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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT[1]

I. THE STATE'S ATTEMPT TO BUTTRESS COUNSEL'S PENALTY PHASE PREPARATION AND PERFORMANCE FALLS SHORT; CONFIDENCE IN THE OUTCOME IS UNATTAINABLE.

The State failed to address or defend the trial court's errors of law, which undermine confidence in the outcome. The jury's unanimous vote for death is a meaningless data point in assessing prejudice, because the totality of the mitigating evidence would have caused a reasonable juror to vote for life. The evaluation by Dr. Much, to the extent one occurred, is unreliable at best given that trial counsel never produced or supplied any records to the evaluator. Although the aggravating evidence of the circumstances of the crime is powerful, so too are those of all capital murder cases; it is the failure of counsel to obtain any records or conduct a meaningful investigation that prejudiced Mr. Sykes in the penalty phase.

II. THE ALLOCUTION CLAIM SUBSTANTIVELY DIFFERS FROM THE CLAIM RAISED BY TRIAL COUNSEL ON DIRECT APPEAL AND THEREFORE CANNOT BE "PREVIOUSLY AJUDICATED."

Mr. Sykes' rights under the Fifth and Sixth Amendment are separate and distinct; to assert one does not require the waiver of the other. The State's assertion that trial counsel's failure to protect Mr. Sykes' Sixth Amendment rights is not a repackaging, but rather a wholly separate claim—one that trial and appellate counsel were ineffective for failing to present.

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[1] Two of five claims are presented in this Reply Brief, but Mr. Sykes disputes all the State's answering contentions and relies upon the arguments made in the Opening Brief.

I. THE STATE'S ATTEMPT TO BUTTRESS COUNSEL'S PENALTY PHASE PREPARATION AND PERFORMANCE FALLS SHORT; CONFIDENCE IN THE OUTCOME IS UNATTAINABLE.

A. The State's non-response concedes judicial error.

The State's failure to respond to the assertions of legal error in the Opening Brief is tantamount to a concession of error. It would indeed be difficult to conjure any justification for the trial court's rationale in any event. The court's complete misunderstanding of the role of mitigation, specifically that it has "to explain why someone would commit murder,"[2] undermines any confidence in the outcome of the penalty phase.[3] This Court and others have repeatedly held that mitigation is not yoked to the actual incident but rather is any evidence related to the character and moral culpability of the defendant.

Moreover, the trial court's holding that Mr. Tease did not perform unreasonably by failing to retain a mitigation specialist or obtain any records[4] ignores the law established by a legion of significant capital cases.[5] It is fundamental 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 mitigating factors."[6] Trial

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[2] *State v. Sykes,* 2014 WL 619503, at *27 (Del. Super.).

[3] Opening Brief ("OB") at 22-24.

[4] *Sykes,* 2014 WL 619503, at *27.

[5] OB at 24-25.

[6] *State v. Wright,* 653 A.2d 288, 299 (Del. Super. 1994).

counsel did not perform the most basic of tasks, rendering the trial judge's holding clearly erroneous.

Trial counsel's failure to obtain any records is all the more disturbing because, as he testified, he did not know that he was supposed to obtain records—it was not part of his training, as he put it.[7] Just this year, the United States Supreme Court held that such lack of knowledge is quintessential ineffectiveness. In *Hinton v. Alabama*,[8] an attorney hired an unqualified expert in the mistaken belief that there was a cap on funding and he could not pay for a qualified one. The Court held, "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."[9] Clearly, a capital defendant is prejudiced when his attorney is so unqualified that he does not know the basic requirements for handling such a case.

The State is also silent about the trial court's untenable attempt to shift the responsibility for competent performance from counsel to Mr. Sykes on the grounds that he was allegedly an "uncooperative client."[10] As the Opening Brief makes clear, counsel's duty is not diminished in a capital case simply because the

[7] A880, 882.
[8] *Hinton v. Alabama,* 134 S.Ct. 1081 (2014).
[9] *Id.* at 1089.
[10] *Sykes*, 2014 WL 619503, at *27.

client is perceived to be recalcitrant.[11] And a capital defendant faced with death can hardly be blamed for being wary when his lawyers did virtually nothing to build trust or rapport.

