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Case Number 372,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LUIS G. CABRERA, JR.,	)	
	)	
	)	
v.	)	
	)	No. 372, 2015
STATE OF DELAWARE,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S REVISED ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

In December 1999, a New Castle County grand jury indicted Luis Cabrera and Luis Reyes, 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-2.[1] In February 2001, a Superior Court jury found Cabrera guilty of all the charges against him and recommended by a vote of 11-1 that he be sentenced to death. DI 74, 79 at A-13. In March 2002, the trial judge sentenced Cabrera to death. DI 104 at A-15. Defendant appealed. DI 117 at A-17.

In July 2002, Cabrera filed a motion for new trial in the Superior Court, alleging newly discovered evidence that a prosecution witness, Malika Mathis, recanted her testimony and accused the chief investigating officer of suborning perjury. DI 133 at A-19.[2] This Court remanded Cabrera's direct appeal for the Superior Court to decide the motion. DI 135 at A-19. The Superior Court ordered briefing and held evidentiary hearings, after which the court denied Cabrera's motion for a new trial. DI 159 at A-22. This Court affirmed Cabrera's convictions and sentences.[3]

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[1] "DI" refers to the Superior Court docket entries in *State v. Luis Cabrera*, ID No. 9904019326.

[2] *See State v. Cabrera*, 2008 WL 3853998, *1 (Del. Super. Ct, Aug. 14, 2008).

[3] *Cabrera v. State*, 840 A.2d 1256 (Del. 2004).

On November 30, 2004, Cabrera filed a motion for postconviction relief to which the State responded on January 21, 2005. DI 193 & 194 at A-26. On March 19, 2007, Cabrera filed an amended motion for postconviction relief. DI 230 at A-31. The State responded on October 15, 2007 and Cabrera replied on January 22, 2008. DI 234 at A-32, DI 240 at A-33. During briefing, Cabrera filed numerous motions which the State answered. DI 225 at A-31, DI 232 at A-32, DI 241 at A-33, DI 247 at A-34, DI 257 & 261 at A-36, DI 262 at A-37, DI 280-282 at A-39. The Superior Court issued orders denying Cabrera's discovery request, his permission to contact jurors, and his motion to preclude the State from interviewing trial counsel. DI 249 & 250 at A-34, DI 285 and 287 at A-40. Evidentiary hearings were initially scheduled the beginning of 2012. DI 267 & 268 at A-37. Over the State's objection, the Superior Court continued the evidentiary hearings and allowed counsel to file a "second amended and restated motion for postconviction relief," which Cabrera filed on October 4, 2012. DI 273 at A-38, DI 284 & 286 at A-40. Evidentiary hearings began immediately thereafter.

The Superior Court heard testimony on October 9, 10, 11, 15, 23 and 25 in 2012 and April 1, 2013. DI 301 at B-42. Counsel conducted a deposition in Florida on November 14, 2012. On April 14, 2014, Cabrera filed a post-

evidentiary hearing Opening Brief. DI 324 at A43. The State answered on July 15, 2014 and Cabrera replied on October 3, 2014. DI 310 at A-43, DI 313 at A-44.

On April 17, 2015, Cabrera filed a motion to stay the postconviction proceedings. DI 315 at A-44. The State answered on April 23, 2015. DI 318 at A-44. On May 27, 2015, the Superior Court held oral argument on Cabrera's motion and a *Batson* claim, raised by the Superior Court *sua sponte*. DI 318 at A-44. On May 28, 2015, the Superior Court issued an order denying Cabrera's motion to stay. DI 319 at A-45. On June 4, 2015, Cabrera submitted a post-argument memorandum on the *Batson* issue and the State replied on June 11, 2015. DI 320 & 321 at A-45.

On June 17, 2015, the Superior Court issued an Opinion denying in part and granting in part Cabrera's motion for postconviction relief.[4] Finding that Cabrera's trial counsel was constitutionally ineffective in their presentation of penalty phase mitigation, the Superior Court vacated Cabrera's death sentence.[5] In all other respects, the Superior Court found "that the fundamental legality, reliability, integrity and fairness of the proceedings leading to Cabrera's convictions and sentencing [were] otherwise sound and [did] not merit relief."[6] Cabrera appealed; the State cross-appealed. The State withdrew its cross-appeal on February 9, 2017,

[4] *State v. Cabrera*, 2015 WL 3878287 (Del. Super. Ct. Jun. 17, 2015).

[5] *Id.* at *14.

[6] *Id.* at *48.

in light of this Court's decisions in *Rauf v. State*, 145 A.3d 430 (Del. 2016), and *Powell v. State*, __A.3d__, 2016 WL 7243546 (Del. Dec. 15, 2016). On March 1, 2017, Cabrera filed a revised opening brief, eliminating arguments responding to the State's claims in its cross-appeal. This is the State's revised answering brief.

SUMMARY OF THE ARGUMENT

I. Argument I is denied. The Superior Court did not err in ruling that Cabrera was required to show *Strickland* prejudice for his claim that trial counsel committed a reverse-*Batson* violation during jury selection. Moreover, the trial record does not substantiate a *Batson* violation. The postconviction record does not assist the analysis.

II. Argument II is denied. The Superior Court properly found that Cabrera did not substantiate his claim of ineffective assistance of counsel because he did not move to suppress the gun found in Cabrera, Sr.'s home. A motion to suppress would not have provided relief. The gun was seized pursuant to Cabrera, Sr.'s valid consent. He told police about the gun and led them to it.

III & IV. Arguments III and IV are denied. The Superior Court did not err in finding Cabrera's claims surrounding the belt comparison evidence and Malika Mathis procedurally barred and meritless. The belt comparison evidence and issues surrounding Mathis were previously fully litigated and therefore barred by Rule 61(i)(4). Because trial counsel acted reasonably, Cabrera's related ineffective assistance of counsel claims fail.

V. Argument V is denied. The Superior Court properly found that Cabrera's claim that his jury was not properly death-qualified was procedurally barred under Rule 61(i)(3) and meritless, as was his associated ineffective of counsel claim, because

the jurors were properly removed for cause. All the jurors about whom Cabrera complains said they could not "recommend" the death penalty.

VI. Argument VI is denied. The Superior Court properly found Cabrera's *Allen* charge claim procedurally barred and his related claim of ineffective assistance of counsel meritless. The trial court's *Allen* charge was not unduly coercive. Transitional language was not required within the charge and Cabrera was not prejudiced by not being present for the office conference on the issue.

VII. Argument VII is denied. The Superior Court properly found Cabrera's *Brady* claims procedurally barred and meritless. Cabrera's *Brady* claim regarding Powell was decided on direct appeal and therefore barred by Rule 61(i)(4). Interests of justice did not require reconsideration. The Harrigan claim was barred by Rule 61(i)(3) and meritless. As to Colon, Cabrera failed to show a *Brady* violation. Cabrera also failed to substantiate his claims of ineffective assistance of counsel.

VIII. Argument VIII is denied. Cabrera's claim against three seated jurors was procedurally barred under Rule 61(i)(3). The Superior Court fully explored the jurors' issues at trial. There was no basis to excuse the jurors. Cabrera did not move to strike any of the jurors. To the extent Cabrera claims ineffective assistance of counsel, he failed to satisfy both *Strickland* prongs.

IX & X. Arguments IX and X are denied. The Superior Court did not abuse its discretion in denying Cabrera postconviction discovery and leave to contact jurors.

Cabrera provided no valid reason for the Superior Court to grant him leave to contact jurors. Moreover, Cabrera failed to show "good cause" for his discovery request.

STATEMENT OF THE FACTS[7]

On January 21, 1996, a pedestrian discovered the bodies of Brandon Saunders and Vaughn Rowe in a wooded area of Rockford Park. The victims appeared to have been killed and then dragged to the location in the woods, where they were covered in a maroon bed sheet. Both victims had been shot in the back of the head. Rowe had been beaten. Wilmington Police Detective Mark Lemon was assigned as the chief investigator.

Police eventually regarded the defendant, Luis Cabrera, as a suspect. Several items of physical evidence linked Cabrera to the victims. Within a week of the murders, Cabrera returned a pager belonging to Saunders to a store in Wilmington. Cabrera later told police that he had found the pager on the ground near his father's home. Police also recovered from Rowe a watch that was programmed with the phone number to Cabrera's father's home. When police searched Saunders bedroom, they found an ISS Servicesystem business card on which was written "434-6154 Big Lou." Cabrera and Luis Reyes, who was also charged and convicted in connection with the murders, both worked at ISS. Some people knew Cabrera as "Big Louie" and Reyes as "Little Louie."

[7] The Statement of the Facts is taken verbatim from this Court's decision on direct appeal in *Cabrera v. State*, 840 A.2d 1256, 1260-61 (Del. 2004) (footnotes omitted).

Cabrera was indicted in December 1999, nearly four years after the homicides. He was indicted on two counts of Murder First Degree, two counts of Possession of a Firearm During the Commission of a Felony, and two counts of Conspiracy First Degree. The State sought the death penalty.

At trial, Donna Ashwell, Cabrera's neighbor, testified that she heard an argument in their common basement one Saturday evening in January 1996, sometime before 9:30 or 10:00. She recognized Cabrera's voice and heard a loud crash. Ashwell went to the basement door to investigate and saw Reyes, who, in response to Ashwell's inquiry about the noise, told her they would leave. Later that evening, Cabrera apologized to Ashwell for making so much noise. Ashwell later discovered that a shovel she had used to clear snow was missing.

