



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERMAINE WRIGHT,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 423, 2013
	)	
v.	)	On Appeal from the
	)	Superior Court of the
STATE OF DELAWARE,	)	State of Delaware in and
	)	for New Castle County
Plaintiff-Below,	)	
Appellee.	)	

STATE'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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NATURE AND STAGE OF PROCEEDINGS¹

On January 30, 1991, Wilmington Police and Delaware State Police arrested Jermaine M. Wright. On April 29, 1991, the New Castle County grand jury indicted Wright on capital murder and related charges.² (D.I. 1). Wright moved to suppress his videotaped confession. After holding an evidentiary hearing on September 30, 1991, Superior Court denied the motion on October 30, 1991. (D.I. 23 & 28). Wright filed an additional motion to suppress his statement on June 25, 1992. (D.I. 58). Superior Court held another evidentiary hearing on that motion on July 30, 1992. (D.I. 61). Superior Court denied that second motion to suppress on August 6, 1992. (D.I. 64). *State v. Wright*, 1992 WL 207255 (Del. Super. Ct. Aug. 6, 1992).

On August 26, 1992, a jury convicted Wright of all counts of the indictment except for conspiracy and the related weapons count. (D.I. 70). Following a penalty hearing, the jury recommended a sentence of death. (D.I. 74). On October 22, 1992, Superior Court sentenced Wright to death, plus 50 years imprisonment. (D.I. 83). On November 17, 1993, this Court

¹ The “(D.I. __)” notations refer to the Superior Court docket items in *State v. Jermaine Wright*, ID No. 91004136DI.

² More specifically: murder in the first degree (intentional murder) (11 *Del. C.* § 636(a)(1)); murder in the first degree (felony murder) (11 *Del. C.* § 636(a)(6)); robbery in the first degree (11 *Del. C.* § 832); conspiracy in the first degree (11 *Del. C.* § 513); and three counts of possession of a deadly weapon during the commission of a felony (“PDWDCF”) (11 *Del. C.* § 1447).

affirmed Wright's convictions and sentence. *Wright v. State*, 633 A.2d 329 (Del. 1993).

On January 24, 1994, Wright filed his first motion for post-conviction relief. (D.I. 132). On August 12, 1994, Superior Court granted Wright's motion as to his claim of ineffective assistance of counsel related to the penalty phase and vacated his sentence of death. (D.I. 160 & 161). *State v. Wright*, 653 A.2d 288 (Del. Super. Ct. 1994). At Wright's new penalty phase hearing in January 1995, the jury found the existence of statutory aggravating circumstances beyond a reasonable doubt by a vote of 12 to 0; the jury then recommended a sentence of death by a vote of 9 to 3. (D.I. 193). On February 8, 1995, Superior Court re-imposed a sentence of death as to Wright's convictions for murder in the first degree. (D.I. 199). On January 26, 1996, this Court affirmed Superior Court's denial of Wright's motion for post-conviction relief as to his 1995 guilt-phase claims, and affirmed the re-imposition of his death sentence. *Wright v. State*, 671 A.2d 1353 (Del. 1996). On June 10, 1996, the United States Supreme Court denied certiorari. *Wright v. Delaware*, 517 U.S. 1249 (1996).

On January 16, 1997, Wright filed his second motion for post-conviction relief. (D.I. 255-58). Following an evidentiary hearing and amendment of that motion, on September 28, 1998, Superior Court denied

relief. (D.I. 303 & 304). *State v. Wright*, 1998 WL 734771 (Del. Super. Ct. Sept. 28, 1998). This Court affirmed. *Wright v. State*, 2000 WL 139974 (Del. Jan. 18, 2000).

On May 10, 2000, Wright filed a petition for writ of habeas corpus in the United States District Court for the District of Delaware (*Wright v. Snyder*, C.A. No. 00-474-GMS). The District Court held three separate days of evidentiary hearings on December 11, 2002, February 26, 2003, and March 1, 2006. District Court subsequently stayed these proceedings.

Wright filed his third motion for post-conviction relief on October 16, 2003. (D.I. 332). On January 12, 2004, Superior Court stayed consideration of the motion pending resolution of the federal habeas proceedings. (D.I. 334). On June 19, 2008, without the third motion having been resolved, Wright filed his fourth motion for post-conviction relief. (D.I. 335). On December 16, 2008, Wright filed an amendment to his fourth motion for post-conviction relief. (D.I. 345). The State filed an answering brief to Wright's third and fourth motions on February 17, 2009. (D.I. 350). On May 1, 2009, Wright filed a "consolidated successor petition" to the previously filed motions for post-conviction relief. (D.I. 367). Beginning on September 14, 2009, Superior Court held five days of evidentiary hearings. (D.I. 384). On September 28, 2009, Wright filed another

amendment to his Rule 61 motion to add a claim that the admission of his confession violated *Miranda*. (D.I. 387). The Superior Court held two additional days of evidentiary hearings on October 7 and 8, 2009. (D.I. 389).