Ultimately, the State had its opportunity to explain or justify the court's legal errors and declined to do so. The errors stand unrebutted as fundamental misperceptions of the law that render the underlying decision unsustainable.

B. The jury's vote of 12-0 is a meaningless reference point given counsel's deficient performance.

The State champions the 12-0 vote as clear evidence of an aggravation landslide.[12] But it is a hollow argument. As discussed, counsel's performance was grossly deficient and resulted in a cursory presentation that consumes only 51 pages of transcript.[13] Witnesses were prepared hastily in the hallway or not at all. The defense established but a few of the 20-item list of mitigators filed the day before the penalty phase.[14] It is little wonder that the jury voted for death; given counsel's performance, any other result would have been shocking.[15]

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[11] OB at 25-26.

[12] *See, e.g.,* Answering Brief (AB) at 9, 16.

[13] A2042-2093.

[14] A2214-2215.

[15] The State also makes much of the fact that the Sentencing Opinion finds that certain mitigators were established. *See, e.g.,* AB at 15. But the mere fact that the court noted them says nothing about the weight that a reasonable juror should have given to them. Due to the paltry penalty phase presentation, a reasonable juror could justifiably give little weight to the list of mitigators noted by the judge.

Moreover, the penalty phase featured two arguments that likely left the jurors understandably unsympathetic. The first was based on Mr. Tease's decision to argue residual doubt to a jury that had just quickly convicted Mr. Sykes of all charges. The second was counsel's decision to pursue a theme of breaking a cycle between father and son, without ever describing the cycle or presenting the father or the son. To be sure, there was a rich vein of mitigation to be had regarding the father, Jesse Sykes—an abuser, drug addict, criminal, and sex offender—but counsel obtained no records and performed no investigation.

Last year's Dissenting Opinion in *Ploof v. State* noted that when there is significant postconviction mitigating evidence, the unanimous jury vote for death is irrelevant to the question of whether a reasonable juror could have voted for life given all available evidence.[16] The Dissent went on to note that in 13 cases in our state, the judge imposed life even though a majority or even supermajority of jurors voted for death.[17] Such is the case here. The unanimous vote by the jury is no guidepost for the potential vote by a fully informed jury; a reasonable probability exists that the calculus could tip in favor of life.

As the postconviction case demonstrated, a full and fair penalty phase would have given the jury the following mitigating evidence:

[16] *Ploof v. State,* 75 A.3d 840, 855 (Del. 2013)(dissent).
[17] *Id.* at 887.

- Health issues at birth and in childhood
- Parental Separation at an Early Age
- Early Childhood Exposure to Domestic Violence
- Early Childhood Exposure to Substance Abuse
- Extreme Economic Deprivation
- Dangerous community environment
- Malnourishment
- Brain damage
- Inconsistent Parenting by both mother and father
- Rejection of affection by both mother and father
- Abandonment by both mother and father
- Exposure to and impact of father's infidelity
- Physically and verbally abused as a child
- History of Early Emotional Problems
- Substance Abuse
- Multiple periods of fulltime employment
- Lack of consistent father figure / role model
- History of positively adjusting to prison environment
- Family history of substance abuse
- Family history of criminal behavior

- Lack of danger to others while incarcerated
- Forced participation in father's criminal activity
- Exposure to father's physical and sexual abuse of loved ones
- Role as a father
- Role as a brother and son
- Mercy[18]

The 12-0 vote is not remotely indicative of what a properly informed, reasonable juror would do given the totality of the evidence, and this Court should see the unanimous vote as the useless data point that it is.

C. Dr. Much's evaluation, to the extent there was one, is of little significance and does not turn deficient performance into effective performance.

The State's characterization of counsels' decision not to call Mandell Much, PsyD, as "wise" has no support in the record.[19] The evaluation, such as it was, was botched from the beginning, and was based on a review of zero records, rendering it meaningless.