Cabrera's wife testified that she and Cabrera married in December 1994 and lived together until October of 1995. She believed that Cabrera later left their apartment in the fall of 1996 and began living with his father. She testified that she and Cabrera had owned a set of burgundy-colored sheets that she did not take with her when she left. In April 1997, Detective Lemon seized a maroon bed sheet from the basement of Cabrera's father's home, where Cabrera slept. An FBI forensic examiner testified that the flat sheet covering the bodies appeared to match the fitted sheet seized from Cabrera's residence.

An ATF firearms and toolmarks examiner analyzed the ballistics evidence, comparing the bullets found in the victims' bodies with a handgun that was owned by Cabrera's father and seized from the Cabrera residence. The ATF examiner testified that the bullet recovered from Rowe's body had been fired from the Cabrera handgun.

Detective Lemon also seized numerous belts from the Cabrera residence in April 1997. Mileka Mathis testified at trial that she met Cabrera in 1994 and had sporadic sexual encounters with him over the course of several years. Mathis testified that she was familiar with Cabrera's clothing style and identified a distinctive belt seized from his residence as one that he likely would have worn. She also stated, however, that she did not specifically recognize the belt. Dr. Richard Callery testified that during the January 1996 autopsy [of Vaughn Rowe] he observed an injury that resembled the imprint of a belt buckle. Two weeks before his testimony in 2001, Dr. Callery measured one of the belts seized by Lemon and compared it to photographs of Rowe's injuries. He opined that the belt was consistent with one that might have caused the injuries.

I. THE SUPERIOR COURT DID NOT ERR IN RULING THAT CABRERA WAS REQUIRED TO SHOW *STRICKLAND* PREJUDICE REGARDING HIS *BATSON* CLAIM AGAINST TRIAL COUNSEL

Question Presented

Whether the Superior Court erred in finding Cabrera had to show *Strickland* prejudice regarding his claim that trial counsel committed a reverse-*Batson*[8] violation during jury selection.

Standard of Review

This Court reviews a trial court's denial of a motion for post-conviction relief for an abuse of discretion.[9] Legal or constitutional questions are reviewed *de novo.*[10]

Argument

Cabrera asserts that the Superior Court erred in ruling that he was required to show *Strickland*[11] prejudice with respect to his claim that his attorney violated *Batson* by purposefully discriminating against jurors on the basis of race during jury selection, thereby committing a reverse *Batson*-violation. He is mistaken.

In postconviction litigation and briefing, Cabrera pursued a claim that his counsel was ineffective for failing to use his peremptory challenges in a race

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

[9] *Outten v. State,* 720 A.2d 547, 551 (Del. 1998) (internal citations omitted).

[10] *Swan v. State,* 28 A.3d 362, 382 (Del. 2011) (internal citations omitted).

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

neutral manner. After hearings were complete, the Superior Court, *sua sponte*, raised the following *Batson* issue: whether a *Batson* error, once established, results in a structural error under which prejudice is presumed, or alternatively, is subject to harmless error review.[12] The Superior Court held a hearing regarding the impact this Court's recent decisions in *McCoy*[13] and *Sells*[14] had on the prejudice prong of Cabrera's ineffective assistance of counsel claim.

Legal Standards

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.[15] There is a strong presumption that the legal representation was professionally reasonable.[16] As such, mere allegations will not suffice; instead, a defendant must make concrete allegations of ineffective assistance, and

[12] *See* Letter Order, dated April 27, 2015, from the Superior Court to Counsel. (Exhibit A).

[13] *McCoy v. State*, 112 A.3d 239 (Del. 2015).

[14] *Sells v. State*, 109 A.3d 568 (Del. 2015).

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

[16] *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990) (citations omitted).

substantiate them, or risk summary dismissal.[17] In other words, conclusory, unsupported, and unsubstantiated allegations are insufficient to establish a claim of ineffective assistance of counsel.[18]

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 counsel's perspective at the time."[19] A defendant must also overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.[20] Indeed, the United States Supreme Court has stated that:

> Surmounting *Strickland's* high bar is never an easy task. An 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

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[17] *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

[18] *Id.*

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

[20] *Id.*

> "prevailing professional norms," not whether it deviated from best practices or most common custom.[21]

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.[22] The first consideration in the "prejudice" analysis alone "requires more than a showing of theoretical possibility that the outcome was affected."[23] The defendant must actually show a reasonable probability of a different result but for trial counsel's alleged errors.[24] "It is not enough to 'show that the errors had some conceivable effect on the outcome of the proceeding.'"[25]

A defendants right to effective assistance of counsel extends to his appeal.[26] As in the case of trial counsel, the *Strickland* test is used to evaluate appellate counsels performance.[27] Although a defendant is entitled to effective assistance of counsel during an appeal, this does not mean that his attorney must raise every non-frivolous issue.[28] A defendant can only show that his appellate counsel ineffectively represented him where the attorney omits issues that are clearly

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[21] *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

[22] *Strickland*, 466 U.S. at 697.

[23] *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).

[24] *Strickland*, 466 U.S. at 695.

[25] *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 693).

[26] *Evitts v. Lucey*, 469 U.S. 396, 397 (1985).

[27] *Flamer*, 585 A.2d at 753 (citing *Strickland*, 466 U.S. 668).

[28] *See Jones v. Barnes*, 463 U.S. 745 (1983).

stronger than those the attorney presented.[29] To determine whether a defendant has been prejudiced because his attorney failed to raise an issue on appeal, a court must consider the issue's merits.

Analysis

During jury selection on January 12, 2001, the trial court noted that the defense had struck three African-American prospective jurors. (A-70). The State responded that it had no application. (A-70). Defense counsel asked if the Court wished for the defense to present a record, to which the Court responded "[y]ou might want to protect yourself, sure." (A-70). As defense counsel was about to respond, the State reemphasized that it had no application at the time. (A70-71). The Court stated, "Okay, I make no such finding anyway. I'm not making a finding. I'm merely making a record." (A-71).

Defense counsel was clearly prepared to make a race-neutral record for its strikes if necessary but the State did not raise a *Batson* objection to Cabrera's exercise of a total of three peremptory challenges.[30] Most importantly, the Superior Court did not find a *Batson* violation. (A70-71). Moreover, Cabrera, in his penalty phase allocution, did not include race as a factor when he told the jurors

[29] *See Ploof v. State*, 75 A.3d 811, 832 (Del. 2013).

[30] *Batson* forbids challenges to potential jurors *solely* on account of their race or on the assumption that black jurors *as a group* will be unable to impartially consider the case. *Batson*, 476 U.S. at 89; *Jones v. State*, 938 A.2d 626, 631 (Del. 2007).

the reasons *he personally* employed for selecting them. "The reasonableness of counsels' actions may be determined or substantially influenced by the defendant's own statements or actions."[31]

In allocution, Cabrera stated:

> I had a major role in selecting each and every one of you individuals. And while I was picking my jury, I was looking for three things. One of them was education; I was looking for people with a high span of attention; and, most of all people who stood by what they believe in, regardless of whether it's for or against me. I thought that was a good quality. And, after the fact, I felt that I did have a good jury, and you proved me right during deliberations because, apparently, there was some of you who just couldn't sway either/or, you all stuck to your belief. The decision was made.[32]

Because the trial judge did not find a *prima facie* case of jury discrimination, the postconviction inquiry was at an end. The fact that one of the trial attorneys testified in the 2012 postconviction hearings that the defense team was looking for jurors who would be inclined to acquit and therefore thought they did not want young black males, or mothers, or possibly parents of young black males, does not in and of itself establish a *prima facie* case of a *Batson* violation at the time of Cabrera's 2001 trial. And the Superior Court's conclusion in postconviction to the contrary is incorrect.

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[31] *Strickland*, 466 U.S. at 691.

[32] Penalty Phase Transcript, 2/15/01, at 23. (B-54).

Cabrera's reliance on *Cooke v. State*[33] to argue that he was similarly prejudiced, fails. *Cooke* is both factually and procedurally inapposite to Cabrera's case and, therefore, is of no assistance to him. In *Cooke*, this Court recognized that there were certain fundamental decisions that belonged to the defendant that counsel could not waive without defendant's fully-informed and publicly-acknowledged consent -- whether to: plead guilty, waive a jury, testify, or take an appeal.[34] This Court stated:

> Cooke's overarching strategy was to obtain a verdict of not guilty by presenting evidence that he was factually innocent. Defense counsel had an independent and inconsistent strategy: to obtain a verdict of guilty but mentally ill by conceding Cooke's guilt and introducing evidence of his mental illness during the guilt/innocence phase of the trial. Counsel's override negated Cooke's decisions regarding his constitutional rights, and created a structural defect in the proceedings as a whole.[35]

Therefore, in *Cooke*, defense counsel's strategy to seek a verdict of guilty but mentally ill, *over Cooke's objection*, violated his fundamental right not to plead guilty.[36] By essentially conceding Cooke's guilt, counsel did not assist him in his trial objective of being found not guilty. Therefore, counsel did not subject the State's case to meaningful adversarial testing, thus negating Cooke's basic trial

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[33] 977 A.2d 803 (Del. 2009).

[34] *Id* at 841-42.

[35] *Id.* at 849.

[36] *Id.* at 847.

rights, which entitled Cooke to a new trial.[37] That was not the case here. Cabrera was neither deprived of a fundamental right, nor were counsels' actions in jury selection over his objection. In fact, the opposite is true. By his own words, Cabrera participated in his jury selection and was pleased with his jury. Moreover, unlike *Cooke*, a case on direct appeal, Cabrera presented his argument, 11 years after conviction, as a claim of ineffective assistance of trial counsel. As the Superior Court found, Cabrera cannot show prejudice under *Strickland* and his claim thus fails.

