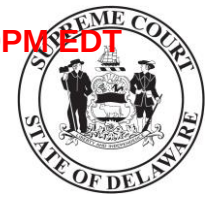
EFiled: May 13 2016 07:29PM EDT
Filing ID 59009394
Case Number 52,2016



IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 52, 2016
	)	
v.	)	
	)	
LUIS E. REYES,	)	
	)	
Plaintiff-Below,	)	
Appellee,	)	

STATE'S OPENING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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Dated: May 13, 2016

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NATURE AND STAGE OF THE PROCEEDINGS

In December 1999, a New Castle County grand jury indicted Luis Reyes and Luis Cabrera, Jr., charging them with two counts of first degree murder and related offenses in the execution style deaths of Vaughn Rowe and Brandon Saunders. DI 2 at A-1.[1] In October 2001, a Superior Court jury found Reyes guilty of all the charges against him and recommended by a vote of 9-3 that he be sentenced to death. DI 84, 86 at A-15. In March 2002, the trial judge sentenced Reyes to death. DI 103 at A-21. Reyes appealed. DI 110 at A-21. This Court affirmed Reyes' convictions and sentence on March 25, 2003.[2]

On March 19, 2004, Reyes filed a motion for postconviction relief. DI 181 at A-31. On November 5, 2004, Reyes filed a request for an evidentiary hearing. DI 196 at A33. On April 28, 2005, Reyes filed an amended motion for postconviction relief. DI 203 at A34. The State responded on November 18, 2005. DI 209 at A-35. On March 16, 2007, Reyes amended his motion for postconviction relief. DI 232 at A38. The State replied on September 17, 2007. DI 237 at A39. Superior Court heard Reyes' motion for a new death penalty hearing on March 31, 2008 and denied it that day. DI 245 at A40.

On September 10, 2008, Reyes filed a motion for an evidentiary hearing

[1] "DI" refers to Delaware Superior Court docket entries in *State v. Luis Reyes*, ID No. 9904019329.
[2] *Reyes v. State*, 819 A.2d 305 (Del. 2003).

which he amended on October 8, 2009. DI 248 at A40 & DI 255 at A42. Also on October 8, 2009, Reyes filed a motion to depose Roderick Sterling. DI 256 at A42. On October 13, 2009, Reyes filed a second amended motion for postconviction relief. DI 258 at A42. On January 8, 2010, the State responded to Reyes' motions for postconviction relief, deposition and evidentiary hearing. DI 261 at A42-43. Evidentiary hearings were initially scheduled the beginning January of 2012 but were continued by Superior Court until May 8, 2012. DI 263 at A43. Superior Court heard testimony on May 8-10, May 14-15 and August 27-29 in 2012 and April 1, 2013. DI 273-74, 279-80, 288-89, 317 at A45-46, 51. Testimony was provided by Jerome Capone, Esq. and Thomas Pedersen, Esq. (trial counsel), Dr. Jonathan Mack, James Aiken, Rebecca Reyes, Victor Reyes, Kathleen Covelli-Reyes, Deborah Diaz, Luz Diaz, Regina Elliot, Ruth Reyes, Damaris Reyes, Michael Reyes, Carl Kent, Paul Parets, Angel Rodriguez, George Lacsny, Daniel Diaz, Detective Edward Schiavi, Detective Vincent Clemmons and Natalie Woloshin, Esq.[3] On November 13, 2012, this Court denied Reyes' motion to depose Roderick Sterling and later denied Reyes' motion for reargument. DI 296, 313 at A48, 50. Counsel deposed Carlos Rodriguez in Florida on November 14, 2012, and took depositions of Dr. Dewey Cornell on August 2, 2012 and Dr.

[3] On November 2, 2012, the State filed a motion to remove defense counsel, Natalie Woloshin. DI 295 at A47. Reyes did not oppose. DI 299 at A48. The motion was granted and as of January 16, 2013, Albert J. Roop, was assigned to assist remaining counsel, Patrick Collins. DI 308 at A49.

Steven Samuel on April 24, 2013 at the New Castle County Courthouse, and Jerry Elliot on April 5, 2013 in Sussex County. DI 319 at A51. On April 30, 2014, Reyes filed his Brief Following Evidentiary Hearing. The State answered on October 7, 2014 and Reyes replied on November 10, 2014. DI 340, 342 at A-54.

On June 23, 2014, Superior Court requested supplemental briefing on a newly raised issue by the court of Reyes' Fifth Amendment rights at trial. DI 344 at A-54. Reyes filed his supplemental brief on the issue on August 24, 2015 and the State answered on November 5, 2015. DI 346, 348 at A-55. Reyes replied on November 23, 2015. DI 349 at A-55.

On January 27, 2016, Superior Court granted Reyes' Motion for Postconviction Relief and thereby vacated Reyes' convictions and death sentence.[4] The State appealed. This is the State's Opening Brief.

[4] *State v. Reyes*, 2016 WL 358613 (Del. Super. Ct. Jan 27, 2016) (Ex A).

SUMMARY OF THE ARGUMENTS

I. Superior Court failed to properly apply the procedural bars of Criminal Rule 61 in granting Reyes postconviction relief. By allowing Reyes to add new claims and by *sua sponte* raising its own claims, after the consolidated amended postconviction motion and the State's response had been filed and the evidentiary hearings had been completed, Superior Court prejudiced the State from presenting evidence to counter the claims. The "new" claims were all previously available to Reyes and untimely.

II. Superior Court erred in *sua sponte* ruling that Reyes' Fifth Amendment rights were violated at trial. This claim, raised 3 years after the completion of postconviction hearings and briefing is time barred under Rule 61(i)(1) and procedurally defaulted under Rule 61(i)(4) because the trial court found, after a colloquy, that Reyes had validly waived his right to testify. Superior Court had no new reason to consider Reyes' waiver.

III. Superior Court erred in faulting the trial court and trial counsel for Cabrera's unavailability as a witness and mistakenly determined that Cabrera's testimony would have been admissible. Cabrera would not have been available to testify even if he had been sentenced. Cabrera, on the advice of counsel, still refused to testify at the postconviction hearings. Cabrera's self-serving statements to trial counsel were inadmissible.

IV. Roderick Sterling's testimony did not violate Reyes' Sixth Amendment rights. The trial judge, during the postconviction proceedings, found that Sterling had not recanted his trial testimony. The State did not violate its *Brady* obligations by failing to provide defense counsel with Sterling's confidential Presentence Investigation Report. Counsel cross-examined Sterling about his plea agreements, criminal history, drug use and treatment. Reyes suffered no prejudice.

V. Superior Court erred in asserting a free-standing claim that the trial court did not properly consider Reyes' age in sentencing. The trial judge found Reyes' youth to be a significant mitigating factor. In weighing the mitigating and aggravating factors, including Reyes' participation in the Otero murder, the trial judge reasonably found a death sentence was appropriate. The trial judge considered the impetuosity of youth and Cabrera's influence on Reyes that had been exacerbated by Reyes' difficult upbringing.

VI. Reyes failed to establish that errors of trial counsel during the penalty phase resulted in prejudice. Superior Court failed to properly apply *Strickland*'s two-part standard to Reyes' claims of ineffective assistance of counsel. The court considered law that was not in place at the time of trial and made clearly erroneous findings of fact. Moreover, Superior Court failed to place the burden of proof on Reyes or to properly consider whether there was a reasonable probability that the outcome would have been different had counsel acted differently.

STATEMENT OF THE FACTS[5]

Early in the morning of January 21, 1996, the bodies of two teenagers were discovered by a passerby in a wooded section of Rockford Park in Wilmington. The bodies of Vaughn Rowe and Brandon Saunders were in a shallow grave that was covered by a maroon bed sheet. Rowe and Saunders had, according to expert testimony, been killed about twelve to eighteen hours before their bodies were discovered.

Both teens had been shot in the back of the head. Rowe also had internal injuries to his spleen, liver and left kidney as well as facial lacerations. The additional injuries suffered by Rowe were consistent with the repeated use of blunt force. Some of the injuries were inflicted by a belt buckle.

The police recovered several pieces of evidence at the scene including bullets, four small bags of marijuana found in the victim Rowe's clothes, and a watch Rowe was wearing that had a memory bank of telephone numbers. The memory bank listed a telephone number that corresponded with the residence of Luis Cabrera's father.

At the victim Saunders' home, the police also recovered a business card for "ISS Servicesystem, Inc." Handwritten on the card was "434-6154 Big Lou."

[5] The Statement of the Facts is taken verbatim from this Court's decision on direct appeal in *Reyes v. State*, 819 A.2d 305, 308-10 (Del. 2003) (footnotes omitted). Superior Court did not include a statement of facts in its decision below. *See State v. Reyes*, 2016 WL 3568613 (Del. Super. Ct. Jan. 27, 2016).

Both Cabrera and Reyes worked at ISS and some people referred to Cabrera as "Big Louie" and Reyes as "Little Louie."

In March 1996, the police learned that the bullet which killed Vaughn Rowe came from a 38-caliber gun. The bullet had certain identifiable markings on it. A year later, in March 1997, police were investigating the unrelated murder of a man named Fundador Otero, who was killed in January 1995. As part of that investigation, the police conducted two searches at Luis Cabrera's father's house. During that search, they found a 38-caliber pistol and a single maroon fitted bed sheet. When the 38-caliber pistol was test fired, the test bullet had markings almost identical to the bullet found in Vaughn Rowe's head.

On or about January 20, 1998, the police interviewed Roderick Sterling, an inmate at Gander Hill prison. Sterling advised the police that he had overheard Reyes having conversations with Ivan Galindez, who was Sterling's cellmate. At the time of those conversations, Reyes was also incarcerated at the Gander Hill prison, serving a twelve-year sentence for the Otero murder.

Sterling heard Reyes admit to Galindez his involvement in the Saunders-Rowe double murder, along with a man named Luis Cabrera. Sterling testified that he had overheard Reyes tell Galindez that Rowe and Saunders had "shorted" Cabrera on a marijuana deal. Sterling also stated that Reyes said he had beat someone with a belt in the basement of a house at "601 something." He also heard

Reyes say that a neighbor came down during the beating because there was so much noise coming from the basement.

Sterling heard Reyes recount to Galindez how he and Cabrera decided to take the person they were beating from the basement to a park. The victim was transported in the trunk of a black BMW. Reyes and Cabrera then picked up the second victim so that they could kill both of them at the same time. Sterling heard Reyes say that once he and Cabrera picked up the second victim, they went to Canby Park. Arriving there, they made both of the victims lie on the softball field and shot them. The bodies were then taken to Rockford Park and left there.

At the time of the murders, Cabrera and Reyes lived together at 610 W. 20th Street in a three-story house. Cabrera and Reyes lived on the second floor. The tenant on the first floor was Donna Ashwell. Clavel Clamomot and Maribel Skjefte lived on the third floor.

Following Sterling's interview, the police located the female tenants of Reyes' former apartment building, Donna Ashwell and Maribel Skjefte. Although they were interviewed two and a half years after the murders, the women remembered a fight in the basement. Donna Ashwell remembered that the fight occurred just a day or two before the two bodies were found in Rockford Park. The women recalled hearing the voices of Luis Cabrera and Luis Reyes during the fight. They also heard the voice of a third person, which they did not recognize.

At trial, both Ashwell and Skjefte testified. Ashwell recalled that on a Saturday night in January 1996, she heard what she described as a fight in the basement of her building. Ashwell also heard an argument. One voice, which sounded like that of Cabrera, asked another person a question. After a negative response to the question, Ashwell heard a metal crashing noise. Ashwell then went to the basement and banged on the door. Reyes came to the door and Ashwell said to him, "Take the fight elsewhere or I'll call the police." Reyes asked her not to do that and told her they would take the fight elsewhere.

Skjefte testified that she went down to the basement shortly after Ashwell did. She stated that Cabrera answered the door and told her they were taking care of some business. Skjefte also heard Reyes' voice. Shortly thereafter, Cabrera came into the first floor foyer. He apologized to the women and said they were leaving.

Several items of physical evidence linked Rowe and Saunders to Cabrera, albeit indirectly. The first item was a watch that Rowe was wearing at the time of his death. That watch had a memory bank of phone numbers, one of which was for a woman. That telephone number was for the Wilmington residence of Luis Cabrera's father, Luis Cabrera, Sr. The second item of evidence was an ISS Servicesystem, Inc. business card found at the Saunders' family home. On it was written a telephone number and the words "Big Lou." Both Cabrera and Reyes

worked at ISS and were known as “Big Louie” and “Little Louie.”

On February 3, 1996, shortly after the murders, Cabrera returned Saunders’ pager to a Page One store in Wilmington. The pager was identified as Saunders’ by a code number inside it. Page One does not generally give receipts for returned pagers, however, when Cabrera returned Saunders’ pager, he also bought a new one, generating a receipt. Cabrera’s name and address appear on the back of the receipt.

Cabrera’s estranged wife testified for the State at Reyes’ trial. She stated that they had both worked for a cleaning service that was located on Silverside Road. The business card with “Big Lou” on it found in Saunders’ bedroom had a Silverside Road address. Cabrera’s wife also testified that she had owned a set of bed sheets that were similar to the single maroon sheet that was found covering the victim’s bodies. When she separated from Cabrera, she left the maroon sheets behind for Cabrera. When police searched Mr. Cabrera, Sr.’s house, they found a maroon sheet on the floor in a pile of laundry. Mr. Cabrera Sr. said it was his son’s sheet. Both the sheet found during the search and the one covering the bodies had nearly identical labels.

Another inmate at Gander Hill prison, Waymond Wright, testified Reyes told him that he had gone to school with Saunders and Rowe. Wright testified that Reyes told him that after the murder several classmates hugged Reyes.

Commenting on this, Reyes told Wright, "if they only knew." Wright also testified that when Reyes admitted to the murders, he said the victims were "short" on a pound of marijuana. Wright's testimony about Reyes' account of how the murders were committed was similar to the events attributed to Reyes by Sterling's testimony.

I. SUPERIOR COURT FAILED TO PROPERLY APPLY THE PROCEDURAL BARS OF CRIMINAL RULE 61.

Question Presented

Whether Superior Court applied incorrect legal standards and erroneously applied the exceptions to the procedural bars in Criminal Rules 61(i)(4) and (5) to consider all of Reyes' postconviction claims on the merits.[6]

Standard and Scope of Review

This Court reviews the Superior Court's decision on a motion for postconviction relief, including factual determinations, for abuse of discretion.[7] Questions of law and constitutional claims are reviewed *de novo.*[8] "Whether a Rule 61 motion states a colorable claim is a question of law and will be reviewed *de novo.*"[9]

Argument

In considering Reyes's motion for postconviction relief, Superior Court was required to first determine whether he had met the procedural requirements of Superior Court Criminal Rule 61 before considering the merits of his claims.[10]

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[6] *See State v. Reyes*, 2016 WL 358613, at *3-4 (Del. Super. Ct. Jan. 27, 2016).
[7] *Zebroski v. State,* 12 A.3d 1115, 1119 (Del. 2010).
[8] *Id.*
[9] *Outten v. State*, 720 A.2d 547, 556 (Del. 1998) (citing *Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992)).
[10] *Ayers v. State*, 802 A.2d 278, 281 (Del. 2002). *See also Maxion v. State*, 686 A.2d 148, 150 (Del. 1996); *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990). All references to Rule 61 refer to the rule in place at the time Reyes' original postconviction motion was filed in 2004. *See Collins v. State*, 2015 WL 4717524, at *1 (Del.

Rule 61(i)(1) prohibits the courts from considering a motion for postconviction relief unless it is filed within the applicable time limitation.[11] Rule 61(i)(2) prohibits the filing of repetitive motions for postconviction relief.[12] Rule 61(i)(3) provides that "any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows (A) cause for relief from the procedural default, and (B) prejudice from the violation of movant's rights.[13] Rule 61(i)(4) provides that any claim that has been formerly adjudicated is thereafter barred unless reconsideration of the claim is warranted in the interest of justice.[14] Rule 61(i)(5) provides that any claim barred by Rule 61(i)(1), (2) or (3) may nonetheless be considered if the claim is jurisdictional or presents "a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."[15]

On October 13, 2009, Reyes filed a Second Amended Motion for Postconviction Relief which the State answered in January 2010. Any claim Reyes raised thereafter should have been barred as untimely. Although a motion may be

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Aug. 6, 2015) (holding, *inter alia*, that the version of Rule 61 in effect at the time of filing of the Rule 61 motion controlled the Court's analysis of the claims).

[11] Del. Super. Ct. Crim. R. 61(i)(1).
[12] Del. Super. Ct. Crim. R. 61(i)(2).
[13] Del. Super. Ct. Crim. R. 61(i)(3).
[14] Del. Super. Ct. Crim. R. 61(i)(4).
[15] Del. Super. Ct. Crim. R. 61(i)(5).

amended at any time before a response is filed (Reyes amended his motion several times prior to the evidentiary hearings without objection from the State), leave of court was required for any amendments after the State's response was filed.[16] Reyes did not seek permission to amend his second amended motion, precluding the State from objecting to further amendment until post-hearing briefing.

Superior Court, having *sua sponte* included its own new claims, considered Reyes's new claims without regard to timeliness or the lack of a request to amend. Claims Reyes had not raised in his 2009 motion, and thus were not considered by the State in determining what evidence to present at the evidentiary hearings, included a variety of ineffective assistance of counsel claims, all of which were available to Reyes prior to the evidentiary hearings. Compounding the prejudice to the State, Superior Court also *sua sponte* raised its own claims after the evidentiary hearings had been completed.

By failing to provide notice of intent to raise these additional claims, Reyes precluded the State from presenting evidence to defend against these later-added claims. And Superior Court, by considering its own claims left the State without recourse. Superior Court manifestly misunderstood the record in finding:

> To consider claims barred after the [Superior] Court permitted amendments and supplements would render the expanded record superfluous, Rule 61 Counsel's efforts futile, and would violate Reyes' rights to full and fair consideration of whether Reyes' death

[16] Del. Super. Ct. Crim. R. 61(b)(6).

> penalty trial and sentencing was conducted in a manner consistent with Reyes' due process rights.[17]

The claims added after the evidentiary hearings were not part of the expanded record – trial counsel had no opportunity to respond to the additional claims of ineffective assistance raised after the submission of their affidavits and after their testimony at the evidentiary hearings, and the State did not have an opportunity to call any additional witnesses or question the witnesses who did testify regarding these additional claims.

Without an end to amendments, postconviction litigation would become an endless cycle of pleadings and hearings. Reyes had five years to amend and re-amend his motion, and he used that time to do so.[18] Thereafter, Reyes' time-barred claims, added without prior leave of the court, should have been summarily dismissed. Instead, Superior Court raised its own claims and "consider[ed] the claims presented in the briefing without regard to whether the claims were presented in Rule 61 motions [that] were not adjudicated."[19] Superior Court erred.

Further, Superior Court misapplied the exceptions to the procedural bars found in Rule 61(i)(4) and (5). Looking first to Rule 61(i)(5), the court found that to avoid a procedural bar, Reyes needed only to show "'some credible evidence

[17] *Reyes*, 2016 WL 358613, at *3.
[18] *See id.* at *2.
[19] *Id.* at *3.

which takes the claim [of a constitutional violation] past the frivolous state.'"[20] This is legally incorrect. To have the court consider an otherwise procedurally defaulted claim under Rule 61(i)(5), the movant must establish not just a colorable claim of a constitutional violation, but a colorable claim of a miscarriage of justice, i.e., that a constitutional violation "undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction."[21] The difference is significant, and Superior Court failed to understand or apply the correct legal requirements of the Rule.

Superior Court also misapprehended Rule 61(i)(4)'s interest of justice exception. The court noted that a movant "may trigger the interest of justice exception by presenting legal or factual developments that have emerged subsequent to the conviction."[22] Superior Court failed to understand, however, that subsequent legal developments must have been found to retroactively applicable in collateral review and be specifically applicable to the case *sub judice*. "In order to invoke the 'interest of justice' provision of Rule 61(i)(4) to obtain relitigation of a previously resolved claim a movant must show that subsequent legal developments

[20] *Reyes*, 2016 WL 358613, at *4 (quoting *State v. Ducote*, 2011 WL 7063381, at *1 n.4 (Del. Super. Ct. Dec. 29, 2011) (citing *State v. Wharton*, 1991 WL 138417, at *5 (Del. Super. Ct. June 3, 1991))). *Wharton* defines "colorable claim" to obtain discovery and to obtain an evidentiary hearing.
[21] Del. Super. Ct. Crim. R. 61(i)(5).
[22] *Reyes*, 2016 WL 358613, at *4 (citing *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990); *Weedon v. State*, 750 A.2d 521, 527 (Del. 2000)).

have revealed that the trial court lacked the authority to convict or punish him."[23] "[T]he term 'authority' includes not only the concept of jurisdiction, but also encompasses any constitutional error meeting the two-part test of *Teague.*"[24] Rather than consider whether Reyes alleged a retroactive right that would have altered the outcome of a previously litigated claim, Superior Court concluded without legal or record support that:

> Upon consideration of the entire record, this Court finds there was a miscarriage of justice pursuant to Rule 61(i)(5), that reconsideration of otherwise procedurally barred claims is warranted in the interest of justice pursuant to Rule 61(i)(4). Legal developments have emerged subsequent to the convictions, Reyes was deprived of his constitutional rights, and the integrity of the Reyes Rockford Park Trial was compromised.[25]

Thus, Superior Court did not properly consider the interest of justice exception when revisiting previously decided claims, having made no effort to determine if any new law made retroactive in collateral review existed or was applicable to Reyes' claims. To the extent the court considered allegedly new factual developments in electing to re-litigate Reyes' Roderick Sterling claim, neither Reyes nor the court pointed to any new factual information that was not available when the trial judge considered and rejected the claim during the postconviction proceedings.

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[23] *Flamer*, 585 A.2d at 746.
[24] *Bailey*, 588 A.2d at 1126 n.5 (referring to *Teague v. Lane*, 489 U.S. 288 (1989)).
[25] *Reyes*, 2016 WL 358613, at *4.

In sum, Superior Court failed to properly apply the procedural bars of Criminal Rule 61 to Reyes' claims. And, the court did not use the correct legal standard in applying the exceptions to the procedural bars of Rule 61(i). Specifically, Superior Court erred in its application of Rule 61(i)(4)'s interest of justice exception and Rule 61(i)(5)'s manifest injustice standard. Consequently, claims raised subsequent to the second amended motion for postconviction relief should be dismissed as untimely, and previously decided claims should be denied as procedurally defaulted pursuant to Rule 61(i)(4).

II. SUPERIOR COURT ERRED IN *SUA SPONTE* RULING THAT REYES' FIFTH AMENDMENT RIGHTS WERE VIOLATED AT TRIAL.

Question Presented

Whether Superior Court abused its discretion in *sua sponte* ruling that Reyes' Fifth Amendment trial rights were violated.[26]

Standard and Scope of Review

This Court reviews Superior Court's decision on a motion for postconviction relief, including factual determinations, for abuse of discretion.[27] Questions of law and constitutional claims are reviewed *de novo.*[28]

Argument

On June 23, 2015, Superior Court requested supplemental briefing on the issue of Reyes' Fifth Amendment rights, noting that in allocution, Reyes told the jury that the only reason he chose not to testify at trial was because he was advised that he would be questioned about the Otero murder. (*See* A282). Because Superior Court determined that the Otero murder evidence was the cornerstone of the State's penalty presentation, it found that Reyes' decision to forego testifying at trial was not knowing, intelligent and voluntary.[29] Superior Court was incorrect.

[26] *See State v. Reyes*, 2016 WL 358613, at *5-7 (Jan. 27, 2016).
[27] *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010).
[28] *Id*.
[29] *Reyes*, 2016 WL 358613, at *4.

A. Fifth Amendment Claim Procedurally Barred

The record does not support Superior Court's postconviction finding that Reyes wanted to testify in the guilt phase, but decided against it in mistaken reliance that the State would not present evidence of his involvement in the Otero murder to the jury during the penalty phase.[30] Superior Court *sua sponte* raised this Fifth Amendment issue after the postconviction hearings and briefing were completed, solely based upon its own misinterpretation of a single statement Reyes made in his penalty phase allocution. Thereafter, postconviction counsel raised a new claim in subsequent briefing that trial counsel's representation was deficient for failing to move to exclude the Otero conviction under Delaware Rule of Evidence ("DRE") 609 so that Reyes could testify at trial if he chose. This Court should not endorse Superior Court's Fifth Amendment ruling, in any permutation, because it is contrary to the established law of the case, procedurally barred, and meritless.

Prior to Superior Court's intercession, Reyes had not asserted any claim that his waiver of his right to testify was invalid, or that his counsel's advice led him to misapprehend his trial rights. Indeed, Reyes had no cause to assert such a claim and there was no reason for Superior Court to reevaluate Reyes' waiver. A free-standing Fifth Amendment claim is procedurally barred under Rule 61(i)(3)

[30] *Id.* at *5.

because it was not raised on direct appeal. The claim is also barred under Rule 61(i)(4) because the trial court, after a colloquy, found that Reyes validly waived his right to testify. (A93-94). Moreover, because the freestanding claim was raised by Superior Court three years after the evidentiary hearings were completed, it is procedurally barred as untimely. Any related claims of ineffective assistance of counsel also come too late. The scope of the evidentiary hearings was defined by the claims that had been raised. Relevant briefing and hearings had been completed based upon those claims. "It is a matter of fundamental import that there be a definitive end to the litigable aspect of the criminal process."[31] Regardless, the claim in any permutation is meritless.

B. Reyes' Waiver of his Right to Testify is Law of the Case

At the conclusion of the defense case on October 16, 2001, the trial judge engaged Reyes in the following colloquy:

> Court: Do you understand, of course, that you had a constitutional right to take the witness stand or not take the witness stand?
> Reyes: Yes, I do.
> Court: And you chose not to take the witness stand?
> Reyes: That is correct.
> Court: Did you consult with your attorneys about that decision?
> Reyes: Yes, I did.
> Court: Do you understand that they can only advise you, and I'm not asking what their advice is, but whatever their advice was, it is only advice; do you understand that?

[31] *Flamer v. State*, 585 A.2d at 736, 745 (1990).

Reyes: Yes, sir.
Court: And, by that, I mean, do you understand that the decision to take the witness stand or not take the witness stand is yours alone and not your lawyers?
Reyes: Yes, I do.
Court: Was it your decision alone not to take the witness stand?
Reyes: Yes, it was, altogether.
Court: Were there any threats, promises or other matters made in connection with that decision?
Reyes: No, sir.
Court: Do you believe the decision on your part was a voluntary one?
Reyes: Yes, I do.
Court: Do you believe that you were adequately, from your perspective, advised about the choices of taking the witness stand or not taking the witness stand?
Reyes: Yes, I do.
Court: Do you feel you had sufficient time to talk to your lawyers about the decision to take – to not take the witness stand?
Reyes: Yes, sir.
Court: Do you wish to consult with them any further about this decision about not taking the witness stand?
Reyes: No, sir.
Court: And, are you satisfied in your mind as you stand there now, having listened to all this case, including the presentation of your evidence over the last few days that you made the correct decision?
Reyes: Yes, I did.
Court: All right. (A93-94)

The trial court conducted a comprehensive colloquy and properly found Reyes' waiver of his right to testify to be knowing, intelligent and voluntary. No facts have changed, nor has the law regarding waivers of constitutional rights. Consequently, Superior Court, having *sua sponte* raised an issue regarding Reyes'

waiver of his right to testify, was precluded from re-visiting the issue.[32]

"The 'law of the case' is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of litigation."[33] "The law of the case doctrine is founded on principles of stability and respect for court process and precedent."[34] Although the law of the case provides reliability and finality in the judicial process, the "doctrine is not intended to preserve error or injustice."[35] "[U]nlike *res judicata*, it is not an *absolute* bar to reconsideration of a prior decision that is clearly wrong, produces an injustice or should be revisited because of changed circumstances.[36] "[T]he law of the case doctrine does not apply when the previous ruling was clearly in error or there has been an important change in circumstances, in particular, the factual basis for the issues previously posed."[37] And, "the equitable concern of preventing injustice may trump the "law of the case' doctrine."[38] No such wrong, injustice, or equitable concern exists here.

To find that Reyes' knowingly waived his right to testify, the court had to

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[32] *Cf. State v. Wright*, 67 A.3d 319, 323 (Del. 2013) (finding "no basis for Superior Court to reconsider the admissibility of Wright's confession" raised *sua sponte* because "the Superior Court did not have any new evidence.").
[33] *Hoskins v. State*, 102 A.3d 724, 729 (Del. 2014) (quoting *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990)).
[34] *Hudak v. Procek*, 806 A.2d 140, 154 (Del. 2002); *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1181 (Del. 2000).
[35] *Hamilton v. State*, 831 A.2d 881, 887 (Del. 2003).
[36] *Gannett*, 750 A.2d at 1181-82 (citing *Brittingham v. State*, 705 A.2d 577, 579 (Del. 1998); *Zirn v. VLI Corp.*, 681 A.2d 1050, 1062 n.7 (Del. 1996)).
[37] *Hamilton*, 831 A.2d at 887 (citing *Kenton*, 571 A.2d at 784).
[38] *Id.* (citing *Brittingham*, 705 A.2d at 579).

find that Reyes' decision was made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[39] This finding is supported by the record. Having waived his right to testify at trial, it was Reyes' burden to demonstrate that the waiver was not valid. But any such claim was nevertheless barred by Rule 61(i)(4). Rule 61's procedural bar to formerly adjudicated claims is premised on the law of the case doctrine and the same analysis applies – once an issue has been decided, unless new evidence or new law requires reconsideration of a claim, the prior ruling in the case should stand.[40]

In *Jones v. Barnes*,[41] the United States Supreme Court recognized that a criminal defendant has "ultimate authority to make certain fundamental case decisions such as whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Because these choices "implicate inherently personal rights which would call into question the fundamental fairness of the trial if made

[39] *See, e.g., Marine v. State*, 607 A.2d 1185, 1195 (Del. 1992) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (internal quotations omitted)).
[40] *Weedon v. State*, 750 A.2d 521, 527-28 (Del. 2000) ("In our view, Rule 61(i)(4)'s bar on previously litigated claims is based on the 'law of the case' doctrine. In determining the scope of the 'interest of justice' exception, we recognize two exceptions to the law of the case doctrine. First, the doctrine does not apply when the previous ruling was clearly in error or there has been an important change in circumstances, in particular, the factual basis for issues previously posed. *See Kenton*, 571 A.2d at 784 ("The 'law of the case' is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation."). Second, the equitable concern of preventing injustice may trump the 'law of the case' doctrine." *See Brittingham*, 705 A.2d at 579.
[41] 463 U.S. 745, 751 (1983).

by anyone other than the defendant,"[42] a lawyer "must both consult with the defendant *and* obtain consent to the recommended course of action."[43]

While waiver of a constitutional right must be a knowing and intentional relinquishment of a known right and the consequences of abandoning it, waiver of the right simultaneously invokes the right not to be compelled to testify. Thus, the trial court should not and cannot delve into the defendant's decision on the matter. Here, the trial court, by conducting the colloquy, ensured that Reyes knew both that he had a right to testify and a right not to be compelled to do so. The trial judge ensured that Reyes was not coerced in making his decision, and that after consultation with counsel, Reyes made an independent choice not to testify at trial. There is simply no evidence that counsel impeded Reyes' ability to make an independent decision about whether to testify. In fact, it was "altogether" his decision alone "not to take the witness stand." (A93). The fact that Reyes, during his penalty phase allocution, stated that he chose not to testify in the guilt phase because he did not want to risk his prior murder conviction being put before the jury for consideration of his guilt or innocence, does not change the "law of the case."

Indeed, in allocution, Reyes stated:

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[42] *See Cooke v. State*, 977 A.2d 803, 841-42 (Del. 2009) (citing *Arko v. People*, 183 P.3d 555, 558 (Colo. 2008)).
[43] *See Cooke*, 977 A.2d at 842 (citing *Florida v. Nixon*, 543 U.S. 175, 187 (2004)).

> I didn't get on the stand during trial because I didn't want what I was presently incarcerated for to come up. I felt that by that coming out, you, the jury, would automatically think I was guilty. Therefore, I choose not to take the stand. If I would have took the stand, you still might have came up to your ultimate decision; you might not have. I will never know. We all never know. (A135).

There was nothing new for Superior Court to justify reconsideration of its previous ruling. Reyes' allocution makes clear he did not take the stand and testify because he was legitimately concerned about his participation in the Otero murder coming in at the guilt phase. He made no reference to the admission of the prior murder during the penalty phase at all. Regardless, Superior Court considered anew his waiver of his right to testify and gave his allocution a new interpretation which has no basis in the record. Superior Court misapplied the procedural bars and ignored the "law of the case." Moreover, the court's findings of fact are clearly erroneous and cannot stand. Thus, any claim based on an erroneous factual finding must also be rejected.