On January 3, 2012, Superior Court granted Wright post-conviction relief on a *Miranda* claim and a *Brady* claim, denied Wright's other claims, and vacated Wright's convictions and sentence. (D.I. 419, 420, & 421). *State v. Wright*, 2012 WL 1400932 (Del. Super. Ct. Jan. 3, 2012). The State filed a timely appeal. Wright did not cross-appeal. On May 28, 2013, this Court issued a corrected opinion, reversing the Superior Court's grant of post-conviction relief. *State v. Wright*, 67 A.3d 319 (Del. 2013). On July 12, 2013, Superior Court re-imposed Wright's convictions and sentences, set a new execution date, entered a stay of that execution, and subsequently corrected the sentence to include all previous convictions. (D.I. 479 & 483).

Prior to Superior Court's resentencing, on June 27, 2013, Wright filed a pleading styled "motion to address and clarify status of unresolved claims." (D.I. 473). The State filed a response on July 1, 2013. (D.I. 474). On July 18, 2013 (docketed July 22, 2013), Superior Court denied Wright's motion. (D.I. 481). Wright appeals this denial.

SUMMARY OF ARGUMENT

1. Wright's appeal from the Superior Court's denial of his "motion to clarify" is an improper attempt to take an untimely appeal from the Superior Court's January 2012 decision. Wright could have filed a cross-appeal when the State filed its appeal because he was subject to a final judgment, having previously been sentenced. The motion to clarify was nothing more than an untimely motion for reargument. The appeal should be dismissed on that basis.

2. Wright's first argument is DENIED. Superior Court properly found that no "deal" existed between the State and prison-witness Gerald Samuels and that the prosecutor did not fail to disclose *Brady* material. The State had no *Brady* obligation to disclose the criminal history of Kevin Jamison, a witness Wright himself called at trial.

3. Wright's second argument is DENIED. Superior Court correctly found that Wright abandoned claims of ineffective assistance of 1995 penalty hearing counsel regarding mitigation. During the 2009 evidentiary hearings, Wright challenged 1995 penalty hearing counsel's performance in his capacity as initial post-conviction counsel. Superior Court did not preclude Wright from raising any claim. Wright instead focused on performance of counsel related to the guilt phase claims.

4. Wright's third argument is DENIED. Even though Superior Court did not find the existence of a constitutional right to effective assistance of post-conviction counsel, it nonetheless permitted Wright to raise claims without the application of a procedural bar and allowed Wright to expand the record on those grounds. Thus, Superior Court provided Wright all the relief he requested on this ground.

5. Wright's fourth argument is DENIED. Superior Court committed no error in following this Court's holdings that *Ring* has no application to the weighing phase of Delaware's capital system.

STATEMENT OF FACTS³

On the evening of January 14, 1991, Jermaine Wright and Lorinzo Dixon went to the Hi-Way Inn, a combination bar and liquor store located on Governor Printz Boulevard near Wilmington, to commit a robbery. During the robbery, Wright shot Philip Seifert three times, once in the neck and twice in the head, killing him. Seifert had been working behind the counter at the cash register in the liquor store portion of the business. After roughly two weeks of investigation, police arrested Wright, and he subsequently confessed to robbing the Hi-Way Inn with Dixon and killing Seifert.

³ Given the two decades of litigation in this case, these facts are a summary drawn from this Court's opinion on direct appeal. *Wright*, 633 A.2d at 330-33.

1. THE SUPERIOR COURT LACKED JURISDICTION TO CONSIDER WRIGHT’S MOTION “TO CLARIFY,” AND THIS COURT LACKS JURISDICTION TO HEAR CLAIMS ARISING FROM SUPERIOR COURT’S PREVIOUSLY APPEALED OREDR.

Question Presented

Whether this Court has jurisdiction to consider Wright’s appeal.⁴

Standard and Scope of Review

Timeliness of an appeal is a jurisdictional requirement. *Smith v. State*, 47 A.3d 481, 484 (Del. 2012). This Court may consider a jurisdictional question at any time, either upon request of a party, or on its own initiative. *Koutoufaris v. Dick*, 604 A.2d 390, 401 (Del. 1992).

Merits of Argument

No jurisdiction to consider claims from January 2012 decision

The Delaware Constitution defines this Court’s appellate jurisdiction as follows:

To receive appeals from the Superior Court in criminal causes, upon application of the accused in all cases in which the sentence shall be death, imprisonment exceeding one month, or fine exceeding One Hundred Dollars, and in such other cases as shall be provided by law; and to determine finally all matters of appeal on the judgments and proceedings of said Superior Court in criminal causes: Provided, however, that appeals from the Superior Court in cases of prosecution under Section 8 of

⁴ The State preserved the issue of the Superior Court’s jurisdiction to consider Wright’s “motion to clarify” in its July 1, 2013 response. [B-75-77].

Article V of this Constitution shall be governed by the provisions of that Section.

Del. Const. art. IV, § 11(1)(b). By statute, this Court has no jurisdiction to hear an appeal in a criminal case unless the notice of appeal is filed with the Clerk of the Supreme Court within 30 days after the date of the judgment.

10 *Del. C.* § 147. This Court’s rules apply this same 30 day period in the context of post-conviction appeals. DEL. SUPR. CT. R. 6(a)(iii). In this case, the State filed a notice of appeal from the Superior Court’s January 2012 order granting post-conviction relief. The State filed that notice of appeal pursuant to 10 *Del. C.* § 9902(d). Wright could have, but did not, file a cross-appeal.