This Court, noting that trial courts should be cautious about inhibiting the use of peremptory strikes by a defendant except after careful application of *Batson*, has recognized the importance of peremptory strikes, and has stated that "a new trial is required when a juror is erroneously allowed to remain on the jury despite the defendants valid peremptory challenge to that juror's presence."[38]

> "Peremptory challenges, when appropriately executed, are an essential tool for eliminating potential jury bias **and must** be available to any party, within constitutional limits. The improper denial of a peremptory challenge forces the defendant to be judged by a jury that includes a juror that is objectionable to him. When this occurs, and the defendant properly objected to seating the juror by attempting to exercise his Rule 24(c) right to use a peremptory challenge, and that

[37] *Id.* at 850.

[38] *McCoy*, 112 A.3d at 257; *Sells*, 109 A.3d at 582.

> objection is overruled by an erroneous finding of a reverse *Batson* violation, prejudice must be presumed."[39]

Recently, in *McCoy* and *Sells*,[40] the Court analyzed reverse Batson claims.[41] In *Sells*, the defendant argued that the trial court erred in finding that he engaged in a pattern of racial discrimination in his three peremptory strikes. This Court held that the State failed to establish a *prima facie* case that Sells intentionally used his peremptory challenges to discriminate against a cognizable group.[42] Finding an insufficient basis for the trial courts conclusion that there was a "pattern" of discrimination, this Court found that prejudice must be presumed and ordered a new trial.[43] In *McCoy*, this Court stated that the fact that McCoy struck *fourteen white jurors* before the Superior Court denied his strike against a fifteenth white juror *did not provide a sufficient context to determine whether there was a discriminatory pattern.*[44] In finding no record support for the trial judge's finding

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[39] *Id.* (quoting *Riley v. State,* 496 A.2d 997, 1012 (Del.1985) (emphasis added)) (citing Del. Const. art. I § 4; Del. Super. Ct. Crim. R. 24(c); *State v. Mootz,* 808 N.W.2d 207, 225 (Iowa 2012)).

[40] 109 A.3d at 568.

[41] 109 A.3d at 577. In *McCoy* this Court stated that "[a] State's *Batson* objection to the defendant's exercise of a peremptory challenge is known as a reverse *Batson* claim." 112 A.3d at 251.

[42] *Sells*, 109 A.3d at 579-80.

[43] *Id.* at 582.

[44] *McCoy*, 112 A.3d at 252 (citing *Jones v. State*, 938 A.2d 626, 632 (Del. 2007), for the proposition that "in determining whether a defendant has made a *prima facie* showing of discriminatory intent, statistics are relevant.").

of pretext, the Court stated that it viewed the judge's *sua sponte* demand that McCoy provide an explanation for striking the juror and his refusal to accept McCoy's race-neutral explanation in the context of the entire record and "all of the circumstances that bear upon the issue of racial animosity."[45]

Unlike *McCoy* and *Sells*, in Cabrera's case, neither the State nor the trial court raised a reverse-*Batson* claim during jury selection. In addition, Cabrera's case is in a different procedural context - Cabrera is not on direct appeal of his conviction. Rather, he has raised a reverse-*Batson* claim *against his own counsel* in postconviction relief. In contrast to *McCoy* and *Sells*, Cabrera was not prevented from exercising his peremptory challenges. Indeed, Cabrera's jury was comprised of the jurors Cabrera personally thought were best suited to consider his case.[46]

Other jurisdictions are in keeping with the logic that a showing of prejudice is required. In *Young v. Bowersox*, the Eighth Circuit rejected the argument that an ineffective assistance of counsel claim premised on a *Batson* error should be considered a structural error entitled to a presumption of prejudice.[47] Instead, *Young* held that the defendant had to demonstrate a reasonable probability that the

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[45] *Id.* at 253.

[46] *See Cabrera*, 2015 WL 3878287, at *17.

[47] *Young v. Bowersox*, 161 F.3d 1159, 1160-61 (8th Cir.1998); *see also United States v. Lee*, 715 F.3d 215, 222 (8th Cir. 2013).

results of the proceeding would have been different.[48] In rendering its conclusion, the Eighth Circuit relied on its decision in *Wright v. Nix*,[49] where it required the defendant to prove *Strickland* prejudice, explaining that an error by counsel does not warrant setting aside the judgment of a criminal proceeding on collateral attack if the error had no effect on the judgment.[50] Specifically, the court stated:

> [Wright] has not shown that the individual jurors who tried him were not impartial, and, as already noted, he has not even begun to show that the presence of the black juror[s] in question on the jury that tried him would have affected the outcome at all. It is in the sense of outcome, I submit, that the *Strickland* Court used the term "prejudice." The focus is on the outcome of the individual trial. Is there a reasonable likelihood that it would have been different? Here, I am persuaded that there is no such likelihood, and I therefore agree that this judgment should be affirmed.[51]

In *People v. Goodwin*, the Illinois Appellate Court considered a defendant's post-conviction petition which alleged, among other claims, that his trial counsel was ineffective for failing to preserve the claim that the State used peremptory challenges to dismiss prospective jurors based solely on race.[52] Because the

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[48] *Young*, 161 F.3d at 1160–61.

[49] 928 F.2d 270 (8th Cir. 1991).

[50] *Wright*, 928 F.2d at 273 (citing *Strickland*, 466 U.S. at 691); *see also Price v. Secretary, Flordia Dept. of Corrections*, 548 F. App'x. 573, 576-77 (11th Cir. 2013); *Purvis v. Crosby*, 451 F.3d 734, 742 (11th Cir. 2006); *Gipson v. Hubbard*, 2009 WL 426215, at *9 (N.D. Cal. 2009).

[51] *Young*, 161 F.3d at 1161, (quoting *Wright*, 928 F.2d at 274 (Arnold, J. concurring)).

[52] *People v. Goodwin*, 976 N.E.2d 17, 21-22 (Ill. 2012).

defendant failed to provide any relevant circumstances to substantiate his claim, the court ruled that his petition was inadequate in that it contained a vague, unsubstantiated, and conclusory allegation of a *Batson* violation and therefore, the trial court did not err by granting the State's motion to dismiss the petition.[53]

Here, like in *Goodwin*, Cabrera has failed to provide any relevant circumstances from the trial to substantiate his claim. Moreover, like in *Young* and *Wright*, Cabrera has not shown a reasonable probability that the result of the proceeding would have been different, and his ineffective assistance of counsel claim must therefore fail. A trial court is within its discretion to determine that there is a *prima facie* case of discrimination so long as there is sufficient evidence to permit the trial judge to draw an inference that discrimination has occurred.[54] Here, the trial judge decided there was insufficient evidence to draw an inference that Cabrera engaged in a pattern of racial discrimination.

Realizing that he must, but cannot, show *Strickland* prejudice, Cabrera, here for the first time, attempts to assert a free-standing *Batson* claim. He comes too late. Because the trial judge found no *prima facie* case of a *Batson* violation, his

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[53] *Id; see also People v. Gutierrez*, 932 N.E.2d 139, 164 (Ill. App. Ct. 2010) (it is settled that a *Batson* case cannot be substantiated merely by the numbers of black venire members stricken by the State but instead, by establishment of a *prima facie* case of discrimination based on a consideration of all relevant circumstances).

[54] *Johnson v. California*, 545 U.S. 162, 169, (2005); *see also Sells*, 109 A.3d at 581.

claim is procedurally barred by Rule 61(i)(4). Reconsideration is not warranted in the interests of justice. The trial record does not substantiate a *Batson* violation. The post-conviction record does not assist the analysis.

II. THE SUPERIOR COURT DID NOT ERR IN RULING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS THE GUN SEIZED FROM CABRERA'S FATHER'S RESIDENCE

Question Presented

Whether the Superior Court properly found that trial counsel did not render ineffective assistance for failing to move to suppress the gun seized from Cabrera's father's residence.

Standard of Review

Review of a trial court's denial of a motion for post-conviction relief is for an abuse of discretion.[55] Legal or constitutional questions are reviewed *de novo.*[56]

Argument

Cabrera claims that the Superior Court erred in finding that his counsel was not ineffective for failing to file a motion to suppress the gun seized from his father's residence during a consent search.[57] The Superior Court determined that trial counsel articulated a reasonable trial strategy inconsistent with seeking suppression of the gun, and that the search of Cabrera's home was pursuant to valid consent.[58] Because there was no basis for counsel file a motion to suppress,

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[55] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (internal citations omitted).

[56] *Swan v. State,* 28 A.3d 362, 382 (Del. 2011) (internal citations omitted).

[57] *See Cabrera*, 2015 WL 3878287, at *23.

[58] *Id.* at *24.

the Superior Court did not abuse its discretion in determining that counsel was not ineffective and Cabrera's claim, therefore, fails.

On March 20, 1997, while investigating the Fundador Otero murder, Wilmington Police obtained a signed consent from Luis Cabrera, Sr. to search his home located at 302 N. Franklin Street.[59] During the search, Cabrera, Sr. told Officer Cuadrado there was gun in the front bedroom that he wanted to show to him.[60] Cabrera, Sr. took the police to the bedroom, went into the closet, removed a clothes basket and told Officer Cuadrado the gun was in the basket.[61] Officer Cuadrado removed some clothing from the basket and found a loaded .38 revolver, which the police seized.[62]

The United States and Delaware Constitutions protect the right of persons to be secure from "unreasonable searches and seizures."[63] Searches and seizures are *per se* unreasonable, in the absence of exigent circumstances, unless authorized by a warrant supported by probable cause.[64] A recognized exception to the warrant requirement, however, is for searches that are conducted pursuant to a valid

[59] Executed consent form. (B-1).

[60] WPD Supplement Report, dated 3/24/97. (B-2-4).

[61] *Id*. (B-2-4).

[62] Id. (B-2-4).

[63] U.S. Const. amend. IV; Del. Const. art. I, § 6.