C. Admissibility of Otero Trial Testimony is Law of Case

The "law of the case" doctrine also applies to Superior Court's reconsideration of the trial court's ruling on the admissibility of Reyes' prior testimony from the Otero trial. Based on no new facts, Superior Court now incorrectly finds Reyes' testimony inadmissible. The specific testimony at issue is:

> Q: Okay. And you don't recall telling your girlfriend that or do you recall telling your girlfriend that you were with Luis and

somebody came over to the house and you went down the basement and beat them up?
A: No. I don't recall telling her that. Not that moment. I told her that another time.
Q: Another time?
A: Yes.
Q: When was that?
A: When we was at our house.
Q: So you lied to your girlfriend when you were at your house?
A: Yes.
Q: And when was that?
A: I couldn't give you an exact date. (A75).

The trial court ruled the excerpt admissible, stating:

> Unless somebody can show something to me otherwise, considering that the only thing Mr. Reyes says was something about a beating and did not mention any possible events thereafter, that's an inference that a jury can take from that particular series of questions and answers on page 118, lines 13 through 17, that he lied to her by not telling her the whole thing. (A74).

On direct appeal, this Court considered Reyes' prior testimony except for the part where he admitted he lied to Santos. The Court ruled that the record reflected that Reyes' statements were corroborated by Santos' independent statements to the police, thus supporting the trial judge's determination that his statement was relevant evidence under DRE 402 and not unfairly prejudicial under DRE 403.[44]

Superior Court, in granting relief on this claim, simply revisited the trial court's ruling, seemingly focusing on the portion of the statement where Reyes' admitted he lied, and found the statement to be inadmissible hearsay, undermining

[44] *Reyes*, 819 A.2d at 311-12.

Reyes' right not to testify.[45] However, in ruling that the "[p]resentation of Reyes' own testimony from a prior proceeding undermined [his] decision not to testify as a witness against himself,"[46] Superior Court made clear that it actually considered the entirety of Reyes' statement inadmissible. Superior Court's decision was both barred by "law of the case" and procedurally barred by Rule 61(i)(4) as formerly adjudicated.[47] Superior Court did not explain why it reconsidered the claim and in any case, reconsideration of the claim was not warranted in the interest of justice.

On the heels of Superior Court's *sua sponte* raising of a free-standing Fifth Amendment claim, Reyes contended that "the record establishe[d] that Mr. Reyes wanted to testify but counsel advised him not to testify, and "from [] Reyes' point of view, his reason for not testifying is that he believed that if he did, his conviction for the homicide of Fundator Otero would be admissible."[48] However, Reyes admitted that the record was not clear as to what, if anything, he knew would be admitted.[49] By acknowledging this, Reyes has admitted that he has offered nothing more than an unsubstantiated claim of counsel's ineffectiveness.

No one explored Reyes' decision not to testify at the evidentiary hearings

[45] *Reyes*, 2016 WL 358613, at *7.
[46] *Id.*
[47] *See State v. Wright*, 131 A.3d 310, 323 (Del. 2016) (finding that the facts to be evaluated in a reformulated *Miranda* challenge were the same facts considered by the original judge when she denied Wright's motion to suppress in 1991 and his second motion for postconviction relief and therefore, it was not manifest injustice to deny Wright an opportunity to set the same facts before a different judge with the hope of receiving a different ruling).
[48] Reyes Supplemental Brief, dated Aug. 24, 2015, at 3. (A283).
[49] *Id.* at 3-4. (A283-84).

because Reyes failed to raise a claim associated with his decision until Superior Court urged him to do so three years after the hearings were completed. The only time Reyes' election not to testify was referenced at the hearings was when, in another context, Mr. Pedersen advised: "A lot of times you would have to divide – divide up and, you know, who is going to question the defendant. But we had, I think, agreed pretty early on with Louie's consent that him testifying probably was not going to be a great idea." (A165a). As there was no pending issue regarding Reyes's decision not to testify, the State did not ask follow-up questions.

Reyes has not proffered any evidence on the scope of counsel's advice and, in any case, Reyes' own colloquy shows that he independently made the decision to not testify. Based upon the record before Superior Court, there is neither a showing of deficient performance or prejudice to satisfy the *Strickland* standard.

Moreover, trial counsel had a realistic concern that Reyes' involvement in the Otero murder would somehow be placed before the jury in the guilt phase of his trial. First, prior to Reyes' arrest for Otero's murder, Santos told police that Reyes had confided to her that at some point, he and Cabrera had beaten someone in Cabrera's basement. When arrested in the Otero case, Reyes admitted to police that he told Santos about that beating, thus implicating himself in the murder of Rowe and Saunders. (A75). When the State stated its intent to offer those portions of Reyes' and Santos' statements into evidence at Reyes' trial in this case, the

defense twice unsuccessfully challenged the admissibility of the evidence, arguing that the State could not sufficiently link the statements to the murders and that the admission created a risk that the jury would hear about the Otero murder. But the trial judge found the statements, if properly redacted, admissible. (A73-74; A76-78).

And, had Reyes testified, he would have exposed himself to vigorous cross-examination on his relationship with Cabrera and who pair were beating in the basement the night Rowe and Saunders were killed. Reyes' prior history as Cabrera's accomplice in the Otero murder would have been an appropriate and damaging area of examination, as were Reyes' comments that he and Cabrera were beating someone in Cabrera's basement. There were real and substantial impediments to Reyes' testifying, and Superior Court and Reyes simply cannot choose to ignore them years later.

That risk was confirmed when Reyes elected to allocute in the penalty phase. Reyes was unable to testify within advised parameters. Before he allocuted, the trial court instructed Reyes that, to the extent he wanted to present matters outside of the guilt phase record, he would be required to testify under oath and be subjected to cross-examination. (A132-33). Reyes stated "I fully understand what I can say and what I can't say." (A132-33). Reyes then allocuted, making

untruthful and inadmissible statements about the parties' plea bargaining.[50] (A135).

It is unquestionable that because Reyes did not testify in the guilt phase of his murder trial, the jury did not hear the facts of the 1995 Otero murder, Reyes' role as Cabrera's accomplice in that murder, or that Reyes had pled guilty to Murder Second Degree. Therefore, when deciding whether he was guilty of killing Rowe and Saunders, the jury remained unaware that Reyes had committed a murder with Cabrera just one year before the 1996 murders of Rowe and Saunders. It was only after he was convicted of the two murders that the jury heard that he was not only a prior felon, but a prior felon who had committed a brutal murder of an older gentleman with the same co-defendant. As the trial court found, Reyes' waiver of his Fifth Amendment right to testify was valid. Superior Court had no basis to revisit this ruling, nor the ruling of this Court and that of the trial court regarding Reyes' statements to Santos. Superior Court improperly raised the Fifth Amendment claim and failed to consider procedural defaults or the law of the case. Reyes's Fifth Amendment rights were not violated and his decision not to testify at trial was a valid waiver. There is no record support for Superior Court to have found otherwise.

[50] Had Reyes testified in the guilt phase as he allocuted, he certainly would have opened the door to the facts of and his participation in the Otero murder.

III. SUPERIOR COURT ERRED IN FAULTING THE TRIAL COURT AND TRIAL COUNSEL FOR CABRERA'S UNAVAILABILITY AS A WITNESS AND MISTAKENLY DETERMINED THAT CABRERA'S TESTIMONY WOULD HAVE BEEN ADMISSIBLE.

Question Presented

Whether Superior Court erred in determining that Cabrera would have testified at Reyes' trial if his sentencing had already taken place, and that trial counsel was ineffective for failing to argue that Cabrera's pretrial statements were admissible.[51]

Standard of Review

This Court reviews Superior Court's decision on a motion for postconviction relief, including factual determinations, for abuse of discretion.[52] Questions of law and constitutional claims are reviewed *de novo.*[53]

Argument

Superior Court found that the trial court, by scheduling Cabrera's sentencing after Reyes' trial, rendered Cabrera to be unavailable as a witness in Reyes' trial. The court further found that Cabrera was in possession of exculpatory evidence regarding Reyes' role in the murders and therefore, had Cabrera testified, he "*may*

[51] *See State v. Reyes*, 2016 WL 358613 at *8, *18-19 (Del. Super. Ct. Jan. 27, 2016).
[52] *Zebroski v. State,* 12 A.3d 1115, 1119 (Del. 2010).
[53] *Id*.

have introduced reasonable doubt regarding Reyes' role."[54] Not only did Superior Court evaluate the claim using an incorrect legal standard, it also disregarded many of the facts related to the issue.

A. Cabrera's Unavailability

On March 6, 2001, Cabrera's trial counsel sent a letter to Cabrera stating, "I agree with your decision. I know you genuinely wish to assist Mr. Reyes in his trial, however, I think any testimony that you give at this point will seriously undermine your chances of success in your appeal, or during any other Postconviction action." (A66). However, in that letter, Cabrera's counsel told Cabrera that if he wished to meet with Reyes' counsel, Cabrera's counsel would agree to an *off the record* discussion between Reyes' counsel and Cabrera. (*Id.*) Thus, in preparation for trial, Reyes' counsel met with Cabrera, who was pending capital sentencing for his own role in the murders.

When trial counsel met with Cabrera "off the record" in 2001, Cabrera denied that both he and Reyes committed the murders but that someone named Neil Walker did. (A156-57).[55] Subsequent to that meeting, Cabrera's attorney

[54] *Reyes*, 2016 WL 358613 at *8 (emphasis added).

[55] Cabrera made a more detailed statement to his own investigator in 1997 while his defense team was preparing for the Otero trial. (A156-57; A58-63). In that statement, Cabrera stated that Saunders had shorted Walker and him on a marijuana deal. When Cabrera confronted him, Saunders pulled a gun on him, Saunders and Rowe later jumped him. Walker came to Cabrera's defense and then they fought with Saunders and Rowe and left them. Sometime later, Cabrera stated that Walker killed Saunders and Rowe on his own. (A60-62). Cabrera explained that

informed Reyes' counsel that even though Cabrera had apparently again reached out to Reyes' counsel in a letter, Cabrera did not wish to testify at Reyes' trial and that if he was called, he would refuse to testify "based upon counsel's advice and based upon his assertions of his Fifth Amendment privileges." (A158; A92).[56] Cabrera's statements to counsel were properly not admitted at Reyes' trial. In fact, at the 2012 evidentiary hearings, the judge ruled that the substance of Cabrera's statements to counsel were "likely inadmissible at [Defendant's] trial" and, therefore, when postconviction counsel attempted to present them in the absence of Cabrera, he refused to consider them. (A231-32). In an attempt to render the statements admissible, postconviction counsel called Cabrera to testify at the evidentiary hearings, but on August 29, 2012, he refused, unsurprisingly invoking his Fifth Amendment right. (A235a-c). As a result, the judge did not admit Cabrera's statements. Based upon the record, it is clear that regardless of the timing of Cabrera's sentencing, Cabrera was unavailable to testify.

Walker must have used his gun and his bedsheets in the crime and Cabrera stated that Walker gave Saunders' beeper to him. (A62-63).

[56] In a letter to Reyes' counsel, Cabrera wrote that Reyes' mother had come to visit him and told him that she felt that he could testify "where both Luis and I can benefit" however, Cabrera also stated, "if your intention is to have me admit to my conviction, then I ask you not to waste your time." (A70).

B. No Related Ineffective Assistance of Counsel[57]

In order to succeed in an ineffective assistance of counsel claim, the United States Supreme Court held in *Strickland v. Washington*, that a defendant must show both: (1) "that counsel's representation fell below an objective standard of reasonableness;" and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[58] There is a strong presumption that the legal representation was professionally reasonable.[59] As such, mere allegations will not suffice; instead, a defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.[60] In other words, conclusory, unsupported, and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.[61]

In fairly assessing an attorney's performance under *Strickland*, "every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from

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[57] Although Superior Court made fleetly reference to claims of ineffective assistance of appellate counsel, because no legal analysis was included, the State has not addressed the merits separately of those claims. To the extent the Court considers those claims, the State also contends that Superior Court erred in finding any ineffectiveness of appellate counsel. *See Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985); *Jones v. Barnes*, 463 U.S. 745 (1983); *Ploof v. State*, 75 A.3d 811, 832 (Del. 2013); *Fautenberry v. Mitchell*, 515 F.3d 614, 642 (6th Cir. 2008) (citing *Monzo v. Edwards*, 281 F.3d 568, 579 (6th Cir. 2002)).
[58] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).
[59] *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990) (citations omitted).
[60] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).
[61] *Id.*

counsel's perspective at the time."[62] A defendant must also overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.[63] Indeed, the United States Supreme Court has stated that:

> Surmounting *Strickland's* high bar is never an easy taskAn ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom.[64]

Because the defendant must prove both parts of his ineffectiveness claim, a court may dispose of a claim by first determining if the defendant established prejudice.[65] The first consideration in the "prejudice" analysis alone "requires more than a showing of theoretical possibility that the outcome was affected."[66] The defendant must actually show a reasonable probability of a different result but

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[62] *Strickland*, 466 U.S. at 689.
[63] *Id.*
[64] *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citations omitted).
[65] *Strickland*, 466 U.S. at 697.
[66] *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).

for trial counsel's alleged errors.[67] "It is not enough to 'show that the errors had some conceivable effect on the outcome of the proceeding.'"[68]

Superior Court incorrectly agreed with postconviction counsel that trial counsel was ineffective for failing to "attempt" to admit Cabrera's statements under DRE 804(b)(3). The Rule allows admission of only truly reliable self-inculpatory statements of unavailable declarants such as.

> A statement which was, at the time of its making, so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability ... that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless *corroborating circumstances clearly indicate the trustworthiness of the statement.*

DRE 804(b)(3) (emphasis added). Moreover, "whether there is sufficient corroborative evidence to admit a hearsay statement against interest is a matter to be committed to the sound discretion of the trial court and reversible only upon a showing of abuse of discretion ... or that the ruling was clearly erroneous."[69]

Factors to consider in determining the trustworthiness of an unavailable declarant's statement, include: 1) whether the statements were made spontaneously and in close temporal proximity to the commission of the crime at issue; 2) the extent to which the statements were truly self-incriminatory and against penal

[67] *Strickland*, 466 U.S. at 695.
[68] *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 693).
[69] *Ross v. State*, 482 A.2d 727, 741 (Del. 1984) (citations omitted).

interest; 3) consideration of the reliability of the witness who was reporting the hearsay statement; and 4) the extent to which the statements were corroborated by other evidence in the case.[70]

Non-self-incriminatory components of a declaration purportedly falling DRE 804(b) are presumptively inadmissible because they cannot claim any special guarantees of reliability and trustworthiness.[71] Cabrera's statements to trial counsel were, for the most part, self-exonerating - he claimed that neither he nor Reyes were guilty but rather someone else committed the murders. Thus to the extent the statement was not self-incriminatory, it was inadmissible.[72] Cabrera's statements must first be bifurcated into their self-inculpatory and non-self-inculpatory components.[73] At most, Cabrera admitted to drug dealing, that he was connected to the victims and that he fist fought with one or both of them because they attacked him. None of that information assisted Reyes. Anything non-self-inculpatory, including the denial that he and Reyes committed the murder, would not be admitted in the absence of Cabrera's testimony from the stand.

Nor were there corroborating circumstances clearly indicating the

[70] *See Demby v. State*, 695 A.2d 1152, 1158 (Del. 1997); *see also Neal v. State*, 80 A.3d 935, 949 (Del. 2013).
[71] *See Smith v. State*, 647 A.2d 1083, 1088 (Del. 1994).
[72] *Id.*; *see also Neal*, 80 A.3d at 950 (finding that because Neal really wanted the non-self-inculpatory components of his co-defendant's statements that tended to exculpate him to be admitted, it was objectively reasonable for trial counsel not to argue DRE 804(b)(3) as a basis for the admission of the statements).
[73] *See Smith*, 647 A.2d at 1088; *Neal*, 80 A.3d at 949.

trustworthiness of Cabrera's statements. Because Cabrera's statements, in the absence of Cabrera's testimony, were apparently inadmissible, counsel cannot be faulted for failing to seek admissibility. Superior Court's finding that trial counsel's performance was objectively unreasonable for failing to have "at least attempted" to seek admissibility is simply untenable, and not a legal standard. Superior Court failed to properly apply *Strickland*'s two prong test to this claim.

IV. RODERICK STERLING'S TESTIMONY DID NOT VIOLATE REYES' SIXTH AMENDMENT RIGHTS; THE STATE DID NOT VIOLATE ITS *BRADY* OBLIGATIONS NOR DID TRIAL COUNSEL PROVIDE DEFICIENT PERFORMANCE.

Question Presented

Whether Superior Court erred in determining that Reyes' Sixth Amendment rights were violated by Sterling's testimony, the State's failed to provide *Brady* material, and trial counsel provided ineffective assistance.[74]

Standard and Scope of Review

This Court reviews a trial court's decision on a motion for postconviction relief for an abuse of discretion.[75] Legal or constitutional questions are reviewed *de novo*.[76]

Argument

This Court found that while incarcerated with Reyes, Roderick Sterling overheard Reyes tell another inmate, Ivan Galindez, that he committed the Rockford Park Murders with Cabrera.[77] In postconviction, Superior Court found, based upon a 2008 interview of Sterling in Jamaica by Reyes' private investigator, that Sterling did not have personal knowledge of the conversation between

[74] *See State v. Reyes*, 2016 WL 358613, at *8-10; *17-18 (Del. Super. Ct. Jan. 27, 2016).
[75] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (internal citations omitted).
[76] *Swan v. State*, 28 A.3d 362, 382 (Del. 2011) (internal citations omitted).
[77] *See Reyes*, 819 A.2d at 309.

Galindez and Reyes.[78] Consequently, Superior Court held that Reyes' Sixth Amendment right to confrontation was violated because Galindez should have testified, not Sterling.[79] Superior Court made this ruling despite contrary findings by this Court on direct appeal, and the court in 2012 when the trial judge denied Reyes' request for a formal deposition of Sterling as part of the postconviction proceedings. This claim was procedurally barred under Rule 61(i)(4). Indeed, the court had nothing new on which to base its finding. In addition, Superior Court erred in determining that the State violated its *Brady* obligations by failing to provide impeachment information about Sterling to the defense.

Prior to Reyes' trial, in a letter to his attorney, Sterling asked to give information about Reyes' role in the murders, hoping to receive a deal on his own pending unlawful sexual intercourse charges. (A79-80). In January 1998, Sterling gave a detailed interview which provided the police with previously unknown details of the murders of Rowe and Saunders – information that led to the arrests of Cabrera and Reyes.[80] At trial, Sterling testified regarding all the things "relating to

[78] *Reyes*, 2016 WL 358613, at *9. Superior Court found its determination to be significant because it also found that Roderick Sterling "was the only evidence [] that linked Reyes to the Rockford Park Murders." *Id.* at *8. This finding is contrary to this Court's finding on direct appeal that Waymond Wright provided much the same evidence at trial as Sterling and other evidence, including the testimony of Ashwell and Skjefte. *Reyes*, 819 A.2d at 308-10.

[79] *Reyes*, 2016 WL 358613, at *9.

[80] Because of Sterling's information, the police found Ashwell and Skjefte, who remembered the fight in the basement of the apartment building at around the time the two bodies were found in Rockford Park. The women also recalled hearing the voices of Cabrera and Reyes during the fight as well as a third unknown person. *See Reyes*, 819 A.2d at 309.

the murder of Brandon Saunders and Vaughn Rowe [that he] overheard [Reyes] say to Ivan Galindez." (A79). Sterling admitted that he provided information to obtain a deal on his charges of sexual intercourse involving a small child and, as a result, did receive a plea agreement allowing him to plead guilty to one count of Unlawful Sexual Intercourse Second Degree. Sterling was sentenced to 20 years Level V incarceration, suspended after ten years for deportation to Jamaica. (A81-82). However, Sterling had also agreed with the State that once he testified in Reyes' case, he would plead to a reduced sex offense and be immediately turned over to INS for deportation.[81] (A81-82). Reyes' counsel cross-examined Sterling on his agreement with the State, including the fact that the victim of his sexual offenses was his 7-year-old niece, that he was initially charged with 2 counts of unlawful sexual intercourse first degree, that each charge carried a minimum mandatory sentence of fifteen years in jail, and that he sold and used drugs. (A86-88; A89-90).

In 2008, postconviction counsel hired an investigator to interview Sterling in Jamaica. Based upon his statements to the investigator, postconviction counsel professed that they had established that Sterling had changed his story as to the source of his information. The trial judge disagreed, and, in 2012, after Reyes moved for a formal deposition of Sterling, denied Reyes' request, finding:

[81] Sterling was ultimately released from prison for time served on February 4, 2002. *See Reyes*, 2016 WL 358613, at *9.

> First, [Sterling] professed lack of memory on some things eleven years after the date he overheard Reyes speak to Galindez. Second, while he identified one area- the motive, which he said Galindez gave in some detail, that was the only one identified. There were a series of details he recited in his 1998 statement and at trial and no basis has been presented to believe those were not things he actually overheard. Third, Sterling did not recant his trial testimony or the 1998 statement. Fourth, a careful reading of his 2008 statement simply makes no compelling case or cause to take his deposition. No glaring changes or inconsistencies appear, and he made no statement that what he said at trial was not truthful.[82]

This ruling was "law of the case." Thus, in 2016, Superior Court erred when it determined that as a result of the private investigator's interview, Sterling "learned details of the Rockford Park Murders from Galindez and not Reyes," and therefore Reyes' Sixth Amendment rights were violated.[83]

Recently, this Court found that testimony from the same witnesses eighteen years after they first took the stand is not the sort of new evidence or changed circumstances that forms the basis of an exception to the law of the case doctrine even if inconsistencies are developed as a result.[84] Evidence from faded memories eleven years after an event does not constitute changed circumstances.[85]

Further, contrary to Superior Court's ruling, the State did not commit a

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[82] *State v. Reyes*, 2012 WL 8256131, at *9 (Del. Super. Ct. Nov. 13, 2012). Reyes did not, but presumably could have, presented Galindez at the evidentiary hearings.
[83] *Reyes*, 2016 WL 358613 at *9.
[84] *See Wright*, 131 A.3d at 323-24 ("Memories understandably fade over time, and testimony from the same witnesses elicited years or decades after the original decision is of questionable value. If such testimony were sufficient to sidestep the doctrine's restrictions, the goals of efficiency, finality, and stability would be defeated because such "new" evidence potentially exists in every case.") (citations omitted).
[85] *See id.* at 324.

Brady violation by failing to disclose impeachment evidence in the form of Sterling's history of alcohol and drug use, convictions and treatment.[86] First, Superior Court is procedurally barred from considering the *Brady* claim because Reyes could have raised it on direct appeal but did not. Reyes showed neither cause and prejudice from the violation of his rights under Rule 61(i)(3), nor a colorable claim of a miscarriage of justice under Rule 61(i)(5).

The State cannot suppress evidence favorable to a defendant if that evidence is material either to guilt or to punishment.[87] The three components of a true *Brady* violation are: 1) that the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; 2) that the evidence must have been suppressed by the State, either willfully or inadvertently; and 3) prejudice must have ensued.[88]

Superior Court does not specify what information the State failed to provide that qualified as *Brady* material. Moreover, the court, while acknowledging the components of a *Brady* violation, failed to apply them to the facts of this case. The State surmises that Superior Court considered, as Reyes did, that the information contained within Sterling's confidential presentence investigation, prepared by court personnel as part of his rape case, was *Brady* information subject to

[86] *See Reyes*, 2016 WL 358613 at *9.
[87] *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Atkinson v. State*, 778 A.2d 1058, 1062 (Del. 2001).
[88] *Atkinson*, 778 A.2d at 1062.

disclosure. But the trial judge had already ruled in 2012, during the course of the evidentiary hearings, that the court would not consider Sterling's presentence investigation report because it was not properly before the court.[89] (A160-62). This is so because presentence officers are not law enforcement officers, nor arms of the prosecution, but prepare their reports only at the court's direction for the court's *confidential* use.[90] Superior Court improperly revisited that ruling, without acknowledging that it did so, and erroneously found that the State committed a *Brady* violation. The information from Sterling's presentence report about Sterling's history of drug and alcohol use and treatment was neither suppressed by the State, nor material.[91] There simply is no support for Superior Court's decision to reverse its prior ruling that it would not consider the presentence investigation and, instead, use it to find that the State violated its *Brady* obligations.

No Related Ineffective Assistance of Counsel

There is similarly no support for Superior Court's determination that Reyes' trial counsel provided ineffective assistance by failing to: 1) establish that the information Sterling provided was hearsay; 2) request a missing evidence

[89] Indeed, postconviction counsel included Sterling's presentence report in the appendix to its post-evidentiary hearing briefing despite the trial judge's ruling that it would not be considered. *See* A2018-2028 of Petitioner's Brief Following Evidentiary Hearing.

[90] *See Duross v. State*, 494 A.2d 1265, 1270 (Del. 1985); *State v. Honie*, 1999 WL 167733 (Del. Super. Ct. Feb. 5, 1999).

[91] "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Michael v. State*, 529 A.2d 752, 757 (Del. 1987).

instruction as to Sterling's letter to his attorney;[92] and 3) call Galindez at trial.[93]

Superior Court ruled that although trial counsel properly objected to Sterling's testimony at trial on hearsay grounds, they did not present "an accurate and thorough basis for the hearsay objection" and therefore provided deficient performance.[94] Superior Court based this ruling on Sterling's 2008 interview with a postconviction counsel's private investigator, finding that Sterling stated "he learned details of the Rockford Park Murders from Galindez directly and not by overhearing a conversation between Galindez and Reyes."[95] As previously asserted, due to this Court's finding on direct appeal and the trial judge's postconviction ruling in 2010, Superior Court was procedurally barred from reinterpreting the substance of Sterling's trial testimony and his 2008 interview. Nor can trial counsel be faulted at the time of trial for Sterling's alleged change of story or claimed lack of memory in 2008.

Trial counsel effectively cross-examined Sterling on his prior conviction for raping a small child, that he both sold and used drugs,[96] his ability to overhear the conversation between Reyes and Galindez, and his impetus for testifying,

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[92] *See Reyes*, 2016 WL 358613, at *17-18.
[93] *Id.* at *18.
[94] *See id.* at *17.
[95] *Id.*
[96] On cross-examination, Sterling admitted that prior to his incarceration, he sold and used drugs but that did not affect his memory. (A89). In his 2008 interview, Sterling stated that while he was imprisoned at Gander Hill and overheard the conversation between Reyes and Galindez, he was not under the influence of drugs. (A142).

including that his sentence would be reduced after his testimony and he would be deported but no longer imprisoned. (A82-91). Superior Court failed to show how trial counsel was deficient in their handling of Sterling's cross-examination.

To the extent Superior Court ruled that trial counsel should have asked for a missing evidence instruction or objected to the discussion about Sterling's letter because Sterling did not write it, both rulings are in error. When the police interviewed Sterling on January 20, 1998, they reviewed his letter to counsel with him and quoted it verbatim:

> I am writing this letter to inform you of some information regarding two bodies found in Rockford Park. The victims were shot, I believe case is unsolved. Me and my roommate heard a conversation about that -- … check about that. Check out with DA to see if we can make deal. That a visit a letter to notify. (Sterling Statement, dated 1/20/98 at p. 18).

The State did not introduce Sterling's letter as evidence at trial and no one disputed that he requested to speak to the State about the murders. Because the contents of the letter were known, there was no basis to believe the letter contained any incriminating or exculpatory evidence. The letter itself was not Reyes' problem at trial, it was Sterling's damaging testimony. Reyes had the opportunity to cross-examine Sterling on what he overheard and his basis of knowledge which is what the Constitution requires.

Superior Court's decision, based upon Reyes' post-evidentiary hearing claim that trial counsel was deficient in failing to call Galindez at trial to rebut Sterling's

testimony, also fails. Because Reyes did not raise this claim until after the evidentiary hearings, there was no relevant testimony elicited at the hearings, nor did Reyes provide Galindez's testimony or tender him for cross-examination. Reyes merely provided an affidavit from Galindez, written in English, dated November 28, 2012, that stated that when Galindez spoke with Reyes in prison, they spoke in Spanish because Galindez did not speak much English.[97] Reyes' offer of evidence, in the form of Galindez prepared affidavit, not subject to cross-examination, falls far short of his burden of proof that trial counsel provided ineffective assistance of counsel at trial and Superior Court therefore erred in finding *Strickland* ineffectiveness.

"In a postconviction proceeding, *the petitioner has the burden of proof* and must show that he has been deprived of a substantial constitutional right before he is entitled to any relief."[98] The Court need not address postconviction relief claims that are conclusory and unsubstantiated as speculation of a different result is not enough.[99] Superior Court's finding that Galindez would have destroyed Sterling's credibility at trial is specious, especially in light of the fact that the record supports

[97] Affidavit of Galindez, dated November 28, 2012. (A248).
[98] *Bailey*, 588 A.2d at 1130 (citing *Younger*, 580 A.2d at 555) (emphasis added).
[99] *See Younger*, 550 A.2d at 555; *Zimmerman v. State*, 1991 WL 190298, at *1 (Del. Super. Ct. Sept. 17, 1991) (citations omitted); *State v. Dividu*, 1992 WL 52348, at *2 (Del. Super. Ct. Feb. 12, 1992) ("[M]ovant has failed to provide any factual support for his perfunctory allegations.); *State v. Brown*, 1998 WL 735880, at *3 (Del. Super. Ct. Aug. 20, 1998) ("As to allegation ... that counsel failed to investigate an alibi witness, obtain an expert witness or subpoena defense witnesses, the Defendant [] merely makes a conclusory statement.").

that Reyes was not fluent in Spanish.[100] Reyes, himself, admitted this at Cabrera's trial for Otero's murder, stating that he did not understand much Spanish. (*See* A64). The fact that Reyes merely proffered queries in his briefing: "Is Galindez not the most reliable source? Why not get the information straight from the mouth of the party who allegedly spoke to Mr. Reyes about the incident?"[101] demonstrates his failure of proof to support his ineffectiveness claim. The burden of proof was on Reyes. Superior Court misapprehended the facts and ignored the record and found that trial counsel was ineffective based on Galindez's affidavit; in so doing, the court abused its discretion.

[100] Luz Diaz, Reyes' aunt, testified at the evidentiary hearings, that "[W]e speak English to him. He tried to speak to my mom in Spanish, you know, broken Spanish. But, you know, [he] don't speak very good Spanish. We always kid him. English please." (A179).
[101] *See* Reyes' PostEvidentiary Hearing Briefing at 48. (A285).

V. SUPERIOR COURT ERRED IN ASSERTING A FREE STANDING CLAIM THAT THE TRIAL COURT DID NOT PROPERLY CONSIDER REYES' AGE IN SENTENCING.

Question Presented

Whether Superior Court erred in considering its own freestanding claim to find that the trial court's sentencing did not comport with constitutional standards due to inadequate consideration of Reyes' status as an adolescent and his immature brain development.[102]

Standard and Scope of Review

This Court reviews the Superior Court's decision on a motion for postconviction relief, including factual determinations, for abuse of discretion.[103] Questions of law and constitutional claims are reviewed *de novo.*[104]

Argument

Reyes did not raise a freestanding claim that the trial court had not given Reyes's youth the proper consideration as a mitigating factor in any version of his postconviction motion. Rather, Reyes raised a claim of ineffective assistance of trial counsel for failure to properly present adequate mitigation evidence regarding Reyes's youthfulness and brain development. Superior Court, however, inappropriately considered the freestanding claim. Because the ineffective

[102] *See State v. Reyes*, 2016 WL 358613, at *10-16 (Del. Super. Ct. Jan. 27, 2016).
[103] *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010).
[104] *Id*.

assistance of counsel claim was properly before the court in postconviction, the court should have limited its consideration of the claim to the *Strickland* standard.

A. This claim, raised *sua sponte* by Superior Court, is procedurally barred.

Because Superior Court raised this freestanding postconviction claim that the trial judge at sentencing erred by failing to give sufficient weight to Reyes' age and immature brain development, it comes too late. The claim is time-barred, having been raised by the Court more than three years after Reyes' conviction and sentence became final after direct appeal.[105] No United States or Delaware Supreme Court decision made retroactive to cases on collateral review provides an exception to the time bar.

