory and hypothetical, and are thus insufficient to satisfy his burden under *Strickland*.[69] Cooke points to no evidence that links someone else to the murder and does not allege how additional investigation or cross-examination would have changed the trial's outcome. Second, the record refutes Cooke's speculative claim. As the court found, although the ATM photo and DNA pointed overwhelmingly to Cooke, the investigation was widespread, and "[t]he evidence involving the dragnet and the many suspects, leads, and tips that were investigated puts an end to this allegation." (O169; *see, e.g.*, B3, B11-17, B28-29, B30-41, B162-64, B169, B170, B172-74, B280, B610). In the end, Cooke cannot prove prejudice because the avalanche of evidence was against Cooke. Moreover, Cooke's claim in a footnote that "the deliberate concealing of data in the DNA evidence would have furthered counsel's defense that the police investigation was flawed, or even biased against Cooke" (OB 55 n.11), is meritless. Cooke conceded below that he had not established that anyone tampered with the evidence. (B1049-50, B1055-57, B1293-1306, B1454-55).

[69] *See State v. Chattin*, 2012 WL 1413452, at *8 (Del. Super. Ct. Jan. 6, 2012), *aff'd*, 2012 WL 5844886 (Del. Nov. 16, 2012).

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING COOKE'S *BATSON* CLAIMS.

QUESTION PRESENTED

Whether the Superior Court correctly denied Cooke's *Batson*[70] claims.

STANDARD OF REVIEW

See postconviction standard in Argument I.

MERITS

As he did below (A818-29), Cooke argues that the State's use of its first six peremptory challenges to strike the following women and/or African Americans constituted a *Batson* violation: (1) Loveleaann Moorer, an African American female; (2) Mary Riley, a Caucasian female; (3) Adrienne Powell, an African American female; (4) Brian Johnson, an African American male; (5) Tysha Sheppard, an African American female; and (6) Barbara Carey, a Caucasian female. (OB 57-60). Cooke also claims that his trial and appellate counsel were ineffective for not objecting at trial or raising the claims on direct appeal. (*Id.*). His claims are unavailing.

A. The freestanding *Batson* claim is procedurally barred.

Because Cooke's objection to the State's fifth peremptory strike of Sheppard was rejected at trial (A424-25), his claim is procedurally barred under Rule 61(i)(4)

[70] *Batson v. Kentucky*, 476 U.S. 79 (1986).

as formerly adjudicated. (*See* O97). To the extent Cooke argues review is warranted under a "cause" and "prejudice" exception, Rule 61(i)(4)'s procedural bar does not include this exception.[71]

Cooke did not challenge the State's first, second, third, fourth, or sixth peremptory strikes or assert a *Batson* claim on direct appeal.[72] Thus, to the extent his claims are based on those strikes, those claims are procedurally defaulted under Rule 61(i)(3). (*See* O97-98). While Cooke concedes that he cannot challenge his own performance during jury selection as being ineffective,[73] he contends that the procedural default is excused because standby counsel (second counsel) could have addressed any jury-selection issues after they took over on the third day of trial. (OB 58). Cooke also cursorily contends that appellate counsel were ineffective because this Court would have found the State acted with discriminatory intent had counsel raised the issue on appeal. (OB 60).

[71] *See* Super. Ct. Crim. R. 61(i)(4).

[72] *See Cooke*, 97 A.3d 513.

[73] *See State v. Newton*, 2010 WL 8250757, at *1 (Del. Super. Ct. July 15, 2010); *State v. Bass*, 2004 WL 396372, at *2-3 (Del. Super. Ct. Feb. 27, 2004), *aff'd*, 2004 WL 1535769 (Del. July 1, 2004).

There is no basis, however, for an ineffective assistance claim.[74] (*See* O107-08). A defendant has no constitutional right to standby counsel.[75] Because there is no right that can be denied, no *Strickland* claim can stand on allegations of standby counsel's deficient performance.[76] Even assuming, however, that Cooke can properly assert an ineffective assistance claim in such circumstances, he has not established that second/appellate counsel were ineffective for not asserting the *Batson* claim. Therefore, Cooke's allegations of ineffective assistance cannot constitute cause for his procedural default, and Rule 61(i)(3) bars the remaining freestanding *Batson* claim.

