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Case Number 53,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMBROSE SYKES,	)	
	)	
Defendant Below	)	No. 53, 2014
Appellant,	)	
	)	
v.	)	Court Below---Superior Court
	)	of the State of Delaware
STATE OF DELAWARE,	)	in and for Kent County
	)	ID No. 0411008300
Plaintiff Below	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

APPELLANT'S CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

Ambrose Sykes was convicted and sentenced to death for the murder of Virginia Trimnell. He appeals the denial of his Amended Motion for Postconviction Relief, which issued from the Superior Court on January 21, 2014.[1] The procedural history of this case is set forth in the lower court's Order in the sections entitled Trial and Sentence, Direct Appeal, and Motion for Postconviction Relief.[2]

Postconviction counsel sought and received an extension to 60 pages for this brief. It soon became apparent that 60 pages would be insufficient to appropriately present the many important claims in this capital case. However, this Court denied the undersigned counsel's motion for an additional page extension. The undersigned counsel is mindful of this Court's holding in *Ploof v. State* that any claims not fully briefed are deemed waived.[3] Counsel is also aware of the duty to preserve and exhaust claims in the event capital habeas review becomes necessary. As such, postconviction counsel has made strategic choices regarding which claims to brief, but asserts that all claims should have been fully presented to this Court.

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[1] *State v. Sykes*, 2014 WL 619503 (Del. Super.).

[2] *Id.* at *2-4.

[3] *Ploof v. State ("Ploof I"),* 75 A.3d 811, 822-823 (Del. 2013).

SUMMARY OF THE ARGUMENT

1. Trial counsel's performance in preparation and conduct of the penalty phase was constitutionally deficient. No records were obtained, no mitigation specialist was retained, and the investigation was virtually nonexistent. Mr. Sykes suffered prejudice in that his jury and sentencing judge were deprived of considering significant and readily available mitigating evidence. The trial court's opinion is rife with legal error evincing a misapprehension of death penalty law, including, *inter alia,* the mistaken belief that mitigating evidence must provide an excuse for the crime. Confidence in the outcome is shattered; Mr. Sykes seeks a new penalty hearing.

2. The trial judge commented to the jury in the guilt phase, "you may also be hearing from the defendant is he chooses to do what we call an allocution." The trial court erred in rejecting the claim about this comment as previously adjudicated. The postconviction claim asserts counsel was ineffective for failing to assert Mr. Sykes' Sixth Amendment right to a fair trial by an impartial jury. Moreover, a jury can hardly be considered properly instructed when the court and counsel were crafting a curative instruction during jury deliberations then never gave it because the jury had quickly reached a verdict.

3. The trial erroneously permitted Juror Number 9 to remain on the jury despite actual and presumed biases. Moreover, trial counsel were ineffective for failing to

voir dire Juror Number 9, who was a prior rape victim, and for failing to object when the Court failed to dismiss her. Appellate counsel's performance was also ineffective because they failed to raise and litigate these claims on direct appeal.

4. Trial counsel failed to retain an expert in forensic pathology. This failure rendered them unable to challenge the medical evidence at trial and to raise a meaningful claim of sufficiency of the evidence of rape, burglary, and kidnapping on appeal. The trial court erred in finding trial counsel not ineffective.

5. The trial court committed error by finding that counsel was not ineffective for failing to assert that the kidnapping charge was incidental to, and not independent of, the evidence pertaining to the rape charge. All the evidence relied on to bolster trial counsel's performance, such as the binding of the victim, occurred after the victim was already deceased. No legitimate inference from any evidence presented at trial supports the proposition that the kidnapping occurred independently of the evidence used to support the rape charge.

STATEMENT OF FACTS

This Court has already set forth the facts of the underlying case in its direct appeal opinion.[4] The trial court's recitation of facts contains the erroneous statement that two toothpicks found in the apartment were a DNA match for Mr. Sykes.[5] In fact, the State's expert concluded the toothpicks did not have Mr. Sykes' DNA on them.[6]

Other relevant facts adduced during postconviction proceedings will be specifically referenced as appropriate for each individual claim.

[4] *Sykes v. State*, 953 A.2d 261, 264-266 (Del. 2008).

[5] *State v. Sykes*, 2014 WL 619503 at *2 (Del. Super).

[6] A3907-3912, A3925.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING THAT MR. SYKES WAS NOT PREJUDICED BY TRIAL COUNSELS' FAILURE TO INVESTIGATE AND PRESENT READILY AVAILABLE MITIGATING EVIDENCE; THE TRIAL COURT'S LEGAL ERRORS UNDERMINE ANY POSSIBILITY OF CONFIDENCE IN THE OUTCOME OF THE SENTENCING PROCEEDING.

QUESTION PRESENTED

Whether Superior Court erred in its finding that trial counsel rendered effective assistance of counsel in the sentencing proceedings?[7] This issue was preserved through the filing of an Amended Motion for Postconviction Relief,[8] a lengthy evidentiary hearing, and post-hearing briefing.[9]

STANDARD AND SCOPE OF REVIEW

Questions of law and constitutional issues are reviewed de novo.[10] This Court reviews for abuse of discretion the Superior Court's decision on an application for postconviction relief.

This ineffective assistance of counsel claim, as well as the others, is governed by *Strickland v. Washington,*[11] which entitles a petitioner to relief if counsel performed deficiently and prejudiced resulted. Counsel has a "duty to

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[7] *Sykes,* 2014 WL 619503 at *28.

[8] A118.

[9] A287.

[10] *E.I. DuPont de Nemours & Co., Inc. v. Shell Oil Co.,* 498 A.2d 1108, 1113 (Del. 1985); *Outten v. State,* 720 A.2d 547, 551 (Del. 1998).

[11] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process," and performs deficiently when his performance falls below "an objective standard of reasonableness."[12] Prejudice is established when counsel's deficient performance undermines confidence in the outcome of the proceeding.[13]

MERITS

A. Counsel's Duty to Conduct a Thorough Investigation of Potential Mitigating Evidence.

Counsel's performance in a mitigation investigation is "measured against an 'objective standard of reasonableness,' 'under prevailing professional norms.'"[14] The Court has long referred to professional standards of conduct – such as the American Bar Association (ABA) Standards for Criminal Justice and the ABA Guidelines for the Appointment and Performance of Counsel in Capital Cases – as "guides to determining what is reasonable."[15]

The case law and the professional norms consistently recognize that capital counsel have an "obligation to conduct a thorough investigation of the defendant's

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[12] *Id*.

[13] *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

[14] *Rompilla v. Beard*, 545 U.S. 374, 380 (2004), quoting *Strickland*, 466 U.S. at 688; *Wiggins*, 539 U.S. at 521.

[15] *Wiggins*, 539 U.S. at 524, *citing Strickland*, 466 U.S. at 688. Although the court in this case referred to them as "merely" guidelines and not binding law, *State v. Sykes*, 2014 WL 619503 at *25, the ABA Guidelines do set forth the standards for what constitutes reasonable investigation. As such, under *Strickland* and its progeny, they are more than "merely" guidelines.

background" for mitigating evidence.[16] Of course, sound strategic decisions cannot be based on an inadequate or cursory investigation; these decisions are only "strategic choices made after less than complete investigations are [only] reasonable . . . to the extent that reasonable professional judgments support the limitations on investigations."[17] A reviewing court must assess the "reasonableness of the investigation that supports counsel's strategy."[18]

The United States Supreme Court has defined "thorough" as a requirement that "investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."[19]

This Court and the Third Circuit Court of Appeals have consistently imposed the same requirements for adequacy of penalty phase investigation and presentation.[20] In *Outten v. Kearney*, the Third Circuit found merit to the petitioner's claim that trial counsel's investigation and presentation of the penalty phase were unreasonably deficient. The Court found support for its conclusion in

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[16] *Williams v.Taylor*, 529 U.S. 362, 396 (2000) (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, at 4-55 (2d ed. 1980)); *see also Wiggins v. Smith*, 539 U.S. at 522, in which the guidelines are quoted.

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

[18] *Id*. at 691.

[19] *Wiggins*, 539 U.S. at 524 (emphasis in *Wiggins*), quoted in *Rompilla*, 545 U.S. at 387 n.7.

[20] See *State v. Wright*, 653 A.2d 288, 303 (Del. 1994) (making clear that a minimal, rudimentary mitigation investigation is not sufficient to protect a capital defendant's rights).

controlling Supreme Court precedents, as well as the 1989 ABA Guidelines, which, the *Outten* court observed, set forth the "standard practice," requiring a penalty phase investigation to include medical, educational, family, social, employment, and correctional history.[21]

A minimal, rudimentary mitigation investigation is not sufficient to protect a capital defendant's rights.[22] Failing to "present possibly mitigating evidence cannot be justified when counsel have not 'fulfilled their obligation to conduct a thorough investigation of the defendant's background.'"[23] Further, as the *Wiggins* court held, "In assessing the reasonableness of an attorney's investigation, [a] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."[24] Recently, this Court held that although counsel obtained some records, the failure to further investigate the defendant's upbringing constituted deficient

[21] *Outten v. Kearney,* 464 F.3d 401, 417-418 (3d Cir. 2006). In its holding that "*Outten* does not apply," *Sykes,* 2014 WL 619503 at *26, the trial court throws the baby out with the bathwater. The one holding in *Outten* that does not have application here is the proposition that in a 7-5 vote, one juror changing his or her mind constitutes prejudice. *See Norcross v. State,* 36 A.3d 756, 770-71 (Del. 2011). Although it is impossible to tell without a remand what the vote would be had trial counsel not been ineffective, the undersigned postconviction counsel never argued the "one vote" holding in *Outten.* However, the remaining principles of *Outten* are valid and instructive, especially its holding as to what constitutes a reasonable investigation.