Further, Reyes did not present this claim in the proceedings leading to the judgment of conviction. Thus, the claim is also barred under Rule 61(i)(3), unless excused under 61(i)(3)'s cause and prejudice standard. Alternatively, to the extent the sentence was reviewed on direct appeal, the claim is barred under Rule 61(i)(4) as previously adjudicated. This Court reviewed Reyes' sentence pursuant to 11 *Del. C.* § 4209(g) and determined that the death penalty was not capriciously or arbitrarily imposed, and was not disproportionate to sentences imposed in similar cases.[106] This Court also found that the evidence supported the jury's finding of a

[105] Del. Super. Ct. Crim. R. 61(i)(1).
[106] *Reyes v. State*, 819 A.2d 305, 317-18 (Del. 2003).

statutory aggravating circumstance under subsection 4209(e).[107] Because it is the movant's burden to establish an exception to the procedural bars, Superior Court cannot find an exception to a claim it has independently raised. Superior Court should not have addressed its own claim and granted relief on that basis.

B. Superior Court failed to apply the law in place at the time of sentencing.

Superior Court, in finding that the trial court erred by failing to give Reyes' youth consideration as a mitigating circumstance, looked to United States Supreme Court law that had not been decided at the time of trial or sentencing. Further, Superior Court misapplied that law to the facts of this case.

The fact that Reyes was 17 years old when he participated in the Otero murder did not prevent the State from alleging or the court from determining that Reyes role in that murder was an aggravating circumstance. Without citing any supporting law, Superior Court found that "[t]he weight attributed to the Otero crime, for purposes of the penalty phase for the Rockford Park Murders, is inconsistent with the constitutional standards established by the United States Supreme Court for youthful offenders, especially in consideration of the relationship between Cabrera and Reyes."[108] Superior Court's disagreement with the weight the trial court gave to the Otero murder as an aggravator does not change that there was no legal error, and Superior Court erred in so finding.

[107] *Id.*
[108] *Reyes*, 2016 WL 358613, at *11.

The trial judge properly found Reyes' role in Otero's murder to be a significant aggravator and in his sentencing decision, he explained:

Fundador Otero Murder

> This is another non-statutory aggravating circumstance included in the State's penalty notice letters for both defendants.
>
> Otero was murdered in his apartment on January 5, 1995. He was days short of his 66th birthday when murdered. Cabrera was convicted in May 1998 of first degree murder, burglary first degree and conspiracy first degree in connection with that murder. His sentences for those convictions, introduced during the penalty hearing, were life for the murder conviction, five years for the conspiracy conviction and four years for the burglary conviction. Reyes did not go to trial for Otero's murder. Instead he pled guilty to murder in the second degree, burglary in the first degree and conspiracy in the second degree.
>
> Beyond these convictions, the State presented evidence in both penalty hearings of the details of that murder. Most graphically, it was done through the reading of Reyes' testimony in the 1998 trial of Cabrera and through his recorded statement to the New Jersey police.
>
> That testimony started with how Reyes met Cabrera, through their work at ISS, and continued with a description of their close personal relationship. According to Reyes, several days beforehand, Cabrera came to him asking for his help in killing Otero. Cabrera said his father had a problem with Otero and Cabrera wanted to kill Otero to prevent Mr. Cabrera, Sr. from going to jail. At first, Reyes said he refused but Cabrera persisted and he finally agreed. Reyes said he finally relented because he loved Cabrera and Cabrera had done so much for him. Reyes was 17 at the time all this happened.
>
> Apparently in the evening after a wrestling match, the two went to Otero's apartment where, after a brief conversation at the door, Reyes indicated Cabrera kicked in the door. He ordered Otero to sit on a couch. Reyes described Otero as an old man in his 60's or 70's. Otero and Cabrera had a discussion about Cabrera's father. Then Cabrera directed Reyes to grab Otero, which he did by holding him in "double

arm bar, chicken wing" from behind. Otero ended up on top of Reyes. Otero struggled. Reyes also wrapped his leg around Otero's leg so he could not move.

Cabrera then went into Otero's kitchen, wet a rag and returned to the couch where the other two were. He put it over Otero's face and kept pressing it there. Otero continued to struggle as Reyes held him. Since this did not result in Otero's death, Cabrera got a plastic bag and wrapped it around Otero's head. The cloth was still over Otero's face. Otero struggled and tried to breathe. The bag had handles which Cabrera tied around Otero's neck and which Cabrera kept pulling.

And then Reyes testified:

Q. Then what happened?
A. Kept holding him, you know. [Cabrera] was squeezing him and Otero was making noises, try to move, but he, you know, and then [Cabrera] took the bag off after a while because I think he had took the bag off and put something in Otero's mouth and put it back on and wrapped it around him again so he wouldn't make no noises. Then he kept pressing it tight until Otero couldn't struggle anymore.
Q. Did you do anything in addition to holding him with his arms and keeping his legs immobile?
A. No, I did not.
Q. And at some point [Otero] stopped moving?
A. Yes.
Q. He also stopped breathing?
A. Yes.
Q. Do you know how long that took?
A. The whole from the time we got there or?
Q. Yeah.
A. From the time we got there, I'd say about 45 to an hour, 45 minutes to an hour, an hour and a-half, around there.
Q. And you told the police that you thought that it took like 45 minutes for [Otero] to die; do you believe it was that long?
A. No.
Q. How long do you think it was?
A. For him to die?
Q. Yeah.
A. I'd say between 10 and 15 and 20 minutes.

Q. Now once he was-oh, once he was dead, what did the two of you do?
A. Then [Cabrera] took the bag off of him, and I released him and laid him on the couch, and [Cabrera] went back to the room, said he was going to get his coat and his keys, and, you know, dress him so we could carry him out to the truck.

They took him, Otero's truck and Cabrera's truck to New Jersey. They abandoned Otero's truck and continued on in Cabrera's truck. Somewhere off the New Jersey Turnpike, the two defendants[] exited. Cabrera drove a short distance, eventually pulling in behind a commercial building. There, according to Reyes, Cabrera removed Otero's body from the truck, placed it in a dumpster, poured gasoline on it and set it on fire. In both penalty hearings, Reyes' statement to the Burlington County investigators was introduced. In it, Reyes says Cabrera told him, before going to Otero's apartment, the plan was to strangle him and then burn the body. This last testimony was not presented, however, in Cabrera's penalty hearing.

The identification of Otero's body, through dental records, was made in March 1997. That is when Reyes was arrested and interviewed by the New Jersey authorities. It was during that interview that he mentioned the beating in the basement.

Without question, the murder of a frail old man one year prior to the murders of Rowe and Saunders constitutes a significant non-statutory aggravating factor. That killing, too, was not the result of a sudden confrontation or a hair trigger pulled by a nervous robber. Nor was it over in an instant. It took many minutes for Cabrera and Reyes to hold down, smother and strangle Otero and to cause his death. All because of a mortgage scam. Otero's picture was used on a State identification with Mr. Cabrera, Sr.'s 302 North Franklin Street address and may have been used to obtain a loan. Otero lived very near the Wilmington Police station, some distance from 302 North Franklin Street. In short, the reason for killing Otero was trivial. This non-statutory aggravating circumstance weighs about as heavily as such circumstance can get.[109]

[109] *State v. Cabrera*, 2002 WL 484641, at *11-12 (Del. Super. Ct. Mar. 14, 2002) (footnotes omitted), *aff'd and remanded sub nom. Reyes v. State*, 819 A.2d 305 (Del. 2003), and *aff'd*. 840 A.2d 1256 (Del. 2004).

Regardless of Reyes' age at the time of the Otero murder (a fact of which the court was well aware), that killing was horrific. Superior Court has offered no reasoned argument for the sentencing court not to have considered this crime as a significant non-statutory aggravator. Reyes had pled guilty to the murder and had testified to the facts surrounding the killing and disposal of Otero's body. The trial court found it even more significant because the Otero murder, like the murders of Saunders and Rowe, was planned, and *not* the result of a rash or spontaneous decision – i.e., not an impulsive act to be expected in a more youthful offender.

However, when considering the mitigating circumstances, the trial court found Reyes' young age to be the foremost factor to be considered. The trial court noted, as part of the youthfulness mitigator, that Reyes had a significantly dysfunctional upbringing, "especially lack of a father in any respect."[110] The court found these additional factors, coupled with his young age, made Reyes vulnerable to the influence of a father figure – Luis Cabrera.[111]

Ultimately, the trial court found that Reyes' youth, the strong influence of Cabrera, and a difficult childhood could not sufficiently outweigh Reyes' decision to participate the execution of his two friends in a dispute over a drug deal and his

[110] *Id.* at *16.
[111] *Id.*

failure to take responsibility for that decision.[112]

> As mitigating circumstances, however, they go only so far. Reyes was 17 when he chose to help Cabrera carry out his plans to murder Otero. He said he made a bad choice then. His choice to participate was not made after minutes or even hours of thought, but after several days. It is unknown how long in advance of January 20th the plan was formed to kill Rowe and Saunders. But, there was a year between the Otero murder and the murder of Rowe and Saunders. This is more than adequate time to have reflected on his choice of committing the ultimate crime in 1995 before doing it again. He chose to help Cabrera in 1995, he has said, because of his love for him and not wanting to disappoint him. That explanation may work once. It disappears after a year. It becomes particularly unpersuasive since these victims were known to him. Nor were these murders to save from prison his "father's" father (Cabrera, Sr.). There was no such emotional tie in this case. It was to kill two people over a pound of marijuana; two people known to Reyes from school and not strangers and two people in their teenage years with life ahead of them.
>
> Reyes expressed remorse, or more accurately, an apology, for the pain Rowe and Saunders' families were enduring. The sincerity of this is debatable. He told Dr. Finkelstein he would be found innocent and denied involvement. He even said Cabrera beat Rowe and he had nothing to do with that. All of this flies in the face of what he told Santos, the New Jersey police, Wright, what Sterling overheard and the 610 tenants saw.
>
> Reyes dysfunctional background is now set and immutable. It has manifested itself in three murders. That dysfunctional background

[112] *See Carroll v. State*, _So. 3d_, 2015 WL 4876584, at *15 (Ala. Crim. App. Aug. 14, 2015) ("The Eighth Amendment does not prohibit the State from using that prior [juvenile] conviction as elements of Carroll's current capital offenses or as aggravating circumstances supporting Carroll's sentences of death.") (citing *Woodward v. State*, 123 So. 3d 989, 1048 (Ala. Crim. App. 2011)); *Taylor v. Thaler*, 397 F. App'x 104, 108 (5th Cir. 2010) (finding no precedent clearly establishing that an offense committed as a juvenile may not be used to elevate murder to capital murder). *Accord United States v. Wilks*, 464 F.3d 1240 (11th Cir. 2006) (holding that the reasoning in *Roper* did not prohibit using a youthful-offender conviction to enhance the sentence of an adult offender).

> may explain his emotional tie to Cabrera and offer a more readily understood reason for helping Cabrera kill Otero. The suggestion is the two of them had become emotional partners. That partnership changed after January 1995. They became, instead, partners in murder.[113]

Superior Court's current finding, fifteen years later, that the sentencing court failed to properly consider Reyes' youth in mitigation is not supported by the record. The trial court gave appropriate weight to Reyes' youth and additional testimony regarding the immaturity and impulsivity of adolescents would have changed nothing. The trial court specifically noted that none of the murders Reyes committed were impulsive in nature and recognized the strong, detrimental influence of Cabrera on Reyes, as well as his susceptibility to that influence in light of his upbringing.

The sentencing decision demonstrates that the court considered:

> (1) the hallmark features of chronological age (immaturity, impetuosity, and the failure to appreciate consequence); (2) the family and home environment from which the youthful offender could not extricate himself; (3) the circumstances surrounding the homicide offense (including the offenders[‘] involvement and the effects of peer pressure); (4) the vulnerabilities to negative influence; (5) the features that distinguish adolescents from adulthood; and (6) the possibility of rehabilitation.[114]

Whether or not Superior Court, fifteen years later and without having participated in the trial, penalty hearing or the postconviction evidentiary hearings, agrees with

[113] *Id.* at 21.
[114] *Reyes*, 2016 WL 358613, at *15 (citing *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012)).

the trial judge who had the ability to view the evidence and determine the credibility of witnesses, is not a legal standard upon which to vacate the legally imposed sentence. The sentencing judge's decision was legally sound, and correctly based upon the facts and circumstances of the murders and the attributes and propensities of Reyes. The sentence should stand.

VI. REYES FAILED TO ESTABLISH THAT ERRORS OF TRIAL COUNSEL DURING THE PENALTY PHASE RESULTED IN PREJUDICE UNDER *STRICKLAND*.

Question Presented

Whether Superior Court abused its discretion in finding trial counsel provided deficient performance during the penalty phase that prejudiced Reyes such that the outcome would have been different.[115]

Standard and Scope of Review

The Superior Court's denial of postconviction relief is reviewed for abuse of discretion.[116] Nevertheless, this Court reviews the record to determine whether competent evidence supports the Superior Court's findings of fact and whether its conclusions of law are not erroneous.[117] This Court ordinarily reviews claims alleging the infringement of a constitutionally protected right *de novo*.[118]

Argument

This Court reviews Superior Court's grant of Reyes' claims of ineffective assistance of counsel under the familiar two-part (performance and prejudice) conjunctive standard set forth in *Strickland v. Washington*.[119] Defense counsel in a capital case has an additional general duty to investigate potentially mitigating

[115] *See State v. Reyes*, 2016 WL 358613, at * 21-37 (Del. Super. Ct. Jan. 27, 2016).
[116] *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003).
[117] *Id.*; *Outten v. State*, 720 A.2d 547, 551 (Del. 1998); *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).
[118] *Keyser v. State*, 893 A.2d 956, 961 (Del. 2006); *Capano v. State*, 781 A.2d 556, 607 (Del. 2001); *Seward v. State*, 723 A.2d 365, 375 (Del. 1999).
[119] 466 U.S. 668 (1984).

evidence for use at the penalty phase.[120] But, "there is no duty for defense counsel to pursue all lines of investigation about potentially mitigating evidence. Counsel can make reasonable choices about what factors stand the best chance to convince the jury not to impose death and focus his investigation on uncovering evidence related to those particular factors."[121] "The decision about what evidence to present remains with defense counsel and in a given case counsel may, quite reasonably, refrain from presenting evidence."[122] "To be reasonably competent, an attorney need not present cumulative evidence, nor must he present every witness who can offer mitigating testimony."[123] "That other witnesses might have been available, alone, is insufficient to prove ineffective assistance of counsel."[124] "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."[125]

Because the defendant must prove both parts of his ineffectiveness claim, a court may dispose of a claim by first determining if the defendant established prejudice.[126] Reyes was required to demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

[120] *E.g.*, *Flamer v. State*, 585 A.2d 736, 757 (Del. 1999).
[121] *Flamer*, 585 A.2d at 757 (citing *Burger v. Kemp*, 483 U.S. 776, 794-95 (1987)).
[122] *Flamer*, 585 A.2d at 757; *see also Zebroski*, 822 A.2d at 1049 n.36.
[123] *Flamer*, 585 A.2d at 757.
[124] *Outten*, 720 A.2d at 553.
[125] *Strickland*, 466 U.S. at 691.
[126] *Strickland*, 466 U.S. at 697.

confidence in the outcome."[127] Counsel's errors must have been "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[128] Reyes failed to satisfy the *Strickland* standard, and Superior Court abused its discretion in finding that he had satisfied *both* prongs of *Strickland*.

Superior Court found trial counsel's penalty phase presentation fell short of minimally acceptable standards of performance of counsel in capital cases.[129] The court found that the cumulative effect of Reyes' trial counsel's errors resulted in a reasonable probability that the outcome "would have been different without the errors."[130] That conclusion was the result of the misapplication of *Strickland*.

A. Superior Court erred in *sua sponte* raising a claim, after postconviction proceedings were completed, and finding that trial counsel was ineffective for failing to challenge the State's penalty phase presentation of Reyes' role in the Otero murder.

At no point in the postconviction litigation did Reyes raise a claim that his trial counsel were ineffective for failing to move to exclude the Otero murder evidence at the penalty hearing. Nevertheless, Superior Court *sua sponte* raised the claim and granted relief finding:

> The record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant or the absence of any such prior criminal convictions and pleas shall also be admissible in evidence [during the penalty phase]." [citing 11 *Del. C.* § 4209(c)(1)].

[127] *Id*. at 694.
[128] *Id*. at 687.
[129] *Reyes*, 2016 WL 358613, at *20-28.
[130] *Id.* at 38 (quoting *Starling v. State*, 130 A.3d 316, 320-21 (Del. 2015)) (internal quotations omitted).

> However, even though Reyes' conviction and guilty plea in connection with the Otero murder were likely admissible during the penalty phase, **Reyes Trial Counsel should at least have made an effort to limit the presentation** to the jury of *highly* prejudicial details of the Otero murder on the basis that the danger of unfair prejudice substantially outweighed the probative value. [citing DRE 403]. Accordingly, Reyes has established the performance and prejudice prongs of *Strickland*.[131]

This is legal error. The performance prong of *Strickland* does not require counsel to file meritless motions. "There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument."[132]

The balancing test of DRE 403 (and included in DRE 404(b)) applies to the potential admission of evidence at the guilt phase of trial, not the sentencing hearing or penalty phase. The Due Process Clause provides the analytical framework for consideration of the admissibility of evidence at a capital sentencing hearing.[133] While "[t]ribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations,"[134] courts imposing sentence are "free to consider a wide range of relevant material."[135]

Section 4209(c)(1) of title 11 of the Delaware Code provides that "evidence

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[131] *Reyes v. State*, 2016 WL 358613, at *21 (Del. Super. Ct. Jan.27, 2016) (emphasis added).
[132] *United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999).
[133] *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994) (citations omitted); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).
[134] *Williams v. New York*, 337 U.S. 241, 246 (1949) (footnote omitted).
[135] *Payne v. Tennessee*, 501 U.S. 808, 820-21 (1991); *accord Dawson v. Delaware*, 503 U.S. 159, 164 (1992). *See also Romano*, 512 U.S. at 12 (finding that the admission of evidence regarding a defendant's prior death sentence did not "so infect[] the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process").

may be presented as to any matter that the Court deems relevant and admissible to the penalty to be imposed. The evidence shall include matters relating to any mitigating circumstance and to any aggravating circumstance." The Otero murder was alleged as an aggravating circumstance by the State, and the evidence of that murder was clearly admissible under the statute. (A94a-b). The evidence was properly admitted. As relevant to Reyes' character and criminal propensities.

Courts have found that the facts underlying even unadjudicated prior murders are admissible in the penalty phase of a capital murder trial.[136] "In fact, even evidence tending to prove that the defendant engaged in criminal conduct for which he has already been prosecuted and *acquitted* may be introduced at sentencing in a trial charging a separate offense."[137] Delaware courts have consistently allowed the evidence of prior criminal and bad acts to be presented in capital sentencing hearings.[138]

Reyes' participation with the same co-defendant in another murder was undoubtedly relevant at sentencing. Reyes' election to kill again with the same partner in crime reveals aspects of his character, his future dangerousness, and the

[136] *See United States v. Lujan*, 603 F.3d 850, 856 (10th Cir. 2010) (collecting cases).
[137] *Id.* (citing *United States v. Watts*, 519 U.S. 148, 156-57 (1997); *United States v. Magallanez*, 408 F.3d 672, 684 (10th Cir. 2005)).
[138] *See, e.g., State v. Milton Taylor*, ID No. 0003016874, Penalty Hearing trans. 04/03/01 at 124-25 (underlying facts of robberies and theft to which defendant had pled guilty admitted) (A68-69); *State v. Emmett Taylor*, ID No. 0708020057, Penalty Hearing trans. 11/02/09 at S3-8; S46-52 (underlying facts of aggravated assault in Mississippi for which defendant entered a plea of nolo contendere admitted at capital sentencing) (A143-55).

amount of influence Cabrera may have had over him. The evidence was not inflammatory or unreliable and certainly did not render his sentencing fundamentally unfair. The jury had already unanimously found Reyes guilty of two murders. In considering their sentence recommendation, the jurors were entitled to know not only that he had killed before, but the circumstances of that killing. Any attempt to prevent the admission of the underlying facts (in Reyes' own words), would have been futile. Superior Court misapplied the *Strickland* test in finding deficient performance and resulting prejudice.

B. Trial counsel presented sufficient Penalty Phase mitigation evidence.

Defense attorneys are "obligat[ed] to conduct a thorough investigation of the defendant's background" when preparing for the penalty phase of a murder trial.[139] The 1989 ABA Guidelines, relevant to Reyes' case, advise counsel to "[c]ollect information relevant to the sentencing phase of trial, including," among other things, "family and social history (including physical, sexual or emotional abuse)."[140] But the ABA Standards, while instructive on reasonableness, are merely guidelines, not legal mandates.[141] *Strickland* is, and remains, the clearly

[139] *Williams v. Taylor,* 529 U.S. 362, 396 (2000) (citation omitted).
[140] Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* § 11.4.1(D)(2)(C) (1989).
[141] *See Ploof v. State,* 75 A.3d 840, 852 (Del. 2013) (citing *Strickland,* 466 U.S. at 690–91); *see also State v. Sykes,* 2014 WL 619503, at *25 (Del. Super. Ct. Jan. 21, 2014); *State v. Taylor,* 2010 WL 3511272, at *17 (Del. Super. Ct. Aug. 6, 2010) ("[n]either the United States Supreme Court nor the Delaware Supreme Court has held that failure to meet the ABA Guidelines is legally tantamount to ineffective assistance of counsel").

established law.[142] Superior Court failed to apply the *Strickland* standard here.

Reyes' trial counsel hired an experienced private investigator and death penalty mitigation specialist/expert in area of social work and family assessment ("mitigation expert") to assist with the case. (A95-97, A108, A163, A165, A167). Counsel was familiar with the mitigation expert because he had previously retained her services in *State v. Richard Roth, Jr.*, and had met with success in procuring a life sentence for Roth after a penalty hearing. (A97, A173). Counsel also retained a child psychologist. (A172).

Because at the time of his penalty phase, Reyes was already serving a twelve-year prison sentence after pleading guilty to Murder Second Degree for brutally murdering and subsequently burning the elderly Otero, counsel realized it would be extremely difficult to present a mitigation case that would spare his life.[143] Counsel explained that the overall theory of the mitigation case was:

> ...[T]his was a young man from a very difficult set of circumstances, not only in terms of where he grew up; and that he sort of fell under the mentorship of Luis Cabrera, who was an evil person; and that he was not someone who initiated any of the murders that he was involved in; and that he was following along sort of the father figure that he had never had.

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[142] *Strickland*, not *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), or *Rompilla v. Beard*, 545 U.S. 374 (2005), remains the appropriate standard. *See Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009). *See also Taylor v. State*, 32 A.3d 374, 382 (Del. 2011).

[143] At the evidentiary hearings, Mr. Pederson stated that once the jury heard that Reyes had been convicted of a previous murder, "we tried as hard as we could, and to be quite honest with you, was surprised we got as many votes for life as we did." (A166).

> In talking with him, all the time that we spent, you know, talking and I think with the doctors that we talked to, there was never any suggestion to me and I don't think to Mr. Capone that he suffered from a mental illness, that he ever wanted us to pursue that. In fact, there was a great deal of discussion on his part with us that, if he was found guilty, he didn't even want us to pursue a mitigation case. (A162a).

Even though Reyes was conflicted about his desire to argue for a life sentence and vacillated between cooperating with and ignoring counsel's efforts to save his life, counsel, consistent with their professional obligations, nevertheless pursued a mitigation case. (A162b; A165; A168).

Recognizing they were substantially impaired by Reyes' conviction for another murder, counsel decided, rather than focus on his positive attributes, to emphasize the effect Reyes' terrible childhood had on him. (A168; A170). Counsel feared that emphasizing Reyes' positive attributes could backfire in the face of being convicted of, now, three murders:

> Because I could see somebody like Paul Parets getting on the witness stand, I have no idea who he is. But, Mr. Parets, you wrote this letter. You know Luis Reyes well enough to write a letter for him back in July of 1998. Did you think he was going to kill somebody else? Is that still the guy that you feel that positively about? I could see that cross-examination as I sit here today. It would have been strategically legitimate not to call somebody who wrote a letter at the first murder case for the second one. (A171).

Therefore, counsel employed a United States Department of Justice study.[144] This study evaluated risk of future violence in young men by considering 15 risk factors. (A168-69; A171).

1. 2001 Mitigation Evidence

In the penalty phase, Reyes presented the testimony of several witnesses: his girlfriend Elena Santos, grandmother Candida Reyes, 12-year-old stepson R.S., Dr. Finkelstein, and Dr. Burry. Dr. Burry prepared a family assessment and a genogram[145] that reconstructed Reyes' family history to provide an understanding of the impact on him of significant events and family issues. (A98-99). Dr. Burry reviewed Reyes' presentence investigation from the *Otero* case, looked at family pictures and interviewed Reyes, his mother Ruth Comeger, Candida Reyes, Elaine Santos, his daughter, and R.S. (A98).

Dr. Burry's genogram of Reyes' family, which consisted of up to four generations, was presented as an exhibit in the penalty phase. (A99). She testified that his family had an extensive criminal history. (A100). Reyes' mother was incarcerated when Dr. Burry interviewed her, and she had a history of substance abuse - a history she shared with a number of family members. (A100). Dr. Burry also noted that the children in the family tree, like Reyes, were often not raised by

[144] Hawkins, Henenbolil, Farrington, Brewer, Catalano, Harachi and Cotham, Juvenile Justice Bulletin (April 2000), *Predictors of Youth Violence*, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice.

[145] Dr. Burry testified that a genogram is used in the area of social work and is a standardized format employed to construct a family tree of at least three generations. (A99).

their biological parent(s), either because the parent was uninvolved or because the courts had terminated parental rights. (A100). Dr. Burry testified that Reyes had not been raised by his biological father but had substitute father figures like Keith Comeger, a substance-abuser, and Luis Cabrera. (A100-01).

Dr. Burry discussed the "Predictors of Youth Violence" study upon which defense counsel based the theme of the mitigation case – that Reyes' behavior was not his fault due to his upbringing. Dr. Burry explained that the study's fifteen risk factors predisposing adolescents to violence fell into five groups: family; school; individual; peer; and community and neighborhood. (A101-02). Under the individual grouping, Dr. Burry opined that Reyes exhibited hyperactivity, concentration problems, aggressiveness, early initiation of violent behavior, restlessness, risk taking and other antisocial behaviors. (A101-02; A103).

Dr. Burry stated that Reyes had all of the seven family risk factors. (A104). Generally, Dr. Burry stated that Reyes' family was negligent or abusive and did not supervise or teach him appropriately, and his parents were uninvolved. (A103). Specifically, Dr. Burry said that Reyes' father was completely absent and his mother was a sporadic presence and a criminal with a substance abuse problem who was abused by her domestic partners. (A103-04). Reyes bonded somewhat with his remaining family members, but there was also a lot of conflict within the

chaotic family. (A104). The one person who filled the role of father figure was his co-defendant, Luis Cabrera. (A107).

Dr. Burry opined that out of the four school factors, Reyes had low school bonding because he failed first grade, failed some high school classes, and had truancy issues. (A104). She stated that while his high school varsity wrestling was a relative strength, it did not counteract his academic weakness. (A104). Dr. Burry acknowledged that Reyes was also involved with delinquent peers. (A105).

In Reyes' community, Dr. Burry found that drugs and firearms were easily accessible and violence and other crime were rampant. (A105). Although it did not appear that Reyes suffered any health effects of being born to a teenage mother, (A105), as is typical in that situation, he did not have a father in his life or receive emotional support, stability and mental stimulation. (A105). He was also poor growing up, and ended up in prison. (A104).

Dr. Burry talked about protective factors that balanced against the risk factors. (A104). She said that Reyes did not strongly possess any protective factors. Dr. Burry downplayed any positive influences from his involvement with the high school wrestling team, because it did not off-set the damage from the malignant influences in his life. (A107). As a result of Reyes' history, Dr. Burry opined that, "when I completed looking at the family history and considering the risk and protective factors that his family history is – family history and family

assessment is a factor that explains why he is the way he is as an adult." (A585). According to Dr. Burry, no one intervened in Reyes' life to help him or prevent him from turning out the way he did. (A590).

Dr. Harris Finkelstein testified that he completed a psychological evaluation of Reyes. (A109). Dr. Finkelstein reviewed documents, including the Reyes' *Otero* presentence investigation (with school grades), and his family court civil and criminal records. (A109-10; A116). He also interviewed Reyes and conducted psychological testing.[146] (A110). Reyes told Dr. Finkelstein that he did not have any mental health or physical impairments and, although he repeated first grade, from then on mostly earned Bs and Cs at school. (A113). Dr. Finkelstein testified that Reyes presented an interesting psychological profile that divided into two parts: one part was confident and capable; one part was unsure of himself and his ability to succeed. (A110). Because of this conflict, Dr. Finkelstein stated that Reyes sought validation from others. (A110-11). While his high school champion wrestling career fed his positive perception of himself, Reyes nevertheless became easily pessimistic and hopeless about his life situation. (A111).

Dr. Finkelstein stated that Cabrera was an important source of support for Reyes and, therefore, when faced with Cabrera's request to assist in doing terrible things, Reyes would become confused and indecisive. (A111). Because of his

[146] In his report, Dr. Finkelstein stated that Reyes denied experiences of physical, sexual or emotional abuse or significant drug or alcohol use. (A65).

chaotic upbringing, Reyes was prone to lapses in judgment in these difficult times and would tend to follow the person providing the validation, in this case, Cabrera. (A111). And because people drifted in and out of his life as he grew up, Reyes did not form lasting attachments, lacked empathy and did not trust others. (A111). Dr. Finkelstein stated that Reyes had a tremendous impulsivity problem based upon his history of hyperactivity/ADHD and because he made quick, thoughtless decisions when confused. (A112). Dr. Finkelstein stated that because of his poor decision-making abilities, Reyes would be well-suited to a highly structured environment where he knew the rules and the days were predictable. (A112).

Candida Reyes, with the assistance of an interpreter, testified that she was 71 years old, was born in the Dominican Republic, and had five children - Michael, Israel, Luz, Demaris and Ruth. (A114). Candida came to the United States, settling in New York in 1968, where her husband was already living. Two years later, her children also came to the United States. (A114). Candida stated her daughter Ruth gave birth to Reyes when she was 16 and did not stay involved with his father. (A114). Reyes and Ruth lived with Candida when he was a child, but instead of taking care of him, Ruth partied and smoked marijuana. (A114). Candida and her other daughter, Luz, took care of him. (A114).

In 1978, the family, including Reyes, moved to Delaware, but Ruth stayed behind in New York, not moving to Delaware until two years later. (A115). Ruth

then married Keith Comeger, and Reyes lived with them. (A115). Comeger physically abused Ruth and they both did drugs. (A115). Reyes' uncles, Michael and Israel also did drugs. (A117). Although Michael was not incarcerated at the time of Reyes' penalty hearing, Israel was. (A114). Between her two sons, Candida had 21 grandchildren, all from different mothers. (A114).

After her relationship with Comeger ended, Ruth began living with Luis Cabrera and Reyes lived with Candida. (A117-18). After Ruth and Cabrera's relationship ended, Ruth began living on the streets and with friends, and Candida moved to Georgia. (A118). Reyes stayed in Delaware with a friend and then moved in with Cabrera. (A118). Candida testified that she regularly visited Reyes in prison and spoke with him on the phone. (A118-19). Candida stated that both she and his children would be devastated if Reyes were to be executed. (A119).

Elaine Santos testified that she had a son by an earlier relationship, and a daughter with Reyes. Their five-year-old daughter appeared in the courtroom, but did not testify. (A112-24). Santos testified that she had met with defense counsel the prior Tuesday to discuss her testimony, and that Reyes' mother was supposed, but failed, to appear for that meeting. (A124). Prior to his incarceration, Reyes lived with her and the children. (A124). He supported them financially and assisted in parenting. (A124-25). Santos and the children continued to visit Reyes in jail and speak with him on the telephone, and he continued to assist in parenting.

(A125-26). Santos stated that she and the children loved him and would be devastated by his execution. (A126). Twelve-year-old R.S. testified that he was in fifth grade and that he considered Reyes his father. (A127). R.S. spent quality time with Reyes before his incarceration and continued to see and speak to him while he was incarcerated. (A128). He testified that he was happy when he would see Reyes and would not feel good if he were to be executed. (A128).

The defense also highlighted that it was only Reyes' cooperation that made the prosecution of Cabrera for Otero's murder possible. (A120-22). Consistent with the mitigation theme, defense counsel read the transcript of Reyes' sentencing for Otero's murder into the record. (A120). At that sentencing hearing, Reyes told the court that he regretted his involvement in Otero's murder. (A122). He said that everything he did was to please Cabrera because he loved him, and Cabrera filled a fatherly void in his life. (A122). Before sentencing him to twelve years of incarceration, the *Otero* trial judge stated that "I myself believe that Mr. Cabrera was manipulative and that he manipulated you even down to the last moment with respect to getting your aid in that he said he was after you." (A122).

