



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL MANLEY,)
)
Defendant Below,) No. 344, 2014
Appellant,)
) On Appeal from the
) Superior Court of the State
) of Delaware in and for
v.) New Castle County
)
STATE OF DELAWARE)
)
Plaintiff Below,)
Appellee.)

APPELLANT'S REPLY TO STATE'S ANSWERING BRIEF

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PRELIMINARY STATEMENT CONCERNING CITATIONS AND FORM

Citations preceded by “A” refer to the Appendix. Citations preceded by “O” refer to the Opinion denying Rule 61 relief. Mr. Manley’s Opening Brief will be referred to as “OB.” The State’s Answer will be referred to as “SA.”

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ARGUMENT

1. **RAUF AND POWELL REQUIRE APPELLANT BE RESENTENCED.**

The State agrees that Mr. Manley's death sentence must be reversed. SA at 12. Because the statute under which Mr. Manley was sentenced, 11 Del. C. § 4209, has been overturned, Rauf v. State, 145 A.3d 430 (Del. 2016), remand for resentencing is warranted.

2. COUNSEL’S INEFFECTIVENESS PREVENT THE JURY FROM HEARING READILY AVAILABLE EVIDENCE DIRECTLY DISPUTING APPELLANT’S GUILT.

The State’s bar contentions fail. SA at 16-18. As described above, the Superior Court correctly rejected the State’s attempt to apply Rule (i)(1) to Mr. Manley’s timely petition. A3175. As described in the Opening Brief, reliance on Rule 61(i)(2) fails because Mr. Manley presented colorable claims involving multiple constitutional violations requiring that his conviction be vacated under Rule 61(i)(5); review is required in the interests of justice, particularly where the evidence the jury never heard directly challenges the reliability and credibility of the State’s case against Mr. Manley; and, precluding review violates Mr. Manley’s federal due process rights. OB at 8-9. The State’s reliance on the former adjudication bar (Rule 61(i)(4)), SA at 17, is perplexing and unavailing. If this claim had been previously adjudicated, the 61(i)(2) bar would not apply. And, it was not previously adjudicated because the quality and quantity of the evidence presented by Mr. Manley during these proceedings was diametrically different than that presented during the prior post-conviction proceedings. Finally, even if 61(i)(4) does apply, but it does not, review is nevertheless required in the interests of justice. There are no bars to review.

The State repeatedly contends that Mr. Manley’s claims should be rejected because “nothing new” was revealed at the postconviction proceedings to show his

entitlement to relief, SA at 20, when in fact, Mr. Manley presented ample new evidence directly contradicting all material aspects of the prosecution's case.

The State's attempt to minimize the impact of the evidence counsel failed to develop in support of their chosen defense theory also fails. While the State is correct that neither Ms. Butler nor Mr. Hudson actually identified Mr. Manley in court, Manley (SA at 18-19), the prosecution nevertheless relied on their descriptions to connect Mr. Manley to the murder. A775. Had the jury heard that Ms. Butler had failed to identify Mr. Manley from a photographic line-up or that Mr. Hudson had told the defense investigator that he was only "pretty sure" that Manley was the individual, there is more than a reasonable probability that it would have rejected the prosecution's argument.

Other than to say that Ms. Dorsey was "candid in her lack of identification," SA at 19, the State offers nothing to dispute the compelling evidence presented during the post-conviction proceedings demonstrating the inherent unreliability of Ms. Dorsey's developing identification testimony to match Mr. Manley. That evidence demonstrated that trial counsel never made clear to the jury that Ms. Dorsey's description of the man who came to her door the night before the offense (e.g., six feet tall with no facial hair, *see* A693; A2345-6) did not remotely resemble Mr. Manley; that she changed her description at trial to more closely resemble Mr.

Manley (describing person who came to her door as “a little shorter” than decedent, who was 5'10"); or that she indicated in her initial statement that “they all look the same” when describing African Americans (A2350). Had the jury learned these factors, there is a reasonable probability it would have rejected her testimony and acquitted Mr. Manley.