[22] *Wright,* 653 A.2d at 303.

[23] *Outten,* 464 F.3d at 419.

[24] *Wiggins,* 539 U.S. at 527.

performance, especially in light of the red flags brought to light by the initial investigation.[25]

B. The Legal Standard for Prejudice and Required Reweighing to Assess the Totality of the Evidence.

Prejudice occurs when the confidence in the penalty phase's outcome is undermined.[26] In other words, prejudice is established when the totality of the evidence "more likely than not" would have changed the outcome.[27] The Supreme Court has explained that [t]o assess that probability [of a different outcome under Strickland], we consider "the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the [postconviction] proceeding" – and "reweigh it against the evidence in aggravation."[28] This prejudice standard applies "regardless of how much or how little mitigation evidence was presented during the initial penalty phase."[29]

In both *Williams v. Taylor*[30] and *Wiggins v. Smith*,[31] the United States Supreme Court reversed based on multiple failures of defense counsel during the penalty phase. In *Williams*, the Court held that the trial judge was correct to

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[25] *Ploof v. State*, 75 A.3d 840, 853 (Del. 2013).
[26] *Strickland*, 466 U.S. at 694.
[27] *Id*.
[28] *Williams*, 529 U.S. 362, 397-398 (2000).
[29] *Sears v. Upton*, 130 S.Ct. 3259, 3266-3267 (2010).
[30] 529 U.S. 362 (2000).
[31] 539 U.S. 510 (2003).

conclude that "the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised 'a reasonable probability that the result of the sentencing proceeding would have been different.'"[32]

In *Wiggins*, the Supreme Court quoted *Williams* when explaining that it evaluates all of the evidence, both adduced at trial and in habeas proceedings.[33] Then it asks: Would a competent, reasonable attorney have introduced the evidence in admissible form? Would defense counsel have changed their strategy and presentation based on this discovery, for instance to prioritize it? Only after answering these questions should a court consider whether a jury confronted with that presentation would have returned a different verdict or sentence.[34] "In assessing prejudice," the Court added, "we reweigh the evidence in aggravation against the totality of the evidence the totality of available mitigating evidence …."[35] That evidence is "taken as a whole."[36]

This Court has remanded several capital cases for reweighing, holding that under *Williams*, *Wiggins*, *Outten* and other cases, the lower court failed to evaluate

[32] *Williams* at 535.
[33] *Id*. at 535.
[34] *Id*. at 538.
[35] *Id*. at 534.
[36] *Id*.

the totality of the available mitigation evidence in re-weighing it against the evidence in aggravation.[37]

Prejudice may be found solely on the basis of a deficient mitigation investigation. This Court found prejudice in *State v. Wright* on the basis of an almost complete failure by trial counsel, as here, to investigate mitigating evidence:

> this Court finds that defense counsel's almost complete lack of investigation into Wright's mental, school, and family history, and, thus, lack of knowledge regarding it, in addition to his lack of strategy in presenting mitigation evidence in the penalty phase, constitutes ineffective assistance of counsel sufficient to undermine confidence in the outcome of the jury's death penalty recommendation.[38]

Wright is in keeping with the legion of jurisprudence finding minimalistic investigation by trial counsel unreasonable and prejudicial.

C. Trial Counsel's Virtually Non-existent Mitigation Investigation.

Christopher Tease, Esquire, was brought on as co-counsel in June 2005, seven months after Mr. Sykes' arrest, to handle the penalty phase.[39] Although he had worked on one other capital case, that case was a second penalty phase for a

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[37] *Norcross v. State*, 36 A.3d 756, 771 (Del. 2010). *See also*, *Ploof*, 75 A.3d at 834 (remanding because "it is important that the trial court in the first instance undertake the required analysis.").

[38] *Wright*, 653 A.2d at 303.

[39] A1655-1656. As such, the trial court's holding that he "got an early start on the investigation" is inaccurate. *Sykes*, 2014 WL 619503, at *27. The clock was already ticking inexorably towards the trial date.

defendant who had been incarcerated for over 20 years.[40] So neither trial attorney had ever handled a capital trial before.

Mr. Tease had very specific personal theories about the handling of capital cases. He testified that the ABA Guidelines were "impossible to meet as a Delaware conflicts lawyer."[41] He also thought that other defense lawyers were spending "ungodly" amounts of money on capital cases.[42] Moreover, he characterized many mitigating factors presented to capital juries as "whining and almost absurd."[43] And despite his lack of experience, he never reviewed the ABA Guidelines at any time during his representation of Mr. Sykes.[44]

Mr. Tease was also too busy to handle Mr. Sykes' case. He was in the middle of a series of three murder trials. He testified that he should have "reached out to the judiciary and said 'this is ridiculous.'"[45] He wrote to Mr. Sykes after the trial and admitted he "wasn't real happy" with his performance in the penalty

[40] A863-864.

[41] A867. Mr. Tease testified further, "I mean, if the Court wants us to handle these death penalty cases in line with those standards or close to them, we can't be handling 120 other cases a year, especially ones that are also very serious…it's asking a lot of the program. A1758-1759.

[42] A1757.

[43] A1641.

[44] A865-866.

[45] A1611-1612. Mr. Tease went on to say, "I can't be doing three murder cases in a row with literally—if you want to subpoena my records I think I had one day off for the whole thing besides weekends."

phase,[46] and in his Affidavit he described his performance as "pitiful" as compared to prevailing norms.[47]

In September 2005, Mr. Tease had an initial meeting with Mr. Sykes in which he gathered a wide range of information, such as family, educational and work history, military service, and the like.[48] Then Mr. Tease deployed a law clerk to interview a few family members, using a questionnaire that Mr. Tease made up "off the top of my head."[49] The clerk used his interview notes from the three family members to draft a memo to Mr. Tease in October, 2005. That memo sets forth a number of significant potential avenues for mitigation such as severe abuse by Mr. Sykes' mother, educational and behavioral problems, poverty, a poor relationship with his father, and others.[50]

The investigation ended as quickly as it began. Counsel did not follow up on any of the red flags surfaced by the initial interviews. In fact, he did not visit Mr. Sykes again until February 16, 2006.[51] The Court's assertion that Mr. Tease met with his client on "an ongoing basis" is completely wrong.[52] He never

[46] A1804; A3170.
[47] A1623; A3270.
[48] Mr. Tease's memorandum from that meeting is at A2165-2166.
[49] A878.
[50] A2172-2177.
[51] A1616; the prison visit logs are at A2265-2266.
[52] *Sykes*, 2014 WL 619503 at *25.

obtained any records—he did not know he was supposed to.[53] Nor did he hire a mitigation specialist, for essentially the same reason.[54] As to the three family members interviewed by the law clerk, Mr. Tease did not meet with them until *during trial*.[55] So despite Mr. Tease's belief that "we had no shot in the guilt phase," he did nothing to investigate or otherwise prepare for the penalty phase.[56]

D. The Mitigating Evidence the Jury Never Heard.

Ambrose Sykes was born cyanotic at Dover Air Force Base and had to be rushed to the Philadelphia Naval Hospital.[57] At the time, Ambrose's father, Jesse Sykes, was in the Air Force, but received an "undesirable discharge" for selling drugs on the base.[58] Their finances in ruins, the Sykes family moved to Virginia, where Jesse Sykes eventually left them.[59]

Jesse Sykes verbally and physically abused his wife Debora during Ambrose's childhood, often in the presence of the children.[60] In those early years, Debora also abused Ambrose, often leaving welts and bruises on his body.[61] She made her sisters hold Ambrose down while she beat him. On one occasion, while

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[53] A880, A882.
[54] A871.
[55] A1637.
[56] A1610.
[57] A1604; the birth records are at A2493-2567.
[58] A1270; the records of the undesirable discharge are at A2609-2634.
[59] A1180.
[60] A1272-1273.
[61] A1244.

beating him with a belt in this fashion, she opened up a gash near his eye; he was held home from school while the wound healed.[62]

The Sykes family moved from home to home in Virginia, all in deplorable conditions. The family lived in the violence and drug-plagued Pin Oaks neighborhood of Petersburg, Virginia, an area with a 92% poverty rate.[63] The squalid homes had no heat or refrigerator.[64] One home had rats and roaches in the house.[65] Ambrose lacked hygiene and was often brought to school in unclean clothes.[66] The neighborhood was cluttered with crack vials; the local drug dealers would pay the young children five cents for each vial they recovered.[67] During grade school, Ambrose attended four different elementary schools due to his family's frequent moves.[68]

When he was 14, Ambrose was sent to Delaware to live with his father. Jesse was living with his paramour, Dawn Williams, and her sister, Tara Whittlesay.[69] By that time, Jesse was a full-blown drug addict, using pills, injected

[62] A1205.
[63] A1352.
[64] A1353.
[65] A1180.
[66] A1183.
[67] A1354.
[68] A1352; the school records are at A3637-3648.
[69] A3544.

drugs, and acid.[70] Jesse was arrested and convicted on a drug charge while Ambrose was living there.[71]

Jesse was also violent and abusive towards Dawn, beating her on a regular basis. He also threatened her with knives and guns, and on one occasion put a gun in her mouth.[72] His violence also extended to frequent abuse of his teenage son, Ambrose, with belts and sticks. If Dawn tried to intervene, she would get beaten as a consequence: "I would get hit for trying to comfort him…I had to watch him suffer through that."[73] Dawn recalls Ambrose frequently having black eyes, bruises and busted lips, and spending most of the time in his room crying.[74] According to Dawn, "Brose loved the ground that man walked on," but his affections were never reciprocated.[75]

Tara Whittlesay, who was 13-15 years-old during the time Ambrose lived there, also recalls Jesse's abuse of Ambrose: "I've seen him hit him to the point where his eyes swell up, knots on his head…I've seen him hit him with tennis rackets, whatever was close by, to be honest with you."[76] Tara testified, "I think he

[70] A3547.
[71] A3548-3549; the court records are at A3022-3041.
[72] A3541.
[73] A3546.
[74] A3545.
[75] A3562.
[76] A3503.

really wanted his dad to love him and he just didn't have time for him."[77] Tara was not physically abused in the same manner. Jesse Raped her.