[64] *Hanna v. State*, 591 A.2d 158, 162 (Del. 1991).

consent.[65] To be valid, consent to search must be voluntary and the person giving such consent must also have the authority to do so.[66] Here, Cabrera, Sr. had authority to consent to a search of his residence and he did so, even going so far as to lead the police to a gun in his residence.[67] As Cabrera's current counsel concedes (Revised Op. Brf. at 9) and trial counsel was aware, Cabrera, Sr. consented to the search of his home.[68] Trial counsel recalled that Cabrera disavowed a possessory interest in the gun, and took the position at trial that the gun did not belong to Cabrera and that he did not have access to it.[69] Trial counsel made a strategic decision in this regard: "And if your defense is not guilty, I didn't do it, I didn't have a gun, so on and so forth, you don't want to leave the door open to any other interpretation." (A275).

Because the seizure of Cabrera, Sr.'s gun was obtained pursuant to valid consent - indeed, Cabrera, Sr., led the police to the gun – counsel had no basis to file a motion to suppress the gun. As trial counsel stated, not only was it a valid consent search, but Cabrera reasonably denied all possessory interest and access to

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[65] *See Schneckloth v. Bustamonte,* 412 U.S. 218, 221-22 (1973); *Scott v. State,* 672 A.2d 550, 552 (Del. 1996).

[66] *Id*; *United States v. Matlock*, 415 U.S. 164, 171 (1974); *DeShields v. State,* 534 A.2d 630, 643 (Del. 1987) (citing *United States v. Matlock,* 415 U.S. 164, 171 (1974)).

[67] *See Cabrera*, 2015 WL 3878287, at *24.

[68] Evid. Hrg. Tran. 10/10/2012 at 77. (B-65; A273-74).

[69] Evid. Hrg. Tran. 10/10/2012 at 89-90. (B-66; A275).

the gun. A motion to suppress would not have prevailed. As the Superior Court found, counsel's strategic decision to not challenge the consent search in this case was reasonable as such a motion would have been meritless. Counsel did not render ineffective assistance by not filing a pretrial motion to suppress evidence because such conduct was a reasonable exercise of professional judgment. Cabrera has failed to satisfy his burden of showing that trial counsels' representation was objectively unreasonable.

III & IV. THE SUPERIOR COURT DID NOT ERR IN FINDING CABRERA'S CLAIMS REGARDING THE BELT EVIDENCE AND MALIKA MATHIS WERE PROCEDURALLY BARRED AND THE ASSOCIATED CLAIMS OF INEFFECTIVE ASSISSTANCE OF COUNSEL MERITLESS[70]

Question Presented

Whether the Superior Court properly found that Cabrera's claims about the belt comparison evidence and Malika Mathis were procedurally barred and the related ineffective assistance of counsel claims were meritless.

Standard of Review

Review of a trial court's denial of a motion for post-conviction relief is for an abuse of discretion.[71] Legal or constitutional questions are reviewed *de novo.*[72]

Argument

A. Belt Comparison Evidence

Cabrera argues that his constitutional rights were violated because the State failed to timely disclose evidence relating to the comparison of patterned injuries found on Rowe's body to a belt found at Cabrera's residence. (Revised Op. Brf. at 12). On direct appeal, Cabrera raised essentially the same argument and this Court disagreed, finding that the Superior Court did not abuse its discretion in admitting

[70] This Argument responds to Arguments III and IV of Cabrera's Revised Opening Brief.

[71] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (internal citations omitted).

[72] *Swan v. State,* 28 A.3d 362, 382 (Del. 2011) (internal citations omitted).

the belt comparison evidence under Delaware Rule of Evidence 901.[73] The Superior Court therefore correctly found Cabrera's postconviction claim, reformulated as a discovery violation, barred by Rule 61(i)(4).[74] Cabrera has failed to argue any new information that would warrant reconsideration in the interests of justice.[75]

Cabrera raised related ineffective assistance of counsel claims, alleging that counsel failed to: 1) prepare for belt comparison evidence; 2) object to the belt "lineup" presented to Mathis as unduly suggestive; 3) maintain an objection to discovery violations; and 4) challenge the State's expert testimony. The Superior Court correctly found that Cabrera failed to substantiate his allegations of ineffectiveness.[76]

The record is clear that counsel mounted specific, repeated objections, which continued through direct appeal, and consulted a knowledgeable expert, Dr. Ali Hameli, former Delaware Chief Medical Examiner, who testified at trial to rebut the State's expert.[77] Cabrera's argument that counsel should have objected to the belt "lineup" presented to Malika Mathis as improperly suggestive (Revised Op.

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[73] *Cabrera*, 840 A.2d at 1263-64.

[74] *See Cabrera*, 2015 WL 3878287, at *27; *see also Johnson v. State*, 1992 WL 183069, *1 (Del. Jun. 30, 1992); *Riley v. State*, 585 A.2d 719, 721 (Del. 1990).

[75] *See Cabrera*, 2015 WL 3878287, at *27.

[76] *Id.* at *27-28.

[77] *Id.*

Brf. at 16) is meritless, because this Court ruled the belt that was seized "from among Cabrera's personal effects and therefore, sufficiently demonstrated a connection between Cabrera and the belt"[78] even without Mathis' testimony.

The Superior Court likewise properly rejected Cabrera's argument that trial counsel was ineffective for abandoning their request for a *Daubert* hearing. Trial counsel testified that they reviewed the proffered evidence with their expert, and felt "duty bound to advise the Court that the methodology employed by the Medical Examiner's Office is, in fact, a readily accepted practice in the field of forensic pathology."[79] "Fearing standard-less speculation"[80] by the jury, Cabrera also withdrew his objection to expert testimony regarding patterned injuries."[81] Trial counsel nevertheless made clear they were not waiving any objection to the admissibility of the evidence, but instead were seeking the most appropriate manner for its presentation in light of the Court's ruling.[82] Cabrera presented Dr. Hameli, who testified in detail that there were just as many inconsistencies as consistencies between the belt and photo overlays. (A198-99). Despite Cabrera's

[78] *See Cabrera*, 840 A.2d at 1264.

[79] Letter from John Deckers, Esq. to the Superior Court, dated Jan. 30, 2001. (B17-18).

[80] *Cabrera*, 840 A.2d at 1263.

[81] *Id*.

[82] Letter from John Deckers, Esq. to the Superior Court, dated Jan. 30, 2001. (B17-18).

contrary complaints, he failed to show deficient performance on the part of trial counsel with respect to their handling of the belt comparison evidence.

B. Malika Mathis

Cabrera contends that his constitutional rights were violated because: 1) the State presented perjured testimony by Malika Mathis about the belt seized from Cabrera's residence; 2) the State failed to grant Mathis immunity to testify at a posttrial evidentiary motion hearing; and 3) the Superior Court would not revisit the issue at the 2012 postconviction hearings. (Revised Op. Brf. at 12-17). On direct appeal, this Court addressed whether the Superior Court properly denied Cabrera's motion for new trial following Mathis' purported recantation of her trial testimony, and considered his argument that Mathis claimed she was coerced to give perjured testimony.[83] This Court found that because Mathis' recantation was inadmissible hearsay, the Superior Court properly did not consider it and, therefore, appropriately denied Cabrera's motion for new trial.[84] This Court specifically agreed with the Superior Court that Mathis' out-of-court statements

[83] *Cabrera*, 840 A.2d at 1266. Mathis also claimed to police that Cabrera wrote her threatening letters from prison, but a handwriting expert hired by defense counsel determined that Mathis likely wrote those letters to herself. *Id. See also State v. Cabrera*, 2003 WL 25763727, *1 (Del. Super. Ct. Apr. 3, 2003). Det. Lemon denied all accusations. *See Cabrera*, 2003 WL 25763727, at *2.

[84] *Id.*

lacked corroboration and sufficient "circumstantial guarantees of trustworthiness."[85]

Although Cabrera continues to argue the same claims, as the Superior Court determined, the "Malika Mathis" issue was fully litigated in Cabrera's motion for new trial and on direct appeal. (A232).[86] Therefore, under Rule 61(i)(4), this claim was barred unless Cabrera could show that in the "interest of justice" it should be reconsidered. The Superior Court correctly determined that he failed to do so.[87] It follows that the Superior Court did not abuse its discretion in denying Cabrera's belated request to take an "out-of-state" deposition of Mathis.[88] Such a deposition would change nothing. This Court has previously affirmed that Mathis' recantation was impermissible hearsay, lacking in corroboration and trustworthiness and other indicia of reliability.

Cabrera's associated claims that the State knowingly suborned perjury and that the State was required to grant Mathis immunity at the new trial hearing were procedurally defaulted by Rule 61(i)(3), as the Superior Court determined, for his

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[85] *Id*. at 1267-68.

[86] "This Court will not reconsider the Trial Court's decision to preclude the introduction of evidence relating to Mathis and her Rockford Park Trial testimony." *Cabrera*, 2015 WL 3878287, at *33.

[87] *Id* at *28.

[88] *See* Evid. Hrg. Tran., 10/10/2012, at 3. (B-62). (Court stated, "I don't see the reason for any evidence [on Malika Mathis]).

failure to raise the claim on direct appeal. The subornation of perjury claim is simply without foundation in the record. And, as to his immunity claim, this Court stated:

> In order to meet the first prong [of granting a new trial based on a witness' recantation], Cabrera had to show that Mathis' trial testimony was false. The trial judge ruled that Cabrera failed to carry this burden because the hearsay statements were inadmissible and *the other evidence at the hearing suggested that it was Mathis' recantation, and not her trial testimony, that was false.*[89]

The trial judge's determination that Mathis' trial testimony was true was not clearly erroneous. The Superior Court, on post-conviction, properly found that "a review of the record suggests Mathis invoked her privilege against self-incrimination at the advice of counsel and not in response to any threats of prosecution for perjury from the State."[90] Cabrera's opposite conclusion is nothing more than a mischaracterization of the record. Because the trial judge determined that Mathis' trial testimony was true and her recantation testimony false, Cabrera failed to show that his constitutional rights were violated because the State did not give Mathis immunity.[91] The point is an academic one because this Court held that Mathis' testimony was not necessary to authenticate the belt.[92]

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[89] *Cabrera*, 840 A.2d at 1266 (emphasis added).