Given the importance of the eyewitnesses to the prosecution’s case, it was critical for counsel to challenge them. As was made clear by Deborah Davis, Ph.D., *see* A3063-80; *see also* OB at 17-8, many critical factors present in the circumstances of this case adversely affected the eyewitnesses’ ability to accurately recall details and rendered any identifications inherently unreliable, including: the violent nature of the incident; the polluting effect of the witness discussions after the incident; and the problems of the photo displays. A3088-95. Contrary to the State’s contentions, SA at 19, had the jury learned of these inherent flaws directly impacting the reliability of the critical prosecution testimony, there is a reasonable probability that it would have rejected that testimony and acquitted Mr. Manley.

The State’s contention that Mr. Manley “revealed nothing new” about his Army Reserve service, SA at 20, also fails. The prosecution went through great lengths to connect the camouflage jacket found in the trunk of Mr. Stevenson’s car to Mr. Manley. But the evidence during the Rule 61 proceedings demonstrated beyond

doubt that the jacket was not Mr. Manley's. *See* A2744-46. While trial counsel did elicit testimony that Mr. Manley had not undergone weapons training or been issued a pistol, they failed to present readily available witness testimony that Mr. Manley had no interest in weapons or combat and was training to be a medic. *See, e.g.*, A2483-4; A2474-5. Had the jury heard this testimony, there is more than a reasonable probability that it would have rejected the prosecution's theory that Mr. Manley's Army Reserve service connected him to the military jacket and the murder weapon.

The State's attempts to diminish the evidence connecting George Stevenson as an alternative suspect similarly fails. SA at 20. As noted previously, the evidence presented during the post-conviction hearing demonstrated that George Stevenson had a stronger motive, the relevant military training, was employed nearby and wore a work-uniform strikingly similar to clothing described by witnesses who saw the shooter flee the scene. OB at 20. For these reasons, the State's contention that Ms. Brown's observations were not relevant because she did not see the actual shooting fails. SA at 20. She saw someone matching George Stevenson's description fleeing the scene immediately afterwards. A2394. Accordingly, a defense theory that it was George Stevenson, not Mr. Manley, who shot the victim, is far more than "speculation" and had the jury learned of this evidence there is a reasonable

probability it would have acquitted Mr. Manley.

The State's contention that Kevin Powlette's testimony made clear that Mr. Manley was not present when David Stevenson asked about getting a gun (SA at 21) is not supported by the record. During direct examination, Mr. Powlette identified Mr. Manley and indicated that he was with Mr. Stevenson the night before the offense. While he did say on cross-examination that he and Mr. Manley talked about "guy-to-guy chit chat," counsel never clarified that Mr. Manley was not with Mr. Stevenson at the time Stevenson asked Powlette about obtaining a gun. A670. Counsel's failure to make that clear to the jury constituted prejudicially deficient performance.

The State also contends that Melissa Magalong's testimony about hearing two male voices outside her door (where the decedent had previously lived) the night before the shooting, was relevant and admissible. SA at 20-21. Nothing remotely connected those voices to the murder or any other aspect of the case. Yet, the prosecution relied on this testimony to speculate that Mr. Manley and Mr. Stevenson were at the decedent's former home the night before the murder as an indication of guilt. A775. The jury's reliance on that speculative testimony and argument in reaching its verdict violated state and federal due process and counsel's failure to object constituted prejudicially deficient performance.

The State's attempt to characterize Mr. Manley's gunshot residue ("GSR") testimony as "nothing new" fails. SA at 19. Dr. Harper explained that the only scientific explanation for the absence of GSR was that Mr. Manley was not the shooter. A2496-2504. Counsel's failure to present expert evidence directly disputing the prosecution's theory constituted prejudicially deficient performance.