2. 2012 Postconviction Mitigation Evidence

a. Lay witnesses

Reyes argued in postconviction that as a child, he was exposed to "a significant degree of physical abuse, emotional abuse, drug use, crime and of

course, the malignant influence of Luis Cabrera."[147] These points, to the extent they are accurate, were competently made by trial counsel and were incorporated into the theme presented in Reyes' penalty phase. Additional testimony provided at the evidentiary hearing, from his cousins Rebecca Reyes and Deborah Diaz, his aunt Luz Diaz, and his uncle Michael Reyes, would not have assisted him. These witnesses made clear that they were a source of familial support for Reyes, testimony that would have been inconsistent with the defense strategy. For example, Luz Diaz testified that Ruth's first husband, Keith Comeger, shared a father/son loving relationship with Reyes. (A176). Michael Reyes, who had many convictions for crimes of dishonesty from the 1990s, testified that he was very close with Reyes and, despite his illegal activities, treated Reyes as one of his own children, enrolling him in school and attending his parent/teacher conferences while Reyes lived with him. (A224-26; 227; A228-29).

Moreover, had counsel presented Luz, who was still visiting Cabrera in jail during the evidentiary hearings and stated that she liked him and he was a "sweet man," (A176; 180), at the penalty phase, it would have conflicted with his argument of Cabrera's malignant influence. Such positive characterization of Cabrera would have done nothing to assist Reyes in his pursuit of a life sentence.

[147] DI 335 at A54.

Reyes asserted, and Superior Court found, that counsel should have presented evidence of his wrestling success, including his leadership ability and respect, and support he received from the team and various coaches and parents involved.[148] But this evidence would not only have run contrary to the counsel's theme, it would have actually worked to Reyes' detriment. Evidence that Reyes was well-liked, a leader, had a bright future and many people guiding him, like George Lacsny, Victor Reyes,[149] Kathy Covelli-Reyes, Paul Parets,[150] the Elliots and the Skinners, would not have provided relevant mitigation evidence, but rather would have undercut his mitigation case.[151] The proffered testimony would have shown that he had so much support that when he began to fail in school and was in danger of being kicked off the wrestling team, the Skinners and others confronted him and offered support to get him back on the right track, but Reyes did not take advantage of those opportunities. (A190). Instead, he chose a different path.

b. Expert witnesses

Reyes argued that his postconviction experts, James Aiken - Corrections Consultant, Dr. Jonathan Mack, PsyD – Neuropsychologist, Dr. Dewey Cornell –

[148] *Reyes*, 2016 WL 358613, at *25-26.

[149] It is difficult to understand why Reyes believes it would have assisted him for counsel to have called former coach Victor Reyes, who at the time of Reyes' trial was a convicted sex offender who had engaged in prohibited sexual acts with one of his student wrestling assistants. (A174).

[150] Paul Parets stated (in a letter for the *Otero* sentencing) that Reyes was a remarkable young man whose pleasant personality, superior athletic skill and personal integrity were a model for other students. (A230).

[151] One former wrestling coach, George Lacsny, testified that Reyes was an excellent wrestler and a natural leader that commanded respect from the team. (A233-34; A235).

Forensic Psychologist, and Delores Andrews – mitigation specialist, provided a vastly different and clearer picture of him that was crucial to the jury's sentencing decision.[152] Superior Court agreed, but in so doing, failed to consider any of the State's evidence or argument to the contrary.

Dr. Mack interviewed and conducted psychological testing of Reyes in 2007, and diagnosed him with a mild neurocognitive disorder not otherwise specified, and personality disorder not otherwise specified with borderline antisocial paranoid and schizotypal features. (A201-02; A215). Dr. Mack stated that Reyes had low average intellectual functioning and ruled out ADHD. (A203, A205). Dr. Mack opined that executive functions, such as judgment and emotion, behavior and impulse control, are the last set of neurocognitive abilities to mature in the brain and do not fully mature until age 25, but that all brains mature at a different rate. (A207-08; A223). In Reyes' case, Dr. Mack stated that even at the age of 29, when he was tested, he presented with difficulties. (A209). Dr. Mack added that unverified reports of Reyes' mother's use of marijuana during pregnancy, and Reyes' unconfirmed claim that he suffered a head injury in a car accident when he was 15, may have contributed to his deficits.[153] (A210).

[152] Def's Post-Evid. Hrg. Op. Brf. at 120-21.

[153] Reports of his mother's marijuana use came after the Reyes' trial through his family members, and Reyes told Dr. Mack and Delores Andrews about his car accident. No supporting medical documentation was provided. (A216; A217-18).

Dr. Mack also stated that although Reyes had a difficult childhood and was exposed to traumatic event(s), he did not experience ongoing symptoms (A211-13). Dr. Mack described the overall picture:

> Mr. Reyes has difficulty controlling emotions. He has some difficulty in relationships. He has a history of antisocial behavior. He has a tendency towards being paranoid and may also tend to live in his head a little bit more than most people. (A214-15).

Dr. Mack agreed with much of Dr. Finkelstein's 2001 psychological conclusions,[154] and agreed that Reyes was able to go to school and work full time while on the wrestling team. (A221-22). He acknowledged that Reyes acted responsibly, took care of his girlfriend and child, and sustained many relationships. (A222). Dr. Mack stated this was not inconsistent with his diagnosis. (A222).

Reyes hired clinical psychologist Dr. Dewey Cornell to "determine psychological evidence that would have [been] relevant to capital mitigation that might have been presented in 2001." (A182). Dr. Cornell met with Reyes three times in 2012, obtaining an account from him "of his upbringing, relationship with family members, functioning in school, his relationship with Mr. Cabrera and other important people in his life" and examining him for his general personality and mental state at the time of the offense and at the time of evaluation. (A182-85; A181). Dr. Cornell also interviewed many people close to Reyes. (A185). While

[154] Both psychologists agreed that Reyes had a personality disorder not otherwise specified with antisocial features and impulsivity problems. (A189; A219-20).

Dr. Cornell generally agreed with defense counsel's 2001 mitigation case, he felt that it was not adequately supported or sufficiently coherent. (A186). However, much like the mitigation presented in 2001, Dr. Cornell opined that Reyes was young and immature at the time of the offense. (A186). And, just as defense counsel argued in 2001, Dr. Cornell stated that Reyes "had the decks stacked against him." (A848). Dr. Cornell reviewed and agreed with Reyes' other postconviction expert, Dr. Mack, regarding immaturity and brain dysfunction, but did not agree with him as to Reyes displaying poor impulse control, ADHD and antisocial features. (A186; A187-88; A191).

Mitigation specialist Delores Andrews reviewed various records and conducted interviews of Reyes and his family and friends. (A192). Like Dr. Cornell, she opined that defense counsel identified mitigation factors in the penalty phase, but did not sufficiently develop them. (A197). She echoed that Reyes was fatherless, his mother was unfit, and he was raised by his grandmother and other family. (A193-94). Michael Reyes was involved in criminal activities, and Keith Comeger, who abused alcohol and drugs, was a surrogate father to Reyes. (A195). Cabrera was also a father figure to Reyes that was ultimately malignant. (A196). The families, teachers and coaches from the wrestling community were a second family for Reyes who provided "nurturing, attention, concern," and "interest in his wrestling achievements" and were "extraordinarily significant in his development."

(A196). Andrews testified that even though Reyes had been convicted of three murders at the time of his penalty phase, defense counsel should have stressed that "in spite of everything [he] stayed employed, that he tried his best to engage in lawful behavior, to be a productive citizen, to take care of himself, particularly when he had to." (A198). Andrews also said that defense counsel failed to present the history of Reyes' parents and grandparents, the instability of his home life, and his self-reported head trauma. (A199). Andrews was selective in her reliance on prior "facts," for example, discounting Reyes' assertion to Dr. Finkelstein that he was not physically abused as a child, instead favoring current reports from Reyes and family members that he was beaten as a child. (A200).

Superior Court made absolutely no reference to Dr. Stephen Samuel, a clinical and forensic psychologist, who testified on behalf of the State. (A249). Dr. Samuel reviewed records, interviewed Reyes, and completed a report. (A253-57).[155] Dr. Samuel testified that he disagreed with Dr. Mack's conclusion that Reyes had cognitive disorder otherwise non-specified, because there was no independent documentation showing that Reyes had a pre-existing medical condition that would justify that diagnosis. (A262-63, A274-75). However, even if Reyes did have a mild form of this condition, Dr. Samuel testified that it could be so transient that he could hold a job and go through life without even knowing

[155] Dr. Samuels report is located A236-247.

he had it. (A265-66). Reyes competently held a series of jobs prior to his incarceration and denied cognitive impairments to Dr. Samuel. (A276-79). Dr. Samuel stated that Dr. Mack's 2007 testing of Reyes was so distant in time from 2001 that it was not particularly useful in determining Reyes' cognitive and neuropsychological functioning at the time of his crimes. (A268). Nor was there any objective evidence in Dr. Mack's report to support his diagnosis of a mildly damaged brain. (A270; A273).

Dr. Samuel also disagreed with Dr. Mack's opinion that "[t]here's no reasonable, logical basis to conclude that an individual's, quote, by definition, brain is mature at 23. [Dr. Mack] says 25." (A271). Dr. Samuel testified that everyone's brain matures at a different rate and it was entirely possible to have a fully developed brain by age 18. (A280-81). Dr. Samuel agreed with Dr. Mack and Dr. Finkelstein's determination that Reyes exhibited features of an antisocial personality disorder. (A266-67; A269; A272). Dr. Samuel did not find objective evidence of Reyes' alleged car accident head injury or his mother's use of marijuana while pregnant with Reyes or any effect on him even if she did. (A267a-b, A268a).

3. In light of the facts, counsel had a reasonable mitigation strategy.

The record shows that defense counsel's strategy was to mitigate Reyes' penalty by showing that he had a terribly unfortunate upbringing without

appropriate role models, leaving him predisposed to violence which he was unable to avoid as an adult. Defense counsel presented Reyes as a young man, 18 years old, who, in his early teens, fell under the malignant influence of Cabrera, whom he loved beyond reason. Cabrera was the catalyst for Reyes' violent behavior. To present this argument, defense counsel presented opening and closing argument, testimony from several witnesses, cross-examined state witnesses, objected when appropriate, utilized experts and identified mitigating circumstances.

Reyes did not, and indeed cannot, deny that youth was presented to the jury as a mitigating factor. Superior Court, however, found that consideration of youth as a mitigating factor in 2001 required that the neurodevelopmental significance of youth be presented. Reyes' argument is almost entirely based on the 2005 United States Supreme Court decision in *Roper v. Simmons*.[156] But, "[t]he *Roper* decision relied in part on the *developing scientific understanding* of the way in which the brain develops in adolescence and young adulthood."[157]

A reviewing court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."[158] Therefore, arguments asserting ineffective assistance in 2001, based on trial counsel's lack of reliance on scientific understanding of brain

[156] 543 U.S. 551 (2005).
[157] *Id.* at 24.
[158] *Strickland*, 466 U.S. at 689-90. *Accord Bobby v. Van Hook*, 558 U.S. 4 (2009).

development, which was still a "developing" scientific field in 2005, and, according to Dr. Samuels, is still developing now, cannot be a valid basis for an ineffective assistance of counsel claim. Although Superior Court found that the information was available in 2001, because it was in its development stage, it is very unlikely that it was peer-reviewed and credible at the time of Reyes' sentencing. Reyes presented absolutely no evidence in support of his argument that an objective standard of reasonableness in 2001 required defense counsel to present the neurodevelopmental significance of youth as a mitigating factor or if they had, that it would have changed the outcome. As such, Reyes did not demonstrate, and Superior Court should not have found, ineffective assistance of counsel. Further, because Reyes was 18 when he committed the murders, he was still eligible for the death penalty under *Roper*. Reyes failed to show how he was prejudiced by lack of presentation of the kind of evidence presented in *Roper*.

Here, Reyes' prior conviction for murder could not be overcome. Defense counsel employed a reasonable strategy in the penalty phase in light of Reyes' prior participation in the horrific murder of a 66-year-old man. Reyes denied both sexual and physical abuse. The jury learned that his mother was absent and many of his family members were either in prison or actively drug-addicted. In any case, Dr. Burry presented a family history of abandonment, substance abuse and neglect. Defense counsel retained and presented a second expert, Dr. Finkelstein, who

testified that Reyes needed constant validation from others, became easily discouraged, was impulsive, and exhibited features of an antisocial personality disorder. Because Cabrera validated Reyes, he also easily led him to do terrible things. Defense counsel both investigated and presented Reyes' psycho-social history to the jury as part of the mitigation theme. Knowing that the State would emphasize the prior murder in the penalty phase, defense counsel reasonably believed that trying to portray Reyes as a nice person would not be the best course and could damage the credibility of the defense presentation. Making this someone else's fault – Cabrera's bad influence and Reyes' horrible family life – was an objectively reasonable tactic. Defense counsel made this strategic choice after significant investigation involving qualified experts.

Superior Court's second-guessing of defense counsel's strategy over fifteen years later is precisely what *Strickland* and its progeny counsel against. To have provided more experts to say more of the same thing would not have advanced Reyes' cause.

Reyes failed to show prejudice from his counsel's purported deficiencies in presenting a mitigation case. In *Ploof*,[159] this Court found that counsel's failure to further investigate mitigation evidence concerning reports of physical and sexual abuse by the defendant's parents amounted to deficient performance under

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

Strickland, but because Ploof was not prejudiced, the claim did not warrant relief.[160] In that case, evidence showed that defense counsel suspected Ploof had been abused but did not investigate and did not follow up on an official review of the Ploof boarding home which had been closed down for violations.[161] Regardless, this Court found that Ploof suffered no prejudice because the aggravating factors in his case were "powerful, and we cannot conclude that there is a reasonable probability that the sum total of the mitigating evidence would lead a reasonable sentencing judge or jury to a different result."[162]

Superior Court erred in finding that Reyes had or could establish actual prejudice resulting from counsel's strategy at the penalty phase. At trial, the jury found Reyes guilty of the intentional murders of Rowe and Saunders, thereby finding beyond a reasonable doubt the statutory aggravating circumstance that Reyes' conduct resulted in the deaths of two people.[163] The jury thereafter recommended death by a vote of 9-3.[164] The trial court independently found the existence of a statutory aggravating circumstance.[165] And the trial court found the following non-statutory aggravating factors: 1) the nature and circumstances of the murders of Rowe and Saunders without justification or explanation, and carried out

[160] *Id.*
[161] *Ploof*, 75 A.3d at 854.
[162] *Id.* at 864.
[163] *State v. Reyes*, 2002 WL 484641, at *9.
[164] *Id.* at *21.
[165] *Id.* at *10.

in a premeditated manner; 2) the murder of a frail old man (Otero) one year prior to the murders of Rowe and Saunders; 3) impact of the murders of Rowe and Saunders on the victims' families, especially because Reyes was a classmate of the victims; 4) Reyes' robbery of Halloween candy when he was 13 (not given great weight); 5) some inability to adjust to prison life as shown by recent and overall write-ups in prison.[166] The trial court found the following non-statutory mitigators: 1) 18 years old at time of murders; 2) significantly dysfunctional family background with no moral compass, leaving him vulnerable to a negative father figure like Cabrera; 3) Cabrera's influence over him was significant and led to his involvement in all three murders; 4) Reyes has a reasonably good chance of remaining sufficiently adjusted to prison life; 5) Reyes loves his daughter, is supportive of her and his stepson, and his execution would be a loss to them and Santos; and 6) no major disciplinary infractions while incarcerated.[167] Ultimately the trial court found by a preponderance of the evidence that the aggravating circumstances outweighed the mitigating circumstances. Reyes presented nothing truly "new' in postconviction.

In *Wong v. Belmontes*,[168] the United States Supreme Court directed that "the reviewing court must consider all the evidence—the good and the bad—when

[166] *Id.* at *10-12
[167] *Id.* at *16-19.
[168] 558 U.S. 15, 26 (2009) (citing *Strickland*, 466 U.S. at 695-96).

evaluating prejudice." Here, Superior Court unquestionably holds to the simplistic "more-evidence-is-better" approach that the Supreme Court rejected in *Belmontes*.[169] The Supreme Court re-affirmed the concept that a postconviction court faced with a claim of ineffective assistance of counsel must consider not just the "new" mitigation evidence, but whatever counter-mitigation evidence the prosecution would have then been able to present.[170] As the Supreme Court found in *Belmontes*, "[i]t is hard to imagine expert testimony and *additional* facts about Belmontes' difficult childhood outweighing the facts of McConnell's murder."[171] Reyes and his co-defendant committed execution-style murders of two teenagers over a pound of marijuana, leaving them in shallow graves in Rockford Park only one year after they had already murdered and set on fire to an elderly man.

Strickland does not require the prosecution to "rule out" a sentence of life in prison to prevail against a claim of ineffective assistance of counsel.[172] *Strickland* places the burden on a defendant to show a "reasonable probability" that the result would have been different.[173]

> In making this determination, [the court] must consider the "totality of the evidence." A careful prejudice inquiry requires us to "consider *all* the relevant evidence that the [sentencer] would have had before [him] if counsel had pursued a different path." That includes the evidence adduced at trial as well as that which was not

[169] *Id.* at 25.
[170] *Cullen v. Pinholster*, 563 U.S. 170, 198 (2011).
[171] 558 U.S. at 27-28 (emphasis in original).
[172] *Belmontes*, 558 U.S. at 27.
[173] *Id.* (quoting *Strickland*, 466 U.S. at 694).

> presented until postconviction review. [The court] must reconstruct the record and assess it anew. In doing so, [the court] cannot merely consider the mitigation evidence that went unmentioned in the first instance. [The court] must also take account of the anti-mitigation evidence that the State would have presented to rebut the movant's mitigation testimony. That evidence, of course, includes the evidence that the State actually presented at trial, at the penalty hearing and in the postconviction proceedings.
>
> Having thus reconstructed the record, [the court] must "reweigh the evidence in aggravation against the totality of available mitigating evidence." Only then may [the court] determine whether there is a reasonable probability that, but for counsel's ineffectiveness, the result of the proceeding would have been different. The *Strickland* test places the burden on [the defendant]—not the State—to show a reasonable probability that the result of the penalty phase of the proceeding would have been different.[174]

Reyes did not carry his burden of showing a reasonable probability that he would have received a different sentence. Superior Court, by erroneously finding that the jury recommendation *might have been* different had they heard more evidence in combination *with less evidence* about Reyes' role in the murder of Otero, is speculative and insufficient to meet *Strickland's* actual prejudice prong.

C. Penalty Phase Closing Arguments

Superior Court found that trial counsel was ineffective in the penalty phase by failing to object when the prosecutor: 1) argued that a life sentence would leave one of the murders unpunished;[175] 2) characterized mitigation factors as excuses;[176]

[174] *Swan v. State*, 28 A.3d 362, 392-93 (Del. 2011) (footnotes omitted).
[175] *Reyes*, 2016 WL 358613, at *30.
[176] *Reyes*, 2016 WL 358613, at *32.

3) called Reyes monstrous;[177] and 4) argued that the jury should send a "message to the community."[178] Although Superior Court explained why each of these alleged arguments were objectionable, the court never explained how Reyes was actually prejudiced. Thus, the court failed to address *both* prongs of *Strickland*.

The applicable statutory aggravating factor that allowed the jury to consider a sentence of death was that Reyes' course of conduct "resulted in the deaths of 2 or more persons where the deaths are a probable consequence of the defendant's conduct."[179] In context, the prosecutor's statements about the second murder going unpunished were not a plea for vengeance, but rather permissible argument, consistent with the statutory aggravator, that the jury impose additional punishment for the additional crime.[180] The State's argument that the statutory aggravator recognizes that "[w]hen you convict someone of two murders, if you impose a life sentence for the first murder because we each have but one life to give, there is no real punishment for that second murder" (A631), was, by simple definition, logical and permissible. Reyes' related argument that the prosecutor misstated facts and the law in its presentation of the Otero murder in the penalty phase lacks record support, and is therefore unavailing.

[177] *Reyes*, 2016 WL 358613, at *32-33.
[178] *Reyes*, 2016 WL 358613, at *33.
[179] 11 *Del. C.* § 4209(e)(1)(k).
[180] *See Rodden v. Delo*, 143 F.3d 441, 447 (8th Cir. 1998).

Reyes' argument, adopted by Superior Court, that defense counsel should have objected to the prosecutor's one-time statement that the jury should reject Reyes' mitigation expert's attempt to excuse his conduct also fails. The court relies on this Court's opinion in *Small v. State*,[181] decided in 2012, where "the prosecutor's repeated and improper use of 'excuses' as a refrain in the State's closing statement may have confused the jury about the purpose of the penalty hearing."[182] In *Small*, this Court decided that 8 references to excuses and 3 references to shifting the blame, changed the tenor of the penalty phase and materially prejudiced the defendant.[183] *Small* is factually dissimilar from Reyes' case. *Taylor v. State*,[184] however, presents comparable facts. In *Taylor*, the prosecutor argued in penalty phase rebuttal closings that the defendant's substance abuse problem did not serve as an excuse for what he did.[185] In postconviction proceedings, Superior Court found that while counsel could have objected to that comment, the prosecutor's remarks were not unfairly prejudicial and, therefore, defense counsel was not ineffective in failing to object.[186] This Court agreed, stating that Taylor could not show a reasonable probability that the outcome of his case would have been different had trial counsel objected:

[181] 51 A.3d 452 (Del. 2012).
[182] *Id.* at 460.
[183] *Id.* at 461.
[184] 32 A.3d 374 (Del. 2011).
[185] *Taylor*, 32 A.3d at 386-87.
[186] *Id.* at 387.

> Those remarks occurred during Taylor's penalty hearing and were properly made to counter mitigating evidence presented by Taylor's counsel. Reconstructing the record by presupposing that those hypothetical objections were made would not change a reasonable sentencing judge's decision on the outcome of the penalty phase. Because in that context Taylor cannot be said to have suffered cognizable prejudice under *Strickland*, the trial court properly denied this ineffective assistance claim.[187]

Here, too, Reyes failed to show how defense counsel's objection to the prosecutor's comment would have changed the outcome of his penalty phase.[188] Superior Court erred by failing to consider the prejudice prong of *Strickland*.

Reyes' claim that counsel should have objected to a portion of the prosecutor's penalty phase rebuttal argument calling him monstrous should also have been rejected by Superior Court. The prosecutor argued:

> He killed and he killed, and he killed again. They're not mistakes. They're not errors in judgment. They're not bad choices. They're not blemishes in one's life.
>
> When you kill, and you kill and you kill again, you are a murderer. That is what you are. You need go no further in defining him.
>
> He is so monstrous. It is so monumental that any definition of Luis Reyes pales into insignificance.

(A139). The prosecutor's argument responded to Reyes' allocution statement that he was not a "cocky, insensitive, no-feeling, cold-blooded killer." (A134). Reyes, at the time of his penalty phase, was a three-time murderer from two separate occasions. The murders he committed, by all standards, were indeed, monstrous.

[187] *Id*. (citations omitted)
[188] *See, e.g., id.; Whalen v. State*, 492 A.2d 552 (Del. 1985).

The prosecutor's comment, taken in context, was not improper.[189]

Likewise, there is no merit to Reyes' claim that counsel improperly failed to object to the prosecutor's appeal to the jury's sense of community. In rebuttal, the prosecution asked rhetorically what a life sentence would "say as the conscience of the community?" (A140). Under the Delaware capital punishment scheme, the trial judge of the Superior Court bears the ultimate responsibility for imposition of the death sentence. The jury acts in an advisory capacity as the conscience of the community in determining whether the death penalty is the appropriate punishment and through their recommendation, plays an integral role in the sentencing result.[190] The prosecutor's reference, here, like the others, was proper.[191]

D. Reyes' Allocution

During his allocution, Reyes told the jury that he refused a plea bargain offered by the State because he was innocent. (A134). His statement was inaccurate. Nevertheless, Reyes argued, and Superior Court found, that his counsel was ineffective for failing to object when the prosecutor, in rebuttal, read a letter

[189] *See People v. Farnum*, 47 P.3d 988, 1054 (Cal. 2002) (the prosecutor's reference to defendant as a "monster" and "beast that walks upright" for the most part was constituted fair comment on the evidence presented and even if it exceeded the bounds of vigorous yet fair argument, no prejudice was shown in light of the full record; *State v. Owsley*, 959 S.W.2d 789, 797 (Mo. 1997) (name-calling not prejudicial where there is evidence of support such characterization).

[190] *Jackson v. State*, 684 A.2d 745, 749 (Del. 1996); *Sullivan v. State*, 636 A.2d 931, 944 (Del. 1994); *State v. Cohen*, 604 A.2d 846, 856 (1992); *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

[191] *E.g., People v. Cornwall*, 117 P.3d 622, 649-50 (Cal. 2005); *Blake v. State*, 121 P.3d 567, 578 (Nev. 2005); *State v. Moseley*, 449 S.E.2d 412, 443 (N.C. 1994); *Commonwealth v. Hughes*, 865 A.2d 761, 806-07 (Pa. 2004).

into the record clarifying that the State had never offered Reyes a plea bargain.[192] Superior Court failed to properly consider the record.

Counsel informed the trial court that they had explained the parameters of allocution to Reyes and they were satisfied that he understood. (A631). Counsel advised that while they debated the merit of Reyes allocuting:

> He's made the decision on his own and it's something that he could not be discouraged or encouraged from doing. It's his own decision and the risks involved were made clear to him as were the potential benefits. So I believe he knows what he can say. And I believe that he's made this decision entirely on his own having heard the pros and cons of what he might say. (A130-31).

The trial court conducted a lengthy colloquy with Reyes about his allocution decision, including the risks and benefits and whether he had enough time to discuss his decision with counsel. (A131-33). At defense counsel's request, the trial court advised Reyes that when a defendant seeks to present new matters of relevance that go beyond the record in the guilt phase and exceeds the limited parameters permitted in allocution, the defendant must testify under oath and be subjected to cross-examination. (A132). Reyes stated "I fully understand what I can say and what I can't say." (A132-33).

Reyes then allocuted, making untruthful and inadmissible statements about plea bargaining between the State and defense. (A134-36). Trial counsel was faced with a ruling from the trial court that Reyes' statements exceeded the limits

[192] *Reyes*, 2016 WL 358613, at *37.

of allocution. (A137). While defense counsel could have insisted that Reyes be placed under oath and cross-examined rather than agreeing to let the State read the accurate letter into the record, the letter would have been admitted regardless. The State would have used the letter in cross-examination and the situation would have been far worse. Given Reyes' demonstrated inability to testify to his advantage, defense counsel reasonably elected a course of action that would not subject their client to rigorous cross-examination by the prosecutor.

When faced with the State's objection and proffered resolution of reading page 2 of the letter, defense counsel suggested a shorter, more concise statement that the prosecutor could make to the jury: "we never made an outright plea [offer], what we did was said if he accepted responsibility and made a statement, then we would have considered that or we would have made that plea." (A137). The prosecutor, however, requested that the State be permitted to read the letter. Defense counsel agreed, with the conditions that the prosecutor identify the statement as a letter written to counsel and that it not be admitted into evidence. (A137).

To the extent the limited portion of the State's letter stating: "[w]ithout an acceptance of responsibility, we believe that the death penalty for your client is absolutely required" (A138) injects the prosecutor's own personal opinion, the letter must be seen in the context it was used. The jury was well aware that the

State was seeking the death penalty for Reyes as an appropriate sentence for his actions. The State's objection to Reyes' allocution was that he created an impression that the State believed that a death penalty was not appropriate for him. (A136a). The letter was only used to correct the record. Although counsel could have argued for redaction of the objectionable portion, removing that portion would have frustrated the prosecution's attempt to correct the perceived error in the record created by Reyes. By limiting the correction to the reading of the letter, identified as such and not admitted into evidence, was a professionally reasonable decision by counsel. Further, counsel informed the jury of Reyes' "mistake" first, thereby mitigating any damage from having the prosecutor point out the error:

> Now, before I get into that part, I would like to address briefly something Mr. Reyes said that I believe was factually inaccurate and that concerns a plea offer that was made to him.
>
> No plea offer was extended. There were plea negotiations, and I offer Mr. Wharton the opportunity to address you and tell you what those plea negotiations were, and whatever he says about what was said, that's the way it was. There was some discussions, but no firm plea offer was ever made.
>
> So I would say in that regard, Mr. Reyes made a misstatement in the text of his half hour conversation. And I can't tell you that I think it was intentional and that its up to you to decide, but I will tell you that it was inaccurate. That part of his statement was inaccurate.

(A137a).

In the State's rebuttal argument, the prosecutor prefaced the reading of the letter by discussing what Reyes had said in allocution:

> He talked about a plea agreement, a plea offer. And he was wrong about that. He presented incorrect information.
>
> And because of that, I'm permitted to set the record straight. Mr. Capone gave you a little bit of a preview of that. I'm permitted to set the record straight so that you're not under any misapprehensions about what the State's position is in this case.
>
> What I'm going to read you, read from is a letter sent to defense counsel on September the 17th of this year to Mr. Capone and Mr. Pedersen from Mr. Wood and myself. (A138).

Superior Court, by failing to consider the Hobson's choice of subjecting Reyes to cross-examination or having the prosecutor read a short letter regarding Reyes' lack of remorse, erred in finding deficient performance. Superior Court's attempt to establish prejudice by citing cases of improper vouching where the prosecutors made reference to charging decisions and implied personal knowledge fails. The letter's language did not imply any additional knowledge. Reyes did not accept responsibility for the murders of Rowe and Saunders. In light of the clear context for the reading of the letter, Reyes cannot and did not establish any prejudice from his counsel's decision not to object to the reading of the letter.

E. Reyes' *Otero* Trial Testimony[193]

Reyes claimed, and Superior Court found, that trial counsel provided ineffective assistance for failing to object to the admission of Reyes' testimony in Cabrera's 1998 trial for the Otero homicide. Superior Court found claims that admission of a portion of that testimony, which he states portrayed him as a liar,

[193] *See* Argument II for a discussion of the free-standing claim.

violated DRE 404 and should not have been admitted. On direct appeal, Reyes argued that the trial judge abused his discretion in admitting the excerpt, not including the part where Reyes admitted lying to his girlfriend, although he did contest the statement where he stated he told her about the beating another time.[194] This Court ruled that the record reflected that Reyes' statements were corroborated by Santos' independent statements to the police and supported the trial judge's determination that his statement qualified as relevant evidence in this case under DRE 402.[195] There is no reason to believe that an objection on the basis that the testimony characterized Reyes as a liar would have been successful, especially in light of the court's analysis under DRE 403.

F. Reyes' Prison Record

Reyes asserted, and Superior Court found, that trial counsel was ineffective for failing to object to and rebut the State's characterization of Reyes' involvement in rehabilitation programs while incarcerated. Superior Court found that the State argued that Reyes was so sure he would not be convicted that he did not do anything to better himself in prison. Reyes and Superior Court, have taken the State's argument out of context.[196] As the State told the jury it was Reyes who told Dr. Finkelstein he would be exonerated. Based upon Reyes' statement, the State

[194] *Reyes*, 819 A.2d at 311.
[195] *Id.*
[196] *See Whittle v. State*, 77 A.3d 239, 248 (Del. 2013) (finding excerpts should be considered in the context of the closing argument which must be analyzed as a whole).

reasonably argued, that Reyes "didn't do anything of significance to make himself a better person in anticipation of his eventual release. No anger counseling, no psychological counseling, no Key program, no Crest program, no certificates of achievement, nothing. Nothing." (A129). Reyes argued that he was ineligible for programs the entire time he was incarcerated, that is not accurate.

The prosecutor argued that no evidence supported that he completed any programs while incarcerated. While James Aiken testified in postconviction that Reyes engaged in vocational training in that fourteen-month time-frame, it appears that that program was frequently interrupted by Reyes' disciplinary problems. The prosecutor's arguments were proper, regardless of whether Reyes was ineligible for prison rehabilitation classes for some amount of time while in prison. Because the argument was proper, trial counsel did not perform below an objective standard of reasonableness by not objecting. Nor did Reyes show how he suffered any prejudice. The trial court clearly instructed the jury that, "the comments of counsel in the case are not evidence, but simply arguments of the attorneys regarding the case." (A141). Because the underlying claim is meritless, appellate counsel was not deficient in failing to raise it. Superior Court erred in finding that Reyes had met his burden of alleging prejudice with substantiation, or showed that, but for errors made by counsel, the outcome of the proceedings would have been different.

Cumulative Error

Superior Court found the cumulative impact of alleged errors by trial and appellate counsel deprived Reyes of a fair trial and penalty hearing and thus warrants postconviction relief. But, a claim of cumulative error, in order to succeed, must involve "matters determined to be error; not the cumulative effect of non-errors."[197]

"Cumulative error must derive from multiple errors that caused 'actual prejudice.'"[198] None of Reyes' claims, individually or collectively, established a meritorious claim for postconviction relief. Reyes, who killed two men execution style after having murdered a 66-year-old man the year before, could not overcome his own criminal record. "The harmlessness of cumulative error is determined by conducting the same inquiry as for individual error—courts look to see whether the defendant's substantial rights were affected."[199] Any errors by counsel at the trial and in the penalty hearing were harmless beyond a reasonable doubt.