> The first time he raped me and then after that there was no saying no. He sodomized me with bottles and sticks or whatever, you know, he would—whenever he would get a chance he would touch me somehow...he gave me crabs, that's how it came out. He was always high prior to approaching me. I got to the point where I knew it was coming….[78]

Tara does not believe Ambrose was sexually abused, but believes he was well aware of what his father was doing to her; it was not a subject they discussed. They exchanged looks, "not a question or a hunt but a look, like I know you know I know."[79]

The family unit remained intact despite the ongoing abuse, and engaged in normal activities when Jesse was away on driving jobs.[80] When Jesse was away, however, he was doing more than just drive a moving truck. He frequently stole items from among the moving goods, tagging the items and coming back to the warehouse at night to steal them.[81] He also committed burglaries and break-ins while on long haul trucking jobs.

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[77] A3502.

[78] A3504-3505. Tara, now 43, was never able to have children. A3978.

[79] *Id.* The court papers regarding Jesse Sykes' arrest and eventual conviction for Unlawful Sexual Intercourse Third Degree and Unlawful Sexual Contact Third Degree are at A2986-3022.

[80] A3564.

[81] A3550-3551.

Jesse Sykes took young Ambrose on many of his stealing jobs, so Ambrose experienced burglary and theft as his father's teenaged accomplice.[82] While on the road with his father, Ambrose was exposed to all his father's proclivities for crime, women and drugs. "As far as the breaking into houses and stealing stuff, he would make Brose go. Brose seen him have sex with another woman….He seen a lot for a little kid; in fact, too much."[83]

After it was discovered that Jesse Sykes was sexually assaulting Tara Whittlesay, the household broke up, with Ambrose moving back to Virginia.[84]

All the witnesses who testified at the evidentiary hearing and provided a meaningful life history were willing and available to testify, but were not asked to do so by trial counsel, nor in most cases were they even contacted.[85] Mr. Tease had the witness names from his initial meeting with Mr. Sykes in September 2005, but never followed up on the information provided.[86]

Despite his cyanotic birth and obvious abuse, Mr. Tease never sought a neuropsychological evaluation for Mr. Sykes, likely because he did not know what one was or when one was indicated. Mr. Tease did hire Mandell Much, PsyD, to

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[82] A3564.

[83] A3550.

[84] A3562.

[85] *See, e.g.,* Richelle Herriott, A1204; Debray Sykes, A1240; Dawn Hawkins, A3560; Tara Whittlesay, A3507-3508.

[86] Counsel's memorandum entitled Ambrose Sykes' Mitigation Case, dated September 19, 2005, is at A2165-2172.

do a psychological evaluation.[87] Dr. Much is not qualified to perform a neuropsychological assessment and in any case had no records to review. The evaluation was botched and rescheduled several times, with the actual evaluation occurring *eight days before trial*.[88] Mr. Tease now claims that Dr. Much told him he should not prepare a report, because his diagnosis was antisocial personality disorder.[89] Nothing in trial counsel's file confirms this. In any event, Mr. Tease admitted that he did not use Dr. Much because he ran out of time.[90] Mr. Tease later testified that Dr. Much had told him he would testify that Mr. Sykes would do well in a structured environment.[91] Inexplicably, this was never pursued, and the defense never countered the correctional testimony presented by the State.

The trial judge's account of Mr. Sykes being uncooperative with the evaluation is grossly inaccurate.[92] Mr. Tease testified that he thought the evaluation was going to have "huge problems" because Dr. Much's first question to Mr. Sykes was "tell me what you did."[93] Then months later, the rescheduled evaluation was cancelled because of unacceptable conditions at the prison. This is

[87] A893.
[88] A1613.
[89] *Id.*
[90] A1614.
[91] A1638.
[92] *Sykes*, 2014 WL 619503 at *27.
[93] A1609.

noted in a letter from Mr. Tease to Dr. Much trying to reschedule the evaluation, which also states, "Ambrose is amenable to the evaluation."[94]

Carol Armstrong, PhD, a neuropsychologist, testified at the evidentiary hearing that Mr. Sykes suffered from brain damage in the hippocampus, possibly caused by all the beatings, from malnutrition, and the cyanosis at birth.[95]

Another postconviction witness, Craig Haney, PhD, testified as an expert regarding Mr. Sykes' potential behavior in prison. He found that Mr. Sykes would not be a danger to other inmates and would fare well in a controlled prison setting.[96]

E. Trial Counsel's Paltry and Deficient Penalty Phase Performance.

On the day before the penalty phase began, counsel filed their lists of aggravating and mitigating factors.[97] The State was able to establish to the Court's satisfaction almost all the items on its list; there was virtually no rebuttal of the aggravating factors.

The defense listed 20 mitigating factors, with no real plans to establish all but a few. It reads like a wish list, and would have been a good working plan a year before trial, but it was submitted *the day before* the penalty phase. Ultimately, through four family members, the defense presented evidence that he had family

[94] A2190.

[95] A1385-1387; Dr. Armstrong's report is at A3617-3622.

[96] A1479-1484; Dr. Haney's report is at A3649-3658.

[97] The State's list is at A2212-2213. The defense's list is at A2214-2215.

members who cared about him, that he had a great relationship with his son, Alex, and limited testimony that he had a difficult upbringing. Trial counsel prepared the witnesses for their testimony either not at all or in the courthouse hallway at the conclusion of the guilt phase.[98] The entirety of the defense witness testimony in the penalty phase is contained in 51 pages of transcript.[99]

Trial counsel's theme in opening was "breaking that cycle, letting him be a dad for his son."[100] He argued, "it's about Ambrose and his Dad, and about Ambrose and Alex; and we need to stop this," although what "this" was is not clear.[101] Neither Mr. Sykes' father nor son testified. When asked why Mr. Tease did not even investigate Mr. Sykes' father Jesse, he testified, "I don't have a good answer for that one."[102]

In closing, counsel launched into a lengthy argument about residual doubt to a jury that had found Mr. Sykes guilty in well under an hour.[103] After doing more challenging of the evidence than had been done during trial, he presented an alternate theory to the jury involving Mr. Sykes borrowing Ms. Trimnell's car, her

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[98] *See* Debray Sykes, A1240; Debora Sykes, A1304; Creshenda Jacobs, A3100-3101.

[99] A2042-2093.

[100] A1960.

[101] A2116.

[102] A1795. No evidence in the record supports the trial court's finding that "Tease still attempted to locate Jesse to no avail." *Sykes*, 2014 WL 619503, at *27.

[103] As the trial court notes, communication between counsel was not effective and Mr. Tease disagreed with several of Mr. Donovan's decisions. *Sykes*, 2014 WL 619503, at *27. Apparently, this was the time Mr. Tease chose to present his own theory of the case. A2105-2111.

loaning him some money, a visit to the apartment and "something goes horribly wrong."[104] In a sad bit of irony, this is the sort of evidence that the defense could have put on had they conducted an investigation and prepared for the guilt phase.

Mr. Tease also set forth his theory, controverted by the evidence, that Ms. Trimnell was alive when put in the suitcase and suffocated to death.[105] How any juror would think that being stuffed in a suitcase and suffocating to death is somehow preferable to being expired before being placed in the suitcase is a mystery for the ages. The jury returned its 12-0 vote for death in three hours.[106]

F. The Trial Court's Legal Errors Leave No Room for Confidence in the Outcome.

The trial judge demonstrated a complete misunderstanding of what mitigating evidence is and is not. In addressing mitigation expert Dana Cook's testimony about Mr. Sykes exposure to sexual abuse, the trial court held, "Cook also acknowledged that such abuse has no direct link to why someone would commit murder."[107] When discussing the evidence of abuse, the trial court held, "the abuse Petitioner suffered as a child neither compels nor excuses his criminal actions."[108] Finally, when addressing the findings of the postconviction

[104] A2114-2115.
[105] A2112-2113.
[106] A2143.
[107] *Sykes*, 2014 WL 619503, at *27.
[108] *Id.* at *28.

neuropsychologist, the trial court held, "Dr. Armstrong was unable to conclusively state the cause of Petitioner's memory issues, and admitted that this condition would not compel Petitioner to commit murder."[109]

Mitigating circumstances are not excuses.[110] An excuse is a "defense that arises because the defendant is not blameworthy for having acted in a way that would otherwise be criminal."[111] Further, excuses,[112] unlike mitigating circumstances, are limited to the guilt phase of a trial.[113] A mitigating circumstance, on the other hand, is "any factor which tends to make the defendant's conduct less serious or the imposition of a penalty of death inappropriate."[114] It does not "excuse" a defendant's conduct because a jury has already returned a guilty verdict against the defendant.[115] In *Whalen v. State*, this Court held that the prosecutor's comment that defendant was attempting to excuse his conduct was "both misleading and inappropriate."[116] In *Small v. State*, this Court found that the prosecutor's improper comments, specifically, eight separate mischaracterizations of mitigating evidence as excuses, "changed the tenor of the

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[109] *Id.*

[110] *Small v. State*, 51 A.3d 452, 460 (Del. 2012).

[111] *Id*. (citing *Black's Law Dictionary* (9th ed. 2009)).

[112] *E.g.*, Duress, 11 *Del. C.* § 431; Insanity, 11 *Del. C.* § 401, and Involuntary Intoxication, 11 *Del. C*. § 423.