3. THE FAILURE TO DISCLOSE MATERIAL EXCULPATORY AND/OR IMPEACHMENT EVIDENCE COMPROMISED THE VERDICT.

For the reasons previously presented, the State's reliance on the Rule 61(i)(1) time-bar fails. SA at 23. The State's reliance on the Superior Court's application of the Rule 61(i)(2) and (3) bars also fails. Id. The Superior Court barred all aspects of this claim, except those related to ineffective assistance of counsel, under Rule 61(i)(2) and(3) because they were not raised at trial, on direct appeal, or in the first post-conviction motion. A3177. The court also found no prejudice in counsel's failure to raise this claim on direct appeal. Id. As explained previously, OB at 25-6, because the State has a continuing obligation under the due process clause to disclose material and exculpatory evidence, Mr. Manley has demonstrated a colorable claim that a miscarriage of justice occurred under 61(i)(5), rendering the (i)(2) bar inapplicable. Rule (61)(i)(3) is inapplicable because counsel's ineffectiveness in failing to raise this claim prejudiced Mr. Manley and constitutes cause under 61(i)(3)(a).

The State fails to dispute the merits of this claim other than to assert that Mr. Manley offered no specifics to support his argument that Brady¹ and

¹ Brady v. Maryland, 373 U.S. 83 (1963).

Napue² violations occurred from the prosecution's failure to provide exculpatory and impeachment evidence about critical prosecution witnesses. SA at 23. As explained previously, this evidence includes complete transcripts of the statements and 911 tapes of these witnesses. OB at 24-5. Contrary to the State's contentions, SA at 23, there were many discrepancies and omissions in the police summaries of the witness statements.

As for the tapes themselves, because Mr. Manley was never provided with complete written and taped statements of these witnesses, he was never able to adequately challenge their accounts of the shootings, or, in the case of George Stevenson, provide the jury with an alternative suspect. OB at 20. With regard to Tiarha Coston, who the lower court precluded Mr. Manley from presenting at the post-conviction hearing, even the police summary of her statement confirming David Stevenson was alone in his car at 8:00 a.m. the morning of the shooting, A2355, is exculpatory to Mr. Manley.

The State's contention that Coston's statement contradicts the evidence that Mr. Manley was purportedly fleeing from Stevenson's car, SA at 23, n. 43, is unavailing. While Mr. Manley was sighted and apprehended near Stevenson's residence, A83, Coston's statement would have supported the defense theory that

² Napue v. Illinois, 360 U.S. 264 (1959).

while Mr. Manley may have spent the night at Stevenson's house, he was not involved in the shooting. Given the affidavit that Coston later provided confirming her police summary that she saw David Stevenson alone in the car, A2059, her actual taped statement would have been critical to Mr. Manley's innocence claim.

Accordingly, Mr. Manley has more than satisfied the materiality and prejudice requirements of Brady and its progeny. Accordingly, counsel's failure to raise these claims on appeal and during the prior post-conviction proceedings constitutes prejudicially deficient performance and relief or, at a minimum, remand for full disclosure and a hearing is required.

4. IMPROPER JOINDER VIOLATED THE U.S. CONST. VI, VIII AND XIV AND DEL. CONST. ART. I, §§ 4, 7, 9, 11, 12 AND 13.

The State relies on the Superior Court's application of the Rule 61(i)(4) bar.

SA at 25. As described previously, Mr. Manley has demonstrated counsel's ineffectiveness in relying solely on the "mutually antagonistic defenses" basis while failing to fully raise all other readily available aspects of this claim on direct appeal, demonstrating both cause and prejudice and that the interests of justice require merits review. OB at 27-8.