Rule 61(i)(5)'s exceptions also cannot assist Cooke, because he does not allege a lack of jurisdiction, new constitutional law applicable to his claims, or anything approaching a claim of newly discovered evidence of actual innocence.[77]

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[74] *See Bass v. State*, 2000 WL 1508724, at *1-2 (Del. Sept. 13, 2000); *Dickens v. State*, 2009 WL 4043549, at *1 (Del. Nov. 23, 2009);.

[75] *Bass*, 2000 WL 1508724, at *1-2 (Del. 2000); *State v. Evans*, 2009 WL 2219275, at *3 (Del. Super. Ct. July 6, 2009), *aff'd*, 2009 WL 3656085 (Del. Nov. 4, 2009).

[76] *United States v. Morrison*, 153 F.3d 34, 55 (2d Cir. 1998); *Evans*, 2009 WL 2219275, at *3, *aff'd*, 2009 WL 3656085, at *1; *State v. Holmes*, 2015 WL 6735911, at *3 (Del. Super. Ct. Nov. 3, 2015).

[77] R. 61(i)(5), (d)(2).

B. The ineffective-assistance claims are meritless.

1. Cooke has not established deficient performance.

Cooke has not shown deficient performance under *Strickland*. Cooke claims that second counsel testified that they did not raise *Batson* because they did not believe they could. (OB 58). The record reveals, however, that when asked by postconviction counsel why they did not object or raise the *Batson* issue on appeal, second/appellate counsel testified that "we didn't really feel it had a lot of merit." (A2764). Such decision was not objectively unreasonable. As discussed below, Cooke's *Batson* claims are meritless, and counsel cannot be found ineffective for failing to raise meritless claims.[78]

The Superior Court also properly found that Cooke's appellate counsel did not perform deficiently because a *Batson* claim would not have been "clearly stronger" than those actually raised. (O107-08). Appellate counsel are expected to maximize their chance of a successful appeal, not raise every possible nonfrivolous claim.[79] Cooke's counsel explained that they selected the issues on appeal that they "believed were meritorious," and a *Batson* argument was not one of them. (B667-68). Furthermore, as discussed below, the court properly found that any *Batson*

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[78] *See, e.g.*, *Folks v. State*, 2007 WL 1214658, at *2 (Del. Feb. 26, 2007); *Rogers v. State*, 2004 WL 2830898, at *1 (Del. Nov. 30, 2004).

[79] *Smith v. Robbins*, 528 U.S. 259, 288 (2000); *Ryle*, 2020 WL 2188923, at *2; *Neal*, 80 A.3d at 946.

challenge against the State would have failed. Therefore, the *Batson* arguments were not clearly stronger than the ten appellate claims that were presented and decided by this Court.[80]

2. Cooke Has Not Demonstrated Prejudice.

Cooke contends that the Superior Court erred in finding a lack of prejudice by analyzing whether he established purposeful discrimination under *Batson*'s higher "preponderance of the evidence" standard rather than under *Strickland*'s "lower [reasonable probability of a different result] standard." (OB 58-59). According to Cooke, "the question for the lower court was whether, had either counsel raised the *Batson*/*J.E.B.*[81] issues, there is a reasonable probability the court(s) would have found discriminatory intent by the State." (*Id.*). Cooke is mistaken. The court analyzed the issue correctly; Cooke is not relieved of *Strickland*'s prejudice requirement even if a *Batson* violation was assumed.[82]

Here, the Superior Court properly analyzed Cooke's claim under *Strickland* and determined that Cooke cannot establish prejudice. Cooke has not demonstrated a reasonable probability that the result would have been different had trial/appellate

[80] *Cooke*, 97 A.3d 513.

[81] *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

[82] *Cabrera v. State*, 173 A.3d 1012, 1021-22 (Del. 2017).

counsel raised the *Batson* issue. The *Batson* claim lacks merit, and Cooke's counsel cannot be faulted for failing to raise meritless claims.[83]

C. Cooke's *Batson* Claim Lacks Merit.

Cooke has also failed to establish a *Batson* violation. (*See* O97-108). The standard used by Delaware courts in evaluating a *Batson* challenge is well-established:

> First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges based on the basis of race…. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question…. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.[84]

Here, the court properly reviewed the totality of the circumstances in conducting the *Batson* analysis. (O97-108). The record establishes that the State provided race/gender neutral reasons for striking the four black prospective jurors, three of whom were female, which were justifiable, credible, supported by the record, and, at least in part, already accepted by the trial court. (*See* O97-108).