[113] *Small*, 51 A.3d at 460.

[114] *Id*. (citing *Wright*, 653 A.2d at 335).

[115] *Small*, 51 A.3d at 460.

[116] *Id*.

penalty phase and materially prejudiced the defendant."[117] The proper focus of the investigation and presentation of mitigation evidence is not an attempt to excuse the crime, but rather an effort to allow the jury an opportunity to assess the moral culpability of the defendant.[118]

The trial judge's misapprehension of controlling law reveals the court's inability to assess the vast new mitigating evidence in a constitutionally appropriate manner. Mitigation and excuses are two very different legal concepts. Never in our death penalty jurisprudence has there been any support for the trial court's holding that there must be a nexus between the offense and the mitigation.

The trial judge was in no position to assess the character and moral culpability of Mr. Sykes because he mistakenly believed that mitigating evidence had to explain or excuse the crime. It is little wonder that the trial court found that the new mitigating evidence would not change the outcome. The evidence was filtered through a flawed legal standard. Moreover, the original penalty phase is stripped of its legitimacy and there can be no confidence in the outcome.

Next, the trial court held, "While it is true that Tease did not retain a mitigation specialist and failed to get any records relating to Petitioner, that alone does not result in his investigation being unreasonable."[119] Actually, it does.

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[117] *Small*, 51 A.3d at 461.

[118] *Wiggins*, 539 U.S. at 513.

[119] *Id.* at *27.

Williams, Rompilla, Wiggins, Wright, and a host of other cases have made clear that "defense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors."[120] No justification exists for the failure to present possible mitigating factors when counsel has not performed a reasonable investigation.[121] This case was devoid of investigation and a complete abdication of responsibility by trial counsel. The trial court's holding that this performance was reasonable is a gross misapplication of established law.

The trial court further holds Mr. Sykes responsible for some of trial counsel's failings because he was an "uncooperative client," who "cannot now fault Tease for decisions that were his in the first place."[122] This is yet another incorrect legal principle. Although the client has the right to make basic decisions about his case, that universe of decisions is limited to whether to plead guilty, to seek a jury trial, or to testify.[123] However, the day-to-day conduct of the case is the responsibility of trial counsel, who "has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop."[124]

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[120] *Wright* at 299 (internal citations omitted).
[121] *Outten*, 464 F.3d at 403.
[122] *Sykes*, 2014 WL 619503, at *27.
[123] *Cooke v. State*, 977 A.2d 803, 841 (Del. 2009).
[124] *Wainwright v. Sykes,* 433 U.S. 72, 93 (1977).

Nor may counsel fail to conduct an investigation because of the client's desire not to present mitigating evidence or have certain witnesses contacted.[125] Even when the client is "fatalistic and uncooperative," recalcitrant, or not forthcomng, trial counsel is not relieved of the duty to conduct a thorough investigation.[126] Moreover, the duty to investigate the client's background is not negated simply because the client represents to counsel that his childhood was "fine" or "uneventful."[127] The trial court's transfer of blame from counsel to defendant for the inadequate investigation is legally unsupportable and should be rejected by this Court.[128]

Finally, the trial court's holding that the new mitigation evidence was "so-called mitigating factors," which are "more specific restatements" of factors already found and are "subsumed" within the factors held to exist completely ignores the concept of the weight the factfinder is required to place on the evidence. Finding of these factors is not a mechanical process of box-checking; the weighing is a reasoned and qualitative one which considers the totality of the

[125] *Blanco v. Singletary*, 943 F.2d 1477, 1501-03 (11th Cir. 1991) (counsel ineffective for "latch[ing] onto" client's assertions he did not want to call penalty phase witnesses and failing to conduct an investigation sufficient to allow their client to make an informed decision to waive mitigation).

[126] *Porter v. McCallum*, 558 U.S. 30, 40 (2009).

[127] *Ploof v. State*, 75 A.3d 840, 853 (Del. 2013).

[128] Of course, if Mr. Sykes was reluctant to share his deepest and darkest secrets with counsel, that position is understandable given counsel's almost nonexistent effort to establish a rapport with their client. The visit logs say it all. A2265-2266. In desperation, Mr. Sykes wrote to both his attorneys asking for them to visit, so the lack of contact cannot be laid at Mr. Sykes' feet. *See* A2191, A2188.

circumstances.[129] The meager evidence in the penalty phase pales in comparison to the depth, breadth and quantum of evidence adduced in postconviction. The jury, who only deliberated for three hours, had only the roughest sketch to consider when a full palette of information was available. As such, the court's holding that the factors had been established is mechanistic, oversimplistic, and inaccurate.

As the foregoing demonstrates, the trial court's legal errors are so profound that confidence in this outcome is completely undermined and postconviction relief is the only appropriate remedy.

G. The Prejudice to Mr. Sykes Due to Trial Counsel's Deficient Performance Can Only be Cured by a Remand for a New Penalty Phase.

The penalty phase was handled by an attorney who was inexperienced, unfamiliar with established performance norms, did not have time to take on the case, and espoused a viewpoint that a lot of mitigating evidence is "whining and almost absurd." A good initial interview and some follow up with a few family members yielded rich veins of exploration for meaningful mitigation. But trial counsel shut down the investigation. Aside from a botched evaluation and a few conversations in the courthouse during the trial, counsel did nothing. The deficient performance resulted in constitutional prejudice to Mr. Sykes, in that without the deficient performance a reasonable probability exists that the outcome would have

[129] *Stevenson v. State*, 709 A.2d 619 (Del. 1998).

been different[130] Childhood experiences of trauma, abuse and physical violence, especially at the hands of family, are hallmark mitigators, which humanize the defendant and present a full picture to the jury.[131] It is exactly the sort of "troubled history we have declared relevant to assessing a defendant's moral culpability."[132]

As in *Wiggins* and *Wright*, this case involves a complete lack of investigation, knowledge, presentation, and strategy regarding the readily available mitigating evidence. A consideration of all the evidence in its totality inexorably leads to the conclusion that there can be no confidence in the outcome of the proceeding. As such, Mr. Sykes respectfully seeks a finding of prejudice and a remand for a new penalty hearing.

[130] *Strickland*, 466 U.S. at 694.

[131] In addition to these hallmark mitigators, the postconviction case established all the mitigating evidence listed by the trial court in its opinion. *Sykes*, 2014 WL 619503, at *25.

[132] *Porter v. McCollum*, 130 S. Ct 447, 449(2009) (quoting *Wiggins*, 535 U.S. at 539).

II. THE SUPERIOR COURT ERRED IN FINDING THAT MR. SYKES' SIXTH AMENDMENT CLAIM REGARDING THE TRIAL COURT'S IMPROPER COMMENT WAS PREVIOUSLY ADJUDICATED.

QUESTION PRESENTED

Whether the Superior Court erred in its finding that Mr. Sykes' claim regarding trial and appellate counsel's failure to argue that the Court had violated Mr. Sykes' right to a fair trial by an impartial jury was formerly adjudicated, and thus barred from consideration?[133] Mr. Sykes preserved this issue through an Amended Motion for Postconviction Relief,[134] evidentiary hearing, and a post-hearing briefing.[135]

STANDARD AND SCOPE OF REVIEW

Questions of law and constitutional issues are reviewed de novo.[136] This Court reviews for abuse of discretion the Superior Court's decision on an application for postconviction relief.[137]

MERITS

Prior to closing arguments in the guilt phase, the Court described to the jury how it would proceed. The trial court concluded its presentation by improperly

[133] *Sykes*, 2014 WL 619503, at *21
[134] A94.
[135] A370.
[136] *E.I. DuPont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).
[137] *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010).

instructing the jury that Mr. Sykes may or may not decide to allocute.[138] Trial counsel failed to object.

The State closed, which the trial court followed by excusing the jury and acknowledging that it had made an error.[139] The State agreed.[140] Trial counsel moved for a mistrial.[141]

A. Mr. Sykes' Claim that the Trial Court's Improper Commented Violated his Right to a Fair Trial by an Impartial Jury was not Previously Adjudicated.

Everyone erroneously focused on Mr. Sykes' Fifth Amendment right to remain silent. Trial counsel never argued that the trial court's improper comment infringed on Mr. Sykes' Sixth Amendment right to a fair trial by an impartial jury. Contrary to the trial court's belief,[142] Fifth Amendment and Sixth Amendment protections are not one in the same, as they provide very different yet equally important rights. This Court denied Mr. Sykes' claim on direct appeal that the

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[138] A3951-3952. "You may also be hearing from the defendant is he chooses to do what we call an allocution. It's entirely up to the defendant, and you may hear about that as we proceed."

[139] A4156. "I think I got a little ahead of myself. I realized after I said it that allocution doesn't take place until the penalty phase. I just got ahead of myself. I'll admit that. And judges should admit mistakes and we make them, so I made a mistake." Although the Court acknowledged that it realized it had improperly instructed the jury regarding Mr. Sykes' right to allocute after making the comment, the State was permitted to proceed with its closing argument.

[140] A4156.

[141] A4160. The trial court denied the motion despite noting that "it would be reversible error if I don't correct the record right now." *Id*. at 76-77.

[142] *See Sykes*, 2014 WL 619503, at *21-22 ("Petitioner is simply attempting to refine and restate his first claim on direct appeal in the context of different constitutional rights."). Indeed, the trial court and the State's failure to appreciate the nature of this claim is evidenced by the State's objection to questioning by postconviction counsel during Mr. Sykes' evidentiary hearing and the trial court's subsequent decision to sustain the objection. *See* A663-A675.