As a result of the improper joinder, the jury was permitted to consider against Mr. Manley (despite the fact that there was no proof that Mr. Manley was aware of these incidents, let alone present when they occurred): extensive evidence of Mr. Stevenson's involvement in the Macy's theft, A620-22; Mr. Stevenson's attempts to get a firearm, A670; Mr. Stevenson's admissions, A622-23; and a note with another Macy's employee's address in Mr. Stevenson's possession. A652; A768. For these reasons, the State's reliance on Getz v. State, 538 A.2d 726 (Del. 1988) fails. SA at 26. Getz involved the admission of the defendant's prior acts, not his co-defendant's. Getz 538 A.2d at 731. While the State may have been able to present evidence that Mr. Stevenson was involved in the Macy's thefts to establish a purported motive, absent any connection or knowledge imputed to Mr. Manley (which it is clear there

was not), the other evidence described above involving conduct and statements by Mr. Stevenson would not have been admissible against Mr. Manley in a separate trial. Counsel's failure to raise and litigate these issues on direct appeal constitutes prejudicially deficient performance, establishing cause and prejudice entitling Mr. Manley to merits review. Because the admission of this evidence violated Mr. Manley's state and federal constitutional rights to confrontation, due process and a verdict based on competent, reliable evidence, merits review and grant of relief is in the interests of justice.

5. IMPROPER ACCOMPLICE INSTRUCTIONS PREJUDICED APPELLANT.

The State contends this claim is barred under Rule 61(i)(1), (i)(3), and (i)(4). SA at 27-8. As noted previously, the State's reliance on Rule 61(i)(1) fails because, as the Superior Court correctly found, the motion was timely filed. A3175. The State's reliance on the (i)(3) bar also fails because Mr. Manley has demonstrated cause and prejudice arising from counsel's ineffectiveness. OB at 32. Mr. Manley has also demonstrated that the instructional errors present colorable claims of constitutional error rendering the (i)(3) bar inapplicable under Rule 61(i)(5). OB at 30-2. Nor does the (i)(4) bar apply because the claim raised here is different in nature and quality from that addressed by this Court in Stevenson v. State, 709 A.2d 619, 634 (Del. 1998), and consideration of the constitutionally improper instructions is in the interests of justice.

The State did not address the merits of this claim in its Answer, other than to quote this Court's direct appeal opinion in Stevenson³ and the Superior Court's decision based on Chance.⁴ Neither are applicable. Mr. Manley challenges the confusing nature of the court's instructions on unanimity as to guilt that failed to specify whether it meant guilt as to murder or to a lesser offense, and the reasonable

³ See SA at 28 (quoting Stevenson, 709 A.2d at 634-5).

⁴ See SA at 28 (citing Chance v. State, 685 A.2d 351 (Del. 1996)).

likelihood that the jury interpreted the instructions in a way that relieved the prosecution of its burden of proof for first degree murder. OB at 29-32. This is different from the issue before this Court in Stevenson, which found that a single theory unanimity instruction as to who was the principal and who was the accomplice was not required. Stevenson, 709 A.2d at 634.

As explained in more detail in OB at 30-31, because the court provided differing instructions on unanimity and failed to distinguish between the different offenses, there is a reasonable probability the jury applied these instructions in an unconstitutional manner, thus violating Mr. Manley's right to due process and a fair trial. Accordingly, relief or, at a minimum, remand for a hearing is required.

6. THE FAILURE TO REQUEST VOIR DIRE ON RACIAL BIAS VIOLATED U.S. CONST. VI, VIII AND XIV AND DEL. CONST. ART. I, §§ 4, 7, 11 AND 13.

The State's bar contentions fail. SA at 30-1. As noted above, Rule 61(i)(1) is inapplicable because, as the Superior Court correctly found, Mr. Manley's motion was timely. A3175. The Rule 61(i)(3) bar is inapplicable because Mr. Manley has demonstrated that counsel's ineffectiveness in failing to preserve and raise these claims constitutes cause and prejudice. OB at 33-4. The Rule 61(i)(2) bar is inapplicable because the question of juror bias constitutes structural error for which merits review is in the interests of justice. Moreover, because this issue arises from the structural error of juror bias, it involves a colorable claim of constitutional error resulting in the denial of a fair and impartial jury rendering the (i)(2) and (i)(3) bars inapplicable under Rule 61(i)(5).