Cross-appeal permissible and necessary to avoid waiver

Wright offers only a single sentence declaring that section 9902 “does not allow for cross-appeals,” citing three cases⁵ for that proposition. Wright misreads the limitations this Court has placed on a criminal defendant’s ability to cross-appeal when the State has filed a notice of appeal. In each instance when this Court has held that a criminal defendant may not cross-appeal the State’s section 9902 appeal, that defendant had not yet been sentenced, i.e., the defendant did not have a final judgment against him.

⁵ *State v. Cooley*, 457 A.2d 352, 356-57 (Del. 1983); *State v. Maxwell*, 1992 WL 401575, at *1 (Del. Dec. 7, 1992); *State v. Brower*, 971 A.2d 102, 110 (Del. 2009).

Being under a sentence of death when the Superior Court issued its January 2012 order, Wright was subject to a final judgment. As this Court stated in the last appeal, “Until the appeal is decided, Wright’s conviction is not finally vacated.” *Wright*, 67 A.3d at 322.

In *Cooley*, the State appealed the pre-trial suppression of evidence. 457 A.2d at 352-53. The defendant filed a cross-appeal challenging the trial court’s denial of a motion to dismiss the indictment for prosecutorial delay. *Id.* at 353. This Court held that it had no jurisdiction to entertain such a cross-appeal. *Id.* The defendant in *Cooley*, at the time of the State’s appeal, had not been sentenced. Consequently, this Court found that it lacked jurisdiction to consider his challenge to a ruling that did not amount to a final judgment. *Id.* at 356-57. *Maxwell* presents essentially the same procedural scenario as *Cooley*. 1992 WL 401575, at *1.

In *Brower*, the State filed an appeal from the trial court’s judgment granting the defendant’s motion for new trial. 971 A.2d at 104. Although the defendant in *Brower* had been convicted, he had never been sentenced. *Id.* at 110 n.42. In dismissing his cross-appeal, this Court explained that the lack of sentencing was the basis on which it dismissed the cross-appeal: “This Court does not have jurisdiction over a defendant’s appeal until the defendant has been sentenced by the trial court or the trial court otherwise

issues a final order or judgment.” *Id.* (emphasis added). A final judgment is “one that determines all the claims as to all parties.” *Tyson Foods v. Aetos Corp.*, 809 A.2d 575, 579 (Del. 2002).

When the General Assembly first enacted section 9902 of title 10 of the Delaware Code, only sections (a) - (c) existed. Subsections (a) – (c) deal only with the pre-trial dismissal of indictments and informations, as well as the pre-trial dismissal of charges based on the grant of a motion to suppress evidence without which the State cannot prosecute a case. When this Court decided *Cooley* in 1983 and *Maxwell* in 1992, only those pre-trial subsections existed. In 1996, the General Assembly amended section 9902 to provide the State with additional instances in which it could file an appeal as a matter of right, including when the Superior Court grants a motion for new trial prior to sentencing, or, as in this case, when the Superior Court grants a motion for post-conviction relief. 10 *Del. C.* § 9902(d). This Court decided *Brower* in 2009, after the 1996 amendment. This Court avoided sweeping language in *Brower* that would have eliminated any cross-appeals when the State files an appeal pursuant to section 9902. Instead it properly drew the line for cross-appeals at the constitutional threshold: defendants cannot cross-appeal unless they have been sentenced. None of the cases

Wright has cited preclude a sentenced defendant from filing a cross-appeal when the State appeals pursuant to 10 *Del. C.* § 9902(d).

Appeal from 2012 order now untimely

Wright filed his notice of appeal for the present case on August 8, 2013. He contends that the order from which he is appealing is a July 12, 2013 decision of the Superior Court. But, as Wright explains in his “preliminary statement” (Op. Brf. at i), the claims he now challenges on appeal are undeniably part of the Superior Court’s January 3, 2012 opinion.⁶ Wright declined to directly include the four issues he now raises on cross-appeal in the prior 2012 appeal. Instead, Wright now attempts to present those issues on appeal from the denial of a motion to clarify a 2012 Superior Court judgment. The practice Wright advocates here would effectively permit him two bites at the apple. *Cf. Robinson v. Meding*, 163 A.2d 272, 275 (Del. 1960) (civil case encouraging appellate courts to review denial of motions incidental to final judgment appealed). Wright’s July 2013 appeal from any decision of the Superior Court’s January 2012 order is untimely, and this Court is without jurisdiction to consider those claims.

⁶ Wright also routinely references arguments in the parties’ prior briefing of this matter (Case No. 10, 2012), providing five abbreviations to the briefs and appendices in that matter.

Proceedings on remand

Before the Superior Court could comply with this Court's instructions on remand to re-instate Wright's convictions and re-impose his sentences, Wright filed an omnibus motion in which he asked Superior Court to: (1) "clarify the status of the Samuels [*Brady*] claim;" and (2) reconsider its prior ruling that he abandoned a claim of ineffective assistance of counsel at his second penalty hearing. [B-62]. As relief, Wright sought the grant of post-conviction relief, or alternatively additional evidentiary hearings, followed by the grant of a third penalty hearing. [B-66; B-71-72]. Wright contended the Superior Court had jurisdiction to consider his motion pursuant to Superior Court Civil Rule 60(b). [B-68]. He is incorrect.