[90] *See Cabrera*, 2015 WL 3878287, at *31.

[91] *Id.*

[92] *See Cabrera*, 840 A.2d at 1264 ("Seizure of the belt from among Cabrera's personal effects sufficiently demonstrated a connection between Cabrera and the

Cabrera's related ineffective assistance of counsel claims fail. Cabrera argued that trial counsel failed to: 1) investigate Mathis prior to her trial testimony; 2) object to, and move to strike, Mathis' trial testimony; 3) locate evidence corroborating Mathis' out-of-court statements; and 4) argue that Mathis' statements were admissible under 11 *Del C.* § 3507. (Revised Op. Brf. at 23-25).

Trial counsel investigated Mathis both before and after trial. Defense counsel's investigator, Carl Kent, interviewed Mathis on January 23, 2001, prior to her testimony, and she relayed much the same information that she provided at trial on January 31, 2001.[93] Moreover, the Superior Court found that the record reflected that trial counsel tried to corroborate Mathis' recantation statement.[94] Trial counsel stated in their affidavit they "ma[de] efforts to corroborate Ms. Mathis' various statements – not only the [Patterned Belt Buckle] claim, but all aspects of her statement," but they were unsuccessful because Mathis blocked access to persons who could have corroborated her statements. [95]

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belt. One of the items located with the belt was the bed sheet that was proven at trial to match the sheet used to cover the victims bodies. This circumstantial evidence, in addition to the medical examiner's testimony, demonstrated a nexus between the belt and the crime sufficient to authenticate the evidence and permit its introduction at trial").

[93] SSI International Investigative Report, dated Jan. 23, 2001. (B-9-13).

[94] *See Cabrera*, 2015 WL 3878287, at *33.

[95] *Id*.

Cabrera's contention that trial counsel should have moved to strike Mathis' trial testimony failed as he did not establish either *Strickland* prong. There was no basis to strike Mathis' testimony and, in any case, as this Court stated, Mathis' testimony was not required to authenticate the belt.[96] Nor could trial counsel have successfully argued that Mathis' out-of-court statement was admissible under 11 *Del. C.* § 3507. On direct appeal, this Court found "Mathis became unavailable to testify when she invoked her Fifth Amendment privileges at the evidentiary hearing."[97] Thus, Mathis was not present for direct or cross-examination purposes of 11 *Del. C.* § 3507. The Superior Court did not err in rejecting this claim.

[96] *See Cabrera*, 840 A.2d. at 1264

[97] *Id.* at 1268.

V. THE SUPERIOR COURT CORRECTLY DENIED AS PROCEDURALY BARRED CABRERA'S DEATH-QUALIFIED JURY CLAIM AND REJECTED AS MERITLESS THE RELATED INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Question Presented

Whether the Superior Court properly found that Cabrera's claim that his jury was not properly death-qualified was procedurally barred and that his associated claim of ineffective assistance of counsel was meritless.

Standard of Review

Review of a trial court's denial of a motion for post-conviction relief is for an abuse of discretion.[98] Legal or constitutional questions are reviewed *de novo.*[99]

Argument

Cabrera claims he was denied an impartial jury comprised of a cross-section of the community, because numerous qualified jurors were improperly excused based upon their death penalty views and *voir dire* that misrepresented the law. (Revised Op. Brf. at 26-30). The Superior Court decided correctly that his claim, having never before been raised, was both procedurally barred under Rule 61(i)(3), and meritless, because the jurors were properly removed for cause.[100] Moreover,

[98] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (internal citations omitted).

[99] *Swan v. State*, 28 A.3d 362, 382 (Del. 2011) (internal citations omitted).

[100] *See Cabrera*, 2015 WL 3878287, at *35.

the Superior Court properly denied as meritless Cabrera's associated claim of ineffective assistance of counsel.

A juror must be excluded if that juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[101] In *Blount*, this Court stated that "the Constitution does not prohibit the States from 'death qualifying' juries in capital cases."[102] "Justice is not served by allowing persons to sit on a jury in a capital case who are unable to render an impartial verdict because of their opposition to the death penalty."[103]

In Delaware capital murder cases, the trial court seeks, through direct questioning, to determine whether, after a guilty verdict, jurors would either impose the death penalty automatically or would refuse to impose the death penalty *under any circumstances.*[104] The controlling standard is not, whether under any conceivable set of circumstances, the juror could never recommend the death

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[101] *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)); *Barrow v. State*, 749 A.2d 1230, 1237 (Del. 2000).

[102] *Blount v. State*, 511 A.2d 1030, 1037 (Del. 1986) (quoting *Lockhart v. McCree*, 476 U.S. 162, 175 (1986).

[103] *Cabrera*, 2015 WL 3878287, at *35 (citing *Gattis v. State*, 697 A.2d 1174, 1181 (Del. 1997).

[104] *See Barrow*, 749 A.2d at 1237 (emphasis added).

sentence.[105] Instead, it is "whether the juror's views render the juror unable to comply with the trial court's instructions and her oath."[106] Although the jury is not the final arbiter of punishment, it is "contrary to law to allow a juror to sit as the conscience of the community despite personal views that would prevent the juror from impartially performing his or her responsibilities."[107]

Under this framework, Cabrera's argument that the trial court improperly excused eight potential jurors for cause was meritless because, upon direct questioning, all eight venire persons stated they would be unable to impose the death penalty. As Cabrera concedes, Prospective Juror Woodward said that he would not be able to recommend death based upon the law and evidence. (Revised Op. Brf. at 28). Cabrera also agrees that the seven other possible jurors were excused because they said they could not "recommend" the death penalty. (Revised Op. Brf. at 28). The Superior Court properly excused the jurors for cause.

To the extent Cabrera argues that the jury was confused because they were erroneously told their decision would act as a recommendation to the Court, he is simply incorrect. Under Delaware's statutory scheme, the jury does

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[105] *See Cabrera*, 2015 WL 3878287, at *35; *Gattis*, 697 A.2d at 1181.

[106] *Gattis*, 697 A.2d at 1181.

[107] *Cabrera*, 2015 WL 3878287, at *35 (citing *State v. Cohen*, 604 A.2d 846, 855-56 (Del. 1992); *see also Gattis*, 697 A.2d at 1181.

recommend a sentence.[108] Cabrera could have, but did not, raise the juror qualification claim on direct appeal. Thus, the Superior Court properly found the claim to be procedurally defaulted. Because Cabrera's juror qualification claim was both procedurally barred and failed on its merits, his associated claim of ineffective assistance of counsel could not be sustained.

[108] *See Barrow*, 749 A.2d at 1240 (citing *Cohen*, 604 A.2d at 856).

VI. THE SUPERIOR COURT PROPERLY FOUND CABRERA'S *ALLEN* CLAIM PROCEDURALLY BARRED AND HIS ASSOCIATED INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM MERITLESS

Question Presented

Whether the Superior Court properly found that Cabrera's *Allen*[109] claim was procedurally barred and his related claim of attorney ineffectiveness meritless.

Standard of Review

Review of a trial court's denial of a motion for post-conviction relief is for an abuse of discretion.[110] Legal or constitutional questions are reviewed *de novo.*[111]

Argument

Cabrera claims that the trial judge's *Allen* charge to the jury was unduly coercive, did not include transitional language, and that Cabrera was improperly excluded from the office conference about the *Allen* charge. (Revised Op. Brf. at 31-36). The Superior Court correctly denied Cabrera relief on all of his claims, procedurally and on the merits.[112]

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[109] *See Allen v. United States*, 164 U.S. 492 (1896).

[110] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (internal citations omitted).

[111] *Swan v. State*, 28 A.3d 362, 382 (Del. 2011) (internal citations omitted).

[112] *See Cabrera*, 2015 WL 3878287, at *36-38.

The trial court, with the agreement of counsel, gave an *Allen* charge after receiving a note from the jury that they were deadlocked. (A211). As the Superior Court found, because Cabrera did not challenge the trial court's *Allen* charge at the time it was given or on direct appeal, his claim was barred by Rule 61(i)(3) unless he could show cause and prejudice to excuse that default.[113] He failed to do so. And because the *Allen* charge here was not coercive, Cabrera's claim is meritless.

Cabrera only targeted portions of the *Allen* charge in formulating his argument, but read as a whole as this Court teaches, it is clear that the instruction did not improperly focus on minority jurors as Cabrera claims. Rather, the trial court properly instructed the jurors to evaluate each other's opinion and to remember "at all times no juror is expected to yield his [] or her conscientious conviction which he or she may have as to the weight and effect of the evidence and remember also after full deliberation and consideration of all the evidence, it is your duty to agree on a verdict if you can do so without violating juror's individual judg[]ment and conscious(sic)." (A216).

Cabrera's argument that the use of a majority/minority distinction is unconstitutional is meritless. In *Collins*,[114] this Court acknowledged that an *Allen* charge instructing the majority and the minority to re-examine their views has been

[113] *See* Del. Super. Ct. Crim. R. 61(i)(3).

[114] *Collins v. State*, 56 A.3d 1012, 1021 (Del. 2012).

approved in the First, Fourth, Sixth and Eighth Circuits.[115] Collins noted that, as in Cabrera's case, each of those circuits found repeated warning that jurors not give up their individual convictions diminished the risk that the majority/minority distinction might be coercive.[116] As such, *Collins* upheld the trial court's *Allen* charge,[117] which, like the one here, distinguished between the majority and minority views, while urging both sides to consider the other's position and come to a decision *if* possible, (A216), and repeatedly instructed the jurors to not "do violence to your individual judgment and conscious (sic)." (A215).