Contrary to the State's contention, Mr. Manley has made much more than a "conclusory claim." SA at 31. He has clearly demonstrated he was entitled to voir dire on racial bias given the prominent and compelling racial undertones throughout his trial. OB at 33-34. Counsel's failure to request voir dire on racial bias constitutes prejudicially deficient performance. Nothing can be more fundamental than the right to an unbiased jury. Irvin v. Dowd, 366 U.S. 717, 721-22 (1961). Because this involves structural error, Mr. Manley is not required to demonstrate prejudice, but

even if he were, given the undeniable racial aspects of this case, there is a reasonable probability that at least one of the seated jurors harbored racial bias. Moreover, the court denied Mr. Manley's request to conduct voir dire of the jurors who sat on his 1996 trial. A2410. Accordingly, any lack of proof falls at the feet of the court, not Mr. Manley. Relief or, at a minimum, remand for full evidentiary development is warranted.

7. THE STATE’S DISCRIMINATORY PEREMPTORY STRIKE PREJUDICED APPELLANT.

The State’s bar contentions fail. SA at 32. As noted previously, because Mr. Manley timely filed his motion, the Superior Court correctly concluded that the Rule 61(i)(1) bar does not apply. A3175. Mr. Manley has shown a colorable claim of miscarriage of justice and that a constitutional violation occurred when the prosecutor struck Juror Stewart, an African American woman, triggering Rule 61(i)(5) which precludes application of the 61(i)(2) and (3) bars. OB at 35-7. Moreover, any default was caused by counsel’s ineffectiveness, establishing cause and prejudice to overcome the Rule 61(i)(3) bar. This claim is also not barred under 61(i)(4) because the interests of justice require reconsideration.

In its attack on the merits, the State mistakenly relies on the trial court’s finding that there was no “pattern of discrimination” by the prosecutor. SA at 33.⁵ However, whether or not a “pattern” of discrimination had been established is irrelevant. When the prosecution improperly excludes even a single juror for a discriminatory purpose, a new trial is required. Snyder v. Louisiana, 552 U.S. 472, 478 (2008). Indeed, in asking the court for “some reciprocity” given defense counsel’s strikes of white jurors, A361, the prosecutor made his discriminatory intent more than clear,

⁵ In its Answer, the State mistakenly refers to the juror as “Stanley,” SA at 33. The juror’s name is “Stewart.” A358.

regardless of his purported race-neutral explanations. See also OB at 35-6.

Counsel's abject failure to object, even when prompted by the court, constituted prejudicially deficient performance. Because Mr. Manley has demonstrated purposeful discrimination, a new trial is required.

8. PROSECUTORIAL MISCONDUCT VIOLATED U.S. CONST. VI, VIII AND XIV AND DEL. CONST. ART. I, §§ 4, 7, 9, 11 AND 13.

The State's reliance on Rules 61(i)(1), (i)(2), (i)(3) and (i)(4) to bar review fails. SA at 32-3. As noted previously, the Superior Court correctly found the Rule 61(i)(1) bar inapplicable because Mr. Manley timely filed his claim. A3175. As explained more fully in OB at 39-40 and below, because the prosecutor's actions compromised the reliability of the verdict and violated Mr. Manley's right to due process and a fair trial, Rule 61(i)(5) renders the (i)(2) and (3) bars inapplicable. Also, counsel's ineffectiveness establishes cause and prejudice overcoming the (i)(3) bar. Id. To the extent (i)(4) is relevant to Mr. Manley's claims via this Court's decision in Stevenson, 709 A.2d at 633-34, the interests of justice render that bar inapplicable as well.

The State contends the prosecutor made an "honest mistake" during closing argument when he misinformed the jury that the jacket (purportedly worn by the shooter) was in the back seat rather than the trunk. SA at 36. Whether or not it was an "honest mistake" - and the State has offered nothing to support this contention - is irrelevant. Because the prosecutor misinformed the jury as to the location of the jacket (placing it in close proximity to the alleged shooter), A773, there is a reasonable likelihood that the jury used the prosecutor's statement against Mr.