Wright's motion to clarify the status of unresolved claims was an attempt to re-open the January 2012 judgment of the Superior Court to find an alternative ruling in his favor. This Court has rejected the very technique Wright seeks to employ. In *Roten v. State*, 2013 WL 3206746 (Del. May 23, 2013), this Court expressly held that Superior Court Criminal Rule 61 does not contain a procedure for re-opening a post-conviction proceeding. *Id.* at *1. Rather, Superior Court has the authority to consider a timely filed motion to re-open pursuant to Civil Rule 59(d). *Id.* (citing to DEL. SUPER. CT. CIV. R. 57(d)). Civil Rule 59(d) allows a motion to alter or amend the

judgment to be “filed no later than 10 days after entry of the judgment.”

Civil Rule 59(e) provides that a motion for re-argument “shall be served and filed within 5 days after the filing of the Court’s opinion or decision.”

Wright’s July 2013 motion was untimely either as a motion to alter or amend a judgment, or as a motion for re-argument.

In July 2013, the only way Wright could have re-presented the claims he presents here was by filing a fifth motion for post-conviction relief pursuant to Criminal Rule 61. *See Roten*, 2013 WL 3206746, at *1 (“If Roten wishes his claims to be considered, he must file a new motion for postconviction relief in the Superior Court.”). *See also State v. Jackson*, 1995 WL 716916, at *1 (Del. Super. Ct. Nov. 2, 1995) (denying “motion to clarify” as untimely motion for re-argument). Wright has not done so. This Court has no jurisdiction to consider any of Wright’s claims.

Wright’s “motion to clarify” mimicked one that recently resulted in the United States Supreme Court’s unanimous reversal of the Ninth Circuit in *Ryan v. Schad*, 133 S. Ct. 2548 (2013). In *Schad*, following the Supreme Court’s denial of certiorari, the habeas petitioner moved the Ninth Circuit for a stay of the issuance of its mandate. *Id.* at 2550. The Ninth Circuit elected to construe the motion as one to reconsider its prior judgment. *Id.* Just as Schad previously presented his claims to the Ninth Circuit, so too did

Wright previously present his claims to the Superior Court. *Id.* at 2552.

Like *Schad*, “there is no indication that there were any extraordinary circumstances here that called for the court to revisit an argument *sua sponte* that it already explicitly rejected.” *Id.* Following this Court’s issuance of its mandate, the Superior Court had a simple task before it: to re-impose the convictions and sentences it vacated. Wright’s “motion to clarify” was not anything more than an untimely Rule 59 motion.

2. WRIGHT’S BRADY VIOLATION CLAIMS ARE PROCEDURALLY BARRED AND MERITLESS.

Question Presented

Whether Superior Court erred in finding no *Brady* violations related to Gerald Samuels and Kevin Jamison.

Standard and Scope of Review

To the extent this Court finds the present appeal permits review of any aspect of the Superior Court’s January 2012 order, this Court reviews a decision to deny post-conviction relief for an abuse of discretion. Questions of law are reviewed *de novo*. *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013).

Merits of Argument

Wright requests that this Court rule on the *Brady* claims the Superior Court denied in its January 2012 order, and which that court declined to reconsider in its July 2013 order. Wright concedes he failed to file a cross-appeal. Nevertheless, Wright argues that this Court failed to decide the issues on the prior appeal. (Op. Brf. at 10-11). Wright further argues that the cumulative effect of the three alleged *Brady* violations (Samuels, Jamisons and BVLS) requires reversal of his conviction. He is incorrect.

a. Gerald Samuels

As this Court reminded when it reversed the Superior Court’s grant of post-conviction relief, it must first consider the applicability of procedural

bars. *Wright*, 67 A.3d at 323. First, review of the Samuels *Brady* claim is barred by Superior Court Criminal Rule 61(i)(1), because Wright failed to present the claim to the Superior Court within three years of his conviction being final. Review is also barred under Superior Court Criminal Rule 61(i)(2), because Wright, having knowledge of the facts surrounding Samuels' testimony, could have raised this claim in prior post-conviction motions but failed to do so. (D.I. 255-58, 273). In August 1997, Superior Court held an evidentiary hearing on Wright's second post-conviction motion at which Samuels testified. Wright questioned him regarding Wright's claim that Samuels was a "state agent." The day after Samuels' testimony, Wright's counsel wrote to the Court and "acknowledge[d] that there exists no factual basis to further pursue the 'state agent' issue." (D.I. 273). And in April 1998, Wright filed an amended motion for post-conviction relief, in which he did not raise any claim about Samuels' testimony. The Superior Court thereafter held that the claim was abandoned. *Wright*, 1998 WL 734771 at *4 n.13. Wright did not appeal that decision.

Wright has voluntarily abandoned any claim regarding Gerard Samuels. Indeed, Rule 61(b)(2) requires the movant to "specify all the grounds for relief which are available to the movant and of which the movant has, or by the exercise of reasonable diligence, should have

knowledge.” Wright has done nothing more than re-cast his Samuels “state-agent” claim into a *Brady* claim. Justice does not require that an issue that has previously been considered and rejected be revisited simply because the claim has been refined or restated. *See, e.g., Younger v. State*, 580 A.2d 552, 556 (1990), *Riley v. State*, 585 A.2d 719, 721 (Del. 1990); DEL. SUPER. CT. CRIM. R. 61(i)(4).