As Cabrera's *Allen* charge was not unduly coercive, the Superior Court properly found defense counsel was not ineffective for failing to argue that it was.[118] Delaware follows the majority rule in permitting trial courts to give *Allen* charges.[119] The record is clear that an *Allen* charge was going to be given in Cabrera's case if necessary and trial counsel vigorously argued the wording of that charge. (A268-69).

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[115] *Id*. at 1021 (internal citations omitted).

[116] *Id*.

[117] *Id*.

[118] *See Cabrera*, 2015 WL 3878287, at *38.

[119] *Bradshaw v. State*, 806 A.2d, 131, 139 (Del. 2002) (citing *Fensterer v. State*, 493 A.2d 959, 967 (Del. 1985).

Nor was counsel deficient for failing to require Cabrera's presence at the related conference in judge's chambers.[120] Trial counsel testified at the 2012 evidentiary hearings that they consulted Cabrera on everything.[121] Because the wording of the *Allen* charge is a "question of law", it is difficult to understand how Cabrera's presence, as distinct from that of his counsel, would have influenced its wording.[122] And Cabrera was present when the trial judge read the *Allen* charge to the jury. Cabrera has not shown that he was prejudiced by not being present for the discussion of the *Allen* charge.

Cabrera's claim that his constitutional rights were violated because the trial court did not include transitional language in the *Allen* charge was procedurally defaulted.[123] During the office conference on the *Allen* charge, trial counsel requested that the Court provide the jury with transitional language, but the court decided against it. (A212-14). Reconsideration of this claim was barred by Rule

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[120] *Id*.

[121] Evid. Hrg. Tran., 10/11/12 at 67-68. (B-71).

[122] *See Bradshaw*, 806 A.2d at 139. ("It is hard to believe that Bradshaws presence, as distinct from that of his counsel, would have influenced the wording of *Allen* charges. That is indeed a "question of law."); *see also* Del. Super. Ct. Crim. R. 43(c)(3) (failing to require a defendant's presence for a "conference or argument upon a question of law").

[123] *See Cabrera,* 2015 WL 3878287, at *38.

61(i)(4) unless Cabrera could show it was warranted in the "interest of justice."[124] The Superior Court correctly found that he failed to do so.

In discussing transitional language during the conference regarding the *Allen* charge, the Superior Court ruled that it sufficiently provided transitional language to the jury in its *Chance*[125] accomplice liability instruction. As the trial court stated,

> You look at the last paragraph of my *Chance* instruction. In that's appropriate transition language if you will. Tries to sum up the very difficult otherwise difficult principles coming from 271 and 274 and interpreted in *Chance*.[126]
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> ***
>
> I think transition language at this point is legally inapplicable and potentially confusing. Other than what has been stated in Chance they have to decide. If they can't they decide he is not the principal, he is an accomplice. They have to look at his culpability, his mental culpability, what degree it is. (A214).

The Superior Court properly instructed the jury on accomplice liability. The jury must find unanimously "that a principal-accomplice relationship existed between the participants with respect to a particular charge."[127] Cabrera's argument to the contrary is nothing more than a misapplication of the law. Moreover, Cabrera provided no reason why the jury should have been instructed

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[124] Del. Super. Ct. Crim. R. 61(i)(4).

[125] *Chance v. State*, 695 A.2d 351 (Del. 1996).

[126] *See* A203-208 for complete jury instruction.

[127] *Probst v. State*, 547 A.2d 114, 123 (Del. 1988).

again regarding lesser-included offenses as part of the *Allen* charge, which spoke only to attempting to reach a unanimous decision if possible. The jury instructions read as a whole were proper. The Superior Court properly determined that Cabrera failed to warrant reconsideration of his procedurally defaulted claim. Nor did he show that had counsel raised the issue, he would have prevailed on appeal and, therefore, his associated claim of ineffective assistance of counsel failed. Highlighting those arguments that are most likely to prevail on appeal "is the hallmark of effective appellate advocacy."[128] There is no requirement that *Allen* charges contain transitional language and Cabrera's claim, being meritless, would have failed on appeal. The Superior Court properly denied the related claim of ineffective assistance of counsel as meritless.

[128] *Smith v. Murray*, 477 U.S. 527, 536 (1986).

VII. THE SUPERIOR COURT PROPERLY DENIED CABRERA'S CLAIMS OF *BRADY* VIOLATIONS

Question Presented

Whether the Superior Court properly found that Cabrera's *Brady* claims were either procedurally barred or meritless.

Standard of Review

Review of a trial court's denial of a motion for post-conviction relief is for an abuse of discretion.[129] Legal or constitutional questions are reviewed *de novo.*[130]

Argument

Cabrera alleged that the State failed to disclose "impeachment evidence about Keith Powell," "exculpatory statements of Sparkle Harrigan," and exculpatory information about Omar Colon's involvement in the murders, in violation of *Brady v. Maryland.*[131] (Revised Op. Brf. at 37). The Superior Court properly found that Cabrera is "not entitled to a new trial on the grounds of cumulative *Brady* violations because [] [he] has not demonstrated the existence of even a single *Brady* violation."[132]

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[129] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (internal citations omitted).

[130] *Swan v. State,* 28 A.3d 362, 382 (Del. 2011) (internal citations omitted).

[131] 373 U.S. 83 (1963).

[132] *Cabrera*, 2015 WL 3878287, at *41.

a. Keith Powell

At trial, Cabrera called Keith Powell who testified that he, the victims, and Kim Payne had been smoking marijuana at Saunders's home the evening before the victims' bodies were found.[133] After Saunders received a page, the four of them left the house between 10:30 and 11:30 that night.[134] Saunders said he was going to get more marijuana.[135] The State impeached Powell with his prior inconsistent statements and poor recollection by showing that he was frequently high and not sure about the date on which he saw the victims.[136]

On direct appeal, Cabrera claimed that the "State's disclosure of Powell's exculpatory statements coupled with its withholding of information of Powell's inconsistent statements and other impeaching evidence, constituted a *Brady* violation that violated Cabrera's due process rights."[137] This Court disagreed, concluding "that the evidence on which Cabrera bases his claim of a *Brady* violation was not favorable to the defense. The State therefore was not required to disclose the information."[138] The Superior Court therefore properly determined that review of this postconviction claim was barred under Rule 61(i)(4) unless

[133] *Cabrera*, 840 A.2d at 1262.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.* at 1269.

[138] *Id.*

Cabrera showed that the "interest of justice" warranted reconsideration, which he failed to do.[139] This Court previously rejected Cabrera's claim that his counsel was misled or unfairly surprised by the State's evidence impeaching Powell.[140] Because Cabrera offered nothing to overcome the procedural bar, the Superior Court declined to reconsider the claim.

Cabrera's argument that trial counsel was ineffective for failing to adequately investigate or prepare for Powell, and require an investigator to assist, also failed. As the Superior Court found, the record belies Cabrera's claim.[141] In their affidavit, trial counsel stated:

> Mr. Powell was a difficult person to track down. We had an address of 1014 W. 7th Street, but we were also given other addresses by neighbors. We reviewed all available Superior Court and Court of Common Pleas documents pertaining to Mr. Powell prior to interviewing him. (None of these documents led us to believe that Mr. Powell was an out-of-control drug addict at the time of his police interview.) We made repeated efforts to contact Mr. Powell prior and during the [Rockford Park T]rial. A number of proposed meetings were either missed or cancelled by Mr. Powell. While our [Defense Investigator] was available to assist us throughout the Rockford Park T[rial], we discovered a brief window of opportunity to track down and meet with Mr. Powell …. We took advantage of that immediate opportunity, and met with him ourselves. On January 22, 2001, Mr. Deckers again spoke with Mr. Powell (beginning at approximately 6:00 p.m.). Mr. Deckers reviewed with Powell the statement that had been provided by the State. [Cabrera's Trial] Counsel recollect that,

[139] *Cabrera*, 2015 WL 3878287, at *42.

[140] *Cabrera*, 840 A.2d at 1270-71. The Court emphasized that "the State disclosed the exculpatory information about Powell and his statements to the police."

[141] *Cabrera*, 2015 WL 3878287, at *42.

> on direct examination, Mr. Powell testified fairly consistent with what he had previously told us[142]

At the evidentiary hearing, trial counsel testified that they thought "Powell would be a good witness. He was working. He had indicated, I believe, that he had *had* a drug problem, but he was not on drugs. He was holding a full-time job, and he appeared to be clean cut[.]"[143] (A263). As the Superior Court found, Powell provided counsel with consistent and helpful information.[144] Counsel is permitted to make strategic decisions based upon his experience in order to best represent his client. Choices made by counsel and the tactics he employs in order to represent his client are insufficient to establish ineffective representation, even if they result in an undesired outcome or draw criticism.[145] The Superior Court correctly found that Cabrera could not show that but for counsel's professional errors with regard to Keith Powell, there was a reasonable probability that the result of his trial would have been different.

b. Sparkle Harrigan

Cabrera claims that the State failed to disclose exculpatory statements of Sparkle Harrigan. Because Cabrera failed to raise this claim at trial or on direct

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[142] *Id.*

[143] *Id.*

[144] *Id.* at 43.