The prosecutor's reason for challenging Moorer was her difficulty with the death penalty questions (A389-93), including her comment during *voir dire* that she was "shaky" about the death penalty (A392-93), and the hesitation in her answers,

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[83] *See Folks*, 2007 WL 1214658 at *2; *Rogers*, 2004 WL 2830898, at *1.

[84] *Robertson v. State*, 630 A.2d 1084, 1089 (Del. 1993).

prompting follow-up questions (A392-93, A403). The prosecutor felt Moorer's answers on imposing the death penalty were so problematic that he challenged her for cause before using the peremptory strike. (A393, A403). The prosecutor explained that he struck Powell because she worked in a "helping profession," aiding people with financial difficulties; seemed meek; and had a long driving record that showed she could not follow rules. (A403; *see also* A401). The State struck Johnson primarily because he disobeyed the court's instruction to not discuss the case, but also because his many out-of-court conversations were potentially a problem. (*See* A405-14, A425). The prosecutor explained that Sheppard knew the judge, expressed religious opposition to the death penalty, and suggested she could not be swayed by other jurors, increasing the risk of a hung jury. (A424).

The State did not provide gender-neutral reasons for striking Riley and Carey because Cooke did not make any *Batson* challenge against those strikes.[85] Cooke's own omission cannot be a "fact or other relevant circumstance" evidencing purposeful discrimination. Furthermore, as the court found, there is nothing in the record to suggest any race- or gender-based discriminatory intent in the State's peremptory challenges. (O98-108).

[85] The reason for striking Carey was apparent on the record. Cooke and the trial judge both observed that she suffered from severe knee problems (A428), and the judge thought her answers were "kind of all over the place." (A431).

Cooke claims that the prosecutor's "discriminatory intent" became "clear" when, in providing his reason for exercising his fifth peremptory strike against Sheppard, he noted the racial makeup of the jurors seated so far. (OB 59-60). But, the trial court has already ruled otherwise. Specifically, the court found no overall pattern of discrimination in the State's use of its peremptory strikes after the State's fifth peremptory challenge (A424-25), indicating that it was also satisfied with the previous strikes. And, this Court considers the jury composition a factor when evaluating the question of purposeful discrimination.[86] Pointing out that minorities had not been systematically excluded from the jury was thus a valid way to defend the strike against Cooke's claim of purposeful discrimination. The prosecutor's comment demonstrates only that he was considering race and gender when responding to Cooke's race-based *Batson* challenge, not that race was the consideration behind the strike itself.

[86] *E.g.*, *Barrow v. State*, 749 A.2d 1230, 1239 (Del. 2000).

IV. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT TRIAL COUNSEL WERE NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE ADMISSION OF COOKE'S STATEMENT.

QUESTION PRESENTED

Whether the Superior Court abused its discretion in finding trial counsel not ineffective for failing to challenge the admission of Cooke's statement.

STANDARD OF REVIEW

See postconviction standard in Argument I.

MERITS

Cooke claimed below that his trial counsel were ineffective for failing to seek the exclusion of Cooke's statement. (A861). He argued his statement should have been suppressed because he lacked the capacity to understand and waive his *Miranda* rights and he invoked his right to counsel. (A708-11, A863-69). He also contended that, because trial counsel did not investigate his competency before the second trial, they failed to equip themselves to challenge his competence to waive those rights. (A713).