Wright claims the Superior Court “misapprehended the nature of the [Samuels *Brady*] claim” when it refused to apply the 61(i)(5) exception to the Rule 61’s procedural bars. Op. Brf. at 11. Superior Court applied no procedural bar to this claim, but rejected the claim on its merits:

[T]here was no express agreement nor was there a “wink or a nod” agreement, therefore a Brady violation did not occur here. Samuels likely had a unilateral expectation of receiving some benefit from his testimony. But whatever hopes he may have harbored, those hopes were not evidence within the possession of the State and thus could not have been suppressed by the State.

Wright, 2012 WL 1400932, at *37. Wright presented the Samuels *Brady* claim in his answering brief to the State’s appeal [B-53-58], thus placing the issue before this Court which acknowledged its existence during oral argument (6/7/12 oral argument, No. 10, 2012). *Cf. State v. Marine*, 464 A.2d 872, 874 (Del. 1983) (considering arguments that could not otherwise properly be filed in a cross-appeal as additional contentions to support the

judgment below). This Court implicitly rejected the Samuels *Brady* claim on the merits. *See Johnson v. Williams*, 133 S. Ct. 1088, 1095 (2013) (finding a rebuttable presumption that state court considered an exhausted federal claim on the merits, noting that “there are instances in which a state court may simply regard a claim as too insubstantial to merit discussion”).

Wright claims that Samuels had an implied agreement with the State and that “[t]he information that Samuels had previously testified against a co-defendant to advance his own legal interests, and his criminal record were unquestionably exculpatory.” There are three components of a *Brady* violation: (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State; and (3) its suppression prejudices the defendant. *Wright*, 67 A.3d at 324, citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Wright failed to satisfy all three elements.

At the 1997 evidentiary hearing, Samuels repeatedly confirmed that his 1992 testimony - that he had not received any consideration for his testimony – was accurate. [B-30-33]. The trial prosecutor informed the Superior Court that he had had no discussions with Samuels about his February 1992 plea. [B-47; B-49-50]. Both the prosecutor and Samuels’ attorney stated they had only discussed moving Samuels to a different prison

prior to his testimony because of Samuels' concern for his own safety. [B-4-5; B-49-51]. The only discussion between counsel regarding the possibility of the State supporting a motion for reduction of sentence came when Samuels was actually testifying, but Samuels was not made aware of that discussion. *Id.*

And, while Samuels was charged for drug crimes in October 1991 and agreed to a plea deal in which he would testify truthfully against his co-defendant, Samuels did not actually testify. [B-33]. Moreover, Wright's trial counsel knew of Samuels' guilty plea when Samuels testified, and counsel was free to cross-examine him on that point. [B-1-6]. Superior Court found:

there was no express agreement nor was there a "wink and a nod" agreement, therefore a *Brady* violation did not occur here. Samuels likely had a unilateral expectation of receiving some benefit from his testimony. But whatever hopes he may have harbored, those hopes were not evidence within the possession of the State and thus could not have been suppressed by the State.

Wright, 2012 WL 14009321400932, at *37. This factual finding is not clearly erroneous, and Superior Court did not abuse its discretion in denying that *Brady* claim on its merits. *E.g., Bultron v. State*, 897 A.2d 758, 766 (Del. 2006).

b. *Kevin Jamison and Norman Custis*

Wright argues that the State violated its *Brady* obligations by failing to disclose that one of Wright's own witnesses – Kevin Jamison – was charged with robbery before he testified. Specifically, Wright argues that when Jamison was asked about when he had last seen Norman Custis, Jamison did not disclose he had been charged with Custis in a robbery in July 1992, but only said that he saw Custis “[e]very now and then. Not often.” Even though Jamison was Wright's witness, Wright argues that the prosecutor was under an affirmative obligation to disclose the July 1992 robbery to Wright. (D.I. 335 at 20). He is mistaken. That Jamison was under investigation for another robbery was something that would have been readily ascertainable by Wright. And, because Jamison's involvement in an unrelated robbery is of no aid to Wright, the State had no obligation to inform him. *See Cabrera v. State*, 840 A.2d 1256, 1268-70 (Del. 2004).

Superior Court did not expressly find the absence of a *Brady* violation. Instead, in the context of Wright's actual innocence allegation, Superior Court found that evidence that Jamison and Custis were the “real” killers came from purported admissions to Wright's friends. *Wright*, 2012 WL 14009321400932, at *30. Superior Court did not find that testimony to be credible. *Id.* Wright had no *Brady* claim related to Jamison.

3. **WRIGHT ABANDONED HIS CLAIM THAT
PENALTY-PHASE COUNSEL’S MITIGATION
INVESTIGATION WAS CONSTITUTIONALLY
INADEQUATE.**

Question Presented

Whether the Superior Court abused its discretion when it ruled that Wright abandoned its claim that 1995 trial counsel’s mitigation investigation was constitutionally inadequate.