[145] *See e.g., Tyra v. State*, 574 N.E.2d 918. 924 (Ind. Ct. App. 1991) (quoting *Cochran v. State*, 445 N.E.2d 974 (Ind. 1983)); *Archy v. State*, 2011 WL 4000994, at *6 (Del. Sept. 8, 2011).

appeal, the Superior Court correctly determined that it was procedurally defaulted under Rule 61(i)(3).[146] Noting that Cabrera failed to overcome his procedural default, the Superior Court nevertheless also denied his claim on the merits.[147]

Cabrera argues that Harrigan's timeline of the events on the night of the murders was different from the State's witness Donna Ashwell, and was, therefore, exculpatory material that should have been turned over to the defense. Not so.

Harrigan testified at the trial of Cabrera's co-defendant, Luis Reyes. In Reyes' trial, she testified that although unsure, Harrigan thought she was at Saunders's home from about 8:30-9:00 to 10:30-11:00 p.m.[148] Harrigan stated she was not strictly paying attention to time and did not have a watch.[149] While there, Harrigan never saw Rowe, but believed she heard him at different points.[150] As the Superior Court decided, Harrigan's statement to police that she went to Saunders home and thought Rowe was there at some point but was gone when she left, does not discredit the State's timeline of events preceding the discovery of the victims' bodies because "[t]he State's timeline was more general than exacting. Harrigan's

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[146] *Cabrera*, 2015 WL 3878287, at *43.

[147] *Id.*

[148] *Id.*; Reyes Tr. Tran. 10/11/2001, at 67-87. (B-56-61).

[149] Reyes Tr. Tran. 10/11/2001, at 82-86. (B-60-61).

[150] *Cabrera*, 2015 WL 3878287, at *43; Reyes Tr. Tran. 10/11/2001, at 67-69. (B-56-57).

estimated timeline did not directly conflict with Ashwell's estimated timeline, nor did Harrigan's statements qualify as exculpatory."[151]

c. Omar Colon

Cabrera argues that the State failed to disclose *Brady* information that a former police informant - Carlos Rodriguez - told a prosecutor sometime in 2001 that his cousin Omar Colon was involved in the Rockford Park murders.

The parties first became aware of this proffered information in 2012, when the former prosecutor[152] recalled it. The claim was fully investigated as part of the postconviction hearings. The former prosecutor testified that she was not sure of the accuracy of her memory or of Rodriguez's exact words, but that Rodriguez linked Colon to the Rockford Park killings. (A288-291). She then stated she told one of the trial prosecutors about the information at the time.[153]

At his deposition in Florida on November 14, 2012, Carlos Rodriguez stated that he was Colon's cousin, but he had not spoken to him in 10 years.[154] Rodriguez had no present recollection of Colon telling him that he was involved in the Rockford Park murders and stated that "even if [Rodriguez] had made a statement

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[151] *Id.* at *43-44.

[152] At the time, the former prosecutor was representing co-defendant Luis Reyes in the post-conviction hearings.

[153] Evid. Hrg. Tran. 10/15/12 at 15-16. (B-74).

[154] Rodriguez dep. 11/14/2012 at 9. (B-111).

regarding Colon's involvement in the Rockford Park murders it was nothing more than a rumor or personal opinion."[155] On April 1, 2013, Delaware State Police Detectives Clemmons and Schiavi testified. Both detectives recalled that Rodriguez mentioned a shooting in New York, but neither officer recalled Rodriguez stating that Colon participated in the Rockford Park murders.[156] The trial prosecutor testified at the evidentiary hearing that he did not recall having a conversation with the former prosecutor in 2001 about Colon, Rodriguez or information she had about the Rockford Park murders, and that if she had given him such information, he would have required it in writing and done follow-up, which was not done here.[157]

The Superior Court correctly determined that the proffered information from the former prosecutor was unsupported by the record and therefore, illusory.[158] Having found no basis in fact, the Superior Court properly found no *Brady* violation.[159]

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[155] *Cabrera*, 2015 WL 3878287, at *44; Rodriguez dep. 11/14/2012 at 17-19, 36, 49, 51, 60-61. (B112-19).

[156] Reyes Evid. Hrg. Tran. 4/1/2013, at 13-14 (A283-84); 53-55 (B-122).

[157] Reyes Evid. Hrg. Tran. 4/1/2013, at 72-73, 101-102. (B-123-25).

[158] *Cabrera*, 2015 WL 3878287, at *45.

[159] *Id.*

VIII. THE SUPERIOR COURT PROPERLY FOUND CABRERA'S CLAIMS AGAINST THREE SEATED JURORS PROCEDURALLY BARRED

Question Presented

Whether the Superior Court properly found that Cabrera's claims against three seated jurors were procedurally barred.

Standard of Review

Review of a trial court's denial of a motion for post-conviction relief is for an abuse of discretion.[160] Legal or constitutional questions are reviewed *de novo.*[161]

Argument

Cabrera claims that his constitutional rights were violated because the Superior Court failed to: 1) order a mistrial, or dismiss a juror, because one of the jurors commented on Cabrera's guilt; 2) dismiss a juror who stated that Cabrera's wife "looked familiar"; and 3) dismiss a juror who made comments about her mental stability during deliberations. (Revised Op. Brf. at 44-48). Because none of these claims were raised at trial or on direct appeal, review of the claim was

[160] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (internal citations omitted).

[161] *Swan v. State,* 28 A.3d 362, 382 (Del. 2011) (internal citations omitted).

procedurally barred under Rule 61(i)(3).[162] Cabrera failed to show cause for his procedural default, nor has he shown prejudice.

During deliberations on February 9, 2001, Juror No. 5 sent a note asking to speak with the judge, stating that she wanted to be excused from the jury, feared for her mental state, and that although she was objective, she refused "to be part of the jury that frees this defendant."[163] The parties agreed that under *McCloskey v. State*,[164] the court should not speak individually with jurors mid-deliberations.[165] The parties agreed with the trial judge's interpretation that the note conveyed a disagreement between this juror and one or more jurors on the merits of the case and Juror #5 felt some pressure because of that.[166] Juror No. 5 followed that note with another (four in total), stating that she was just frustrated because of the seriousness of case and did not want the court to think she was crazy.[167] Cabrera did not file a motion for a mistrial nor did a basis for one exist.[168]

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[162] *See Cabrera*, 2015 WL 3878287, at *36. Although the Superior Court discussed the three jurors and the merits of the claims in its 2008 Opinion on Cabrera's Motion for Leave to Contact Jurors, the Superior Court denied the motion because Cabrera failed to present good cause for the requested discovery.

[163] Tr. Tran., 2/9/2001 at 10-11. (B-33).

[164] 457 A.2d 332, 338-39 (Del. 1983).

[165] Tr. Tran., 2/9/2001 at 16-17. (B-34-35).

[166] Tr. Tran., 2/9/2001 at 17. (B-35).

[167] *State v. Cabrera*, 984 A.2d 149, 157 (Del. Super. Ct. 2008).

[168] *Id* at 174.

At the 2012 evidentiary hearings, trial counsel agreed that they did not move to excuse Juror No. 5 based upon her notes because it seemed as if the jury was split and the jury was talking about possibly freeing Cabrera. (A-242). Moreover, counsel conceded that Juror No. 5 was entitled to form an opinion during deliberations and therefore there was no basis to exclude her. (A242-43).

On February 1, 2001, Juror No. 8 sent a note to the trial judge, stating that she had heard one of the other jurors express an opinion that Cabrera was guilty. (A150). The Superior Court thoroughly explored the issue at trial.[169] The trial judge individually questioned Juror No. 8 and all the other jurors, and then directed them to write, on individual pieces of paper, whether they had made or overheard any comment regarding Cabrera's guilt or innocence.[170] When no juror reported having formed any opinion about Cabrera's guilt, the trial judge further questioned Juror No. 8.[171] After Juror No. 8 began to cry and told the bailiff she felt overwhelmed, the State moved to discharge her; Cabrera opposed, and the trial judge denied the application. (A-170, 173-75). The court ruled that it was satisfied that any of the jurors who deliberated on the case would keep an open mind about the evidence, be able to render a fair and impartial verdict and properly follow the court's instructions. (A171). When Cabrera moved to contact jurors in 2008, the

[169] *Cabrera*, 984 A.2d at 174.

[170] Tr. Tran., 2/1/2001, at 118-121. (B-20-21).

[171] Tr. Tran., 2/1/2001, at 136-144. (B-22-24).

Superior Court found that it was satisfied no improper extraneous influence or pre-judgment was present within the jury.[172] Moreover, during trial the Superior Court engaged in a lengthy colloquy with Cabrera who repeatedly stated he personally did not want a mistrial.[173] The record refutes Cabrera's claim that his constitutional rights were violated by the court's handling of this juror issue. Nor has Cabrera shown he was prejudiced.

On January 23, 2001, after the State called Stephanie Cabrera, Cabrera's wife, to testify, Juror No. 9 contacted the bailiff and then told the court that although she did not know Mrs. Cabrera, she looked familiar. (A97-8). Juror No. 9 said that merely recognizing Mrs. Cabrera would not affect her ability to assess her credibility as a witness. (A-98). Cabrera made no application for further questioning or for her discharge. (A-98). As the Superior Court found in 2008, the "juror's possible recognition of Mrs. Cabrera was vague and uncertain at best."[174]

Cabrera's claim failed both procedurally and on the merits. Had counsel moved to strike any of the jurors, the court would not have granted the request. Moreover, it is clear that Cabrera did not wish to remove the jurors. Cabrera has not substantiated his associated ineffective assistance of counsel claims.

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[172] *Cabrera*, 984 A.2d at 175; *Styler v. State*, 417 A.2d 948 (Del. 1980)

[173] *Cabrera*, 984 A.2d at 154.

[174] *Id*. at 174.

IX & X. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING CABRERA POSTCONVICTION DISCOVERY AND LEAVE TO CONTACT JURORS[175]

Question Presented

Whether the Superior Court abused its discretion when it denied Cabrera's 2008 Motions for Discovery and Leave to Contact Jurors.