The Superior Court denied Cooke's claims, finding his arguments failed because (1) it had determined Cooke was not incompetent and (2) counsel could not have been ineffective because Cooke objected to mental health evidence and he did not want his statement suppressed at trial, abandoning counsel's motion to suppress

the statement when he began representing himself. (O119-20). The court noted that counsel could not be faulted for failing to renew their motion to suppress because once Cooke told the jury about his statement in his opening, "[i]t was too late to close the barn door." (O119). Cooke claims the court erred in so deciding. (OB 39-41, 61-64). His claim is unavailing.[87]

Cooke's trial counsel performed reasonably under the unique circumstances of the case and its complex history of representation. First, Cooke's counsel *did* file a pre-trial motion to suppress his statement before Cooke invoked his right to self-representation. (B285-346). The trial court did not hear the motion because Cooke disavowed it once he took control of his case. (B368). Counsel are not ineffective for failing to raise an issue they did pursue, but which Cooke himself disavowed.[88]

Second, Cooke's claim that he was not competent to have waived his *Miranda* rights is belied by the interrogation itself. A defendant may only waive his *Miranda* rights during a custodial interrogation if "the waiver is made voluntarily, knowingly and intelligently."[89] To be knowing and intelligent, "the waiver must have been

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[87] To the extent the Superior Court denied this claim for different reasons than those argued herein, this Court may affirm on a different rationale. *See Unitrin*, 651 A.2d at 1390.

[88] *See Ploof v. State*, 75 A.3d 840, 852 (Del. 2013) (reasonableness of counsel's decisions may be determined by defendant's own actions (citing *Strickland*, 466 U.S. at 691)).

[89] *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[90] This Court has held that "the appropriate inquiry is 'whether [defendant] had sufficient capacity to know what he was saying and to have voluntarily intended to say it.'"[91]

Cooke pointed to self-serving statements he made during the interrogation as evidence that he lacked capacity to understand his rights. (*See* A709-10). But it is clear from the totality of the circumstances, including Cooke's answers to the officers' questions that he understood those rights.[92] (*See* A2363-69, A2372-74). He indicated he was previously familiar with them, the detectives took time to explain each right, and Cooke affirmed he understood each right specifically. (*Id.*). In any event, as the Superior Court appropriately noted, Cooke refused any further competency evaluations. (B662). An attorney's performance is evaluated based on "[his] perspective at the time."[93] Here, at the time, second counsel were unable to further develop evidence to support a competency-based suppression motion.

Finally, Cooke could not establish that he suffered prejudice as a result of counsels' alleged failures. Cooke's argument that his statement was obtained

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[90] *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

[91] *Hubbard v. State*, 16 A.3d 912, 919 (Del. 2011) (quoting *Traylor v. State*, 458 A.2d 1170, 1176 (Del. 1983)).

[92] *See Whalen v. State*, 434 A.2d 1346, 1351 (Del. 1981).

[93] *Strickland*, 466 U.S. at 689.

illegally over his invocation of his right to counsel was not likely to succeed. Contrary to his claim that police ignored his request for counsel, the officers did appropriately clarify that Cooke was willing to proceed without counsel.[94] (*See* A2368-69, A2373-76).

In addition, a motion to suppress based on Cooke's competency to waive his rights would not have succeeded. Mental illness and low IQ are not necessarily barriers to a knowing and intelligent waiver of *Miranda* rights.[95] And Cooke's behavior during the interrogation indicated that he did understand the rights he was waiving.

In any case, even if the statement had been suppressed, it would still have been admissible for impeachment purposes.[96] Cooke insisted on testifying at trial, as was his right. The State used Cooke's prior statement to impeach his testimony. (*See* B643a-b, B646a). Contrary to Cooke's argument (*see* A198-99), suppressing his statement would not have "foreclosed" that cross-examination.

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[94] *See Davis v. United States*, 512 U.S. 452, 459 (1994) (indecisive request for counsel is not unequivocal); *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991) ("[T]he likelihood that a suspect would wish counsel to be present is not the test for applicability of *Edwards*"); *Draper v. State*, 49 A.3d 807, 810 (Del. 2002) (police are entitled to clarify suspect's intention before continuing with interrogation when defendant ambiguously invokes right to remain silent).

[95] *See United States v. Robinson*, 404 F.3d 850, 861 (4th Cir. 2005); *accord Colorado v. Connelly*, 479 U.S. 157, 165 (1986).

[96] *Foraker v. State*, 394 A.2d 208, 212 (Del. 1978) (discussing *Harris v. New York*, 401 U.S. 222 (1971)).

In sum, the Superior Court did not err in finding trial counsel not ineffective for failing to further pursue suppression of Cooke's statement to police.

V. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING COOKE A CONTINUANCE AFTER HE ELECTED TO PROCEED *PRO SE*.