Superior Court violated Mr. Sykes' Fifth Amendment right to remain silent.[143] This Court never analyzed whether the Superior Court's comment tainted Mr. Sykes' jury. Consequently, this claim is not barred by Superior Court Criminal Rule 61(i)(4).

Rather than grant a mistrial, the trial court adopted the State's unsupported position that "nine out of ten [jurors] don't know what 'allocute' means."[144] By that logic, at least one juror *would* know the meaning, and could have conveyed it to the jury. The trial court's comment demonstrates that it failed to consider the possibility that even one juror understood the meaning of "allocute."

The next morning, as the jury deliberated, the State - not trial counsel - expressed concerns that the trial court's curative instruction was insufficient. The State maintained that "it does kind of go to a central issue, which is the defendant's right not to testify."[145] The State continued, "our concern is that although the Court's curative instruction was crafted to try to cure any error, and I think it did address the ultimate issue, we didn't – the part about the defendant not even having the opportunity to speak during closing was not included."[146] The State then

[143] *Sykes v. State*, 953 A.2d 261, 269 (Del. 2008).
[144] A4160.
[145] A4098.
[146] A4099-4100.

requested a second curative instruction and trial counsel reiterated that the error necessitated a mistrial.[147]

The trial court denied trial counsel's application and decided to issue a second curative instruction. In other words, everyone agreed that the initial instruction was deficient. Despite the trial court's desire to avoid the word "allocute,"[148] ironically, just three days earlier, the it commented during the prayer conference that "we have some wordsmiths on the jury…."[149]

In the midst of preparing the instruction,[150] the jury reached a verdict.[151] The trial court commented, "I'm not sure – if they've got a verdict, I don't think you can tell them not to have a verdict and then give them a supplemental instruction. I don't see how you can do that."[152]

B. Mr. Sykes has a Right to a Fair Trial before an Impartial Jury.

The right to a fair trial before an impartial jury is a bedrock of the American criminal justice system,[153] guaranteed by the Sixth Amendment to the United

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[147] A4100-4101.

[148] A4103. The trial court's comment on the jury's knowledge of the meaning of allocution fails to consider that the trial court, in using the word allocute, stated that the jury "may be hearing from the defendant…."

[149] A3979.

[150] The Court stated, "I'll get these typed up and we'll be ready to go." A4113.

[151] A4114.

[152] *Id.*

[153] *See Flonnory v. State*, 778 A.2d 1044, 1051 (Del. 2001).

States Constitution,[154] and Article I, § 7 of the Delaware Constitution.[155] Jury impartiality is essential to the proper functioning of a jury.[156] Indeed, "if only one juror is improperly influenced, a defendant in a criminal case is denied his Sixth Amendment right to an impartial jury."[157] In the interest of fairness, and the overall integrity of the judicial process, maintaining jury impartiality is of the utmost importance.[158] Moreover, "jury bias, either actual or apparent, undermines society's confidence in the judicial system."[159]

The Delaware Constitution also forbids the court from making comments that evince his preference for one side or the other, or commenting on the evidence.[160] A jury must base its verdict on the evidence presented at trial, and nothing more.[161] In *Smith v. State*, this Court reversed a conviction on the premise that the trial court had improperly commented on post-conviction clemency when

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[154] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury …."

[155] "In all criminal prosecutions, the accused hath a right to … a speedy and public trial by an impartial jury …."

[156] *Schwan v. State*, 65 A.3d 582, 587 (Del. 2013) (citing *Knox v. State*, 29 A.3d 217, 223-24 (Del. 2011) and *Banther v. State*, 823 A.2d 467, 481 (Del. 2003)).

[157] *Schwan*, 65 A.3d at 587-88 (citing *Hall v. State*, 12 A.3d 1123, 1127 (Del. 2010)(quoting *Styler v. State*, 417 A.2d 948, 951-52 (Del. 1980)).

[158] *Schwan*, 65 A.3d at 588 (citing *Knox*, 29 A.3d at 223).

[159] *Id*. (quoting *Banther*, 823 A.2d at 481). "So delicate are the balances in weighing justice that what might seem trivial under some circumstances would turn the scales to its perversion. Not only the evil, in such cases, but the appearances of evil, if possible, should be avoided." *Jackson v. State*, 374 A.2d 1, 2-3 (quoting *George F. Craig & Co. v. Pierson Lumber Co.*, 53 So. 8023, 805 (1910)).

[160] Del. Const. art. IV, § 19.

[161] *Flonnory*, 778 A.2d at 1052.

answering questions posed by jurors during deliberations.[162] The *Smith* court noted that any comment by the trial court "relates them to the case at hand and draws the jury's attention away from performance of its proper task."[163]

Judges are also prohibited from speculating about the mental processes of jurors.[164]

With respect to crafting appropriate jury instructions, judges are given wide latitude;[165] however, a defendant has the "unqualified right to a correct statement of the substance of the law."[166]

C. Trial Counsel Failed to Argue that the Court's Improper Comment on Allocution Violated Mr. Sykes' Right to a Fair Trial by an Impartial Jury.

Trial counsel deficiently argued that Mr. Sykes' Fifth Amendment rights were affected by the trial court's improper comment on allocution. As a result, the trial court never considered the possibility that its comment influenced one juror. Even if the Court were to assume that 9 out of 10 jurors don't know what allocute

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[162] *Smith v. State*, 317 A.2d 20, 24-26 (Del. 1974).

[163] *Id*. at 25.

[164] D.R.E. 606(b); *see also Massey v State*, 541 A.2d 1254, 1257-59 (Del. 1988)(adopting a presumption of prejudice analysis to maintain the sanctity of jury deliberations).

[165] *Chambers v. State*, 930 A.2d 904, 910 (Del. 2007) (other citation omitted).

[166] *Flamer v. State*, 490 A.2d 104, 128 (Del. 1984) (other citation omitted).

means,[167] it still leaves the possibility that one juror did, and that alone denied Mr. Sykes his fundamental right to a fair trial by an impartial jury.[168]

The trial court's curative instruction was deficient. It did not adequately cure the Sixth Amendment issue, which is evidenced by the trial court's decision to prepare to issue a second, revised instruction. A misinformed jury operating under the impression that it might be hearing from Mr. Sykes, depending on what he decides, then realizing that he chose to remain silent cannot be deemed fair and impartial. Indeed, it is likely that the trial court's comment drew the jury's attention away from their task at hand and focused it on Mr. Sykes' decision not to allocute, or speak in general during closing arguments, something he was not permitted to do.

Trial counsel's failure to raise this argument also meant that the trial court never considered that one juror might know what the word allocute means. All it would take is one juror to understand the word and define it to the others during deliberations. By informing the jury that Mr. Sykes had the right to allocute – before the jury convicted him of any crime – the trial court conveyed its belief that Mr. Sykes was guilty. This is the definition of denying Mr. Sykes' right to a fair trial by an impartial jury.

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[167] Again, this is unlikely given the context in which the Court used the word and its reference to Mr. Sykes decision to address the jury.

[168] *Schwan*, 65 A.3d at 587-88 (citing *Hall v. State*, 12 A.3d 1123, 1127 (Del. 2010)(quoting *Styler v. State*, 417 A.2d 948, 951-52 (Del. 1980)).

Further, D.R.E. 606(b) forbids inquiring into the mental processes of jurors, and the trial court's comment, not subject to confrontation, gave rise to a presumption of jury prejudice. The presumption arises through the trial court's improper comment on the evidence, which acted to inject its own opinion as to Mr. Sykes' guilt into the trial, which is impermissible.[169] The trial court's conjectural comment that most jurors do not know what the term "allocute" means constitutes impermissible speculation into the mental processes of the jury.

The foregoing failures by trial counsel deprived Mr. Sykes of a fair trial by an impartial jury.

D. Trial Counsel's Failure Prejudiced Mr. Sykes.

Trial counsel's failure to argue that the trial court's improper comment tainted Mr. Sykes' right to a fair trial by an impartial jury demonstrates trial counsel's lack of competence, and ultimately, the prejudice Mr. Sykes suffered. Had trial counsel raised the argument, with the understanding that if even one juror was influenced by the Court's comment it violated Mr. Sykes' Sixth Amendment right to an impartial jury, there is a reasonable probability that the outcome of Mr. Sykes' case would have been different. There is no confidence in the jury's decision given trial counsel's preceding deficiencies. The prejudice Mr. Sykes

[169] Del. Const. art. IV, § 19 forbids the Court from commenting on the evidence to the jury. Indeed, the judge is required to "avoid any language or any conduct which would lead the jury to suspect that the judge is favorable to one party to the trial." *Wright v. State*, 405 A.2d 685, 689 (Del. 1979) (other citation omitted).

suffered as a direct result of trial counsel's deficient performance mandates reversing his conviction and granting him a new trial before an impartial jury.

E. Appellate Counsel was Equally Deficient and Prejudiced Mr. Sykes When it Failed to Raise Meritorious Issues on Appeal.

Trial counsel agreed during his evidentiary hearing testimony that the trial court's comment violated the Delaware Constitution and the Sixth Amendment's right to a fair trial by an impartial jury.[170] It also left the jury to deliberate with an inaccurate statement of law that prejudiced Mr. Sykes. Notwithstanding the foregoing, trial counsel failed to raise these arguments on direct appeal. Because the arguments raised in this claim are separate and distinct from the Fifth Amendment claim, the Delaware Supreme Court never evaluated these arguments on appeal.

The aftermath of trial counsel's errors calls into question the reliability of the jury's verdict in light of the likely prejudicial effect the comment had on the jury's deliberations. The Court's insufficient jury instructions also cast doubt over the integrity of the entire process. It cannot be ignored that the Court felt the need to issue a second jury instruction given the concerns raised by the State, yet the Court allowed the jury to deliver its verdict in the interim.