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[18] A plea for mercy "is not unusual, nor is it improper." *State v. Wright*, 653 A.2d 288, 299 (Del. Super. 1994) (citing *Flamer v. State*, 585 A.2d 736, 757 (Del. 1990)). Trial counsel unreasonably failed to list mercy as an enumerated mitigating factor, inexcusably failed to argue mercy to the jury and unreasonably failed to present mitigating factors that would likely elicit a life recommendation. *See Franklin v. Lynaugh*, 487 U.S. 164, 190 (1988) (Stevens, J., dissenting) (noting that past conduct may shed light on defendant's character in a way that evokes a merciful response); *Gregg v. Georgia*, 428 U.S. 153, 199-203 (1976) (emphasizing the importance of the jury's ability to exercise mercy); *Deutscher v. Whitley*, 884 F.2d 1152, 1161 (9th Cir. 1989) ("The Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy.").

[19] AB at 14-15.

Dr. Much is a psychologist. Mr. Tease hired Dr. Much because he had heard from another lawyer that Dr. Much treats juveniles, but does not recall why that distinction would be relevant.[20] Nevertheless, Mr. Tease provided Dr. Much a copy of his file.[21] There was not much in the file because Mr. Tease did not obtain any records. The evaluation was rescheduled several times. On one such occasion, the prison did not establish proper conditions for an evaluation.[22] On another occasion, January 23, 2006, Mr. Sykes apparently did not cooperate because according to Mr. Tease, "one of the first questions from Dr. Much to Mr. Sykes was 'so tell me what you did' so naturally I would think that is going to cause huge problems with the evaluation going forward."[23] In any event, the evaluation did go forward, 8 days before jury selection, and Dr. Much apparently told Mr. Tease that a report would be of no value.[24] So Mr. Tease's decision not to call Dr. Much appears based on Dr. Much's advice, "and lack of time, probably, as well."[25]

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[20] AB at 14-15.

[21] A1605. The record reflects that Mr. Tease's letter informed Dr. Much that Mr. Sykes had been physically beaten. A2171. That letter does not square with Mr. Tease's statement in his sworn affidavit that "Mr. Sykes and his family denied any sexual or physical abuse as a child." A3269. Nevertheless, Mr. Tease did inform Dr. Much about the abuse by letter.

[22] A1609.

[23] *Id.* The prison visit log also reflects that trial counsel did not meet with Mr. Sykes prior to the evaluation. Nor is there a letter in the file to Mr. Sykes explaining who Dr. Much was and the nature of his visit.

[24] A1613.

[25] A1614.

Mr. Tease's testimony about Dr. Much was based on a foggy recollection (he called him "Dr. Mensch" in his affidavit), and he recalls Dr. Much telling him that he should not write a report. Ultimately, the evaluation was haphazard, last minute, and performed by a psychologist who was flying blind without any records review whatsoever. How Dr. Much could reach any diagnosis, let alone Antisocial Personality Disorder, without any records after a thrice-scheduled prison evaluation, invites a healthy skepticism. Regardless, there was nothing "wise" about trial counsel's performance regarding a true psychological or neuropsychological evaluation.

D. A heinous crime does not ipso facto *require a death sentence; otherwise there would be no reason to have a penalty phase.*

The State asserts that due to the aggravation evidence, "there was very little that could be presented in terms of mitigation that could change revulsion to begrudging understanding."[26] To be sure, the crimes of which Mr. Sykes was convicted are terrible.[27] But so are the facts of virtually all capital murders. The State's argument that mitigation does not even matter in the face of an egregious

[26] AB at 15-16.