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[197] *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990); *see also United States v. Powell*, 2011 WL 4037404, at *4 (3d Cir. Sept. 13, 2011) ("The cumulative effect of each non-error does not rise to constitutional error, as the saying goes, zero plus zero equals zero."); *State v. Sykes*, 2014 WL 619503, at *38 (Del. Super. Ct. Jan. 21, 2014).

[198] *Michaels v. State*, 970 A.2d 223, 231 (Del. 2009) (citing *Fahy v. Horn*, 516 F.3d 169, 205 (3d Cir. 2008)).

[199] *Rivera*, 900 F.2d at 1470 (citing *United States v. Kartman*, 417 F.2d 893, 894, 898 (9th Cir. 1969)).

CONCLUSION

For the foregoing reasons, the State respectfully requests that the judgment of the Superior Court be reversed.

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Dated: May 13, 2016

2016 WL 358613
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

State of Delaware,
v.
Luis Reyes, Defendant.

Cr. I.D. No. 9904019329
|
Final Submission: November 24, 2015
|
Decided: January 27, 2016

***Upon Defendant's Motion for Postconviction Relief* GRANTED**

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MEMORANDUM OPINION

Rocanelli, J.

I. *INTRODUCTION AND PROCEDURAL HISTORY*

***1** The bodies of Brandon Saunders and Vaughn Rowe were discovered in a wooded area of Rockford Park in Wilmington, Delaware, on January 21, 1996. Nearly four years later, on December 6, 1999, Luis Reyes ("Reyes") and Luis Cabrera ("Cabrera") were indicted as co-defendants for the murders of Saunders and Rowe ("Rockford Park Murders"). [1] The State sought the death penalty for both Reyes and Cabrera in connection with the Rockford Park Murders. Counsel was appointed for both defendants. [2] The trials of Cabrera and Reyes were severed by the Trial Court. [3]

[1] At the time they were indicted for the murders of Rowe and Saunders, Reyes and Cabrera were serving sentences imposed for the January 1995 murder of Fundador Otero. Cabrera was serving a life sentence for Murder First Degree. Reyes was serving a twenty-year sentence for Murder Second Degree (Level V time suspended after twelve years for decreasing levels of community-based supervision).

[2] "Reyes Trial Counsel" was Jerome M. Capone, Esquire, and Thomas A. Pedersen, Esquire. Reyes Trial Counsel also represented Reyes on direct appeal.

[3] The "Trial Court" refers to the presiding judge to whom this case was assigned until September 2013.

A. Reyes Rockford Park Trial and Direct Appeal

Cabrera was tried first and convicted of all counts by a jury, which recommended by a vote of 11–1 that the death sentence be imposed. Reyes' trial for the Rockford Park Murders took place thereafter ("Reyes Rockford Park Trial"): jury selection started on September 18, 2001; the guilt phase began on October 2, 2001; jury deliberations began on October 18, 2001; and, on October 19, 2001, the jury returned a verdict finding Reyes guilty of two counts of First Degree Murder, two counts of Possession of a Firearm During the Commission of a Felony, and two counts of Conspiracy in the First Degree.

During the guilt phase, Reyes moved for a mistrial on grounds of juror misconduct. The Trial Court denied the motion, concluding that the jurors were able to continue in an unbiased manner. The penalty phase began on October 23, 2001, and ended on October 26, 2001. The jury recommended that Reyes receive the death sentence for each of the two murders by a vote of 9–3. By decision and Order dated March 14, 2002, the Trial Court sentenced both Reyes and Cabrera to death. [4]

[4] *State v. Cabrera*, 2002 WL 484641, at *5–8 (Del.Super. Mar. 14, 2002) *aff'd and remanded sub nom Reyes v. State*, 819 A.2d 305 (Del.2003) (hereinafter *Reyes Sentencing*).

An automatic, direct appeal was filed with the Delaware Supreme Court, [5] which addressed several issues: (i) the Trial Court's denial of individual *voir dire* during jury selection; (ii) the admission into evidence of Reyes' testimony during cross-examination in the Otero trial; [6] (iii) the admission into evidence of two statements attributed to co-defendant

Cabrera; (iv) the admission into evidence of testimony about the victims' state of mind on the night of the Rockford Park Murders; (v) alleged juror misconduct; (vi) whether jury deliberations were tainted by consideration of information not in evidence; (vii) the constitutionality of the 1991 Delaware Death Penalty Statute; and (viii) an independent review of the death sentence, including statutory aggravators, and whether the imposition of the death penalty was arbitrary or capricious. The Supreme Court affirmed Reyes' convictions and death sentences by Opinion and Order dated March 25, 2003. [7]

5 *See* 11 *Del. C.* § 4209(g) ("Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the recommendation on and imposition of that penalty shall be reviewed on the record by the Delaware Supreme Court"); Reyes' direct appeal to the Delaware Supreme Court was filed on March 21, 2002.

6 *See supra* n.1.

7 *Reyes v. State*, 819 A.2d 305 (Del.2003) (hereinafter *Reyes Direct Appeal*).

B. Appointment of Rule 61 Counsel and Postconviction Motions

***2** By letter dated March 8, 2004, Reyes notified the Trial Court that Reyes intended to pursue postconviction relief and requested appointment of counsel. The Trial Court appointed counsel to represent Reyes in the postconviction proceedings ("Rule 61 Counsel"). [8] Reyes' Rule 61 motion filed in March 2004—amended in 2005, 2007, in 2009, and as briefed in 2014, and 2015—is now pending before this Court for decision. [9]

8 Various lawyers have been appointed to Reyes since 2004: first, Kevin J. O'Connell, Esquire and Jan T. Van Amerongen, Esquire; second, Jan T. Van Amerongen, Esquire and Andrew J. Witherell, Esquire; third, Jan T. Van Amerongen, Esquire and Joseph Gabay, Esquire; fourth, Jan T. Van Amerongen, Esquire and Jennifer–Kate Aaronson, Esquire; fifth, Jennifer–Kate Aaronson, Esquire; sixth Jennifer–Kate Aaronson, Esquire and Michael Modica, Esquire; seventh, Jennifer–Kate Aaronson, Esquire and Natalie Woloshin, Esquire; eighth, Natalie Woloshin, Esquire and Patrick J. Collins, Esquire; ninth, Patrick J. Collins, Esquire and Albert J. Roop, V, Esquire; and tenth, Patrick J. Collins, Esquire.

9 On March 19, 2004, Reyes filed his first motion for postconviction relief. On April 28, 2005, Reyes filed a supplemented motion for postconviction relief. On March 16, 2007, Reyes filed an amended motion for postconviction relief. On October 13, 2009, Reyes filed a second amended motion for postconviction relief. On April 1, 2013, the Trial Court began an evidentiary hearing pursuant to Superior Court Criminal Rule 61(h). The Trial Court held evidentiary hearings in May and August 2012 and April 2013. The presiding judge retired from the Superior Court in May 2013. The matter was reassigned by then-President Judge Vaughn in September 2013. Reyes filed a post-evidentiary hearing brief on April 30, 2014. The State filed a response on October 7, 2014. Reyes replied on November 10, 2014. On January 29, 2015, this Court entered an Order staying Reyes' postconviction proceedings pending the outcome of Cabrera's postconviction proceedings. On June 17, 2015, this Court issued its decision with respect to Cabrera's motion for postconviction relief and issued a revised opinion on June 22, 2015. The Court requested supplemental briefing, which was submitted on August 24, 2015, November 6, 2015, and November 24, 2015.

There was little physical evidence presented at the Reyes Rockford Park Trial that connected Reyes to the Rockford Park Murders. Rather, most of the evidence presented at the Reyes Rockford Park Trial tied Cabrera to the Rockford Park Murders. With little physical evidence linking Reyes to the Rockford Park Murders and with the possibility of a sentence of death, it was essential to a fair trial and sentencing that Reyes Trial Counsel use all available evidence and "make timely and appropriate objections to the admission of evidence going to the heart of the State's case." [10] Therefore, it was especially important that Reyes Trial Counsel use all available exculpatory evidence and make appropriate objections to challenge the State's minimal case. This Court's review of the record leads the Court to conclude that mistakes were made that undermine this Court's confidence in the Reyes Rockford Park Trial conviction and sentencing.

10 *Starling v. State*, 2015 WL 8758197, at *1 (Del.2015).

First, Reyes' decision to invoke his Fifth Amendment right during the guilt phase was not knowing, intelligent, and voluntary. Second, the Trial Court's delay in sentencing Cabrera rendered Cabrera unavailable as a witness in the Reyes Rockford Park Trial, denying access to important exculpatory evidence. Third, the testimony of Roderick Sterling was the most significant evidence against Reyes; however, it was highly suspect and because Sterling did not have personal knowledge of the claims he made, Reyes was deprived of his Sixth Amendment Right to Confrontation. Fourth, Reyes has established various claims of ineffective

assistance of counsel in both the guilt and penalty phases of the Reyes Rockford Park Trial that cumulatively prejudiced Reyes.

***3** There is a reasonable probability that the outcome of the Reyes Rockford Park Trial verdict and sentencing would have been different absent these errors. Therefore, Reyes' judgments of conviction and death sentence imposed by Order dated March 14, 2002 must be vacated.

II. *CONSIDERATION OF PROCEDURAL BARS*

Superior Court Criminal Rule 61 governs Reyes' motion for postconviction relief. [11] Postconviction relief is a "collateral remedy which provides an avenue for upsetting judgments that have otherwise become final." [12] To protect the finality of criminal convictions, the Court must consider the procedural requirements for relief set out under Rule 61(i) before addressing the merits of the motion. [13]

11 Super. Ct.Crim. R. 61 has since been amended. All references to Rule 61 refer to the version of the Rule in place in 2004, when Reyes filed his motion for postconviction relief.

12 *Flamer v. State*, 585 A.2d 736, 745 (Del.1990).

13 *Younger v. State*, 580 A.2d 552, 554 (Del.1990).

Rule 61(i)(1) bars a motion for postconviction relief if it is filed more than three years from the final judgment; this bar is not applicable as Reyes' first postconviction motion was filed in a timely manner. [14] Rule 61(i)(2) bars successive postconviction motions; [15] this bar is not applicable as Reyes has not filed successive postconviction motions. Rule 61(i)(3) bars relief if the motion includes claims not asserted in prior proceedings leading to the final judgment; this bar will be addressed in the discussion of the claims to which it applies. Rule 61(i)(4) bars relief if the motion includes grounds for relief formerly adjudicated in any proceeding leading to the judgment of conviction, in an appeal, or in a postconviction proceeding; this bar will be addressed in the discussion of the claims to which it applies.

14 Rule 61(i)(1) (barring a motion for postconviction relief unless filed within three years after the judgment of conviction is final); *Bailey v. State*, 588 A.2d 1121, 1127 (Del.1991).

15 Super. Ct.Crim. R. 61(i)(2) (barring successive postconviction motions if the motion includes grounds for relief not asserted in a prior postconviction proceeding).

This Court rejects the State's contention that certain claims set forth in the pending Rule 61 Motion should not be considered because those claims were not presented in prior Rule 61 Motions. This is Reyes' *first* Rule 61 Motion because the prior motions were not adjudicated. Moreover, the Trial Court allowed postconviction evidentiary hearings that further developed the record. There have been numerous changes in Reyes' postconviction counsel since Reyes first filed his Rule 61 Motion in 2004. The Trial Court permitted successive, amended, and supplemental motions to be filed on Reyes' behalf. To consider claims barred after the Court permitted amendments and supplements would render the expanded record superfluous, Rule 61 Counsel's efforts futile, and would violate Reyes' rights to full and fair consideration of whether Reyes' death penalty trial and sentencing was conducted in a manner consistent with Reyes' due process rights. Accordingly, this Court will consider the claims presented in the briefing without regard to whether claims were presented in Rule 61 motions were not adjudicated.

***4** The procedural bars to postconviction relief under Rule 61(i)(3) [16] can be overcome if the motion asserts a colorable claim that there has been a "miscarriage of justice" as the result of a constitutional violation that undermined the fundamental fairness of the proceedings. [17] Likewise, the procedural bar under Rule 61(i)(4) [18] can be overcome if consideration of the claim on its merits is warranted in the "interest of justice." [19]

16 This exception is also applicable to procedural bars to postconviction relief under Rule 61(i)(1) and (2), but those bars are not relevant here.

17 Super. Ct.Crim. R. 61(i)(5); *see also Younger*, 580 A.2d at 555; *State v. Wilson*, 2005 WL 3006781, at *1 n.6 (Del.Super. Nov. 8, 2005).

18 This exception is also applicable to procedural bars to postconviction relief under Rule 61(i)(2), but that bar is not relevant here.

19 Super. Ct.Crim. R. 61(i)(5).

Finally, Reyes' postconviction motion asserts multiple claims of constitutional violations, including claims of ineffective assistance of counsel. The Delaware Supreme Court has

declined to hear claims of ineffective assistance of counsel on direct appeal. [20] Therefore, the first opportunity for Reyes to assert such claims is in an application for postconviction relief.

20 *Flamer*, 585 A.2d at 753; *State v. Gattis*, 1995 WL 790961, at *3 (Del.Super. Dec. 28, 1995).

III. *THERE ARE COLORABLE CLAIMS OF MISCARRIAGE OF JUSTICE IN THE REYES ROCKFORD PARK TRIAL.*

Pursuant to Rule 61(i)(5), procedural bars to postconviction claims are not applicable to a "colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction." [21] Not every constitutional violation merits relief under the "miscarriage of justice" exception. [22] Rather, a criminal defendant must establish a colorable claim of a constitutional violation, which requires the criminal defendant show "some credible evidence which takes the claim past the frivolous state." [23]

21 Super. Ct.Crim. R. 61(i)(5).

22 *See Webster v. State*, 604 A.2d 1364, 1366 (Del.1992).

23 *State v. Ducote*, 2011 WL 7063381, at *1 n. 4 (Del.Super. Dec. 29, 2011) (citing *State v. Wharton*, 1991 WL 138417, at *5 (Del.Super. June 3, 1991)).

Moreover, pursuant to Rule 61(i)(4), the Court must address any postconviction claim that has been formerly adjudicated if "reconsideration is warranted in the interest of justice." A criminal defendant may trigger the interest of justice exception by presenting legal or factual developments that have emerged subsequent to the conviction. [24] The interest of justice exception is narrow in scope; however, the Court must also preserve the purpose of Rule 61(i) procedural bars: achieving finality of judgments. [25]

24 *Flamer*, 585 A.2d at 746; *Weedon v. State*, 750 A.2d 521, 527 (Del.2000) (discussing witness recantation as a factual development for purposes of the exception).

25 *State v. Rosa*, 1992 WL 302295, at *7 n.10 (Del.Super. Sept. 29, 1992).

Upon consideration of the entire record, this Court finds there was a miscarriage of justice pursuant to Rule 61(i)(5), that reconsideration of otherwise procedurally barred claims is warranted in the interest of justice pursuant to Rule 61(i)(4). Legal developments have emerged subsequent to the convictions, Reyes was deprived of his constitutional rights, and the integrity of the Reyes Rockford Park Trial was compromised.

A. Reyes' Fifth Amendment rights were violated.

1. Reyes' decision to invoke his Fifth Amendment right at the guilt phase was not knowing, intelligent, and voluntary.

***5** The decision of whether or not to testify is a fundamental right. [26] In making that decision, Reyes should have had the opportunity to consider that evidence regarding his involvement with the Otero murder would be admitted during the penalty phase as an aggravating factor. In his allocution during the penalty phase of the Reyes Rockford Park Trial, Reyes professed his innocence. Specifically, Reyes stated: "[O]n everything that I love and on the Word of God, I did not kill Brandon and Vaughn. I did not take their life. No matter how bad things may look, the evidence that was presented, I'm not the murderer of them two." [27] Reyes explained to the jury that he had wanted to testify to profess his innocence during the guilt phase, but he did not do so because Reyes did not want the jury to hear about Reyes' role in the Otero murder. [28]

26 *See* U.S. CONST. amend. V; DEL. CONST. art. 1, § 7.

27 Penalty Phase Tr. Oct. 25, 2001 at 94:20–95:1.

28 *Id.* at 96:3–11.

A criminal defendant alone must make the fundamental decision whether to testify on his own behalf. [29] The decision regarding whether to testify must be made by a criminal defendant and cannot be made by defense counsel [30] because such a choice "implicate[s] inherently personal rights which would call into question the fundamental fairness of the trial if made by anyone other than the defendant." [31] Furthermore, waiver of the right to testify on one's own behalf must be knowing, intelligent, and voluntary. [32] Whether a waiver of a constitutional right is knowing, intelligent, and voluntary depends upon the facts and circumstances of each case. [33] A waiver of a constitutional right is knowing, intelligent,

and voluntary "if the defendant is aware of the right in question and the likely consequences of deciding to forego that right." [34]

29 *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *United States v. Lively*, 817 F.Supp. 453, 461 (D.Del.1993) *aff'd*, 14 F.3d 50 (3d Cir.1993); *Taylor v. State*, 28 A.3d 399, 406 (Del.2011).

30 *Lively*, 817 F.Supp. at 461.

31 *Cooke v. State*, 977 A.2d 803, 841 (Del.2009) (internal citations omitted).

32 *See Hall v. State*, 408 A.2d 287, 288 (Del.1979); *see also State v. Taye*, 2014 WL 785033, at *5 (Del.Super. Feb. 26, 2014) *aff'd*, 2014 WL 4657310 (Del. Sept. 18, 2014).

33 *Lewis v. State*, 757 A.2d 709, 714 (Del.2000).

34 *Davis v. State*, 809 A.2d 565, 569 (Del.2002); *Richardson v. State*, 2015 WL 5601959, at *2 (Del.Super. Sept. 22, 2015).

Although the Trial Court conducted an appropriate colloquy with Reyes and Reyes stated in open court that his decision was voluntary and not a product of a threat or promise, [35] Reyes' waiver of his right to testify was predicated on the mistaken understanding that, if he did not testify, then information regarding his involvement in the Otero murder would not be presented to the jury. During his allocution, Reyes explained: "I didn't get on the stand during trial because I didn't want what I was presently incarcerated for to come up. I felt that by that coming out, you, the jury, would automatically think I was guilty. Therefore, I chose not to take the stand." [36]

35 Guilt Phase Tr. Oct. 16, 2001 at 19:1–21:14.

36 Penalty Phase Tr. Oct. 25, 2001 at 96:3–8.

Despite this very significant step taken by Reyes, *i.e.* not testifying in his own defense to profess his innocence, the jury heard about the Otero murder in great detail—not only from the State, but also from Reyes' own lawyers. For example, during the penalty phase, the State started its opening statement with a photograph of Otero and told the jury that the Rockford Park Murders were not the first time that Reyes had committed murder. The Otero murder was the central focus of the State's arguments in favor of death. In addition, Reyes Trial Counsel introduced the transcript from Reyes' sentencing for the Otero murder. Highlighting the prior murder, in introducing the transcript to the jury, [37] Reyes Trial Counsel stated:

> ***6** I'm going to skip the niceties. I'm going to get right to the heart of the matter and I want to tell you that this —and I'm going to tell you that this is the sentencing transcript of September 25th, 1988 of Luis Reyes who was being sentenced on a murder second charge for the murder of Fundador Otero. [38]

37 The transcript included statements from Reyes' Otero trial counsel that Reyes only participated in the Otero murder because of Cabrera's influence and that Reyes cooperated in the investigation of Cabrera for the Otero murder. *Id.* at 6:21–7:17. The transcript also included statements from Reyes' Otero counsel and the State that Reyes, after learning that the police were looking for him, turned himself in, and gave a detailed confession to the murder of Otero. *Id.* at 7:11–13; 9:23–10:2. The transcript included the State's reference to the "wrenching" testimony of Otero's daughter who dreamed of walking down the aisle with her father, the fact that Otero's "charred remains" were found in New Jersey, and that Reyes "physically was a principal in the murder by holding down Mr. Otero." *Id.* at 10:22–11:20. The transcript also included Reyes' statement to the Otero sentencing judge, in which Reyes conceded that Cabrera's influence over Reyes did not justify Reyes' actions, but that Reyes allowed his love for Cabrera to lead him in the wrong direction and that Reyes regrets that every day. *See id.* at 14:12–15:8.

38 *Id.* at 4:21–5:4.

While it appears that Reyes understood the right that he waived in waiving his right to testify on his own behalf, Reyes did not understand the consequences of choosing to forego that right. Reyes' explanation to the jury during the sentencing phase of the Reyes Rockford Park Trial that he wanted to testify to profess his innocence during the guilt phase, but did not do so to avoid presentation to the jury about Reyes' role in the Otero murder shows that Reyes' expectation was that such evidence would not be admitted, including by Reyes Trial Counsel. In making the decision not to testify, Reyes should have had the opportunity to consider that evidence regarding his involvement with the Otero murder would be admitted during the penalty phase as an aggravating factor.

Accordingly, Reyes' decision was not knowing or intelligent because it was premised on a misunderstanding. The introduction of evidence about Otero coupled with Reyes' expectation that such evidence would not be introduced seriously undermines whether Reyes' decision was knowing, intelligent, and voluntary.

2. The State's presentation of Reyes' prior testimony from another proceeding undermined Reyes' decision to invoke his Fifth Amendment right not to testify.

When Reyes was interviewed by police regarding the Otero murder, Reyes told police that he made a statement to his girlfriend/fiancé, Elaine Santos, that one night Reyes was with Cabrera, someone came to Reyes' house, and Cabrera and Reyes went to the basement to beat him up. As part of Reyes' plea agreement in the Otero murder, Reyes agreed to testify as a witness against Cabrera in Cabrera's Otero murder trial in 1998. During Cabrera's Otero murder trial, the State questioned Reyes about his statement to Ms. Santos and Reyes admitted that he lied to Ms. Santos. Subsequently, during the guilt phase of the Reyes Rockford Park Trial, the State read into evidence (with a detective on the witness stand) this part of Reyes' trial testimony from Cabrera's Otero murder trial. [39] It appears the State's purpose in introducing this testimony was twofold: (1) to suggest that the beating involved Saunders and Rowe and had taken place on the night of the Rockford Park Murders; and (2) to suggest to the jury that Reyes is a liar.

39 *See* Guilt Phase Tr. Oct. 2, 2001 at 241:22–242:14 (reading into evidence Reyes' trial testimony dated May 26, 1998, Exhibit 42 in the Reyes Rockford Park Trial).

***7** This was improper and objectionable. Although Reyes Trial Counsel objected to the reading in of Reyes' prior testimony, [40] the Trial Court permitted Reyes' prior testimony to be read to the jury in the Reyes Rockford Park Trial. The Trial Court simply explained that the testimony was probative and determined there was no Delaware Rule of Evidence ("DRE") "403 issue that prohibit[ed] its admission." [41] However, Reyes' former testimony was nevertheless inadmissible hearsay and undermined Reyes' choice to invoke his Fifth Amendment right not to testify.

40 Reyes Trial Counsel objected to Reyes' prior testimony at a pre-trial conference and during the guilt phase of the Reyes Rockford Park Trial. *See* Pre Trial Conf. Tr. Sept. 27, 2001 at 34:19–53:16; Guilt Phase Tr. Oct. 2,2001 at 230:17–233:11.

41 Pre Trial Conf. Tr. Sept. 27, 2001 at 49:13–50:11.

"Evidence of a person's character or a trait of his character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." [42] However, an exception to this rule includes "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." [43] Moreover, a witness' credibility may be impeached by evidence in the form of reputation or opinion. [44] Generally, a witness' credibility may not be impeached with extrinsic evidence of a specific instance of conduct. [45] However, in the discretion of the Court, a specific instance of conduct related to the witness' credibility may be "inquired into on cross-examination of the witness" if it concerns "the witness' character for truthfulness or untruthfulness" or it concerns "the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." [46]

42 D.R.E. 404(a).

43 D.R.E. 404(a)(1).

44 D.R.E. 608(a).

45 D.R.E. 608(b).

46 *Id.*

There is nothing in the record that suggests that Reyes Trial Counsel introduced evidence regarding the character trait for truthfulness or untruthfulness for Saunders, Rowe, or Reyes. Further, Reyes' testimony that was introduced was neither opinion nor reputation evidence as permitted under the DRE. Instead, it was a specific instance of conduct, which is inadmissible in the form of extrinsic evidence and can only be inquired into on cross-examination. Accordingly, evidence of Reyes' character trait for truthfulness was inadmissible because he was not a witness in the Reyes Rockford Park Trial because he invoked his Fifth Amendment right, and his character for truthfulness was not otherwise attacked. Moreover, even if Reyes' character for truthfulness was at issue, extrinsic evidence—the reading of the testimony into evidence and introducing it as an exhibit—was inadmissible under the DRE. Presentation of Reyes' own testimony from a prior proceeding undermined Reyes' decision not to testify as a witness against himself.

B. Cabrera was unavailable as a witness in the Reyes Rockford Park Trial because Cabrera was not promptly sentenced after his conviction.

Cabrera's trial for the Rockford Park Murders took place in early 2001. The jury returned a verdict on February 11, 2001, finding Cabrera guilty of two counts of First Degree Murder, two counts of Conspiracy in the First Degree, and other offenses. The Cabrera penalty phase began on February 13, 2001, and ended on February 15, 2001. The jury recommended that Cabrera receive the death sentence for each of the Rockford Park Murders by a vote of 11–1. The Court postponed Cabrera's sentencing until the completion of the Reyes Rockford Park Trial. Ten months later, Reyes was convicted on October 19, 2001, and on October 26, 2001, the jury recommended that Reyes receive the death sentence for each of the Rockford Park Murders by a vote of 9–3. By decision and Order dated March 14, 2002, the Trial Court sentenced both Cabrera and Reyes to death. [47]

47 *Reyes Sentencing*, 2002 WL 484641, at *5–8.

***8** Although Cabrera's trial concluded more than eight months before the Reyes Rockford Park Trial, Cabrera had not been sentenced by the Trial Court at the time of Reyes' trial. Indeed, the Cabrera death sentence was imposed more than thirteen months after the jury recommended a death sentence for Cabrera. Because his sentencing was still pending, Cabrera was unavailable as a witness at the Reyes Rockford Park Trial. [48]

48 *Cabrera v. State*, 840 A.2d 1256, 1267 (Del.2004) (hereinafter *Cabrera Direct Appeal*).

Had Cabrera testified as a witness at the Reyes Rockford Park Trial, Cabrera may have introduced reasonable doubt regarding Reyes' role in the Rockford Park Murders. Specifically, Reyes Trial Counsel met with Cabrera in March 2001 and Cabrera explained to Reyes Trial Counsel that *Reyes was not responsible for the Rockford Park Murders*, but instead that a man named Neil Walker had committed the murders. Cabrera detailed an altercation that involved Walker, Cabrera, Saunders, and Rowe that gave a motive for Walker to commit the Rockford Park Murders.

However, instead of testifying on behalf of Reyes, Cabrera advised that, if called as a witness in the Reyes Rockford Park Trial, Cabrera would invoke his Fifth Amendment right because he had not yet been sentenced. [49] Accordingly, a critical witness with exculpatory evidence for Reyes was unavailable because of the Trial Court's exercise of discretion as to the timing of Cabrera's sentencing. The Trial Court's delay in sentencing Cabrera rendered Cabrera unavailable as a witness in the Reyes Rockford Park Trial, denying access to exculpatory evidence and undermining the fairness of the trial.

49 *See* Letter from John P. Deckers to Luis Cabrera, March 6, 2001; Letter from Luis Cabrera to Reyes Trial Counsel, Sept. 23, 2001; Letter from John P. Deckers to Reyes Trial Counsel, Oct. 9, 2001.

C. The testimony offered by Sterling was highly suspect yet it was the most significant evidence linking Reyes to the Rockford Park Murders.

There was very limited evidence presented at the Reyes Rockford Park Trial that linked Reyes to the Rockford Park Murders. Indeed, there was no physical evidence at all that connected Reyes to the Rockford Park Murders. Instead, most of the evidence presented linked the murders to Cabrera who had already been tried and convicted. Instead, the only evidence presented at Reyes Rockford Park Trial that linked Reyes to the Rockford Park Murders was the testimony of Roderick Sterling, a convicted sex offender who received a significant advantage by testifying against Reyes and who did not even have personal knowledge about the claims he made against Reyes. The Trial Court described this as “the most significant testimony” presented against Reyes by the State. [50]

50 *Reyes Sentencing*, 2002 WL 484641, at *8.

1. The benefit offered to Sterling by the State in exchange for Sterling's testimony rendered Sterling's testimony unreliable.

Sterling was arrested on May 2, 1997, for raping a seven-year-old child. Sterling was charged with two counts of Unlawful Sexual Intercourse First Degree and detained at Howard R. Young Correctional Institution (“HRYCI”). At that time, Reyes was also detained at HRYCI for the Otero murder and no one had yet been charged with the 1996 Rockford Park Murders. [51]

51 Reyes was sentenced for the Otero murder on September 25, 1998. Upon sentencing, Reyes would have been moved to the sentenced population at HRYCI.

***9** In June 1997, Sterling—with the assistance of his cellmate Ivan Galindez—sent a letter to Sterling's attorney in the child rape case claiming to have information in connection with the Rockford Park Murders. Specifically, Sterling claimed he had overheard Reyes admit Reyes was responsible for the Rockford Park Murders when Reyes was speaking to Galindez. On January 20, 1998, Sterling gave a statement to the police claiming that sometime between May 1997 and June 23, 1997, a conversation took place between Galindez and Reyes regarding the Rockford Park Murders, which Sterling claimed to have overheard.

On December 1, 1998, Sterling pled guilty to one count of Unlawful Sexual Intercourse Second Degree and was sentenced by Order dated January 29, 1999, to twenty (20) years at Level V, suspended after ten (10) years at Level V, followed by ten (10) years of community-based supervision. On December 6, 1999, Cabrera and Reyes were indicted for the Rockford Park Murders. On September 14, 2001, four days before jury selection for the Reyes Rockford Park Trial, Sterling agreed to testify at the Reyes Rockford Park Trial about the alleged jailhouse confession by Reyes.

Sterling received a huge benefit for his testimony against Reyes. Indeed, after Sterling's testimony in the Reyes Rockford Park Trial, the State joined Sterling's motion to withdraw his guilty plea to Unlawful Sexual Intercourse Second Degree. The motion was granted; Sterling withdrew his plea; the State offered Sterling a plea to the lesser offense of Unlawful Sexual Intercourse Third Degree, and recommended a sentence of ten (10) years at Level V, suspended *immediately* for time served for non-reporting probation at Level I, with the expectation that Sterling would promptly be deported to Jamaica. Therefore, in exchange for his testimony against Reyes, Sterling was released immediately from prison for time served on February 4, 2002, serving half the time to which he was originally sentenced.

2. Sterling did not have personal knowledge regarding the claims he made and, therefore, Reyes was deprived of his Sixth Amendment Right of Confrontation.

Sterling testified inaccurately at the Reyes Rockford Park Trial that Sterling overheard a conversation at HRYCI between Reyes and Galindez and that, in that conversation, Reyes admitted to Galindez that Reyes killed Saunders and Rowe. In other words, when Sterling testified, he claimed to have personal knowledge regarding Reyes' alleged statements. However, in September 2008 when private investigators interviewed Sterling in Jamaica, Sterling claimed that he learned details of the Rockford Park Murders from Galindez and not from Reyes.[52] Reyes had a Sixth Amendment right to confront the witness who testified against him.[53] Because Sterling testified against Reyes and not Galindez, Reyes' Sixth Amendment right was violated.

52 *State v. Reyes*, 2012 WL 8256131, at *9 (Del.Super. Nov. 13, 2012).

53 *Franco v. State*, 918 A.2d 1158, 1161 (Del.2007) ("Both the United States and the Delaware Constitutions guarantee an accused the right to confront the witnesses against him in all criminal prosecutions.").

3. The State violated *Brady* by failing to disclose impeachment evidence.

The State violated Reyes' constitutional rights by failing to disclose impeachment evidence concerning Sterling. Specifically, the State knew that Sterling had a history of drug and alcohol use, convictions, and treatment, yet failed to provide this information to Reyes Trial Counsel. Reyes was prejudiced because without access to this impeachment evidence, Sterling could not properly be cross-examined with information that called into question Sterling's reliability.

