



IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY PLOOF,	)	
	)	
Defendant Below	)	No. 108, 2012
Appellant,	)	
	)	
v.	)	Court Below---Superior Court
	)	of the State of Delaware
STATE OF DELAWARE,	)	in and for Kent County
	)	ID No. 0111003002
Plaintiff Below	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

APPELLANT'S REPLY BRIEF

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DATED: November 26, 2012

TABLE OF CONTENTS

TABLE OF CITATIONS	ii
SUMMARY OF ARGUMENT	1
ARGUMENT	
I. THE STATE’S PROCEDURAL AND TECHNICAL COMPLAINTS REGARDING MR. PLOOF’S POSTCONVICTION CLAIMS ARE UNAVAILING; ALL CLAIMS SHOULD BE CONSIDERED BY THIS COURT ON APPEAL . .	3
A. The State’s jurisdictional argument is barred, and in any event, should fail on its merits	3
B. All the claims discussed in the Opening Brief were properly raised and should be considered on appellate review	4
II. THE STATE’S SUGGESTION THAT AN “IMPLICIT REWEIGHING” OF THE AGGRAVATING AND MITIGATING EVIDENCE IS SUFFICIENT MISSTATES THE LAW AND SHOULD BE REJECTED BY THIS COURT IN FAVOR OF A REMAND	6
III. THE STATE’S ASSERTION THAT TRIAL COUNSEL’S PERFORMANCE WAS NOT DEFICIENT IN THE PENALTY PHASE IGNORES THE IMPACT OF THE EVIDENCE TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT	7
CONCLUSION	11

TABLE OF CITATIONS

Cases

<i>Johnson v. State</i> , 2009 WL 3286107, at *1 (Del.)	4
<i>Murphy v. State</i> , 632 A.2d 1150 (Del. 1993)	5
<i>Norcross v. State</i> , 36 A.3d 756 (Del. 2011)	7
<i>Outten v. Kearney</i> , 464 F.3d 401 (3d Cir. 2006)	9
<i>Roca v. E.I. du Pont de Nemours & Co.</i> , 842 A.2d 1238 (Del. 2004) . .	5
<i>Sommerville v. State</i> , 703 A.2d 629 (Del. 1997)	5
<i>State v. Wright</i> , 683 A.2d 288 (Del. 1994)	9
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	7

Statutes and Other Authorities

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 11.4.1 (2003).	9
Del. Super. Ct. Crim. R 61(b)(6)	4
Del. Super. Ct. Crim. R 61 (i)(1)	3

SUMMARY OF ARGUMENT

I. THE STATE'S PROCEDURAL AND TECHNICAL COMPLAINTS REGARDING MR. PLOOF'S POSTCONVICTION CLAIMS ARE UNAVAILING; ALL CLAIMS SHOULD BE CONSIDERED BY THIS COURT ON APPEAL.

The State's argument that some of the claims made are untimely fails because the judge permitted the amendment of a timely filing. In any event, the State waived this claim by failing to file an appeal of the judge's decision. The State's assertion that certain claims were only cursorily briefed also fails. The record reflects that each claim was adequately raised with appropriate references to the record.

II. THE STATE'S SUGGESTION THAT AN "IMPLICIT REWEIGHING" OF THE AGGRAVATING AND MITIGATING EVIDENCE IS SUFFICIENT MISSTATES THE LAW AND SHOULD BE REJECTED BY THIS COURT IN FAVOR OF A REMAND.

The jurisprudence on this point makes clear that the postconviction court must perform a reweighing of the aggravating evidence against all the evidence presented, both at trial and in the postconviction matter. As the court failed to do so here, a remand is the only course.

III. THE STATE'S ASSERTION THAT TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT IN THE PENALTY PHASE IGNORES THE IMPACT OF THE EVIDENCE TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT.

The State's assertion that trial counsel's investigation and presentation was adequate runs contrary to established precedent which sets forth the minimal requirements for a constitutionally effective investigation by trial counsel. Here,

trial counsel's failure to investigate and present classic, powerful mitigation evidence prejudiced Mr. Ploof. Further, the State's reliance on only the aggravating factors in the death penalty calculus marginalizes the role of each juror to weigh the aggravating *and* mitigating evidence before making a recommendation to the sentencing judge.

ARGUMENT

I. THE STATE'S PROCEDURAL AND TECHNICAL COMPLAINTS REGARDING MR. PLOOF'S POSTCONVICTION CLAIMS ARE UNAVAILING; ALL CLAIMS SHOULD BE CONSIDERED BY THIS COURT ON APPEAL.