Manley in its guilt determination. Were this the only “honest mistake,” perhaps the State’s argument could be accepted. However, when coupled with the myriad of other examples that cannot be explained away, it is clear this was deliberate misconduct designed to prejudice the jury against Mr. Manley. For instance, contrary to the State’s contention that the prosecutor properly referred to the testimony of Officer Townley about Mario Cruz’s statement pursuant to 11 Del. C. § 3507, SA at 36-7, the prosecutor’s argument at closing was a complete falsification of Mr. Cruz’s own testimony. A775. Moreover, while § 3507 allows for the use of the “voluntary out-of-court prior statement” of a testifying witness, 11 Del. C. § 3507(a), Officer Townley testified about his own recollection of what Mr. Cruz told him, but had nothing in writing to verify this statement or his own memory of it. A594. When asked on cross examination by Stevenson’s counsel to produce the notes he was purportedly relying on, he could not. A594. While Mr. Cruz testified he was unclear about the time he saw David Stevenson, there was no question whatsoever that he did *not* recall seeing Mr. Manley with Stevenson that morning. A583-4.

As to the State’s contention that the prosecutor’s blatant misstatement (which the State admitted was inaccurate, SA at 37) about Mr. Manley’s hands sweating at the time of apprehension was “hardly material,” nothing could be further from the truth. Given that the absence of gunshot residue (“GSR”) on Mr. Manley’s hands and

clothing was a major obstacle to the prosecution's theory that Mr. Manley shot the decedent, and Agent Kinard's testimony that sweating could displace and deplete any residue that may have been on the hands, A588, by misinforming the jury that Mr. Manley was sweating, there is a reasonable probability the jury believed this explained the absence of GSR and improperly considered this false argument in its determination.

Because counsel failed to object or request a curative instruction, there is a reasonable probability the jury believed the prosecutor's false argument and found Mr. Manley guilty based on this rather than competent, reliable evidence.

9. JUDICIAL BIAS DEPRIVED APPELLANT OF A FAIR TRIAL.

The State's bar contentions fail. SA at 38-39. Even if Rule 61(i)(2) is, as the Superior Court found, applicable, and it is not, reconsideration of Mr. Manley's claim involving the bias of his trial judge is warranted in light of Williams v. Pennsylvania, 136 S.Ct. 1899, 1909 (2016). As noted previously, because Mr. Manley timely filed his motion, Rule 61(i)(1) is inapplicable. A3175. As this claim involves the denial of a fair and impartial tribunal, Mr. Manley has demonstrated a colorable claim of constitutional error and that merits review of this claim is in the interests of justice. Accordingly, neither the Rule 61(i)(2) nor the (i)(3) bar apply. OB at 43-4.

Mr. Manley was tried and convicted before a judge who was clearly biased as a result of his prior involvement with Mr. Stevenson's case and knowledge of the decedent. OB at 41-4. While this structural error requires a new trial regardless of prejudice, id., Mr. Manley was prejudiced by Judge Barron's biased legal rulings and counsel's ineffective failure to raise this claim on direct appeal.

In attempting to avoid application of Williams, the State attempts to limit that decision to only those cases in which the judge was also the prosecutor in the case. SA at 39. But the Williams Court made clear that due process is violated from "the participation of an interested judge," Williams, 136 S. Ct. at 1909, regardless of how that interest arises.

The State also misstates the finding of this Court in Stevenson v. State, 709 A.2d 619 (Del. 1998). SA at 40. In denying relief, this Court did not reject the merits of the issue of Judge Barron’s partiality, but rather found it waived for purposes of the direct appeal. Stevenson, 709 A.2d at 635. On the joint appeal from the initial Rule 61, this Court determined Judge Barron’s personal contact with the decedent and his request to be assigned to this case “created an unacceptable appearance of impropriety.” Manley v. State, 782 A.2d 249, 251 (Del. 2001). This Court determined Judge Barron should not have requested assignment to this case given his prior contact with the decedent at the suppression hearing in the Macy’s theft case. Id. at 257. This Court also noted as support for its conclusion Judge Barron’s failure to disclose to the parties his request for assignment to this case. Id. at 257, n. 4. This Court found the focus of a judicial bias inquiry should not necessarily be on prejudice, but on the “reaction of the reasonable observer.” Id. at 258. While this Court limited its grant of relief to the penalty phase, it specifically directed that a different judge consider the guilt phase postconviction claims, and withheld any opinion on those issues. Id. at 261. For these reasons and those presented previously, OB at 42-44, the State’s contentions fail and relief is required.