[27] The State also makes much of the purported statement to St. Jean that he would have burned the body if he had a little more time. AB at 14, 16-17. This is hardly a new revelation. The shovel and gas cans were found in the car with Mr. Sykes and his fingerprints were present. The jury heard all that evidence in the guilt phase. What the State describes as a revelation is not new, and does not establish that Mr. Sykes' is guilty of the murder. Ironically, the State attempts to bolster the credibility of St. Jean when it comes to the statement she claims to have heard. Yet the State disparages her credibility when it comes to Claim III and her statements about Juror No. 9 being previously acquainted with her. AB at 36.

homicide, aside from being legally untenable, is also factually unsupportable in light of other murder cases. In the following sampling of cases, the death penalty was overturned because of prejudice—prejudice in the form of trial counsel's failure, as here, to obtain and present readily available mitigation evidence. In all the following cases, the defendant had his death sentence overturned because counsel was ineffective in their investigation and presentation of mitigating evidence:

In *Williams v. Taylor*,[28] the defendant brutally killed a man with a pickax during a robbery. His other criminal activity included setting fire a home, choking two inmates, and savagely beating an elderly woman into a "vegetative state."[29] The jury unanimously sentenced Williams to death and the trial judge concluded that such punishment was proper.[30]

The Court held that Williams was denied his constitutional right to effective assistance of counsel when his attorney failed to investigate and present substantial mitigating evidence during the sentencing phase of the capital murder trial.[31] The record established that counsel failed to prepare for sentencing until a week beforehand and failed to uncover extensive records graphically describing

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[28] *Williams v. Taylor*, 529 U.S. 362 (2000).

[29] *Id.*

[30] *Id.* at 370.

[31] *Id.*

Williams' nightmarish childhood.[32] The failure to present the mitigating evidence of William's childhood fell "below the range expected of reasonable, competent assistance of counsel" and did not measure up to the standard required under the *Strickland* holding.[33]

In *Wiggins v. Smith*,[34] the defendant drowned a 77-year-old woman in the bathtub of her own ransacked apartment.[35] The jury returned a death sentence and the Maryland Court of Appeals affirmed.[36] Wiggins sought postconviction relief challenging counsel's ineffectiveness of failing to investigate and present mitigating evidence of his dysfunctional background.[37] At the close of the postconviction proceedings, the judge observed from the bench that he could not remember a capital case in which counsel had not compiled a social history of the defendant, explaining, "[n]ot to do a social history, at least to see what you have got, to me is absolute error. I would just be flabbergasted if the Court of Appeals said anything else."[38] The trial court and court of appeals denied Wiggins' petition for postconviction relief, concluding that counsels' decision not to investigate

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[32] *Williams*, 529 U.S. at 370.
[33] *Id.* at 371.
[34] *Wiggins v. Smith*, 539 U.S. 510 (2003).
[35] *Id.* at 514.
[36] *Id.* at 515.
[37] *Id.* at 516.
[38] *Id.* at 517.

further was "a deliberate, tactical decision…"[39] The district court reversed, holding that since counsel were aware of some aspects of Wiggins' background, this knowledge triggered an obligation to look further.[40]

The United States Supreme Court held once again (applying the *Strickland* standard) that counsel's failure to uncover and present mitigating evidence at sentencing is not justified as a tactical decision and moreover, counsel did not "fulfill their obligation to conduct a thorough investigation into defendant's background."[41]

In *Jermyn v. Horn,*[42] the defendant savagely beat his mother in her bed and then set the bed on fire. The victim died from smoke inhalation.[43] Jermyn's counsel failed to investigate readily available mitigating evidence, including severe physical and psychological abuse. Jermyn's father often hung him by his heels as punishment, beat him with a cat-o-nine-tails, and chained him in the attic, forcing him to eat from a dog food bowl. Jermyn's mother did nothing to intervene.[44]

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[39] *Wiggins*, 539 U.S. at 518.

[40] *Id.* at 519.

[41] *Id.* at 522 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)).

[42] *Jermyn v. Horn*, 266 F.3d 257 (3d. Cir. 2001).

[43] *Id.* at 264.

[44] *Id.* at 308.