[170] A664. Trial counsel also agreed that the trial court's curative instruction did not cure the prejudice suffered by Mr. Sykes.

Counsel's total lack of advocacy on appeal in this area constitutes a deficient performance, as there is no tactical or strategic reason for not advancing these claims. There is a reasonable probability that but for counsel's failure to raise these claims, the outcome of Mr. Sykes' appeal would have been different.

F. A Jury Cannot be Constitutionally Fair and Impartial if it Reaches its Verdict While the Trial Court is Fashioning an Instruction to Cure its Improper Comment.

The facts and circumstances surrounding the Court's instruction are discussed above. It shows that the jury deliberated with an inadequate instruction. Even the State expressed its concern, ultimately requesting a second instruction. Consequently, the verdict reached in Mr. Sykes' trial does not comport with Mr. Sykes' right to have his jury properly instructed on the law. Trial counsel failed Mr. Sykes again in this respect. Without a proper instruction, Mr. Sykes was denied his Sixth Amendment right to a fair trial.

G. A Jury Cannot be Constitutionally Fair and Impartial if it Reaches its Verdict While the Trial Court is Fashioning a D.R.E. 609 Instruction.

As the jury deliberated, the parties and the trial court were also in the midst of crafting a D.R.E. 609 instruction related to St. Jean. However, the jury never heard this instruction because it returned its verdict.[171] Trial counsel also never argued this on appeal.

[171] A666.

III. THE SUPERIOR COURT ERRED WHEN IT DENIED MR. SYKES' CLAIM THAT COURT ERROR AND INEFFECTIVE ASSISTANCE OF COUNSEL PERMITTED A BIASED JUROR TO SERVE ON MR. SYKES' JURY.

QUESTION PRESENTED

Whether the Superior Court erred in its finding that Court error and ineffective assistance were not responsible for seating Juror Number 9?[172] Mr. Sykes preserved this issue through his Amended Motion for Postconviction Relief,[173] an evidentiary hearing, and a post-hearing brief.[174]

STANDARD AND SCOPE OF REVIEW

Questions of law and constitutional issues are reviewed de novo.[175] This Court reviews for abuse of discretion the Superior Court's decision on an application for postconviction relief.[176]

MERITS

The right to a fair trial by an impartial jury is well-settled and discussed thoroughly in claim II. Juror bias may be actual or presumed. Actual bias is demonstrated when a "juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and

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[172] *State v. Sykes*, 2014 WL 619503, at *34 (Del.).

[173] A179.

[174] A422.

[175] *E.I. DuPont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985); *Outten v. State*, 720 A.2d 547, 551 (Del. 1998).

[176] *Zebroski*, 12 A.3d at 1119.

oath."[177] If the court establishes that a juror can set his or her beliefs or experiences aside, due process is satisfied.[178]

Where, however, a juror has a close relationship with a participant or the issues in the trial, a conclusive presumption of implied bias exists.[179]

Voir dire is employed to identify bias in prospective jurors.[180] It provides "sufficient information to decide whether prospective jurors can render an impartial verdict based on the evidence developed at trial in accordance with the applicable law."[181] Juror challenges safeguard the right to a fair trial by an impartial jury. That right is compromised by a juror's failure to disclose relevant and material information during *voir dire*.[182]

The trial erroneously permitted Juror Number 9 to remain on the jury despite actual and presumed biases. Further, trial counsel were ineffective for failing to *voir dire* Juror Number 9 and objecting when the Court failed to dismiss her. Appellate counsel's performance was also ineffective because they failed to raise and litigate these claims on direct appeal.

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[177] *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

[178] *Adams v. Texas*, 448 U.S. 38, 45 (1980).

[179] *Smith v. Phillips*, 455 U.S. 209, 222 (1982).

[180] *Banther v. State*, 823 A.2d 467, 481-482 (Del. 2003) (citing *Diaz v. State*, 743 A.2d 1166, 1172 (Del. 1999)).

[181] *Hughes v. AH Robins Co., Inc.*, 490 A.2d 1140, 1141 (D.C. 1985) (citing *Parson v. State*, 275 A.2d 777, 780 (Del. 1971)).

[182] *Jackson v. State*, 374 A.2d 1, 2 (Del. 1977).

A. Juror Number 9's Misrepresentations to the Court Regarding her Relationship with Jenny St. Jean.

After the trial began, Jenny St. Jean disclosed to the Court that she knew Juror Number 9, Katrina Bordley. During *voir dire*, Bordley represented that she did not know any of the witnesses in the case.[183] Bordley stated that she did not know St. Jean, but then changed her story and told the Court that she may have seen St. Jean on a prior occasion.[184] She added that St. Jean might have gone to school with her sister, Kimberly.[185] The trial court asked no more questions.[186] It did, however, allow St. Jean to speak on the record for a limited inquiry.[187]

St. Jean provided specific, detailed facts about Bordley that she would not have known if she did not know her well. For example, Bordley told said that she was 28 and her sister was 32; St. Jean reported the same information.[188] Next, St. Jean disclosed that she had known Bordley since she was a little girl, and that she had attended school with her sister, Kimberly.[189] St. Jean also noted that she knew Bordley's mother and ex-boyfriend, Dallas Drummond. St. Jean described

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[183] A3970-3971.
[184] A3978.
[185] A4152.
[186] *Id.*
[187] A4153.
[188] A2404.
[189] A2403.

working at a hospital with Bordley's mother, sister, and the sister's husband.[190] St. Jean even visited Bordley's home, and held her son as an infant.[191]

The State, rather than trial counsel, objected to keeping Ms. Bordley on the jury, pointing out that St. Jean provided specific details matching Ms. Bordley's statements.[192] The Court declined to strike Ms. Bordley, stating that she had been forthright and that "her body language indicate[d] that she was telling the truth."[193] The Court made this finding despite the fact that Bordley had lied regarding her prior juror service.[194] As a result, Bordley remained on the jury for the remainder of the guilt phase when she should have been dismissed.[195]

B. The Court Erred in Failing to Dismiss Bordley.

Bordley should have been dismissed as soon as St. Jean disclosed that she knew her. Bias is presumed in this scenario because Bordley had previous interactions with St. Jean that she failed to disclose to the Court. Further, Bordley's sister had a relationship with St. Jean, which presumes bias. During *voir dire*, the trial court specifically asked if anyone knew any of the witnesses.

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[190] A2406-2407.

[191] *Id*. St. Jean testified in more detail about her relationship with Bordley during the evidentiary hearing. A1087-1088. Dallas Drummond also testified during the evidentiary hearing, and established that St. Jean and Bordley knew each other. A1695-1697.

[192] A2421, A2424.

[193] A2424.

[194] A3710. Bordley indicated on her juror questionnaire that she had previously served on a jury; however, when asked by the Court about prior service, she stated she had not served.

[195] The Court later dismissed Bordley after the jury rendered a verdict, but prior to the penalty phase, after she had contact with St. Jean at a Little League game. *See* A1890-A1896.

Bordley remained silent. It was not until St. Jean spoke up that this issue came to light. Bordley's failure to disclose this information raises questions as to her motivations for answering the trial court's questions as she did.

Nevertheless, the trial court failed to dismiss Bordley and allowed her to participate in the guilt phase deliberations in violation of Mr. Sykes' Sixth Amendment and Article I, § 7 right to fair trial by an impartial jury.

C. Trial Counsel Were Ineffective.

Trial counsel downplayed Bordley's jury service instead of objecting.[196] Where, as here, the issue involved a juror's bias in a capital trial, trial counsel had no reasonable strategic basis for failing to object to Bordley remaining on the jury. The result of trial counsel's failure to remove Bordley from this jury caused constitutional prejudice to Mr. Sykes. As such, trial counsel's ineffectiveness violated Mr. Sykes' Sixth, Eighth, and Fourteenth Amendment rights to the effective assistance of counsel.

D. The Superior Court Erroneously found that Bordley was not a Biased Juror based on her "Casual Acquaintance" with St. Jean.

During the evidentiary hearing, St. Jean reiterated that she knew Bordley well, providing the same facts that she provided in 2006.

Dallas Drummond also testified during the evidentiary hearing and cast doubt on Bordley's assertions that she did not know St. Jean. Drummond's

[196] A2412-2413.

testimony casts Bordley's comments in a different light and calls into question her motives.

The trial court downplayed the significance of the relationship between Bordley and St. Jean.[197] But it is undisputed that the State's key witness in this capital case was at the very least, a "casual acquaintance" of a juror who found Mr. Sykes guilty. This demonstrates that Bordley's continued service denied Mr. Sykes an impartial jury, and trial counsel were ineffective for failing to protect this right.

E. Trial Counsel Did Not Strike Bordley, Who Was a Rape Victim.

Jury *voir dire* revealed that Bordley was a rape victim. When asked if she had ever witnessed a violent crime, Bordley responded, "I mean, I was part of it. I was raped back in '96."[198] Her rapist had been convicted, sentenced, and eventually released.[199] Bordley thought the process produced a fair result, and she bore no ill will towards the criminal justice system.[200]

Trial counsel aptly stated, "I find it almost hard to believe from my lay standpoint that after going through what she went through with her own rape case, that she would be impartial."[201] The trial court questioned her about her ability to

[197] *Sykes*, 2014 WL 619503, at *34.
[198] A3723.
[199] *Id*.
[200] *Id*.
[201] A3730-3731.

remain impartial, which she confirmed.[202] Notwithstanding trial counsel's earlier comment, Bordley was no struck for cause and a rape victim was seated on a capital jury hearing a rape and murder case.[203]

F. Trial Counsel Was Ineffective When it Failed to Strike Bordley.

Trial counsel's failure to remove a rape victim from a rape-murder trial constitutes ineffective assistance. Trial counsel offered no reasonable strategy in failing to move for Bordley's dismissal. To the contrary, Mr. Donovan stated that seating a rape victim on a jury in a rape trial does not seem like a good idea and he was "shocked" that they did not challenge her.[204]

Mr. Sykes also suffered constitutional prejudice as a result of trial counsel's error. There is a reasonable probability that, but for trial counsel's error, Ms. Bordley would have been excluded as a juror.