10. ADMISSION OF STEVENSON’S STATEMENTS AND BAD ACTS AGAINST APPELLANT AND THE IMPROPER INSTRUCTIONS PREJUDICED APPELLANT.

The State’s bar contentions fail. SA at 43. The Rule 61(i)(2) bar is inapplicable under the fundamental fairness exception of Rule 61(i)(5), because Mr. Manley has presented colorable claims involving multiple constitutional violations requiring his conviction be vacated under the Rule 61(i)(5). Younger v. State, 580 A.2d 552, 555 (Del. 1990); see also OB at 45-7. Rule 61(i)(4) is inapplicable because, contrary to the State’s contentions, this claim is not restricted to the sole issue presented previously on direct appeal; i.e., the admission of Stevenson’s statement after the police chase. SA at 43. This Court specifically noted that “standing alone,” Stevenson’s statement does not implicate Mr. Manley. Manley v. State, 709 A.2d 643, 656 (Del. 1998). The claims presented now address additional bad acts evidence, as well as counsel’s ineffectiveness in failing to properly raise and litigate these claims at trial and on appeal. OB at 46-7. As to the State’s contention that the issue related to Powlette’s testimony about Stevenson wanting to purchase a gun is barred under 61(i)(3), SA at 43, counsel’s ineffectiveness constitutes cause and prejudice overcoming this bar.

Prior to his conviction for this offense, Mr. Manley had no criminal record. There was no evidence presented at trial showing he had any involvement at all in the

Macy's thefts for which Stevenson was charged and the decedent was allegedly killed. Other than his friendship with David Stevenson, there was no evidence of motive on the part of Mr. Manley. Despite this, the court and counsel allowed the jury to hear irrelevant and patently prejudicial statements by and evidence about Mr. Stevenson's bad acts related to the Macy's thefts. A622-25.

The State alleges Mr. Manley and Mr. Stevenson "conspired together." SA at 44. Yet the only evidence of any conspiracy was their prior friendship. The court's finding that Mr. Stevenson's theft indictment constituted motive for Mr. Manley to murder the decedent, A793, simply does not hold water. The State's contention that the evidence about Stevenson's bad acts and motives was properly admitted because of its probative value is also unavailing. SA at 44. The State's reliance on Richardson v. Marsh, *id.* at 45, is misplaced. There, the jury was instructed not to use the codefendant's confession against Marsh. Richardson v. Marsh, 481 U.S. 200, 204 (1987). Here, the court removed Mr. Manley's name from the first paragraph, but included it in the charging language directing the jury to consider Mr. Stevenson's statements and other bad acts evidence against Mr. Manley. A793. Remarkably, counsel agreed to this instruction. A727. Counsel's failure to object or request a stronger limiting instruction and his subsequent failure to properly raise this issue on appeal constituted prejudicially deficient performance. Relief is required.

11. THE DENIAL OF A FAIR AND IMPARTIAL JURY VIOLATED U.S. CONST. VI, VIII AND XIV AND DEL. CONST. ART. I, §§ 4, 7, 11 AND 13.

The State's bar contentions fail. SA at 46-7. This claim is not time-barred under Rule 61(i)(1) as the Superior Court correctly concluded. A3175. Rule 61(i)(2) and (i)(3) are not applicable because prior counsel's ineffectiveness establishes cause and prejudice and review of the constitutional claims arising from the denial of an impartial jury is in the interests of justice. OB at 49. Moreover, Mr. Manley has demonstrated a colorable claim of constitutional violations warranting review under Rule 61(i)(5).