Standard and Scope of Review

To the extent this Court finds the present appeal permits review of any aspect of the Superior Court’s January 2012 order, this Court does not review claims not fairly presented to the trial court unless the error presented on appeal is plain. *Damiani-Melendez v. State*, 55 A.3d 357, 359-60 (Del. 2012), citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986); DEL. SUPR. CT. R. 8. The appellant carries the burden of showing that plain error is so clearly prejudicial to substantial rights as to effect the fairness and integrity of the process. *Moody v. State*, 988 A.2d 451, 453 (Del. 2010).

Merits of Argument

In his fourth motion for postconviction relief, Wright asserted that his counsel for the 1995 penalty hearing failed “to investigate and adequately present ... readily available evidence of Mr. Wright’s major mental disorders, childhood physical abuse, family dysfunction, parental separation,

poverty, inadequate childhood medical care and learning disabilities.” (D.I. 335 at 23). The Superior Court found that Wright failed to “develop any factual basis upon which the court could decide whether his counsel’s assistance was ineffective,” and therefore, had abandoned his claim. *Wright*, 2012 WL 14000932, at *33-34. After this Court’s decision reversing the grant of post-conviction relief, but prior to re-sentencing, Wright requested yet more evidentiary hearings on his claim of ineffective assistance of counsel; the Superior Court found Wright’s proffer insufficient to require an evidentiary hearing and denied relief. (Ex. B of Op. Brf.). That ruling was correct.

Procedurally, Wright’s claim is barred by Rule 61(i)(1) because it is untimely and by Rule 61(i)(2) because it could have been, but was not, properly raised in Wright’s second motion for post-conviction relief in 1997. Wright failed to demonstrate a colorable claim of miscarriage of justice pursuant to Rule 61(i)(5). In his 1997 motion for post-conviction relief, Wright claimed ineffective assistance of his 1995 penalty hearing counsel, but did not allege that counsel failed to pursue mitigation evidence. At an office conference on August 29, 1997, defense counsel stated:

Defense Counsel: Yes. I think he [Bernstein] adequately – I mean, I’m not going to be cagey, I think he adequately covered Mr. Wright’s background in the psychological evidence, but I think that the residual evidence is key.

...

Prosecutor: I just want to make it clear that what we're talking about, I mean, we're not talking about some other array of psychiatric experts.

Defense Counsel: We're not going to have a neurological psychiatric person come in and say he should have pursued this area, no. I don't have any reason to believe that what he pursued in terms of that mitigation evidence wasn't adequately done the second time.

[B-34-35]. By virtue of this discussion, it is apparent that Wright, even before the Superior Court's most recent evidentiary hearings, voluntarily and intentionally abandoned his claim that 1995 penalty hearing counsel failed to adequately investigate and present evidence of Wright's background.

Wright's assertion that the court refused to permit any evidentiary hearing testimony regarding his ineffectiveness claim against 1995 penalty hearing counsel is inaccurate. On June 12, 2009, counsel presented oral argument on numerous issues. During the course of the argument regarding the alleged failure to procure records, the court commented that counsel's assertions against penalty hearing counsel fell "short of demonstrating that it is reasonably probable that if there had – if these records had been collected there would have been a different result." [B-36]. Wright's counsel thereafter conceded that Wright's 1995 counsel presented a very competent psychological expert and evidence to the jury that Wright had been

neglected as a child, had a low I.Q., grew up poor, and was a drug abuser. [B-37-39]. At the end of the oral argument, the court ordered an evidentiary hearing regarding Wright's actual innocence claim, the Samuels *Brady* claim, and the voluntariness of his confession. [B-40-44]. The Superior Court did not prevent him from calling witnesses. During the course of the evidentiary hearings, when Wright's counsel expressed concerns about the limited amount of time the Superior Court would devote to the hearings, the judge corrected counsel, stating: "It's not finite, it's infinite." [B-46]. Before the evidentiary hearings concluded, the Superior Court judge asked: "Does the defendant have any further evidence it [*sic*] wishes to introduce?" Wright's counsel responded: "Not evidence in terms of witnesses or any other documents." [B-47]. Over the course of the hearings, Wright expanded the record to include evidence regarding BVLS, Jamison/Custis, alibi, as well as other challenges to the voluntariness of Wright's confession. Wright made no attempt to introduce testimonial evidence regarding his claim against 1995 penalty hearing counsel. Wright even objected when the prosecutor questioned penalty hearing counsel about the 1995 penalty phase:

Can I pose an objection? I am not trying to be rude, but we didn't talk about the penalty phase, or whether or not and neither the affidavit, nor in direct examination today. We have been going on a while about the penalty phase from 1995, I guess I am not sure the relevance to the direct examination or the contents.

[B-45].

The Superior Court considered the evidence Wright presented. The affidavit from one of the 1995 penalty hearing attorneys did not address penalty hearing claims. Wright did not take the opportunity to question that witness regarding his penalty phase performance when he was at the evidentiary hearing and objected when the State did so. Wright presented no testimony or affidavit from Wright's other 1995 penalty hearing attorney. *Wright*, 2012 WL 1400932, at * 34. Wright left the Superior Court without a record to decide Wright's claim and therefore abandoned it.