QUESTION PRESENTED

Whether the Superior Court properly found Cooke's continuance claim procedurally barred under Rule 61.

STANDARD OF REVIEW

See postconviction standard in Argument I.

MERITS

Cooke contended below that the Superior Court erred by denying his continuance requests after he went *pro se*. (A871-73). The court held Cooke's claim was procedurally barred by Rule 61(i)(4), because his challenges were previously adjudicated on direct appeal. (O230). On appeal, Cooke claims the court erred because it "ignored the effects of Cooke's cognitive and mental health impairments." (OB 65-66). Cooke is mistaken.

Because Cooke previously challenged the denials of his continuance requests on direct appeal (A575-83), and the Court found there was "no plausible basis for Cooke's contention that he was denied an adequate opportunity to prepare for trial,"[97] his continuance claim is procedurally barred from reconsideration by Rule

[97] *Cooke*, 97 A.3d at 528-30.

61(i)(4). Although Cooke asserts that the claim was not previously litigated because the Court "was denied evidence of the compelling circumstances of this case explaining … Cooke required a continuance … because of his 'impairments,'" "[j]ustice does not require that an issue that has been previously considered and rejected be revisited simply because the claim is refined or restated."[98] Because this Court has already decided this claim, Rule 61(i)(4) barred the Superior Court from revisiting it in postconviction.

To the extent Cooke claims that "counsel's failure to raise and present Cooke's impairments constitute ineffectiveness … to overcome the bar" (OB 66), he is wrong. Rule 61(i)(4)'s procedural bar does not include a "cause" and "prejudice" exception.[99]

Rule 61(i)(5)'s exceptions also cannot assist Cooke, because he does not allege a lack of jurisdiction, new constitutional law applicable to his claims, or anything approaching a claim of newly discovered evidence of actual innocence.[100]

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[98] *Riley v. State*, 585 A.2d 719, 721 (Del. 1990).

[99] *See* Super. Ct. Crim. R. 61(i)(4).

[100] Super. Ct. Crim. R. 61(i)(5), (d)(2).

VI. COOKE WAS NOT ENTITLED TO RELIEF BASED ON CUMULATIVE ERRORS.

QUESTION PRESENTED

Whether several errors cumulatively resulted in an unfair trial.

STANDARD OF REVIEW

See postconviction standard in Argument I.

MERITS

Cooke argues that the cumulative impact of errors deprived him of a fair trial. (OB 67). He is mistaken. For a claim of "cumulative error" to succeed, appellant must identify multiple errors in the proceedings below that caused actual prejudice.[101] Here, Cooke's cumulative error claim fails because each of his claims individually lack merit.

[101] *Prince v. State*, 2022 WL 4126669, at *5 (Del. Sept. 9, 2022).

VII. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING COOKE'S DISCOVERY REQUESTS.

QUESTION PRESENTED

Whether the Superior Court abused its discretion when it denied Cooke's discovery requests.

STANDARD OF REVIEW

This Court reviews a trial court's denial of a discovery motion for an abuse of discretion.[102]

MERITS

Cooke argues that the court's denial of "the majority" of his discovery requests rested on a "misapprehension of *Brady* requirements," because the court held that "the State's representation that it had produced all '*Brady* material' is dispositive." (OB 68-70). According to Cooke, courts have generally rejected such a universal rule because "*per se* acceptance of the State's *Brady*-representations makes *Brady*-based discovery impossible, as the State could always represent the non-existence of such material (and, as the *Bagley*-dissent noted, innocently and without bad faith or not.)." (*Id.*). Cooke also contends that the United States Supreme Court's decision in *Pennsylvania v. Ritchie*,[103] which "[t]he court cited as

[102] *See Brooke v. Kent Gen. Hosp., Inc.*, 1996 WL 69828, at *1 (Del. Feb. 9, 1996).
[103] 480 U.S. 39 (1987).

the basis for its holding that the [S]tate's *Brady*-representation is final, "does not make that holding." (*Id.*). He is mistaken.