Mr. Manley was denied his right to a fair and impartial jury. OB at 48-9. In attempting to minimize the constitutional violations, the State mischaracterizes what actually took place during voir dire. SA at 47-8. For instance, while the court did not require Mr. Manley to wear his prison jumpsuit to jury selection, because he was not provided with civilian clothes as required, he was essentially compelled. A235. Counsel's acquiescence in moving forward rather than accepting the court's offer of a recess violated Mr. Manley's due process right to the presumption of innocence as well as his Sixth Amendment right to effective assistance of counsel.

The State contends that the record reflects three of the jurors identified by Mr. Manley as having actual or implied biases, OB at 49, were impartial based on their

voir dire responses.⁶ SA at 48. A court should not simply rely on a juror's assurances of impartiality. Kirk v. Raymark Indus., Inc., 61 F.3d 147, 156 (3d. Cir. 1995). Because counsel failed to effectively challenge them after their biases were revealed, there is a reasonable probability that one or more of these jurors harbored an actual or implied bias against Mr. Manley.

The State also maintains Mr. Manley's claim that the jury was exposed to external influences is conclusory. SA at 48. Three jurors held sufficient direct and/or implied biases warranting their exclusion from the panel. OB at 48. Because it is unclear from the record whether these jurors discussed their biases with other sitting jurors (which would constitute an improper external influence), at a minimum, remand for an evidentiary hearing is required.

⁶ The State did not address Mr. Manley's arguments about several jurors who had heard or read about the case, lived near the murder scene, or knew people who lived at the scene. OB at 49, n. 25.

12. THE CUMULATIVE PREJUDICIAL EFFECT OF THE ERRORS VIOLATED U.S. CONST. VI, VIII AND XIV, AND DEL. CONST. ART. §§ 4, 7, 9, 11, 12 AND 13.

The State acknowledges that cumulative error may be a basis for granting relief, SA at 49, but makes a blanket assertion that Mr. Manley was not prejudiced by any of the errors that may have occurred. Id. As made clear above and in the Opening Brief, the State is incorrect as Mr. Manley has demonstrated prejudice. This Court should grant relief or remand for an evidentiary hearing.

13. MR. MANLEY HAS NOT WAIVED ANY CLAIMS UNDER THE DELAWARE CONSTITUTION.

Contrary to the State's contentions,⁷ Mr. Manley has not waived any claims under the Delaware Constitution. Mr. Manley briefed the constitutional claims in his appeal and within the arguments above. Article I, § 4 mirrors the Sixth Amendment right to a trial by an impartial jury; § 7 is the equivalent of the Fifth Amendment right to due process; § 11 prohibits cruel and unusual punishment like the Eighth Amendment; § 12 guarantees access to counsel similar to the Sixth Amendment; and § 13 prohibits the suspension of habeas corpus as mandated in Article One, § 9, clause 2 of the United States Constitution. Mr. Manley has demonstrated the denial of these rights and relief is required.

⁷ SA at 14; 22; 24; 30; 35; 38; 42.

14. MR. MANLEY'S CLAIMS ARE TIMELY.

The State contends throughout its Answer that Mr. Manley's claims are untimely under Rule 61(i)(1).⁸ The Superior Court correctly rejected this contention because Mr. Manley's motion was filed within one year of the date his conviction became final on May 29, 2007. A3175. Moreover, because Mr. Manley has demonstrated colorable claims involving a constitutional violation undermining the reliability and fairness of the proceedings leading to his conviction, Rule 61(i)(5) precludes application of this bar. Bailey v. State, 588 A.2d 1121, 1129 (Del. 1991); Younger, 580 A.2d at 555.

⁸ SA at 16, 23, 25, 27, 31, 32, 36, 39, 43, 46.

CONCLUSION

For the reasons presented here, Appellant respectfully requests that this Court vacate his conviction.

Respectfully submitted,

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