***10** Under *Brady*, the State may not suppress evidence that is favorable to a defendant if the evidence is material to either guilt or punishment.[54] Under Delaware law, there are three necessary elements for a finding that a *Brady* violation occurred: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice ensued.[55] Impeachment evidence falls within *Brady* because it is " 'evidence favorable to an accused,' so that, if disclosed and used effectively, it may make the difference between conviction and acquittal."[56] Moreover, "[e]ffective cross-examination is essential to a defendant's right to a fair trial" because it is the " 'principal means by which the believability of a witness and the truth of [his] testimony are tested.' "[57] To reverse a conviction based on a *Brady* violation, a defendant must show that the undisclosed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[58] The

suppressed evidence must "create[ ] a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." [59]

54 *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Atkinson v. State*, 778 A.2d 1058, 1062 (Del.2001) (applying *Brady*).

55 *Starling*, 2015 WL 8758197, at *12.

56 *Atkinson*, 778 A.2d at 1062 (internal citations omitted).

57 *Id.* at 1061–62 (internal citations omitted).

58 *Jackson v. State*, 770 A.2d 506, 516 (Del.2001).

59 *Starling*, 2015 WL 8758197, at *12.

Most recently, the Delaware Supreme Court addressed *Brady* violations in *Starling v. State*. [60] The Court held that the State violated *Brady* when it "inaccurately describe[d] the status of [ ] criminal charges" of a pivotal witness. [61] Indeed, the witness identified Starling as the shooter involved in the deaths of two individuals. [62] The Delaware Supreme Court identified the witness as "the State's main witness" whose credibility was at stake. [63] Specifically, the State inaccurately represented to Starling's trial counsel that the witness' violation of probation and outstanding capias were pending during trial; however, those pending legal matters had in fact been dismissed before Starling's trial. [64]

60 *See id.* at *1

61 *Id.* at *10.

62 *Id.* at *1.

63 *Id.* at *14, 15.

64 *Id.* at *10–11.

The reasoning of the Delaware Supreme Court in *Starling* is applicable here. Just as there was no physical evidence linking Reyes to the Rockford Park Murders, there was also "no physical evidence linking Starling to the crime" of which he was convicted. [65] Like the identification witness about whom the Supreme Court expressed concerns, Roderick Sterling was the State's "main witness" in the Reyes Rockford Park Trial. In *Starling*, the State inaccurately described the pending criminal charges against the State's pivotal witness; similarly, in the Reyes Rockford Park Trial, the State failed to disclose Roderick Sterling's history of drug and alcohol abuse, convictions, and treatment. Reyes could have utilized this information to cast doubt on the credibility of Roderick Sterling as a witness. Cross-examination is critical to a fair trial. [66]

65 *Id* at *1

66 *Atkinson*, 778 A.2d at 1062.

D. There was a miscarriage of justice in the Reyes Rockford Park Trial.

Viewing the Reyes Rockford Park Trial conviction and sentencing as a whole, Reyes' right to a fair trial was seriously undermined. There are colorable claims of miscarriage of justice in the Reyes Rockford Park Trial, and Reyes was deprived of his constitutional trial rights. Accordingly, because the integrity of the Reyes Rockford Park Trial was compromised, the conviction must be vacated.

IV. *REYES' ROCKFORD PARK SENTENCING DID NOT MEET CONSTITUTIONAL STANDARDS BECAUSE THERE WAS INADEQUATE CONSIDERATION OF REYES' STATUS AS AN ADOLESCENT AND HIS IMMATURE BRAIN DEVELOPMENT.*

When Fundador Otero was murdered, Reyes was just seventeen (17) years old. At the time, Reyes was a high school student and varsity member of the A.I. DuPont High School wrestling team. Reyes confessed to his role in Otero's murder, and agreed to testify against Cabrera. [67] At Cabrera's Otero murder trial, Reyes admitted his role, but also explained his reluctance to participate in the crime. Reyes explained how he succumbed to pressure placed on him by Cabrera. In the Reyes Rockford Park Trial—although Reyes was only seventeen (17) years old at the time and despite his confession and cooperation with the police during the Otero investigation and trial—the State and the Trial Court emphasized Reyes' role in the Otero murder as the most significant non-statutory aggravating factor supporting the death penalty for the Rockford Park Murders.

67 In marked contrast to his admissions during the Otero murder investigation, Reyes steadfastly professed his innocence with respect to the Rockford Park Murders.

***11** At the time of the Otero murder, Reyes was seventeen (17) years old. At the time of the Rockford Park Murders, Reyes was eighteen (18) years old. [68] Although Reyes had

reached the chronological age of adulthood, Reyes was a youthful offender at the time of the Rockford Park Murders. The weight attributed to the Otero crime, for purposes of the penalty phase for the Rockford Park Murders, is inconsistent with the constitutional standards established by the United States Supreme Court for youthful offenders, especially in consideration of the relationship between Cabrera and Reyes. The constitutional standards for sentencing of a youthful offender demand full consideration of Reyes' youth and brain development, as well as consideration of Cabrera's negative influence, particularly in a death penalty case.

68 At the time of the Rockford Park Murders, Reyes was one month shy of his 19th birthday. While the State emphasized that the murder victims were teenagers, the State did not acknowledge that Reyes was also only a teenager at the time. Indeed, Reyes was a *classmate* of the victims.

A. Constitutional jurisprudence pre–2001

In 1982, the United States Supreme Court decided *Eddings v. Oklahoma,* [69] and held:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be *most susceptible to influence* and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. [70]

The *Eddings* Court noted: " '[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults." [71] The conclusions reached in *Eddings* relied, in part, on task force reports dating back to 1967, which provided:

> Adolescents everywhere, from every walk of life, are often dangerous to themselves and to others. [A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth. [72]

69 455 U.S. 104 (1982).

70 *Id.* at 115–116 (emphasis added).

71 *Id.* at 116 (quoting *Bellotti v. Baird,* 443 U.S. 622, 635 (1979)).

72 *Id.* at 115, n.11.

The *Eddings* Court explained that consideration of an adolescent defendant's background, as well as the defendant's mental and emotional development, did not serve to excuse the defendant's legal responsibility for the crime committed. [73] Rather, such considerations are important because "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background *and mental and emotional development of a youthful defendant* be duly considered in sentencing [for the crime of murder]." [74]

73 *Id.* at 116 (acknowledging that youths were committing increasingly violent crimes).

74 *Id.* at 116 (emphasis added).

In 1988, the United States Supreme Court held in *Thompson v. Oklahoma* [75] that "the execution of a person who was under 16 years of age at the time of his or her offense" is unconstitutional. [76] The *Thompson* Court's reasoning, rather than its holding, is of interest to this Court. Specifically, the decision in *Thompson* explained that distinctions between juveniles and adults abound in society and these distinctions should apply for purposes of sentencing young criminal defendants:

> ***12** Justice Powell has repeatedly reminded us of the importance of "the experience of mankind, as well as the long history of our law, recognizing that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those

> of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office." [77]
>
> * * * *
>
> It is generally agreed "that punishment should be directly related to the personal culpability of the criminal defendant." There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults. We [have] stressed this difference in explaining the importance of treating the defendant's youth as a mitigating factor in capital cases.... Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult. [78]

75 487 U.S. 815 (1988).

76 *Id.* at 838.

77 *Id.* at 823 (internal citations omitted).

78 *Id.* at 834–35 (internal citations omitted).

In 1993, the United States Supreme Court revisited the issue of youth as a mitigating factor in *Johnson v. Texas.* [79] The *Johnson* Court made clear that "[t]here is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of *Lockett* and *Eddings.*" [80] The *Johnson* Court held:

> A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. A sentencer in a capital case *must be allowed to consider the mitigating qualities of youth* in the course of its deliberations over the appropriate sentence. [81]

The *Johnson* Court stressed the importance of presenting the qualities of youth as mitigating evidence:

> Even on a cold record, one cannot be unmoved by the testimony of petitioner's father urging that his son's actions were due in large part to his youth. It strains credulity to suppose that the jury would have viewed the evidence of petitioner's youth as outside its effective reach in answering the second special issue. *The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.* [82]

79 509 U.S. 350 (1993).

80 *Id.* at 367 (citing *Sumner v. Shuman*, 483 U.S. 66, 81–82 (1987); *Eddings*, 455 U.S. at 115; *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (plurality opinion)); *see Lockett*, 438 U.S. at 604 ("[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer.... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (emphasis added).

81 *Johnson*, 509 U.S. at 367 (emphasis added).

82 *Id.* at 368 (emphasis added).

***13** Therefore, the constitutional precedent at the time of the Reyes Rockford Park Trial—as established in 1982, 1988, and 1993—required Reyes Trial Counsel to present the transient qualities of youth as mitigating evidence. The purpose of such a presentation was to advise a jury that the youthfulness of a criminal defendant is to be viewed as more than a chronological age. Rather, youthful criminal defendants, such as Reyes, are *adolescents*, susceptible to their environment, negative influences, and peer pressures but often without the fully developed brain and ability to

appreciate the consequences for their reckless and dangerous behaviors. More importantly, evidence of youthfulness allows a jury to consider the fact that, as the youthful defendant ages, his emotional and mental intelligence will develop along with the wherewithal to reason, rationalize, and comprehend consequence.

B. *Roper v. Simons*

In 2005, the United States Supreme Court readdressed the presentation in a capital trial of youthfulness as mitigating evidence in *Roper v. Simmons.* [83] The *Roper* Court recognized that capital punishment, the ultimate punishment, should be limited to a narrow category of defendants who commit the most heinous crimes with extreme culpability. The Court held that a defendant under the age eighteen (18) —a juvenile—could not receive the death penalty even when the juvenile defendant commits a heinous crime. [84]

83 543 U.S. 551 (2005).

84 *Id.* at 568, 570–71 (holding that juveniles are of a diminished capacity and, thus, the Eighth Amendment prohibits the imposition of the death penalty on juvenile offenders under eighteen years of age.)

In reaching its conclusion, the *Roper* Court noted three general differences between juveniles and adults that render the death penalty unconstitutional for juveniles. First, according to scientific and sociological data, juveniles lack maturity and have an underdeveloped sense of responsibility. [85] Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." [86] "This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." [87] Third, juveniles have not developed a sense of character as their personality traits are "more transitory, less fixed." [88]

85 *Id.* at 569 (relying, in part, on data from a 1992 study: Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 DEVELOPMENTAL REV. 339 (1992)).

86 *Id.*

87 *Id.* (relying, in part, on data from a 2003 report: Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1014 (2003), providing, "[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.").

88 *Id.* at 570 (relying, in part, on data from a 1968 report: E. Erikson, Identity: Youth and Crisis (1968)).

The *Roper* Court summarized the significance of a juvenile's transient youth as follows:

> The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. *From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.* [89]

89 *Id.* (internal citations omitted) (emphasis added).

***14** The *Roper* decision was issued three years after the imposition of Reyes' death sentence. Despite the timing of *Roper* after the Reyes Rockford Park Trial, the decision is significant. First, the *Roper* decision is rooted in United States Supreme Court precedent and data from scientific and sociological studies that *pre-date* the Reyes Rockford Park Trial. Indeed, brain development—particularly development of the brain's executive functions—was already a topic of discussion and scientific research at the time of the Reyes Rockford Park Trial. [90] Accordingly, while the *Roper* decision did establish a new constitutionally-based rule of law three years after the Reyes Rockford Park Trial, *Roper* did so, almost entirely, based on information readily available to Reyes Trial Counsel in 2001. Second, this Court acknowledges that Reyes was eighteen (18) years old at the time of the Rockford Park Murders and, therefore, the rule of *Roper* does not strictly apply; nevertheless, as the *Roper* Court explained: "the qualities that distinguish juveniles from adults *do not disappear when an individual turns 18.*" [91]

90 *See e.g.,* Anderson, Vicki A., et. al, *Development of Executive Functions Through Late Childhood and Adolescence in an Australian Sample,*

DEVELOPMENTAL NEUROPSYCHOLOGY, Vol. 20, Issue 1, p. 385–406 (2001); Nagera, Humberto, M.D., *Reflections on Psychoanalysis and Neuroscience: Normality and Pathology in Development, Brain Stimulation, Programming, and Maturation,* NEUROPSYCHOANALYSIS: AN INTERDISCIPLINARY JOURNAL FOR PSYCHOANALYSIS AND THE NEURSCIENCES , Vol. 3, Issue 2, p. 179–191 (2001); Welsh, Marilyn C., et. al., *A normative-developmental study of executive unction: A window on prefrontal function in children,* DEVELOPMENTAL NEUROPSYCHOLOGY , Vol. 7, Issue 2, p. 131–149 (1991).

91 *Roper*, 543 U.S. at 574 (emphasis added).

Reyes Trial Counsel should have explored and presented mitigating evidence concerning the qualities of Reyes' youth. Moreover, in its penalty phase presentation, the State emphasized Reyes' involvement in the Otero murder, which occurred when Reyes was only a seventeen (17) year old juvenile. More importantly, the Trial Court relied heavily on the Otero murder in sentencing Reyes to death, explaining that the "non-statutory aggravating circumstance [of Reyes' involvement in the Otero murder] weighs about as heavily as such circumstance can get." [92]

92 *Reyes Sentencing*, 2002 WL 484641, at *512.

C. Evolving Standards Evidenced in *Graham v. Florida* and *Miller v. Alabama*

The trend of recognizing the constitutional differences between youth and adulthood continued in the United States Supreme Court's 2010 decision in *Graham v. Florida.* [93] Noting that juvenile offenders are less culpable than adults, the *Graham* Court held that it was unconstitutional to sentence a juvenile to life imprisonment for any crimes less serious than murder. Referencing *Roper*, the *Graham* Court explained that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." [94] The underlying message of *Graham* is consistent with the message of its decisional predecessors: "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." [95]

93 560 U.S. 48 (2010).

94 *Id.* at 68.

95 *Id.* (quoting *Roper*, 543 U.S. at 570).

In 2012, the United States Supreme Court decided *Miller v. Alabama*. [96] Reiterating the notion that juveniles are "less deserving of the most severe punishments," [97] and relying on the aforementioned constitutional precedent, the *Miller* Court held it was unconstitutional to "require[ ] that all children convicted of homicide receive lifetime incarceration without possibility of parole, *regardless of their age and age-related characteristics and the nature of their crimes*." [98]

96 132 S.Ct. 2455 (2012).

97 *Id.* at 2464.

98 *Id.* at 2475 (emphasis added). Further, on January 25, 2016, the Supreme Court of the United States decided *Montgomery v. Louisiana* and held that *Miller's* ban on mandatory life-without parole sentences for juvenile offenders must be applied retroactively. *See Montgomery v. Louisiana*, 577 U.S. —— (2016). As noted, *infra* ns.102–04, the Delaware legislature has already extended *Miller* retroactively by statute.

***15** The reasoning and analysis in support of the rule of *Miller*, rather than the rule itself, is relevant to the matter pending before this Court. The *Miller* Court concluded that such a mandate—that all juveniles convicted of homicide receive life without a chance of parole—precludes the sentencer from considering critical factors related to the youthful offender even when imposing the harshest penalties. According to the *Miller* Court, such a mandate precluded consideration of factors such as: (1) the hallmark features of chronological age (immaturity, impetuosity, and the failure to appreciate consequence); (2) the family and home environment from which the youthful offender could not extricate himself; (3) the circumstances surrounding the homicide offense (including the offenders involvement and the effects of peer pressure); (4) the vulnerabilities to negative influence; (5) the features that distinguish adolescents from adulthood; and (6) the possibility of rehabilitation. [99] The concept explained in *Miller* was not new, it was just simplified: children are different. [100]

99 *Miller*, 132 S.Ct. at 2468.

100 *Id.* at 2464.

In response to *Graham* and *Miller*, in 2013, the Delaware General Assembly amended Chapter 42 of Title 11 of the Delaware Code by inserting Section 4209A [101] and amending Section 4204A [102] to conform Delaware law to the constitutional requirements stated by the United States Supreme Court, specifically the differences between juveniles and adult offenders for purposes of sentencing. [103]

101 11 *Del. C.* § 4209A, entitled Punishment for first-degree murder committed by juvenile offenders, provides:

> Any person who is convicted of first-degree murder for an offense that was committed before the person had reached the person's eighteenth birthday shall be sentenced to term of incarceration not less than 25 years to be served at Level V up to a term of imprisonment for the remainder of the person's natural life to be served at Level V without benefit of probation or parole or any other reduction.

102 11 *Del. C.* § 4204A (providing for the confinement of youth convicted in Superior Court).

103 *See* Del. Bill Summ., 2013 Reg. Session. S.B. 9 (147th General Assembly 2013) (May 16, 2013).

D. Reyes Trial Counsel's mitigation presentation did not include adequate information regarding Reyes' youth as a mitigating factor and, therefore, did not meet constitutional standards.

Reyes Trial Counsel did not present the transient qualities of Reyes' youth in accordance with constitutional demands. To the contrary, Reyes Trial Counsel emphasized Reyes' status as an irredeemable adult predisposed to violence, which Reyes was unable to avoid as an adult. Instead of presenting Reyes as a youthful offender who should be considered less culpable, Reyes Trial Counsel actually presented a so-called "mitigation" case that emphasized Reyes as a violent and dangerous person.

In their penalty phase opening statement, Reyes Trial Counsel showed a picture of Reyes as a toddler—"Point A"—and pointing to Reyes, a convicted murder, in the courtroom —"Point B"—Reyes Trial Counsel explained to the jury that its penalty phase presentation would present evidence meant to "take [the jury] from point A to B. We will introduce this evidence to you for one purpose so you can understand why Luis Reyes turned out the way he is." [104] Reyes Trial Counsel explained its point A to B theory to the jury as follows:

> [T]he evidence is important to help you understand how a child at risk, [a] child like Luis Reyes is molded into a teenager who makes horrible wrong choices. You will hear from our witnesses that at certain important stages of his development Luis Reyes was exposed to certain behaviors by his family members that put him at high risk to commit violent acts.... You will hear Mr. Reyes lived in as home with domestic violence both physical and verbal. [105]

104 Penalty Phase Tr. Oct. 23, 2001 at 27:5–12.

105 *Id.* at 28:15–21, 29:11–12.

Additionally, in its closing statements of the penalty phase, Reyes Trial Counsel stated, "[t]here is only one truly important question in this case and that's how and why Luis Reyes developed the capacity to commit murder." [106] Then Reyes Trial Counsel asked the jury, rhetorically, "How does a child, born like any other child, develop into *a teenage murderer*?" [107] Finally, in one of the final comments for the jury's consideration, Reyes Trial Counsel told the jury: "Reyes' life was marked, measured, and set into place when he was still a child. [Reyes] was unable to escape from the tragic path of his life, though others have escaped, and he became a criminal like all the men who grew up in the Reyes household." [108]

106 Penalty Phase Tr. Oct. 25, 2001 at 113:2–4.

107 *Id.* at 121:1–2 (emphasis added).

108 *Id.* at 137:18–23.

***16** The record demonstrates that Reyes Trial Counsel only discussed Reyes' "youth" to support a theme that Reyes had been "hardwired for violence" and became a violent and dangerous adult. Reyes was presented as someone who was fully developed and beyond the capacity for change. Reyes Trial Counsel did not offer even the possibility for change as Reyes matured chronologically, mentally, intelligently, and so on. Indeed, the jury never heard the idea that the capacities of a youthful offender are less than that of an adult and that youths are still developing and maturing even though these

concepts are at the very heart of the jurisprudence demanding consideration of the qualities of youth as mitigating evidence.

This Court is not suggesting that it is *per se* unreasonable for defense counsel to present only "negative" aspects as its mitigation strategy. It seems that the strategy of Reyes Trial Counsel was meant to avoid death for their client. Nevertheless, in light of constitutional demands, prevailing professional norms, the mitigation investigation conducted, and all of the relevant mitigating evidence in the record, including the postconviction record, the Court finds the presentation did not meet constitutional standards. This is especially because of the Trial Court's significant reliance on Reyes' involvement at age seventeen (17) in the Otero murder as well as Reyes' age at the time of the Rockford Park Murders.

Reyes Trial Counsel failed to present the age-related characteristics of Reyes that weighed against Reyes' moral culpability for the Rockford Park Murders. Instead, Reyes Trial Counsel solely presented "negative" aspects of Reyes and his childhood and argued, essentially, that Reyes was born and raised to become the violent man sitting before the jury. Such a mitigation strategy is entirely inconsistent with the well-known concepts of youth underlying our constitutional jurisprudence. [109] Executing Reyes based on this presentation would violate constitutional standards. For these reasons, Reyes' death sentence must be vacated.

109 With respect to the evidence that Reyes Trial Counsel failed to produce in mitigation regarding Reyes' developmental issues, *see infra* Section V(C) generally.

V. *INEFFECTIVE ASSISTANCE OF COUNSEL*

A. Standard for Ineffective Assistance of Counsel

Reyes claims that Reyes Trial Counsel provided ineffective legal assistance in violation of Reyes' rights under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 7 of the Delaware Constitution. The standard used to evaluate claims of ineffective counsel is the two-prong test articulated by the United States Supreme Court in *Strickland v. Washington*, [110] as adopted in Delaware. [111] The movant must show that (1) trial counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. [112] Failure to prove either prong will render the claim insufficient. [113] Moreover, the Court shall dismiss entirely conclusory allegations of ineffective counsel. [114] The movant must provide concrete allegations of prejudice, including specifying the nature of the prejudice and the adverse affects actually suffered. [115]

110 466 U.S. 668 (1984).

111 *See Albury v. State*, 551 A.2d 53 (Del.1988).

112 *Strickland*, 466 U.S. at 687.

113 *Id.* at 688; *Dawson v. State*, 673 A.2d 1186, 1196 (Del.1996).

114 *Younger*, 580 A.2d at 555; *Jordan v. State*, 1994 WL 466142, at *1 (Del. Aug. 25, 1994).

115 *Strickland*, 466 U.S. at 692; *Dawson*, 673 A.2d at 1196.

With respect to the first prong—the performance prong—the movant must overcome the strong presumption that counsel's conduct was professionally reasonable. [116] To satisfy the performance prong, Reyes must assert specific allegations to establish Reyes Trial Counsel acted unreasonably as viewed against "prevailing professional norms." [117] With respect to the second prong—the prejudice prong—cumulative error can satisfy the prejudice prong when it undermines confidence in the verdict. [118]

116 *Strickland*, 466 U.S. at 687–88.

117 *Id.* at 688; *Wright v. State*, 671 A.2d 1353, 1356 (Del.1996) ("Mere allegations of ineffectiveness will not suffice.").

118 *See Starling*, 2015 WL 8758197, at *14–15.

B. Reyes has established Ineffective Assistance of Counsel in the guilt phase of the Reyes Rockford Park Trial.

***17** With no physical evidence linking Reyes to the Rockford Park Murders, it was essential for a fair trial that Reyes Trial Counsel "use all available impeachment evidence, and make timely and appropriate objections to the admission of evidence going to the heart of the State's case." [119] Roderick Sterling's testimony was at the heart of the State's case against Reyes. This Court finds that the errors by Reyes Trial Counsel during the guilt phase of the Reyes Rockford Park Trial resulted in cumulative prejudice to Reyes.

119 *Id.* at *1.

1. Reyes Trial Counsel failed to establish that the information Sterling provided in the letter to Sterling's counsel was hearsay.

Under the DRE, hearsay is inadmissible unless otherwise provided by the DRE or law. [120] It is well-established under the DRE that admissions by party opponents are considered non-hearsay. [121] Admissions by a party include statements made by the party himself and "statements which he has manifested his adoption or belief in its truth." [122]

120 D.R.E. 802.

121 D.R.E. 801(d)(2); *Flonnory v. State*, 893 A.2d 507, 516 (Del.2006).

122 D.R.E. 801(d)(2)(A)-(B).

Sterling sent a letter to his counsel ("Sterling Letter") claiming that Reyes admitted his role in the Rockford Park Murders and Sterling testified about the Sterling Letter at the Reyes Rockford Park Trial. Sterling admitted at the Reyes Rockford Park Trial that Galindez wrote the Sterling Letter and that Sterling signed it. [123] At the Reyes Rockford Park Trial, Reyes Trial Counsel objected to Sterling's testimony regarding the Sterling Letter on hearsay grounds. [124] Overruling Reyes Trial Counsel's objection, the Trial Court found that even though Galindez and not Sterling wrote the Sterling Letter, Sterling adopted the contents of the Sterling Letter and, therefore, testimony regarding the Sterling Letter was admissible under the DRE. [125]

123 Guilt Phase Tr. Oct. 3, 2001 at 36:3–4; 39:12–16.

124 *Id.* at 36:11–23; 37:1–23.

125 *Id.* at 37:1–12.

Although Reyes Trial Counsel properly objected to Sterling's testimony about the Sterling Letter, Reyes Trial Counsel did not present an accurate and thorough basis for the hearsay objection to the Trial Court. Specifically, even if the Trial Court agreed with the State that Sterling adopted the statements by Galindez by signing the Sterling Letter, the letter was hearsay. Particularly, Sterling testified at the Reyes Rockford Park Trial that the information within the Sterling Letter was learned by Sterling when Sterling overheard a conversation between Reyes and Galindez. [126] However, in September 2008 when private investigators interviewed Sterling in Jamaica, Sterling stated that he learned details of the Rockford Park Murders from Galindez directly and not by overhearing a conversation between Galindez and Reyes. [127] In other words, even though Sterling claimed at the Reyes Rockford Park Trial that he had personal knowledge of the contents of the Sterling Letter, Sterling did not have personal knowledge. Accordingly, the Sterling Letter was hearsay, but this argument was not presented for the Trial Court's consideration. This failure reflected inadequate trial preparation which was not reasonable performance under the circumstances especially, where, as here, Sterling was the *only* witness to link Reyes to the Rockford Park Murders.

126 Guilt Phase Tr. Oct. 3,2001 at 8:15–23; 9:1–21.

127 *Reyes*, 2012 WL 8256131, at *9.

Moreover, Sterling may have signified adoption of Galindez's writing, but adoptive admissions are only considered non-hearsay as to parties. Neither Galindez nor Sterling was a party in the Reyes Rockford Park Trial. Therefore, Reyes Trial Counsel should have presented argument that the Sterling Letter was hearsay if it was to be offered for the truth of its contents. Reyes Trial Counsel's failure to make this argument was unreasonable and Reyes has established the performance prong of *Strickland.*

2. Reyes Trial Counsel's failure to call Galindez as a witness was objectively unreasonable.

***18** Reyes Trial Counsel was ineffective by failing to call Galindez as a witness. Only Galindez could have challenged Sterling's testimony, which was "the most significant testimony" against Reyes. [128]

128 *Reyes Sentencing*, 2002 WL 484641, at *8.

Sterling claimed that Sterling overheard and understood conversations between Reyes and Galindez. However, if Galindez had testified, Galindez would have demonstrated that Sterling's claim was false because Sterling could not possibly have understood any conversation between Galindez and Reyes. At trial, Sterling testified that he did not speak Spanish and only understood Spanish "a little bit." [129] Sterling further testified that he heard the conversation between Galindez and Reyes in English. [130] However, in a 2012 affidavit, Galindez provided:

> [ ] While I was serving my sentence [at Gander Hill], I was on the same pod as Luis Reyes. [ ] Luis Reyes and I talked about a lot of things while we were on the same pod. [ ] When I spoke to Luis Reyes, I spoke to him in Spanish because at the time, I spoke very little English. [ ] At the time, my cell [mate] was Roderick Sterling. [ ] Roderick Sterling did not speak Spanish. [131]

129 Guilt Phase Tr. Oct. 3,2001 at 72:11–16.

130 *Id.* at. 75:3–9.

131 Aff. of Ivan Galindez, Nov. 28, 2012.

Reyes Trial Counsel fell below an objective standard of reasonableness when they failed to call Galindez as a witness. It was critical to challenge Sterling's claim that Sterling heard Reyes tell Galindez that Reyes participated in the Rockford Park Murders. Accordingly, Reyes has established the performance prong of *Strickland.*

3. Reyes Trial Counsel failed to request a missing evidence instruction.

The State never produced the Sterling Letter. Importantly, Reyes Trial Counsel did not request a missing evidence instruction for the Sterling Letter. Had Reyes Trial Counsel requested the instruction, the jury would have received the standard *DeBerry* instruction, providing that the jury is to assume the missing evidence is exculpatory for Reyes:

> In this case, the Court has determined that the State failed to create or to preserve certain evidence, which is material to the defense. The failure of the State to create or preserve such evidence entitles the Defendant to an inference that, if such evidence were available at trial, it would be exculpatory. This means that, for purposes of deciding this case, you are to assume that the missing evidence, had it been created or preserved, would not have incriminated the Defendant, but would have been favorable to his assertion of not guilty. [132]

132 *See, e.g., State v. Adgate,* 2014 WL 3317968, at *5 (Del.Super. July 7, 2014); *see also DeBerry v. State,* 457 A.2d 744 (Del.1983).

Reyes Trial Counsel's performance fell below an objective standard of reasonableness and Reyes has established the performance prong of *Strickland.*

4. Reyes Trial Counsel failed to notify the Court that presenting Cabrera as a witness was critical to Reyes' defense.

Approximately one week before the Reyes Rockford Park Trial, Reyes Trial Counsel received a letter from Cabrera who wanted to help Reyes, but not at the expense of admitting his own guilt. [133] Cabrera's counsel subsequently advised Reyes Trial Counsel that Cabrera would not be testifying on behalf of Reyes and if Cabrera was called, he would invoke his Fifth Amendment privilege. [134]

133 Letter from Luis Cabrera to Reyes Trial Counsel, Sept. 23, 2001.

134 Letter from John P. Deckers to Reyes Trial Counsel, Oct. 9, 2001.

***19** Cabrera was a critical witness for Reyes' defense. Had Cabrera been available as a witness, Cabrera would have testified that Reyes was not responsible for the Rockford Park Murders. Furthermore, Cabrera would have testified that a man named Neil Walker had committed the murders. Additionally, Cabrera would have offered details about an altercation that involved Walker, Cabrera, Saunders, and Rowe that gave a motive for Walker to commit the Rockford Park Murders. [135]

135 Cabrera provided these details to Reyes Trial Counsel during an interview in March 2001. Reyes Trial Counsel also reviewed—prior to meeting with Cabrera—a report from an investigator who interviewed Cabrera for the Otero case in August 1997. The investigator's report provided similar details, as recounted by Cabrera, regarding the altercation with Saunders, Rowe, and Walker. Importantly, Cabrera maintained the same account even after Reyes testified against Cabrera in the Otero case.

Under DRE 803(b)(3), statements against interest are those statements that "at the time of its making, so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability,

or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true." Statements against interest are admissible when a declarant is unavailable to testify, which includes when a declarant has invoked his Fifth Amendment privilege against self-incrimination. [136] Moreover, "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." [137]

136 D.R.E. 804(a)(1); *see also Demby v. State*, 695 A.2d 1152, 1158 (Del.1997) (noting that a witness was "unavailable" because he invoked his Fifth Amendment privilege).

137 D.R.E. 804(b)(3). In determining whether there are sufficient corroborating circumstances to indicate trustworthiness of an unavailable declarant's statements, the Court considers: (1) whether the statements were made spontaneously and in close temporal proximity to the commission of the crime at issue; (2) the extent to which the statements were truly self-incriminatory and against penal interest; (3) consideration of the reliability of the witness who was reporting the hearsay statement; and (4) the extent to which the statements were corroborated by other evidence in the case. *Demby v. State*, 695 A.2d 1152, 1158 (Del.1997).

Cabrera's proposed statements about Reyes' factual innocence met the standard under DRE 803(b)(4) because the statements exposed Cabrera to criminal liability and were contrary to Cabrera's penal interests. [138] Nevertheless, the Trial Court did not rule on the admissibility of Cabrera's statements during the Reyes Rockford Park Trial because Reyes Trial Counsel did not even seek to admit the statements. [139] This was objectively unreasonable performance. Accordingly, the performance prong of *Strickland* has been established.

138 Although Cabrera never admitted any involvement in the Rockford Park Murders, Cabrera's statements were nevertheless incriminating. Cabrera's statements were against Cabrera's penal interests in that Cabrera admitted to purchasing drugs, unlawfully possessing a handgun, assaulting Rowe during a confrontation prior to the Rockford Park Murders, and assaulting Walker.

139 The Trial Court addressed Cabrera's statements at a postconviction evidentiary hearing on August 28, 2012. *See* Evid. Hrg. Tr. Aug. 28, 2012 at 8:10–11; 15–20.

5. The cumulative effect of Reyes Trial Counsel's errors in the guilt phase of the Reyes Rockford Park Trial resulted in prejudice to Reyes.

***20** It was imperative for Reyes Trial Counsel to make timely objections and utilize appropriate impeachment and exculpatory evidence. The cumulative effect of Reyes Trial Counsel's errors during the guilt phase of the Reyes Rockford Park Trial resulted in prejudice to Reyes. Accordingly, Reyes' convictions must be vacated.