G. Bordley was not Fair and Impartial.

The Court found Mr. Sykes' claim meritless because Ms. Bordley was "forthcoming" about her status as a rape victim and had informed the Court that she could remain fair and impartial. Bordley was raped. To say that her experience did not rise to the level of trauma necessary to exclude her from serving

[202] A3732-3733.
[203] A3734.
[204] A1188; A1686.

as a juror in a similar case, especially in a death penalty case, is error.[205] It was far too dangerous to seat Bordley in a death penalty case as it is highly unlikely that she could actually remain impartial. There is no telling what she shared with her fellow jurors regarding her own traumatic experience in light of the evidence presented in this case.

H. Appellate Counsel's Failure to Argue that the Superior Court Should Have Excluded Bordley on Appeal Constitutes Ineffective Assistance of Counsel.

Appellate counsel did not raise the above-described claims on direct appeal. Appellate counsel's failure to do so constitutes ineffective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments. Mr. Donovan testified that there were no reasons why he did not pursue the issue on appeal.[206] As a result, Mr. Sykes suffered prejudice, as there is a reasonable probability that the outcome of the appeal would have been different had appellate counsel raised these claims.

[205] *See Banther*, 823 A.2d at 481.
[206] A703.

IV. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RETAIN A FORENSIC PATHOLOGY EXPERT; THIS FAILURE PREJUDICED MR. SYKES IN THE TRIAL AND ON APPEAL.

QUESTION PRESENTED

Whether the Superior Court erred by finding that appellate counsel was not ineffective for failing to retain a forensic pathology expert?[207] Mr. Sykes preserved this issue through his Amended Motion for Postconviction Relief,[208] the evidentiary hearing, and a post-hearing brief.[209]

STANDARD AND SCOPE OF REVIEW

Questions of law and constitutional issues are reviewed de novo.[210] This Court reviews for abuse of discretion the Superior Court's decision on an application for postconviction relief.

MERITS

A. The State Failed to Prove Burglary, Rape, and Kidnapping Beyond a Reasonable Doubt.

The due process clauses of the United States Constitution and the Delaware Constitution prohibit the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt.[211] In determining the sufficiency of the evidence,

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[207] *Sykes*, 2014 WL 619503, at *35.

[208] A67, A188.

[209] A352, A431.

[210] *E.I. DuPont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985); *Outten v. State*, 720 A.2d 547, 551 (Del. 1998).

[211] *Jackson v. Virginia*, 443, U.S. 307, 309 (1979); *In re Winship*, 397 U.S. 358 (1970).

a court must consider "whether, after viewing the evidence in the light most favorable to the [State], any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt."[212]

To prove Rape First Degree, the State must prove, among other things, that the victim did not consent to sexual intercourse.[213] The State failed to meet its burden. The State's failure was directly related to a lack of evidence. Dr. Vershvovsky established that although Ms. Trimnell had engaged in sexual intercourse, it was not necessarily a byproduct of a sexual assault.[214] The State also did not present any testimony regarding the timing of any sexual intercourse in conjunction with Ms. Trimnell's injuries.[215] Indeed, according to Dr. Jonathan Arden, that determination was not possible from the medical evidence.[216]

There also was no testimony about whether biological material was found under Ms. Trimnell's fingernails, consistent with someone fighting off their attacker.

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[212] *Jackson*, 443 U.S. at 317; *Lively v. State*, 427 A.2d 882 (Del. 1981).

[213] 11 *Del. C.* § 733. "Without consent" is further defined under 11 *Del. C.* § 761(j).

[214] In fact, Dr. Vershovsky testified that she would not be able to opine whether a sexual offense was committed. *See* A3304-3305. She also testified that Ms. Trimnell's vaginal area did not exhibit "lacerations, [and] there was no bruising." A3952-3953.

[215] The State presented evidence that semen belonging to Mr. Sykes was located inside of Ms. Trimnell's vagina and that "reddening" of her vagina showed sexual activity. Neither demonstrates lack of consent. This evidence simply shows that sexual intercourse took place.

[216] A1445 at 33. This finding underscored the need for trial counsel to hire an independent forensic pathologist to review Dr. Vershovsky's findings.

Moreover, tying Ms. Trimnell in pantyhose did not prove lack of consent. Dr. Vershvovsky testified that Ms. Trimnell was tied up loosely with one hand free.[217] Dr. Arden testified that this occurred after her death for purposes of transporting the body.[218] Tying her legs and one hand together[219] would hinder, rather than facilitate, sexual intercourse. The knots were not tight,[220] and Ms. Trimnell had "absolutely no marks whatsoever on her body or under her skin where there could be bruising from binding by a ligature."[221]

Further, the State's failure to prove the timing of the injuries in relation to sexual intercourse meant that it did not prove, as alleged in Count 3, that Mr. Sykes "cause[d] physical injury" to Ms. Trimnell "during the commission of the crime, during the immediate flight following the commission of the crime, or during the attempt to prevent the report of the crime."[222]

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[217] A3303-A3304.

[218] A1442 at 20 ("it is very clear to me from the review of the autopsy report and photographs that Ms. Trimnell was bound by the stockings after death.").

[219] *Id*. at 28. ("you can see on this picture that the body was . . . in a fetal position with both legs bent at the knees, and you can see pantyhose which tied both legs").

[220] Dr. Vershovsky testified that she was "simply … able to untie them."

[221] A1444 at 26. Dr. Arden's testimony could have served to rebut the State's case as to the underlying offenses, which served as statutory aggravators in Mr. Sykes' case. The Court itself seemed to understand this concept when the argument was made; however, it still denied Mr. Sykes' Motion for Judgment of Acquittal. *See id.* at 26 (noting that the injuries and restraints "may show lack of consent with respect to getting murdered, but it doesn't show lack of consent for some sort of sexual crime.").

[222] *See* 11 *Del. C.* § 773.

The State's failure to prove rape also means the State did not prove Burglary Second Degree. There was also no evidence presented that that Mr. Sykes unlawfully entered or remained in Ms. Trimnell's apartment. There was no sign of forced entry. As such, the State failed to meet its burden of proof.

Prior to the trial court's decision on trial counsel's motion for judgment of acquittal, the State improperly placed the burden of proof on Mr. Sykes multiple times.[223]

B. Trial counsel failed to challenge the medical evidence of homicide.

Ms. Trimnell died of ligature strangulation.[224] The State disclosed to Mr. Donovan that although there was some reddening in the vaginal area, that "might be indicative of sexual activity but which might have had other causes."[225] For some reason, Mr. Donovan took that statement to mean that Dr. Vershvovsky would opine that Ms.Trimnell was sexually assaulted. As he noted, "if that's a mistake, that's a pretty big mistake."[226] Mr. Tease, for his part, decided to pursue a theory he developed *during jury selection*: that Ms. Trimnell was alive when put in the

[223] *See, e.g.*, A3963 ("there's nothing to indicate that she consented to this intercourse"); A4145 ([t]here's really nothing to indicate there was any consent."); A4151 ("there is absolutely, absolutely no evidence to support the notion that Virginia Trimnell willingly had sex with Ambrose Sykes on that day or any other day.").

[224] A3392-3395.

[225] A2182.

[226] A642.

suitcase and suffocated to death.[227] He actually called Dr. Vershvovsky in the defense case and confronted her with an article he had found on the Internet about suffocation. She dismissed the article and the idea out of hand.[228]

The failure of defense counsel to hire either a consulting or testifying expert to save them from this sad folly is deficient performance causing prejudice to Mr. Sykes. Mr. Tease, who handled the doctor's testimony, called it "absolutely an error."[229]

Dr. Arden opined that there was no way that Ms. Trimnell was bound or put in the suitcase while alive, or else there would have been wounds at those sites.[230] Trial counsel could have then objected to the prosecutor's inflammatory arguments such as "having her bound and gagged certainly made raping her a lot easier."[231]

Dr. Arden opined the facts were rare for a strangulation case. The scarf was loose around the neck rather than pulled taut. The injuries indicate the victim was strangled from behind and by an upward pulling motion, a fact which negated intent.[232] Moreover, the "scalpene hemorrhages" that the State used to imply were inflicted by Mr. Sykes, were in fact very minor "bump on the head type injuries"

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[227] A1653-1654.

[228] A3389.

[229] A1678. Mr. Tease makes a similar statement in his Affidavit. A3269.

[230] A1439-A1443.

[231] A1442.

[232] A1441.

which may have occurred up to a full day prior to Ms. Trimnell's death.[233] Trial counsel was unaware of these issues because of its failure to retain an expert.

C. Trial and Appellate Counsel Were Ineffective.

As to the trial stage, the trial court erred when it held that trial counsel's decision not to hire and expert was reasonable because counsel thought it was not necessary.[234] Simply to rubber stamp counsel's decisions would eviscerate the right to collateral attack on postconviction The trial court's holding that a defense expert would have made no difference is at odds with the trial and postconviction record. With the assistance of an expert, counsel (and Mr. Sykes) would have been spared the many serious mistakes counsel committed. Mr. Sykes suffered prejudice because trial counsel's grievous errors left the jury without crucial evidence with which to consider Mr. Sykes' culpability.

A defendant whose lawyer does not provide him with effective assistance on direct appeal and who is prejudiced by the deprivation is entitled to a new appeal.[235] Trial counsel acknowledged that the failure to raise the meritorious appeal issue of insufficient evidence of nonconsent was a "mistake."[236] Nor did counsel raise on direct appeal the unfairly prejudicial impact these convictions had

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[233] A1444-1445.