A. The State's jurisdictional argument is barred, and in any event, should fail on its merits.

In its Opinion, the trial court held that because Mr. Ploof's initial *pro se* filing was timely, and that since the 2008 Amended Motion was filed by leave of the court, that it would consider all postconviction claims. *Exhibit 1* at 5-6. The court further held that none of the claims were barred in that this was Mr. Ploof's first motion for postconviction relief. *Id.* at 6. As such, the court considered all postconviction claims and denied relief.

In its Answering Brief, the State contends that Mr. Ploof's postconviction claims are barred as untimely pursuant to Delaware Superior Court Criminal Rule 61(i)(1). *Ans. Br.* at 8-9. The State takes issue with the court's holding that all claims would be considered, stating, "this legal ruling by the Superior Court was incorrect and the procedural bar of Rule 61(i)(1) applies." *Ans. Br.* at 9.

As a threshold matter, this issue cannot be raised in an Answering Brief. The State had the opportunity to challenge the Superior Court's holding by filing a timely Notice of Appeal or a Notice of a Cross-Appeal. The State failed to do so. The State is barred, therefore, from asking this Court to overturn the ruling of the Superior Court.

Even if not legally barred, the State's protestations are unavailing. As the court noted in its Opinion, Mr. Ploof filed a timely motion on July 6, 2005. *Exhibit 1* at 4. After the case underwent myriad replacements of postconviction counsel¹, the current counsel filed an Amendment on August 1, 2008. The Superior Court permitted the amendment, in keeping with Rule 61(b)(6), which permits amendment "by leave of court, which shall be freely given when justice so requires." *Del. Super. Ct. Crim. R. 61(b)(6)*. See *Johnson v. State*, 2009 WL 3286107, at *1 (Del.) (Counsel permitted to file an amended motion for postconviction relief following defendant's timely *pro se* motion and counsel's subsequent appointment.)

In sum, the Superior Court's ruling that all postconviction claims were to be considered, including those raised by amendment to the initial timely motion, was legally correct and should not be disturbed.

B. All the claims discussed in the Opening Brief were properly raised and should be considered on appellate review.

The State next contends that the claims raised in Argument I.C. and Argument III of the Opening Brief have been waived for failure to brief these claims. *Ans. Br.* at 34. The State asserts that raising the claims in the body of the brief with appropriate references to the Appendix amount to "insufficient conclusory allegations." *Id.*

¹The lengthy procedural history of the case detailing the various substitutions of counsel can be found in the Opening Brief at 4-6.

In support of this notion, the State cites cases which are distinctly unhelpful to supporting its assertions. This Court's holding in *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) makes clear that when the Appellant raises only a single issue on appeal, then other issues raised below are deemed waived. Similarly, *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) holds, "the failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal." Finally, this Court held in *Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) that "[t]he merits of any argument that is not raised in the body of the opening brief [is] deemed waived and will not be considered by the Court on appeal."

The State's cases do not relate to the instant appeal because all the claims about which the State complains were raised in both the heading and the body of the Opening Brief. Further, although the Opening Brief contains only concise descriptions of the claims, the Brief makes appropriate references to the Appendix, which sets forth the arguments in full. As such, the appellate record as a whole raises and argues these claims fully.²

Given the foregoing, Mr. Ploof respectfully requests that all issues raised on this appellate record be considered by this Court.

² The record also reflects that Appellant sought a 20-page extension for his Opening Brief but only a 10-page extension was granted.

II. THE STATE'S SUGGESTION THAT AN "IMPLICIT REWEIGHING" OF THE AGGRAVATING AND MITIGATING EVIDENCE IS SUFFICIENT MISSTATES THE LAW AND SHOULD BE REJECTED BY THIS COURT IN FAVOR OF A REMAND.

In its Answering Brief, the State agrees with Mr. Ploof's assertion that federal death penalty jurisprudence requires that the postconviction court reweigh the aggravating evidence against *all* the mitigating evidence—that which was produced at trial plus the postconviction evidence. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). *Ans. Br.* at 26. The State also acknowledges that the reweighing is required by Delaware law. *Id.* See also *Norcross v. State*, 36 A.3d 756, 771 (Del. 2011).

The State suggests, however, that the postconviction court's holding that the "prolonged foster child information" would likely have not made any impact on the jury constitutes an "implicit reweighing" of the evidence. *Ans. Br.* at 26. In doing so, the State points out that the postconviction judge was not the same judicial officer who sentenced Mr. Ploof to death. *Id.*

To ask this Court to find an implicit reweighing in the record, as the State does here, would not comport with clearly established federal and Delaware law. Because the postconviction court is required to explicitly reweigh the totality of the evidence, Mr. Ploof is entitled to a remand directing the lower court to do so. The fact that the postconviction proceedings were heard by a different judge than the trial judge only emphasizes the need for a remand so that the entire record may be considered afresh now that all the evidence is in.

III. THE STATE'S ASSERTION THAT TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT IN THE PENALTY PHASE IGNORES THE IMPACT OF THE EVIDENCE TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT.