C. Reyes has established Ineffective Assistance of Counsel in the penalty phase of the Reyes Rockford Park Trial.

The Court finds that the errors by Reyes Trial Counsel in the penalty phase of the Reyes Rockford Park Trial resulted in cumulative prejudice to Reyes.

1. Reyes Trial Counsel was ineffective for failing to limit the presentation to the jury of Reyes' role in the Otero murder.

Reyes Trial Counsel did not file a motion *in limine*, or otherwise argue, that evidence regarding Reyes' role in the Otero murder was inadmissible. As detailed above, [140] Reyes explained to the jury during his allocution that he wanted to testify to profess his innocence during the guilt phase, but refrained from doing so to avoid presentation of his role in the Otero murder. [141] While no evidence of Reyes' Otero conviction was admitted during the guilt phase of the Reyes Rockford Park Trial, [142] and would have been inadmissible during the guilt phase, [143] the State's penalty phase opening statement immediately began with the murder of Otero by Reyes. [144] The State's presentation also included details of the Otero murder, including that Reyes physically held Otero down while Cabrera suffocated Otero with a plastic bag, then Cabrera and Reyes took Otero's body to New Jersey where they disposed of Otero's body in a dumpster and incinerated him. [145] The State further explained to the jury that while Reyes could have received the death penalty for the death of Otero, he was actually only sentenced to twelve years because of a plea agreement. [146] Then, Reyes Trial Counsel read a portion of the transcript from Reyes' Otero sentencing that included that Reyes participated in the Otero murder because of Cabrera's influence; Reyes fully cooperated in the investigation into Cabrera; Reyes gave a detailed confession to the murder of Otero; Otero's daughter gave a "wrenching"

testimony of dreaming of walking down the aisle with her father; Otero's "charred remains" were found in New Jersey; and Reyes "physically was a principal in the murder by holding down Mr. Otero." [147]

140 *See supra* Section III(A).

141 Penalty Phase Tr. Oct. 25, 2001 at 96:3–11.

142 *Reyes Sentencing*, 2002 WL 484641, at *11 (noting that information regarding the murder of Otero was introduced during the penalty phase).

143 *See e.g.*, D.R.E. 404(b) (providing that evidence of a defendant's previous crime is inadmissible to prove a defendant's the character or that a defendant acted in conformity with a crime. However, evidence of a defendant's previous crimes is admissible for other purposes, including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident"); D.R.E. 609(a) (stating that a defendant's previous convictions are only admissible for the purposes of impeachment when: (1) the previous conviction was a felony and the court determines that the probative value outweighs its prejudicial effect; or (2) the crime involves dishonesty or false statement).

144 Penalty Phase Tr. Oct. 23, 2001 at 12:19.

145 *Id.* at 12:23–14:7.

146 *Id.* at 15:2–7.

147 Penalty Phase Tr. Oct. 25, 2001 at 6:21–11:20.

***21** "The record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant or the absence of any such prior criminal convictions and pleas shall also be admissible in evidence [during the penalty phase]." [148] However, even though Reyes' conviction and guilty plea in connection with the Otero murder were likely admissible during the penalty phase, Reyes Trial Counsel should at least have made an effort to limit the presentation to the jury of *highly* prejudicial details of the Otero murder on the basis that the danger of unfair prejudice substantially outweighed the probative value. [149] Accordingly, Reyes has established the performance and prejudice prongs of *Strickland.*

148 11 *Del. C.* § 4209(c)(1).

149 *See* D.R.E. 403.

2. Reyes Trial Counsel's representation with respect to mitigation during the penalty phase of the Reyes Rockford Park Trial was ineffective.

Reyes Trial Counsel was ineffective under the prevailing professional norms because their mitigation presentation was based on an incomplete and inadequate investigation that failed to consider Reyes' youth and brain development. Moreover, Reyes Trial Counsel missed crucial opportunities to rebut the State's presentation of aggravating factors. Reyes Trial Counsel presented a one-dimensional, negative portrayal of Reyes in an effort to demonstrate to the jury that Reyes never had a chance and, therefore, the strategy was "to focus on, instead of the positive aspect of Luis Reyes, the negative things that happened to [Reyes] in his life." [150] This presentation did not meet prevailing professional norms and was prejudicial to Reyes.

150 Ev. Hrg. Tr. May 9, 2012 at 136:2–13.

a. The Standard for Mitigation in a Capital Case

The United States Supreme Court has recognized that defense counsel in a capital case is "obligat[ed] to conduct a thorough investigation of the defendant's background." [151] In 1989, the American Bar Association promulgated guidelines for defense attorneys in capital cases ("ABA Guidelines"). [152] Section 11.4.1 of the ABA Guidelines provides:

> A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.
>
> B. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.
>
> C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This *investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence* that may be introduced by the prosecutor.

151 *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

152 *See Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) (hereinafter *ABA Guidelines*).

The ABA Guidelines serve to "enumerate the *minimal* resources and practices necessary to provide effective assistance of counsel." [153] Although failure to follow the ABA Guidelines is not tantamount to ineffective assistance of counsel *per se;* [154] the ABA Guidelines set a standard for evaluation of Reyes Trial Counsel's representation regarding its mitigation investigation. [155] According to the ABA Guidelines, defense counsels' "duty to investigate is not negated by the expressed desires of a client. Nor may [defense] counsel sit idly by, thinking that the investigation would be futile. The attorney must first evaluate the potential avenues of action and then advise the client on the merits of each." [156] Moreover, the ABA Guidelines suggest that the mitigation investigation "should comprise efforts to discover *all reasonably available* mitigating evidence *and* evidence to rebut any aggravating evidence that may be introduced by the [State]." [157] The ABA Guidelines recommend obtaining the following sources for investigative information: all charging documents; [158] information from the accused concerning the incident relating to the offense charged; [159] and records—including but not limited to—medical records, birth records, school records, employment and training records or reports, family and social history, prior records, and religious or cultural influences. [160] The ABA Guidelines further suggest obtaining the names of sources to contact for verification of the information in the collected records. [161]

153 *Id.* (emphasis added).

154 *State v. Taylor*, 2010 WL 3511272, at *17 (Del.Super. Aug. 6, 2010) ("Neither the United States Supreme Court nor the Delaware Supreme Court has held that failure to meet the ABA Guidelines in legally tantamount to ineffective assistance of counsel.").

155 *Strickland*, 466 U.S. at 688 ("Prevailing norms of practice as reflected in the [ABA Guidelines] and the like ... are guides to determining what is reasonable.").

156 *ABA Guidelines*, *supra* note 152 at § 11.4.1, cmt. (internal quotation omitted).

157 *Id.* at § 11.4.1(C) (emphasis added).

158 *Id.* at § 11.4.1(D)(1)(A)–(C).

159 *Id.* at § 11.4.1(D)(2)(B).

160 *Id.* at § 11.4.1(D)(2)(C).

161 *Id.* at § 11.4.1(D)(2)(E).

b. Reyes Trial Counsel's mitigation strategy was not based on a reasonable mitigation strategy and instead was counterproductive by presenting Reyes as a man with inevitable propensity for violence.

***22** Reyes Trial Counsel pursued a mitigation strategy that compared Reyes' background with the findings of a report issued in April 2000 by the Office of Juvenile Justice and Delinquency Prevention of the United States Department of Justice ("Youth Violence Report"). [162] The Youth Violence Report, *Predictors of Youth Violence*, identified risk factors that "confidently predict which youth would be prone to commit violent acts." [163] The Youth Violence Report identified violence-predicting risk factors within each of five domains: individual factors, family factors, school factors, peer-related factors, and community and neighborhood factors. [164] According to the Youth Violence Report "[t]he risk of violence is also compounded by the number of risk factors involved [with the youth]." [165] Reyes Trial Counsel presented to the jury that the characteristics and life of Reyes closely matched the Youth Violence Report risk criteria, which demonstrated Reyes' potential for future violence. [166] As Reyes Trial Counsel explained at the postconviction evidentiary hearing:

> And I think we decided that ... was going to be the strategy to say, do you know what, instead of saying what a good guy ... [Reyes] was or how responsible [Reyes] was, that what we were focusing on was—as I sit here, this is my recollection—what a pretty lousy childhood [Reyes] had and how the cards were stacked against [Reyes]. And [Reyes] met most of the risk factors for that [Youth Violence Report], which would indicate tendency for violence or future violence. [167]

162 Office of Juvenile Justice & Delinquency Prevention, U.S. DOJ, *Predictors of Youth Violence*, Juvenile Justice Bulletin (April 2000) (hereinafter *Youth Violence Report*).

163 *Id.* at 1.

164 *Id.* at 2. The Youth Violence Report also identified situational factors, which are "circumstances that surround a violent event and influence the outcome of that event." *Id.* at 5 (providing that situational factors may include "consumption of alcohol or other drugs by the offender or victim, the behavior of bystanders, the motives of the offender" but noting that such situational factors are "difficult to assess").

165 *Id.* at 7 ("The larger the number of risk factors to which an individual is exposed, the greater the probability that the individual will engage in violent behavior.").

166 Ev. Hrg. Tr. May 9,2012 at 122:17–123:1, 124:12–18.

167 *Id.* at 120:9–121:1–2.

i. Dr. Caroline Burry's testimony focused on Reyes' amenability to violence and was based on a cursory investigation.

Reyes Trial Counsel hired Dr. Caroline Burry as a mitigation specialist to assist with the mitigation investigation. According to Dr. Burry, Reyes Trial Counsel specifically hired Dr. Burry to "determine the factors and events in [Reyes'] developmental, family, and/or social history which may have influenced his subsequent functioning as an adult." [168] The majority of Dr. Burry's mitigation investigation consisted of twenty (20) hours of interviews. [169] Specifically, in addition to interviewing Reyes, Dr. Burry interviewed: (1) Reyes' mother, Ruth Reyes, (2) Reyes' grandmother, Candida Reyes, (3) Reyes' aunts, Luz Diaz and (4) Damarias Reyes, (5) Reyes' girlfriend/ fiancé, Elaine Santos, (6) Reyes' daughter, Desiree Reyes, and (7) Reyes' stepson, Raymond Sanchez. [170] Dr. Burry also reviewed family photographs and Reyes' presentencing investigation report ("PSI Report"). Dr. Burry compiled her findings in an informal document titled *Draft of Dr. Caroline Burry Personal Notes* ("Dr. Burry Notes"). [171]

168 *See* Dr. Caroline Burry Draft of Personal Notes (Aug. 27, 2001), Reyes App. 4, (hereinafter *Dr. Burry Notes*).

169 *Id.;* Penalty Phase Tr. Oct. 24, 2001 at 96:4–8, 96:14.

170 *Dr. Burry Notes supra* n.168; Penalty Phase Tr. Oct. 24, 2001 at 96:4–8, 96:14.

171 *See Dr. Burry Notes supra* n.168.

During the penalty phase, Dr. Burry testified on behalf of Reyes as an expert in family assessment. To explain her findings to the jury, Dr. Burry created a genogram [172] that showed four generations of Reyes' family and identified repetitive themes throughout the family. [173] Dr. Burry testified that Reyes' genogram contained repetitive themes of criminal history, substance abuse, and relationships Reyes' mother had with "substitute father figure[s]." [174] Moreover, Dr. Burry testified that the father role in Reyes' life was later filled by Cabrera. [175]

172 "The genogram is [the] social work term for a family tree.... geno meaning generations and gam meaning written." Penalty Phase Tr. Oct. 24,2001 at 98:1–3.

173 *Id.* at 100:4–21.

174 *Id.* at 100:22–101:14; 104:12–105:3.

175 *Id.* at 135:14–21.

***23** Dr. Burry testified that, in her professional opinion, "Reyes' family history reveal[s] a number, in fact, a strikingly large number of risk factors predictive of violence." [176] Indeed, Dr. Burry presented to the jury a number of charts that highlighted the factors indicated in the Youth Violence Report and the applicability of each factor as to Reyes. Dr. Burry testified that Reyes had been exposed to twenty out of twenty-seven risk factors identified by the Youth Violence Report. Specifically, Reyes experienced five out of the eight individual risk factors; all seven of the family risk factors; all four of the school risk factors; one of the three peer-related factors; and three out of the five community and neighborhood risk factors. [177] Dr. Burry also elaborated on the risks associated with having a teen mother, noting that Reyes' mother was sixteen when she gave birth to Reyes.

176 *Id.* at 107:16–18.

177 *Id.* at 119:6–127:5.

Dr. Burry noted that a full assessment of a youth requires consideration of protective factors, which are factors that "may help to balance against risk [,]" because "even a child out of a negative background might still do well if he or she

has a number of strong protective factors." [178] In this case, Dr. Burry testified that out of four groups of factors, which each contain multiple protective factors, Reyes qualified for only two protective factors. [179] Dr. Burry provided that it was her professional opinion "that Reyes had numerous risk factors and very few protective factors ... particularly at the individual and family level, [and] that [Reyes] was at very high risk *and did in fact become* dangerous." [180]

178 *Id.* at 130:9–131:1.

179 First, Reyes was socially bonded to his high school; and second, Reyes was subject to early intervention because he attended pre-school. *See* Penalty Phase Tr. Oct. 24,2001 at 131:2135:13 (explaining that Reyes lacks intelligence, social orientation, a resilient temperament, a pro-social family, and exposure to parental values and standards of no violence and/or the promotion of abstinence from drugs).

180 *Id.* at 136:7–12 (emphasis added).

In addition to this Court's concern with the counterproductive presentation of Dr. Burry's testimony that Reyes was seemingly inevitably violent, this Court is also concerned with the adequacy of Dr. Burry's mitigation investigation as it relates to the information obtained through a limited number of interviews from one narrow source—relatives. Even though Dr. Burry presented a genogram addressing four-generations of Reyes' family, Dr. Burry conducted interviews with only seven of Reyes' family members.

This Court is also concerned with the limited scope of records that Dr. Burry reviewed. Dr. Burry testified that she obtained her information to compile Reyes' social history from her interviews, the materials within Reyes' PSI Report, and family photographs. [181] Dr. Burry wanted more records to review; she noted: "Information needed: 1. Criminal records on the entire family [and] 2. Medical records." [182] Dr. Burry never obtained any of these records. [183] Accordingly, the information presented was inadequate and insufficient.

181 *See id.* at 96:1–11.

182 *Dr. Burry Notes, supra* note 168.

183 Ev. Hrg. Tr. May 9, 2012 at 125:16–126:8.

Dr. Burry's narrow set of investigative sources is troubling. Dr. Burry was retained to complete a *social* history of Reyes; however, a mitigation investigation should be broader than social information. Mitigation investigations should include the discovery of "all reasonably available mitigating evidence *and* evidence to rebut any aggravating evidence that may be introduced[.]" [184] It is ineffective for defense counsel to abandon an investigation after gathering " 'rudimentary knowledge of [the defendant's] history from a narrow set of sources.' " [185] This is because such a cursory mitigation investigation makes it impossible for defense counsel to make a fully informed decision with respect to a mitigation strategy. [186]

184 *ABA Guidelines, supra* note 152 at § 11.4.1(C).

185 *Ploof v. State*, 75 A.3d 840, 852 (Del.2013) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)).

186 *Wiggins*, 539 U.S. at 527–28.

***24** Moreover, "[i]n assessing the reasonableness of an attorney's investigation, however, a court must consider not only the ... evidence already known to counsel but also whether the known evidence would lead a reasonable attorney to investigate further." [187] Here, the information Dr. Burry began to uncover during her limited mitigation investigation —family drug abuse, physical and verbal abuse, and child abandonment—is exactly the type of information that would lead reasonable attorneys to pursue additional mitigation investigation. [188] The failure to do so did not meet prevailing professional norms.

187 *Id.* at 527.

188 *See id.* at 523–25 (finding defense counsel's mitigation investigation fell short of professional standards where it relied only on the defendant's PSI and records from social services regarding defendant's time in foster care, which provided that defendant's mother was a chronic alcoholic; defendant was transferred from foster home to foster home and displayed emotional difficulties; defendant had frequent, lengthy absences from school; and, on at least one occasion, defendant's mother left him and his siblings alone for days without food).

ii. Dr. Harris Finkelstein's testimony offered a rudimentary explanation for Reyes' behaviors and relied on Dr. Burry's cursory investigation and Reyes' unsubstantiated self-report.

Dr. Harris Finkelstein testified during the penalty phase as an expert in the field of psychology. Reyes Trial Counsel

retained Dr. Finkelstein to "determine some type of insight into ... what would contribute to [Reyes] doing the kinds of behaviors which at that point [Reyes] was accused of and later convicted of." [189] Dr. Finkelstein testified as to his opinion on Reyes' psychological adjustment, which he explained as the "clear end point in terms of a person's behavior.... [and how to] understand those kinds of behaviors.... not necessarily excusing the behavior, [but] simply trying to explain it [to] reach a deeper level of understanding." [190] In forming his opinion, Dr. Finkelstein performed a limited review, including an interview of Reyes for a total of four hours during which Dr. Finkelstein conducted projective psychological tests, and a review of a report prepared by court personnel in connection with sentencing, as well as other records kept by the various courts. [191]

189 Penalty Phase Tr. Oct. 24,2001 at 150:17–20.

190 *Id.* at 163:13–164:2.

191 *Id.* at 160:22–163:10.

Dr. Finkelstein explained that Reyes tends to think of himself in two divided psychological standpoints. [192] According to Dr. Finkelstein, these two psychological standpoints are in conflict and, as a result of this conflict, Reyes became "dependent upon the validation and affirmation of other people who are important to him." [193] As an example, Dr. Finkelstein explained that Reyes' success in high school wrestling earned him the support and recognition that fed into Reyes' positive self-concept and helped him make good choices. Dr. Finkelstein also explained that Reyes' home life and background pulled Reyes to his more withdrawn, hopeless, and despondent side. [194]

192 According to Dr. Finkelstein, on one hand, Reyes appears to feel quite good about himself, thinks he is capable, and carries himself in a confident fashion. On the other hand, Reyes carries significant self-doubt and sees himself as someone who simply cannot succeed.

193 Penalty Phase Tr. Oct. 24,2001 at 164:22–165:1.

194 *See id.* at 165:8–11:7.

Finally, Dr. Finkelstein addressed Reyes' relationship with Cabrera to demonstrate the complexities of Reyes' divided psychological self-perception. According to Dr. Finkelstein, Cabrera provided Reyes with an important source of support and validation that Reyes desired but the "dilemma was when Cabrera started to give [Reyes] validation that was in part based on [Reyes] being able to win [Cabrera's] support by doing very, very awful things." [195] Moreover, Dr. Finkelstein offered an opinion that Reyes possessed impulsive tendencies and may have suffered from Attention Deficit Hyperactivity Disorder ("ADHD"). Dr. Finkelstein explained that Reyes was someone with "narcissistic vulnerability" whose background created "somebody who is very much compromised in terms of their abilities to use other people [for support or advice], compromised in terms of decision-making abilities and [somebody] ... very much in conflict over how to sustain good feelings about himself." [196]

195 *Id.* at 166:8–15.

196 *Id.* at 170:10; 166:15–169:11,169:16–20.

***25** Decisional law mandates that defense counsel's strategic decisions properly involve consideration of the defendant's own statements, actions, and preferences; [197] however, the mitigation investigation should not be limited to the degree of information offered by the defendant as to his own past. [198] Nevertheless, during cross-examination at the Reyes Rockford Park Trial, Dr. Finkelstein conceded that his testimony represented mere opinions as to Reyes' psychological adjustment more than true medical diagnoses because Dr. Finkelstein's conclusions were "based mostly on the defendant['s] data utilizing just a few selected points from history." [199]

197 *Strickland*, 466 U.S. at 691.

198 *See Porter v. McCollum*, 558 U.S. 30, 40 (2009) (the United States Supreme Court explained that a "fatalistic or uncooperative [client] ... does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation."); *see also Rompilla v. Beard*, 545 U.S. 374, 381–83, 89–90 (2005) (determining that the defense counsel's mitigation investigation was deficient notwithstanding the defendant's minimal contributions and unwillingness to address his past and providing "[n]o reasonable lawyer would forgo examination of the file[s] thinking he could do as well by asking the defendant or family[,]" despite knowing that the State intends to introduce prior convictions and damaging testimony).

199 Penalty Phase Tr. Oct. 24, 2001 at 194:9–13.

Dr. Finkelstein further explained that he did not review any of Reyes' medical or school records, and that he did not have conversations with any of Reyes' family members. Rather, Dr. Finkelstein reviewed only a brief version of facts presented

to him by Reyes Trial Counsel and Dr. Burry. Indeed, Dr. Finkelstein testified that he did not necessarily have full confidence that he received "all the matters about [Reyes'] factual history." [200]

200 *Id.* at 178:16–179:16.

It was the responsibility of Reyes Trial Counsel to make this information available for a complete review. The failure to provide the information necessary for Dr. Finkelstein to act as an effective witness for Reyes was unreasonable.

iii. Reyes Trial Counsel failed to contact mitigation witnesses.

Reyes Trial Counsel presented only three family members on behalf of Reyes during the penalty phase. Candida Reyes, Reyes' grandmother, testified regarding her relationship with Reyes as well as Reyes' difficult childhood without a father and with a mother who was always partying. [201] Elaine Santos, Reyes' fiance/girlfriend and mother of Reyes' two children, testified that Reyes supported their family financially and emotionally and that Reyes had a close relationship with his children. [202] Reyes' stepson, Raymond Sanchez, described his relationship with Reyes and said that he (Raymond) "would not feel good" if he could no longer see Reyes. [203]

201 *See id.* at 216:11–234:23.

202 *See id.* at 19:13–32:2.

203 *See id.* at 32:20–38:13.

Presentation of three family members was inadequate for the jury to have a complete picture of Reyes. Many additional witnesses were available to discuss Reyes' dysfunctional upbringing, as well as Reyes' leadership skills developed on the wrestling team and his ability to act as a role model for the younger wrestlers on the team.

First, Reyes Trial Counsel failed to call George Lacsny, a teacher at Reyes' high school and Reyes' wrestling coach. At the postconviction evidentiary hearing, Mr. Lacsny testified that he does not think Reyes Trial Counsel ever contacted him to testify at the Reyes Rockford Park Trial because, as he stated, "If they did, I said I would." [204] Second, Reyes Trial Counsel failed to call Victor Reyes (of no relation to defendant Reyes), Reyes' wrestling coach during the 1995–1996 winter wrestling season. [205] Third, Reyes Trial Counsel failed to call Kathleen Corvelli–Reyes (Victor Reyes' wife and no relationship to Reyes) who became close with Reyes as a result of her husband's coaching. Although Ms. Corvelli met Reyes Trial Counsel before the Reyes Rockford Park Trial, they did not ask her to testify. [206] At the evidentiary hearing, Ms. Corvelli stated that she would have testified on behalf of Reyes. [207] Fourth, Reyes Trial Counsel failed to call Paul Perets, a teacher, band director, and timekeeper for the wresting team at A.I. DuPont High School. These additional witnesses would have allowed the jury an understanding of Reyes as a high school student and successful wrestler.

204 Ev. Hrg. Tr. Sept. 29, 2012 at 23:18–23.

205 Victor Reyes admitted that in December 1996, after Reyes had graduated high school, Victor was charged with third degree sexual assault. Pedersen—of Reyes Trial Counsel—represented Victor on the charges and in June 1997, Victor resolved the charges by entering a plea. Reyes Trial Counsel did not contact Victor to testify on Reyes' behalf at the Reyes Rockford Park Trial, but Victor provided that he would have testified if contacted. Victor opined that his own personal problems distracted him from paying better attention to Reyes and that "if I would ha[ve] been a little more involved—I mean, at that time, that was my life, that was my job ... and I should have known better. If I would have got a little bit more involved, I don't think we would be here now."

206 Ev. Hrg. Tr. May 10, 2012 at 61–63.

207 *Id.* at 63.

***26** At the postconviction evidentiary hearing, Reyes Trial Counsel maintained that some of Reyes' Otero supporters were not interviewed because the strategy was "to focus on, instead of the positive aspect of Luis Reyes, the negative things that happened to [Reyes] in his life." [208] Reyes Trial Counsel did admit, however, that they "probably would have *or should have*" presented to the jury any and all credible admissible evidence that was supportive of their presentation of Reyes' dysfunctional childhood. [209] Moreover, Reyes Trial Counsel admitted that Ms. Covelli should have been called as a mitigation witness and, in fact, there was no excuse not to do so. [210]

208 Ev. Hrg. Tr. May 9,2012 at 136:2–13.

209 *Id.* at 158:13–23.

210 *Id.* at 164:8–167:16.

Reyes Trial Counsel did not meet prevailing professional norms and their strategy was not based on an adequate investigation. Under the applicable decisional law, the deference owed to Reyes Trial Counsel's mitigation strategy depends on the adequacy of the mitigation investigation supporting their strategy. [211] A strategy that is based on a " 'thorough investigation of law and facts relevant to plausible [mitigation] options [is] virtually unchallengeable[.]' " [212] Here, Reyes Trial Counsel did not perform a thorough investigation.

211 *Wiggins*, 539 U.S. at 521.

212 *Id.* (citing *Strickland*, 466 U.S. at 690–91).

Certain mitigation strategies may limit the scope of the mitigation investigation as long as defense counsel reasonably decides that " 'particular investigations [are] unnecessary.' " [213] A decision not to investigate further must be assessed for reasonableness in light of all the circumstances. [214] Here, it was not reasonable to limit the investigation. For instance, in *Williams v. Taylor*, the United States Supreme Court concluded, under *Strickland*, that defense counsel could not justify its failure to uncover and present certain mitigation evidence as a strategic decision because defense counsel failed to "fulfill their obligation to conduct a thorough investigation of the defendant's background" to support such a strategy. [215] The reasoning of *Williams* is applicable here and supports a finding that the investigation was inadequate.

213 *Id.* (citing *Strickland*, 466 U.S. at 690–91).

214 *Id.* at 521–22.

215 *Williams v. Taylor*, 529 U.S. 362,395–96 (2000).

Accordingly, the question for this Court is not whether Reyes Trial Counsel *should have* presented *more* mitigating evidence in support of its mitigation strategy. [216] Rather, the question is whether reasonable judgment supported the extent of Reyes Trial Counsel's mitigation investigation. This Court finds that Reyes Trial Counsel's mitigation strategy was not reasonable, was not based on a proper investigation, and was counterproductive.

216 *Outten v. Kearney*, 464 F.3d 401,416–19 (3d Cir.2006); *Wiggins*, 539 U.S. at 521–23.

c. The jury did not have the opportunity to consider mitigating evidence regarding Reyes' adolescent brain functioning.

There was extensive mitigating evidence that Reyes Trial Counsel would have uncovered if a proper mitigation investigation was undertaken.

i. Dr. Jonathan Mack determined Reyes had limited executive functions.

In connection with the postconviction motion, Rule 61 Counsel retained Dr. Jonathan Mack, a forensic psychologist and neuropsychologist. Dr. Mack testified at a postconviction hearing as a defense expert in the study of the relationship between brain function and behavior. Dr. Mack testified generally that the executive functions of the brain are the last to develop and that the frontal lobes are not mature until age twenty–five. [217]

217 Ev. Hrg. Tr. Aug. 27, 2012 at 34:5–10; *see also Roper*, 543 U.S. 551 (discussing the executive functions of the brain in extensive detail).

***27** Dr. Mack conducted a neuropsychological and psychological evaluation of Reyes in 2007, when Reyes was twenty-nine years old, to determine Reyes' executive function sequencing and mental flexibility. [218] With respect to Reyes' executive functions, Dr. Mack testified that Reyes' abilities fell in the sixth (6th) percentile among the general population and Reyes suffered mildly to moderately impaired executive functioning. [219] With respect to mental flexibility, Dr. Mack testified that, based on Reyes' score, which placed Reyes in the eighth (8th) percentile, Reyes demonstrated definite mental impairment. [220] Dr. Mack also testified that he concluded that Reyes' full scale IQ—also known as Reyes' overall intellectual ability—was in the eighteenth (18th) percentile, which is the low average range. [221] Upon consideration of Reyes' records, test results, and a clinical interview of Reyes, Dr. Mack determined that, even at age twenty-nine, Reyes demonstrated difficulties with "nonverbal problem solving, abstract reasoning, concept formation and mental flexibility" and that Reyes' executive functions would have been worse in 1996, when Reyes was seventeen and eighteen years old. [222]

218 Ev. Hrg. Tr. Aug. 27, 2012 at 8:16–10:1, 34:21–23.

219 *Id.* at 35:8–13.

220 *Id.* at 35:18–22.

221 *Id.* at 21:17–19,23:5–6; *see* Ev. Hrg. Tr. April 24,2013 at 27:5–10.

222 Ev. Hrg. Tr. Aug. 27,2012 at 36:10–37:1.

The jury in the Reyes Rockford Park Trial did not have the opportunity to consider the expert opinion of Dr. Mack or any other expert in this field. Reyes Trial Counsel should have presented this or similar mitigating evidence to the jury in deciding whether to recommend a death sentence for Reyes. The failure to develop this mitigating evidence fell short of objectively reasonable performance standards.

ii. Dr. Dewey Cornell determined that Reyes' brain damage had significance for Reyes' relationship with Cabrera.

In connection with these postconviction proceedings, Dr. Dewey Cornell was retained as a forensic psychologist focused on the assessment of psychological evidence for the use in legal—decision making. Dr. Cornell conducted a six hour clinical interview of Reyes and interviewed Reyes' mother, Ruth Reyes; Reyes' Aunt, Luz Diaz; Reyes' cousin, Debbie Diaz; and Reyes' girlfriend/fiance, Elaine Santos. In addition, Dr. Cornell interviewed Kathy Covelli–Reyes; the Skinners; and reviewed the relevant court proceedings and expert reports for a postconviction evidentiary hearing.

At a postconviction evidentiary hearing, Dr. Cornell testified that a neuropsychological evaluation on Reyes should have been conducted before the Reyes Rockford Park Trial because there were several indicators of brain dysfunction, prenatal marijuana exposure, teen drug use, and being held back in elementary school. [223] Dr. Cornell noted Reyes' significant "psychological dependency on [ ] Cabrera as magnified by his cognitive impairment and maturity." [224] In Dr. Cornell's opinion, Reyes' mild brain damage, as diagnosed by Dr. Mack, coupled with Reyes' incomplete prefrontal cortex development was significant because:

> The young man who does not have the even normal 18–year–old capacity to reflect on consequences of his actions, to separate himself from what other people are telling him to do, sort of use ordinary judgment that would lead you to act more independently rather than dependently on an authority figure or a person that you depend on. [225]

This would have been powerful and important information for the jury to understand Reyes' relationship with Cabrera. Reyes Trial Counsel's failure to develop this evidence fell short of reasonable performance.

223 Ev. Hrg. Tr. Aug. 2,2013 at 22:5–23:1.

224 *Id.* at 44:12–14.

225 *Id.* at 21:16–22.

iii. Dolores Andrews testified that Dr. Burry's mitigation investigation was incomplete and it could have had an effect on the jury.

***28** Dolores Andrews, a clinical social worker who works as a mitigation specialist, particularly in capital cases, was retained in connection with the postconviction proceedings. Ms. Andrews interviewed Reyes; Reyes' mother, Ruth Reyes; his aunts, Demaris and Luz Reyes; his cousin, Debra Diaz; and other non-family members, including employees of A.I. DuPont High School. Ms. Andrews authored a report with her findings. At a postconviction evidentiary hearing, [226] Ms. Andrews testified about Reyes' childhood, including Ruth's drug use and attempted abortions during her pregnancy with Reyes; Ruth's substance abuse; Ruth's general inability to parent Reyes; Ruth's use of corporal punishment on Reyes; the absence of Reyes' biological father; and Reyes' exposure to prostitution, drug use, and drug sales.

226 Ms. Andrews' complete testimony is contained in: Ev. Hrg. Tr. Aug. 2, 2012 at 80:11–152:3.

Ms. Andrews was critical of Dr. Burry's investigation and provided that both Reyes Trial Counsel and Dr. Burry's investigation were incomplete. Ms. Andrews testified that there were various mitigating factors that were underdeveloped during the penalty phase of the Reyes Rockford Park Trial, including Reyes' exposure to emotional and physical abuse; Candida's ability to parent or care for Reyes considering her age, and physical and mental health; Reyes' exposure to child endangerment and criminal activity from his uncle Michael Reyes; the extent of Ruth's drug addiction; the fact that despite of Reyes' unfortunate

upbringing, "he tried his best to engage in lawful behavior, to be a productive citizen, to take care of himself, particularly when he had to[,]" such as keeping gainful employment; [227] Ruth's incarceration; and the impact Reyes' execution would have on members of his family.