Standard of Review

This Court reviews a trial court's denial of a discovery motion for an abuse of discretion.[176] Legal or constitutional questions are reviewed *de novo.*[177]

Argument

A. Leave to Contact Jurors

Cabrera argues that the Superior Court erred in denying his 2008 motion for leave to conduct *ex parte* interviews of all jurors. The Superior Court found that there was "no need to contact the trial jurors" because "[t]he issues about which Cabrera claims there is such a need were thoroughly explored at his trial over seven years ago."[178] Moreover, the Superior Court found that Delaware Lawyers' Rule of Professional Conduct 3.5(c) only permitted juror examinations under

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[175] This Argument responds to Arguments IX and X in Cabrera's Revised Opening Brief.

[176] *See Brooke v. Kent General Hospital, Inc.*, 1996 WL 69828 (Del. Feb. 9, 1996).

[177] *Swan v. State*, 28 A.3d 362, 382 (Del. 2011) (internal citations omitted).

[178] *State v. Cabrera*, 984 A.2d 149, 150 (Del. 2008).

judicial supervision, consistent with Delaware Rules of Evidence § 606, and thus, did not violate Cabrera's constitutional rights.[179] Cabrera disagrees, stating that Rule 3.5(c) is unconstitutional because it forecloses any post-trial investigation that could uncover juror misconduct. The Superior Court properly denied this claim as procedurally barred by Rule 61(i)(3) and his related claim of ineffective assistance of counsel as meritless.

Delaware Lawyers' Rule of Professional Conduct 3.5(c) states that a lawyer shall not "[c]ommunicate with a juror or prospective juror after discharge of the jury unless the communication is permitted by court rule."[180] Cabrera attacks this Rule based solely on a United District Court of Hawaii decision, *Rapp v. Disciplinary Board of the Hawaii Supreme Court*.[181] The Hawaii juror contact rule in *Rapp* provided that a lawyer "shall not [] communicate ex parte with such person (juror) except as permitted by law."[182] The *Rapp* Court found this Rule to violate the First Amendment right of free speech because the phrase "as permitted by law", under Hawaii judicial interpretation, was unconstitutionally vague and overbroad and acted as a complete ban.[183] The *Rapp* Court noted that "a

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[179] *Id.*

[180] Del. L. R. Prof. C. 3.5(c).

[181] 916 F. Supp. 1525 (D. Hawaii 1996).

[182] *Id.* at 1528.

[183] *Cabrera*, 984 A.2d at 162; *Rapp*, 916 F. Supp, at 1528, 1536.

description of the mechanism for review by a trial judge is conspicuously absent from the rule."[184] No other court has followed *Rapp*. As the Superior Court ruled, *Rapp* does not help Cabrera.[185] The Hawaii rule challenged in *Rapp* is worded differently than Delaware's Rule 3.5(c) and that alone, distinguishes it.

Delaware Rule of Evidence (DRE) 606(b), in keeping with common law, discusses the proper extent of juror inquiry:[186]

> (b) *Inquiry into the validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

As the Superior Court determined the phrase "except as provided by court rule" in Rule 3.5(c) at least encompasses DRE 606(b) and this Court's interpretations.[187] Jurors have been examined post-verdict in accordance with DRE 606(b). In *Hughes*, this Court remanded a murder conviction for an evidentiary hearing in

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[184] *Id.* at 1537.

[185] *Cabrera*, 984 A.2d at 163.

[186] *See Flonnory v. State*, 778 A.2d 1044, 1053-54 (Del. 2001) ("The common law prohibition against inquiry into the juror's mental process is adhered to in Delaware." (internal citations omitted).

[187] *Cabrera*, 984 A.2d at 170.

accordance with DRE 606(b) as to extraneous prejudicial information which might have been improperly known to jurors.[188] In *Massey*, this Court remanded a case for an evidentiary hearing on the question of a complaining jurors asserted incompetency at trial.[189] In *Banther*, this Court reversed a murder conviction after the Superior Court's evidentiary hearings and questioning of the jury's forelady led to a conclusion that the juror should not have served.[190] *Banther* demonstrated that with "an appropriate showing there is no impediment to judicially supervised communication between counsel and jurors"[191] In *United States v. Griek*, the Eleventh Circuit held, in a post-verdict request by counsel to question jurors, that any First Amendment right of a defendant to question jurors concerning the verdict was "outweighed by the government interest in ensuring that a criminal defendant is tried by a jury whose deliberations cannot be exposed to public view except by a showing of outside influence."[192] "Substantial policy considerations support the common law rule against the admission of jury testimony to impeach a verdict."[193]

Cabrera provided no valid reason for the Superior Court to grant him leave to contact the jurors, and therefore, failed to make a "sufficient, if any, showing of

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[188] *Id.* at 165; *See Hughes v. State*, 490 A.2d 1034 (Del. 1985).

[189] *See Massey v. State*, 541 A.2d 402, 404 (Del. 1986).

[190] *Banther v. State*, 823 A.2d 467, 471-72 (Del. 2003).

[191] *Cabrera*, 984 A.2d at 169.

[192] *United States v. Griek*, 920 F.2d 840, 843 (11th Cir. 1991).

[193] *Tanner v. United States*, 483 U.S. 107, 119 (1987).

a reason or good cause" to contact the jurors from his trial in any fashion. As the Superior Court correctly determined, the record needed no further exploration or expansion.[194]

B. Discovery

Cabrera argues that the Superior Court erred by refusing to grant him discovery regarding: 1) the basis for the seizure of the gun from Cabrera's Sr.'s residence; 2) the relationship between Detective Lemon and Malika Mathis; and 3) the out-of-court statements by Sparkle Harrigan and Keith Powell. (Revised Op. Brf. at 51). Because Cabrera did not provide good cause for any of his requests, the Superior Court did not abuse its discretion in denying them.

On August 14, 2008, the Superior Court denied Cabrera discovery relating to the gun, including depositions of officers, tapes, and information on Cabrera, Sr.'s mental health, because: 1) trial counsel had yet to respond to the ineffective assistance of counsel claims, 2) the sworn record indicated the gun was not Cabrera's and was not in his room, but belonged to his father who voluntarily gave it to police; 3) Rule 61 did not permit a defendant to obtain additional discovery and while the Superior Court may grant certain discovery for good cause shown, Cabrera had failed to make that showing.[195]

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[194] *Cabrera*, 984 A.2d at 175.

[195] *State v. Cabrera*, 2008 WL 3853998, at *4 (Del. Aug. 14, 2008).

"Petitioners are not entitled to go on a fishing expedition through the government's files in hopes of finding some damaging evidence."[196] To satisfy good cause, a defendant must show a compelling reason for the discovery.[197] Although Cabrera's request for gun-related discovery correlated to one of his ineffective assistance of counsel claims, counsel had yet to file affidavits and the known facts did not support his claim.

The same was true for the material Cabrera requested on Mathis. Not only was Cabrera's request overbroad, but the Superior Court had already held a hearing and decided the issue, which this Court had affirmed. Cabrera presented no good cause to start afresh.

Nor did Cabrera justify his reasons for additional discovery regarding Harrigan and Powell. This Court decided the Powell issue on direct appeal.[198] Cabrera provided no "good cause" for pre-hearing discovery on Harrigan. Because Harrigan testified at the postconviction hearings, any discovery argument is moot[199]

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[196] *Id*. (citing *State v. Jackson*, 2006 WL 1229684, at *2 (Del. Super. Ct. May, 2, 2006)).

[197] *Id.* (citing *Dawson v. State*, 673 A.2d 1186, 1198 (Del. 1996)).

[198] *Id.* at *6.

[199] Evid. Hrg. Tran., 10/15/12, 6-10. (B72-73).

CONCLUSION

For the foregoing reasons, as well as those articulated in the State's prior submissions, Cabrera is not entitled to relief and his claims should be denied.

/s/ Elizabeth R. McFarlan
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Del. Bar #3759

/s/Maria T. Knoll
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Date: March 10, 2017

SUPERIOR COURT
OF THE
STATE OF DELAWARE

ANDREA L. ROCANELLI
JUDGE

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Re: State of Delaware v. Luis Cabrera – Cr. ID No. 9904019326

Dear Counsel:

In February 2001, a Superior Court jury convicted Defendant Luis Cabrera of two counts of murder in the first degree and related charges. In March 2002, the trial judge sentenced Defendant to death. The Delaware Supreme Court affirmed Defendant's conviction and sentence in 2003. On November 30, 2004, Defendant filed a Motion for Postconviction Relief. Over a decade later, Defendant's postconviction matter remains pending before the Court. Now, the Court has received Defendant's April 17, 2015 Motion to Stay Proceedings and the State's April 23, 2015 Answer. Under these circumstances, the Court requests oral argument to address the parties' contentions with respect to a stay.

In addition, the Court requests oral argument on Defendant's *Batson* challenge.[1] Specifically, Counsel should focus its arguments on Defendant's ability to satisfy the performance and prejudice prongs of *Strickland*; and whether a *Batson* error, once established, results in a structural error under which prejudice is presumed, or alternatively, subject to harmless-error review.

Ms. Dangello will contact you to schedule oral argument.

Sincerely,

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli

[1] *See* Defendant's Second Amended Petition at 54; Defendant's Opening Brief at 145; State's Answer at 75; Defendant's Reply at 73.

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LUIS G. CABRERA, JR.,	)	
	)	
	)	
v.	)	
	)	No. 372, 2015
STATE OF DELAWARE,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the page limit set in the August 19, 2015 briefing schedules. It contains 13,095 words, which were counted by Microsoft Word 2016.

Dated: March 10, 2017

/s/ Elizabeth R. McFarlan
Signature of filing attorney