When Jermyn was 12 years old, his father handed him a pistol and said, "here Fred, blow your brains out."[45]

Jermyn's counsel began preparing for the penalty phase the night before it began.[46] It was his first capital case and he was "overwhelmed."[47] Counsel put a reverend on the stand who had little knowledge of Jermyn's childhood, and yet failed to call a close relative who was available tell the jury firsthand about incidents of abuse she had witnessed.[48]

The *Jermyn* court found that trial counsel's failure to present available evidence that he was abused and "terrorized" by his father prejudiced Jermyn to the extent that his death penalty was vacated.[49]

In *Porter v. McCollum*,[50] the defendant was angered that his ex-girlfriend would no longer see him. He followed her for two days, and on the third day, became intoxicated and went to the girlfriend's home and shot her dead. After a struggle with her new boyfriend, Porter shot him too.[51]

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[45] *Jermyn*, 266 F.3d at 271.
[46] *Id.* at 307.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 309.
[50] *Porter v. McCallum*, 558 U.S. 30 (2009).
[51] *Id.* at 31-32.

The only evidence put on by the defense in the penalty phase was his ex-wife, who testified that Porter loved his son.[52] What the jury never heard, but the postconviction court did, was that Porter was a heroic Korean War veteran who in two separate battles surely saved the lives of many of his regiment. He received two Purple Hearts and several other combat decorations.[53] Postconviction counsel also introduced evidence of Porter's mental limitations and brain damage.[54]

In reversing his death sentence, the Porter court held that the evidence the jury never heard "might well have influenced the jury's appraisal of [Porter's] moral culpability."[55]

Given the foregoing cases, what becomes clear is the crucial importance of a thorough and well-investigated penalty phase presentation, which can humanize even the most horrific of cases. The cases also illustrate that when, as here, trial counsel conducts a deficient investigation, constitutional prejudice results. In Mr. Sykes' case, counsel's failure to perform even basic investigative tasks left the jury and sentencer little choice but to focus on the crime and not Mr. Sykes' moral culpability. Only a new trial will cure this prejudice.

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[52] *Porter*, 558 U.S. at 32.

[53] *Id.* at 35.

[54] *Id.* at 36.

[55] *Id.* at 41.

II. THE ALLOCUTION CLAIM SUBSTANTIVELY DIFFERS FROM THE CLAIM RAISED BY TRIAL COUNSEL ON DIRECT APPEAL AND THEREFORE CANNOT BE "PREVIOUSLY AJUDICATED."

The State and the trial court have repeatedly mischaracterized Mr. Sykes' claim that the trial court violated his right to a fair trial by an impartial jury as a previously adjudicated claim. The State relies on this Court's denial of Mr. Sykes' claim on direct appeal that the trial court's reference to allocution in the guilt phase violated his Fifth Amendment right to remain silent.[56] The State's argument fails to consider a number of factors.

The rights guaranteed under the Bill of Rights are separate and distinct. Raising a Fifth Amendment claim does not waive a defendant's right to raise a separate and distinct claim under the Sixth Amendment, or any other amendment, at a later time. Indeed, the very construction of the two amendments at issue here establishes this right. The Fifth Amendment protects against, among other things, self-incrimination. The Sixth Amendment, on the other hand, provides a defendant with certain trial rights, including the right to a fair trial by an impartial jury. This Court focused its analysis on direct appeal solely on the claim presented to it – a violation of Mr. Sykes' Fifth Amendment Right to remain silent.

The State also argues that Mr. Sykes' is simply "repackaging" his previous Fifth Amendment claim and therefore it should be denied. Nothing about his claim

[56] AB 22; *Sykes v. State*, 953 A.2d 261, 269 (Del. 2008).

is repackaged. "Repackaging" occurs when post-conviction counsel raises the same claim under the guise of ineffective assistance of counsel. Here, Mr. Sykes' claim alleged that trial counsel was ineffective when it failed to argue that his rights were abridged under an entirely separate constitutional premise.

Trial counsel's failure to argue this point prevented the trial court (and this Court on appeal through no fault of its own) from considering the possibility that the allocution comment influenced even one juror, and therefore compromised Mr. Sykes' right to a fair trial by an impartial jury.[57]

[57] *Schwan v. State*, 65 A.3d 582, 587-88 (Del. 2013) (citing *Hall v. State*, 12 A.3d 1123, 1127 (Del. 2010)(quoting *Styler v. State*, 417 A.2d 948, 951-52 (Del. 1980)).

CONCLUSION

Based on the foregoing, as well as the arguments set forth in the Opening Brief, 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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