227 *Id.* at 120:16

Ms. Andrews explained that there were a number of mitigating factors that were completely ignored, including Reyes' family's difficulty in assimilating to a new country; the lack of Reyes' biological paternal family's involvement in Reyes' life; Ruth's attempted abortions while pregnant with Reyes; and Reyes' difficulty in finding an attachment with Ruth. When Reyes Rule 61 Counsel asked Ms. Andrews why it was significant that a comprehensive presentation be made for the jury with respect to Reyes' life, Ms. Andrews testified:

> Because the mitigation report and the mitigation phase addresses the penalty phase, and *originally with what the jury knew then, three people had voted to save his life. Had they known more, had these 12 jurors known more, maybe more would have voted, perhaps all, to save his life.* That is what this is in pursuit of humanizing him, putting Luis Reyes in a context that people will understand what his life was about, not simply what he is accused of and charged with. [228]

228 *Id.* at 124:2–12 (emphasis added).

Reyes Trial Counsel did not present a comprehensive mitigation case for the jury's consideration. Even without a more rigorous presentation, three jurors voted for a life sentence. The failure to present a mitigation specialist such as Ms. Andrews did not meet prevailing professional norms.

d. Reyes suffered prejudice as a result of Reyes Trial Counsel's deficient mitigation presentation.

Defense counsel in capital cases have an obligation to conduct a thorough investigation for the purposes of sentencing and mitigation. [229] Per decisional law and the ABA Guidelines, this obligation involves efforts to discover *all reasonably available* mitigating evidence. [230] Reyes Trial Counsel failed to properly satisfy counsel's obligations. Instead, the mitigation presentation was deficient and counterproductive by presenting Reyes as an individual "hard wired for violence."

229 *See supra* Section V(C)(2)(a) for the legal standard for mitigation in a capital case.

230 *Wiggins*, 539 U.S. at 524 (emphasis in original); *ABA Guidelines, supra* note 152, 11.4.1(C).

***29** At best, Reyes Trial Counsel's performance left the jury with an incomplete profile and understanding of Reyes, his background, and his mental functioning. At worst, Reyes Trial Counsel's deficient performance actually served to dehumanize Reyes and to portray him as violent. The jury was not given a fair opportunity to assess Reyes' culpability for the Rockford Park Murders because the jurors did not hear complete or sufficient testimony regarding Reyes' youth, mental development, abusive, dysfunctional upbringing, and the extent of Reyes' susceptibility to Cabrera as a father figure. Accordingly, Reyes suffered prejudice as a result of the substandard performance of Reyes Trial Counsel.

3. Reyes Trial Counsel failed to object to prosecutorial misconduct.

The prosecutor, on behalf of the State, made improper comments during the penalty phase of the Reyes Rockford Park Trial, denying Reyes his right to a fair and impartial trial as guaranteed by the United States and Delaware Constitutions. [231] Reyes Trial Counsel was ineffective for failing to protect Reyes from the prosecutorial misconduct (*i.e.*, failing to object to the State's remarks during the Reyes Rockford Park Trial). Moreover, Reyes Trial Counsel was ineffective for failing to assert these claims on direct appeal, thereby limiting Reyes' relief to the more stringent *Strickland* standard of review in these postconviction proceedings [232] Moreover, because Reyes' constitutional challenges were not presented below, those claims are subject to procedural default under Rule 61(i)(3) unless Reyes can demonstrate cause and prejudice or a colorable claim of a constitutional violation. [233]

231 U.S. CONST. amend. VI; DEL. CONST. Art. I § 7; *Flonnory v. State*, 778 A.2d 1044, 1051 (Del.2001) (noting that the right to a fair trial before an impartial jury is a bedrock of the American criminal justice system).

232 Notably, despite acknowledging that his postconviction claims are subject to review under *Strickland,* Reyes focuses the majority of his argument on the grounds that he is entitled to relief under the *Wainwright/Hughes* standards, which are applicable on direct appeal.

233 Super. Ct.Crim. R. 61(i)(3)(A)–(B); (i)(5); *Hainey v. State,* 2008 WL 836599, at *1 (Del. Mar. 31, 2008).

Reyes' claims of prosecutorial misconduct will be addressed on the merits as an ineffective counsel claim. Although the prosecution operates within an adversarial system, prosecutors must seek justice, not merely convictions. [234] In the role of "minister of justice," prosecutors must "avoid improper suggestions, insinuations, and assertions of personal knowledge in order to ensure that guilt is decided only on the basis of sufficient evidence." [235] Pursuant to ABA Standard 35.8(d), "[t]he prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence." Moreover, the conduct of a prosecutor is of particular importance during the penalty phase of a capital trial. This is "because of the possibility that the jury will give special weight to the prosecutor's arguments ... because of the prestige associated with the prosecutor's office." [236] Ultimately, the trial judge determines whether the defendant will live or die only after giving substantial weight to the jury's recommendation. [237] As such, the "jury's recommendation is significant, and therefore *the conduct of the penalty phase hearing must be conducted fairly.*" [238]

234 ABA Standards, *Prosecution and Defense Functions,* 3–1.2(c) ("The duty of the prosecutor is to seek justice, not merely to convict."); *Whittle v. State,* 77 A.3d 239, 246 (Del.2013) (reiterating the special weight juror's give to the prosecutor's arguments); *Brokenbrough v. State,* 522 A.2d 851, 855 (Del.1987).

235 *Kirkley v. State,* 41 A.3d 372, 377 (Del.2012); *Trump v. State,* 753 A.2d 963, 968 (Del.2000).

236 ABA Standards, *Prosecution and Defense Functions,* 3–5.8, commentary (3ed.1993).

237 *Capano v. State,* 781 A.2d 556, 656 (Del.2001) (citing 11 *Del. C.* § 4209).

238 *Id.* (emphasis added).

a. The State's "unpunished murder" comments were objectionable.

***30** The State's argument to the jury that a life sentence for Reyes would leave one of the Rockford Park Murders unpunished was objectionable; yet Reyes Trial Counsel did not object. First, the State's argument was a misleading misstatement of law. Second, the State's argument was an improper plea for vengeance.

Specifically, in its penalty phase opening statement, the State remarked:

> It [the death of two or more individuals] is a significant statutory aggravating circumstance. Because if [Reyes] should be sentenced to life imprisonment for the murder *of one of the two victims* in this case, either Vaughn Rowe or Brandon Saunders, [Reyes] has only one life to serve. And for the murder of the other [victim] he will receive no punishment.
>
> Oh, the [Trial J]udge would sentence [Reyes] to life without parole, just as [the Trial Judge] would for the other [victim], but *the practical effect of that would be [Reyes] would receive no punishment for the second murder he committed in this case.* [239]

239 Penalty Phase Tr. Oct. 23, 2001 at 16:12–22 (emphasis added).

Additionally, in the State's closing argument, the State improperly emphasized the "practical" effect—rather than the "legal" effect—of recommending a life sentence:

> [A]s you [the jurors] know, as was true with Brandon [Saunders] and with Vaughn [Rowe], [Reyes] only has one life to give. So that second life sentence for the second murder of the two murders [Reyes] committed on January 21, 1996, is essentially a *meaningless punishment.* If you [the jurors] do not recommend the death penalty in this case; your Honor, if you do not impose the death penalty in this case, one of those two murders will go unpunished. Justice, ladies and gentlemen, demands that *every crime* be punished. [240]
>
> * * * *
>
> When you convict someone of two murders, if you impose a life sentence for the first murder[,] because we each have but one life to give, there is no real punishment for that second murder. [241]
>
> I ask you this ladies and gentlemen, [Trial Judge], whose murder will go unpunished? Will it be Brandon's?

> Or Vaughn's? And what have you [the jurors] heard throughout the course of this trial, particularly over the last two days, which suggests, for a minute, that [Reyes] deserves the gift, the grace of *being able to go practically and essentially unpunished for one of those two murders?* What has he done to deserve that? [242]
>
> * * * *
>
> Ladies and gentlemen, [Trial Judge], only a death sentence will ensure that the murders of both Brandon Saunders and Vaughn Rowe are *justly and fairly punished.* Only a death sentence can ensure that the defendant pays; yes, pays for those murders. Only a death sentence can ensure that justice is done. [243]

240 Penalty Phase Tr. Oct. 25,2001 at 43:14–44:1 (emphasis added).

241 *Id.* at 69:13–17.

242 *Id.* at 69:18–70:4 (emphasis added).

243 *Id.* at 70:5–11 (emphasis added).

The State also made improper comments in its closing rebuttal argument:

> We're talking about what the [Delaware] General Assembly says, your general assembly, your legislature says what constitutes appropriate procedure to prove a death penalty when one of them is where two people are killed in a particular case. And it's easy to understand why. It's easy to understand why because a life sentence for one murder *means no punishment for the other [murder].* It's as simple as that. We're not talking about an eye for an eye. We're talking about accountability. We're talking about *no free murders.* No opportunities to kill somebody and *not be punished*. [244]
>
> ***31** * * * *
>
> If you [the jurors] return a life sentence for these—if you recommend a life sentence for these murders, [Reyes] will serve a one life sentence and that life sentence will begin at sometime between 2007 and 2009. It won't even be [Reyes'] entire life because a portion of that life up until that time will be spent serving a sentence for the murder of Fundador Otero. What does it say, ladies and gentlemen? What does it say as the conscience of the community? What does it say about justice if Luis Reyes can kill and kill and kill yet again, and for the last murder, never be punished? [245]

244 *Id.* at 144:21–145:11 (emphasis added).

245 *Id.* at 153:4–15.

It is well-established that a prosecutor may not misstate or misrepresent the evidence or "mislead the jury as to the inferences it may draw." [246] This Court must consider a prosecutor's statements in the context of the record as a whole and in light of all the evidence. [247] Upon review of the record and consideration of the context of the challenged statements, this Court finds the prosecutor's statements related to an unpunished murder to be, at a minimum, objectionable.

246 ABA Standards, *Prosecution and Defense Functions,* 3–5.8; *Daniels v. State,* 859 A.2d 1008, 1011 (Del.2004) (quoting *Sexton v. State,* 397 A.2d 540, 545 (Del.1979)); *Kurzmann v. State,* 903 A.2d 702, 708 (Del.2006); *Flonnory v. State,* 893 A.2d 507, 540 (Del.2006); *Hunter,* 815 A.2d at 735; *Hughes v. State,* 437 A.2d 559, 567 (Del.1981) ("It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.") (quoting *ABA Standards, Prosecution and Defense Functions* (1971)).

247 *Daniels v. State,* 859 A.2d 1008, 1012 (Del.2004).

Here, the State presented to the jury evidence concerning the gravity of Reyes' criminal conduct throughout the guilt and penalty phases of the Reyes Rockford Park Trial. Thereafter, however, the State focused its penalty phase arguments not on the evidence—*i.e.*, the aggravating and mitigating factors—but on the idea that Reyes can serve but one life sentence and thus, a life sentence is not a punishment for *both* murders. The State's argument that, absent the death penalty, Reyes would somehow escape punishment for one of the murders—notwithstanding the fact that Reyes faced life imprisonment—diverted the jury from deciding if the aggravating factors outweighed the mitigating factors by a preponderance of the evidence. [248] The State improperly appealed to the jury for vengeance by death (i.e., a retaliatory sentence).

248 *See Small v. State,* 51 A.3d 452, 462 (Del.2012) ("The prosecutorial misconduct tainted the jury's vote on whether the aggravating circumstances outweighed the mitigating circumstances.").

As the commentary of ABA Standard 3–5.8 makes clear, "The prosecutor should not make arguments that encourage the jury to depart from its duty to decide the case on the evidence.... Predictions about the effect of an [outcome] ... go beyond the scope of the issues in trial and are to be avoided."

***32** The State's arguments were improper and Reyes Trial Counsel was objectively unreasonable for failing to object. Moreover, Reyes was prejudiced by the State's improper argument. Accordingly, Reyes has satisfied *Strickland.*

b. The State improperly characterized Reyes' mitigation factors as excuses.

In its closing of the penalty phase, the State argued the following:

> Well, against the weight of these many aggravating circumstances, [Reyes], through his able and capable counsel ... has introduced evidence *of what he claims are facts where were mitigating* which make the death penalty less appropriate. What did we hear?
>
> Well, [Reyes Trial Counsel] began by saying that this evidence would not be introduced in an attempt to excuse the murders. But then consider the testimony of Caroline Burry, and *although she never said that she was trying to excuse the murders, what was your [the jurors] read on what she was really saying?* [249]
>
> * * * *
>
> Folks, although [Dr. Burry] didn't say it and she never did say it, [Dr. Burry's mitigation testimony] is *an attempt to excuse what [Reyes] has done* and [the State] submits you should reject that for exactly what it is. [250]

249 Penalty Phase Tr. Oct. 25,2001 at 63:9–21 (emphasis added).

250 *Id.* at 64:13–16 (emphasis added).

This was improper argument, yet Reyes Trial Counsel did not object. The Delaware Supreme Court addressed this issue as recently as 2012 in its decision in *Small v. State,* holding that "mitigating circumstances are different from excuses." [251] In *Small,* the State, on eight different occasions, referred to each of the defendant's mitigating circumstances individually as an excuse. [252] On direct appeal, the *Small* Court concluded that the prosecutor's repeated improper characterization of the defendant's mitigating circumstances as excuses "changed the tenor or the penalty phase" and distracted "the jury from its proper role and duty to weigh the aggravating and mitigating circumstances." [253] As a result, the *Small* Court remanded the matter for a new penalty hearing. [254]

251 *Small,* 51 A.3d at 460 (distinguishing the term "excuse" in the context of criminal law from a "mitigating circumstance").

252 *Id.* at 459.

253 *Id.* at 461.

254 *Id.* at 462.

The Delaware Supreme Court's concerns in *Small* are likewise applicable here. The State characterized the entirety of Dr. Burry's mitigation testimony as an attempt to "excuse" the Rockford Park Murders. Therefore, this was improper argument by the State and was objectionable. Reyes Trial Counsel was objectively unreasonable for failing to object to the State's mischaracterizations of Reyes' mitigation evidence as an excuse. Reyes suffered prejudice as a result of this improper presentation. Accordingly, Reyes has satisfied *Strickland.*

c. The State's characterization of Reyes as "monstrous" was improper and Reyes Trial Counsel should have objected.

The State injected improper inflammatory remarks into the penalty hearing by describing Reyes as "monstrous." Specifically, Reyes challenges the following from the State's rebuttal argument:

> When you kill, and you kill, and you kill again, you are a murderer. That is what you are. You need go no further in defining him. *He is so monstrous.* It is so monumental that any definition of Luis Reyes pales into insignificance. [255]

255 Penalty Phase Tr. Oct. 25, 2001 at 148:16–21 (emphasis added).

***33** In presenting the State's case at trial, prosecutors "may argue legitimate inferences of the [defendant's] guilt

that flow from the evidence." [256] However, prosecutors must "refrain from legally objectionable tactics calculated to arouse the prejudices of the jury." [257] For example, it is both inflammatory and impermissible for a prosecutor to engage in name-calling against the defendant because such characterizations attempt to inflame the passions of the jury. [258] Accordingly, the State's comments in this regard were improper and Reyes Trial Counsel was ineffective by failing to object. Moreover, Reyes suffered prejudice.

256 *Daniels v. State*, 859 A.2d 1008, 1011 (Del.2004) (internal quotations omitted).

257 *Brokenbrough*, 522 A.2d at 855 (internal quotations omitted).

258 *Id.* at 857 (finding that it was improper for the prosecutor to insinuate, by analogy, that the defendant was the devil).

d. The State improperly presented a "message to the community" argument.

Delaware Courts have held that it is improper for a prosecutor to appeal to a jury's sense of personal risk and " 'to direct the jury's attention to the societal goal of maintain a safe community.' " [259] Arguments that urge the jury to prevent danger in the community are objectionable because such arguments, for example, direct juror attention to matters outside the record, implicate varying levels of juror perception and personal knowledge, and suggest jurors are at personal risk. [260]

259 *Williamson v. State*, 1998 WL 138697, at *3 (Del. Feb. 25, 1998) (quoting *Black v. State*, 616 A.2d 320, 324 (Del.1992)).

260 *Black v. State*, 616 A.2d 320 at 324 (Del.1992).

The State improperly appealed to the jury's sense of community. In the final paragraph of its rebuttal at the penalty phase, the State rhetorically asked the jury, "What does it say, ladies and gentlemen? *What does it say as the conscience of the community?* What does it say about justice if Luis Reyes can kill and kill and kill yet again, and for the last murder, never be punished?" [261] These statements were objectionable; it was objectively unreasonable for Reyes Trial Counsel to withhold an objection, and Reyes suffered prejudice. Therefore, *Strickland* is satisfied.

4. Reyes Trial Counsel failed to rebut the State's improper and inaccurate characterization of Reyes' prison record.

While discussing Reyes' prison record during its penalty phase closing argument, the State argued the following:

> What's worse and perhaps what's more significant is what's not here. There is no evidence that the defendant, since he was incarcerated in 1997, has undertaken any significant efforts whatsoever to rehabilitate himself. Now, remember, he told Dr. Finkelstein and you'll see [...] Dr. Feinkelstein's report, that he was convinced you all would exonerate him and that he would be released from prison some day. But he didn't do anything of any significance to make himself a better person in anticipation of his eventual release. No anger counseling, no psychological counseling, no psychiatric counseling, no Key program, no Crest program, no certificates of achievement, nothing. Nothing. [262]

Accordingly, this presentation offered a false impression that Reyes had not attempted to rehabilitate himself and would not do so if given a life sentence; therefore, according to the State, execution was the most appropriate sanction.

261 Penalty Phase Tr. Oct. 25, 2001 at 152:11–15 (emphasis added).

262 *Id.* at 58:1–16. The State offered a similar argument in its rebuttal argument of the penalty phase, stating:

> What's more important is where are the attempts to rehabilitate himself?
> Until Friday, if you believe him, he expected to walk out of jail at the end of his 12–year sentence. So where are the attempts to rehabilitate himself? Where are the certificates from anger management classes, occupational therapy, [sic], anything good? Where are those records?

Id. at 146:6–12.

***34** However, Reyes' prison records reflect that Reyes participated in various education programs from 1999 to

2002. Importantly, most of Reyes' time in prison before the Reyes Rockford Park Trial was as a pre-trial detainee for both the Otero murder and the Rockford Park Murders. As a pre-trial detainee, Reyes was not even eligible for rehabilitative programs at HRYCI. Moreover, at a postconviction evidentiary hearing, correctional consultant James Aiken testified that Reyes had enrolled in vocational programs as a sentenced inmate at HRYCI.

Reyes has established the performance prong of *Strickland*. Where Reyes Trial Counsel, by their own admission, failed to even investigate Reyes' involvement in any prison programs as a mitigating factor in a pending death penalty matter, their representation fell below an objective standard of reasonableness. Reyes Trial Counsel had an obligation to Reyes to gather information which would rebut the State's characterization of Reyes. Ideally, Reyes Trial Counsel would have objected to the State's presentation regarding rehabilitative efforts by Reyes and obtained a ruling by the Trial Court that the probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. [263] Had the Trial Court declined to prohibit this presentation, then Reyes Trial Counsel should have presented evidence to explain to the jury Reyes' status as a pre-trial prison detainee made him ineligible for rehabilitative programs.

263 *See* D.R.E. 403.

The failure of Reyes Trial Counsel to challenge the State's comments on Reyes' alleged failure to participate in rehabilitative programs fell below the expectations of reasonable performance. Moreover, Reyes was prejudiced because the State relied on this information to argue that a death sentence was mandated because Reyes would not make any effort to be rehabilitated during a life sentence.

5. Reyes Trial Counsel failed to object to the State's improper rebuttal to Reyes' allocution.

Reyes exercised his right to allocate during the penalty phase. [264] Before doing so, the Trial Court engaged in a detailed colloquy regarding the parameters of allocution. [265] Reyes expressed that he had discussed with Reyes Trial Counsel the potential risks and benefits of personally addressing the jury. The Trial Court also engaged in a colloquy with Reyes about allocution. [266] Reyes Trial Counsel also specifically addressed on the record that Reyes has been advised that he could be cross-examined under oath if Reyes' allocution went beyond the record. The State expressly agreed with Reyes Trial Counsel that should Reyes exceed the parameters of allocution, then Reyes must be cross-examined under oath. [267]

264 The right to allocution is not constitutional but, rather, is a substantial right grounded in Superior Court Criminal Rule 32(a)(1)(c), Delaware's death penalty statute, codified at 11 *Del. C.* § 4209(c)(2), and Delaware decisional law. *See Shelton v. State*, 744 A.2d 465, 491–98 (Del.1999).

265 *See* Penalty Phase Tr. Oct. 25, 2001 at 73:21–87:9.

266 *Id.* at 81:16–82:11.

267 *Id.* at 84:10–11; *see Shelton*, 744 A.2d at 496.

After Reyes personally addressed the jury, the State raised issue with the following statements:

> REYES: I've made many bad choices in my life and I'm guilty of many things, and out of all of those bad choices that I've made, I admitted to my wrong. Whether it was exactly at that time or a little later down the line, I admitted to what I did. I came forward. [268]

***35** *Before this trial started, [the State] came to me with a plea of life in prison, to spend the rest of my life in jail, but I turned that plea down*. My lawyers advised me of the evidence that [the State] had and that it didn't look good, but regardless of that, I would not take that plea. I told them I would not take a plea for something that I did not do. So we came to trial. [269]

Specifically, the State submitted and the Trial Court agreed that Reyes had introduced a new matter into evidence—a plea offer from the State rejected by Reyes. However, the State never formally extended a plea offer to Reyes.

268 Penalty Phase Tr. Oct. 25,2001 at 95:11–16.

269 *Id.* 95:17–96:2 (emphasis added).

Nevertheless, while it is technically accurate that a *formal* plea had never been extended, there had, in fact, been plea discussions. Indeed, it was made clear by the State that, if Reyes would admit responsibility for the Rockford Park Murders, then the State would agree to a life sentence and would not seek Reyes' execution. However, Reyes claimed factual innocence and refused to accept responsibility for crimes he contended he did not commit.

To correct the record, per the State's request and as agreed upon by Reyes Trial Counsel, the State read to the jury—and into the record—a letter the State wrote to Reyes Trial Counsel on September 17, 2001, before the Reyes Rockford Park Trial began. Therefore, despite the acknowledgement of all parties and the Trial Court, the correct procedure was not followed; Reyes was not placed under oath and cross-examined.

Not only did Reyes Trial Counsel fail to insist upon correct procedure, but the September 17th letter inserted improper commentary and vouching by the State that was inappropriate. The State's rebuttal argument was as follows:

> [Reyes' allocution] talked about a plea agreement, a plea offer. And [Reyes] was wrong about that. [Reyes] presented incorrect information. And because of that, [the State is] permitted to set the record straight ... so that you're not under any misapprehensions about what the State's position is in this case.
>
> What I'm going to read to you [ ] is a letter sent to [Reyes Trial C]ounsel on September the 17th of this year to [Reyes Trial Counsel] from [the State].

"We also want to comment on [Reyes Trial Counsel's] arguments concerning a prior plea offer. To be precise, no plea was ever offered. We did ask whether your client would be willing to discuss a possible plea to a life sentence coupled with a proffer to the victim's families in some undetermined form as to the specifics of what happened and why. Your client expressed no interest in opening those lines of communication, so no plea was ever offered. While we might be willing to talk about waiving the death penalty for someone who accepts responsibility for his actions and helps grieving families cope with their losses, we are not willing to do so for a person we believe to be a triple murderer who does not accept that responsibility. Without an acceptance of responsibility, we believe that the death penalty for your client is absolutely required. It seems to us that while we will be able—that we will be able to seat an unbiased jury. If your client wants to avoid the possibility of a death penalty, we believe he should rethink his earlier position rather than seek unilateral concessions from the State." [270]

270 *Id.* at 142:8–143:20.

***36** A prosecutor—seeking justice in his or her "unique role in the adversary system"—may argue to the jury "all legitimate inferences of the defendant's guilt that follow from the evidence." [271] A prosecutor must not, however, engage in vouching by "impl[ying] personal superior knowledge, beyond what it logically inferred from the evidence at trial." [272] ABA Standards also warn against a prosecutor sharing his or her personal opinions or beliefs "as to the truth or falsity of any testimony or evidence or the guilt of the defendant." [273]

271 *Burns v. State*, 76 A.3d 780, 789–90 (Del.2013); *Kirkley*, 41 A.3d at 377 (referencing *Daniels v. State*, 859 A.2d 1008, 1011 (Del.2004) (quoting *Hooks v. State*, 416 A.2d 189, 204 (Del.1980)), and *Boatson v. State*, 457 A.2d 738, 742 (Del.1983)).

272 *Burns*, 76 A.3d at 789–90; *Kirkley*, 41 A.3d at 377; *White v. State*, 816 A.2d 776, 779 (Del.2003); *Flonnory*, 893 A.2d at 539 ("It it well-settled that prosecutors may not express their personal opinions or beliefs about the credibility of witnesses or about the truth of any testimony.").

273 ABA Standards Prosecution Function, 3–5.8(b), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html.

In *Kirkley v. State*, the Delaware Supreme Court held that the prosecutor's statement—that the State only pursued criminal charges against the defendant because the defendant was actually guilty—constituted improper vouching of the defendant's guilt. [274] The Delaware Supreme Court recently addressed this issue in *McCoy v. State*. [275] The *McCoy* Court found that the prosecutor vouched for the testimony of a State witness by expressing a personal opinion on the defendant's guilt, which "implicitly and inappropriately corroborated [the State witness'] testimony and endorsed [the State witness'] credibility." [276] The *McCoy* Court determined that the prosecutor's statements, like statements made in *Kirkley*, implied superior knowledge of the evidence. [277]

274 *Kirkley*, 41 A.3d at 377–78 (concluding that the prosecutor's comments regarding the State's charging decisions suggested superior knowledge of the evidence and resulted in "an improper inference" that could not be drawn from the evidence).

275 112 A.3d 239 (Del.2015).

276 *McCoy*, 112 A.3d at 261.

277 *Compare McCoy*, 112 A.3d at 261 (finding misconduct because the prosecutor vouched for the State's witness by expressing his personal opinion that the defendant shot the victim, which implied superior knowledge of the evidence); *Kirkley*, 41 A.3d at 377–78 (finding misconduct because the prosecutor vouched for the State's case by staying that the State pursued criminal charges only when the defendant was indeed guilty, which implied superior knowledge of the evidence); *and Whittle*, 77 A.3d at 247–48 (finding misconduct because the prosecutor expressly endorsed the testimony of the State's witness that the defendant was guilty); *with Burns*, 76 A.3d at 790–91 (determining the prosecutor's statements that the defendant committed the criminal conduct charged was logically inferred from the evidence).

In *Burns v. State*, the Delaware Supreme Court held that the prosecutor's statements—that the defendant "did this" and was responsible for the criminal conduct as charged—did not imply superior knowledge of the evidence but, rather, constituted a logical inference from the evidence. [278] The *Burns* Court noted that the prosecutor did not speak in the first person and "couched his statements by saying 'what the attorneys say is not evidence [,]' " and determined that such a warning bolstered the *Burns* Court's conclusion. [279] Unlike the prosecutor's statements in *Burns*, the State's September 17th letter, written in the first person, contained the State's personal opinion that Reyes' case "absolutely required" the death penalty. [280]

278 *Burns*, 76 A.3d at 790.

279 *Id.*

280 Penalty Phase Tr. Oct. 25,2001 at 143:13–14.

***37** It was objectively unreasonable for Reyes Trial Counsel to agree to the State's reading of its September 17th letter into the record to "cure" Reyes' statements that the Trial Court found had exceeded the bounds of allocution. Reyes Trial Counsel was ineffective by agreeing with the State that reading the State's letter into the record "was the fair way to deal with the situation." [281] This was not the correct procedure and Reyes Trial Counsel should have objected to the presentation of the September 17th letter.

281 *Id.* at 106:9–10.

Rather than present to the Trial Court an argument that Reyes' statement was not completely inaccurate, Reyes Trial Counsel abandoned their client on this point. Moreover, and perhaps more importantly, Reyes Trial Counsel should have argued that the remedy for the State was to cross-examine Reyes. The State concedes, as it must, that Reyes Trial Counsel could have insisted that Reyes be cross-examined. [282] Had that cross-examination taken place, Reyes could have explained Reyes' understanding of the options that were explained to him.

282 State's Answer to Reyes' Brief Following Ev. Hrg., Oct. 8, 2014, p. 60 ("While [Reyes] is correct that rather than agreeing to let the State read the accurate letter into the record, [Reyes Trial Counsel] could have insisted that [Reyes] be placed under oath and cross-examined to his detriment on the issue....").

This Court finds, at a minimum, Reyes Trial Counsel should have objected to the reading of the September 17th letter because it contained the personal beliefs and opinions of the prosecutors. Indeed, the letter expressly said that "we believe" (the State) that the death penalty was absolutely required. Accordingly, Reyes Trial Counsel acted objectively unreasonable with respect to the State's challenge to Reyes' allocution, the subsequent "curative measure," and the improper vouching within the September 17th letter. Furthermore, Reyes suffered prejudice as a result of the State's improper vouching. Accordingly, this Court finds that Reyes has satisfied both the performance and prejudice prongs of *Strickland.*

VI. *WHETHER REYES IS ENTITLED TO RELIEF ON HIS GENERAL CONSTITUTIONAL OBJECTIONS TO DELAWARE'S EXECUTION DRUGS IS AN ISSUE RESERVED FOR THE APPELLATE COURT.*

Reyes argues that this Court must vacate his death sentence because, in light of a nationwide shortage of lethal injection drugs, the state of Delaware cannot administer the death penalty in a manner consistent with Reyes' constitutional rights against cruel and unusual punishment.

The protocol in Delaware for administering execution via lethal injection is described as:

> Punishment of death shall, in all cases, be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such person sentenced to death

> is dead, and such execution procedure shall be determined and supervised by the Commissioner of the Department of Correction. [283]

The Delaware Supreme Court has consistently upheld the constitutionality of the Delaware Death Statute. [284] The Delaware Supreme Court has upheld the constitutionality of the Delaware Death Statute as applied to Reyes [285] Moreover, lethal injection as a form of execution does not violate the United States Constitution or the Delaware Constitution. [286]

283 11 *Del. C.* § 4209(f).

284 *See e.g.*, *Swan v. State*, 820 A.2d 342 (Del.2003) (holding that a jury's conviction of a defendant unanimously and beyond a reasonable doubt for a crime that itself established a statutory aggravating circumstance satisfied the constitutional requirements set forth in *Ring v. Arizona*, 536 U.S. 584 (2002), by providing a determination of the actor that rendered the defendant "death eligible"); *Brice v. State*, 815 A.2d 314 (Del.2003) (upholding the 2002 version of 11 *Del. C.* § 4209, noting that "[t]he 2002 Statute transformed the jury's role ... from one that was advisory under the 1991 version ... into one that is now determinative as to the existence of any statutory aggravating circumstances."); *Ortiz v. State*, 869 A.2d 285, 305 (Del.2005) (stating that the Delaware Supreme Court "adhere[s] to [its] holding in *Brice* that Delaware's hybrid form of sentencing, allowing the jury to find the defendant death eligible and then allowing a judge to impose the death penalty once the defendant is found to be death eligible, is not contrary to the Sixth Amendment of the United States Constitution[.]"); *Cabrera Direct Appeal*, 840 A.2d at 1272–74.

285 *Reyes Direct Appeal*, 819 A.2d at 316–17.

286 *State v. Deputy*, 644 A.2d 411, 420–22 (Del.Super.) *aff'd*, 648 A.2d 423 (Del.1994).

***38** The determination of whether the application of Delaware's Death Statute is unconstitutional because of an alleged national lethal injection drug shortage is not for this Court to decide. To the extent that Reyes needs to reserve this argument for further proceedings, it is so reserved.

VII. *CONCLUSION*

This Court has determined that Reyes' constitutional rights were violated during the guilt and penalty phases of the Reyes Rockford Park Trial. Moreover, Reyes Trial Counsel was ineffective. The cumulative effect of Reyes Trial Counsel's errors leads this Court to conclude that "mistakes were made that undermine the confidence in the fairness of the [Reyes Rockford Park T]rial" and "there is a reasonable probability that the outcome of the [Reyes Rockford Park] [T]rial would have been different without the errors." [287] Based on the record before the Court and consideration of decisional law, this Court finds that the fundamental legality, reliability, integrity, and fairness of the proceedings leading to Reyes' convictions and sentencing are not sound. Accordingly, the judgments of convictions and death sentenced imposed by Order dated March 14, 2002 must be vacated.

287 *Starling*, 2015 WL 8758197, at *2.

NOW, THEREFORE, this 27th day of January, 2016, the Postconviction Motion of Luis Reyes is GRANTED. The judgments of conviction and death sentence imposed by Order dated March 14, 2002 are hereby VACATED.

IT IS SO ORDERED.

All Citations

Not Reported in A.3d, 2016 WL 358613