[234] *Sykes* at *19.

[235] *E.g., Barry v. Brower*, 864 F.2d 294, 300 - 01 (3d Cir.1988); *Matire v. Wainwright*, 811 F.2d 1430, 1439 (11th Cir.1987).

[236] A567-568.

on the sentencing phase of Mr. Sykes' trial. Their stewardship of the appeal was deficient.

Mr. Sykes suffered prejudice, both with regard to his convictions for the crimes of rape, burglary, and kidnapping for which there was insufficient evidence, and with regard to his death sentence. If there had been no rape, kidnapping and burglary convictions, it would have negated the sole aggravating factor the jury found: that the murder was committed in the course of a burglary. It also would have affected the trial court's sentencing analysis, which was based in part on a finding that the defendant did not know the victim and "he selected her at random for the purpose of committing the crimes of rape, burglary and murder" and that "[t]he actions of the defendant were heartless, depraved, cruel and inhuman."[237]

The trial court erred in denying this claim. First, it mistakenly stated, "despite the heading for this claim, Petitioner only addresses the rape charge in his briefs."[238] Mr. Sykes raised the same arguments in his post-hearing brief that he raises here. The burglary and kidnapping charges depend upon the rape charge, and the State failed to meet its burden of proof for each. Yet the trial court adopted the State's argument at trial that the injuries and binding of the victim demonstrate a lack of consent.[239]

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[237] A4134-4135.

[238] *State v. Sykes*, 2014 WL 619503, at *36.

[239] *Id*.

As such, the trial court completely ignored Dr. Arden's clear testimony that the victim was bound *after* she was killed. Moreover, the trial court ignored its *own* prior acknowledgement that while the injuries may demonstrate a lack of consent to murder, they do not in any way demonstrate a lack of consent to any sexual crime. Had trial counsel raised these issues on appeal, there is a reasonable probability that the outcome would have been different. As such, the reliability of Mr. Sykes' conviction is undermined. Based on the foregoing, Mr. Sykes is entitled to a new trial.

V. THE SUPERIOR COURT ERRED BY FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE THAT MR. SYKES' KIDNAPPING CONVICTION WAS INCIDENT TO, AND NOT INDEPENDENT OF, THE EVIDENCE ALLEGED TO SUPPORT MR. SYKES RAPE CONVICTIONS.

QUESTION PRESENTED

Whether the Superior Court's finding that trial counsel was not ineffective for failing to argue that Mr. Sykes' kidnapping conviction was based on insufficient evidence?[240]

Mr. Sykes preserved this issue through his Amended Motion for Postconviction Relief,[241] the evidentiary hearing, and a post-hearing brief.[242]

STANDARD AND SCOPE OF REVIEW

Questions of law and constitutional issues are reviewed de novo.[243] This Court reviews for abuse of discretion the Superior Court's decision on an application for postconviction relief.[244]

MERITS

The State's required burden of proof, and the Court's review of claims of insufficient evidence are discussed above. In denying Mr. Sykes Amended Motion for Postconviction Relief, the Court held that the acts of tying Ms. Trimnell up in

[240] *Sykes*, 2014 WL 619503, at *36.
[241] A196.
[242] A441.
[243] *E.I. DuPont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).
[244] *Zebroski*, 12 A.3d at 1119.

pantyhose, placing her in a suitcase, and inserting her into the trunk of her car are "clearly independent from the physical injuries and other evidence …."[245] Under Delaware law,[246] and the trial judge's charge to the jury,[247] evidence of kidnapping must involve conduct that is not merely incident to, but independent of, the underlying offense.[248] The Court acknowledged as much when it stated, "[i]t is well settled that the restraint requirement must be independent of, and not merely incidental to an underlying offense."[249]

The Grand Jury indicted Mr. Sykes for kidnapping on the premise that he unlawfully restrained Ms. Trimnell with the intent to facilitate the commission of Rape First Degree.[250] Or as the State argued, "to make raping her easier."[251] The

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[245] *Sykes*, 2014 WL 619503, at *37.

[246] *e.g.*, *Burton v. State*, 426 A.2d 829 (Del. 1981); *Scott v. State*, 521 A.2d 235 (Del. 1987); *Weber v. State*, 547 A.2d 948, 957 – 959 (1988) (finding that "restraint," as defined by 11 *Del. C.* § 786(a), means to restrict another person's movement intentionally and in such a way as to "interfere substantially" with his liberty, and that "substantially" "means that there must be *'much more'* interference than is ordinarily incident to the underlying offense) (emphasis in the original); *Kornegay v. State*, 596 A.2d 481, 486 (Del. 1991) (directing entry of judgment of acquittal on kidnapping conviction because evidence did not support a finding that kidnapping was separate from underlying offense of attempted sexual intercourse in the first degree); *Cruz v. State*, 628 A.2d 83 (Del. 1993) (noting that when the defendant's purpose in restraining or moving the victim is to accomplish separate offenses, rather than just facilitating one continuous offense, the movement is sufficient to independently establish kidnapping).

[247] A4094-4095.

[248] *See, e.g.*, *Kornegay v. State*, 596 A.2d 481, 486 (Del. 1991) (directing an entry of judgment of acquittal on kidnapping conviction where evidence did not support a finding that kidnapping was separate from underlying offense of attempted sexual intercourse).

[249] *Sykes*, 2014 WL 619503, at *36.

[250] A2245-2248.

[251] A4014-4016.

Court, however, focused on an unindicted, and therefore uninstructed portion of the kidnapping statute in denying this claim. The Court held:

> Here, the victim's wrists were bound together by stockings, and her legs were tied together with pantyhose. The victim's body, while still bound, was placed inside a suitcase which was then inserted inside the trunk of the victim's own vehicle, which Petitioner was driving when he was originally stopped by Sergeant Mutter. This evidence is clearly independent from the physical injuries and other evidence discussed supra concerning Claim XIX and Petitioner's rape conviction. Specifically, the binding of the victim's legs and transporting her inside a suitcase inside the trunk of a vehicle constitutes "much more" interference with her liberty than would have been required for rape. Thus, this claim is without merit, and it was not ineffective assistance for counsel to not raise it on appeal. It is procedurally barred under Rule 61(i)(3), and is hereby denied.[252]

The Court failed to articulate how this evidence demonstrates Mr. Sykes' intent to facilitate the commission of Rape First Degree. If anything, it shows Mr. Sykes attempted to dispose of a dead body, which could have been charged as abuse of a corpse.[253] But these acts that allegedly took place *after* the rape have nothing to do with Mr. Sykes' intent to facilitate raping Ms. Trimnell. On the contrary, as discussed in the claim above, it would have restricted sexual intercourse. And in light of the fact that the jury was never instructed on the element of kidnapping the trial court now relies on to deny Mr. Sykes' claim, the trial court's finding is flat out wrong.

[252] *Sykes*, 2014 WL 619503, at *37.

[253] Interestingly, Mr. Sykes was initially charged with abuse of a corpse.

Moreover, the Court's reliance on these particular acts to deny Mr. Sykes' claim fail to take into account that Ms. Trimnell was not bound or moved to the suitcase, or trunk of the car, until she was deceased. As morbid as it sounds, it is physically impossible to kidnap a deceased person. To establish kidnapping, the State had to prove Mr. Sykes restrained Ms. Trimnell by restricting her movements "intentionally in such a manner to interfere substantially with [her] liberty."[254] If, as Dr.Arden testified, she was deceased at that time, it is not kidnapping.

The State used the same evidence it used to argue lack of consent regarding rape, *i.e.*, strangulation and tying Ms. Trimnell up with pantyhose, to argue that Mr. Sykes had kidnapped Ms. Trimnell.[255] There was insufficient evidence for a kidnapping conviction for this reason, which violates due process. The failure to show evidence of kidnapping that was independent of rape the underlying offense also violated the double jeopardy clause of the Fifth Amendment.[256]

Based on the foregoing, trial counsel were ineffective for not arguing for a judgment of acquittal on the kidnapping charge. There is no legitimate reason for failing to raise and argue that the State presented insufficient evidence to prove kidnapping. Mr. Sykes suffered constitutional prejudice because there was a

[254] 11 *Del. C.* § 786(c).

[255] A4016 ("having Virginia Trimnell bound and gagged certainly made raping her a lot easier for the defendant.").

[256] *Blockburger v. United States*, 284 U.S. 299 (1932).

reasonable probability that he would not have been convicted of kidnapping if counsel had argued for a judgment of acquittal on the basis outlined above.

Mr. Sykes was further prejudiced with regard to his death sentence. The Court mentioned the kidnapping conviction as part of its analysis as to why Mr. Sykes should receive a death sentence.[257] As such, Mr. Sykes is entitled to a new sentencing phase.

The Court erred when it denied this claim. The only evidence the trial court cites to support its finding is that Ms. Trimnell was bound and placed in a suitcase. As noted above, these restraints occurred *after* the victim was killed, and therefore do not serve as evidence of kidnapping. As a result, Mr. Sykes' conviction should not stand.

[257] A4133.

CONCLUSION

Based on the foregoing, as well as the cumulative effect of the errors described in this brief,[258] Appellant Ambrose L. Sykes respectfully requests that this Court grant him a new trial and any other relief the Court deems appropriate.

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Dated: June 6, 2014

[258] *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978)(cumulative prejudice of prosecutorial misconduct plus errors in jury instructions undermined fairness of trial, necessitating relief); *Berryman v. Morton*, 100 F.3d 1089 (3d. Cir. 1996)(cumulative effect of each instance of counsel's many "derelictions" was sufficient to warrant relief).