The State's assertion that the "power of the aggravating evidence is what led to the unanimous 12-0 jury recommendation for death" stands as an ironic testament to the paltry and ineffective presentation of mitigating evidence by trial counsel. *Ans. Br.* at 31. Due to trial counsel's utter failure to conduct an investigation that would have mitigated the power of the aggravating evidence, there can be no confidence in the result of the sentencing phase of this trial. Besides, if, as the State asserts, the only relevant determinant of a sentence is the aggravating factors of the offense, then there would be no need for a penalty phase. Of course, however, the State has it wrong because the law requires that mitigating evidence be considered. Mr. Ploof suffered prejudice of a constitutional dimension because his trial counsel failed to present readily available evidence that would have made the imposition of death inappropriate.³

The State's assertion that the aggravating evidence "stands like the Matterhorn" (*Ans. Br.* at 31) only begins the inquiry. In this capital case, the available mitigating evidence stands like Annapurna—but it was never known to or presented by trial counsel due to deficient performance.

³ A "mitigating circumstance" is any factor relating to the crime or to the offender which tends to make the defendant's conduct less serious or the imposition of a penalty of death inappropriate. *Delaware Pattern Criminal Jury Instruction* 10(d).

The State's assertion that Mr. Ploof told the defense team that his upbringing was uneventful gets to the heart of trial counsel's ineffectiveness and underscores the court's legal error. *Ans. Br.* at 28. For that should have been only the starting point, not the end, of the investigation. A rudimentary investigation from a narrow set of sources is exactly the sort of performance found deficient by the United States Court of Appeals for the Third Circuit in *Outten v. Kearney*, 464 F.3d 401 (3d Cir. 2006) and by this Court in *State v. Wright*, 683 A.2d 288, 303 (Del. 1994). *Outten* also adopts Guideline 11.4.1 of the ABA Guidelines, which states, in relevant part, that the "standard practice" in death cases requires an investigation that includes medical, educational, family, social, employment, and correctional history. *Outten*, 464 F.3d at 417-18.⁴

In any event, Mr. Ploof's recalcitrance was not dispositive. Trial counsel also ignored the concerns of their investigator, Linda Zervas, and their forensic psychiatrist, Stephen Mechanick, PhD, who were both concerned about the effect of the impairments of Mr. Ploof's handicapped brother and the 30+ foster children in the Ploof home. (A-859). Further, there was Gerald Ploof's phone message to Linda Zervas, expressing indecision as to whether he should talk about "it," which Ms.

⁴ The Opening Brief mainly refers to the 2003 ABA Guidelines, and the State objects, noting that "the 2003 version was not in existence during most of the pretrial preparation in Ploof's case." *Ans. Br.* at 11. However, the record reflects that the State introduced the 2003 Guidelines into evidence; the prosecutor remarked, "February 2003 was the revised edition which was relevant to this timeframe." A-515.

Zervas thought might have been information about a family secret such as abuse. (A-411). As such, even though Gary Ploof was not forthcoming about his traumatic upbringing, further investigation would have revealed there was far more to the story.

The State attempts to minimize the powerful testimony of the 6 former foster children, by noting that there was no information presented about the other 27. *Ans. Br.* at 29. Notably, the State did not present the testimony of any of the other 27 individuals to rebut the shocking accounts of physical abuse, sexual abuse and mental abuse that ran rampant in the Ploof home during Gary Ploof's formative years. It seems likely, however, that if the 6 who did testify were sexually and physically abused, and also saw Gary Ploof being abused, that the other 27 would have have confirmed, not denied, those accounts. After all, the foster home was closed down by the State in 1984 due to Mr. Ploof's inappropriate sexual conduct. (A-370)

The State also notes that Gerald Ploof was never prosecuted for raping his foster children, despite the lack of a statute of limitations. *Id.* It is not clear what import this fact has, except as a paltry effort by the State to cast doubt upon the testimony of the 6 women who came forward and relived their horrific experiences in the Ploof foster home. It would appear from the testimony of the former foster children that Gerald Ploof certainly should be held to account for his crimes.

The mitigating evidence left uninvestigated and unrepresented by trial counsel is classic, hallmark evidence that a jury should

have heard in order to make a recommendation that can be relied upon. There can be no confidence in the outcome of a proceeding in which trial counsel made no such presentation. Only by a remand for a new trial can this Court remedy the prejudice suffered by Mr. Ploof due to his trial counsel's deficient performance.

CONCLUSION

For the reasons set forth in the Opening Brief, Reply Brief, and Appendix, Mr. Ploof respectfully requests that this Court vacate his judgment of conviction and death sentence and remand this matter to the Superior Court for further proceedings.

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Dated: November 26, 2012

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