In any case, Wright's claim fails on its merits. The Delaware courts analyze claims of ineffective assistance of counsel under the familiar deficient performance and prejudice standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). *E.g., Ploof*, 75 A.3d at 851-52.

At his 1995 penalty hearing, Wright called his mother, Delores Wright, and his sister, Tammie Wright. Delores Wright testified that she raised Wright and his siblings in the "projects" without a father. [B-7-8]. Wright's mother told the jury that Wright was involved with drugs by age 16 and had been held back in school at least twice before he quit. [B-9-10]. She testified that she continued to visit her son in prison and observed him to

be a changed man. [B-11-14]. Tammie Wright also visited her brother in prison and observed that he had matured. [B-15]. Evelyn Stevenson, a correctional counselor at the Delaware Correctional Center, testified that Wright was a respectful and courteous person who had matured and adapted well to prison. [B-16-17].

Dr. Gerald Cooke, a well-respected clinical and forensic psychologist, testified on Wright's behalf. [B-18-20]. Dr. Cooke interviewed Wright, conducted a battery of tests and obtained Wright's family, social, and educational history. [B-21-23]. Dr. Cooke's interview revealed the absence of Wright's father and Wright's consequent resentment. [B-24-25]. The social history revealed Wright's economic deprivation. [B-25]. Dr. Cooke testified that Wright sold drugs at a young age, had a limited work history, and a series of prior arrests. Dr. Cooke also testified that Wright had two children. [B-26-27]. Dr. Cooke's testing revealed that Wright had an I.Q. of 80 and that he was immature and functioned well below his intellectual potential. [B-27-29].

Defense counsel presented the crime for which Wright was convicted as a robbery-gone-bad shooting. They presented Wright as an immature person who had grown up in poor circumstances with little hope for the future, but also as a father, brother, and son who had a family whom he

loved and who would be grievously harmed by his execution. Counsel presented six mitigating circumstances: (1) Wright's age at the time of the offense; (2) Wright's limited intellectual capacity and immaturity; (3) Wright's family and economic circumstances; (4) Wright's propensity to be influenced by peers; (5) Wright's history of drug abuse; and (6) Wright's potential for rehabilitation. *State v. Wright*, Findings after penalty hearing, Cr. A. Nos. IN91-04-1947-1953, Del Pesco, J. (Del Super. Ct. Feb. 8, 1995).

Strickland does not require defense counsel in a capital case to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing, or even to present mitigation evidence at sentencing in every case. *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). The approach taken by defense counsel here was reasonable; Wright has not shown otherwise. *See Sistrunk v. Vaughn*, 96 F.3d 666, 671 (3d Cir. 1996) (court reviewing claim of ineffective assistance of counsel required to assume informed decision-making by counsel in the absence of affirmative evidence to the contrary). Wright waived his claim of ineffective assistance of 1995 penalty phase counsel. The claim is also procedurally barred and without merit. The Superior Court made an extensive record in this case and its decision to deny an additional evidentiary hearing following remand was not clearly erroneous.

4. TO THE EXTENT INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL IS A COGNIZABLE CLAIM, SUPERIOR COURT EFFECTIVELY GRANTED WRIGHT RELIEF BY DECLINING TO APPLY ANY PROCEDURAL BAR TO HIS UNDERLYING CLAIMS.

Question Presented

Whether any error in Superior Court's finding that no right to effective assistance of post-conviction counsel exists was harmless because Superior Court did not apply a procedural bar to Wright's claims that he now contends prior post-conviction counsel should have raised and investigated.

Standard and Scope of Review

To the extent this Court finds the present appeal permits review of any aspect of the Superior Court's January 2012 order, and finds the existence of a right to effective assistance of post-conviction counsel, this Court reviews the Superior Court's decision for harmless error. *See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (central purpose of a criminal trial is to decide a defendant's guilt).

Merits of Argument

Superior Court found it unnecessary to opine on the performance of counsel who represented Wright in his 1997 motion for post-conviction relief because the court did not find a constitutional right to the effective assistance of post-conviction counsel exists. *Wright*, 2012 WL 1400932, at

*32-33, citing *Pennsylvania v. Finley*, 481 U.S. 551, 553 (1987). That decision was correct. *See, e.g., Roten v. State*, 2013 WL 5808236, at *1 (Del. Oct. 28, 2013) (“We did not hold in *Holmes* [*v. State*, 2013 WL 2297072 (Del. May 23, 2013)] that a right to counsel in first post-conviction proceedings exists as a matter of Delaware constitutional law.); *Watson v. State*, 2009 WL 2006883, at *2 (Del. July 13, 2009); *Cropper v. State*, 2001 WL 1636542, at *1 (Del. Dec. 10, 2001) (“[T]here is no right to court-appointed counsel in postconviction proceedings.”); *Floyd v. State*, 1992 WL 183086, at *1 (Del. July 13, 1992). *See also State v. Zebroski*, 2009 WL 807476, at *2 (Del. Super. Ct. Mar. 2009), *aff’d* 2011 WL 1900445 (Del. May 16, 2011). *But cf. Guy v. State*, __A.3d __, 2013 WL 6224483 (Del. Nov. 27, 2013). *See also Moore v. DiGuglielmo*, 489 F. App’x 618, 627 n.5 (3d Cir. 2012) (*Martinez v. Ryan*, 132 S. Ct. 1309 (2012), did not overrule *Finley* or establish a constitutional right to the effective assistance of post-conviction counsel).