Under *Brady v. Maryland*,[104] the State must disclose impeachment and exculpatory evidence that is both favorable to the defense and material to guilt or punishment.[105] The obligation is ongoing and continues even after conviction.[106] A defendant's right to exculpatory or impeachment evidence, however, does not entitle him access to the State's file to find it and argue what may be relevant.[107] This procedure is consistent with the prohibition against fishing expeditions in postconviction discovery.[108]

Under *Ritchie*, Cooke was entitled to disclosures implicated by his specific averments, but was not entitled to rummage through the State's file looking for more. The United States Supreme Court held in *Ritchie* that prosecutors control the decisions over what information must be disclosed under *Brady*, and defendants have no right to search the State's files to contest the prosecutor's "final" decision.[109] Here, the prosecutors represented during trial and in postconviction that the State

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[104] 373 U.S. 83, 87 (1963).

[105] *United States v. Bagley*, 473 U.S. 667 (1985); *Dawson v. State*, 673 A.2d 1186, 1193 (Del. 1996) .

[106] *Ritchie*, 480 U.S. at 60; *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976)..

[107] *Ritchie*, 480 U.S. at 59.

[108] *See State v. Petty*, 2014 WL 2536987, at *1 (Del. Super. Ct. May 22, 2014).

[109] *Ritchie*, 480 U.S. at 59.

properly reviewed its files for *Brady* information and affirmed the State's compliance with *Brady*. (*See, e.g.*, DO at 32, 61, 68, 84, 102-04, 118-19, 126-27; B376-83).[110] Nor did Cooke establish that the State withheld any exculpatory evidence from its "near-blanket production."[111] (*See* B1423-24 at ¶35). Accordingly, the Superior Court did not abuse its discretion in ruling that Cooke was not entitled to review the State's files and instead was required to accept the State's word that all *Brady* information had been disclosed.[112] (*See* DO 12-13, 62).

Cooke also claims the court's ruling that there is "no due process right to discovery of police reports" and "no general constitutional right to discovery in a criminal case" is "clearly contrary to the *Brady* requirement." (OB 69). He is wrong. As this Court has recognized, *Brady* does not create a general constitutional right to discovery in criminal cases and a defendant has no due process right to discovery of police reports.[113] Nor did the court misapprehend *Brady*. The court recognized that the State was still bound by its *Brady* obligations and was required to provide exculpatory and impeaching material, including any redactions to the police reports

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[110] "DO" refers to the transcript of the July 7, 2021 Rule 61 discovery motions hearing, attached as Exhibit A to Cooke's opening brief.

[111] *See Ritchie*, 480 U.S. at 59.

[112] Although the State cooperated in providing more information to the defense after the July 2021 hearing, none of this material constituted *Brady* material, as the Superior Court found. (*See* O180).

[113] *Lovett v. State*, 516 A.2d 455, 472 (Del. 1986).

that contained *Brady* information. (O149-51, O179-80; *see, e.g.*, DO at 10, 12, 17, 32, 36, 68, 70-73, 84, 91, 93, 96, 100, 104). Moreover, although the State had no obligation to turn over police reports, it nevertheless provided them after redacting victim and witness identifying information under the Victim's Bill of Rights. (DO 104; B698, B1078-83). Prosecutors confirmed that none of the redactions contained *Brady* material. (*See* DO at 32, 68, 104).

VIII. COOKE IS NOT ENTITLED TO RELIEF FOR HIS OTHER NON-BRIEFED CLAIMS.

QUESTION PRESENTED

Whether Cooke waived seven other claims by failing to brief those contentions on appeal.

STANDARD OF REVIEW

See postconviction standard in Argument I.

MERITS

Cooke raises seven other claims by incorporating his Superior Court briefs by reference. (OB 71-72). Cooke has waived these arguments by failing to address the merits of the issues, most of which are procedurally barred, in the opening brief's body.[114]

[114] *See Ploof*, 75 A.3d at 823 (citing Supr. Ct. R. 14(b)(vi)(A)(3)).

CONCLUSION

For the foregoing reasons, the Superior Court's judgment should be affirmed.

DEPARTMENT OF JUSTICE

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Dated: January 3, 2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES COOKE,	)	
	)	
Defendant-Below,	)	No. 12, 2023
Appellant	)	
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using MS Word.

2. This brief complies with the type-volume requirement of Rule 14(d)(i) because it contains 14,950 words, which were counted by MS Word.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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DATE: January 3, 2024