A finding of ineffective assistance of post-conviction counsel does not provide for the reversal of a defendant’s conviction or his death sentence. *Martinez*, 132 S. Ct. at 1320. Instead, such a finding allows a post-conviction court to review whatever underlying claim post-conviction counsel arguably should have raised without the application of a procedural

bar to that claim. *Id.* The relief that Wright requested in Superior Court when he pled ineffective assistance of post-conviction counsel was the ability to raise the claims he contends prior counsel should have raised, without facing a procedural bar, and with the chance to expand the record through evidentiary hearings. D.I. 367 at 99. Wright pursued and received the only remedy available for the alleged ineffective assistance of post-conviction counsel. Because Superior Court expressly refused to apply any procedural bar to any of the *Brady* or “actual innocence” claims, and permitted him to expand the record, he suffered no harm from the Superior Court’s ruling that he had no constitutional right to the effective assistance of post-conviction counsel. *See Wright*, 2012 WL 1400932, at *20, 32, 35.

5. RING DOES NOT APPLY TO THE WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES OF A DELAWARE DEATH SENTENCE.

Question Presented

Whether this Court should overrule a decade of post-*Ring* holdings that juries are not required to unanimously find that aggravating circumstances outweigh mitigating circumstances before a judge may impose a death sentence.

Standard and Scope of Review

To the extent this Court finds the present appeal permits review of any aspect of the Superior Court’s January 2012 order, this Court reviews a Superior Court judge’s decision to deny post-conviction relief for an abuse of discretion. When deciding legal or constitutional questions, it applies a *de novo* standard of review. *Ploof*, 75 A.3d at 851.

Merits of Argument

Wright asks this Court to overrule a decade of its own cases and hold that *Ring v. Arizona*, 536 U.S. 584 (2002), extends to the weighing stage of a capital trial. This Court has repeatedly rejected the same proposition from every other Delaware murderer sentenced to death who has made Wright’s present claim. This Court first resolved the question in *Brice v. State*, 815 A.2d 314, 327 (Del. 2003): “If *Ring* applies to Delaware at all, it only

reaches the ‘narrowing phase’ of the sentencing process.’” This Court has consistently re-affirmed its holding in *Brice*. See *Norcross v. State*, 36 A.3d 756, 775 (Del. 2011); *Swan v. State*, 28 A.3d 362, 390-91 (Del. 2011); *Gattis v. State*, 955 A.2d 1276, 1289-90 (Del. 2008); *Starling v. State*, 882 A.2d 747, 757 (Del. 2005); *Steckel v. State*, 882 A.2d 168, 172 n.23 (Del. 2005); *Ortiz v. State*, 869 A.2d 285, 304-05 (Del. 2005). Rule 61’s procedural bars apply to a *Ring* claim, just as they do to others. *E.g., Norcross*, 36 A.3d at 775; *Swan*, 28 A.3d at 390-91; *Gattis*, 955 A.2d at 1289-90.

In Delaware, once a jury unanimously finds a statutory aggravator beyond a reasonable doubt, a judge makes the ultimate sentencing decision, determining if the aggravators outweigh the mitigators by a preponderance of the evidence. 11 *Del. C.* § 4209(d). This statutory scheme is constitutional. Any argument that *Ring* invalidates the weighing process in Delaware’s capital sentencing scheme fails because it misapprehends the role of the weighing process. Under Delaware law, the jury must first find unanimously and beyond a reasonable doubt that the State has established at least one statutory aggravating factor. 11 *Del. C.* § 4209(e). Once the jury has so found, the death penalty has become the maximum penalty allowable. As the sentencing judge considers mitigating circumstances and conducts the

weighing process, two punishments are available: life without the possibility of parole and death. 11 *Del. C.* § 4209(a). This weighing process is discretionary and does not involve fact-finding. *Swan*, 28 A.3d at 390-91. The weighing process does not increase the maximum punishment, but only ensures that the punishment is proportionate and appropriate. *Id.*

Here, the jury's unanimous conviction of Wright on the charge of felony murder satisfies *Ring*. *Norcross*, 36 A.3d at 775. Even though Wright was sentenced to death under an earlier version of section 4209 that did not require the jury to unanimously find the existence of a statutory aggravating factor, Wright's felony murder conviction amounted to a unanimous factual finding by the jury of a statutory aggravating circumstance. "[O]nce a jury finds unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance, the defendant becomes death eligible and *Ring*'s constitutional requirement of jury fact-finding is satisfied." *Swan v. State*, 820 A.2d 342, 359 (Del. 2003). The Superior Court committed no error in finding no *Ring* violation.

CONCLUSION

Wright's appeal should be dismissed as an untimely appeal from the Superior Court's January 2012 order. The Superior Court Criminal Rules do not permit the "reopening" of a previously decided motion for post-conviction relief. Wright's June 2013 motion was not a timely filed motion for re-argument, and Superior Court had no authority to consider it.

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CERTIFICATION OF SERVICE/MAILING

The undersigned certifies that on December 6, 2013, he caused the attached *Answering Brief* to be delivered to the following persons in the form and manner indicated:

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